IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,

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

BENCH-DB

COURT –IV

**Service Tax Appeal No.ST/56171/2013-ST [DB]**

[Arising out of Order-in-Original No.106/RDN/2011 dated 07.03.2011 passed by the Commissioner of Service Tax, Delhi]

ACL Mobile Ltd. …Appellant

**Vs.**

C.C.E., Delhi … Respondent

Present for the Appellant : Mr.A.K. Batra, CA &
Ms. Vibha Narang, Advocate
Present for the Respondent: Mr. Sanjay Jain, D.R.

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

**Date of Hearing / Decision : 20.02.2018**

**FINAL ORDER NO. 50847/2018**

**PER: B.RAVICHANDRAN**

The appellant is aggrieved by the order dated 18.01.2013 of Commissioner of Service tax, New Delhi. The appellant is involved in providing various services mainly in connection with telecommunication services. They were registered with the Department and were discharging Service Tax. Their whole area of operation is to develop various contents like SMS, news, ring tones, games, videos, alerts, images etc. for telecom operators for usage for the subscribers. After conducting audit of the accounts maintained by the appellant, the Revenue entertained a view that the appellants did not discharge service tax under various categories for the period from 01.10.2003 to 31.03.2008. After collecting various details from the appellant, proceedings were initiated against them to demand and recover service tax not paid by them. The original authority after hearing the appellant adjudicated the case. He confirmed service tax liabilities under various headings for different periods. The total liability confirmed is Rs.1,40,45,132/- alongwith penalties under various Sections of Finance Act, 1994.

2. The ld. Consultant appearing for the appellant submitted that there are 4 different issues involved with the service tax demand confirmed by the lower authority. The first issue is with reference to supply of content like news, ring tone, games, SMS, alerts etc. to telecom operators who provided it to the subscribers. The Revenue held a view that the said service is liable to be taxed under the support of business and commerce for the period 01.05.2006 to 31.05.2007. Ld. Consultant submitted that the said service was more specifically covered under the category of development and supply of content as per the ratio laid down by Hon'ble Andhra Pradesh High Court in BSNL case - 2012 (25) STR 321(A.P.).

Contesting the finding of the original authority that the said service is liable to be taxed under BSS for the period prior to introduction of the new tax entry, the ld. Consultant submitted that such proposition is against the settled legal position. The BSS tax entry continued to remain without amendment, when the new tax entry for development and supply of contents was introduced. Following the ratio of the decision of the Tribunal in Diebold System (P) Ltd. – 2008 (9) STR 546 (2008-TIOL-489-CESTAT-MAD) it is held that such new entries will have validity from that date, when there was no amendment carried out in the old tax entry which was also sought to be invoked for taxing.

3. On the second issue regarding services received from foreign parties under management, maintenance and repair service and management consultancy service, it is submitted that there is no reverse charge tax liability prior to 18.04.2006, as decided by Hon'ble Bombay High Court in the case of Indian National Ship Owners Association – 2009 (13) STR 325 (Bom.) which was upheld by the Apex Court.

4. On the third issue, which is also regarding tax liability under reverse charge under the category of business auxiliary service, it is submitted that the appellant entered into a joint venture arrangement with M/s. Technology Aided System, Kuwait to develop and provide contents by SMS, Games, Ring-tones etc. for telecom operator M/s. Mobile Telecommunication

Co. Network, Kuwait. It is the submission of the appellant that this is a clear joint-venture arrangement as could be seen from the agreement with shared the responsibilities and obligations and also the income being shared on a pre-determined proportion. In such arrangement there could be no tax liability inter-se between two parties of joint venture.

5. On the last issue regarding service tax liability on reverse charge basis under the category of BSS, ld. Consultant submitted that they have obtained space in the servers hosted in foreign country by foreign service provider. These servers were used by them to maintain their database and various developed contents. These hiring of space in servers cannot be taxed under BSS during the material time. The ld. Consultant strongly contended against the demand on the ground of revenue neutrality stating that even the tax was to have been paid, the full credit of such tax is available to the appellant for discharging their tax liability on output services in India. On that ground relying on the decision of Jet Airways India Ltd. – 2016 (44) STR 465 (Tri.-Mum.) (read with rectification order), the ld. Consultant pleaded that there is no loss to the Government and no tax liability that too involved in extended period can be confirmed against the appellant.

