CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
CHANDIGARH
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REGIONAL BENCH – COURT NO. 1

Service Tax Appeal No. 1789 Of 2011

[Arising out of 65/ST/CHD-II/2011 dated 15.09.2011 passed by the Commissioner of Commissioner of Central Excise, Chandigarh-II]

M/s S. R. Medical Agencies : Appellant (s)
122-P, Azad Chowk, Bazar No. 1, Ferozepur

Vs

Commissioner of Central Excise, Chandigarh-II : Respondent (s)
C R Building Sector 17-C, Chandigarh-160017

APPEARANCE:
Shri Joy Kumar, Advocate for the Appellant
Shri Narinder Singh, Authorised Representative for the Respondent

CORAM : HON'BLE Mr. S. S. GARG, MEMBER (JUDICIAL)
HON'BLE Mr. P. ANJANI KUMAR, MEMBER (TECHNICAL)

ORDER No. A/60282/2023

Date of Hearing:28.04.2023

Date of Decision:24.08.2023

Per : S. S. GARG

The present appeal is directed against the impugned order dated 15.09.2011 passed by the Commissioner whereby he has confirmed the demand alongwith interest and penalties.

2. Briefly the facts of the case are that the appellant is a "Authorized distributor/Franchisee" of M/s Bharat Sanchar Nigam Ltd. (in short of BSNL). A show cause notice dated 21.10.2010 was issued to the appellant by the Ld. Commissioner of Central Excise, Commissionerate, Chandigarh-II calling upon them to show cause as to why service tax amounting to Rs. 1,15,08,277/- (Service Tax Rs. 1,11,99,118/-; Education Cess Rs. 2,23,982/- & Health and Service
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Education Cess Rs. 85,177/-) be not demanded and recovered from them under Section 73 of the Finance Act, 1994 by invoking the extended period of limitation along with interest under Section 75 of the Finance Act, 1994 and further penalty under Section 76, 77 and 78 of the Act be not imposed. It was alleged to recover the aforesaid service tax on the total amount of commission of Rs.7,85,55,876.00 (Period 01.04.2005 to 31.03.2010) and discount of Rs.1,97,23,027.00 (Period 01.04.2008 to 31.03.2010) alleged to have been received by the appellant on the ground that the appellant "appears" to have provided services to "BSNL" which fell under the definition of "Business Auxiliary Service" as defined under Section 65 (19) of the Finance Act, 1994.

3. The appellant filed detailed reply dated 29.07.2011 before the Commissioner, Central Excise Commissionerate, Chandigarh-II, Chandigarh to the said notice denying their liability to the action as proposed.

4. After following due process, the Ld. Commissioner has passed the impugned order dated 15.09.2011 confirming the following demands:-

"i) I confirm the demand of service tax amounting to Rs.1,15,08,277.00 (Service Tax Rs.1,11,99,118.00; Edu.Cess Rs.2,23,982.00 & H&S Edu. Cess Rs.85,177.00) against the noticee under Section 73(1) of the Act, 1994.

ii) I order recovery of interest on the confirmed demand of Rs.1,15,08,277.00 under Section 75 of the Finance Act, 1994, from the Noticee;

iii) I do not impose penalty upon the Noticee under Section 76 of the Act;

iv) I impose penalty of rupees one thousand for the period prior to 16.05.2008 and two hundred rupees for every day during the period from 16.05.2008 till the final payment of the service tax is made, under clause (a) and rupees five thousand under clause (b) of Section 77 of the Act upon the Noticee for aforementioned contraventions of service tax law; and

v) I impose a penalty of Rs.1,15,08,277.00 upon the Noticee under Section 78 of the Act."

5. Aggrieved by the said order, the appellant filed the present appeal.

6. Heard both the parties and perused the records.

7. Ld. Counsel for the appellant submitted that the impugned order passed by the Ld. Commissioner is not sustainable in law as the same has been passed without properly appreciating the facts and law. He further submitted that the appellant is not liable to pay service tax on the commission received by them. He further submits that BSNL has discharged service tax liability on full value equal to MRP (maximum retail price) which was inclusive of the appellant's discount/ /trade margin earned by the appellant on the sale of prepaid Mobile connections/recharge coupons. This aspect has not been verified by the department from "BSNL" while foisting the liability of service tax upon the appellant at any point of time as charging of tax twice on the upfront discount would tantamount to double taxation. He further submitted that they have produced certificate on record which is issued by BSNL wherein they have certified that maximum retail price

of prepaid mobile connections/recharge coupons on which service tax has been discharged/paid by them are including of upfront discount/commission of the appellant who are their authorized distributors. He further submitted that this issue has been considered by various benches of the Tribunal and the Tribunal has consistently held that the assessee who is dealing with recharge coupon/mobile connection and getting commission from BSNL are not liable to pay service tax under the category of 'Business Auxiliary Service'. Following decisions are relied upon by the appellant in support of their submissions:-

i. Final Order No. 60094/2023 dated 18.04.2023 in the matter of M/s Lovely Traders Versus CCE & ST, Rohtak.

