IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI
COURT NO.

Appeal No. ST/89908/2014

(Arising out of Order-in-Original No. 58/ST-II/RS/2014 dt. 19.08.2014 passed by the Commissioner of Service Tax, Mumbai-II)

Reliance Communication Infrastructure Limited	:	**Appellant**
VS		
Commissioner of Service Tax, Mumbai-II	:	**Respondent**

Appearance

Shri Gopal Mundra, C.A. for Appellant

Shri Roopam Kapoor, Commr. (A.R) for respondent

CORAM:

Hon'ble Shri Ramesh Nair, Member (Judicial)
Hon'ble Shri Raju, Member (Technical)

Date of hearing : 18/01/2018
Date of pronouncement : 13/04/2018

ORDER NO. A/86019/2018

Per : Ramesh Nair

This appeal is directed against Order-in-Original No. 58/ST-II/RS/2014 dated 19.08.2014 passed by the Commissioner of Service Tax, Mumbai – II whereby the Commissioner has confirmed demand of service tax and imposed penalty against the Appellant.

2. The facts of the case are that the Appellant is engaged in providing the services of Online Database or Information Access & Retrieval Services, Business Auxiliary Services, Business Support

Service, Maintenance & Repair Service etc. They are also engaged in activity of marketing, distribution, billing and collection services for Reliance Communication Ltd. (RCOM) and has been classifying such service under "Business Support Service". M/s Reliance Communication Services is engaged in providing telecommunication services. In terms of agreement with M/s Reliance Communication the Appellant is providing marketing/ distribution services of telecommunication services. They are authorized to collect the sums due from the customers/ subscribers in the capacity of agent of M/s Reliance and also authorized to bundle their own services and products alongwith tariff plans of M/s Reliance. The Appellant is also engaged in business of purchase/ sale of Sim Cards to various distributors across the country under an agreement with such persons.

3. Vide show cause notice dt. 18.10.2013 issued on the basis of audit conducted by the revenue, the Appellant were called upon to pay service tax alongwith interest and penalty on the ground that the sale of Sim cards is taxable communication services provided to the customer as said service has been provided on behalf of M/s RCOM. The value of Sim cards shall form part of the activation charges as no activation is possible without the provision of Sim cards. The provision of SIM cards to distributors/ end users on behalf of RCOM is thus taxable entry under Telecommunication service. The adjudicating authority confirmed the demand alongwith interest and penalty. Hence the present appeal.

4. Shri Gopal Mundra, Ld. CA appearing for the Appellant submits that the demand is not correct. He submits that the Appellant are not telecom service provider and are merely engaged in supply of Sim cards. The sale of Sim cards to distributor is an independent transaction and separate from marketing and distribution services to RCOM as sale of Sim cards is sale of goods. The State Government has levied VAT on sale of Sim cards. The distribution of SIM cards is a separate discernible sale transaction liable to sales tax/ VAT and no findings was given by the adjudicating authority on this point. He draws our attention to the clauses of agreement between the Appellant and M/s RCOM which are as under:

> *""[ ]*
>
> *"Business" means the marketing of RCOM services or various tariff plans related to the telecommunication services offered by RCOM, including Fixed Wireless Terminals/ Fixed Wireless Phones etc. and any other services offered by RCOM from time to time;*
>
> *[ ]*
>
> *While marketing the services, RCIL shall be free to bundle the tariff plans of RCOM with other products or services as it deem fit and offer composite schemes to the customer;*
>
> *[ ]*
>
> *RCIL shall raise bills on behalf of RCOM and send the same to the subscriber either electronically or printed bills through courier or through means as agreed to between the parties. RCIL, may raise consolidated statement of charges to the subscribers including amounts due, if any, to RCIL;*
>
> *[ ]*
>
> *RCIL shall also undertake the responsibility of collecting on behalf of RCOM from the subscribers;*
>
> *[ ]*
>
> *RCOM shall bear all expenses in respect of marketing, billing and collection services*
>
> *[ ]" (emphasis supplied)*

He submits that in terms of the above agreement the Appellant was engaged merely in marketing of services of M/s RCOM, billing the customers of RCOM and collecting the bill amount from customers. Thus the appellant cannot be said to be engaged in providing any service either to customer or to RCOM which can be taxed under the category of 'Telecommunication Services'. That they entered into separate agreements with distributors in terms of which they supply various products on their own account to distributor who in turn sells it to customers who are interested in availing of the services to be provided by RCOM. He cites the relevant paras as under :

"[ ]
1. <u>Product shall mean and include 'Handsets, Fixed Wireless Phones, Data Cards, Recharge Vouches, Get Started Kits, SIM Cards telecom accessories and any other telecommunication product that maybe notified to the distributor by RCIL from time to time.</u>
[ ]
2.1 <u>The Distributor shall sell or distribute the Product in the areas as defined by RCIL</u>
[ ]
5.8 The Distributor shall maintain records of transaction, details of CAF, RSN and any other details as required by RCIL and shall prepare and forward them as requested by RCIL in physical or electronic format or as direct input in one or more of RCIL's information systems, as RCIL deems necessary.
[ ]
5.13 <u>Upon acceptance of the order by RCIL, RCIL shall use its reasonable efforts to supply of the Products.</u>
[ ]"

