

**IN THE CUSTOMS, EXCISE AND SERVICE TAX
APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI**

APPEAL NO: ST/89926/2014

[Arising out of Order-in-Original No: 62/ST/RN/SCL/M II/13-14 dated 18th August 2014 passed by the Commissioner of Central Excise, Mumbai–II.]

For approval and signature:

**Hon’ble Shri C J Mathew, Member (Technical)
Hon’ble Shri Ajay Sharma, Member (Judicial)**

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1. Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982? : Yes
 2. Whether it should be released under Rule 27 of CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not? : Yes
 3. Whether Their Lordships wish to see the fair copy of the Order? : Seen
 4. Whether Order is to be circulated to the Departmental authorities? : Yes
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Idea Cellular Ltd

... Appellant

versus

Commissioner of Service Tax
Mumbai – I

...Respondent

Appearance:

Shri SS Gupta, Chartered Accountant for appellant

Shri MK Sarangi, Joint Commissioner (AR) for respondent

CORAM:**Hon'ble Shri C J Mathew, Member (Technical)****Hon'ble Shri Ajay Sharma, Member (Judicial)****Date of hearing: 06/09/2018****Date of decision: 26/11/2018****ORDER NO: A/87966 / 2018***Per: C J Mathew*

Appellant, M/s Idea Cellular Ltd, is a 'telecom service' provider whose employees, according to their internal category, are entitled to use of air time on the value of which tax liability under section 65(105) (zzzx) of Finance Act, 1994 was not being discharged for the period from 2008-09 to 2011-12. *Vide* order-in-original no. 62/ST/RN/SCL/M II/13-14 dated 18th August 2014, Commissioner of Central Excise, Mumbai-II confirmed demand of ₹ 2,71,97,608 and, while imposing penalties of like amount under section 78 of Finance Act, 1994, also, for the demand pertaining for the period upto 16th May 2008, invoked section 76 of Finance Act, 1994.

2. Narrating the background of the dispute, Learned Chartered Accountant informs that employees are classified in various categories and a scale of eligibility to free service is provided to them as part of the policy of the appellant. The bills raised in the automated system for each such connection is written off by the appellant to the extent of eligibility and service tax liability is duly discharged on any

recovery for usage in excess of eligibility. The original authority, while acknowledging that any usage of this facility for business purpose would entitle the appellant to exclusion from the assessable value, determined the tax liability on the entire eligible free service for failure on the part of the appellant to segregate utilisation for business and non-business purposes by presuming the entire free usage to be for personal purpose. Citing the definition of the taxable service in section 65(105) (zzzx) of Finance Act, 1994 to be applicable upon provision of such by one person to another, Learned Chartered Accountant contends that the service is provided to itself and, therefore, excluded from the scope of taxable service. Again citing the finding by the original authority that usage for business purpose would not constitute taxable service, Learned Chartered Accountant contended that the maxim '*lex non cogit ad impossibilia*', which was foundation of the decision of the Tribunal in *Commissioner of Central Excise, Jaipur-I/Jalandhar v. Goyal Proteins Ltd* [2015 (325) ELT 165 (Tri-Del)], of the Hon'ble High Court of Bombay in *Indian Seamless Steel and Alloys Ltd v. Union of India* [2003 (156) ELT 945 (Bom)] and of the Hon'ble High Court of Jharkhand in *Commissioner of Central Excise, East Singhbhum v. Tata Motors Ltd* [2013 (294) ELT 394 (Jhar)], would also exclude them from being brought under the tax net owing to lack of wherewithal to furnish the segregation of such use held to be a pre-requisite in the impugned order.

3. Furthermore, he relied upon the decision of the Tribunal in *Hico Products Ltd, Bombay v. Collector of Central Excise, Bombay [1983 (14) ELT 2483 (CEGAT)]* and the decision of the Hon'ble Supreme Court in *Union Carbide India Ltd v. State of Andhra Pradesh [267 JT 1995 (3) 218]* to seek relief by invoking the doctrine of dominant use. He also contends that, for most of the period covered by the demand, tax liability was to be discharged on actual receipts and, therefore, imposition of tax on a free service rendered to its employees was not legal and that recourse to rule 3(a) of Service Tax (Determination of Value) Rules, 2006 could be had only when the value was not determinable in monetary terms which would not apply to the appellant whose bills on the employees are written off to the extent of eligibility. In addition, he pleads that revenue neutrality and absence of any evidence of suppression or misrepresentation would immunize them from recovery of tax liability beyond the normal period.

