CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
HYDERABAD

REGIONAL BENCH - COURT NO. – I

Service Tax Appeal No. 1319 of 2010

(Arising out of **Order-in-Original** No.08/2009(S.Tax)(Commr.), dated 31.12.2009 passed by Commissioner of Customs, Central Excise & Service Tax, Hyderabad-IV)

Syniverse Mobile Solutions Pvt Ltd., .. **APPELLANT**
(Earlier Transcibernet India Pvt Ltd.,)
I – Labs, Plot No. 18,
Software Unit Layout,
Madhapur, Hyderabad,
Telangana – 500 081.

VERSUS

Commissioner of Customs, .. **RESPONDENT**
Central Excise & ServiceTax
Hyderabad – IV
Posnett Bhavan, Tilak Road,
Ramkoti, Hyderabad,
Telangana – 500 004.

APPEARANCE:

Shri Narendra Dave, Advocate for the Appellant.
Shri S. Hanuma Prasad, Authorised Representative for the Respondent.

CORAM: **HON'BLE Mr. R. MURALIDHAR, MEMBER (JUDICIAL)**
HON'BLE Mr. A.K. JYOTISHI, MEMBER (TECHNICAL)

FINAL ORDER No. A/30152/2023

Date of Hearing:31.05.2023
Date of Decision:31.05.2023

[ORDER PER: R. MURALIDHAR]

The Appellant is providing services of data clearing and financial settlement service to various mobile operators. The Appellant was issued Show Cause Notice on the ground that the services undertaken by them fall under the category of Business Auxiliary Services. On this count demand for Rs. 1,15,79,699/- was raised. On the allegation that they have not paid the service tax towards import of services, the demand of Rs. 12,40,303/- was raised. After due process the Adjudicating Authority confirmed the demands. Aggrieved by the impugned Order-in-Original the Appellant is before the Tribunal.

2. As per the Appellant the demand of Rs. 1,15,79,699/- can be bifurcated into demand towards services provided by them as (i) data clearing services Rs. 1,06,74,048/- (ii) management services forming part of information technology services Rs. 9,05,651/-. The Learned Counsel appearing on behalf of the Appellant submits that in respect of financial settlement services they are not disputing the issue and have paid the service tax of Rs. 9,05,651/- along with interest of Rs. 4,35,830/- which

have been appropriated in the Order-in-Original. They only pray for setting aside of the penalty on this amount.

3. In respect of Business Auxiliary Services wherein the service tax of Rs. 1,06,74,048/- has been confirmed, he takes the preliminary objection that the Show Cause Notice was issued alleging that the Appellant is rendering the service of Business Auxiliary Services falling under Section 65(19). This Section 65(19) has the following clauses wherein different types of services are specified. The relevant portion is extracted 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

Explanation – For the removal of doubts, it is hereby declared that for the purposes of this sub-clause, "service in relation to promotion or marketing of games of chance, organized, conducted or promoted by the client", in whatever form or by whatever name called, whether or not conducted online, including lottery, lotto, bingo;

(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).

4. Further, he submits that the data management services provided by them are in the nature of information technology services which is excluded from the definition of Business Auxiliary Services as per the Explanation given therein. Apart from these, he submits that without prejudice to their submission that the activity undertaken by them does not fall under the category of Business Auxiliary Services, going by the Order passed by the Adjudicating Authority holding that the Appellant's service falls under (iii), (iv) read with (vii) of Section 65(19), in all these cases there has to be a presence of 3 parties, i.e. service provider, client and another party to whom service is provided on behalf of the client. In their case as per the Agreements entered in with all the clients, there are only two parties i.e. Appellant and the client and there is no question of any third party being

part of this scheme. Therefore, even on this count their services cannot fall under Business Auxiliary Services and hence the confirmed demands are liable to be set aside on merits.

5. He cites the case laws of Balaji Enterprises Vs CCE & ST, Jaipur [2020 (33) GSTL 97 (Tri-Del)] wherein Delhi Bench has categorically held that when the Show Cause Notice fails to indicate the specific sub-clause of Section 65(19), the confirmed demands are liable to be set aside on the score itself. He also relies on the case law of CCE, Goa Vs Swapnil Asnodkar [2018 (10) GSTL 479 (Tri-Mum)] wherein the issue pertain to Business Auxiliary Services. Further, he relies on the case law of United Telecom Ltd., Vs CST, Hyderabad [2011 (22) STR 571 (Tri-Ban)] wherein also it was held that if not allegation is made regarding non-payment of Service Tax on account of Business Auxiliary Services being provided, the Show Cause Notice must clearly indicate the sub-clause under which the service rendered falls.

