

Service Tax Appeal No.71506 of 2013

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,
EAST REGIONAL BENCH : KOLKATA**

Service Tax Miscellaneous Application (AE) No.75660 of 2015

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Service Tax Appeal No.71506 of 2013

(Arising out of Order-in-Original No.32-35/ST/Commr./2013 dated 28.03.2013 passed by Commissioner of Central Excise & Service Tax, Ranchi)

M/s Computer India

Court Road, Bye Lane, Ranchi

Appellant

VERSUS

Commissioner of Central Excise & Service Tax, Ranchi

5A, Main Road, Ranchi-834001

Respondent

Appearance:

Shri N.K.Chowdhury, Advocate for the Appellant

Shri J.Chattopadhyay, Authorized Representative for the Respondent

CORAM:

HON'BLE SHRI SANJIV SRIVASTAVA, TECHNICAL MEMBER

HON'BLE SHRI P.DINESHA, JUDICIAL MEMBER

**MISC. ORDER NO.75240/2022 FINAL ORDER
NO.75422/2022**

DATE OF HEARING : 27.07.2022 DATE
OF DECISION : 27.07.2022

Per Sanjiv Srivastava :

The present Miscellaneous Application for submission of additional evidence is rejected. With the consent of both sides, the appeal is taken up for final disposal.

2. This appeal is directed against the Order-in-Original No.3235/ST/Commr./2013 dated 28.03.2013 passed by Commissioner of Central Excise & Service Tax, Ranchi. By the impugned order, the Commissioner has held as follows :

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"ORDER

24. In view of above discussion and findings, I pass the following order, -

- (i) I confirm the demand of Service Tax totally amounting to Rs.1,29,47,706/- (Rs.One Crore Twenty nine lakh Forty seven thousand seven hundred six) [Rs.1,26,72,490/- as service tax, Rs.2,50,661/- as education cess, Rs.24,555/- as secondary & higher education cess] only as demanded vide the instant four SCNs under Section 73(1) of Chapter V of the Finance Act, 1994.
- (ii) I impose penalty amounting to Rs.1,29,47,706/- (Rs.One Crore Twenty nine lakh Forty seven thousand seven hundred six) only under Section 78 of the Finance Act, 1994.
- (iii) Under Section 76 of the Finance Act, I impose penalty of rupees two hundred for everyday during which the failure to pay the above tax continues or at the rate of two percent of the tax per month, whichever is higher, starting with the first day after the due date till the date of actual payment of the outstanding amount of service tax. However, the total amount of penalty under Section 76 shall not exceed the amount of tax demand as at (i) above.
- (iv) I impose penalty amounting to Rs.10,000/- under Section 77 of the Finance Act, 1994 for violation of Sections 69 & 70 of the Finance Act, 1994.
- (v) M/s Computer India, Court Road, Bye Lane, Ranchi-834001 shall pay interest under Section 75 of the Finance Act, 1994 at appropriate rate for their default of not paying the above amounts of service tax for the period of default until the date of payment of above confirmed amounts of service tax."

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3.1 The appellant is a distributor of SIM Cards of M/s BSNL. He entered into an agreement with BSNL, Ranchi, for causing sale of the products. For the activities of sale undertaken by the appellants, BSNL would give him trade discount of 4.5%.

3.2 Revenue of the view that the appellant was providing taxable service under the category of "Business Auxiliary Service" against the consideration of 4.5% of the sale value. A show-cause notice was accordingly issued to the appellant demanding the duty as indicated below :

Sl. No.	No..& Date of showcause Notice C.No.	Period	Amount of Tax (Rs.)		
1	V(65)(105)03/Comp/India/Adjn/Ran/09/6595 dt. 17.04.2009	2003-04 to 2007-08	11695339	231117	14783
2.	V(65)(105zzb)102/Computer India/Adjn/Ran/09/16687 dt. 24.09.2009	Aprl 2008 to March 2009	584826	11697	5849
3.	IV(4)136/ST/RAN/Periodical SCN/09/4263 dt. 15.10.2010	April 2009 to Sept. 2009	19593	392	196
4.	V(28)68/SCN/Computer India/Ran Div/11/2438 dt. 24.10.2011	Oct.2009 to Sept. 2010	372732	7455	3727
		Total	12672490	250661	24555

3.3 The show-cause notice was adjudicated by the Commissioner as per the impugned order referred to above in Para 1. Being aggrieved, the appellants have filed this appeal before us.

4. We have heard Shri N.K.Chowdhury, Ld.Advocate for the appellant and Shri J.Chattopadhyay, Ld.Authorised Representative for Revenue.

