

**IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL, CHENNAI**

Service Tax Appeal No.41808/2014

(Arising out of Order in Original No. 13/2014-Commr. dated 10.6.2014 passed by the Commissioner of Central Excise, Customs and Service Tax, Coimbatore)

M/s. Vodafone Idea Ltd.

1045/1046

Avinashi Road

Coimbatore – 641 108.

Appellant

Vs.

Commissioner of GST & Central Excise

No. 6/7, A.T.D. Street, Race Course

Coimbatore – 641 018.

Respondent

APPEARANCE:

Ms. Krithika Jaganathan, Advocate for the Appellant

Smt. Anandalakshmi Ganeshram, Superintendent (AR)

CORAM

Hon'ble Shri P. Dinesha, Member (Judicial)

Hon'ble Shri M. Ajit Kumar, Member (Technical)

Final Order No. 40876/2023

Date of Hearing : 14.09.2023

Date of Decision: 10.10.2023

Per M. Ajit Kumar,

This appeal is filed by M/s. Vodafone Idea Ltd (appellant) against Order in Original No. 13/2014-Commr dated 10.6.2014 passed by the Commissioner of Central Excise, Customs and Service Tax, Coimbatore (impugned order).

2. Brief facts of the case are that the appellants as part of the telecommunication services provided by them, have tied up with several foreign mobile telecom operators so that the customers of the appellant when on foreign tour, continue to receive telecom related services. This service is known in the telecommunication parlance as

'International outbound roaming'. The foreign mobile telecom operators charge the appellant for the said connectivity provided by the visited mobile operator network to the appellant's subscribers. The appellant in turn charges their customers for the said services. Therefore, it appeared to the department that the appellant had received services from their foreign telecom operators for international outbound roaming services which appeared taxable under 'Business Auxiliary Service' (BAS). Show Cause Notice was issued to the appellant proposing to demand service tax of Rs.1,19,31,129/- for the period 01/10/2007 to 30/06/2012 along with interest and for imposition of penalty. After due process of law, the adjudicating authority confirmed the allegations in the Show Cause Notice and demanded service tax amount of Rs.1,19,31,129/- along with interest and imposed equal penalty under section 78 of the Finance Act, 1994 (herein after also referred to as FA 1994) and penalty under sec. 77 *ibid*. Aggrieved by the order the appellant is before the Tribunal.

3. No cross objections have been filed by the respondent-department.

4. Ms. Krithika Jaganathan, learned counsel appeared before us for the appellant and Smt. Anandalakshmi Ganeshram, learned Superintendent (AR) appeared for Revenue.

4.1 The learned counsel for the appellant submitted that they hold a license under the Indian Telegraph Act, 1885 ('Telegraph Act') for providing cellular/ mobile services to its subscribers within a 'circle'. The Appellant (Home Network Operator i.e. 'HNO') had executed arrangements with Foreign Telecommunication Operators (FTO) to

enable international roaming services whereby a subscriber of the appellant who travels outside India (and hence outside the appellant's network) would be able to use the network of the FTO for the duration of their trip and receive seamless service. She stated that service tax liability on international outbound roaming services received by a HNO from a FTO under Telecommunication Services has been held to be not sustainable by a Coordinate Bench of this Tribunal in **M/s Vodafone Essar Digilink Ltd Vs CCE Jaipur – I** [2017 (5) TMI 882 – CESTAT NEW DELHI] dated 30/11/2016. It was held that since the FTO is not granted with any licenses under the Indian Telegraph Act, they cannot be considered as a 'telegraph authority' under the provisions of the Telegraph Act and that the services provided by any person who is not a telegraph authority, is not liable to service tax either u/s 66 or u/s 66A of FA 1994. She stated that cellular mobile telephone services including inbound and outbound roaming service to and from national and international destinations were defined under the category of TCS as per section 65(109a) of Finance Act, 1994 with effect from 01.06.2007. The activity of international roaming is specifically covered under TCS. It is settled that the same activity cannot be brought to tax under a different heading for the same period. Further, in identical circumstances, this question was considered in **Vodafone Cellular Ltd Vs The Commissioner of GST & Central Excise** (2019 (5) TMI 234 – CESTAT Chennai) dated 29/04/2019, the Tribunal had held that when the said services fall under the category of TCS, the very same activity cannot be subjected to levy of service tax by treating them as BAS and had set aside the demand. She also prayed that extended period of

limitation ought not to be invoked against the appellant as the issue involved in the present appeal is revenue neutral as the demands are made under RCM. The demand for interest under Section 75 of the Act and Penalty under Sections 77 and 78 of the Act is also not sustainable since prima facie the services are not taxable.

4.2 The learned Superintendent (AR) appearing on behalf of Revenue has relied heavily on the 'Education Guide' 2012 issued by CBEC. She stated that the service provider (appellant) was located within the taxing jurisdiction while providing uninterrupted service to their customers who went abroad with the help of FTO's who were intermediaries. She further relied on the arguments contained in the Minority Order of the judgment of this Tribunal in **M/s Vodafone Idea Limited Vs Commissioner of Central Excise and Service Tax, Coimbatore** [2023 990 TMI 68 – CESTAT Chennai], in favour of its stand, that the role of the home network (HNO) is nothing but that of an intermediary - in terms of Rule 2(f) of the Place of Provision of Service Rules, 2012 - in the entire scheme for provision of service and that the actual recipient of the service is the international roamer-subscriber. Hence the tax has been correctly demanded. She further reiterated the findings in the impugned order.