6. In view of the foregoing, he submits that the Appeal is liable to be allowed on merits.

7. The Learned AR submits that Show Cause Notice was issued based on the investigation of enquiries conducted by the Department and there is no scope to doubt that the services rendered by the Appellant falls under the category of Business Auxiliary Services. He submits that mere non-mentioning of the sub-clause of Section 65(19) will not vitiate the proceedings. He cites the case of Collector of Central Excise Vs Pradumna Steel Ltd., [1996 (82) ELT 441 (SC)] wherein it is held that mere mention of wrong provision of law will not vitiate the proceedings initiated. He further submits that mere usage of computers and other accessories will not get the service classified under the category of 'Information Technology Services'. As a matter of fact, the Appellant is providing only Business Auxiliary Services by acting as a bridge between two different telecom service providers. Therefore, though the Appellant might have entered into an agreement with one client, the fact remains that these services are also rendered to third parties. Therefore, the condition that more than two parties are involved in such service, is fully met.

8. The Learned AR also reiterates the findings given by the Adjudicating Authority while confirmed the demands.

9. In respect of service tax of Rs. 12,40,303/- confirmed towards import of services, the Learned Counsel submits that almost the entire services were received by the Appellant prior to 18.04.2006. He also relies on the case law of Indian National Ship Owner's Association Vs Union of India [2009 (14) STR 289 (Bom)] wherein it has been held that for the services imported from abroad, the liability to pay the Service Tax on RCM basis would be effective from 18.04.2006 only after Section 66A of the Finance Act 1994 was introduced. He admits that the Service Tax of Rs. 1,26,539/- for the period subsequent to 18.04.2006 is not been contested by them. They have paid this amount along with interest of Rs. 15,368/- and the same has been appropriated in the Order-in-Original. He prays to waive the penalty imposed on this issue. The Learned AR admits that for the period subsequent to 18.04.2006 the Appellant has paid the service tax along with interest and the same has been appropriated in the Order-in-Original.

10. Heard both sides and perused the documents.

11. Coming to the very first preliminary objection raised by the Appellant that the Show Cause Notice has failed to correctly specify the clause under which the Appellant services will fall, on perusal of the Show Cause Notice it is seen that the entire portion of Section 65(19) pertaining to Business Auxiliary Services has been extracted at Para 2 of the Show Cause Notice without any reference whatsoever as to under which clause of the Section 65(19) the services referred by the Appellant would fall. On this issue it is seen that Tribunals have been consistently holding that it is essential for the Show Cause Notice issuing authority to clearly indicate the sub-clause under which the service tax in question would fall.

12. In the case of CCE, Goa Vs Swapnil Asnodkar [2018 (10) GSTL 479 (Tri-Mum)] the Tribunal has held as under:

> *4. We have carefully considered the submission made by both sides. We find that though in the SCN the respondent was made liable to pay service tax but as rightly held by the adjudicating authority, no specific clause of Section 65(19) defining "Business Auxiliary service" has been shown to be applicable to levy service tax. <u>It is not appearing from the show cause notice as to what goods or services the respondent has promoted or helped to promote. The Appellate Commissioner also on the same ground has held that the demand being vague is not enforceable against the respondent. We do not find any reason to infer any different view than expressed by the lower authorities as without specifying the activity and the nature of service of the respondent he cannot be taxed.</u> Further out of the seven clauses under Section 65(19) no clause has been pointed out under which the respondent is liable for service tax.[emphasis supplied]*

In the case of United Telecom Ltd., Vs CST, Hyderabad [2011 (22) STR 571 (Tri-Ban)] the Bench has held as follows:

> ***2.3*** *In the impugned order, the Commissioner (Appeals) observed that the Original Authority himself was not clear under which category of service the activity of the appellants was liable Service tax. The Commissioner (Appeals) reproduced Section 65A(2), the statutory provision for classification of a taxable service prima facie classifiable under two or more sub-clauses of Clause 105 of Section 65 and observed as follows:-*
>
> *"The lower authority has obviously not followed principles detailed supra and clearly erred in holding that the services rendered by the appellants are classifiable under both "Business Auxiliary Service" as well as "Business Support Service". Having reproduced the findings of the Commissioner in the impugned order and having observed that "I am in agreement with the aforesaid findings of the Commissioner", there was no need to come to such a weird conclusion of classifying the service under more than one head."[emphasis supplied]*

In the recent decision of CESTAT, Delhi in the case of Balaji Enterprises Vs CCE and ST, Jaipur [2020(33) GSTL 97 (Tri-Del)] the Bench has considered even the arguments of the Department in respect of Collector Vs Pradyumna Steel Ltd., [1996 (18) ELT 441 (SC)] which is cited by the Learned AR in the present case and the Hon'ble Bench has held as under:

> ***28.*** *Likewise, the decision of the Supreme Court in Collector of Central Excise, Calcutta v. Pradyumna Steel Ltd. [1996 (82) E.L.T. 441 (S.C.)] would also not come to the aid of the Department. This decision holds that mere mention of a wrong provision of law, when power that has been exercised is available under a different provision, is by itself not sufficient to invalidate the exercise of that power.*
>
> ***29.*** *The impugned order, therefore, can be set aside only on this ground as the show cause notice does not mention which service out of the seven services specified in Section 65(19) of the Act was undertaken by the Appellant.[emphasis supplied]*

13. From the above decisions, it can be seen that the Tribunals have been consistently holding that the Show Cause Notice should clearly indicate the sub-clause of Section 65(19) under which the alleged services rendered. If the demand is made merely stating that the services rendered falls under Business Auxiliary Services without mentioning the specific clause, the demands cannot be legally sustained.

