

(2023) 11 CESTAT CK 0020

Customs, Excise And Service Tax Appellate, Chandigarh

Case No: Service Tax Appeal No. 58203 Of 2013

Saraswati Gas Service

APPELLANT

Vs

CCE & ST-
Chandigarh-II

RESPONDENT

Date of Decision: Nov. 21, 2023

Acts Referred:

- Finance Act, 1994 - Section 65(19), 76, 77, 78

Hon'ble Judges: S. S. Garg, Member (J); P. Anjani Kumar, Member (T)

Bench: Division Bench

Advocate: Jitender Kumar Jindal, Shivani

Final Decision: Allowed

Judgement

S. S. Garg, Member (J)

1. The present appeal is directed against the impugned order dated 20.03.2013 whereby the Commissioner (Appeals) has rejected the appeal of the

appellant and upheld the order-in-original.

2. Briefly the facts of the case are that the appellants were appointed franchisees by M/s Bharat Sanchar Nigam Limited (BSNL) for providing

services of sale and purchase of sim cards. The department entertained a view that the appellant is providing "Business Auxiliary Service"™ to

BSNL and is liable to pay service tax on the business auxiliary service. On these allegation, a show cause notice dated 06.01.2010 was issued for

invoking the extended period of limitation to demand of Service tax for the period from 2005-06 to 2007-08 amounting to Rs. 3,84,323/- alongwith

interest and penalties under Section 76, 77 and 78 of the Act. Aggrieved by the said order, the appellant filed an appeal before the Ld. Commissioner

(Appeals) who rejected their appeal. Hence, the present appeal.

3. Heard the parties and perused the case records.

4. Ld. Counsel for the appellant submitted that the impugned order is not sustainable in law as the same has been passed without properly appreciating

the facts and the law. He further submits that the appellant is a dealer of BSNL which is a public sector undertaking and has been appointed as dealer

on the terms and conditions as contained in the agreement between the parties. He further submitted that perusal of clauses 9.7, 11, 13.4, 22 & 24.1

show that their activity is to effect sale of BSNL products and income so earned is on account of effecting sales and not on account of rendering any

service. That in their financial statements they have reported the transactions with BSNL as purchase transactions. He further submits that the

discounts received by them on sale of recharge coupons have been referred as commission and service tax has been demanded on it. That the

commission is nothing but discount earned by them on sale or purchase of various recharge coupons, sim card etc. from BSNL. He further submits

that the services provided by the appellant are not covered under Business Auxiliary Service as their transaction with BSNL are on principle to

principle basis and the terms commission/rebate/discount has been used interchangeably. He further submits that the promotion and marketing is an

activity in relation to appellants own business and as such activity cannot be taxed under any Section of the Act in terms of clauses 24.1, 13.4 and 22

of the agreement with BSNL. He also submitted that their agreement with BSNL is a Franchisee Agreement and w.e.f. 16.06.2005 any service

provided is covered under franchisee service. He also submitted that the entire demand is barred by limitation. He further submits that prior to the

impugned show cause notice dated 31.08.2009 was issued alleging that the appellant has provided Business Auxiliary Service to BSNL by sale to its

sim cards and received commission therefore. The said adjudication was confirmed the service tax liability. The appeal was allowed and the demand

of tax, interest and penalty was dropped and the revenue did not challenge the same before the higher authorities. He further submitted the fact that

the appellant is in the business of selling sim cards/recharge vouchers of BSNL was well within the knowledge of the department when the first show

cause notice was issued and therefore, the suppression cannot be alleged in subsequent notices issued for the similar facts to invoke extended period

of limitation. For this submission, he relied upon the judgement of Honâ€™ble Supreme Court in the case of Nizam Sugar Factory vs. Collector of

Central Excise, A.P. 2006 (197) ELT 465 (S.C.). He also submitted that this issue is no more res-integra and 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 â€˜Business Auxiliary Serviceâ€™. 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 COMM. 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)

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)]

5. 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 vs CCE: 2008 (9) STR 101 (Tri-Bang)

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

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

iv. V. Mccann Erickson (India) Pvt. Ltd. vs. CST 2008 (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)

6. As far as limitation is concerned, the Ld. Counsel for the appellant submitted that the entire demand is barred by limitation because for the earlier

show cause notice, the Commissioner finally dropped the demand which was not challenged by the department and the department was aware of the

activities of the appellant, and therefore, in view of the judgement of the Honâ€™ble Supreme Court in the case of Nizam Sugar Factory cited

(supra), the entire demand is barred by limitation.

7. On the other hand, the Ld. DR 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 Honâ€™ble

Kerala High Court in the case of Vodafone versus ACIT -2010-TIOL-655-HC-KERALA-IT and that of Honâ€™ble Delhi High Court in the case of

CIT versus idea cellular Ltd-2010-TIOL-139-HC-DEL-IT. He further submitted that the Honâ€™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 Honâ€™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.

8. After considering the submission of both the parties and perusal of material on record and the decisions relied upon by both the sides, we find that

this issue has been considered by this Tribunal in the latest decision in the case of S.R. Medical Agencies vs. Commissioner of Central Excise,

Chandigarh-II vide Final Order No. A/60282/2023 dated 24.08.2023 and after considering the various decisions of the Tribunal, this Tribunal has

observed as under.

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.

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 Honâ€™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 Honâ€™ble Allahabad High Court and the Honâ€™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 Tribunalâ€™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:-

â€œ7. 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 Honâ€™ble High Court of Allahabad and subsequently followed by the

Honâ€™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.â€

9. Besides this, we also find that the entire demand is barred by limitation also.

10. In view of discussion above, we are of that the impugned order is not sustainable in set-aside the same by allowing the appeal consequential relief, if any, as per law.