(2021) 09 CESTAT CK 0046

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Service Tax Appeal No. 86678 Of 2015

Idea Cellular Ltd APPELLANT

Vs

Commissioner Of Service Tax Mumbai -IV RESPONDENT

Date of Decision : 07-09-2021

Acts Referred:

Finance Act, 1994 — Section 65, 65(75), 65(105), 65(105)(zh), 65(104c), 66, 66A, 73, 76, 78
Indian Telegraph Act, 1885 — Section 3, 4
Export of Services Rules, 2005 — Rule 3(1)(ii), 3(1)(iii)

Citation : (2021) 09 CESTAT CK 0046

Hon'ble Judges : Ajay Sharma, J;C.J. Mathew, Technical Member

Bench : Division Bench

Final Decision : Allowed

Judgement

1. Conscious of our responsibility as a judicial institution, and before we take up adjudgement of the rival disputations, it behoves us to point out that the impugned order, disposing off two show cause notices, found no impropriety in imposing penalty under section 78 of Finance Act, 1994 for failure to discharge tax dues in the subsequent period and for which the appellant herein was not even placed on notice. This is particularly glaring as the literal application of legislative intent, espoused by the Hon'ble High Court of Kerala in Asst Commissioner of Central Excise & others v. Krishna Poduval & others [2006 (1) STR 185 (Ker)], is the thread upon which the adjudicating authority has dangled simultaneous imposition of penalties, under section 76 and the section 78 of Finance Act, 1994, for failure to discharge tax liability between 18th April 2006 and 16th May 2008 in the first of the show cause notices. We intend to take up this contradiction only if, in the circumstances following, we are obliged to.

2. From the submissions of Learned Chartered Accountant, representing the appellant, it would appear that, of the total demand of Rs. 51,26,09,423, there is no controversy on Rs.38,32,581 which was held to be leviable on some services procured during the period covered by the first show cause notice. In this

dispute, there is again no controversy that the appellant, M/s Idea Cellular Ltd (as M/s Vodafone Idea Ltd was known then), did remit Rs. 75,55,74,933 towards 'roaming charges', Rs. 170,60,97,474 towards 'cell termination charges' and Rs. 64,17,94,492 towards 'carrier charges' to overseas telecom operators. Again, in this dispute, there is no controversy that appellant was contractually obliged, in accordance with universal industry practice, to recompense overseas operators. Nonetheless, it is their cavil that the adjudicating authority has contrived an unwarranted enlargement of one of the elements of 'support service of business or commerce' of overcoming the limitations of legislative intent to tax only 'telecom services' provided within the country.

3. Learned Chartered Account put forth the proposition that the expression 'infrastructural support service' of the definition of 'support service of business or commerce' in section 65(104c) of Finance Act, 1994, upon which the adjudicating authority has rested the entire demand, cannot be expanded beyond the specifics of the enumeration to encompass all and any kind of infrastructure for which he placed reliance on the decision of the Hon'ble Supreme Court in South Gujarat Roofing Tiles Manufacturers Association v. State of Gujarat [1976 (10) TMI 147-Supreme Court] and its application in the decision of the Tribunal in Air Liquide North India Pvt Ltd v. Commissioner of Central Excise, Jaipur [2017 (6) TMI 476-CESTAT New Delhi] which was affirmed by the Hon'ble High Court of Rajasthan in Commissioner of Central Excise & Service Tax, Alwar v. Air Liquide North India Pvt Ltd [2018 (8) TMI 1291-Rajasthan High Court]. In the light of other submissions made by Learned Chartered Accountant, the contours of this enunciation does not require our immediate attention; the claim of the appellant for coverage under another, and entirely different, 'taxable service' does in the first instance.

4. It is the contention of Learned Authorised Representative that the adjudicating authority has elaborated upon the interpretation of the inclusive component in the definition abundantly enough to justify the confirmation of tax liability. In this connection, he drew our attention to the relevant portions of the impugned order.

