

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL

WEST ZONAL BENCH AT MUMBAI

COURT NO. I

Appeal No. ST/236/12-Mum

[Arising out of Order-in-Original No. 56/STC-I/SKS/11-12 dated 31/01/2012 passed by the Commissioner of Service Tax, Mumbai]

For approval and signature:

Hon ble Mr. M.V. Ravindran, Member (Judicial)

Hon ble Mr. C.J. Mathew, Member (Technical)

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1. Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982? : No
 2. Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not? : No
 3. Whether Their Lordships wish to see the fair copy of the Order? : seen
 4. Whether Order is to be circulated to the Departmental authorities? : Yes

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Loop Mobile India Ltd.

VS

Commissioner of Service Tax

Appearance

Shri Vinay Jain, Charter Accountant for the Appellant

Shri B. Kumar Iyer, Supdt. (A.R.) for the Respondent

CORAM:

Hon ble Mr. M.V. Ravindran, Member (Judicial)

Hon ble Mr. C.J. Mathew, Member (Technical)

Date of hearing: 01/03/2016

Date of decision: 01/03/2016

Per : M.V. Ravindran

This appeal is directed against Order-in-Original No. 56/STC-I/SKS/11-12 dated 31/01/2012 passed by the Commissioner of Service Tax, Mumbai.

2. Heard both the sides and perused the records. It transpires that the issue involved in this case is whether the value of sim cards sold by the appellant herein to their mobile subscribers is to be included in taxable service under Section 65(105)(zzzx) of the Finance Act, 1994 or otherwise.

3. The appellant were selling the sim cards to their franchisee and was paying sales tax to the State and activating the sim cards in the hands of subscribers at a valuable consideration and paying sales tax on the activation charges. They did not discharge the service tax liability on the gross value of the amounts received by them and as provided under Section 67 of the Finance Act, 1994.

4. We find that the issue is no more res integra and on merits, it is decided against the appellant in the case of Idea Mobile Communication Ltd. vs. Commissioner of Central Excise & Customs, Cochin - 2011-TIOL-71-SC-ST.

5. This takes us to the correct quantum of the service tax liability to be confirmed against the appellant. The appellant has been claiming the benefit of cum-tax benefit treating the amount realized by them as inclusive of

tax. The adjudicating authority did not agree with the contentions. We find that this issue is also no more res integra and is settled in favour of the appellant herein as held by the Tribunal in the case of Commissioner of Central Excise & Customs, Patna vs. Advantage Media Consultant - 2008 (10) STR 449 wherein it has been held as under:

3. Service tax is an indirect tax. As per this system of taxation, tax borne by the consumer of goods/services is collected by the assessee (manufacturer/service provider) and remitted to the Government. When the amount is collected for the provision of services, the total compensation received should be treated as inclusive of service tax due to be paid by the ultimate customer of the services unless service tax is also paid by the customer separately. So considered, when no tax is collected separately, the gross amount has to be adopted to quantify the tax liability treating it as value of taxable service plus service tax payable. We find that this principle has been legislated in the following terms with effect from 18/04/2006 in Section 67(2) of the Finance Act, 1994 as amended:

67(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.

4. This principle has all along been relevant and had to be applied. In the circumstances, we find no reason to interfere with the impugned order and we reject both the appeals filed by the Revenue. The Cross Objection in respect of S.T. Appeal No. 55/06 is also disposed.

6. Aggrieved by such an order, Revenue filed a civil appeal before the Hon ble Apex Court and the apex Court, after condoning the delay, dismissed the civil appeal, as reported in 2009 (14) STR J49 (SC). The ratio of the decision of the Tribunal would squarely apply in the case in hand and we hold that the appellant is eligible for cum-tax benefit and therefore service tax liability and interest thereof needs to be recalculated by the lower authority. This view has also been taken by the bench in the case of Bharti Airtel Ltd. in appeal No. ST/426/2007 in final order No. ST/A/531/12 dated 04/07/2012.

7. For the limited purpose of re-quantification of the service tax liability, we remand the matter to the adjudicating authority to do so and direct the appellant to discharge such service tax as re-quantified along with interest.

8. This takes us to the penalty imposed on the appellant by the adjudicating authority. In view of the fact that the entire position of law as to taxability of the sim cards and value to be considered for such tax was agitated before the various judicial forum and had to be settled by the apex Court in the case of Idea Mobile Communication Ltd. (supra), we are of view that the appellant could have entertained a bonafide belief as to the sale of sim cards is not a taxable activity. In the case of Bharti Airtel Ltd. in final order No. ST/A/531/12 dated 04/07/2012 in appeal No. ST/426/2007 in an identical issue, we have set aside the penalties. Accordingly, we, by invoking the provisions of Section 80 of the Finance Act, 1994, set aside the penalties imposed by the lower authority.

9. The appeal is disposed of as indicated herein above.

(Operative order pronounced in court)

C.J. Mathew

Member (Technical)

M.V. Ravindran

Member (Judicial)