He submits that the above activity of provision of hardware products to distributors for their onward distribution to customer is distinct and separate activity carried out by them on their own account. Once the sale of communication products is complete, the Appellant is in no manner concerned with the provisions the telecommunications services by RCOM. The consideration received by the Appellant from distributors is having no relation with the amount collected from the customers as collecting agent of RCOM. That nothing has been pointed out in the agreements entered into by the Appellant with the RCOM as well as with the distributors which can show that the activities are related. The judgment of Hon'ble Supreme Court in case of Idea Mobile Communications Vs. CCE, Cochin 2011 (23) S.T.R. 433 (S.C.) relied upon by the adjudicating authority is not applicable to the present case as the facts are entirely different. The issue involved was whether the value of sim cards sold by M/s Idea was to be included in the value of telecommunication services provided by them or whether the said activity of sale of sim cards liable to sales tax/ VAT whereas in the present case they are not providing any telecommunication service and hence the facts are entirely different. He submits that the 'Dominant Nature Test' is inapplicable to the present case as the independent sale of SIM card to the Distributors and provision of marketing and distribution services to M/s RCOM. That the adjudicating authority has wrongly held that SIM cards need to be activated for providing telecommunication service and therefore forms part of the Telecommunication service provided by RCOM and cannot be sold as goods. The SIM card is not integral part of Telecommunication service but is part of telecommunication network. The network consists of various elements of goods which are owned by the subscriber as well as telecom operator. Till the time of activation of telecommunication services, all the element remain in network building stage and the actual provision of telecommunication service commences only after the handset and the SIM card is interfaced and integrated with the RCOM's network. Therefore mere sale of SIM card by the Appellant does not initiate the provision of telecommunication services as such provision of services commences only post payment of the subscription amount by the subscriber who avail RCOMs services. He relies upon the judgment of Hon'ble Supreme Court in case of BSNL Vs. UOI 2006 (2) S.T.R. 161 (S.C.) in support of his submission. He also relies upon the order in case of M/s Imagic Creative Pvt. Ltd. vs. Commissioner of Commercial taxes 2008 (9) ETR 337 wherein it was held that Service Tax and VAT exclude each other and cannot be levied concomitantly on transaction. He submits that during the period involved there were various interpretations of the issue and hence extended period cannot be invoked. He relies upon the order in case of Bharti Airtel Ltd. Vs. CCE, Delhi 2012 – TIOL – 910- CESTAT – DEL and Bharti Televentures Ltd. Vs CST, Chennai 2012 (24) Taxmann.com 254 (Chennai – CESTAT). He also relies upon the Apex Court judgment in case of Pahwa Chemicals Pvt. Ltd. Vs. CCE 2005 (189) ELT 257 (SC), Anand Nishikawa Co. Ltd. Vs. Commissioner 2005 (188) ELT 149 (SC).

5. Shri Roopam Kapoor, ld. Commissioner, A.R. Shri Rishi Goyal, ld, Additional Commissioner, AR appearing for the revenue submits that in view of Hon'ble Supreme Court judgment in case of Idea IDEA MOBILE COMMUNICATION LTD. Vs. COMMR. OF C. EX. & CUS., COCHIN 2011 (23) S.T.R. 433 (S.C.) the issue is squarely settled that the sale of SIM cards is liable for Service Tax. He also submits that the tax has been avoided by showing sale of sim card through the Appellant which is group company and it is planning of tax avoidance

and evasion. He relies upon the judgment of Hon'ble Supreme Court in case of UOI Vs. Playworld Electronics Pvt. Ltd. 1989 (41) ELT 368 (SC) and Maddi Avenkatraman Co. (O) Ltd. Vs. Comm. Of Income Tax 1998 (2) SCC 95. The consideration for the supply of sim cards which is in the nature of provision of telecommunication service is collected by the Appellant and merely because the taxable service are provided using the services of Appellant the levy of tax cannot be avoided. He submits that SIM cards are required to be activated for providing telecommunication services and therefore are part of such services provided by RCOM. Hence the SIM cards cannot be considered as goods and thus liable for Service tax. He supports the findings of the impugned order.

6. On careful consideration of the submissions made by both the sides and perusal of records. We made by both the sides. On going have carefully considered the submissions through the entire facts of the case we find that the Appellant are engaged in the activity of providing Business Support Service to M/s RCOM under which it is providing billing and collection services to RCOM under an agreement. In addition to same they are also engaged in separate activity of selling of SIM cards and other hardware to the distributors who are selling it onwards to customers. We find that the Appellant is not providing any telecommunication service to any person or subscribers. Hence in such case there is no principal service or dominant service to which the sale of sim card can be related. No evidence is on record which can show that the sale of sim card is related to telecommunication services of RCOM. The sale of sim card is an independent activity

