

**Office of the Commissioner (Appeal),**

**Central GST, Appeal Commissionerate, Ahmedabad**

जीएसटी भवन, राजस्वमार्ग, अम्बावाड़ी अहमदाबाद ३८००१५.

CGST Bhavan, Revenue Marg, Ambawadi, Ahmedabad 380015

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आयुक्त (अपील) द्वारा पारित

Passed by **Shri Akhilesh Kumar**, Commissioner (Appeals)

ग Arising out of Order-in-Original No.20 to 21/AC/MEH/CGST/20-21 दिनांक:21.09.2020 issued by Assistant Commissioner, CGST & Central Excise, Division Mehsana, Gandhinagar Commissionerate

ध **अपीलकर्ता का नाम एवं पता Name & Address of the Appellant / Respondent**

M/s Darshan Electronics  
Viskram Complex, Opp. Taluka  
Panchayat, Visnagar

कोई व्यक्ति इस अपील आदेश से असंतोष अनुभव करता है तो वह इस आदेश के प्रति यथास्थिति नीचे बताए गए सक्षम अधिकारी को अपील या पुनरीक्षण आवेदन प्रस्तुत कर सकता है।

Any person aggrieved by this Order-In-Appeal may file an appeal or revision application, as the one may be against such order, to the appropriate authority in the following way :

भारत सरकार का पुनरीक्षण आवेदन :

**Revision application to Government of India :**

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1994 की धारा अतः तनीचे बताए गए मामलों के बारे में पूर्वोक्त धारा को उप-धारा के प्रथम परन्तुक के अंतर्गत पुनरीक्षण आवेदन अधीन सचिव, भारत सरकार, वित्त मंत्रालय, राजस्व विभाग, चौथी मजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली : 110001 को की जानी चाहिए।

(i) A revision application lies to the Under Secretary, to the Govt. of India, Revision Application Unit Ministry of Finance, Department of Revenue, 4<sup>th</sup> Floor, Jeevan Deep Building, Parliament Street, New Delhi - 110 001 under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35 ibid :

(ii) यदि मालकी हानि के मामले में जब ऐसी हानि कारखाने से किसी भण्डागार या अन्य कारखाने में या किसी भण्डागार से दूसरे भण्डागार में माल ले जाते हुए मार्ग में, या किसी भण्डागार या भण्डार में चाहे वह किसी कारखाने में या किसी भण्डागार में हो माल की प्रकिया के दौरान हुई हो।

(ii) In case of any loss of goods where the loss occur in transit from a factory to a warehouse or to another factory or from one warehouse to another during the course of processing of the goods in a warehouse or in storage whether in a factory or in a warehouse.

(क) भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित माल पर या माल के विनिर्माण में उपयोग शुल्क कच्चे माल पर उत्पादन शुल्क के रिबेट के मामले में जो भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित है।

(A) In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.

(ख) यदि शुल्क का भुगतान किए बिना भारत के बाहर (नेपाल या भूटान को) निर्यात किया गया माल हो।

(B) In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.

अंतिम उत्पादन की उत्पादन शुल्क के भुगतान के लिए जोड्यूटीक्रेडिटमान्य की गई है और ऐसे आदेश जो इस धारा एवं नियम के मुताबिक आयुक्त, अपील के द्वारा पारित हो समय पर या बाद में वित्त अधिनियम (नं. 2) 1998 धारा 109 द्वारा नियुक्त किए गए हो।

(c) Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under and such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec. 109 of the Finance (No. 2) Act, 1998.

(1) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 के नियम 9 के अंतर्गत विनिर्दिष्ट प्रपत्र संख्या इए-8 में दो प्रतियों में, प्रेषित आदेश के प्रति आदेश प्रेषित दिनांक से तीन मास के भीतर मूल-आदेश एवं अपील आदेश की दो-दो प्रतियों के साथ उचित आवेदन किया जाना चाहिए। उसके साथ खाता इ. का मुख्य शीर्ष के अंतर्गत धारा 35-इ में निर्धारित फी के भुगतान के सबूत के साथ टीआर-6 चालान की प्रति भी होनी चाहिए।

The above application shall be made in duplicate in Form No. EA-8 as specified under Rule, 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the OIO and Order-In-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.

