



सत्यमेव जयते

## केंद्रीय कर आयुक्त (अपील)

O/O THE COMMISSIONER (APPEALS), CENTRAL TAX,

केंद्रीय कर भवन,

7<sup>th</sup> Floor, GST Building,

Near Polytechnic,

सातवीं मंजिल, पॉलिटेकनिक के पास,

Ambavadi, Ahmedabad-380015

आम्बावाडी, अहमदाबाद-380015

☎ : 079-26305065

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रजिस्टर्ड डाक ए.डी. द्वारा

क फाइल संख्या : File No : V2(ST)46/Ahd-II/2017-18  
Stay Appl.No. /2017-18

353010  
3534

ख अपील आदेश संख्या Order-In-Appeal Nos. AHM-EXCUS-001-APP-002-2018-19  
दिनांक Date : 21-05-2018 जारी करने की तारीख Date of Issue

6/6/18

श्री उमा शंकर आयुक्त (अपील) द्वारा पारित

Passed by Shri. Uma Shanker, Commissioner (Appeals)

ग Arising out of Order-in-Original No. AHM-SVTAX-000-JC-033-16-17 दिनांक: 28.02.2017 issued  
by Joint Commissioner, Service Tax, Ahmedabad.

घ अपीलकर्ता का नाम एवं पता Name & Address of the Appellant / Respondent  
Vodafone Mobile Sevcies Ltd.  
Ahmedabad

कोई व्यक्ति इस अपील आदेश से असंतोष अनुभव करता है तो वह इस आदेश के प्रति यथार्थिति 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) केंद्रीय उत्पादन शुल्क अधिनियम, 1994 की धारा अतत नीचे 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 मंजिल, 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 :

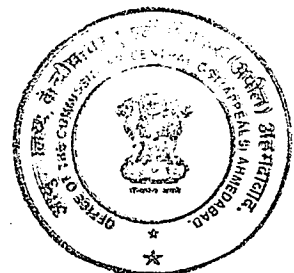
(ii) यदि माल की हानि के मामले में जब ऐसी हानि कारखाने से किसी भण्डागार या अन्य कारखाने में या किसी भण्डागार से दूसरे भण्डागार में माल ले जाते हुए मार्ग में, या किसी भण्डागार या भण्डार में चाहे वह किसी कारखाने में या किसी भण्डागार में हो माल की प्रकिया के दौरान हुई हो।

(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.

(b) 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.

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

... 2 ...



(ख) 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 मामलों में जो भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित है।

(b) 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.

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

(c) 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 जो ड्यूटी क्रेडिट मान्य की गई है और ऐसे आदेश जो इस धारा एवं नियम के मुताबिक आयुक्त, अपील के द्वारा पारित दो समय पर या बाद में वित्त अधिनियम (नं.2) 1998 धारा 109 द्वारा नियुक्त किए गए हो।

(d) 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 मुख्यशीर्ष 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.

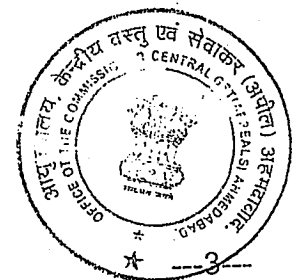
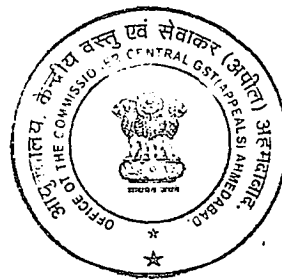
सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील:-  
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(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) उक्तलिखित परिच्छेद 2 (1) क में बताए अनुसार के अलावा की अपील, अपीलो के मामले में सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, अहमदाबाद में ओ-20, न्यू मैनटल हास्पिटल कम्पाउण्ड, मेघानी नगर, अहमदाबाद-380016

(a) To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at O-20, New Metal Hospital Compound, Meghani Nagar, Ahmedabad : 380 016. in case of appeals other than as mentioned in para-2(i) (a) above.



