IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI PRINCIPAL BENCH, COURT NO. IV

Appeal No. ST/371/2011-CU(DB)

[Arising out of Order-in-Appeal No. 419(DKV)ST/JPR-I/2010 dated 09.12.2010 (Appeals), by the Commissioner of Customs, Central Excise & Service Tax (Appeals), Jaipur].

M/s. Vodafone Essar Digilink Ltd. ....Applicants

Vs.

C.C.E. Jaipur-I ....Respondent

Appearance:

Shri Manish Gaur, Advocate for the Applicants
Shri Ranjan Khanna, DR for the Respondent

CORAM:
Hon'ble Shri S.K. Mohanty, Member (Judicial)
Hon'ble Shri V. Padmanabhan, Member (Technical)

Date of Hearing: 30.11.2016

FINAL ORDER NO. 56465/2016-CU(DB)

Per S.K. Mohanty:

This appeal is directed against the impugned order dated 09.12.2010 passed by Commissioner of Customs and Central Excise (A) Jaipur.

2. Brief facts of the case are that the appellant had entered into an agreement with Foreign Telecom Service provider for the purpose of providing connectivity to its subscribers. Whenever the Indian subscriber goes abroad, the foreign telecom service provider's network is used by the appellant for keeping its subscriber connected to the network. The department initiated show cause notice proceedings against the appellant on the ground that it is liable to pay service tax, under reverse charge mechanism, on the outbound roaming services received from the foreign

telecom service provider under the category of "Telecommunication services". Thus show cause notice issued in this regard was adjudicated vide order dated 05.02.2010 wherein demand of service tax of Rs.10,46,360/- was confirmed along with interest and penalties under section 78 and 76 of the Finance Act 1994. In appeal against the adjudication order the Ld. Commissioner (A), vide impugned order dated 09.12.2010, has dropped the service tax demand for the period upto 31.05.2007, but upheld the demand made for the subsequent period.

3. Feeling aggrieved with the impugned order dated 09.12.2010 the appellant has preferred this appeal before the Tribunal.

4. Shri Manish Gaur, Ld. Advocate appearing for the appellant submits that the services provided by the Foreign Telecom service provider is not conforming to the taxable services defined under clause (zzzx) of section 65(105) of the Finance Act 1994. Thus he submits that since the service is not conforming to the taxable service falling as above, the demand of service tax under section 66A cannot be confirmed against the appellant in the capacity of recipient of such services. He further submits that since the services were not provided by the overseas service provider in the capacity of "Telegraph Authority", the said service is outside the scope and ambit of telecom services as defined under clause (zzzx) of section 65(105) ibid.

5. In this context he relies on circular no. 137/21/2011-ST dated 15.07.2011 issued by CBEC and also on the decision in the case of ***TCS E-Serve Ltd. Vs CCE 2014 (33) STR 641 (Tri-Mumbai)***

and in the case of Infosys Ltd. Vs. CCE 2015 (37) STR 862 (Tri Bangalore).

6. On the other hand, Shri Ranjan Khanna, Ld. DR for the Revenue reiterated the findings in the impugned order.

7. We have heard the Ld. Counsel of both the sides and examined the records.

8. The short question involved in this appeal for consideration by the Tribunal is whether the services provided by the overseas service provider is conforming to the telecommunication services defined under sub clause (zzzx) of section 65(105) ibid.

9. On perusal of the statutory provision it is seen that in order to fall under the taxable category, service provider must be a Telegraph Authority. The term 'Telegraph Authority' has been defined under clause 111 of section 65 ibid which is as under:

> *"Telegraph Authority has the meaning assigned to it in clause (6) of section 3 of the Indian Telegraph Act, 1885 (13 of 1885) and includes a person who has been granted a license under the first proviso to sub-section (1) of Section 4 of that Act."*

10. The said definition provides that in order to be considered as Telegraph Authority, the person has to be granted a license under the first provisio to sub section (1) of section 4 of the India Telegraph Act 1885. Admittedly in this case the Foreign Service provider has not been granted with any licenses under the Indian Telegraph Act 1885 and hence cannot be considered as a Telegraph Authority under the provisions of the Indian Telegraph Act 1885.