(2) रिविजन आवेदन के साथ जहाँ संलग्न रकम एक लाख रुपये या उससे कम हो तो रुपये 200/- फीस भुगतान की जाए और जहाँ संलग्न रकम एक लाख से ज्यादा हो तो 1000/- की फीस भुगतान की जाए।

The revision application shall be accompanied by a fee of Rs. 200/- where the amount involved is Rupees One Lac or less and Rs. 1,000/- where the amount involved is more than Rupees One Lac.

सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवा कर अपीलीय न्यायाधिकरण के प्रति अपील:-  
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1944 की धारा 35-बी/35-इ के अंतर्गत:-

Under Section 35B/ 35E of CEA, 1944 an appeal lies to :-

(क) उक्त लिखित परिच्छेद 2 (1) क में बताए अनुसार के अलावा की अपील, अपीलों के मामले में सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवा कर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, अहमदाबाद में 2<sup>nd</sup> माला, बहुमाली भवन, असरवा, गिरधरनागर, अहमदाबाद-380004

(a) To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at 2<sup>nd</sup> floor, Bahumali Bhawan, Asarwa, Girdhar Nagar, Ahmedabad : 380004. in case of appeals other than as mentioned in para-2(i) (a) above.



**ORDER-IN-APPEAL**

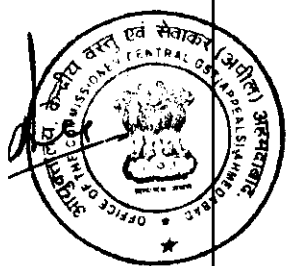
Two appeals have been filed by M/s. Darshan Electronics, Vikram Complex, Opp. Taluka Panchyat, Visnagar [hereinafter referred to as the appellant] against OIO No.20/AC/MEH/CGST/20-21 dated 21.09.2020 and OIO No. 21/AC/MEH/CGST/20-21 dated 21.09.2020 [hereinafter referred to as the impugned orders] passed by Assistant Commissioner, Central GST, Division : Mehesana, Commissionerate : Gandhinagar [hereinafter referred to as the adjudicating authority]. Since the issue involved is the same in both the appeals viz. GAPPL/COM/STP/1269/2020 and GAPPL/COM/STP/1209/2020, they are being decided vide this OIA.

2. Briefly stated, internal audit party of the department raised an objection vide Audit Report no. 25/ST/07-08 dated 21.04.2008 that the commission received by the appellant from M/s.BSNL, Mehsana for marketing of the products i.e. selling of SIM Cards falls under Commission Agent service which is falling under the category of Business Auxiliary Service and is liable to Service Tax w.e.f. 09/07/2004. The appellant, however, failed to pay the service tax on the taxable service provided, namely Business Auxiliary Service (BAS), by them to BSNL. Therefore, the appellant were issued notices dated 04.09.2013 and 27.09.2013 demanding Service Tax amounting to Rs.10,383/- and Rs. 8,752/- respectively under the proviso to Section 73 of the Finance Act, 1994. Interest was also sought to be recovered under Section 75 of the Finance Act, 1994 and penalties were also proposed under Section 76, 77 & 78 of the Finance Act, 1994.

3. The said Show Cause Notices were adjudicated vide the impugned orders confirming the demand for service tax along with interest. Penalties were imposed under Section 77 & 78 of the Finance Act, 1994.

