(2024) 05 CESTAT CK 0008

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Service Tax Appeal No. 38 Of 2011

M/s Krishna Electronics — APPELLANT

Vs

Commissioner Of Central Excise And ST, Delhi III — RESPONDENT

Date of Decision : 07-05-2024

Acts Referred:
Finance Act, 1994 — Section 65(19), 65(105) (zzb), 73, 76, 77, 78

Citation : (2024) 05 CESTAT CK 0008

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

Bench : Division Bench

Advocate : Shivam Syal

Final Decision : Allowed

Judgement

S. S. Garg, Member (J)

1. The present appeal is directed against the impugned order dated 31.08.2010 passed by the Commissioner (Appeals) whereby the Commissioner (Appeals) has confirmed the demand as stated in the show cause notice along with interest and also imposed penalty of Rs. 16,00,000/- under Section 76, 77 and 78.

2. Briefly the facts of the present case are that the appellants are Authorized Distributor/Franchise of BSNL and are selling its SIM Cards/Recharge coupons since may 2003 as an authorized distributor/franchise of BSNL the appellant are purchasing SIM Cards/Recharge coupons from BSNL on full payment of the Purchase consideration and selling these SIM Cards/ Recharge coupons to its customers on a Principal to Principal basis on a profit Margin. The face value of the SIM Cards/Recharge coupons sold by BSNL to the appellant also includes appellant's profit margin and BSNL is paying the service tax on the face value of SIM Cards/Recharge coupons.

3. The Revenue entertained the view that the appellant is liable to pay service tax under category of Business Auxiliary Services as he is promoting and marketing the services offered by the BSNL. On these allegations, a show cause

notice was issued demanding service tax for the period from 01.01.2007 to 30.09.2007 amounting to Rs. 14,51,026/- and education Cess of Rs. 29,020/- and higher education cess Rs. 7,561/- under Section 73 of the Finance Act, by invoking the extended period of limitation along with interest and penalties. The appellant filed the reply to the show cause notice and after following the due process, the Original Authority confirmed the demand and thereafter, the appeal was filed which was rejected. Hence, the present appeal.

4. None appeared on behalf of the appellant.

5. We have heard the Ld. DR and perused the material on record including the written submissions filed by the Ld. DR wherein the Ld. DR reiterated the findings of the impugned order and submitted that as per the agreement between appellant and BSNL, the appellant was operating as franchise/agent of BSNL and was getting commission for promoting the services of BSNL and it is not the case of mere sale and purchase of products or services of BSNL. He further relied upon the judgment of Idea Mobile Communication Limited Vs. CCE, Cochin-2011-TIOL-71-SC wherein it has been held that there is no element of sale involved in the transaction of SIM Cards. He further submitted that the judgments relied upon by the appellant are not applicable in the present case.

6. After considering the submissions of Ld. DR and after perusal of the material and the decisions relied upon by the appellant in the pleadings, we find that the commission received by the appellant are for sale of SIM Cards and other products of BSNL. We also find that the service tax has already been paid by the BSNL on the products sold by the appellant.

7. Further, we find that this issue is no more res integra and has been settled by the various decisions of the Tribunal as relied upon by the appellant cited (Supra); in the case of Commissioner of CGST Vs. Rama Sales and Service – 2018 (12) GSTL 286 (All.), the Hon’ble Allahabad High Court held that purchase and sale of SIM Cards by franshisee/distributors appointed by telecom companies not leviable to Service Tax under category of Business Auxiliary Service especially when such companies already discharged service tax on gross amount of Such SIM cards and charging any further service tax on same amount would lead to double taxation. Similarly, in the case of Dyal Medicos Vs. CCE and ST, Ludhiana-2017 (49) STR 409 (Tri.) it was held by the Tribunal that commission on SIM Cards of BSNL where service tax has already been discharged by BSNL on full value of SIM cards, separate commission is not payable. Further, in the case of Daya Shankar Kailash Chand cited (Supra), the tribunal has held that the activity of purchase and sale of SIM card belonging to BSNL where BSNL discharged the service tax on the full value of the SIM cards, does not amount to providing business auxiliary services and confirmation of demand on the distributor for the second time is not warranted as per Section 65(19) and 65(105) (zzb) of Finance Act, 1994.

8. We also find that the Department’s appeal against the said decision was also

dismissed by the Hon’ble Allahabad High Court as reported in 2014 (34) STR J99 (All.).

9. Ld. DR has relied upon the decisions of the Hon’ble Apex Court in the case of Idea Mobile Communication Limited Vs. CCE, Cochin-2011-TIOL-71-SC. It is pertinent to mention that this judgment of the Hon’ble Apex Court was considered by the Tribunal in the case of Daya Shankar Kailash Chand Vs. Commissioner of C.Ex. & S.T., Lucknow 2013 (30) STR 428 (Tri.) and it was observed by the Tribunal that the issue involved in the said case before the Supreme Court was different than the issue involved in the present case. It was also observed in para 3 in the case of Daya Shankar Kailash Chand that the issue involved in the case of Idea Mobile Communication before the Hon’ble Supreme Court was as to whether the value of SIM Cards is required to form part of the activation charges or not; in as much as the issue before the Hon’ble Supreme Court was entirely different than the issue involved in the present case. This decision of the Tribunal was upheld by the Hon’ble High Court of Allahabad High Court as reported in 2014 (34) STR J99 (All.).

10. By following the ratio of the above said decisions, we are of the considered view that the impugned order is not sustainable in law and the same is set aside by allowing the appeal of the appellant with consequential relief, if any, as per law