without any relation to any other service hence the same cannot be made liable to service tax. The consideration received from sale of Sim cards is retained by the Appellant themselves and not being remitted to M/s RCOM who is telecom operator which shows that the sale of Sim cards is not part of telecommunication service. We thus find that the Appellant is engaged in two separate activities viz. first rendering marketing services to M/s RCOM or billing services and second sale of Sim cards. These two separate activities not being related to each other does not fall into category of telecommunication service so as to charge service tax from the Appellant on sale of Sim cards on which appropriate VAT has been paid. Pertinently the payment of VAT has been assessed by the VAT authorities and accepted as valid payment. We find that Sim cards are sold by the Appellant to the distributors who in turn sell it to the customers and unless interfaced and integrated with the RCOM's telecom network activated after sale by the distributors to the customers the Telecommunication services do not commence. Thus the telecommunication service commences only after handset and sim card is interfaced and integrated with the RCOM/s telecom network which is only post payment of subscription amount by the subscribers who opts to avail RCOM's service. The Appellant has principal to principal agreement with the distributors for sale of sim cards. The consideration towards sim cards is being retained by the Appellant and no amount is paid to RCOM on account of such sale. The Sim cards reach the subscribers only after two transactions of sale i.e first from the Appellant to the distributor and second after sale from Distributor to subscriber. Thus even before the Sim card reaches the customer and he is recognized as subscriber, the property is transferred to distributor. It is only after interface of Sim card with network of RCOM that the telecommunication service is provided to the subscriber in which the Appellant has no role. Further the Appellant is not providing any telecommunication service but only Business Support Service to M/s RCOM under which it is marketing the services of M/s RCOM and is collection bill payments from its subscribers. In such case even if the Appellant concern may be associate concern of M/s RCOM but cannot be considered as Telecommunication service provider. It is coupled with the fact that the Sim card is never owned by M/s RCOM. The Appellant is not even holding telecom licence to provide telecom services. In the present case the Appellant has separately sold the Sim cards to the distributors and therefore cannot be considered as rendering of services to subscribers of RCOM. Further such transactions having been accepted to be liable for VAT cannot be subjected to service tax under the category of "Telecommunication Services".

7. The adjudicating authority has relied upon the judgment of Hon'ble Apex Court in case of M/s Idea Communications supra. However we find that the facts are quiet different. In M/s Idea Communication case the said assessee were providing telecommunication services to its subscribers and was charging service tax on activation charges and in order to provide such service they also sold sim cards and discharged sales tax on such activity. The issue involved was whether the value of Sim cards sold by M/s Idea were to be included in the value of telecommunication services provided by them for the purpose of payment of service tax or it was

liable for VAT/ Sales Tax. The Sales Tax authorities themselves conceded the position before the High Court that no assessment of sales tax would be made on sale value of SIM card supplied by the said concern to their customer irrespective of the fact that whether they have filed returns and remitted tax or not. The relevant portion of the Apex Court order is as under :

> *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.*
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> *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.

It was under the above facts that M/s Idea was themselves the telecom service provider who issued sim cards to their customer that the sim cards were made liable to service tax being part of telecommunication services. In the present case as per the facts narrated above the Appellant themselves are not any telecommunication service provider and even the sim cards have been assessed to VAT which leads to the conclusion that no service tax can be levied on such sale of sim cards. Further once the sim cards are being used by the subscribers by integration to RCOM telecom network all the charges are being paid to M/s RCOM on which RCOM is discharging service tax and Telecommunication services and the Appellant has no role to play. The Hon'ble Court held in idea case supra that the value of Sim card forms the part of value of activation charges and hence it has to be included in the gross value of services rendered by M/s Idea. However in the present case we find that the Appellant is not rendering any services of telecommunication. They are selling Sim Cards to the distributors who in turn sell it to subscribers. M/s RCOM has no role in sale of such sim cards except in activation on its network for which they charge subscription. In such facts there is no ground to hold that the Appellant is liable for service tax .

8. We also find that the adjudicating authority has not given any findings as to how the sale of sim cards by the Appellant is part of the telecommunication services of RCOM when the sale of sim cards is a separate transaction. In such case we find that in absence of any cogent reasons the demands is not sustainable.

9. The Appellant apart from merits has also contested the demand on time bar. We find that the adjudicating authority has confirmed the demand and imposed penalties by invoking extended period of limitation. However on appreciation of the records of the case we find that there is no deliberate attempt on the part of Appellant to evade payment of tax. The Appellant are already registered under the service tax as assessee and were paying service tax under the category of "Business Support Service" on marketing and collection charges

received by them from M/s RCOM. Further all the transactions of sale of Sim card stands recorded in books of accounts and has been assessed to VAT. Even the audit party conducted EA 2000 audit found the alleged non-payment of service tax during audit of the records of the Appellant which clearly shows that there is no suppression of facts. Hence we are of the view that there is no reason to demand service tax by invoking extended period of limitation. For the same reason we also find that no penalty is imposable.

10. In view of our above discussions and findings we therefore hold that the demand and penalties are not sustainable on merits as well as on time bar and accordingly set aside the impugned order and allow the appeal.

(Pronounced in court on 13/04/2018)

(Raju)
Member (Technical)

(Ramesh Nair)
Member (Judicial)

SM.