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 पढी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को 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 Appellate 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 शुल्क अधिनियम 1970 यथा संशोधित की अनुसूचि-1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूल आदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रति पर रु.6.50 पैसे का न्यायालय शुल्क टिकट लगा होना चाहिए।

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) इन ओर संबंधित मामलों को नियंत्रण करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है जो सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्याविधि) नियम, 1982 में निहित है।

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

- (6) सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट), के प्रति अपील के मामले में कर्तव्य मांग (Demand) एवं दंड (Penalty) का 10% पूर्व जमा करना अनिवार्य है। हालांकि, अधिकतम पूर्व जमा 10 करोड़ रुपए है। (Section 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

केन्द्रीय उत्पाद शुल्क और सेवा कर के अंतर्गत, शामिल होगा "कर्तव्य की मांग" (Duty Demanded) -

- (i) (Section) खंड 11D के तहत निर्धारित राशि;
- (ii) लिया गलत सेनवैट क्रेडिट की राशि;
- (iii) सेनवैट क्रेडिट नियमों के नियम 6 के तहत देय राशि.

⇒ यह पूर्व जमा 'लंबित अपील' में पहले पूर्व जमा की तुलना में, अपील दाखिल करने के लिए पूर्व शर्त बना दिया गया है।

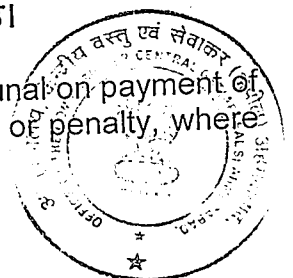
For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shall not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT. (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:

- (i) amount determined under Section 11 D;
- (ii) amount of erroneous Cenvat Credit taken;
- (iii) amount payable under Rule 6 of the Cenvat Credit Rules.

इस इस आदेश 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."



**ORDER IN APPEAL**

This appeal has been filed by M/s Vodafone Mobile Services Ltd., C-48, Okhla Industrial Area, Phase-II, New Delhi - 110020 (herein after referred to as the appellants) against the OIO No. AHM-SVTAX-000-JC-033-16-17 dtd. 28.02.2017 (herein after referred to as the impugned order) passed by the Joint Commissioner, Service Tax, Ahmedabad (herein after referred to as the adjudicating authority).

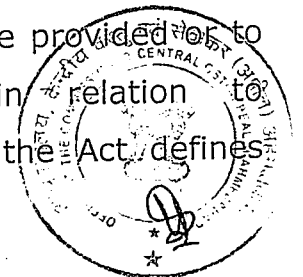
2. The brief facts of the case are that during the audit, it was observed that the appellant had incurred foreign currency expenses which were shown as Roaming Charges under the head foreign currency expenses. These charges were the payments made to various service providers located beyond the geographical area of the appellant and charged the appellant as per their tariff. It appeared that the services received by the appellant fell under the category of 'business auxiliary service' in terms of sub-clauses (iii) and (vi) of Section 65 (19) of the Finance Act, 1994 (herein after referred as "Act") and being recipient of the services shown in their balance sheets under the head 'roaming charges' in terms of Rule 3 of Taxation of Services Provided from outside India and received in India) Rules, 2006 and in terms of Rule 2(1)(d)(iv) of Service Tax Rules, 1994 read with Section 66A of the Act. It was observed that the appellant had not discharged service tax liability on that payment. On being enquired, they provided the details of service tax amounting to Rs. 1,02,94,080/- during the period from April, 2012 to June, 2012 as not paid. In view of this, a show cause notice F.No. DL-II/ST/R-XX/Vodafone/SCN/45/2010/982 dtd. 19.05.2014 was issued by the Commissioner of Service Tax, New Delhi proposing demand of service tax not paid amounting to Rs. 1,02,94,080/- with interest and imposition of penalties under various Sections of the Act. Due to change in jurisdiction after centralized registration on the appellant company in Ahmedabad and in view of revised monetary limits of adjudication vide Notification No. 44/2016-ST dtd. 28.09.2016, the show cause notice came to be decided by the adjudicating authority who, vide the impugned order, confirmed the demand and imposed penalties under Sections 76 and 77 (2) of the Act by holding that the services provided fall in the category of services specified in clause (iv) and (vi) of the definition of business auxiliary service.