11. Analyzing the true scope and ambit of the definition of Telegraph Authority the CBEC vide circular dated 15.07.2011 has clarified as below:

"The matter has been examined. The activities are in the nature of leased circuit services presently covered under Telecommunication service. However, for getting classified under telecommunication service, section 65(105)(zzzx) of the Finance Act, 1994 provides that the service should be provided by a Telegraph authority. Telecommunication service as defined under section 65(109a) covers services which are provided by a person who has been granted a license under the first proviso to sub section (I) of section 4 of the Indian Telegraph Act, 1885. In this situation in the first instant case since the service provider is located abroad, he is not covered under the definition given in section 65(109a). Thus the service provided by foreign vendors cannot be taxed under telecommunication service."

12. Further, this Tribunal in the case of ***TCS E-Serve Ltd.,*** by relying on the circular dated 15.07.2011 has held that services provided by any person who is not a Telegraph Authority, is not liable to service tax either under section 66 or under section 66 A ibid. The relevant paras of the said decision are extracted here below:

5.3 Now let us see how the leased circuit services with which we are concerned has been defined in Section 65(105). Prior to 1-6-2007, the taxable service was defined as follows :-

"(105) 'Taxable service' means any service provided or to be provided -

(a) to (zc) ……………

(zd) to a subscriber, by the telegraph authority in relation to a leased circuit."

With effect from 1-6-2007, leased circuit services got merged into telecommunication service as defined and the taxable service under Section 65(105) read as follows :-

"(zzzx) to any person, by the telegraph authority in relation to telecommunication service."

In other words, for the leased circuit service to be taxable, it has to be provided by a 'telegraph authority'. As per Section 65(111), "Telegraph authority" has the meaning assigned to it in Clause (6) of Section 3 of the Indian Telegraph Act, 1885 and includes a person who has been granted a licence under the first proviso to sub-section (1) of Section 4 of that Act." It is not the case of the department that the foreign service provider or the appellant herein is a telegraph authority as defined in the law. If that be so, leased circuit service provided by a person who is a telegraph authority is not liable to Service Tax either under Section 66 or under Section 66A and we hold accordingly.

5.4 This legal position is evident from the clarification issued by the Board vide letter dated 15-7-2011 cited supra. The relevant portions from the said letter are extracted verbatim below :-

"Sub : Sections 65(104c), 65(105)(zzzq), 65(111), 66A, Rule 2(1)(d)(iv) - Taxability in respect of International Private Leased Circuit (IPCL) charges and amendment in the definition of Telegraph authority u/s 65(111) of the Finance Act, 1994 - reg.

Representations have been received seeking clarification regarding taxability of IPCL charges incurred in foreign currency by BPO/MNCs against receipt of services from the service provider situated outside India/group companies under reverse charge mechanism [Section 66A of the Finance Act, 1994 read with Rule 2(1)(d)(iv) of the Service Tax Rules, 1994].

2. The matter has been examined. The activities are in the nature of Leased Circuit services presently covered under Telecommunication service. However, for getting classified under Telecommunication service, Section 65(105)(zzzx) of the Finance Act, 1994 provides that the service should be provided by a Telegraph authority. Telecommunication service as defined *under Section 65(109a) covers services which are provided by a person who has been granted a licence under the first proviso to sub-section (1) of Section 4 of the Indian Telegraph Act, 1885. In this situation in the instant case since the service provider is located abroad, he is not covered under the definition given in Section 65(109a). Thus the service provided by foreign vendors cannot be taxed under Telecommunication service."*

The clarification given by the Board squarely deals with the situation in the case before us. As per the said clarification, no Service Tax is payable under Section 66A if leased circuit service is received from a foreign vendor. The argument of the department that this clarification is only an internal correspondence and not a circular and hence not binding on the department is childish, to say the least.

13. In view of the above settled position of law we do not find any infirmity in the impugned order. Consequently we allow the appeal.

[Dictated & Pronounced in the open Court]

(V. Padmanabhan)
Member (Technical)

(S.K. Mohanty)
Member (Judicial)

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