6. The ld. Consultant also contested the demands wherever involving extended period and also imposition of penalties on the ground that the issues involved as discussed above are all

with reference to interpretation of statute and also considering the eligibility of the appellant for credit of such tax payment, no malafide can be attributed.

7. The ld. AR contested the appeal stating that the contents provided by the appellant to the telecom operators is clearly supporting the business of such operators. The Original Authority examined the defence submitted by the appellant regarding the tax liability under a new tax entry as well as under the old tax entry, BSS. Ld. AR submitted that applying the provisions of section 65 A the original authority arrived at a correct finding regarding tax liability of the appellant for whole of the period. Regarding the tax liability in pursuance of agreement with M/s. Technology Aided System, Kuwait, the ld. AR submitted that the appellant did pay amount to the said company in pursuance of the said arrangement and the same should be considered as a commission. He supported the findings of the original authority on these aspects.

8. Regarding the server space provided by foreign service provider to host the database and contents of the appellant on such servers, the ld. AR submitted that it is clearly an infrastructural support service falling under BSS. The appellants business very much depends on such web hosting server space by the owners of the server in foreign country. It is an essential infrastructure for the services rendered by the appellant. Regarding revenue neutrality, the ld. AR submitted

that the tax liability is decided as per the tax entries and the services rendered by the appellant. The same cannot be opposed only on the ground that if the said tax was paid, the same would have been available as a credit to the appellant. The availability of credit is determined by the provisions of Cenvat Credit Rules, 2004 and the same cannot be inferred based on the assertions made by the appellant.

9. We have heard both sides and perused the appeal records. On the first issue, we note, that very same issue regarding supply of content and usage by telecom operators was subject matter of examination by the Hon'ble Andhra Pradesh High Court though in a Sales Tax matter. The Hon'ble High Court in BSNL case (supra) examined similar set of facts and recorded the following finding:-

> ***"35.*** *Value added services, like ring tones and music downloads, are audio messages, and the manner of their transmission from the service provider to the subscriber, or from one subscriber to another, is by electro-magnetic waves. Wall paper, like SMS/Text messages, are visual images. The process of transmission of voice messages is identical to the transmission of data in non-voice messages. Sounds or images are converted into electro-magnetic waves, transmitted through the network of cell towers and servers of the service provider, and are received by the person to whom it is intended in his handset. The mobile handset is both a transmitter and a receiver. Information transmitted/received by a mobile phone, be it audio or visual, is only by means of electro-magnetic waves. VAS involves only a transfer of data (textual, audio, visual etc.) and/or accessibility (ability to*

*access) of such data or content in the network of the service provider. "Value added services" fall within the ambit of "telecommunication services" as defined in Section 2(k) of the TRAI Act and Section 65(109a) of the Finance Act, 1994. Ringtones, music downloads, wall paper, music clips etc., fall within the definition of "development and supply of content" under Section 65(36c) and constitute "taxable service" under Section 65(105)(zzzb) of the Finance Act, 1994."*

10. Regarding the contention of the ld. AR that the services could still be taxed under BSS for the period prior to the introduction of a new tax entry, we note that BSS did not undergo any statutory change during the relevant time, when new tax entry was introduced for development and supply of content under Section 65 (36)(c) of the Finance Act, 1994. The Tribunal in Diebold Systems (supra) held that introduction of a new entry for the purpose of levy of tax pre-supposes that it was not covered by any of the pre-existing entries. In other words, in the ever widening spare of service tax addition of an item to the list of taxable services is just an addition and not a subtraction from a pre-existing entry. In the present case, we note that pre-existing entry continue to remain with the same scope and words even after the introduction of the new tax entry, thereby revealing that the new tax entry is an altogether new addition to the taxing scope. Accordingly, we note that applying the ratio of Hon'ble A.P. High Court, the tax liability under BSS is not sustainable for development and supply of contents to the telecom operators.