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5. After hearing from both sides, we find that the issue involved in this appeal is squarely covered in favour of the appellant by various decisions of this Tribunal. The South Zonal Bench of this Tribunal in the case of R.Venkataramanan Vs. Commissioner of Central Excise, Trichy : 2009 (13) STR 187 (Tri.-Chennai) has held as under :

"5. The facts of the case are that during the period 7/2003 to 12/2005 the appellant was engaged in sale of SIM cards received from M/s. BSNL. From the order of the original authority, it is seen that the face value of the SIM cards includes its 5% allowed as discount/commission to the distributors of BSNL. BSNL pays service tax on the face value of the card, which includes the discount/commission received by the distributors. The impugned demand is on the element of five per cent of the face value of the SIM card sold by the appellant. The original authority had studied the transaction adopting the value, commission and tax involving the sale of SIM card of face value Rs. 300/- as follows :-

Face value of card	Service Tax @ 10.2%	Card value as sold to customer	Commission to franchisee @ 5%	Amount received from franchisee
300 (285+15)	30.06 (29.07+1.53) [rounded of to 31	331 (300+31)	15	316 (285+31)

6. The appeal has challenged the demand on the basis that if at all an element of service is involved in the distribution of SIM cards procured from BSNL, the same is charged to service tax which is paid by BSNL. The distributors like the appellant receive part of the value of the SIM card, which has suffered service tax. The impugned demand on the commission element included in the taxable value is against the recognized principles of taxation. Moreover the appellant was not engaged in promoting the business of BSNL. BSNL was engaged in rendering telephone service. The appellant is a dealer who received SIM cards at 95% of the taxable value from BSNL and sold it charging full

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value and paying tax on it. Their dealership could not be categorized as a taxable service and the commission/discount amount received by them taxed under the Business Auxiliary Service.

6. Ld. Counsel for the appellant relies on the following decisions of the Tribunal in support of his case that the appellant did not engage in rendering Business Auxiliary Service.

(i) South East Corporation v. CCE & ST, Cochin - [2007 \(8\) S.T.R. 405](#) (Tri.-Bang.)

(ii) R.B. Agencies v. CCE, Calicut - [2008 \(11\) S.T.R. 124](#) (Tri.Bang.).

7. Ld. JCDR reiterates the findings contained in the impugned order.

8. On a careful consideration of the facts of the case, I find that the appellant is engaged only in the sale of SIM cards for a consideration. The entire consideration charged from the customers is subjected to service tax which is paid by the BSNL. Therefore, the finding that the appellant is promoting the business of sale or service of BSNL is misconceived. The impugned order is therefore not consistent with law. I also find that in South East Corporation v. CCE & ST, Cochin case (*supra*) this Tribunal had held as under :

"There is no service carried out by the appellants but actually they have done the activity of purchase and sale which comes within the purview of „sale of goods“ and sales tax is attracted. The Commissioner (Appeal) „s finding that the appellant is doing the activity of marketing and distribution of products and it comes within the ambit of Business Auxiliary Service is not correct finding especially, in the light of the appellants having paid full value for

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the Sim Cards to the BSNL and sold the same on the profit margin.”

The ratio of R.B. Agencies v. CCE., Calicut (supra) was also to the same effect. Following the ratio of the above decisions I allow the appeal. Stay application also gets disposed of.”

The Chennai Bench of this Tribunal in the case of M/s JR Communications & Power Controls Vs. Commissioner of Central Excise, Trichy : 2009 (14) STR 379 (Tri.-Chennai) has followed the earlier decision in the case of R.Venkataramanan referred above, to set aside the demand made.

6.1 The Bangalore Bench of this Tribunal in the case of Karakkattu Communications Vs. Commissioner of Central Excise, Cochin : 2007 (8) STR 164 (Tri.-Bang.) has held as follows :

"3. *We have gone through the cited final order. The findings recorded in para 2 are reproduced herein below.*

"2. I have heard both sides in the matter. I am of the considered opinion that the appellants were not carrying on the activity of Business Auxiliary Service. They have purchased BSNL post-paid/pre-paid Cellular Sim Cards and sold the same in the market. They have only received certain amount of profit which is ultimately a business practice when goods are sold in the market. The issue pertaining to levy of Sales Tax is already before the Apex court. There is no service carried out by the appellants but actually they have done the activity of purchase and sale which comes within the purview of „sale of goods“ and sales tax is attracted. The Commissioner (appeals)“s finding that the appellant is doing the activity of marketing and distribution of products and it comes within the ambit of Business Auxiliary Service is not a correct finding especially, in the light of the appellants having paid full value for the Sim Cards to the BSNL and sold the same on the profit margin. The learned counsel

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points out to the correspondence with the BSNL, the appellants had on this issue, and the BSNL had clarified that they had already paid Service tax on the sim cards sold to the appellants, this also clearly shows that the BSNL had already discharged their burden and there cannot be double taxation in the peculiar circumstances of the case there is no merit in the impugned order and same is set aside by allowing the appeal with consequential relief if any."