ii. Final Order No's. 21144-21158/2018 dated 16.08.2018 in the matter of M/s Devangi Communications, Devangi Complex Jail Circle, Shimoga & Others.

iii. Commissioner of Central Excise, Meerut Versus Moradabad Gas Service [2013 (31) S.T.R. 308 (Tri- Del)]

iv. J.KEnterprises Versus Principal Commissioner, Central Excise, Alwar [2023 (70)G.S.T.L.297/3 Centax 53 (Tri- Del)]

v. CCE, Lucknow vs. Chotey Lal RadheyShyam: 2018 (8) GSTL 225 (All.)

vi. Goyal Automobiles vs. CCE, Chandigarh: 2016 (43) STR 268 (Tri.-Del)

vii. Omer Agencies (Hutch) vs. CCE, Allahabad: 2015 (40) STR 1135 (Tri.-Del)

viii Karakattu Communication vs. CCE: 2007 (8) STR 164 (Tri.) affirmed by Hon'ble High Court of Kerala as reported in 2016 (45) STR J209 (Ker.)

ix. Daya Shankar Kailash Chand vs. CCE, Lucknow: 2013 (30) STR 428 (Tri.-Del) affirmed by Hon'ble High Court of Allahabad as reported in 2014 (34) STR J99 (All.)

x GR Movers vs. CCE: 2013 (30) STR 634 (Tri.-Del)

xi. M/s South East Corporation Versus COMMR. OF CUS., C. EX. & S.T., COCHIN [2007 (8) STR 405 (Tri- Bang)].

xii. M/s R. Venkataramanan. Versus COMMR. OF Central Excise, Trichy [2009 (13) STR 187 (Tri.- Chennai)].

xii. Chetan Traders Versus Commissioner of Central Excise, Jaipur [2009 (13) S.T.R. 419 (Tri. - Del.)]

xiv. Commissioner of Central Excise, Coimbatore Versus Bharat Cell [2015 (40) S.T.R. 221 (Mad)]

8. Ld. Counsel further submitted that the incentives and discounts in the course of their trading activity by the appellant are not leviable to service tax as per the ratio of the following decisions:

i. Kerala Publicity Bureau vsCCE: 2008 (9) STR 101 (Tri-Bang)

ii. Euro RSCG Advertising Ltdvs. CCE: 2007 (7STR 277 (Tri.-Bang)

iii. P. Gautam & Covs. CST: 2011 (24) STR 447 (Tri.-Ahmd).)

iv. V. Mccann Erickson (India) Pvt. Ltd. vs. CST2008 (10) STR 365 (Tri.-Del).

v. CST vs Jaybharat Automobiles Ltd.: 2016 (41) TR 311 (Tri.-Mum)

vi. My Car Pvt. Ltd. vs. CCE: 2015 (40) STR 1018 (Tri.-Del)

vii. CST vs. Sai Services Station Ltd.: 2014 (35) STR 625 (Tri.-Mum)

9. As far as limitation is concerned, the Ld. Counsel further submitted that the show cause notice was issued invoking extended period of limitation in terms of clause (a) of sub-section (1) of Section 73 as the noticee never declared to the department their practice of discharging service tax liability on total value, billed by them to their customers and further they never produced their details to prove as the whether such amount was later on realized and if realized whether service tax due paid by them. He further submitted that the subject proceedings are linked with the question as to "whether or not the commission earned by agent selling pre-paid recharge coupons attract service tax" and this activity of appellant does not fall within the ambit of service. Accordingly, they were having the bonafied belief that no

service tax was payable. In support of this, he relied upon the following decisions:

i. Collector of Central Excise VsChemiphar Drugs & Liniments 1989 (40) ELT 276 (SC))

ii. M/s Padmini Products Vs. Collector of Central Excise 1989 (43) ELT 195 (SC)].

iii. M/s Pushpam Pharmaceuticals Company Vs. Collector of Central Excise, Bombay [1995 (78) ELT 401 (SC)].

iv. M/s Tamilnadu Housing Board Vs. Collector of Central Excise, Madras [1994 (74) ELT 9 (SC)].

10. Ld. Counsel further submits that the demand of interest and imposition of penalty are neither justified nor warranted in view of the facts and circumstances of the present case because there was no malafide intention on the part of the appellant.

11. On the other hand, the Ld. AR for the Revenue defended the impugned order and submitted that on perusal of the agreement and the Sales and Distribution Policy under which the appellant was operating as franchisee/agent of BSNL reveals that the procedure relating to sale and accounting has been decided by the BSNL for their franchisees and that the appellant as franchisee/agent are not carrying out the sale of products/services as per the terms laid down by BSNL in the agreement and the Policy. He further submitted that ultimate service in respect of the products/services is given to the customers in the name of BSNL only. Necessary activation of the services and acknowledgement to the customers is also done by BSNL after due commercial verification which clearly shows that all sales/services are done by the appellants as a franchisee/agent are on behalf of BSNL and BSNL remains de-facto owners of their products/services. He further submitted that the business transaction

