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

Date of Hearing:02.11.2017
Date of Decision:28.11.2017

Service Tax Appeal No.10/2011-DB

[Arising out of Order-in-Original No.03/SJS/CST (Adj)/2010 dated 28.09.2010 passed by the Commissioner of Service Tax, New Delhi]

CST, New Delhi — Appellant

Vs.

M/s.Oxigen Services India Pvt. Ltd. — Respondent

Appearance:

Rep. by Shri Sanjay Jain, AR for the appellant.
Rep. by none (on merit) for the respondent.

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

Final Order No.58104/2017

Per B. Ravichandran:

The Revenue is in appeal against the order dated 28.09.2010 of Commissioner (Adjudication), Service Tax, New Delhi.

2. The brief facts of the case are that the respondents are engaged in the business of trading in Electronic Recharge Coupons (ERCs) and also in collection of payment of post paid bills for various telecommunication operators from their subscribers. The dispute in the present case relates to the activities of the respondent with reference to transaction in ERC. The Revenue held that the commission/discount earned by the respondent on such transaction in ERC shall be liable to service tax under the category of "Business Auxiliary Service" in terms of Section 65(19) of the Finance Act, 1994. The Revenue held that the respondents

are rendering services of distribution, promotion and marketing of ERCs on behalf of the telecom operators. Accordingly, proceedings were initiated by issue of show cause notice dated 21.01.2008. The impugned order was passed by the Commissioner dropping all proceedings. The Original Authority held that the respondents were buying and selling ERCs on their own account. Such sales' activities does not involve any service of promotion or marketing, to be liable under "Business Auxiliary Service". He referred to various clauses of the agreements and after detailed analysis, arrived at such conclusion. The Revenue is aggrieved by this and filed appeal

3. Ld. AR elaborating the grounds of appeal submitted that the transaction between the respondent and the telecom operator is one of principal and the agent. There is no transfer of ownership of goods in the present case. The telecom service is provided by the telecom companies. The respondent is acting in his capacity of distributing and promoting such service by the telecom operator. The respondent is actually acting as a bridge between the subscriber and the telecom operator. The amount received or retained by the respondent is for such activity. Relying on the decision of the High Court of Kerala in **Vodafone ESSAR Cellular Limited – 2010 –TIOL-655-HC-Kerala –IT** and also the decision of the Hon'ble Karnataka High Court in **Bharti Televentures Ltd. – 2017 (49) STR 129 (Kar.)**. Ld. AR submitted that there is no sale of any goods in this arrangement. The delivery of SIM cards or ERCs is only for rendering service to ultimate subscribers. The distributor is only the middleman arranging customers or subscribers for the assessee. The distribution agreement clearly indicate that it is for the distributor to enroll the subscribers with required documentation. It is clear that the respondents

are engaged in the service of distributing and promoting services provided by the telecom operators. The Original Authority erred in dropping the demand.

4. None appeared on behalf of the respondent. However, by their letter dated 5.9.2011, the appellants submitted detailed reply against the appeal by the Revenue. We note that on earlier occasions, 20.12.2016, 27.03.2017, 26.04.2017, 15.06.2017, 7.8.2017 and 18.09.2017, the matter was listed with due notices. The respondent did not make any appearance on any of these dates. Accordingly, we proceed to decide the case based on the written submissions made by them.

5. Upon hearing the ld. AR and on perusal of the appeal papers including the written submissions made by the respondent, we note that the only issue for consideration is that the liability of the respondent to pay service tax on the transactions in ERCs. The Original Authority examined the terms of the various contracts involved in the present case. He concluded that the respondent was not acting as agent of telecom operators even in cases, where they were receiving "commission" for marketing and promotion of service of such telecom operators. He concluded that allegation that the respondent provided services of marketing the services of telecom operators is not supported by the terms of the various agreements. There was no relationship of agent and principal between the respondent and the telecom operators. We note that the dispute involved in the present case was earlier subject matter of decision by this Tribunal. In **Chotey Lal** Radhey Shyam - 2016 (44) STR 266 (Tribunal-Allahabad), Goyal **Automobiles – 2016 (43) STR 268 (Tribunal-Delhi)** and **G.R. Movers - 2013 (30) STR 634 (Tribunal)**, the Tribunal held that when the telecom operators paid service tax on the full MRP of such ERCs/SIM cards, there is no liability on the appellant, who

are involved in sale of such ERC/SIM cards to the subscribers. We also note that the said view has been upheld by the Hon'ble Allahabad High Court in **2015 (37) STR J-132** as well as Hon'ble Madras High Court in **Bharti Televentures Ltd. – 2015 (40) STR 221 (Madras)**.

6. We note that in the present case, the telecom operators have paid service tax on the full MRP of ERC, which was further sold by the respondent. In such situation, the ratio of the decisions mentioned will squarely apply to the dispute in the present appeal also. Accordingly, we find no merit in the appeal filed by the Revenue. We note that the decisions relied upon by the Revenue are not on the dispute of service tax liability with present set of facts. Accordingly, the appeal filed by the Revenue is dismissed.

[Order pronounced on 28.11.2017]

(S.K. Mohanty)
Member (Judicial)

(B. Ravichandran)
Member (Technical)

Ckp.