11. Regarding service tax liability on reverse charge basis under MMR and management consultancy, we note that the period involved is prior to 18.04.2006 and there is no reverse charge tax during that period as held by Hon'ble Bombay High Court in Indian National Ship Owners Association (supra).

12. The tax liability in pursuance of an arrangement with M/s. Technology Aided System, Kuwait is also under a dispute. We have perused the terms of agreement. It is clear that the appellants have entered into a joint-venture arrangement with shared responsibilities and obligations. The income is credited with common bank account and shared as per the pre-arranged percentage between the two parties. We note that in such arrangement in terms of the said agreement, there could be no service inter-se between parties to the agreement. In this connection, we refer to the decision of the Tribunal in Mormugao Port Trust – 2017 (48) STR 69 (Tri.-Mum.). The Tribunal held that activity undertaken by co venture (partner) in furtherance of joint-venture work cannot be said to be a service rendered by such co-venture to the joint-venture. The Tribunal concluded that in an arrangement of joint-venture/partnership the element of consideration, which is basis for service, is absent.. Accordingly, we hold that in the arrangement before us there can be no tax liability on the appellant.

13. Regarding the last issue with reference to tax liability of the appellant on the facility of availing server/web hosting provided by the Foreign Service provider, we note that providing space in the server is essential and important infrastructure requirement for the appellant. Though, the explanation to BSS gives only inclusive definition of infrastructure support, examining the present context of the support received by the appellant by way of server hosting, we are of the considered view that the same will fall under the overall category of infrastructural support service, which is part of the BSS. Regarding the contention of the appellant that they need not pay service tax as the situation is revenue neutral, we note that the question of revenue neutrality as a legal principle to hold against a tax liability is not tenable. In other words, no assessee can take a plea that no tax need have been paid as the same is available to them as a credit. This will be against the very basic canon of value added taxation. The revenue neutrality can at best be pleaded as principle for invoking bonafideness of the appellant against the demand for extended period as well as for penalty which require ingredients of malafide. Reliance was placed by the ld. Consultant regarding the submission on revenue neutrality, on the decision of the Tribunal in Jet Airways (supra). We have noted that in the said decision the Tribunal recorded as admitted facts that the appellant are using the said facility for

the taxable output services. We note that no such categorical assertion can be recorded in the present case. Even otherwise we note that the availability or otherwise of credit on input service by itself does not decide the tax liability of output service or on reverse charge. The tax liability is governed by the legal provisions of applicable during the relevant time in terms of Finance Act, 1994. The availability or otherwise of credit on the amount to be discharged as such tax liability cannot take away the tax liability itself. Further, the revenue neutrality cannot be extended to a level that there is no need to pay tax on the taxable service. This will expand the scope of present dispute itself to decide on the manner of discharging such tax liability. We are not in agreement with such proposition.

14. However, the appellant have a strong case against demand for extended period as well as for penalty imposed on such reverse charge basis. The issue regarding tax liability on reverse charge basis was highly contentious involving multiple interpretation and litigation. The matter was resolved by the Hon'ble Bombay High Court in Indian National Ship Owners Association (Supra), which was later-on affirmed by the Hon'ble Apex Court. The Board issued clarification on 30.06.2010. The Board has clarified the applicability of the ratio of the said decision to be followed by the field formations. As such, we find that there is no scope for invoking extended

period of demand on such reverse charge and also impose penalty applicable to such tax. Service tax liability shall be restricted to the normal period of limitation.

15. In view of the above discussion and analysis, except for confirmation of tax liability on reverse charge basis on server space facility availed by the appellant for normal period, the appeal is otherwise allowed on other issues. The penalties imposed are also set aside.

[Dictated and pronounced in the open Court]

**(B. RAVICHANDRAN)**
**MEMBER (TECHNICAL)**

**(S.K. MOHANTY)**
**MEMBER (JUDICIAL)**

Anita