3. Being aggrieved by the impugned order, the appellant have filed this appeal on the following grounds:

- a) That the impugned order is in violation of principle of natural justice as their submissions have been overlooked;



- b) That the demand has been raised solely on the basis of the audit objections and no further investigations were carried out to substantiate the objections;
- c). That the foreign mobile operators are not providing any service on behalf of the appellant. They are providing services to the subscribers and the appellant is making payment for the services received by the subscriber directly from the foreign mobile operators;
- d) That to be covered under the definition of business auxiliary services, the service provider should act as an agent of the client and undertake any service on behalf of the client whereas in their case, it is not so and the foreign mobile operators are providing service directly to the subscribers on a principal to principal basis;
- e) That as per clause 6 of the Agreement, the subscriber may receive services different from that provided by the appellant. The only requirement of the foreign mobile operator is to ensure that same standard is maintained as it is providing to its own subscriber;
- f) That the services provided by the foreign mobile operator are in the nature of telecommunication services as envisaged under the Act;
- g) That as per CBEC Circular No. 90/1/2007-S.T., dtd. 03.01.2007 in relation to in-bound roaming subscriber has clarified that the local network provides telecommunication service to the roaming subscriber as its own subscriber on a temporary basis. Therefore during the period of roaming, the Indian telecom service provider provides telephone service to an international in-bound roamer. In view of this clarification, the Department itself is of the view that said service provided by the visiting network to the roaming subscriber is in the nature of 'telecommunication service';
- h) That the CBEC letter F.No. 137/21/2011-ST dtd. 19.12.2011 has also clarified that the international private leased Circuit service is not classifiable under "Business Support Service" and the same will be classified under "Telecommunication Service";
- i) That in terms of Section 65 A(2) (a) of the Act, the entry providing more specific description shall be preferred over entry providing general description;
- j) That in terms of Section 65 (105) (zzzx) of the Act, telecommunication service is defined as any service provided or to be provided by the Telegraph authority in relation to telecommunication service. Section 65 (111) of the Act defines



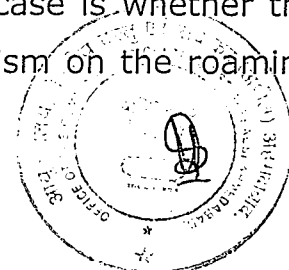
"telegraph authority" as having the same meaning assigned to it in clause (6) of Section 3 of the Indian Telegraph Act, 1885 and includes a person who has been granted a license under the first proviso to sub-section (1) of Section 4 of that Act. Section 3 (6) of the Indian Telegraph Act, 1886 defines telegraph authority as the director General of (Posts and Telegraphs and includes any officer empowered by him to perform all or any of the functions of the telegraph authority under this Act. In their case, the foreign telecom operators are not covered by the definition as they have not obtained a license under the first proviso to Section 4 (1) of the Indian Telegraph Act, 1885. Therefore the foreign telecom operator is not a telegraph authority as defined under Section 65 (111) of the Act;

- k) That the service tax is leviable only when the activity of rendering of the prescribed service takes place in the taxable territories of India as held in the case of Bengal Immunity Co. Ltd. vs. State of Bihar (1955) 2 SCR 603;
- l) That the entire case is revenue neutral as even if the appellant is liable to pay service tax on the amount remitted to foreign telecom operators, service tax so paid by the appellant is admissible as credit as the said service amounts to input service for providing output service to their subscribers as held in International Auto Ltd. vs. CCE- 2005 (183) ELT-239 (SC), CCE vs. Narayan Polyplast Ltd. - 2005 (179) ELT-20 (SC), CCE vs. Narmada Chematur Pharma - 2005 (179) ELT-276 (SC) and CCE vs. Coca-Cola India Pvt. Ltd.- 2007 (213) ELT-490 (SC);
- m) That no liability for interest and imposition of penalty is also not right in view of many case laws as the case involves interpretation of law.

4. The personal hearing in the case was held on 24.01.2018 in which Shri Madhu Jain, Advocate appeared on behalf of the appellant. He reiterated the grounds of appeal and cited case law of 2017-TIOL-3315-CESTAT-DEL.

5. I have carefully perused the documents pertaining to the case and submitted by the appellants along with the appeal. I have considered the arguments made by the appellants in their appeal memorandum as well as oral submissions during personal hearing.

