Court No. - 1

Case :- WRIT TAX No. - 774 of 2023

Petitioner :- M/S Vodafone Idea Ltd
Respondent :- Union Of India And 3 Others
Counsel for Petitioner :- Ashish Mishra
Counsel for Respondent :- C.S.C.,Parv Agarwal

With

Case :- WRIT TAX No. - 776 of 2023

Petitioner :- M/S Vodafone Idea Ltd.
Respondent :- Union Of India And 3 Others
Counsel for Petitioner :- Ashish Mishra
Counsel for Respondent :- C.S.C.,Parv Agarwal

With

Case :- WRIT TAX No. - 777 of 2023

Petitioner :- M/S Vodafone Idea Ltd.
Respondent :- Union Of India And 3 Others
Counsel for Petitioner :- Ashish Mishra
Counsel for Respondent :- Parv Agarwal

With

Case :- WRIT TAX No. - 778 of 2023

Petitioner :- M/S Vodafone Indea Ltd
Respondent :- Union Of India And 3 Others
Counsel for Petitioner :- Ashish Mishra
Counsel for Respondent :- C.S.C.,Parv Agarwal

Hon'ble Shekhar B. Saraf,J.

1. These writ petitions are arising out of a common appellate order dated March 2, 2023, therefore, the same have been heard together and are being decided by this common order.

2. These are the writ petitions under Article 226 of the Constitution of India

wherein the writ petitioners are aggrieved by order dated March 2, 2023 passed by respondent no.3 in appeal under Section 107(11) of the Central Goods and Services Tax Act, 2017.

3. I have heard the counsel appearing on behalf of the parties and perused the material on record.

4. Upon a perusal of the impugned order, it appears that the appellate authority has not properly appreciated the judgements of the Supreme Court for condoning the delay. Furthermore, having held that the matter was time barred, the appellate authority has proceeded to decide the matter on merits, which also unfortunately is without any basis in law as the appellate authority has not taken into consideration the judgement of the Bombay High Court in **Vodafone Idea Limited v. Commissioner of CGST and Central Excise, Mumbai** reported in **2022 SCC OnLine Bom 1485** and the judgment of Delhi High Court in **Vodafone Idea Limited v. Union of India and Others** reported in **2023 SCC OnLine Del 6673**.

5. The Bombay High Court in **Vodafone Idea Limited (Supra)** has specifically dealt with the issue and come to the following findings :-

> *"**19.** As per clause (a) of section 2(93) of the CGST Act, "recipient" means where the consideration is payable for supply of goods or services, the person who is liable to pay the consideration. Clauses (b) and (c) of section 2(93) is applicable when no consideration is payable. In this case consideration is payable by the FTO for the services rendered to it. We find the adjudicating authority in his orders does refer to the terms of agreements with FTO. The services are rendered under agreements with the service recipients and according to the agreement, the Vodafone Idea Ltd. is contractually obligated only to the FTOs for the services under the agreement ; the consideration is payable by the FTOs and the consideration is payable in convertible foreign exchange. There is no mention of any agreement with subscriber of FTO. The Vodafone Idea Ltd. has reiterated that there is no contract with subscriber of FTO making it liable to pay value of service to the Vodafone Idea Ltd. We find that practically it is impossible for the*

Vodafone Idea Ltd. to have contract with subscriber of FTO. Therefore, the subscriber is not liable to make any payment to the Vodafone Idea Ltd. In the impugned order it is stated "as per the agreement reproduced in paras 16.1 (Appeal No. 257/2021) and 13.1 (Appeal No. 258/2021) of the impugned orders with M/s. Cello Partnership or M/s. Verizon Wireless USA D/B/A, for provision of service is payable by FTO." This is not controverted by Revenue. It is a fact that payment is received from FTO. Hence, subscriber of the FTO cannot be considered as recipient of service as held by adjudicating authority. FTO is undoubtedly the recipient of service.

20. *The point of dispute is whether provisions of section 13(2) or section 13(3) of the IGST Act is applicable to the present case. Section 13(2) refers to the place of supply of services as the location of the recipient of services except in cases of sub-sections (3) to (13) of section 13. Section 13(3) identifies the place of supply of services as the location where the services are actually performed. The provision of section 13(3)(b) is applicable in the case where services are supplied to an individual as section 13(3) (b) starts with the words "service supplied to an individual". We find that in the instant case the said services were supplied to FTO and not to an individual. The FTO had supplied services to their subscriber (individual). Here, the supplier of services is the Vodafone Idea Ltd. and the recipient of the service is FTO as discussed above. Further, the Vodafone Idea Ltd. has no idea of subscribers of FTO and therefore question of supplying service to an individual (subscribers) does not arise. The Vodafone Idea Ltd. had issued invoices to FTO and not to any individual which substantiates that services were not provided to an individual.*

