(2015) 07 MAD CK 0096

In the Madras High Court

Case No : C.M.A. No. 1384 of 2010

Commissioner of Central Excise — APPELLANT

Vs

Bharat Cell — RESPONDENT

Date of Decision : 03-07-2015

Acts Referred:
Finance Act, 1994 — Section 77, 78

Citation : (2015) 52 GST 715 : (2015) 40 STR 221

Hon'ble Judges : R. Sudhakar and K.B.K. Vasuki, JJ.

Bench : Division Bench

Advocate : E. Vijay Anand, for the Appellant

Judgement

R. Sudhakar, J.—Aggrieved by the order of the Tribunal in rejecting the appeal filed by it, the Revenue/appellant is before this Court by filing the present appeal raising the following substantial questions of law:--

"1. Whether in the facts and circumstances of the case, the Appellate Tribunal is right in deciding the case in favour of the assessee that there is only buying and selling of cards, when the fact remains that there is no sale involved and only commission was paid by the BSNL to the franchisees? and

2. Whether in the facts and circumstances of the case the Appellate Tribunal is right in deciding the case in favour of the assessee based on a decision given by the Bangalore Tribunal wherein the existence of a Franchisee Agreement was not brought to the attention of the Tribunal?"

The brief facts of the case is that,

"(i) Intelligence was gathered that M/s. Bharat Cell, Coonoor, a franchisee of BSNL, was authorised to trade in pre-paid BSNL cards. As per para 8.1 of agreement made between the assessee and BSNL, BSNL have agreed upon distributing the following commission to the franchisee:

(i) Basic Fixed Commission of Rs. 200/- for post paid and Rs. 100/- for pre paid cards.

(ii) 5% Commission on recharge coupons.

(iii) Target achievement bonus in consultation with SSA.

(iv) Retention Bonus

(ii) The franchisee/distributor is liable to pay service tax since 1-7-2003 onwards on the Commission/Margin/Bonus received from BSNL both for post-paid and pre-paid BSNL cards under the category "Business Auxiliary Services". The information on the above types of commission paid to the party were solicited from D.G.M. (IMPCS), CTO Compound, Trichy-1. The G.M. (CMTS), BSNL, Trichy had vide their letter ref No. GM/CMTS/Tr.Service Tax/2005-06, dated 27-1-2006 furnished the information relating to commission paid to Mobile phone service dealers for the period 2004-05 detailing the Commission paid for pre-paid and post-paid separately. Further, vide letter ref GM/CMTS/Tr.Service Tax.2005-06, dated 18-3-2006, the G.M. (CMTS), BSNL, Trichy, provided the details of commission paid in the Nilgiris SSA of BSNL to M/s. Bharat Cell for the period from July, 2003 to March, 2004. It was noticed that the assessee has not made any payment of Service Tax on Business Auxiliary Services. Scrutiny of the records received from BSNL by Head Quarters Preventive Unit revealed that the assessee had received a commission of Rs. 17,65,562/- during the period 7/2003 to 3/2005 and the service tax payable works out to Rs. 1,67,739/-(ST-Rs. 1,65,330/- and E.Cess-Rs. 2,409/-). Though the assessee hold centralized registration for payment of service tax, it was noticed that they have not paid Service Tax on the commission received on the pre-paid cards as listed by BSNL and had not followed the procedures laid down under the Service Tax Rules. As it appeared that the service offered by the assessee for sale of pre-paid cards of BSNL for a commission would get covered under the Business Auxiliary Services and the service tax is payable on the commission received by the assessee, a show cause notice dated 7-7-2005 was issued to the assessee. After due process of law, the adjudicating authority vide his order dated 6-6-2007, confirmed the demand of service tax of an amount of Rs. 1,67,739/- (Service Tax of Rs. 1,65,330/- + Rs. 2,409/- - Education Cess) and also imposed a penalty of Rs. 1,67,739/- under Section 78 of Chapter V of Finance Act, 1994 and also a penalty of Rs. 1,000/- under Section 77 of Finance Act, 1994.

(iii) On an appeal by the assessee, the Commissioner of Central Excise (Appeals), vide his order dated 17-6-2008, allowed the appeal. Aggrieved over the same, the Department filed an appeal before the Tribunal which came to be rejected and hence, the present appeal."

2. When this appeal is taken up for hearing, it is brought to the notice of this Court by the learned counsel appearing for the appellant that similar question has been considered by the CESTAT Principal Bench, New Delhi, in the case of G.R. Movers v. Commissioner of Central Excise, Lucknow, reported in , 2013 (30) S.T.R. 634 (Tri.-Delhi) and the issue has been answered against the Revenue and

in favour of the assessee. The relevant portion of the order reads thus,

"23. The argument of the distributors in the present case is not as unreasonable as illustrated in the example discussed above. The following aspects need to be noted in this regard. This is not a case where the distributor is doing a service, billing for it, collecting the charges for the service and then BSNL charging for the services to the customers through a separate process. On the contrary this is a case where BSNL sells the cards through the distributor and collects money from customers through the distributor and then pays to the distributor out of consideration received by them from their customers on which consideration service tax is first discharged by BSNL. That is to say the transactions of both the parties are essentially one and payment on the full value of service occurs earlier than payment of commission to the distributor. Further payment of tax on full value of service rendered by the principal, that is BSNL, is easily verifiable unlike in the case of services rendered by many other sub-contractors for other type of services.

24. ....

25. Interestingly the above services as also the services of selling agent or a distributor of SIM cards or recharge coupon vouchers have been exempted from service tax vide entry No. 29 in Notification 25/2012-S.T., dated 20-6-2012. So, the special nature of services in such cases is recognized though only recently.

26. Though the correct procedure for discharge of the service tax liability by the two parties is that the distributors raise bills for commissions that is due to them along with service tax and BSNL takes Cenvat credit of tax paid by distributors for discharging liability on the telecommunication service provided by BSNL, such procedure does not result in extra realization of Revenue. Considering the special nature of the impugned activities and the fact that it can be easily verified that full taxable value of the service provided by BSNL to customers is subjected to tax, we are of the view that there is no case to undo decisions already taken by the Tribunal in this regard. A contrary approach will result in a difference in value that is taxed for mobile telecom service according to the decision of the Apex Court in the case of Bharat Sanchar Nigam Ltd. and Another Vs. BPL Mobile Cellular Ltd. and Others, . We also note that this issue has lost relevance for the future because of exemption under Notification 25/2012-ST-S. No. 29 for this type of service."

3. In view of the said statement made by the learned counsel that the ratio laid down in aforesaid case, is equally applicable to the case on hand, following the said ratio, the substantial questions of law are answered in favour of the assessee/respondent and against the Revenue/appellant. Accordingly, the civil miscellaneous appeal fails and the same is dismissed. However, in the circumstances of the case, there shall be no order as to the costs.