5. In the proceedings leading to this appeal for setting aside order-in-original no. 11/ST/RN/IDEA/M-II/13-14 dated 30th April 2015 of Commissioner of Service Tax-II, Mumbai, recourse was had to section 66A of Finance Act, 1994 designed, in conjunction with Taxation of Service (Provided from Outside India and Received in India) Rules, 2006, to shift the liability to tax on to the recipient, as deemed provider of 'taxable service', when procured from outside India. In the course of resolving disputes arising from such deemed provision of service, the Tribunal has enunciated the schema of the special legislation thus

'10. It is clear from the above that the adjudicating authority has transposed the transactions onto a portion of the definition in Section 65(75) and Section 65(105)(zh) of Finance Act, 1994 without any discussion to identify the appellant as the recipient of the service and, in accordance with the special provisions of Section 66A, the deemed provider of the service for liability to tax. This is an essential requirement considering the manner in which Section 66A has been enacted as a deviation from the general norm in Section 66 of Finance Act, 1994. It would appear to us that the tenor of the various decisions handed down by the Tribunal, and cited by the rival sides, have not been appreciated for the valorous attempts to clarify this much-misinterpreted provision of Finance Act, 1994. It, therefore, devolves upon us to enlighten both disputants and, at the same time, provide ourselves with that steady and unwavering beam within which we will find the resolution to this dispute.

11. After a futile attempt, through a provision in the Service Tax Rules, 1994, to accord a national treatment to services received from abroad that should, in equity, be subject to the same tax that a provider and receiver situated within the domestic territory is, legislative sanction to incorporate Section 66A in Finance Act, 1994 was accorded with effect from 18th April, 2006. The key expression authorising the collection of tax dues from the recipient of the service as a deviation from the norm of placing the burden on the provider is

'.......and such taxable service shall be treated as if the recipient had himself provided this service in India, and accordingly all the provisions of this Chapter shall apply :'

12. It is apparent that legislative wisdom considered it necessary to discard for this purpose the use of the expression 'person liable to tax' that applies to 'reverse charge' in a domestic situation and to substitute it with the legal fiction of the recipient being deemed to be the provider of the service and, thereby, subject not only to the tax but also all other obligations and privileges ensconced in the Chapter. It is not the force of administrative convenience that prompted the alteration but the dilemma of having to collect a tax from a nebulous entity that could not be identifiable as the corporeal 'person' referred to in the various enumerations in Section 65(105) of Finance Act, 1994 and the apparent lack of jurisdiction over the overseas entity. Conversely, the recipient of the particular service who is to be so subjected to tax must necessarily be associated with the service in some manner; it was to give effect to such intention that the Taxation of Service (Provided from Outside India and Received in India) Rules, 2006 was framed. This, again, is apparent from the content of the Rules and the authority under which the Rules are framed; these Rules do not flow from Section 66A but invoke the general rule-making powers, as well as the power to exempt, conferred in Finance Act, 1994. These Rules enable the identification of the person in receipt of the service in the context of the specific taxable service. We, therefore, come to the conclusion that, where Section 66A of Finance Act, 1994 is sought to be invoked, the classification of the service must necessarily be dealt with in concatenation with identification of the recipient. The impugned order has failed to do so and is liable to be set aside on that count itself.

13. Nevertheless, we must also address the larger issue of the intention of the sovereign legislature in placing the burden of tax on the recipient of the service. The economic reality of cross-border commercial transfer of goods has been

grafted into the tax laws of most countries in near-perfect visualisation of the flows and has evolved as a nearly universal code. The intangibility of services, unfortunately, does not easily lend itself to such a clear perception. Such transnational engagement in services take multifarious forms which are not readily amenable to straitjacketing as 'one rule fits all'; hence, the selective culling of judicial interpretations in a vain attempt to persuade us to adopt respective points of view. Most disputes have stemmed from the single-minded determination to tax by relying upon the Explanation in Section 66A that disaggregates units within the same commercial entity and the refuge sought by assessees in this disaggregation to claim exclusion from taxability. Ignoring these expectations, an analysis of the various decisions points to the convergence of thinking apparent in the judicial interpretations.'

in Korean Air v. Commissioner of Service Tax-I, Mumbai [2017-TIOL-3332-CESTAT-MUMBAI]. The nuance of this levy, fashioned by legislated enactment and shaped by judicial precedent, and the particular characteristics of the 'taxable service' rendered by the appellant, inextricably conjoined as they are, impact the legality and propriety of the impugned order to which we now address ourselves.