4. Being aggrieved with the impugned orders, the appellant firm has filed the present appeals on the following grounds:

A. The matter is regarding commission earned as agent for BSNL SIM card and entire service tax on value has been paid by BSNL. The adjudicating authority has relied upon the judgement of Idea Mobile Communication which is regarding determination of SIM card as



The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 as prescribed under Rule 6 of Central Excise(Appeal) Rules, 2001 and shall be accompanied against (one which at least should be accompanied by a fee of Rs.1,000/-, Rs.5,000/- and Rs.10,000/- where amount of duty / penalty / demand / refund is upto 5 Lac, 5 Lac to 50 Lac and above 50 Lac respectively in the form of crossed bank draft in favour of Asstt. Registrar of a branch of any nominate public sector bank of the place where the bench of any nominate public sector bank of the place where the bench of the Tribunal is situated.

- (3) यदि इस आदेश में कई मूल आदेशों का समावेश होता है तो प्रत्येक मूल आदेश के लिए फीस का भुगतान उपर्युक्त ढंग से किया जाना चाहिए इस तथ्य के होते हुए भी कि लिखा पढ़ी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरणको एक अपील या केन्द्रीय सरकारको एक आवेदन किया जाता है।

In case of the order covers a number of order-in-Original, fee for each O.I.O. should be paid in the aforesaid manner notwithstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filled to avoid scriptoria work if excising Rs. 1 lacs fee of Rs.100/- for each.

- (4) न्यायालय शुल्कअधिनियम 1970 यथासंशोधित की अनुसूची-1 के अंतर्गतनिर्धारितकिए अनुसारउक्तआवेदन या मूलआदेश यथास्थितिनिर्णयनप्राधिकारी के आदेशमेंसेप्रत्येक की एक प्रतिपर रु.6.50 पैसेकान्यायालय शुल्कटिकटटलगाहोनाचाहिए।

One copy of application or O.I.O. as the case may be, and the order of the adjournment authority shall a court fee stamp of Rs.6.50 paise as prescribed under scheduled-I item of the court fee Act, 1975 as amended.

- (5) इनओरसंबंधितमामलोंकोनियंत्रण करनेवालेनियमों की ओरभी ध्यानआकर्षितकियाजाताहैजोसीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवंसेवाकरअपीलीय न्यायाधिकरण (कार्याविधि) नियम, 1982 मेंनिहितहै।

Attention is invited to the rules covering these and other related matter contended in the Customs, Excise & Service Tax Appellate Tribunal (Procedure) Rules, 1982.

- (17) सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवंसेवाकरअपीलीय न्यायाधिकरण(सिस्टेट),के प्रतिअपीलो के मामलेमेंकर्तव्यमांग(Demand) एवंदंड(Penalty) का10%पूर्वजमाकरनाअनिवार्यहै। हालांकि, अधिकतमपूर्वजमा10 करोड़रुपएहै।(Section 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

केन्द्रीयउत्पादशुल्कऔरसेवाकरकेअंतर्गत, शामिलहोगा "कर्तव्यकीमांग"(Duty Demanded)-

- (i) (Section) खंड 11D केतहतनिर्धारितराशि;
- (ii) लियागलतसेनवैटक्रेडिटकीराशि;
- (iii) सेनवैटक्रेडिटनियमोंकेनियम 6 केतहतदेयराशि.

⇒ यहपूर्वजमा 'लंबितअपील' मेंपहलेपूर्वजमाकीतुलनामें, अपील' दाखिलकरनेकेलिएपूर्वशर्तबनादियागयाहै.

For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shall not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT. (Section 35 C (2A) and 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

Under Central Excise and Service Tax, "Duty demanded" shall include:

- (xxxiv) amount determined under Section 11 D;
- (xxxv) amount of erroneous Cenvat Credit taken;
- (xxxvi) amount payable under Rule 6 of the Cenvat Credit Rules.

इसआदेश के प्रति अपील प्राधिकरण के समक्ष जहाँ शुल्क अथवा शुल्क या दण्ड विवादित हो तो माँग किए गए शुल्क के 10% भुगतान पर और जहाँ केवल दण्ड विवादित हो तब दण्ड के 10% भुगतान पर की जा सकती है।

In view of above, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute."

trading of goods or service. Thus, relying on this judgement is grossly wrong and incorrect.

