**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA**
**EASTERN ZONAL BENCH: KOLKATA**

**Appeal No. ST/107/2008**

(Arising out of Order-in-Original No. ST/Shilong No. 03/2008 dated 27/03/2008, passed by the Commissioner of Central Excise, Shilong.

M/s. BSNL

Appellant (s)

**Vs.**

CCE & ST, Shilong Respondent (s)

Appearance:
Shri. S. P. Majumdar, Advocate for the Appellant (s)
Shri D. Haldar, A. C. (A. R.) for the Revenue

**CORAM:**
**HON'BLE SHRI V. PADMANABHAN, MEMBER (TECHNICAL)**
**HON'BLE SHRI S. K. PATI, MEMBER (JUDICIAL)**
Date of Hearing: -04.10.2018
Order No.-FO/76694/2018

**PER SHRI V. PADMANABHAN**

The present appeal is against the Order-in-Original No. ST/Shilong No.3/08 dt. 27/03/2008. The appellant is a provider of telecommunication services to the customers in Assam, District, Bongaigaon. The accounts of the appellant were subjected to audit by the department officers. Perusal of records revealed that the appellant had short paid Service Tax amounting to Rs.1,07,93,581/- during the period from July 1994 to march 2004. The appellant was served with Show Cause Notice dated 25/10/2004 purposing to demand Service Tax found to have been short paid. Further, interest on the late payment of Service Tax amounting to Rs.67,94,198/- was also demanded. After the dew process of Adjudication, the Adjudicating Authority passed the impugned order in which he upheld the demand of Rs.93,48,698/- for the period of April 1999 to March 2004. The rest of the demand, which fell beyond the period of 5 years, was dropped. However, he ordered payment of interest and also imposed penalty for amount equal to Service Tax demand. The impugned Order stands challenged in the present appeal.

2. BSNL is represented by Shri, S. P. Majumdar, Ld. Advocate and the Revenue is represented by Shri D. Haldar, Ld. DR.

3. The Ld. Advocate advance the following arguments:-

(i) The Telephone services were originally provided by the Department of Telecommunication (DOT). With effect from 1/11/2000, M/s. BSNL was formed and the services were provided by them from that date. He submitted that during the period when services were provided by devotee, Service Tax was paid by the DOT, as per the provisions of Finance Act, 1994. However, the appellant was not able to submit documents for payment of Service Tax for the period when it was under DOT.

(ii) He referred to the work-sheets attached to the Show Cause Notice and submitted that in many cases, service tax amounts paid by DOT was more than the service tax amounts due. In certain months, it was the other way, but the Department has raised the present demand by considering only those cases wherein service tax paid was less than the Service Tax due. If the excess paid service tax was also taken to account, the final demand would work out to be far lesser.

(iii) He also submitted that certain services provided by the DOT/BSNL were exempted at the relevant time by Notification No. 3/94-ST dated 13/06/1994. Such services were available to Departmentally run Public Telephones, Guaranteed Public Telephone operating only for local calls etc. It has been clarified that the benefit of such exemption will be available not only to DOT but also to BSNL but the department has not given the benefit of such exemptions.

(iv) He challenged the work-sheet attached to SCN by submitting that the department has summarily worked-out the service tax due @ 5% of the amount recovered. Such amount recovered also included the exempted services and re-calculation adopted by the department was incorrect.

(v) Lastly, he submitted that the matter may be remanded for re-verification and to arrive at the correct demand of Service Tax.

4. The Ld. DR justified the impugned order. He referred to the findings of the Adjudicating Authority, in Para 5.2 & 5.3 in which he recorded that the claim of the appellant pertaining to the period falling under DOT has not been substantiated by submission of any documentary evidence. Accordingly, he submitted that the impugned order may be up-held.

5. Heard both sides and perused the record.

6. Out of total demand of Service Tax confirmed in the impugned order, the period from April 1999 up to 30/01/2000 pertains to the period when the services were provided by the DOT. With effect from 1/11/2000 the appellant i.e BSNL came into existence and were providing the telephone services. During the audit of the books of accounts, the department noticed that service tax was not paid correctly during the disputed period. The appellant has claimed before the Adjudicating Authority that service Tax was paid up to August 2003 by DOT and only from September 2003, BSNL started making such

payments. But the Adjudicating Authority has recorded that absolutely, no documentary evidence was submitted for the period up to September 2003 when the Service Tax was claimed to have been paid by DOT. In the absence of any such documentary evidences, he has declined to consider any of the submissions advanced before him.

7. During the course of arguments, the Ld. Advocate has highlighted several errors in the calculation attached by the department in the Show Cause Notice. It has also been submitted that in many cases excess Service Tax has been deposited by DOT but the same was not taken into account. Ld. Advocate was not in a position to submit any revised calculation even at this stage specifically quantifying the revised demand which may arise by taking into account, the misgivings pointed out on behalf of the appellant. The demand pertains to a very old period from April 1994 to March 2004. Considering the fact that even at the time of adjudication i. e., in 2008 the appellant was unable to submit documentary evidence to support their arguments, we are of the view that no useful purpose will be served by remanding the matter for further verification and re-calculation. The Adjudicating Authority has already restricted the demand to the period of five years from the date of Show Cause Notice. In the facts and circumstances of the present case, we have no option but to up-hold the demand confirmed by Adjudicating Authority with interest. But on the question of penalty, we are inclined to waive the same by taking recourse to Section 80 of the Finance Act, 1994 which was part of the Finance Act during the relevant time. For such purpose, we take note of the fact that during the transitioning of

service from DOT to BSNL lot of confusion in accounts was prevalent which appear to got settled only from September 2003. Under the circumstances, we waive the penalty.

8. In the result, impugned order is modified and appeal is partly allowed.

(Dictated and pronounced in the open court.)

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| **(S. K. PATI)** | **(V. PADMANABHAN)** |
| **MEMBER (JUDICIAL)** | **MEMBER (TECHNICAL)** |

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