5. We have gone through the appeals and have heard the rival parties. The dispute relates to exigibility of international outbound roaming service.

5.1 The impugned period for which tax has been demanded is from 01/10/2007 to 30/06/2012 pertains to the pre-negative list period i.e

prior to 1.7.2012. The primary issues to be decided for the resolution of the dispute are:

- i) As per the impugned facts, who is the recipient of service provided by a FTO to a cellular / mobile subscriber of an HNO, during international roaming? As per the appellant they (HNO) receives the service from the FTO and not the appellants subscriber during periods of his international outbound roaming. Revenue on the other hand is of the view that the FTO is only an intermediary and service is rendered by the HNO to their subscriber who is on international outbound roaming.
- ii) Whether the activity of providing cellular / mobile services to a subscriber during 'international outbound roaming' relates to the taxable service of BAS defined as per section 65(19)(vi) of FA 1994 as claimed by Revenue or to TCS as per section 65(109a) of Finance Act, 1994 as averred by the appellant.
- iii) Whether the activity is taxable at the hands of the appellant.

6. The issue of the service provider and the service recipient, has been examined by a Coordinate Bench of this Tribunal in **M/s Vodafone Idea Limited** (supra). We find that though the issue in the said order pertained to 'inbound roaming services' the technical issues involved are similar. The issue as to who is the actual service provider and the actual service receiver was examined in para 11 of the Third Member's Order which forms a part of the Majority Decision. The said para is reproduced below:

"11. In the present case the nerve chord of dispute rests on the issue is who is the actual service receiver provided by the Appellant in India. At para 5.3.3 of the Education Guide, in answering who is the service receiver, it is stated that "Normally, the person who is legally entitled to receive a service and therefore obliged to make

payment, is the receiver of a service, whether or not he actually makes the payment or someone else makes the payment on his behalf. Illustration given thereunder amplifies the said answer. In the present case, the legal relationship is between the appellant and the overseas FTO for provision of the service, when their (FTO's) subscriber visits India and uses the services during his stay in India. The consideration / payment for the service flows from the FTO to the appellant, for the said service, under an agreement, even though the beneficiary for such service is subscriber of the FTO. Thus, the FTO is the person who is legally entitled to receive the service as per the agreement, even though the beneficiary is the customer of FTO on their visit to India. Therefore, in my view, there is no change of status of the FTO from service receiver to an Intermediary, post introduction of POPS Rules, 2012, when read in the context of the charging section 66B. The FTO who enters into a legal agreement with the appellant, for its customers to receive service during the Customers' visit to India and accordingly obliged to make the payment for such service, and the Appellant agrees to provide the service, is the service receiver. Further, in my considered opinion, the FTO, in the present circumstances cannot be called as an intermediary, but is the actual service receiver, as per the agreement between them and the Appellant, the service provider. The illustration referred to under the Education Guide that the lady who owns the car and leaves at the garage for servicing, later when her chauffeur collects the serviced car after making payment on behalf of the lady, cannot be called the service receiver. Undoubtedly, the service receiver is the lady, not the chauffeur, who makes the payment, for the simple reason that she is the person legally entitled to receive the service. In other words, the decisive factor, is the agreement between the service station and the lady for servicing the car, under which she is obliged to make the payment in consideration of the service received. The mode/medium of payment of the obliged amount may be through the Chauffeur. Thus, the illustration makes it clear, to identify the service receiver, who makes the payment for the service, is a factor immaterial, but who is legally obliged to make the payment, in pursuance to the agreement for rendition of the service, is the decisive factor. Examining the issue other way round, legally, if any deficiency in the service of the car, the lady can proceed against the service provider and not the chauffeur who has made the payment on behalf of the lady, while taking delivery of the car. In the present case, it is the agreement between the appellant and the FTO; hence any deficiency in the service provided by the appellant to the Customers' of FTO, can only be proceeded by the FTO and not the subscriber of the FTO, who is the beneficiary of the service during his visit to the taxable territory. Also, the subscriber of the FTO, cannot proceed against the Appellant for any deficiency, but only against the FTO with whom he has a valid agreement. Examining the issue from all angles, it cannot be said that the FTO is not the service receiver, but the visitors to India who use the service during their visit to India, are the service receiver. A somewhat similar principle can be noticed by the majority opinion of the Tribunal in the case Paul Merchants Ltd. Vs. Commissioner of C.Ex., Chandigarh [(2013 (29) STR 257(Tri-Del.))] later referred and endorsed by the Delhi High Court in Verizon Communication India Pvt. Ltd. Vs. Asst. Commissioner Service Tax, Delhi-III (2028 (8) GSTL 32(Del.)."