4. Learned Authorised Representative drew attention to circular no. 93/04/2007-ST dated 10th May 2007 of Central Board of Excise & Customs which deemed any instruction/circular that was inconsistent with Service Tax (Determination of Value) Rules, 2006 issued under authority of section 67 of Finance Act, 1994 to be rescinded. According to him, the Hon'ble High Court of Rajasthan had, in *Vodafone Digilink Ltd v. Commissioner of Central Excise, Jaipur-II*

[2013 (29) STR 229 (Raj)], placed a premium on full disclosure by assessees that claim to be professionally managed concerns; pointing out that this judgement did approve of the decision of the Tribunal in the appeal of the assessee, he urged us to reject the contentions made on behalf of the appellant.

5. We take note from the company policy that ‘airtime charges’ are not to be billed for ‘intra-circle calls’; the objective of the policy being that of high-quality and timely service to customers, it would stand to reason that the amount raised in the periodical bills do not appear to relate to business of the circle concerned but, being in the nature of a perquisite, is a non-cash service. Since it has been placed on record by Learned Chartered Accountant that the dispute is limited to the billed amount on which tax liability is not discharged to the extent of write-off, and the policy clearly stipulates that billing shall only be to the extent of calls outside the circle and on other networks, our conclusion *supra* is reinforced. With that, the argument advanced on behalf of the assessee that it is impossible to determine the extent of personal calls would not sustain as also the reliance upon the doctrine of dominant use.

6. It also appears from the records that the bills are raised on, and in the names of, the personnel of the company; had these been billed to the company, the absence of a second person as a recipient would

have excluded tax liability in accord with that submission on behalf of appellant. That the amount is first billed and thereafter written off is categorical evidence of a service having been rendered to an individual recipient and liable to tax; undoubtedly, till June 2011 the tax was to be collected on receipt but the appellant, instead of recording the amount as due sometime in the future, opts for writing off without waiting, or even anticipating, any recovery. This would, therefore, not be consideration that will be subject to tax when collection occurs. The tax liability crystallizes when the debt of the employee is erased. The demand and applicable interest stands.

7. The appellant has sought relief by claiming that the entire exercise would be revenue neutral inasmuch as the tax liability so discharged would entitle them to credit as input service. As pointed out by as above, the billings are not attributable to business activity but entirely to personal use by the employees. The decision of the Tribunal in *Commissioner of Central Excise, Bangalore-I v. Conzerv Systems (Pvt) Ltd* [2009 (13) STR 638 (Tri-Bang)], relied upon in *Commissioner of Central Excise (A-II), Bangalore v. TG Kirloskar Automotive (P) Ltd* [2009 (14) STR 743 (Tri-Bang)] and in *Force Motors Ltd v. Commissioner of Central Excise, Pune-I* [2009 (16) STR 616 (Tri-Mumbai)], would not, in the facts of the facility afforded to the employees, come to their assistance as credit of such tax paid. In the absence of entitlement to such credit, the exercise

cannot be claimed to be revenue neutral.

8. The appellant is, undoubtedly, aware of the scope of facility that is extended to its employees. They are equally aware that the revenues written off is a voluntary act of erasure on which the plea of liability to tax on receipt stands blunted. Had the appellant disclosed in their returns that there was no uncertainty on the non-recoverability of the amount decided in advance to be written off, the claim of disclosure could have been accepted. In the face of failure to do so, we are of the opinion that the decision of the Hon'ble High Court of Rajasthan in *re Vodafone Digilink Ltd*, endorsing the finding of the Tribunal, would apply to approve of the invoking of the extended period envisaged in section 73 of Finance Act, 1994.

9. Considering that penalty imposed under section 78 of Finance Act, 1994 is thus confirmed and, owing to the statutory exclusion of simultaneous imposition of penalty under section 76 of Finance Act, 1994 which, in the impugned order, is for a small portion of the demand, we set aside the other penalty.

10. The impugned order is upheld with this modification.

(Pronounced in Court on 26/11/2018)

(Ajay Sharma)
Member (Judicial)

(C J Mathew)
Member (Technical)