

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

Service Tax Appeal No. 54967 of 2014

[Arising out of the Order-in-Appeal No. BPL-EXCUS-000-APP-029-14-15 dated 09.05.2014 passed by Commissioner (Appeals), Service Tax, Bhopal]

Bharat Sanchar Nigam Ltd.

Appellants

Vs.

CCE, Bhopal

Respondent

Appearance:

**Shri Himanshu Khemka, Advocate for the Appellants
Shri G R Singh, AR for the Respondent**

CORAM:

**Hon'ble Mr. C L Mahar, Member (Technical)
Hon'ble Ms. Rachna Gupta, Member (Judicial)**

Date of Hearing : 19.07.2018
Date of Decision : 07.12.2018

FINAL ORDER No. 53368/2018

Per C L Mahar:

The present appeal arises out of confirmation of demand of Rs.4,88,898/- against the appellant on the value received by them on account of "sale of post paid SIM", 'registration of post paid SIM', 'access registration of pre-paid SIM' and sale of Anant plan (Life time prepaid SIM)", which has been held as includable in the taxable value

for the purpose of levy of Service Tax by the lower adjudicating authority and same has been confirmed by the learned Commissioner (Appeals) in his order dated 09.05.2014. The appellants are before us against this order of the Commissioner (Appeals).

2. It has been contended by the learned advocate appearing for the appellant that the value received by them for providing the 'sale of post paid SIM', 'sale of Anant plan' etc. is not on account of taxable service but same is purely the 'sale of SIM card' and on which, the appropriate tax under Sales Tax Act has also been paid by them and therefore, same is not taxable under the Service Tax Act.

3. We have heard both the sides and have perused the record of the appeal.

4. We find that the issue is squarely covered by Hon'ble Apex Court judgment in the case of *M/s. Idea Mobile Communication Ltd. vs Union of India [2011 (23) STR 433 (SC)]*. The relevant extract of same are reproduced below:

“15. As against the order passed by the adjudicating authority, the appellant assessee took up the matter in appeal before the Commissioner of Central Excise & Customs, Cochin. The appellate authority upheld the findings of the adjudicating authority. The assessee took up the matter before the CESTAT, Bangalore. The CESTAT vide its order dated 25-5-2006 held that the levy of service tax as demanded is not sustainable for the reason that the assessee had already paid the sales tax and therefore it

follows that service tax is not leviable on the item on which sales tax has been collected.

17. The High Court has given cogent reasons for coming to the conclusion that service tax is payable inasmuch as SIM Card has no intrinsic sale value and it is supplied to the customers for providing mobile service to them. It should also be noted at this stage that after the remand of the matter by the Supreme Court to the Sales Tax authorities the assessing authority under the Sales Tax Act dropped the proceedings after conceding the position that SIM Card has no intrinsic sale value and it is supplied to the customers for providing telephone service to the customers. This aforesaid stand of the Sales Tax authority is practically the end of the matter and signifies the conclusion.

18. The sales tax authorities have themselves conceded the position before the High Court that no assessment of sales tax would be made on the sale value of the SIM Card supplied by the appellant to their customers irrespective of the fact whether they have filed returns and remitted tax or not. It also cannot be disputed that even if sales tax is wrongly remitted and paid that would not absolve them from the responsibility of payment of service tax, if otherwise there is a liability to pay the same. If the article is not susceptible to tax under the Sales Tax Act, the amount of tax paid by the assessee could be refunded as the case may be or, the assessee has to follow the law as may be applicable. But we cannot accept a position in law that even if tax is wrongly remitted that would absolve the parties from paying the service tax if the same is otherwise found payable and a liability accrues on the assessee. The charges paid by the subscribers for procuring a SIM Card are

generally processing charges for activating the cellular phone and consequently the same would necessarily be included in the value of the SIM Card.

19. There cannot be any dispute to the aforesaid position as the appellant itself subsequently has been paying service tax for the entire collection as processing charges for activating cellular phone and paying the service tax on the activation. The appellant also accepts the position that activation is a taxable service. The position in law is therefore clear that the amount received by the cellular telephone company from its subscribers towards SIM Card will form part of the taxable value for levy of service tax, for the SIM Cards are never sold as goods independent from services provided. They are considered part and parcel of the services provided and the dominant position of the transaction is to provide services and not to sell the material i.e. SIM Cards which on its own but without the service would hardly have any value at all. Thus, it is established from the records and facts of this case that the value of SIM cards forms part of the activation charges as no activation is possible without a valid functioning of SIM card and the value of the taxable service is calculated on the gross total amount received by the operator from the subscribers. The Sales Tax authority understood the aforesaid position that no element of sale is involved in the present transaction.”

5. We also find that though the appellant has contended that the amount paid by the customers towards the above mentioned services is either refunded if SIM is not issued or adjusted by them when the SIM is activated towards Service Tax plus service charges. However, on perusal of the record, we find that as per the chart annexed with the Show

Cause Notice, the difference between the Service Tax actually paid and payable still remains equal to the service tax demanded and confirmed and therefore, we feel that the appellant have not been able to substantiate his claim and therefore, we do not find any lacuna in the Order-in-Appeal regarding confirmation of service tax against the appellant.

6. On the issue of limitation which has been mentioned by the appellant in their appeal, we find that the appellant have not put forward any evidence to show that the fact of 'sale of SIM card' etc. and its value not being included in the taxable value, was in the knowledge of the department. Since the appellant have been working under self-assessment mechanism and if they are having any doubt in their mind, they should have sought clarification from the department regarding the includibility of the sale value of SIM and other plans in the taxable value for levy of Service Tax. However, they have failed to do that and therefore the plea that the demand is hit by period of limitation is not acceptable and we do not find any short-coming in the order-in-appeal, so far as the confirmation of Service Tax demand for extended period is concerned.

7. Accordingly, following Hon'ble Apex Courts judgment (supra), we do not find any shortcoming in the Order-in-Appeal, same is upheld. As a result, appeal is rejected.

(order pronounced in the open Court on 7/12/2018)

(Rachna Gupta)
Member (Judicial)

(C L Mahar)
Member (Technical)