

**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
KOLKATA
EASTERN ZONAL BENCH: KOLKATA**

Service Tax Appeal No. 70946 of 2013

(Arising out of Order-in-Original No. 63/Commr/ST/Kol/2012-13 dated 14.02.2013 passed by Commissioner of Service Tax, Kolkata.)

M/s Vodafone Essar East Ltd.,
11, Dr. U.N. Brahmachari, Kolkata-700017, West Bengal.

...Appellant (s)

VERSUS

Commissioner of Service Tax, Kolkata,
180, Shantipally, GST Bhawan, Rajdanga Main Road, Kolkata-700107.

..Respondent(s)

APPEARANCE :

Shri Rahul Tangri & Mr. Shovit Betal, both Advocates for the Appellant
Shri J. Chattopadhyay, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. R MURALIDHAR, MEMBER (JUDICIAL)

HON'BLE MR. K. ANPAZHAKAN MEMBER (TECHNICAL)

FINAL ORDER No...77558/2023

DATE OF HEARING : 07.11.2023

DATE OF PRONOUNCEMENT: 30.11.2023

PER K. ANPAZHAKAN :

The Appellant, M/s. Vodafone Essar East Limited are engaged in providing a comprehensive range of telecommunication services in eastern India. The Appellant had entered into international roaming agreements with various foreign telecom operators (FTOs) for providing international roaming facilities to the subscribers of the appellant travelling to foreign countries. As per the agreement, a subscriber visiting a country where an agreement exists with a specified FTO can automatically make and receive calls, send and receive data, or access other services including home data services while travelling outside the geographical coverage area of the home network, by means of using a visited network. For providing these services, the FTO charges the Appellant at a rate as agreed between the parties as per the terms of

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the agreement. The Appellants pay the foreign telecom operators (FTOs) in foreign currency.

2. A Show Cause Notice dated 19.12.11 was issued to the Appellant demanding service tax amounting to Rs. 61,69,700/- under the category "*business auxiliary services*" as defined under Section 65(19) of the Finance Act, 1994 along with interest under Section 75 and penalty under Section 78 of the Finance Act, 1994. The SCN alleged that the services received by the appellants have been received in India because such services involve routing the call through the Appellant's network in India and the Appellant are the recipient of such services. Thus, the Appellant was liable to pay service tax on reverse charge mechanism as the recipient of services under Section 66A of the Finance Act, 1994 and The Taxation of Services (Provided from Outside India and Received in India) Rules, 2006 read with Rule 2(1)(d)(iv) of the Service Tax Rules, 1994. The Notice was adjudicated by the Ld. Commissioner vide Order-in-Original dated 14.02.2013, wherein he confirmed the entire demand of service tax proposed in the SCN along with interest and penalty. Being aggrieved with the O-I-O, the Appellant has filed the present appeal.

3. In respect of service tax demand confirmed under the head 'Business Auxiliary Service', the Appellant contends that the services received by them from the FTO's would be rightly classifiable under the category of "Telecommunication services". Regarding the roaming charges paid to FTOs, the Appellant submits that demand of service tax amounting to Rs. Rs.61,69,700/- has been confirmed in *the impugned order* on roaming charges paid to Foreign Telecommunication Operators (FTOs). The payment of roaming charges was made by them to FTOs for providing connectivity services to their subscribers when they are abroad. Thus, the services are rightly classifiable as 'Telecommunication Service'. It is submitted that during the relevant period only telecommunication services provided by a 'Telegraph Authority' to a person was taxable. In the instant case, FTOs by no means of construction can be brought within the ambit of 'Telegraphy Authority' as defined under Section 65(111) of the Finance Act, 1994 read with Section 3(6) of the India Telegraph Act, 1885, hence, under no

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circumstances roaming charges can be taxed under the head "Business Auxiliary Service".

4. It is submitted that the instant issue is no longer res-integra and has been settled by the CESTAT, New Delhi in case of one of their group Companies, viz. **Vodafone Essar Mobile vs. CST, New Delhi, 2017 (6) GSTL 67 (Tri-Del)**. The Tribunal in the aforesaid ruling held that roaming services provided by foreign telecom company cannot be taxable under the head "business auxiliary service".

5. The Appellant submits that similar observation was made again by CESTAT, Mumbai in **Idea Cellular Ltd vs. Commissioner of Service Tax, Mumbai – IV, 2021 (55) GSTL 326 (Tri-Mumbai)** following the **Vodafone (supra)** ruling.

6. In light of the aforesaid decisions, the Appellant contended that that the instant demand is not sustainable. Since the demand is not sustainable consequently, demand of interest and penalty is also not sustainable.