21. *We would agree with the concept that customer's customer cannot be your customer. In the case at hand customer of the Vodafone Idea Limited is the FTO and the subscribers of FTO are the customers of FTO. When a service is rendered to a third party customer of FTO - your customer, the service recipient is your customer and not the third party customer of FTO. These issues have been considered by the Central Excise and Service Tax Appellate Tribunal (CESTAT Act), West Zonal Branch, Mumbai and one of Bangalore Tribunal. We accept the views expressed and law laid down by the Tribunals. The relevant portion reads as under :*

"1. Vodafone Essar Cellular Ltd. v. Commissioner of Central Excise (2013) 31 STR 738 (Trib.-Mum) (paras 5.1, 5.2, 5.3 and 5.4)

'5.1. We have perused the agreement entered into between the appellant and the foreign telecom service providers. As per the said agreement, the appellant has agreed to provide telecom services to the customer of the foreign telecom service provider while he is in India using the appellants telecom net work. The consideration for the service rendered is paid by the foreign service provider. There is no contract/agreement between the appellant and the subscriber of the foreign telecom service provider to provide any service. Since the contract for supply of service is between the appellant and foreign telecom service provider who pays for the services rendered, it is the foreign telecom service provider who is the recipient of the service. From the provisions of law relating to GST in UK and Australia, relied upon by the appellant, this position becomes very clear. Your customer's customer is not your customer. When a service is rendered to a third party at the behest of your customer, the service recipient is your customer and not the third party. For example, when a florist

delivers a bouquet on your request to your friend for which you make the payment, as far as the florist is concerned you are the customer and not your friend.

5.2. The Export of Service Rules, 2005 defines export in respect of taxable services. For this purpose, the services have been categorized into 3. Category I deals with specified services provided in relation to an immovable property situated in India. Category II deals with specified taxable services where such taxable service is partly performed outside India and states that when it is partly performed outside India, it shall be treated as performed outside India. Category III deals with services not covered under category I and II. The telecom services fall under category III. As far as category III services are concerned, the transaction shall be construed as export when provided in relation to business or commerce to a recipient located outside India and when provided otherwise to a recipient located outside India at the time of provision of such service. The

additional conditions required to be satisfied are such services as are provided from India and used outside India ; and consideration for the service rendered is received in convertible foreign exchange. As observed earlier, the service is rendered to a foreign telecom service provider who is located outside India and therefore, the transaction constitutes export and we hold accordingly.

5.3. The Board's clarification vide Circular No. 111/5/2009-S.T., dated February 24, 2009 makes this position very clear. Para 3 of the circular which is relevant is reproduced verbatim below :

"3. It is an accepted legal principle that the law has to be read harmoniously so as to avoid contradictions within a legislation. Keeping this principle in view, the meaning of the term 'used outside India' has to be understood in the context of the characteristics of a particular category of service as mentioned in sub-rule (1) of rule 3. For example, under Architect service (a category I service (rule 3(1)(i))), even if an Indian architect prepares a design sitting in India for a property located in U. K. and hands it over to the owner of such property having his business and residence in India, it would have to be presumed that service has been used outside India. Similarly, if an Indian event manager (a category II service (rule 3(1)(ii))) arranges a seminar for an Indian company in U. K., the service has to be treated have been used outside India because the place of performance is U. K. even though the benefit of such a seminar may flow back to the employee serving the company in India. For the services that fall

under Category III (rule 3(1)(iii)), the relevant factor is the location of the service provider and not the place of performance. In this context, the phrase 'used outside India' is to be interpreted to mean that the benefit of the service accrues outside India. Thus for category III services, it is possible that export of service may take place even when all the relevant activities take place in India so long as the benefits of these services accrue outside India."

Thus what emerges from the above circular is that when the appellant rendered the telecom service in the context of international roaming, the benefit accrued to the foreign telecom service provider who is located

outside India since the foreign telecom service provider could bill his subscriber for the services rendered. This is the practice followed in India also. When an Indian subscriber to, say, MTNL/BSNL goes abroad and uses the roaming facility, it is the MTNL/BSNL who charges the subscriber for the telecom services including service tax, even though the service is rendered abroad by the foreign telecom service provider as per the agreement with MTNL/BSNL.