The above order clearly applies to the facts of the case. Respectively following the ratio of the same, the impugned order is set aside and appeal allowed with consequential relief."

6.2 The Principal Bench of the Tribunal in the case of Chetan Traders

Vs. Commissioner of Central Excise, Jaipur : 2009 (13) STR 419 (Tri.Del.), has held as follows :

"4. *We find that the issue involved in this appeal is already settled by the Tribunal in the case of Karakkattu Communications (supra). The Tribunal held as under :-*

"The stay application and appeal are taken up together for disposal as per law. The appellants were acting as distributors of cellular mobile telephone service for and on behalf of BSNL as per the agreement entered into between them during the period July 03 to December 04. Their services have been brought under the category of „business auxiliary services.“They are contesting the matter on the ground that the service tax has been discharged by BSNL and they were not getting Commission but were trading in the cards. They were discharging sales tax. Learned counsel relies on the ratio of the ruling of South East Corporation v. CCE by Final Order No. 610/2007 dated 25-5-07 in respect of identical issue and she says that this bench has already decided the case in assessee"s favour. The said final order refers to the clarification given by BSNL about discharge of service tax on sim cards sold to the distributors.

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2. *Heard learned DR who defends the order.*
3. *We have gone through the cited final order. The findings recorded in para 2 are reproduced herein below.*

"2. I have heard both sides in the matter. I am of the considered opinion that the appellants were not carrying on the activity of „Business Auxiliary Service. They have purchased BSNL post-paid/pre-paid Cellular Sim Cards and sold the same in the market. They have only received certain amount of profit which is ultimately a business practice when goods are sold in the market. The issue pertaining to levy of Sales Tax is already before the Apex court. There is no service carried out by the appellants but actually they have done the activity of purchase and sale which comes within the purview of „sale of goods“ and sales tax is attracted. The Commissioner (Appeals) finding that the appellant is doing the activity of marketing and distribution of products and it comes within the ambit of Business Auxiliary Service is not a correct finding especially, in the light of the appellants having paid full value for the Sim Cards to the BSNL, and sold the same on the profit margin. The learned counsel points out to the correspondence with the BSNL, the appellants had on this issue, and the BSNL had clarified that they had already paid service tax on the sim cards sold to the appellants, this also clearly shows that the BSNL had already discharged their burden and there cannot be double taxation in the peculiar circumstances of the case there is no merit in the impugned order and same is set aside by allowing the appeal with consequential relief, if any."

The above order clearly applies to the facts of the case. Respectively following the ratio of the same, the impugned order is set aside and appeal allowed with consequential relief."

6.3 The Principal Bench of the Tribunal in the case of Goyal Automobiles Vs. Commissioner of Central Excise, Chandigarh II : 2016

(43) STR 268 (Tri.-Del.), has held as follows :

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"6. We note that the impugned order has built its foundation on the assumption that appellants render "business auxiliary service" in relation to SIM cards and hence liable to tax on the commission earned by them. At the same time, the impugned order has considered the commission received as discount on sale of recharge and "top-up" coupons as not liable to tax following the decision of the Tribunal in Commissioner of Central Excise, Meerut v. Moradabad Gas Service [[2013 \(31\) S.T.R. 308](#) (Tri.-Del.)]. Our attention has also been drawn to the decisions of this Tribunal in the case of GR Movers v. Commissioner of Central Excise, Lucknow [[2013 \(30\) S.T.R. 634](#) (Tri.-Del.)] and Daya Shankar Kailash Chand v. Commissioner of Central Excise & Service Tax, Lucknow [[2013 \(30\) S.T.R. 428](#) (Tri.-Del.)]. The Hon'ble High Court of Allahabad has upheld these two decisions.

7. We find that this contrived distinction attempted in the impugned order by the first appellate authority does not conform to logic or to any commercial distinction. On the contrary, the three decisions cited above are clear in laying down the principle that the user of the telephony services is the service recipient and tax liability on the gross value charged from such customer, whether first-time purchaser of SIM card or subsequent purchaser of other cards, is collected from the customer and deposited to Government account by the principal. An attempt has been made to catalogue the various activities that devolve on the appellants in relation to activation of SIM cards without appreciating the fact that the SIM cards are marked with an MRP on which tax is collected in full from the customer. Therefore, the commission paid to appellants is also included in the value on which tax has been collected from the customer. The customer is, consequently, the recipient of the full value of services from none other than M/s. Bharat Sanchar Nigam Ltd.; thus, it is no different from the other two products.

