IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI, PRINCIPAL BENCH NEW DELHI

Date of Hearing/Decision:15/12/2016

Service Tax Appeal No.3578/2012

[Arising out of Order-in-Original No.134/ST/PKJ/CCE/2012 passed by the Commissioner of Central Excise (Adj.), New Delhi]

M/s.Times Internet Ltd. Appellant

Vs.

CCE(Adj.), New Delhi Respondent

<u>Appearance</u>:

Rep. by Shri A.K. Batra, CA for the appellant.
Rep. by Shri Ranjan Khanna, DR for the respondent.

Coram: Hon'ble Shri S.K. Mohanty, Member (Judicial)
Hon'ble Shri B. Ravichandran, Member (Technical)

Final Order No.56479/2016

<u>Per S.K. Mohanty:</u>

The appeal is against order dated 6.8.2012 of Commissioner (Adj.), Central Excise and Service Tax, New Delhi. The appellant is a company registered under Companies Act, 1956 is also registered with the Service Tax Department in respect of various categories of taxable services. The present appeal is with reference to the dispute in respect of two types of activities undertaken by the appellants. In August and September, 2009, the officers of Service Tax Commissionerate, New Delhi conducted audit of the records of the appellant. Thereafter, proceedings were initiated against the appellant for non-payment of service tax under two categories of taxable services. The first issue related to the transaction with telecom service providing companies. In terms of agreement entered into by the appellant with

Mobile Telecom Companies such as Reliance Communication, Aircel etc., the appellants developed various short messaging services (SMS) under two categories - regular and premium. The said services could be delivered to the mobile phones of the subscriber through short codes 8888. The subscribers of Mobile Telecommunication Services pays charges for such services to the telecom service provider. The appellants shared such income. Thus, the appellants were engaged in developing and supplying contents like news, cricket scores, jokes, etc. to various telecom companies on revenue sharing basis. To access these services, the subscribers have to dial short codes like 8888/58888, etc. These short codes are advertised in various media by the appellant. The Revenue entertained a view that these types of value added services with reference to news, cricket score, astrology, jokes, etc. are to be considered under the taxable category of “Business Auxiliary Service” (BAS). Referring to various sub-clauses in the tax entry, the Revenue held that these services provided by the appellant through telecom operators to various subscribers should be taxed under “BAS”.

2. The second issue involved in the appeal is relating to the agreement between the appellant and M/s. Bennett and Coleman Co. Ltd. (BCCL). The agreement stipulates that the appellant shall develop, operate and maintain online sites of BCCL. BCCL is a flagship company of Times of India Group and is, inter alia, engaged in the business of printing and publishing various newspapers. BCCL also owns online publications, which are internet based version of print publications. BCCL primarily is in the print media and does not have the requisite expertise, technology, software, etc. for operating and managing online publication

and online sites and accordingly, entered into an agreement for Information Technology services with the appellant. In terms of the said agreement, the appellant shall provide the information technology services in relation to online publication and online sites including design, look, feel and content of such online publication and online sites. The appellant shall be responsible for development, operation and maintenance of the online sites, technical operation of the online sites including all related equipments, hardware and software systems and maintenance of adequate technical equipments, hardware and software systems to ensure uninterrupted availability of the online publication and online sites.

3. The Revenue entertained a view that the activities of the appellant in pursuant of the said contract is liable to be taxed under the category of "Management, Maintenance or Repair Services" (MMR Services). It was held that the appellants were engaged in management, maintenance and repair of software and accordingly, are liable to pay service tax.

4. Proceedings were initiated against the appellant by issue of demand-cum-show cause notice dated 21.04.2010. The case was adjudicated by the Commissioner vide his impugned order dated 6.8.2012. The Original Authority confirmed the service tax liability of Rs.2,95,63,317/- under "BAS" and Rs.2,75,95,438/- under "MMR Services". He also imposed a penalty of Rs.5,71,58,755/- under Section 78 and a further penalty of Rs.5,000/- under Section 77 of the Finance Act, 1994 on the appellant.

