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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK NO.2, R.K.PURAM, NEW DELHI-110066
CUSTOMS APPEAL BRANCH

Appeal No. : ST/1264/2011-CU[DB]

Dated: **09/07/2012**

Assistant Registrar
C.E.S.T.A.T. New Delhi
To,
UNIVERSAL ENTERPRISES
Maini Road, Tanda Urmur, Amritsar.

UNIVERSAL ENTERPRISES (Appellant)

VS

C.C.E. LUDHIANA (Respondent)

I am directed to transmit herewith a certified copy of Final Order No. **ST/A/510/2012-CU[DB]**, Stay/MISC Order No. and dated **25/06/2012** passed by the Tribunal under section **01(5) of the Finance Act, 1994 relating to Service Tax Act, 1994.**

Assistant Registrar
CUSTOMS Appeal Branch

Copy To,
1. Respondent
C.C.E. LUDHIANA
Central Excise House, 'F' Block, rishi
Nagar, Ludhiana 141001 (Punjab)

2. Advocate(s) / Consultant(s):
SUDHIR MALHOTRA,
ADVOCATE(NEW)
CHAMBER NO.103, C.K. DAPHTARY
LAWYER'S CHAMBERS, SUPREME
COURT OF INDIA, BHAGWAN DASS
ROAD, NEW DELHI.
3. C.D.R
4. Bar Association, CESTAT, New Delhi

5. Director Publications, Customs, Excise. I.P. Estate, New Delhi

6. M/s Centax Publications Pvt. Ltd., 1512-B, Bhishm Pitamah Marg, Opp. ICICI Bank of Defence Colony, New Delhi-3

7. Company Law Institute of India Pvt. Ltd., No.2 (old no.36), Vaithyaram Street, T. Nagar, Chennai-17

8. Taxmann Allied Service Pvt. Ltd., 59/32, New Rohtak Road, New Delhi-110005

9. Easy Service Tax Online Dot Com Pvt. Ltd., 407A, Iscon Mall, Above Star India Bazar, Satellite Road, Ahmedabad-15

10. LAWCRUX Advisors Pvt. Ltd., LAW House, 1-8, Sector-10, Faridabad 121003 (Haryana)

11. TaxIndiaOnline.com Pvt. Ltd., Unit No. 1, 2nd Floor, Vasant Arcade, Nelson Mandela Road, Vasant Kunj, New Delhi - 110070

12. Office Copy

13. Gaurd File

Assistant Registrar
CUSTOMS Appeal Branch

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi – 110 066.

Date of Hearing : 25.6.2012

Service Tax Appeal No. 1264 of 2011

[Arising out of the Order-in-Original No. 04/CE/JC/Ldh/09 dated 9.6..2009 passed by the Commissioner, Central Excise, Ludhiana)

For Approval & signature :

Hon'ble Ms. Archana Wadhwa, Member (Judicial)
Hon'ble Shri Mathew John, Member (Technical)

1.	Whether Press Reporter may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	No
2.	Whether it would be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	No
3.	Whether their Whether their Lordships wish to see the fair copy of the order?	Seen
4.	Whether order is to be circulated to the Department Authorities?	Yes

M/s Universal Enterprises — Appellants

Vs.

CCE, Ludhiana — Respondent

Appearance:

Appeared for Appellant : Shri Sudhir Malhotra, Advocate
Appeared for Respondent : Shri B.L. Soni, A.R.

CORAM: Hon'ble Ms. Archana Wadhwa, Member (Judicial)
Hon'ble Shri Mathew John, Member (Technical)

Final Order No. ST/A/510/12-Cus. dated............

Per **Archana Wadhwa :**

After hearing both the sides, we find that the appellant is a distributor of SIM cards of M/s Bharti Mobiles Ltd. He purchases the said SIM cards from M/s Bharti Mobiles Ltd. and ~~sold~~ & sell the same ~~as~~ in the market.

2. Revenue by entertaining a belief that such activity amounts to business auxiliary service, raised demand of Service tax against the appellant by way of issuing a Show Cause Notice dated 18.3.2009 proposing to confirm the demand for the period January 2004 to March 2005. The said Show Cause Notice was dropped by the original adjudicating authority on merits, by taking note of various decisions of the Tribunal and holding that such activity amounts to sale and purchase of SIM cards and no service is involved. As he dropped the Show Cause Notice on merits, the appellant's plea on limitation was not considered.

3. The said order of the original adjudicating authority was reviewed by Commissioner, by way of issuance of Show Cause Notice on 14.2.2011, in terms of the provisions of Section 84 of Finance Act, 1994. The Commissioner vide his impugned order, reversed the order of the original adjudicating authority. He relied upon the Hon'ble Supreme Court's decision in the case of **BSNL Vs. Union of India** – 2006 (03) LCX 0022 holding that the activity of purchase and sale of SIM cards amounts to providing service falling under the category of Business Auxiliary Service.