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8. *The rationale for non-leviability of tax in relation to recharge and „top-up“ coupons in Paragraph 26 in re GR Movers (supra) is as follows :*

"26. Though the correct procedure for discharge of the service tax liability by the two parties is that the distributors raise bills for commissions that is due to them along with service tax and BSNL takes Cenvat credit of tax paid by distributors for discharging liability on the telecommunication service provided by BSNL, such procedure dos (sic) not result in extra realization of Revenue. Considering the special nature of the impugned activities and the fact that it can be easily verified that full taxable value of the service provided by BSNL to customers is subjected to tax, we are of the view that there is no case to undo decisions already taken by the Tribunal in this regard. A contrary approach will result in a difference in value that is taxed for mobile telecom service according to the decision of the Apex Court in the case of Commissioner v. BPL Mobile Cellular Ltd. - [2011 \(24\) S.T.R. J175](#) (S.C.). We also note that this issue has lost relevance for the future because of exemption under Notification 25/2012-S.T.-S. No. 29 for this type of service."

9. *As commission system and sale methodology in relation to SIM cards is the same as the other two products, we, for the reason elaborated supra, set aside the impugned orders and allow both the appeals with consequential relief".*

6.4 The Hon'ble High Court of Madras has framed the following two questions for his specialization :

"1. Whether in the facts and circumstances of the case, the Appellate Tribunal is right in deciding the case in favour of the assessee that there is only buying and selling of cards, when the fact remains that there is no sale involved and only commission was paid by the BSNL to the franchisees? and

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2. Whether in the facts and circumstances of the case the Appellate Tribunal is right in deciding the case in favour of the assessee based on a decision given by the Bangalore Tribunal wherein the existence of a Franchisee Agreement was not brought to the attention of the Tribunal?"

And finally the Hon'ble Madras High Court has concluded the matter by stating as follows :

"3. When this appeal is taken up for hearing, it is brought to the notice of this Court by the learned counsel appearing for the appellant that similar question has been considered by the CESTAT Principal Bench, New Delhi, in the case of G.R. Movers v. Commissioner of Central Excise, Lucknow, reported in [2013 \(30\) S.T.R. 634](#) (Tri.-Delhi) and the issue has been answered against the Revenue and in favour of the assessee. The relevant portion of the order reads thus,

"23. The argument of the distributors in the present case is not as unreasonable as illustrated in the example discussed above. The following aspects need to be noted in this regard. This is not a case where the distributor is doing a service, billing for it, collecting the charges for the service and then BSNL charging for the services to the customers through a separate process. On the contrary this is a case where BSNL sells the cards through the distributor and collects money from customers through the distributor and then pays to the distributor out of consideration received by them from their customers on which consideration service tax is first discharged by BSNL. That is to say the transactions of both the parties are essentially one and payment on the full value of service occurs earlier than payment of commission to the distributor. Further payment of tax on full value of service rendered by the principal, that is BSNL, is easily verifiable unlike in the case of services rendered by many other sub-contractors for other type of services.

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24.

25. *Interestingly the above services as also the services of selling agent or a distributor of SIM cards or recharge coupon vouchers have been exempted from service tax vide entry No. 29 in Notification 25/2012-S.T., dated 20-6-2012. So, the special nature of services in such case is recognized though only recently.*

26. *Though the correct procedure for discharge of the service tax liability by the two parties is that the distributors raise bills for commissions that is due to them along with service tax and BSNL takes Cenvat credit of tax paid by distributors for discharging liability on the telecommunication service provided by BSNL, such procedure does not result in extra realization of Revenue. Considering the special nature of the impugned activities and the fact that it can be easily verified that full taxable value of the service provided by BSNL to customers is subjected to tax, we are of the view that there is no case to undo decisions already taken by the Tribunal in this regard. A contrary approach will result in a difference in value that is taxed for mobile telecom service according to the decision of the Apex Court in the case of Commissioner v. BPL Mobile Cellular Ltd. - [2011 \(24\) S.T.R. 1175](#) (S.C.). We also note that this issue has lost relevance for the future because of exemption under Notification 25/2012-ST-S. No. 29 for this type of service."*

4. *In view of the said statement made by the learned counsel that the ratio laid down in aforesaid case, is equally applicable to the case on hand, following the said ratio, the substantial questions of law are answered in favour of the assessee/respondent and against the Revenue/appellant."*

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6.5 Similar views have been expressed by the Principal Bench of this Tribunal in the case of G.R.Movers Vs. Commissioner of Central Excise, Lucknow : 2013 (30) STR 634 (Tri.-Del.).

7.1 Accordingly, we do not find any merits in the impugned order and the same is set aside. Consequently, appeal is allowed.

7.2 Since appeal itself is disposed off, Miscellaneous Application is dismissed as infructuous.

(Pronounced in the open Court)

Member (Technical)

Sd/
(Sanjiv Srivastava)

Member (Judicial)

Sd/
(P. Dinesha) mm