5. Ld. Consultant appearing on behalf of the appellant elaborated on the grounds of appeal. His submissions can be summarized as below:-

(a) The show cause notice itself is not clear as to under what category of tax entry, the appellant should be taxed for the services of developing and supplying contents to the telecom service provider. Referring to para 2.5, 2.6 and 2.8 of the show cause notice, the ld. Consultant submitted that there is no clarity about the category under which the appellant should be made liable to pay service tax.

(b) The value added service provided by the appellant to the telecom companies in terms of the contract and dealings are on principal to principal basis. The appellants are earning the revenue on account of supplying such contents to telecom operators. No consideration is received on account of any customer care service on behalf of client or procurement of inputs for telecom companies. None of the clauses mentioned under BAS is applicable to the transactions entered into by the appellant.

(c) Referring to the contents of the agreement entered into by the appellant with various telecom operators, the ld. Consultant emphasized that the appellants are engaged in development and supplying contents to telecom companies on revenue sharing basis. The said consideration can never be equated to an incentive or commission involving a three party arrangement. Ld. Consultant also referred to the certain decided cases in support of his contention.

(d) Regarding the maintenance of online website for BCCL, it is submitted that the terms of the agreement are very clear to the effect that they are involved in providing Information Technology Service in relation to online publication and online sites for BCCL. Such service cannot be considered as maintenance and repair of software. Even otherwise maintenance of software has been made taxable only w.e.f. 16.05.2008. The contract entered into by the appellant with BCCL is not a maintenance or repair contract but for whole package of services starting from design of the website and uninterrupted operation of the said website, for public access.

(e) It is also contended that designing, operating and maintaining a website cannot be equated to maintenance and repair of software. Websites are nothing but collection of data whereas software is a coded system, which forms basis for display of the decided data in the website.

(f) The demand is also contested on the question of time bar. There is no basis for alleging fraud, suppression, etc. against the appellant. The demands, presently made are based on properly maintained records of the appellant. The issue of tax liability under these two categories involves pure question of interpretation and there could be no deliberate intention to evade payment of service tax on the part of the appellant. In any case, even if the service tax is paid, all payments are eligible for credit for service recipient in such situation also. There could be no malafide intent to evade payment of service tax.

6. Ld. AR reiterated the findings in the impugned order. He further submitted that the legal scope of services rendered by the appellant were examined by the Original Authority and the final conclusions are on sound legal basis. He prayed for dismissal of the appeal against the impugned order.

7. We have heard both the sides and perused the appeal records along with written submissions and various case laws relied upon by the appellants.

8. On the first issue regarding appellant's liability under the category of "Business Auxiliary Service", we note that the demand pertains to period October, 2004 to March, 2007. The tax entry "Business Auxiliary Service" as defined under Section 65(19) of the Finance Act, 1994 is as below:-

"Business Auxiliary Service" means any service in relation to -

(i) Promotion or marketing or sale of goods produced or provided by or belonging to the client; or
(ii) Promotion or marketing of service provided by the client; or
(iii) Any customer care service provided on behalf of the client; or

(iv) Procurement of goods or services, which are inputs for the client; or explanation -- for the removal of doubts, it is hereby declared that for the purposes of this sub-clause, "inputs" means all goods or services intended for use by the client;

(v) Production or processing of goods for, or on behalf of the client; or

(vi) Provision of service on behalf of the client; or

(vii) a service incidental or auxiliary to any activity specified in sub-clauses (i) to (vi), such as billing, issue or collection or recovery of cheques, payments, maintenance of accounts and remittance, inventory management, evaluation or development of prospective customer or vendor, public relation services, management or supervision, and includes services as a commission agent, but does not include any activity that amounts to "manufacture" within the meaning of clause (f) of Section 2 of the Central Excise Act, 1944 (1 of 1944)."

