(2013) 08 BOM CK 0260

In the Bombay High Court

Case No : Public Interest Litigation No. 112 of 2011 and Cri. Public Interest Litigation No. 29 of 2013

Kanchandevi Sunderlal Kothari APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 12-08-2013

Acts Referred:

Citation : (2014) 33 STR 116

Hon'ble Judges : S.C. Gupte, J;D.Y. Chandrachud, J

Bench : Division Bench

Advocate : Jitendra Sunderlal Kothari, for the Appellant; Pradeep S. Jetly, Ms. Suchitra Kamble, Ajay Patil, Suresh Kukar for Income Tax Department, Sayaji Shinde, APP for the State, Shri Milind Sathe and Chirag Shah, Amicus Curiae, for the Respondent

Judgement

1. The Petition which has been filed in the public interest raises important issues relating to the recovery of taxes in respect of cellular telephone services provided by telecom operators. A list of the telecom service operators in various circles in India has been furnished. Since the issues which have been raised by the Petitioner in person are of considerable significance, a Division Bench of this Court while hearing the petition, by an order dated 17 January, 2013, requested Mr. Milind Sathe, Senior Advocate to appear as amicus curiae with the assistance of Mr. Chirag Shah, Advocate. Since the petition has been drafted by a party in person, many of the issues which would arise for consideration have not been set out as succinctly as would be expected of a presentation by a legal draftsman. Hence, during the course of the hearing, the learned amicus curiae has formulated the issues which would arise, the factual background and the applicable provisions of law. We now proceed to summarize the gist of what has emerged before the Court. The issues in the PIL pertain to recovery of taxes on account of-

(i) Levy of Service Tax on providing of services by telecom operators to various customers;

(ii) Tax deduction at source on the commission/brokerage paid by the Telecom Service Providers to distributors and by distributors to retailers.

2. The above issues are only in respect of what is known as "prepaid cellular connections". Insofar as postpaid connections are concerned, the Service Tax is recovered by the cellular operators by raising a bill and recovering the amount from the bill for a specified service period. The bill is required to include details of charges for service and the Service Tax. The assessment of Service Tax, insofar as postpaid services are concerned, is not the issue in the present PIL.

3. Prepaid connections are granted by cellular operators. The following entities are involved in the service:

(i) Service provider (cellular telephone provider);

(ii) Distributors;

(iii) Retailer appointed by the distributors;

(iv) Other retailers like shops, etc., who sell vouchers over the counter; and

(v) Customers.

4. The Cellular Service Provider grants the facility of distributing/selling talk time to the distributor. This talk time can be by way of coupons/vouchers which are known as (i) plan vouchers, (ii) top up vouchers and (iii) special tariff vouchers. The latter two of the vouchers are by way of sale of talk time by the cellular operator to the consumer, which is either sold through distributor, retailer or directly by the service provider to the customer.

5. The above vouchers can also be purchased electronically by logging on to the website of the service provider (E-Recharge).

6. In each of the above cases when a voucher is either purchased physically or electronically, the charges paid by the consumer are the gross amount paid by the consumer for the service provided.

7. Service Providers grant the distributors a fixed amount to be sold as talk time. This in turn is sold by the distributor to the retailer/shops or to the customers directly.

8. On a particular amount of talk time being sold by the distributor, he gets or is entitled to a commission which in turn sometimes is granted by the Service Provider by way of talk time. For this additional talk time, the distributor does not pay any cash consideration. However, this talk time is sold by the distributor to the retailers and customers for consideration. This revenue generated is not assessed for Service Tax collection.

9. In some cases of electronic recharge there is a system followed between the

service provider and distributor where bulk talk time credit is granted to the distributor which he keeps on selling to retailers/customers. The Petitioner in his statement has described this as follows:

10. There is no system by which the entire talk time, which is sold by the cellular operator, can be accounted so as to assess the revenue generated from that for the purposes of Service Tax.

11. To correctly assess the entire revenue generated for cellular telephone services provided by the cellular operator, the following steps need to be taken:

(i) All vouchers, whether physically or electronically sold by the Service Providers, should have a record;

(ii) The sale of vouchers should be correspondingly matched with the actual cellular telephone services provided by the Service Providers to match the sale and utilization of talk time;

(iii) In the few instances referred to above, there is obviously additional talk time sold and utilized by the customer, which is not accounted for, for the Service Tax;

(iv) Post 2012, by virtue of Telecom Consumers'' Protection Regulations, 2012 framed by the Telecom Regulatory Authority of India (TRAI) by a notification dated 6 January, 2012, the cellular operators are now mandated to provide information in respect of each of the three vouchers sold physically, i.e. (i) plan vouchers, (ii) top up vouchers, and (iii) special tariff vouchers. The price of these vouchers is now required to give break-up of the total charges including processing fee, administration charges, tax deducted, monetary value available for the customer, etc. [See Regulations 6 and 7]

12. The report filed on behalf of Service Tax Department [pages. 506 to 510] and the gist of information [pages. 511 to 513] does not indicate that the above concerns and the possibility of certain transactions escaping assessment for Service Tax have not been dealt with or taken care of.