The majority order makes it clear that in the case of international inbound roaming the FTO is the person who is legally entitled to receive the service of the HNO as per the agreement, even though the beneficiary is the customer/ subscriber of FTO in the taxable territory. The order hence rejects the concept that during international roaming the subscriber of the home telecom operator is the service receiver. On the same analogy we hold that during international outbound roaming outside the taxable territory the HNO is the service recipient of the services provided by the FTO and not the HNO's subscribers/ customers. The averment of the appellant in this regard hence succeeds. The reliance placed by Revenue on the minority order and Board's 'Education Guide' has been examined by the majority decision in the same judgment and has not found favour for reasons stated therein.

7. Having decided on the service provider and the service recipient, we can now examine the classification of the service being provided. We find that the issue has been examined by a Coordinate Bench of this Tribunal at Chennai in **Vodafone Cellular Ltd** dated 29/04/2019 (supra) relying on an earlier order of the Tribunal in **M/s Vodafone Essar Digilink Ltd** dated 30/11/2016 (supra). Relevant portions of the said order which deals with the matter are reproduced below.

"3.4.1 The second issue is with regard to the demand of service tax under 'Business Support Services'. The demand has been confirmed on the activity of International Outbound Roaming services received by the appellant from Foreign Telecom Operators abroad. The Department alleges that the Foreign Telecom Operators have rendered Business Support Services to the appellant. The demand under this category is incorrect. The cellular mobile telephone services including provision of access to and use of switched and non-switched networks for the transmission of voice, data and video, inbound and outbound roaming services to and from national and international destinations were introduced as 'Telecommunication

Services' with effect from 01.06.2007. Therefore, the very same activity cannot be made liable to service tax under a different heading viz., Business Support Services for the same period.

7.1 The second issue pertains to the demand of service tax under Business Support Services for the period 2007-09. Telecommunication Services have been brought into the service tax net with effect from 01.06.2007, which includes the activity of international access and use of inbound/outbound roaming facility. When a subscriber of the appellant travels outside India, he will be able to use the mobile network of the Foreign Telecom Operator as per the agreement entered between the appellant and the Foreign Telecom Operator. For such services provided to the appellant, the appellant has to discharge service tax under reverse charge mechanism. When the said services fall under the category of 'Telecommunication Services', the very same activity cannot be subjected to levy of service tax by treating them as 'Business Support Services'. The said service does not in any way fall under the category of Business Support & Services, especially when the activity is covered under the definition of 'Telecommunication Services.'"

The appellant has also relied upon two more judgments of Coordinate Benches in the case of **Vodafone Essar Mobile VS CST, Delhi**. (Final Order No 55606/2017 dated 26/07/2017 and **Vodafone Cellular Ltd Vs CCE Pune III** (Final Order No. A/91120/17 dated 30/11/2017). Judicial discipline requires us to follow the judgments of the Coordinate Bench's. We concur with the views as examined and crystalized in the above orders. The activity of providing cellular / mobile services to a subscriber during 'international outbound roaming' relates to the taxable service of TCS as defined by section 65(109a).

8. This brings us to the final issue as at para 5.1 (iii) above as to whether the activity undertaken / provided by the FTO to the HNO is exigible under RCM. The issue as to whether the appellant is liable to pay service tax under RCM on outbound roaming services received from the foreign telecom service provider under the category of 'telecommunication services' was examined by a coordinate Bench of

this Tribunal in **Vodafone Essar Digilink** (supra). Relying on **Boards Circular No 137/21/2011** dated 15/07/2011 wherein in the case of leased circuit services covered under 'telecommunication services' it was clarified that since the service provider located abroad, is not covered under the definition given in section 65(109a), the service provided by foreign vendors cannot be taxed under telecommunication service. Accordingly, the Division Bench concluded that services provided by any person who is not a 'telegraph authority' is not liable to discharge service tax either under section 66 or under section 66A of the Finance act 1994. In other words, although the activity of providing cellular / mobile services to a subscriber during 'international outbound roaming' relates to telecommunication service, however the said services provided by any person who is not a 'telegraph authority', as in the present case, the activity would not be a taxable service as defined by section 65(109a) and is hence not exigible to service tax at the hands of the appellant under RCM. Maintaining judicial discipline, we concur with the same.

9. We now summarise our findings as under:

- (i) During international outbound roaming the HNO (appellant) is the service recipient of the services provided by the FTO and not the HNO's subscribers/ customers.
- ii) The activity of providing cellular / mobile connectivity from outside the country to a subscriber of a HNO during 'international outbound roaming', relates to 'telecommunication service'.
- iii) Although the activity of providing cellular / mobile services to a subscriber during 'international outbound roaming' relates to

telecommunication service, however the said services provided by any person who is not a 'telegraph authority', as in the present case, the activity would not be a taxable service as defined by section 65(109a) of FA 1994 and is hence not exigible to service tax at the hands of the appellant under RCM.

10. Having regard to the facts as discussed above we set aside the impugned order. The appeal succeeds and is disposed of accordingly. The appellant is eligible for consequential relief, if any, as per law.

(Pronounced in open court on 10.10.2023)

(M. AJIT KUMAR)
Member (Technical)

(P. DINESHA)
Member (Judicial)

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