6. As a public utility inhering in the State, telecommunication is regulated by the municipal laws of each country legislated specifically for oversight. Owing to this, taxability is couched with reference to the licensing provisions which, inevitably, has a bearing on the manner in which 'national treatment' is accorded to the access beyond the jurisdiction - whether temporarily based outside India or while engaging in cross-border communication - of such legislation. The appellant is a telecommunication operator licensed by the relevant regulatory agency and, in that capacity, is authorised to offer services to its registered subscriber base. Subscribers of other licensees also may, under contract, be serviced by them with the stipulation that the subscriber is obliged to pay for such services only to the licensee with which they are registered. Likewise, when travelling outside India or for international calls from India, servicing is handled, in full or partially, by an overseas operator under contract with the licensed operator. In a nutshell, the subscriber, irrespective of the operational utilisation, engages commercially only with the licensee with whom the telephone number has been registered. It is in this context that the 'taxable service' in section 65 (105) is restricted to service provided, or to be provided,

'(b) to a subscriber, by the telegraph authority in relation to a telephone connection;'

and with effect from 1st June 2007

'(zzzx) to any person, by the telegraph authority in relation to telecommunication service;'

with 'telegraph' having the meaning

'(110)... assigned to it in clause (1) of section 3 of the Indian Telegraph Act, 1885...;'

and 'telecommunication service'

'(109a)... means service of any description... By the person who has been granted a license under the first proviso to sub-section (1) of section 4 of the Indian Telegraph Act, 1885...'

in section 65 of Finance Act, 1994.

7. Consequently, the substitution of 'subscriber', from the legislative intent of including inter-operator servicing within the definition, did not alter the transactional engagement of the licensee with the subscriber. It is to this avatar of 'taxable service' that the submissions of Learned Chartered Accountant incline in portraying the service provided by the appellant, along with those provided to the appellant, entirely, and exclusively, as 'telecommunication service' which is acknowledged as such only when licensed under the appropriate statute referred to Finance Act, 1994.

8. This is the context in which the Tribunal, adjudging the dispute in Vodafone Essar Mobile v. Commissioner of Service Tax, Delhi [2017 (6) GSTL 67 (Tri-Del)], was compelled to take note of the significance of the licencing regime for holding that

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

9. It is contended by Learned Chartered Accountant that this decision was not available to assist the wisdom of the adjudicating authority in the impugned proceedings and that the decision of the Tribunal, having been accepted by the service tax authorities, precludes any disputation on that score now. Learned Authorised Representative did not contest this assertion. Though the contours of that dispute lay in the attempt to tax identical commercial engagement as provision of 'business auxiliary service' by the overseas telecom operator, the principle that taxability, arising only as provider of 'telecommunication service', does not apply to an overseas entity stands settled irrespective of any alternative within which service tax authorities choose to enforce tax liability.

10. It has been contended by Learned Chartered Accountant, and without contest from Learned Authorised Representative, that this decision of the Tribunal derives felicitous support of legislative intent from the two clarifications, viz., in circular no. 137/21/2011 dated 15th July 2011 and in circular no. 137/21/2011 dated 19th December 2011 of Central Board of Excise & Customs, that identified the service for which 'international private leased circuit' charges were consideration for exclusive use by commercial entities as 'telecommunication service' with no tax consequence in view of the restricted scope for taxing the consideration after a tentative foray at subjecting it to tax as 'support service of business or commerce' from the Explanation for definition of 'infrastructural support service' included therein. This revisit is squarely applicable to 'carrier charges' in the present dispute which is consideration for usage akin to 'private circuit' leased to users save that it is the public network which is offered at operator-to-operator level for cross-border transmission of data or voice signals.