9. We have perused the agreement entered into by the appellant with various telecom service providers. The scope of service rendered by the appellant in terms of the said agreement is that the appellant shall provide the content to the telecom service provider to enable the users to avail the service through mobile telephony. The appellant shall provide necessary support for uninterrupted supply of service with reference to the content provided. The nature of contents are listed in the agreement under the heading "Description of the Services". It stipulates that the appellant, being official representative of Zoom T.V., will provide the telecom operator video content, promos, movie trailers, etc. The Zoom TV will be given adequate credit for the video content along with the logo. The telecom operator shall promote the Zoom TV log wherever possible in their promotional activities. The appellants have received consideration in a revenue sharing arrangement. 25% of net revenue received by the telecom company is paid to the appellant.

10. The Original Authority held that the appellants provided "Business Auxiliary Service" to the telecom companies. His findings are as below:-

> "19.2 It is seen that the short access code (58888/8888) is widely publicized by the assessee on its website www.indiatimes.com. The same is also pupolarised through advertisements in newspapers inviting people to use their cellular operator's value added service (VAS) for getting updates like news, cricket score etc. Accordingly, it is clear that the VAS services are provided by telecom operators to their mobile subscriber. The noticee is promoting the service provided by the mobile operators. Mobile operators also advertise the service acknowledging the service of the assessee as "powered by indiatimes" Usage of VAS results in revenue generation for mobile operators which leads to incentive for the noticee. Thus, it is clear that the service provided is for promotion of usage of VAS of mobile operator and hence is covered under sub clause (iii) and (iv) of Section 65(19) of the Act ibid i.e. Business Auxiliary Services. Accordingly, I find that the services provided by M/s. Time to the subscribers of telecom companies against which the noticee has received the consideration shown as income in their Balance Sheet under the head "Income from SMS", is covered under category of "Business Auxiliary Service" as defined in clause (iii) and (iv) of Section 65 (19) of the Act, as amended by the Finance Act, 2004 w.e.f. 10.09.2004.".

11. We note that the findings of the Original Authority that the appellant is promoting the service provided by the mobile operator is without any factual basis. Admittedly, the arrangement is on principal to principal basis, wherein the

appellants develops and provides certain contents to be transmitted by the mobile telecom operators to their various subscribers, as a value added service. The consideration for providing such contents were fixed as percentage of income obtained by the telecom service providers. The arrangement generates revenue both for telecom service providers as well as the appellant. We note the Original Authority held that the consideration received by the appellant is attributable to service rendered under clause (iii) and (iv) of BAS. Clause (iii) talks about "any customer care service provided on behalf of the client and clause (iv) states procurement of goods or services, which are inputs for the clients". We are not able to appreciate as to how the supply of contents developed by the appellant can be called as a customer care service provided on behalf of the telecom operators. Similarly, it is clear that the appellants are not engaged in procuring any input service for the telecom operators. In fact, they are developing the contents and supplying the same to the telecom operators on a revenue sharing model. It is clear that the consideration received in such revenue sharing model cannot fall under either of the two categories mentioned above. In such situation, we find that the impugned order did not legally justify the tax liability of the appellant under the category of "Business Auxiliary Service".

12. On the second issue, we note that the appellants were subjected to the service tax levy under "management, maintenance or repair service". The statutory provisions are as below:-

“Management, Maintenance or Repair Services ” are defined under Section 65(64) of the Act as under:-

Position w.e.f. 01.07.2003 to 15.06.2005

“Maintenance or repair” means any service provided by

(iii) any person under a maintenance contract or agreement; or

(iv)a manufacturer or any person authorized by him,

in relation to a maintenance or repair or servicing of any goods or equipment, excluding motor vehicles. Section 65(64)

“Motor Vehicle” has the meaning assigned to it in clause (28) of Section 2 of the Motor Vehicle Act, 1988 [Section 65(73)]

Position w.e.f. 16.06.2005 to 30.04.2006

“Maintenance and repair” means any service provided by –

(iii) any person under a contract or an agreement ; or

(iv) a manufacturer or any person authorized by him.

