
(2023) 07 CESTAT CK 0032

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : ?Service Tax Appeal No. 40129 Of 2013

M/S.Bharat Sanchar Nigam Limited

APPELLANT

Vs

Commissioner Of GST & Central Excise

RESPONDENT

Date of Decision : 20-07-2023

Acts Referred:

Service Tax (Determination Of Value) Rules, 2006 — Rule 5(1)
Finance Act, 1994 — Section 65(104), 65(105)(zzzx)

Citation : (2023) 07 CESTAT CK 0032

Hon'ble Judges : Sulekha Beevi C.S., Member (J); Vasa Seshagiri Rao, Member (T)

Bench : Division Bench

Advocate : G. Vardini Karthik, N. Sathya Narayanan

Final Decision : Allowed

Judgement

Sulekha Beevi C.S., Member (J)

1. The issue in this appeal is with regard to the demand of service tax under telecom services for the period 01.06.2008 to 31.03.2011.

2. The appellant viz. M/s.Bharat Sanchar Nigam Ltd. (BSNL) holds service tax registration under the category of 'telecom service' as defined under section 65 (105) (zzzx) of the Finance Act, 1994. M/s.BSNL provides the telecom service to the subscribers/customers who have obtained telephone connection from them and also to the pubic customers/callers by an arrangement of Public Call Office (PCO). These PCOs are maintained by a person called PCO operators appointed by BSNL for this purpose.

3. Prior to 01.06.2008, the call from PCOs were charged uniformly at the rate of Re.1/- per Metered Call Unit (MCU) i.e. per minute with a 60 seconds pulse. The tariff of Re.1/- per MCU consisted of three components viz. revenue share for the BSNL, commission for the PCO operators and service tax to the Government. Out of Re.1/- charged for a call, Re.0.11 was for the service tax payable and the

remaining Re.0.89 was for both the revenue share of BSNL and the commission payable to the PCO operators. Service tax payable was worked out by BSNL by taking the call charge of Re.1 as cum-tax value and there was no service tax separately charged and collected from the customers.

4. With effect from 01.06.2008, it appeared that BSNL had revised their policy and restructured the tariff of PCO business. As per the revised policy issued vide Circular No.3-5/007 R&C dated 11.04.2008 of BSNL, New Delhi, it appeared that the Maximum Retail Price of call charges of Re.1/- per MCU remained as such, but the nature of consideration to PCO operators was changed from "commission basis " to "discount basis" which varied from Re.0.30 to Re.0.40 per MCU. BSNL charged the PCO operators at the defined rates on the basis of volume of metered calls (slab basis) along with service tax and cess payable thereon, irrespective of the actual amount charged by the PCO operators from the users / callers of telecommunication services. BSNL raised bills on the PCO operators indicating gross calls, discount, net amount and service tax payable. BSNL collected the billed amount i.e. amount net of discount, plus service tax, from the PCO operators and pay the service tax so collected to the credit of the Central Government. While so arriving at the taxable value, the appellant did not take into account the discount extended to PCO operators. The non-inclusion of amount of discount given to PCO operators in the taxable value, for the purpose of payment of service tax resulted in short payment of service tax by BSNL. Accordingly, show cause notices were issued for the different periods between 01.06.2008 to 31.03.2011 demanding the service tax along with the interest and for imposing penalties. After due process of law, the original authority confirmed the demand along with interest and imposed penalty. Aggrieved by such orders, the appellant is now before the Tribunal.

5. Ld. Counsel Ms. G. Vardini Karthik appeared and argued for the appellant. It is submitted that the BSNL is a Government of India undertaking and has been paying the service tax on the telecom services. Prior to 01.06.2008, the tariff of Re.1 per meter call unit consists of three components revenue shares of BSNL, commission for PCO operators and service tax to the Government. Out of this Re.1 collected towards call charges, 11 paise was the service tax paid and the balance 89 paise was the revenue share and the commission payable to the PCO Operators. There was a change in the tariff w.e.f. 11.04.2008. As per the revised policy of BSNL, the nature of consideration of PCO operators was changed from 'commission basis' to discount basis' which varied form 0.30 paise to 0.40 paise per Meter Call Unit.