- B. The matter is already decided in their favour by the Commissioner (Appeals), Ahmedabad vide OIA No. 206/2012/(Ahd-III)/SKS/Commr.(A)/Ahd dated 31.12.2012.
- C. Service Tax on the entire value has been paid by BSNL which is evidenced from the invoice of BSNL raised on the appellant. This value includes the discount/commission/profit of the appellant for which demand is sought to be made. The value in the hands of the appellant is already service tax paid in the hands of BSNL.
- D. The SIM card or recharge coupon which is sold to them by BSNL is inclusive of all taxes. The discount or commission received by them is integral part of the value of the SIM card or recharge coupon on which service tax is already paid. Taxing the profit earned by them tantamount to double taxation which is completely wrong and against natural justice. They refer to the decision in the case of Vijay Sharma & Co Vs. CCE reported at 2010 (020) STR 0309 (Tri.-Delhi).
- E. Tax paid by them would be available as credit to BSNL and therefore, there is no revenue effect and the matter is revenue neutral.
- F. They are not acting on behalf of BSNL and they are an independent trader dealing in products of BSNL. They do not collect payment on behalf of BSNL but pays them for the products procured and receive payment from the customer to whom the products is sold. It is a simple trading activity and can never be termed as activity of commission agent.
- G. When no service tax is payable the question of interest or penalty does not arise.

5. Personal Hearing in the case was held on 16.09.2021 through virtual mode. Shri Arpan Yagnik, CA, appeared on behalf of the appellant for the hearing. He reiterated the submissions made in appeal memorandum.

6. I have gone through the facts of the case, submissions made in the Appeal Memorandum, and submissions and evidences available on records. I find that the issue to be decided in this case is whether the appellant is liable to pay service tax



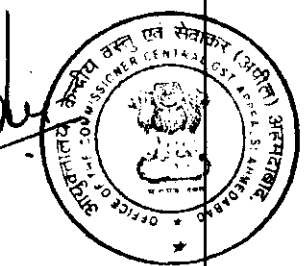
on the amount of commission given to them by BSNL, Mehesana for sale of SIM cards/Recharge Coupons.

6.1 I find that the issue has been decided in favour of the appellant previously by the Commissioner(Appeals), Ahmedabad vide OIA No. 206/2012/(Ahd-III)/SKS/Commr.(A)/Ahd dated 31.12.2012. The demand in the said case pertained to the period October, 2009 to June, 2011. The period covered in the present appeals is from July, 2011 to June, 2012 and July, 2012 to June, 2013.

6.2 I find that the adjudicating authority has confirmed the demands against the appellant by considering the appellant to be Commission agent. The appellant had in their submission before the adjudicating authority relied upon the OIA No. 206/2012/(Ahd-III)/SKS/Commr.(A)/Ahd dated 31.12.2012 passed by the Commissioner (Appeals). However, the adjudicating authority has sought to distinguish the issue involved in the present appeals on the grounds that the appellant have not produced any documentary evidence which reveal that service tax has been discharged by BSNL, Mehesana in respect of the SIM Cards rendered by them to the appellant and that while furnishing the data of commission earned by the appellant and that BSNL had not commented or objected anything regarding the payment or liability to pay service tax by the appellant.

6.3 I find that the adjudicating authority has given his findings on the decisions relied upon by the Commissioner (Appeals), Ahmedabad in OIA No. 206/2012/(Ahd-III)/SKS/Commr.(A)/Ahd dated 31.12.2012. He has, thereafter, proceeded to rely upon the decision of the Hon'ble Supreme Court in the case of Idea Mobile Communication Ltd Vs. Commissioner of C.Ex. & Customs, Cochin reported at 2011-TIOL-71-SC-ST.

6.4 I find that there is nothing in the records to indicate that the department had challenged OIA No. 206/2012/(Ahd-III)/SKS/Commr.(A)/Ahd dated 31.12.2012 before a higher appellate authority. Therefore, the adjudicating authority while passing the impugned order, was bound to follow the decision passed by the Commissioner(Appeals), Ahmedabad in the case of the same appellant on the same issue for earlier period. There is no change in legal position brought out in SCN as



well as in the impugned order. The adjudicating authority has committed judicial indiscipline in not following the orders of Commissioner (Appeals).