13. The Service Tax regime prior to the Finance Act, 2012 broadly provided as follows:

(1) Section 66 of Finance Act, 1994 providing for charge of Service Tax on taxable services.

(2) Section 67 of the Finance Act, 1994 provided for valuation of taxable services.

(3) Taxable services were defined u/s 65(105)(zzzx) to mean service rendered "to any person by the telegraph authority in relation to telecommunication services".

(4) "Telegraph Authority" is defined u/s 65(111) of the Finance Act, 1994 as the authority u/s 3 of the Indian Telegraph Act, 1885. Section 3(6) of Telegraph Act reads thus:

''Telegraph authority'' means the Director General of Posts and Telegraphs, and includes any officer empowered by him to perform all or any of the functions of the telegraph authority under this Act.

(5) Section 4 of Indian Telegraph Act confers upon the Central Government exclusive privilege of providing telegraph. The Central Government can confer upon any other person the said privilege. The cellular telecom operators are licensees u/s 4 and, therefore, fall within the definition of "telegraph authority" as defined u/s 4 of Indian Telegraph Act, 1885 as well as Section 65(111) of Finance Act, 1994.

(6) Telephone services were covered by Section 65(109a) to mean telecommunication service, which reads as follows:

65(109a). ''Telecommunication service'' means service of any description provided by means of any transmission, emission or reception of signs, signals, writing, images and sounds or intelligence or information of any nature, by wire, radio, optical, visual or other electro-magnetic means or systems, including the related transfer or assignment of the right to use capacity for such transmission, emission or reception by a person who has been granted a licence under the first proviso to sub-section (1) of Section 4 of the Indian Telegraph Act, 1885 and includes-

(i) voice mail, data services, audio text services, video text services, radio paging;

(ii) fixed telephone services including provision of access to and use of the public switched telephone network for the transmission and switching of voice, data and video, inbound and outbound telephone service to and from national and international destinations;

(iii) cellular mobile telephone services including provision of access to and use of switched or non-switched networks for the transmission of voice, data and video, inbound and outbound roaming service to and from national and international destinations;

(iv) carrier services including provision of wired or wireless facilities to originate, terminate or transit calls, charging for interconnection, settlement or termination of domestic or international calls, charging for jointly used facilities including pole attachments, charging for the exclusive use of circuits, a leased circuit or a dedicated link including a speech circuit, data circuit or a telegraph circuit;

(v) provision of call management services for a fee including call waiting, call forwarding, caller identification, three-way calling, call display, call return, call screen, call blocking, automatic call-back, call answer, voice mail, voice menus and video conferencing;

(vi) private network services including provision of wired or wireless telecommunication link between specified points for the exclusive use of the client;

(vii) data transmission services including provision of access to wired or wireless facilities and services specifically designed for efficient transmission of data; and

(viii) communication through facsimile, pager, telegraph and telex, but does not include service provided by-

(a) any person in relation to on-line information and database access or retrieval or both referred to in sub-clause (zh) of Clause (105);

(b) a broadcasting agency or organization in relation to broadcasting referred to in sub-clause (zk) of clause (105); and

(c) any person in relation to internet telecommunication service referred to in sub-clause (zzzu) of clause (105)

(7) Thus, the services provided by cellular operators by way of prepaid connection was a taxable service covered by Sections 65(105)(zzzx) and 65(109a) of the Finance Act, 1994. If the break-up in the charges recovered by cellular operators was not given, then in that case Section 67(2) would operate which provides that the gross amount charged by the Service Provider would be deemed to include the Service Tax as well and on that basis the Telecom Service Provider would be liable for assessment of Service Tax.

14. Post 2012: The taxation regime for Service Tax has been amended as follows:

(1) Section 65B(34) provides for a negative list of services which are not charged to Service Tax u/s 66D.

(2) Section 66, which was the earlier charging section for Service Tax is now deleted. Section 66B introduced Post 2012 is charging Section which reads thus:

66B. There shall be levied a tax (hereinafter referred to as the Service Tax) at the rate of twelve per cent on the value of all services, other than those services specified in the negative list, provided or agreed to be provided in the taxable territory by one person to another and collected in such manner as may be prescribed.

(3) Section 66D provides for a negative list of services which are not to be charged for Service Tax. Telecommunication services are not a part of the negative list. Section 66D reads as follows:

66D. The negative list shall comprise of the following services, namely:-

(a) services by Government or a local authority excluding the following services to the extent they are not covered elsewhere-

(i) services by the Department of Posts by way of speed post, express parcel post, life insurance and agency services provided to a person other than Government;

(ii) services in relation to an aircraft or a vessel, inside or outside the precincts of a port or an airport;

(iii) transport of goods or passengers; or

(iv) support services, other than services covered under Clauses (i) to (iii) above, provided to business entities.

