

**Customs, Excise & Service Tax Appellate Tribunal  
West Zonal Bench At Ahmedabad**

REGIONAL BENCH-COURT NO. 3

**Service Tax Appeal No. 13071 of 2013 -DB**

(Arising out of OIA-PJ-626-VDR-I-2012-13 dated 28/03/2013 passed Commissioner of Central Excise, Customs and Service Tax-VADODARA-I)

**Messrs Hari Om Marketing**

G.M.Patel Compound,  
Opp. Bajwa Railway Station,  
Vadodara, Gujarat

**.....Appellant**

*VERSUS*

**C.C.E. & S.T.-Vadodara-i**

1st Floor...Central Excise Building,  
Race Course Circle,  
Vadodara,Gujarat - 390007

**.....Respondent**

**APPEARANCE:**

Shri Amal Dave, Advocate for the Appellant

Shri Ajay Kumar Samota, Superintendent (AR) for the Respondent

**CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR**

**HON'BLE MEMBER (TECHNICAL), MR. C.L.MAHAR**

**Final Order No. A/ 11302 /2023**

DATE OF HEARING: 03.03.2023

DATE OF DECISION: 21.06.2023

**RAMESH NAIR**

The issue involved in the present case is that whether commission received by the appellant from their principal client M/s. BSNL in connection with sale and purchase of SIM card is liable to service tax under the head of business auxiliary service.

2. Shri Amal Dave, Learned Counsel appearing on behalf of the appellant submits that the issue is settled in favour of the assessee in various judgments cited below:-

- G. R Movers Vs. CCE, Lucknow – 2013 (30) STR 634 (Tri. Del)
- Chotey Lala Radhey Shyam Vs. CCE & ST, Lucknow – 2016 (44) STR 66 ( Tri. All)

- CCE, Lucknow Vs. Chotey Lal Radhey Shyam – 2018 (8) GSTL 225 (All.)
- Daya Shankar Kailash Chand Vs. CCE & ST, Lucknow – 2013 (30) STR 428 (Tri. Del)
- Commr. Vs. Daya Shankar Kailash Chand – 2014 (34) STR J99 (All.)
- M/s. J.K. Enterprises Vs. Principal Commr, Alwar - 2023 (1) TMI 936 -CESTAT New Delhi

3. Shri Ajay Kumar Samota, Learned Superintendent (AR) appearing on behalf of the Revenue reiterates the finding of the impugned order.

4. On careful consideration of submission made by both sides and perusal of records, We find that the commission received by the appellant since included in the gross sale price of SIM card sold to the customers and the total price of the SIM card suffered service tax, no separate service tax can be demanded on the commission received by the appellant. This issue is no more res- integra as per the judgments delivered in the various cases cited by the appellant. Some of the decisions are reproduced below:-

- Chotey Lala Radhey Shyam Vs. CCE & ST, Lucknow – 2016 (44) STR 66 (Tri. All)

*"6. We have heard both the sides and perused records. On perusal of the records, we find that in this case BSNL had already paid service tax on the SIM cards and recharged coupons sold to the franchisee and again demanding service tax from the franchisee would amount to double taxation which is not permissible in law. Secondly, we find that the appellant is only engaged in purchase and sale of SIM cards and recharge coupons and his relation with BSNL is of principal to principal basis. The appellant cannot be termed as an agent of BSNL. In view of this, the finding of impugned order is therefore not consistent with law and the catena of judgments delivered by the Tribunal and High Court. The Judgment cited above by the learned counsel for the appellant squarely cover the case of the appellant to the fact that appellant is only engaged in trading activity and does not render any taxable service in the category of "business auxiliary service".*

7. *By following the decision cited above, we set aside the impugned order and allow the appeal of the appellant with consequential relief, in any, in accordance with law."*

The above decision of Tribunal was upheld by Hon'ble High Court of Allahabad reported at CCE, Lucknow Vs. Chotey Lal Radhey Shyam – 2018 (8) GSTL 225 (All.) wherein Hon'ble court has passed the following order:-

**"4.** *We find that similar controversy came up before Tribunal, Principal Bench, New Delhi in Daya Shankar Kailash Chand v. Commissioner of C. EX. & S. T., Lucknow, [2013 \(30\) S.T.R. 428](#). After considering judgment of Supreme Court in Idea Mobile Communication Ltd., [2011 \(23\) S.T.R. 433](#) (S.C.), Tribunal passed following judgment : -*