7. Coming to the issue on hand, I find that the appellant is selling SIM cards/recharge coupons and selling them to his customers. It has been contended by the appellant that the SIM cards/recharge coupons procured by them from BSNL are those on which service tax has been paid by BSNL. Therefore, the appellant is merely trading in products in respect of which the applicable service tax has already been paid. I find that the findings of the Commissioner (Appeals), Ahmedabad at para 6 of OIA No. 206/2012/(Ahd-III)/SKS/Commr.(A)/Ahd dated 31.12.2012 covers the entire gamut of the issue :

“ I find that M/s.BSNL, Mehsana i.e. service provider has already discharged service tax in respect of all the products and services including Mobile services rendered by BSNL, as such no service tax can be demanded twice on the same value. These facts are based on documentary evidence and when service tax has been paid no further service tax can be demanded on the same amount only because its classification differs when there is no change in rate of duty. The sole purpose of taxation is that the value on which service tax is required to be paid should not escape and here in this case, the service tax has been paid on entire value, therefore, it will not be in the fitness of the things to demand service tax again on the same amount as law never permits such activities and as such the demand made on the service tax amount is not sustainable.”

7.1 I further find that the Hon'ble Tribunal had in the case of Daya Shankar Kailash Chand Vs. Commissioner of C.Ex., & S.T., Lucknow reported at 2013 (30) STR 428 (Tri.-Del) held that :

“3. We have seen the Supreme Court 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 No. 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.”



7.2 A similar view was taken by the Hon'ble Tribunal in the case of Chotey Lal Radhey Shyam Vs. Commissioner of C.Ex., & S.T., Lucknow reported at 2016 (44) STR 266 (Tri.-All) wherein it was held that :

“6.We have heard both the sides and perused the records. On perusal of the records, we find that, in this case, BSNL had already paid service tax on the SIM cards and recharge 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 relationship 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 the learned Commissioner that the appellant is promoting the business of sale or service of BSNL is misconceived. The 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 the appellant is only engaged in trading activity and does not render any taxable service in the category of 'business auxiliary service'.”


7.3 The above order of the Hon'ble Tribunal was affirmed by the Hon'ble High Court, Allahabad, which was reported at 2018 (8) GSTL 225 (All).

8 Considering the facts of the present appeals and the decisions cited above, I find that the activity of the appellant i.e. purchase and sale of SIM Cards/Recharge coupons of BSNL on which service tax has already been paid by BSNL cannot be considered to be business auxiliary services.

9. In view of the above the discussions and the above decisions of the Hon'ble Tribunal and the High Court, I set aside the impugned orders for being not legal and proper and allow the appeals filed by the appellant.


10. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।

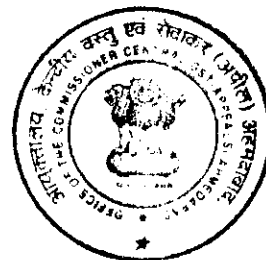
The appeals filed by the appellant stands disposed off in above terms.

  
(Akhilesh Kumar)  
Commissioner (Appeals)

Date: .10.2021.

Attested:

  
(N.Suryanarayanan. Iyer)  
Superintendent(Appeals),  
CGST, Ahmedabad.





BY RPAD / SPEED POST

To

M/s. Darshan Electronics,  
Vikram Complex,  
Opp. Taluka Panchyat, Visnagar

Appellant

The Assistant Commissioner,  
Central GST, Division- Mehsana  
Commissionerate, Gandhinagar

Respondent

Copy to:

- 1) The Chief Commissioner, Central GST, Ahmedabad Zone.
- 2) The Commissioner, CGST, Gandhinagar.
- 3) The Assistant Commissioner (HQ System), CGST, Gandhinagar.  
(for uploading the OIA)

✓ 4) Guard File.

5) P.A. File.