(4) The valuation of chargeable services continues to be u/s 67, which reads as follows:

67. Valuation of taxable services for charging Service Tax. - (1) Subject to the provisions of this Chapter, Service Tax chargeable on any taxable service with reference to its value shall,-

(i) in a case where the provision of service is for a consideration in money, be the gross amount charged by the service provider for such service provided or to be provided by him;

(ii) in a case where the provision of service is for a consideration not wholly or partly consisting of money, be such amount in money, with the addition of Service Tax charged, is equivalent to the consideration;

(iii) in a case where the provision of service is for a consideration which is not ascertainable, be the amount as may be determined in the prescribed manner.

(2) Where the gross amount charged by a service provider, for the service provided or to be provided is inclusive of Service Tax payable, the value of such taxable service shall be such amount as, with the addition of tax payable, is equal to the gross amount charged.

(3) The gross amount charged for the taxable service shall include any amount received towards the taxable service before, during or after provision of such service.

(4) Subject to the provisions of sub-sections (1), (2) and (3), the value shall be determined in such manner as may be prescribed.

15. From the above, it is evident that-

(i) the services provided by cellular operators are chargeable to service tax; Pre 2012 and Post 2012;

(ii) the entire amount received by the cellular operators from the customer, including the price of SIM card, is the value of taxable service. (See: Idea Mobile Communication Ltd. Vs. C.C.E. and C., Cochin,) The provision or sale of handset is not covered by service since it is a sale of goods liable for payment of VAT. (See Bharat Sanchar Nigam Ltd. and Another Vs. Union of India (UOI) and Others, ;

(iii) in the system in which the prepaid vouchers are sold, either physically or electronically, the price of such vouchers would include processing charges or administration fee, Service Tax and the price of talk time or activation charges, as the case may be;

(iv) if the break-up is not given, the entire price should be deemed as gross value inclusive of Service Tax; [see Section 67(2)]

(v) sale of vouchers, i.e. plan vouchers, top up vouchers or special tariff vouchers, either sold physically or electronically, are not counted properly and there is no provision either in the TRAI Regulations or in the Service Tax to ensure that the entire sale of vouchers is accounted for the purposes of levy of Service Tax;

The Service Tax Department needs to look at the above aspect in respect of all cellular operators to ensure that Service Tax is assessed and levied on all schemes, transactions and plans by whatever name called and under whatever schemes as long as they result in providing of service by Cellular operator to the consumer.

16. Re: Tax deduction at source

(1) Chapter XVII of thee income tax Act, 1961 provides for collection and recovery of tax.

(2) Sections 192 to 195 provide for tax deduction at source.

(3) Section 194H requires that any person paying income by way of commission/ brokerage shall deduct tax at source at the rate of 5%.

(4) Section 195 is the residuary provision for tax deduction at source which requires any person paying to another person any other sum chargeable under the provisions of income tax Act to deduct tax at the rates specified.

(5) The commission paid by Cellular Service Providers to the distributors or retailers is thus commission from which the tax is required to be deducted at source under the provisions of Section 194 of the Income Tax Act.

(6) The fact that commission is paid by the cellular operators to the distributors/ retailers is not disputed.

(7) Whether tax is deducted at source on such amount or not is not clear and whether such TDS is reflected in the accounts of cellular operators as well as distributors, needs to be seen.

(8) When the commission is paid by way of additional talk time, how the same has to be treated for the purposes of tax is another angle which needs to be looked into by the income tax Authorities.

17. An affidavit in reply was filed in these proceedings by the Assistant Commissioner of Service Tax on 29 April, 2013. The affidavit states that by a letter dated 8 February, 2011 addressed to the Deputy Commissioner (AE),

Service Tax-I, Mumbai, two envelopes (one containing the source information and the other containing the identify of the informant) was forwarded by the officer who recorded the source information. On the basis of the information recorded in form "AE-1 Intelligence Report" action was initiated and a copy of the AE-I was forwarded to the Director General, DGCEI and Commissioner of Service Tax among other authorities. It was proposed that further steps would be initiated by the Anti-Evasion wing in regard to information pertaining to the jurisdiction of the Service Tax-I, Mumbai Commissionerate and in respect of telecom operators in other jurisdictions, the request for investigation will be initiated with the respective jurisdictional authorities. Letters were issued on 9 February, 2011 and 4 March, 2011 to five telecom operators. Similarly, on the basis of specific information gathered, the premises of four telecom service providers were visited to ascertain information. It has been stated that a scrutiny of the records and investigation undertaken by the Anti-Evasion wing of the Service Tax-I, Mumbai Commissionerate has till date not confirmed any evasion of Service Tax. We have duly perused the material which has been provided by the Petitioner as well as the replies and the AE-1 Intelligence report. We are of the view that the issues which have been highlighted before the Court by the amicus curiae as noted above, would require a closer application of mind and investigation both by the Service Tax authorities and by the concerned Income Tax authorities. In the circumstances, we are of the view that a response both of the Service Tax and Income Tax authorities to the issues which have been raised before the Court would be warranted. We expect that these replies shall be filed within a period of six weeks from today. We accordingly stand over the further proceedings to 25 September, 2013.