7. The Ld. A.R. reiterated the findings of the adjudicating authority in the impugned order and contended that the services received by the Appellant are rightly classifiable under 'Business Auxiliary Service' and the Appellant is liable to pay service tax under reverse charge.

8. Heard both sides and perused the appeal documents.

9. We observe that the issue to be decided in the present appeal is whether the Appellant is liable to pay service tax under head "business auxiliary services" on roaming charges paid to foreign telecom operators (FTOs) for providing services to the subscribers of the Appellant when they are outside India. Regarding the service tax demand of Rs.61,69,700/- confirmed under the head "Business Auxiliary Service" on roaming charges paid to Foreign Telecommunication Operators (FTOs), we observe that the payment of roaming charges was made by the Appellant to FTOs for providing connectivity services to their subscribers when they are abroad. We find that the services are appropriately classifiable as 'Telecommunication Service'. During the relevant period, only telecommunication services provided by a 'Telegraph Authority' to a person was taxable. In the instant case, FTOs located abroad providing

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the connectivity services would not fall within the ambit of 'Telegraphy Authority' as defined under Section 65(111) of the Finance Act, 1994 read with Section 3(6) of the India Telegraph Act, 1885. Accordingly, we observe that the charges paid for the services rendered by the FTOs cannot be taxed under head "Business Auxiliary Service" on the Appellant.

10. We find that the issue is no longer *res-integra* as the issue has been settled by the decision of the CESTAT, New Delhi in case of one of the Appellant's group Companies, viz. **Vodafone Essar Mobile vs. CST, New Delhi, 2017 (6) GSTL 67 (Tri-Del)**. The Tribunal in the aforesaid ruling was considering whether roaming services provided by foreign telecom company can be taxable under the head "business auxiliary service" wherein the Tribunal has observed as under:

"7. We have heard both the sides and perused the appeal records. The admitted facts of the case are that the subscriber of the appellant while visiting foreign country continue to receive telecom service using the connectivity provided by roaming partner of the appellant in that foreign country. There is no dispute that the services provided by the foreign telecom Company is squarely covered by the tax entry 'telecommunication service'. However, the tax liability could not be brought in only for the reason that the said provider of service in foreign country is not a Telegraph Authority as required under Finance Act, 1994. The question now is such services, otherwise recognized as telecom service, which can be subjected to tax if provided in India by a Telegraph Authority, can be brought under tax under a different tax entry, namely, Business Auxiliary Service. We note examining an almost similar situation, the Board has categorically clarified vide letter dated 19-12-2011 that what otherwise constitutes telecommunication service cannot amount to any other taxable service. Further, we also note in parallel situation examining the tax liability of an activity, which is otherwise covered, in a tax entry, can be taxed under the category of another tax entry has been examined by the Hon'ble Kerala High Court in the case of Federal Bank Ltd. (supra). Here also we note that the telecommunication service liable to tax has been exhaustively defined and admittedly, the services now under consideration are specifically covered in the said tax entry. We also note that the ld. Counsel for the appellant submitted that the services rendered by foreign telecom service provider to their subscribers while roaming, are subject to VAT/other liable tax in the concerned country in terms of agreement. In this connection, we also note the Board has examined the international practice with reference to roaming services vide Circular dated 3-1-2007. It was held that services to inbound roamers is delivered and consumed in India and hence, it is not an export of service. It was further clarified that international practice treats the telephone service provided to

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an inbound roamer by the visited network, for purpose of taxation, in the same manner as a telephone service provided to any home subscriber.

8. In view of the discussion and analysis recorded above, specific clarification of the Board dated 19-12-2011 and the decisions of Hon'ble Kerala High Court as affirmed by Apex Court, we hold that the impugned order is not legally sustainable. Accordingly, the same is set aside. The appeal is allowed....."

11. We also find that similar observation was made again by CESTAT, Mumbai in **Idea Cellular Ltd vs. Commissioner of Service Tax, Mumbai – IV, 2021 (55) GSTL 326 (Tri-Mumbai)** following the **Vodafone (supra)** ruling.

12. We observe that the facts and circumstances of the case cited above are similar to the case on hand and the ratio is applicable for the present case on appeal. In light of the aforesaid decisions, we hold that the demand confirmed in the impugned order under the category of 'Business Auxiliary Service' on the Appellant is not sustainable. Since the demand is not sustainable consequently, demand of interest and penalty is also not sustainable. Accordingly, we set aside the same.

13. In view of the above discussion, we set aside the impugned order and allow the appeal filed by the Appellant.

(Pronounced in the open court on.....30.11.2023)

Sd/-

(R. Muralidhar)
Member (Judicial)

Sd/-

(K. Anpazhakan)
Member (Technical)

Tushar