In relation to—

(a) Maintenance and repair including reconditioning or restoration, or servicing or any goods or equipment, excluding motor vehicle; or

(b) Maintenance or management of immovable property ; -65(64)

Position w.e.f. 01.05.2006 to 31.05.2007

“management, maintenance or repair” means any service provided by-

(iii) Any person under a contract or an agreement ; or

(iv)A manufacturer or any person authorized by him.

In relation to-

(e) Management of properties, whether immovable or not;

(f) Maintenance or repair of properties, whether immovable or not;

(g) Maintenance or repair including reconditioning or restoration, or servicing of any goods, excluding a motor vehicle-Section 65(64)

Whereas the following Explanation has been inserted under Section 65(64) with effect from 1.6.2007:

"Explanation.- For the removal of doubts, it is hereby declared that for the purposes of this clause, 'goods' includes computer software".

13. The Original Authority held that the appellants were involved in management, maintenance & repair of software covered under the above taxable entry. Reliance was also placed on the circular dated 7.10.2005 of the Board.

14. We have examined the agreement entered into by the appellant with M/s. M/s. BCCL. As already noted, BCCL is a flagship company of the Times of India Group and are engaged in the business of printing and publishing newspapers. The agreement with the appellant is to provide the information technology services to BCCL in relation to online publications and online sites for BCCL. In other words, the offline publication of BCCL are to be put online in designed websites for access through internet by the public. The appellants were to provide information technology services for such online publications and online websites. The agreement states that the appellant shall decide on the design, look, feel and content of the online publication and online sites. The websites are for online publication of various offline print editions published by the BCCL. These publications are various newspapers like Times of India, Maharashtra Times, Nav Bharat Times, etc. In other words, the role of the appellant is to provide complete

information technology service in relation to the online publications and maintenance of websites for such online publications for and on behalf of BCCL. The appellants received consideration for such services.

15. The Original Authority reproduced the statutory provisions for MMR services and thereafter simply concluded as below:-

> "20.3 From the above, it is clear that management, maintenance and repair of software is covered under MMR services. CBEC Circular No.81/2/2005-ST dated 07.10.2005 also clarified that any service in relation to maintenance or repair or servicing of software would be leviable to service tax under Section 65(105) (zzg) read with Section 65(64) of the Finance Act, 1994. In this case the web sites may be hosted on the servers/ equipments of the noticee but the websites were owned/belonging to the clients. Thus the maintenance of the websites would be taxable under the taxable category of Management, Maintenance or Repair Service"

16. We find there is no detailed examination of the scope of service rendered by the appellants and various technical issues as submitted by the appellant. The Original Authority simply stated that the appellants provided MMR service with reference to software. It is apparent that he did not go into the details of the technology involved in maintaining a website or managing online publications of newspapers, etc. A plain reading of the agreement and the scope of the activities by the appellant, will indicate that they are not involved in any software, repair or maintenance. They are involved in a comprehensive service of designing and managing the online publication for BCCL. Here, it is relevant to note that the

appellants are engaged in designing and maintaining websites. They are not involved in maintenance and repair of software. We also take note of the fact that the website *per se* is not a computer software. The reliance placed by the ld. Commissioner on the circular dated 7.10.2005 is not appropriate. The said circular clarified that computer software is always included in "goods". The Original Authority also failed to distinguish between the computer software and information technology software. The show cause notice itself mentions the provisions of Section 53(a) and alleges that website is a Information Technology Software as it fulfills all the requirements of the statutory definition. On careful consideration of the scope of activities undertaken by the appellant, we are of the considered view that the same will not fall under the scope of management/maintenance/repair of software.

17. In view of above discussion, we find that the impugned order is not legally sustainable. The same is set aside and appeal allowed.

[Operative portion already pronounced in open court]

(S.K. Mohanty)
Member (Judicial)

(B. Ravichandran)
Member (Technical)

Ckp.