*"We have seen the Supreme Court's judgment in the case of Idea Mobile Communication Ltd. [[2011 \(23\) S.T.R. 433](#) (S.C.)]. The issue involved before the Hon'ble Supreme Court was as to whether the value of the SIM cards is required to form part of the activation charges or not. Inasmuch as the issue before the Hon'ble Supreme Court was entirely different than the issue involved in the present case we are of the view that following said decision by Commissioner (Appeals) in preference to the decision of Tribunal on the same issue as involved in the present case is not proper. We also refer to the latest decision in the case of Martend Food & Dehydrates Pvt. Ltd. vide Final Order Nos. ST/A/684-687/2012-Cus., dated 6-11-2012, wherein after taking note of the entire case law available on the said issue, the Tribunal in a detailed order has held that activity of purchase and sale of SIM card belonging to BSNL where BSNL has 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 distributors for the second time is not called for. By following the said decision, we set aside the impugned order and allow the appeal with consequential relief to the appellants."*

**5.** *Then, again similar controversy came up in Central Excise Appeal No. 21 of 2013, Commissioner Central Excise v. M/s. Daya Shankar Kailash Chandra Mal [[2014 \(34\) S.T.R. 199](#) (All.)] and a Division Bench of this Court consisting of Hon'ble Rajiv Sharma and Hon'ble Dr. Satish Chandra, JJ, vide judgment dated 25th July, 2013 dismissed appeal at admission stage passing following order : -*

*"Heard Mr. Rajesh Singh Chauhan, learned Counsel for the appellant.*

*In nutshell, the case of the appellant is that M/s. Daya Shanker Kailash Chandra/respondent having Service Tax Registration under the category*

*of 'Business Auxiliary Service' is a partnership firm which is providing the service on behalf of M/s. Bharat Sanchar Nigam limited (BSNL), a company incorporated under the Companies Act, 1956 for providing services of promotion and marketing/distribution of its various products. During the course of enquiry, it was observed that the respondent neither paid Service Tax amount to Rs. 6,87,387/- including cess during the periods 2008-09 and 2009-10 including April, 2010 nor submitted ST-3 returns as and when required. Accordingly, a show cause notice was issued to the respondent. The case was adjudicated by the Additional Commissioner, Central Excise, Lucknow, vide order dated 25-10-2011, wherein the adjudicating authority confirmed the demand of Rs. 6,87,389/- under the proviso to Section 73(1) of the Finance Act, 1994 along with interest and imposed penalty under (sic) Section 78 of the said Act. Feeling aggrieved, the respondent preferred an appeal before the Commissioner (Appeals), who, vide order dated 30-4-2012, upheld the order dated 25-10-2011. Thereafter, the respondent filed an appeal before the Customs, Excise & Service Tax Appellate Tribunal (CESTAT), which was allowed vide order dated 18-12-2012. Hence, the instant appeal.*

*After hearing learned Counsel for the appellant, we are of the opinion that no substantial question arises in the instant appeal, in view of the decisions of the Apex Court in the case of Martend Food & Dehydrates Pvt. Ltd. vide final order dated 6-11-2012, wherein it was held that activity of purchase and sale of SIM Card belonging to BSNL where BSNL has discharged the service tax on the full value of the SIM cards does not amount to providing Business Auxiliary Service. Therefore, no interference is called for.*

*Accordingly, the appeal is dismissed at the admission stage itself."*

**6.** *Judgment of Supreme Court in Idea Mobile Communication Ltd. [2011 (23) S.T.R. 433 (S.C.)] (supra) has been considered by Tribunal, Principal Bench, New Delhi and similar issue has already been considered in aforesaid judgment of this Court, with which we do not find any reason to take a different view. Hence, aforesaid questions are answered against Revenue, following aforesaid judgments.*

**7.** *Appeal is, accordingly, dismissed. Interim order, if any, shall stand vacated."*

In view of the above decision including other decisions cited by the appellant, the issue is no longer res- integra and stands settled in favour of the assessee.

5. Accordingly, the impugned order is set aside. Appeal is allowed.

(Pronounced in the open court on 21.06.2023)

**RAMESH NAIR**  
**MEMBER (JUDICIAL)**

**C.L.MAHAR**  
**MEMBER (TECHNICAL)**

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