11. We have already taken note of the licence that enables entities like the appellant to offer services to its subscribers; the charges due from subscribers are also itemised in the bills raised for payment at pre-arranged intervals. No other operator is contractually competent to collect charges from the subscriber. At the same time, the constraints of territorial licencing - whether within the country or outside it, though, in this dispute, the former does not concern us - impede provision of service to subscribers who are physically, albeit temporarily, outside the licence territory and in facilitating communication of 'calling party' subscriber in India with 'called party' in another territory. Doubtlessly, the equipment of licencee outside the country is utilised but, nonetheless, are not placed at the disposal of the appellant; the subscriber is provided in entirety, or

for continuity of service, directly by the overseas operator. The premise of the adjudicating authority that infrastructural facilities of the overseas operator are made use of by the appellant has no basis in facts.

12. The billings for each such use are transmitted through the appellant to the subscriber as separately itemised charges which, though paid on demand to the overseas operator by the appellant, is to be recovered from the subscriber. In terms of the decision of the Tribunal in Paul Merchants Ltd v. Commissioner of Central Excise, Chandigarh [2013 (29) STR 257 (Tri-Del)] that

'21. It may be seen that the phrase "delivered outside India" used initially could not have been understood clearly in the case of services which is intangible and so the expression was replaced by "is provided from India" which is an expression better understood. However the meaning of the expression "used outside India" continued to create interpretational difficulty till this expression also finally got deleted on 27-2-2010. PML argues that their services are used in the business of Western Union in their business outside India. Revenue argues that the service is utilized in the business of Western Union in India, because all the activities of PML are carried out in India. Here it is to be noted that Revenue is equating "used" with "performed" though they are directly not stating so. After having used the word "performed" in Rule 3(1)(iii) of Export [of Services] Rules, if the same word is not used and a different word is used in Rule 3(1)(iii) it is obvious that the words are not interchangeable. Further as already explained PML is getting their payment from Western Union located abroad and it is very obvious that the service is used by the person making the payment and not the recipient of money in India who does not make any payment. The Western Union is getting their payment from the person remitting money abroad and hence obviously the services rendered by PML is ultimately used by the person remitting the money from abroad. So we come to the conclusion that the impugned service is used outside India and would qualify as export of services as per conditions laid down in Rule 3(1)(iii) of Export of Services Rules, 2005. These arguments are equally applicable for the period from 1-5-2006, since when the service is classifiable as "Banking and Financial Services", because this service is also specified under Rule 3(1)(iii) of Export of Services Rules, 2005 and not under Rule 3(1)(ii).'

it is the flow of consideration that renders the provision of service complete. It is not the case of the service tax authorities that the amount paid by the subscriber in relation to 'roaming charges' or for 'international calls' are subsumed in the revenues of the appellant. The separate and distinct itemisation in the billing forecloses such supposition.

13. It only remains to be seen if, by any stretch, the services of the overseas entity are 'input service' for the appellant. The manner of billing and the specific stage at which the subscriber becomes dependant on the overseas entity controverts that possibility. The appellant, as a licencee of the domestic telecommunication regulatory regime, is not conferred with empowerment to

operate in a foreign territory and can neither, conceivably, offer such service independent of the overseas entity nor avail of the equipment of overseas operator for rendering 'telecommunication service' to its subscribers. The activity, therefore, lies outside the ambit of 'support service of business or commerce' which is the 'taxable service' sought to be fastened on the appellant as 'deemed provider' under section 66A of Finance Act, 1944. Consequently, the demand of tax on 'roaming charges' and 'call termination charges' in the impugned order fails.

14. Tax liability of Rs. 12,74,60,204, Rs. 35,10,51,305 and Rs.3,02,65,333 under section 73 of Finance Act, 1994, along with interest thereon under section 75 of Finance Act, 1994, penalties under section 76 and penalty under section 78 of Finance Act, 1994 are set aside to allow the appeal to that extent.

(Order pronounced in the open court on 07/09/2021)