He also relied upon the Kerala High Court decision in the case of **Escotel Mobile Communications Ltd. Vs. Union of India** – 2002 (02) LCX 0013 as also on the judgement of **M/s Bharti Cellular Ltd. Vs. CCE** – 2004 (10) LCX 0150. As regards limitation, Commissioner observed that inasmuch as the appellants have failed to discharge their service tax liability, the extended period is available to the Revenue. Accordingly, he confirmed the service tax to the extent of Rs.12,28,535/- and penalty of identical amount ~~be~~ was imposed, in addition to imposition of penalties under Section 75 and 76 of the Finance Act, 1994.

4. We find that the Assistant Commissioner had addressed a letter to the appellant on 12.7.2005 indicating that as the appellants are providing services of distribution of SIM cards for M/s Bharti Cellular Ltd. they are liable to pay service tax. Accordingly, the appellant was requested to calculate the amount of service tax and to deposit in the bank along with interest.

In response to the said letter, the appellant vide their letter dated 8th August 2005 clarified that the agreement between them and M/s Bharti Cellular Ltd. is for sale and purchase of SIM cards and no commission is being received by them. On the contrary they are making payments to Airtel Office price of the merchandise invoiced by them to the appellant from time to time. They have further sold the SIM cards ~~by~~ and earned some profit margin. As such, the appellant contended that the activity undertaken by them cannot be treated as service inasmuch as the same is purchased and sale of SIM cards on profit margin basis.

The Assistant Commissioner subsequently vide his letter dated 9.8.2005 addressed to the appellant accepted their stand that the relationship between the appellant and M/s Bharti Cellular is of seller and buyer and as the appellant had sold the merchandise after adding some profit margin, it does not attract service tax. Accordingly he informed the appellant that as long as they are engaged in buying and selling the product, this activity is not liable to service tax.

5. Ld. AR appearing for the Revenue submits that the said correspondence between the appellant and the Revenue is of July/August 2005 and inasmuch as the period in the present appeal is from Jan. 2004 to March 2005, disclosure of the above facts cannot help the assessee to claim the benefit of limitation. He submits that during the relevant period, there was suppression on the part of the assessee and as such extended

period of limitation was available to the Revenue in terms of the decision of Ahmedabad High Court in the case of **CCE Vs. Neminath Fabrics Pvt. Ltd.** – 2010 (256) ELT 369 (Guj.).

6. After appreciating the submissions made by both the sides, we find from the correspondence entered into by the appellant with the Revenue that the entire activity of buying and selling SIM cards was placed before the Revenue as early as in July/August 2005. In fact, we find that the Assistant Commissioner's letter dated 9.8.2005 arrived ~~arise~~ at a decision that such activity does not amount to service and the said decision was intimated by ~~to~~ the Revenue to the assessee under the said letter. Thereafter Revenue kept quiet for a period of four years and issued Show Cause Notice on 18.3.2009. We find that there was no change of circumstances and no new facts came on record. The appellant's activity remained the same even during the relevant period, during the period under correspondence and subsequently also. As such it seems to be a case of change of opinion on the part of the Revenue. When the entire facts were put before the Revenue and Assistant Commissioner had taken a decision on the same and intimated the appellant accordingly, it cannot be said that the appellant had any mala fide on their part to suppress the activity undertaken by them. We find no

merit in the contention of the ld. AR that the said disclosure was made in August 2005 whereas the period involved is prior to the same. Even after the disclosure, the Revenue did not issue any Show Cause Notice for the period in question within the limitation but the same was issued in 2009. The decision of the Hon'ble Ahemdabad High Court in the case of Neminath Farbics Pvt. Ltd. is not applicable to the facts of the present case inasmuch as the issue before the Hon'ble High Court was as to whether the limitation of six months or five years would be applicable in the case of visit of the officers in the assessee's factory. Otherwise also we note that the above correspondence reflects a complete bonafide on the part of the assessee, ~~but~~ in which case extended period cannot be invoked. We also take note of the fact that during the relevant period, some of the decisions of the Tribunal were holding that such activity of purchase and sale of SIM cards would not amount to providing business auxiliary services. If that be so, no malafide intention can be attributed to the appellant so as to attribute any suppression or mis statement to them with intent to evade payment of duty.

7. Inasmuch as the entire demand is barred by limitation, we allow the appeal on the said point, without going into the merits of the case.

(Dictated & pronounced in open Court)

(Archana Wadhwa)
Member (Judicial)

(Mathew John)
Member (Technical)

RM