of the appellant with the BSNL is not on principle to principle basis as the overall control/supervision of the products/services remains with BSNL, even after the sale of product to the customer, as evident from the clauses of the agreement. He further submitted that the appellant has carried out various activities on behalf of BSNL to promote and market/sale of products and services of BSNL, hence, it is covered under the category of Business Auxiliary Services as per the definition provided under section 65(19) of Finance Act, 1994. The Ld. DR in support of his submissions referred to the judgement of the Hon'ble Kerala High Court in the case of Vodafone versus ACIT -2010-TIOL-655-HC-KERALA-IT and that of Hon'ble Delhi High Court in the case of CIT versus idea cellular Ltd-2010-TIOL-139-HC-DEL-IT. He further submitted that the Hon'ble High Court have held that the transaction between the telecom company and the distributor under the similar arrangements constitute relationship of Principal and agent and not principal to Principal. He further submitted that the claim of the appellant that they were involved in the purchase and sale of SIM card is not in consonance with the finding of the Hon'ble Supreme Court in the case of Idea mobile communication Limited versus CCE, Cochin -2011-TIOL-71-SC-ST wherein it has been categorically held that there is no element of sale involved in the transaction of SIM cards. Ld. DR also submitted that the judgements relied upon by the appellant in support of his submissions are not applicable in the facts and circumstances of the present case and are distinguishable.

12. After considering the submissions of both the parties and the perusal of material on record and the decision relied upon by both the sides, we find that this issue has been considered by various benches

of the Tribunal and has consistently been held that the assessee is not liable to pay service tax under the category of 'Business Auxiliary Service'.

13. Further, in view of the judgement of Goyal Automobiles cited (supra) which was not challenged by the Revenue before the appellate authority wherein the Tribunal held in Para 6 and 7 as under:-

> "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.
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> 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."

14. Further, we find that this Tribunal in the case of M/s Devangi Communications and others vs. Commissioner of Service Tax, Mysore

vide Final Order No. 21144-21158 of 2018 dated 16.08.2018 held that when the telecom operators are discharging service tax on the whole MRP value of SIM cards and recharge cards, then there could be no further service tax liability on the persons who are dealing/selling the said SIM cards or recharge cards to the public. The ratio of decision in the case of GR Movers cited (supra) has been upheld by the Hon'ble Madras High Court in the case of Bharti Televentures Ltd. -2015 (40) STR 221 (Mad.) and further the case of GR Movers cited (supra) was appealed against by the Revenue before the Hon'ble Allahabad High Court and the Hon'ble Allahabad High Court upheld the decision of the Tribunal as reported in 2015 (37) STR J132.

15. Further, coming to the contention of the Ld. DR that there is a specific contract between BSNL and the appellant, we find that similar is the issue with all the service providers like BSNL and other operators and respective dealers as has been elaborately discussed in Tribunal's Delhi Order CCE vs. Moradabad Gas Services 2013 (31) STR 308 (Tri.-Del.).

16. Further, the CESTAT Chennai Bench in the case of Kumar Electronics vs. Commissioner of Central Excise, Madurai 2019 (29) GSTL 463 (Tri.-Chennai) wherein identical issue was involved and the Tribunal has held in Para 7 as under:-

> **"7.** The first contention of the Ld. DR is that the judgments relied upon by the Ld. Counsel for the appellant pertain to BSNL or other telecom SIM cards and not to recharge coupon vouchers of DTH operators. We are unable to agree with this argument because the logic, on which it was held that no service tax needs to be paid on the commission of the commission agent, is the same in both the cases. Once the service tax has been paid on the M.R.P. no service tax needs to be paid on the commission received

> by the distributor because it is a part of the M.R.P. If tax is so levied, it amounts to double taxation. This view held by the Tribunal has been upheld by the Hon'ble High Court of Allahabad and subsequently followed by the Hon'ble High Court of Madras. The present case, though it pertains to DTH operators, stands on the same footing and the logic, in our opinion, should be applied to these cases as well. It is true that the appellant is providing services to the DTH operators and is getting commission for such services. If the appellant had paid service tax on such commission, the main DTH operator could have availed Cenvat credit of the same thereby proportionately reducing the amount paid in cash by the DTH operator. Therefore the entire exercise is also revenue-neutral. **In view of the above, we find that the issue is no longer *res integra*. On the SIM cards, recharge coupons etc., where the service tax has been paid on the M.R.P. by the main operator the commission agent/distributor need not pay service tax on the commission received by him because commission also forms part of the M.R.P. on which service tax has already been discharged."**

17. Further, we find that the decisions relied upon by the Ld. DR are not applicable in the facts and circumstances of the present case as the issue involved in those cases were not under the category of 'Business Auxiliary Service' whereas the decisions relied upon by the appellant is squarely applicable to the facts of the present case, therefore, by following the ratio of the above said decisions, we are of the considered opinion that the impugned order is not sustainable in law and therefore, we set-aside the same by allowing the appeal of the appellant with consequential relief, if any, as per law.

(Pronounced on 24.08.2023)

(S. S. GARG)
MEMBER (JUDICIAL)

(P. ANJANI KUMAR)
MEMBER (TECHNICAL)

G.Y.