
(2023) 04 CESTAT CK 0029

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Appeal ST No. 638 Of 2010

Lovely Traders

APPELLANT

Vs

CCE & ST, Rohtak

RESPONDENT

Date of Decision : 18-04-2023

Acts Referred:

Citation : (2023) 04 CESTAT CK 0029

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

Bench : Division Bench

Advocate : Joy Kumar, Amandeep Kumar

Final Decision : Allowed

Judgement

S.S.Garg, Member (J)

1. The present appeal is directed against the impugned order dated 14/15.1.2010 passed by the Commissioner (Appeals) wherein the Commissioner (Appeals) has rejected the appeal of the appellant.

2. Briefly facts of the case are that the appellant are franchisee of BSNL for providing the service of promotion and marketing and distribution of various products of BSNL for which they were receiving the commission and was not paying service tax thereon. During the audit, this fact was noticed by the department and a show cause notice was issued on 12.1.2007 to the appellant for demand of Rs.77,578/- for the period 1.9.2006 to 31.3.2007 which was confirmed ex-parte vide Order-in-Original dated 19.12.2008. Aggrieved by the said order, the appeal filed by the appellant before the Commissioner (Appeals), who upheld the Order-in-Original. Hence, the present appeal.

3. Heard both the parties and perused the records.

4. Ld. Counsel for the appellant submits that the appellant is not liable to pay service tax on the commission received by them. He further submits that BSNL has discharged service tax liability on full value equal to MRP (maximum retail

price) which was inclusive of the appellant's discount/ commission and hence they are not liable to pay service tax. He further submits that they have produced certificate on record which is issued by BSNL wherein they have certified that maximum retail price of prepaid mobile connections/recharge coupons on which service tax has been discharged during the period 1.7.2003 to March,2007 includes commission/discount paid to M/s.Lovely Traders i.e. the appellant, who were their authorised distributor/franchisee. Ld. Counsel further submits that the department did not enquire from BSNL regarding payment of service tax on the commission paid to the appellant. He further submits that charging of tax twice on the commission received by the appellant would tantamount to double taxation which is not permitted in law. He further submits that this issue is no more res intera as the same has been settled in various decisions of the Tribunal. He cited following decisions:-

1. Daya Shankar Kailash Chand vs. CCE & ST, Lucknow-2013 (30) STR 428 (Tri.-Del.)
2. Chotey Lal Radhey Shyam vs.CCE & ST, Lucknow-2016 (44) STR 266 (Tri.-All) upheld by the Hon'ble Allahabad High Court.
3. South East Corporation vs. CCE & ST, Cochin-2007 ((8) STR 405 (Tri. Bang.)
4. R.Venkataramanan vs. CCE, Trichy-2009 (13) STR 187 (Tri.-Chennai)
5. Goyal Automobiles vs. CCE, Chandigarh-II-2016 (43) STR 268 (Tri.-Del.)
6. Dyal Medicos vs. CCE & ST, Ludhiana-2017 (49) STR 409 (Tri.-Del.)

5. On the other hand, Ld.DR reiterates the findings of the impugned order and submits that the service tax has rightly been demanded from the appellant as the appellant has received commission from BSNL which is liable to service tax. Ld.DR submits that the decision relied upon by the appellant in the case of Daya Shankar Kailash Chand (supra), Chotey Lal Radhey Shyam (supra), South East Corporation (supra), R.Venkataramanan (supra) are not applicable to the present case. In those cases, they are only dealing with issue of purchase and sale of sim card, no question of charging of service tax on commission amount was raised therein whereas in the present case, the only issue involved is regarding liability of appellant on commission received from BSNL. Ld.DR fairly concedes that in the case of Goyal Automobiles (supra) and Dayal Medicos cited (supra), relied upon by the appellant, the issue of levability of service tax on commission received from BSNL was involved. He further submits that the department filed appeal against the decision of the Tribunal in the case of Dayal Medicos (supra) but the same was withdrawn on monetary limit under National Litigation Policy. But the Hon'ble High Court in its order has specifically mentioned that substantial question of law has kept open.

6. After carefully considering the submissions of both the parties and perusal of record and several decisions relied upon by both sides, we are of the considered view that the issue is no more res-intera in view of the judgement in the case of

Goyal Automobiles (supra) which was not challenged by the Revenue before the appellate authority. Relevant paras from the said judgement are reproduced herein below:

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.

7. We find that BSNL has already deposited service tax on commission received by the appellant, which is clear from the certificate produced by them on record. Therefore, by following the ratio of said decision, we allow the appeal by setting aside the impugned order.