14. It would also be relevant to note the decision of Hon'ble Supreme Court in the case of Collector of Central Excise Vs HMM Ltd., [1995 (76) ELT (SC)]. In this case, the demand was made by invoking the proviso to Section 11A(1) of Central Excise Act 1944 by demanding the Excise Duty for the extended period. The Hon'ble Supreme Court after considering the submissions from both sides held as under:

> 2. *If the Department proposes to invoke the proviso to Section 11A(1), the show cause notice must put the assessee to notice which of the various commissions or omissions stated in the proviso is committed to extend the period from six months to 5 years. Unless the assessee is put to notice, the assessee would have no opportunity to meet the case of the department. The defaults enumerated in the proviso to the said sub-section are more than one and if the excise department places reliance on the proviso it must be specifically stated in the show cause notice which is the allegation against the assessee falling within the four corners of the said proviso. In the instant case that having not been specifically stated the Additional Collector was not justified in inferring (merely because the assessee had failed to make a declaration in regard to waste or by-product) an intention to evade the payment of duty. The Additional Collector did not specifically deal with this contention of the assessee but merely drew the inference that since the classification list did not make any mention in regard to this waste product it could be inferred that the assessee had apparently tried to evade the payment of excise duty.[emphasis supplied]*

15. From the above judgment, it gets clarified that even when extended period is invoked in terms of Section 11A(1), the Department should clearly specify as to under which of the sub-clause the Show Cause Notice is being issued. The ratio of this case law to clarify that whenever any allegation is made, the same is required to be made with specific sub-clause of main clause.

16. Without going into further merits of the arguments on various counts, on the sole ground that the Department has failed to issue the Show Cause Notice with specific allegation specifying the sub-clause of Section 65(19), respectfully following the above cited case law, we hold that the present Appeal towards the confirmed demand of Rs.1,06,74,048/- is required to be allowed. Accordingly, we allow the Appeal to this extent.

17. In respect of the confirmed demand of Rs. 12,40,303/- in respect of import of services, in the case of Indian National Shipping Owner's Association Vs Union of India [2009 (13) STR 235 (Bom)], the Hon'ble High Court has held as under:

> 20. *It appears that a similar provision in the rules was made applicable by the Government in relation to the Clearing Agents by making customers of the Clearing Agent liable for levy of the service tax. That question has been decided by the Supreme Court by its judgment in the case of Laghu Udyog Bharati (supra) and the Supreme Court has clearly laid down that the imposition of the service tax is on the persons rendering the services and by making a provision in the Rules, levy of tax cannot be shifted to the recipients of the services and the Rule framed which brought about this situation has been declared by the Supreme Court to be invalid. The law laid down by the Supreme Court in its judgment in Laghu Udyog (supra) is squarely applicable*

to Rule 2(1)(d)(iv), which is relied on in this case. It appears that it is first time when the Act was amended and Section 66A was inserted by Finance Act, 2006 w.e.f. 18-4-2006, the Respondents got legal authority to levy service tax on the recipients of the taxable service. Now, because of the enactment of Section 66A, a person who is resident in India or business in India becomes liable to be levied service tax when he receives service outside India from a person who is non-resident or is from outside India. Before enactment of Section 66A it is apparent that there was no authority vested by law in the Respondents to levy service tax on a person who is resident in India, but who receives services outside India. In that case till Section 66A was enacted a person liable was the one who rendered the services. In other words, it is only after enactment of Section 66A that taxable services received from abroad by a person belonging to India are taxed in the hands of the Indian residents. In such cases, the Indian recipient of the taxable services is deemed to be a service provider. Before enactment of Section 66A, there was no such provision in the Act and therefore, the Respondents had no authority to levy service tax on the members of the Petitioners-association.[emphasis supplied]

18. The Special Leave Petition by Revenue was dismissed by the Supreme Court. After this there are number of decisions by various Tribunal and High Courts holding that the Service Tax liability on RCM basis will arise for the importer from the 18.04.2006 onwards. Therefore, the confirmed demand of Rs.11,13,764/- pertaining to the demand till 17.04.2006 is set aside and Appeal is allowed to this extent. As the Appellant has already paid the balance of Rs. 1,26,539/- along with interest of Rs. 15,368/- for the subsequent period and issue was under litigation for quite sometime, the penalty imposed is also set aside.

19. In respect of confirmed demand of Rs. 9,05,651/- on account of financial settlement services, it is seen that the Appellant has paid the same along with interest of Rs. 4,35,830/- in the course of adjudication process. Therefore, taking a lenient view, the penalty of Rs. 9,05,651/- stands reduced to Rs.2,26,425/-.

20. The Appeal is disposed off thus.

(Operative part of this order was pronounced in court
on conclusion of the hearing)

(R. MURALIDHAR)
MEMBER (JUDICIAL)

(A.K. JYOTISHI)
MEMBER (TECHNICAL)

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