6. I find that the issue to be decided in the instant case is whether the service tax liability arises under reverse charge mechanism on the roaming

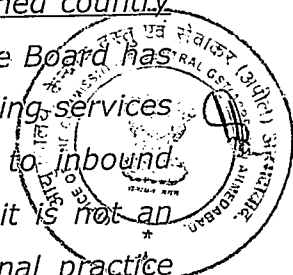


charges paid by the appellant to foreign telecom operator under business auxiliary services.

7. First of all, I find that the issue in question is a part of various periodical demands raised against the appellant. In the demands for other periods, the appellant contested the Order In Original successfully before the CESTAT and the Tribunal, vide its order No. ST/A/55606/2017-CU(DB), dated 26-7-2017 in Appeal No. ST/51934/2014-CU(DB) cited at 2017 (6) G.S.T.L. 67 (Tri. - Del.) set aside the demand. Further I find that the International Private Leased Circuit (IPLC) is specifically covered by the definition of the telecommunication service given in clause 65 109 (a) (iv) of the Act. As per the said section, these services are taxable only when provided by a person who has been granted a licence under the first proviso to sub-section (1) of section 4 of the Indian Telegraph Act, 1985. It is only because the foreign telecom service provider cannot constitute a telegraph authority under an Indian law that they remain outside the taxability clause of the telecommunication service. In view of the Tribunal's order supra in which the fact about the services provided by the respondent in that case have been discussed, I also find that the service tax liability is imposed only on the persons providing such service who have been granted a licence under the first proviso to sub-section (1) of section 4 of the Indian Telegraph Act, 1985 and I find that this issue may be remanded to the adjudicating authority for specifically examining this aspect as to whether the foreign telecom operator is so registered in India or otherwise and service tax liability will be decided accordingly.

8. The appellants have submitted the case cited at 2017 (6) G.S.T.L. 67 (Tri. - Del.) by the the CESTAT, Principal branch, NEW DELHI in the Vodafone Essar Mobile Vs. C.S.T., DELHI in Final Order No. ST/A/55606/2017-CU(DB), dated 26-7-2017. In this order, the Tribunal has held as under:

*"Here also we note that the telecommunication service liable to tax has been exhaustively defined and admittedly, the services now under consideration are specifically covered in the said tax entry. We also note that the Id. Counsel for the appellant submitted that the services rendered by foreign telecom service provider to their subscribers while roaming, are subject to VAT/other liable tax in the concerned country in terms of agreement. In this connection, we also note the Board has examined the international practice with reference to roaming services vide Circular dated 3-1-2007. It was held that services to inbound roamers is delivered and consumed in India and hence, it is not an export of service. It was further clarified that international practice*



*treats the telephone service provided to an inbound roamer by the visited network, for purpose of taxation, in the same manner as a telephone service provided to any home subscriber." (emphasis supplied)*

9. I find that the part of the Tribunal's order supra quoted in para 8 above which has been emphasized, needs examination by the adjudicating authority. In view of the above findings, I set aside the impugned order and allow the appeal by way of remand with a direction to the adjudicating authority to examine the facts of the case in the light of Hon'ble Delhi Tribunal's order cited supra.

10. The appeal is disposed off accordingly.

अपीलकर्ता द्वारा दर्ज की गयी अपील का निपटारा उपरोक्त तरीके से किया जाता है !

*उमा शंकर*

(उमा शंकर)

केंद्रीय कर आयुक्त (अपील्स)

अहमदाबाद

दिनांक:

सत्यापित

*R.P.A.D.*

(धर्मद्व उपाध्याय)

अधीक्षक (अपील्स),

केंद्रीय कर, अहमदाबाद

**By R.P.A.D.**

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**Copy to:-**

- (1) The Chief Commissioner, CGST, Ahmedabad Zone,
- (2) The Commissioner, CGST, Ahmedabad (South),
- (3) The Dy./Astt. Commissioner, CGST, Div.-VIII, Ahmedabad (South),
- (4) The Dy./Astt. Commissioner (Systems), CGST, Ahmedabad (South),
- (5) Guard File,
- (6) P.A. File.