6. The very same issue came up for consideration before the Tribunal in the appellant's own case as reported in 2019 (20) GSTL 596 (Tri.- Mad). The Tribunal took into consideration the amendment brought forth in Rule 5 (1) of the Service Tax (Determination of Value) Rules, 2006 wherein an Explanation was inserted w.e.f. 01.03.2011. The said Explanation clarified that for the services specified in sub-clause (zzzx) of clause (105) of Section 6 of the Finance Ac, 1994, the value

of the taxable service shall be the gross amount paid by the person to whom telecom service is provided by the telegraph authority. It is submitted by the Ld. Counsel that this clarification would make it clear that from 01.03.2011 the assessee viz. BSNL, is liable to pay service tax on the value of gross amounts paid by the person who makes the call. Since the Explanation added takes effect only on 1.3.2011 the demand for the period prior to 01.03.2011 cannot sustain. The amendment is by way of clarification and the same has to be considered to have prospective application only as laid in the decision of UOI Vs Martin Lottery Agencies Ltd. - 2009 (14) ELT 597 (SC). It is submitted by the Ld. Counsel that the Tribunal in the said decision had relied on the earlier decision in the appellant's own case as reported in 2014-TIO-3033-CESTAT-Bang. and the case of Bharti Infotel Ltd. Vs CCE Bhopal - 2006 (1) STR 107 (Tri.-Del.). Ld. Counsel prayed that the appeal may be allowed.

7. Ld. A.R Sri N. Sathya Narayanan supported the findings in the impugned order. It is submitted that the claim of the appellant that prior to 01.06.2008 the agreement between PCO operators and BSNL was on franchise basis and after the said date, the agreement is on principal basis, has been considered by the original authority. The Explanation added to Rule 5 (1) of the Service Tax Rules, 2006 makes it abundantly clear that the service provider has to pay service tax on the gross amount paid by the person who avails the telecom services provided. The appellant has therefore to pay service tax on the entire amount collected from the customers. The adjudicating authority has rightly confirmed the demand interest and impose penalties. It is prayed that the appeal may be dismissed.

8. Heard both sides.

9. The Ld. Counsel has submitted that though they are liable to pay service tax on the entire amount collected from the customer, the same would be applicable only w.e.f. 01.03.2011 as the said Explanation was added to the Rules only on such date. To understand the issue, the relevant provisions are noticed as under :

"Pre 1-6-2007 Definitions

65(105)(b). Taxable service means any service provided to a subscriber by the telegraph authority, in relation to a telephone connection.

Section 65(104) "subscriber" means a person to whom any service of a telephone connection or a facsimile (FAX) or a leased circuit or a pager or a telegraph or a telex has been provided by the telegraph authority.

Post 1-6-2007 Definitions

The above sub-sections were omitted.

Section 65(105)(zzzx). Taxable service means any service or (sic) to be provided to any person, by the telegraph authority in relation to telecommunication service.

After 1-6-2007, the words "services provided to a subscriber" has been substituted by the words "to any person".

The Notification No. 2/2011-S.T., dated 1-3-2011 has inserted an Explanation in Rule 5, clause (1) of Service Tax (Determination of Value) Rules, 2006. The said Explanation is as under :

"3. In the said rules, in Rule 5, after sub-rule (1), the following 'Explanation' shall be inserted, with effect from the 1st day of March, 2011 namely :

"Explanation. - For the removal of doubts, it is hereby clarified that for the services specified in sub-clause (zzzx) of clause (105) of Section 65 of the Finance Act, 1994, the value of the taxable service shall be the gross amount paid by the person to whom telecom service is provided by the telegraph authority."

10. It can be seen that the Explanation has been added only w.e.f. 01.03.2011 which indicates that the service tax has to be paid on the gross amount collected from the person (PCO user) and to whom the telecom services are provided. In the appellant's own case [2019 (20) G.S.T.L. 596 (Tri.-Chennai)], the very same issue was considered and the Tribunal held that Explanation would take effect only from 01.03.2011 and the demand for the period prior to 01.03.2011 cannot sustain. The discussions in the appellant's own case (supra) are reproduced as under :

"9....It is seen that w.e.f. 1-3-2011, the value of taxable services in sub- clause (zzzx) of clause (105) of Section 65 namely the telecommunication services, shall be the gross amount paid by the person/PCO user to whom the telecom service is provided by the telegraph authority. The said amendment makes it clear that w.e.f. 1-3-2011, the value of taxable service would include the total amount collected by the PCO operator. However, since it is specifically stated that the said notification shall be effective only from 1-3-2011, the period involved in the present case being prior to 1-3-2011, the demand of differential amount of service tax alleging that entire amount collected by the PCO operator is subject to levy of service tax cannot sustain. The impugned orders confirming the demand is set aside. Appeal filed by the assessee is allowed. Consequently, the appeals filed by department are dismissed."

11. By judicial discipline, applying the ratio of decision in appellant's own case, we are of the opinion that the demand cannot sustain and requires to be set aside which we hereby do.

12. In the result, the impugned order is set aside. Appeal is allowed with consequential relief, if any.