IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,

WEST BLOCK NO.2, R.K. PURAM, NEW DELHI-110066

BENCH-DB

COURT –III

Service Tax Appeal No.ST/51934/2014-CU [DB]

[Arising out of Order-in-Original No.20-22/ST/SRB/2013-14 dated 31.12.2013 passed by the Commissioner (Adjudication), Service Tax, New Delhi]

Vodafone Essar Mobile …Appellant

Vs.

C.S.T., Delhi … Respondent

Present for the Appellant : Mr.B.L.Narasimhan, Advocate
Mr.Narendra Singhvi, Advocate
Present for the Respondent: Mr.Amresh Jain, D.R.

Coram:
HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)
HON'BLE MR. B.RAVICHANDRAN, MEMBER (TECHNICAL)

Date of Hearing / Decision : 26/07/2017

FINAL ORDER NO. 55606/2017

PER: B.RAVICHANDRAN

The appeal is against order dated 31.12.2013 of Commissioner of Service Tax (Adjudication), New Delhi. The appellants are engaged in providing taxable service under the category of telecommunication services, business support services etc. The appellant is basically engaged in providing Cellular telecommunication service to various subscribers in

India. The dispute in the present case relates to the liability of the appellant to pay Service Tax on reverse charge basis under the category of "business auxiliary service". This is in respect of considerations paid to the foreign telecom service provider who provides telecom service to the subscriber of the appellant during their visit outside India. The subscriber of the appellant during the visit outside India continues to avail telecom services through the roaming partner of the appellant, in different countries. The appellants charges the subscriber telecommunication charges, which include roaming charges wherever applicable. For roaming services provided outside India by another telecom partner the appellant pays the consideration on actual basis. The Revenue entertained a view that such payment made by the appellant to a foreign telecom partner, who enabled roaming telecom service to the subscriber of the appellant, is rightly taxable under the category of Business Auxiliary Services in terms of Section 65 (105) (zzb) of Finance Act, 1994 read with Section 65 (19) of the Finance Act, 1994.

2. In other words, the Revenue held that the foreign telecom partner of the appellant provided telecom service on behalf of the appellant to its subscriber during the visit outside India. Such provision of service on behalf of appellant is liable to be taxed on reverse charge basis at the hands of the appellant, as a recipient of service. The Original authority

confirmed the tax liability of Rs.23,49,91,142/- for the period 2006-07 to 2011-12, covered in 3 demand notices. He held that the provision of services like tele-services, speech telephony, SMS, clip, forwarding, call waiting etc. by the foreign mobile operator to the subscriber of the appellant will fall under the category of provision of service on behalf of the principal (appellant). The Original Authority also held that such services will be covered by the general category of customer care services provided on behalf of the appellant to the subscriber on a visit abroad.

3. The ld. Counsel for the appellant submitted that the services provided by foreign mobile operator in terms of understanding with the appellant for roaming subscriber, is typically a telecom service as per the statutory definition of Section 65 (109a) read with Section 65 (105) (zzzx) of the Finance Act, 1994. When the services are specifically covered by the tax entry for telecommunication services, still the tax liability could not be fastened on the provider (foreign roaming company) for the reason that the said service provider is not a Telegraph Authority as defined under Section 65 (111) of the Finance Act, which refers to clause (6) of Section 3 of Indian Telegraph Act, 1885. In other words, though, the services rendered are squarely covered under the telecommunication service, the tax liability could not be enforced as the provider is falling outside the statutory definition. The ld. Counsel

submitted that in a similar situation involving leased circuit service which is also a part of telecom service, the Board vide their Circular dated 19.12.2011, clarified that when the service provider being a foreign telecom service company is not covered by Indian Telegraph Act, 1895, there is no question of treating the same service under other taxable category like business support service.

4. The ld. Counsel also drew our attention to the decision of Hon'ble Kerala High Court in Federal Bank Ltd. – 2013 (29) S.T.R. 554 (Kerala) which was affirmed by Hon'ble Supreme Court – 2016 (42) S.T.R. 418 (S.C.) wherein a parallel situation of banking service was examined by the Hon'ble Courts. The cash management service, which was disputed for tax liability was held to be specifically covered/ excluded under taxable category of banking and other financial services. The Revenue held a view that the said service can still be taxed under Business Auxiliary Service. The High Court held that when the BOFS was exhaustively listed, this particular activity was not covered then it is not legally sustainable to tax it under an entirely different tax entry only on the ground that the broad definition of another entry may cover the said activity.

5. The ld. Counsel also relied on the decision of the Tribunal in the case of TCS E-Serve Ltd. vs. CST Mumbai - 2014 (33) STR 641 (Tri. Mum.) and Infosys Ltd. v. CST, Bangalore -

2015 (37) STR 862 (Tri.- Bang.) to support his submission that these services cannot be taxed under telecom service because the provider is outside the ambit of statutory definition.

6. The ld. A.R. reiterated the findings of the Original Authority. He submitted that the telecom services provided by the authorized service provider in India are rightly taxed under the said tax entry. However, when somebody provides similar service on behalf of the appellant, the aspect of service changes its colour and can be rightly brought under BAS, which specifically covers service provided on behalf of the another person and also customer care service. Admittedly, the telecom subscriber is the customer of the appellant receiving service from the foreign service provider during roaming.

7. We have heard both the sides and perused the appeal records. The admitted facts of the case are that the subscriber of the appellant while visiting foreign country continue to receive telecom service using the connectivity provided by roaming partner of the appellant in that foreign country. There is no dispute that the services provided by the foreign telecom Co. is squarely covered by the tax entry 'telecommunication service'. However, the tax liability could not be brought in only for the reason that the said provider of service in foreign country is not a Telegraph Authority as required under Finance Act, 1994. The question now is such services, otherwise recognized as telecom service, which can be subjected to tax if

provided in India by a Telegraph Authority, can be brought under tax under a different tax entry, namely, Business Auxiliary Service. We note examining an almost similar situation, the Board has categorically clarified vide letter dated 19.12.2011 that what otherwise constitutes telecommunication service cannot amount to any other taxable service. Further, we also note in parallel situation examining the tax liability of an activity, which is otherwise covered, in a tax entry, can be taxed under the category of another tax entry has been examined by the Hon'ble Kerala High Court in the case of Federal Bank Ltd. (Supra). Here also we note that the telecommunication service liable to tax has been exhaustively defined and admittedly, the services now under consideration are specifically covered in the said tax entry. We also note that the ld. Counsel for the appellant submitted that the services rendered by foreign telecom service provider to their subscribers while roaming, are subject to VAT/ other liable tax in the concerned country in terms of agreement. In this connection, we also note the Board has examined the international practice with reference to roaming services vide Circular dated 03.01.2007. It was held that services to in-bound roamers is delivered and consumed in India and hence, it is not an export of service. It was further clarified that international practice treats the telephone service provided to an inbound roamer by the visited network, for purpose of taxation, in the same manner as a telephone service provided to any home subscriber.

8. In view of the discussion and analysis recorded above, specific clarification of the Board dated 19.12.2011 and the decisions of Hon'ble Kerala High Court as affirmed by Apex Court, we hold that the impugned order is not legally sustainable. Accordingly, the same is set aside. The appeal is allowed.

[Dictated and pronounced in the open Court]

(S.K. MOHANTY)
MEMBER (JUDICIAL)

(B. RAVICHANDRAN)
MEMBER (TECHNICAL)

Anita