5.4 The Paul Merchants case [2013] 62 VST 501 (CESTAT-New Delhi) ; (2013) 29 STR 257 (Trib.-Delhi) relied upon by the appellant dealt with an identical case. The question before the Tribunal in that case was when agents/sub-agents in India of Western Union Financial Services, Panama, makes payments to an Indian beneficiary on behalf of the customer of the Western Union in foreign country, whether the services rendered by the Indian agents/sub-agents should be treated as export or not under the Export of Services Rules, 2005. By a majority decision, it was held that the service being provided by the agents and sub-agents is delivery of money to the intended beneficiaries of the customers of the Western Union abroad and this service is "business auxiliary service", being provided to Western Union. It is the Western Union who is the recipient and consumer of this service provided by their agents and sub-agents, not the persons receiving money in India. The ratio of the said decision applies squarely to the facts of the present case before us. Once the ratio is applied, it can be easily seen that the service recipient is the foreign telecom service provider and not the subscriber of the foreign telecom service provider who is roaming in India.'

2. Commissioner of Service Tax v Bayer Material Science P. Ltd. (2015) 38 STR 1206 (Trib.-Mum) (para 7)

'7. A similar issue came up before this Tribunal in the case of Vodafone Essar Cellular Ltd v. Commissioner of Central Excise, Pune-III (2013) 31 STR 738 wherein it was held that the telecom service provided in India to international inbound roamers registered with foreign telecom network operator, payment received from impugned foreign telecom operators in convertible foreign exchange, in that set of facts this Tribunal has held that

the service have been provided outside India as an export of service. In this case, the respondent is in a better footing that in the case of Vodafone Essar Cellular Ltd. (2013) 31 STR 738 wherein it was held that the service recipient is the foreign telecom service-provider and not the subscriber of the foreign telecom service in India and providing service in India and it is a case of export of service. In the circumstances, I hold that the learned Commissioner (Appeals) has rightly held that the case of export of service as per rule 3(1)(iii) of the Export of Services Rules, 2005. In the circumstances, I do not find any infirmity with the impugned order and the same is upheld. The appeal filed by the Revenue is dismissed.

3. ABS India Ltd. v Commissioner of Service Tax (2009) 13 STR 65 (Trib.-Bang) (para 4)

The appellant is a company incorporated in India. They have a subsidiary company in Singapore. The appellant booked orders for the sales of the goods manufactured by the subsidiary situated in Singapore. For this purpose, they received certain commission and initially they paid the service tax. Later they realized that as they had exported the service, they would not be liable to pay service tax. Hence, they requested for refund of the amount. The refund was rejected by the original authority. The rejection order has been upheld by the appellate authority. Both the original authority and appellate authority have held that the service has been rendered in India and it has been utilized delivered in India and it is also used in India. The learned advocate strongly argued that the understanding of the lower authority is not correct, the services have rightly been delivered abroad and they have been used by the Singapore company. They relied on several case laws. They also stated that it should not be considered that the appellant and the company in Singapore are related, even though one is a subsidiary of the other, they are separate legal entities. They produced a large number of case laws on this subject. They also relied on the decision of this Tribunal in the case of Blue Star Ltd. v. Commissioner of Central Excise vide Final Order No. 489/2008, dated

March 27, 2008 (2008) 11 STR 23 (Trib.-Bang), wherein a similar

situation was dealt with. The situation here also is similar. In this case, the Indian company is the principal and the Singapore company is a subsidiary. The appellant is the Indian Company, booked certain orders for the Singapore company. It cannot be said that these booking of the orders indicate service being rendered in India. It is not correct. And also because the appellant books the orders for the Singapore company, we have to consider that the service is delivered only to the Singapore company. The recipient of the service is a Singapore company. When the recipient of the service is Singapore Company, it cannot be said that service is delivered in India and the benefit of the service is derived only by the recipient company. Because of the booking of the orders, the Singapore company gets business. Therefore, the service is also utilized abroad. In terms of rule 3(2) of the Export of Services Rules, 2005 the service rendered is indeed a service, which has been exported. In such circumstances, the appellant is not required to pay the service tax. There is absolutely no merit in the impugned order. Hence, we allow the appeal with consequential relief."

22. *In our opinion, therefore the Vodafone Idea Limited has provided services to FTOs and not to the individual subscribers of FTOs. Therefore section 13(3)(b) is not attracted. Section 13(3)(b) on which reliance has been placed by the Deputy Commissioner is not applicable."*

6. It is to be noted that the judgement of the Bombay High Court was not taken up in appeal before the Supreme Court and the Central Board of Indirect Taxes and Customs decided not to file SLP against the order passed by the Bombay High Court.

7. In light of the same, the decision of the Bombay High Court holds the field and since the issue is that under the Central Legislation, I am of the view that following the doctrine of comity, the judgement of the Bombay High Court would apply in the State of Uttar Pradesh too.

8. Accordingly, the impugned orders passed in aforementioned appeals dated March 2, 2023 is quashed and set aside with a direction upon the

appellate authority to decide the issue afresh in light of the observations made hereinabove.

9. The writ petitions are disposed of.

Order Date :- 3.4.2024
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(**Shekhar B. Saraf,J.**)