

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
HYDERABAD
REGIONAL BENCH - COURT NO. I**

Service Tax Appeal No. 1939 of 2012

(Arising out of Order-in-Original No. 11/2012-Adjn.(Commr)S.T. dated 28.03.2012 passed by the Commissioner of Customs and Central Excise, Hyderabad.)

M/s Qualcomm India Pvt Ltd

Building#8, 5th Floor,
Mindspace, Hitec City,
Madhapur, Hyderabad
500 081.

Appellant

VERSUS

**Commissioner of Customs &
Central Excise, Hyderabad-IV**

Posnett Bhavan, Tilak Road, Ramkote,
Hyderabad-500 001,
Andhra Pradesh, India

Respondent

APPEARANCE:

Shri Prasad Paranjpe, Advocate for the Appellant

Shri A. Rangadham, Authorised Representative for the Respondent

CORAM:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)

HON'BLE MR. P. VENKATA SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER NO. A/30017/2023

Date of Hearing: 09.09.2022

Date of Decision: 01.03.2023

ANIL CHOUDHARY:

The issue involved in this appeal is whether the services availed by the Appellant from Verizon Inc (located outside India) are liable to service tax as 'Internet Telecommunication Service' or are classifiable as 'Leased Circuit Service' (upto 31 May 2007) and there after 'Telecommunication Service', having been provided by an entity

not qualifying to be a Telegraph Authority, whether liable to service tax?

1.1 Since the Appellant would be entitled for Cenvat credit of alleged service tax liability and also refund of it, will the demand for extended period be sustainable and penalties imposable on the ground of revenue neutrality?

Brief Facts:

2. The Appellant is a subsidiary of Qualcomm Inc. USA. The said Qualcomm Inc USA has entered into a Master Service Agreement with a group entity 'Verizon Inc' located outside India for providing telecom bandwidth and telephone related services for all its affiliated entities across the globe. The Appellant being one of the group entities of Qualcomm Inc USA, avails telecom bandwidth and telephone services from Verizon Inc, as per the terms of the agreement. Verizon Inc raises invoice directly on the Appellant on a monthly basis. The said services received by the Appellant is used by them in provision of their taxable output services.

3. For the period under dispute October 2006 to July 2009, the Revenue was of the view that the services availed by the Appellant from Verizon Inc, USA merits classification under 'Internet Telecommunication Service' and demanded service tax vide Show Cause Notice dated 28.09.2011.

4. The Appellant contended that the services availed by them from Verizon Inc are not in the nature of Internet Telecommunication service and at best will be classified as 'Leased Circuit Service' until 31.05.2007 and from 01.06.2007 such services at best would merit

classification as 'Telecommunication service'. However, under both these categories, there is a requirement under the law that the service provider should qualify as 'Telegraph authority' i.e. the person licensed under Indian Telegraph Act, 1885. Since Verizon Inc, USA did not have such a license granted under the Indian Telegraph Act, 1885, the services availed from Verizon Inc, USA would not be liable to service tax.

5. Ignoring the above submissions, the Ld. Adjudicating Authority confirmed service tax demand along with interest, penalties including mandatory penalty vide Order-in-Original dated 28.03.2012. Being aggrieved the appellant is before this Tribunal.

Submissions

6. Learned Counsel inter alia urges that at the outset it is submitted that the SCN proposes to levy service tax under the category of 'Internet Communication Service'. The said services were brought into the service tax ambit only with effect from 16.05.2008. Therefore, the present demand to the extent it covers the period from 01.10.2006 till 15.05.2008, will not be liable to service tax.

7. Without prejudice to the above, under section 65(57a) of Finance Act, 1994, "Internet telecommunication service" includes, —
(i) Internet backbone services, including carrier services of internet traffic by one Internet Service Provider to another Internet Service Provider, (ii) Internet access services, including provision of a direct connection to the internet and space for the customer's web page, (iii) Provision of telecommunication services, including fax, telephony, audio conferencing and video conferencing, over the internet.

8. It is submitted that the services availed by the Appellant are not availed through Internet but are availed by way of obtaining a dedicated international private bandwidth connectivity. This bandwidth connectivity is exclusively for the Appellant unlike the internet services, which do not provide such exclusivity. These services are specifically covered upto 31.05.2007, under the category of Leased Circuit Services and thereafter under the category of Telecommunication services.

9. Under Section 65(109a) of Finance Act, 1994, "Telecommunication service" means service of any description provided by means of any transmission, emission or reception of signs, signals, writing, images and sounds or intelligence or information of any nature, by wire, radio, optical, visual or other electro-magnetic means or systems, including the related transfer or assignment of the right to use capacity for such transmission, emission or reception, by a person who has been granted a license under the first proviso to sub-section (1) of section 4 of the Indian Telegraph Act, 1885 and *inter alia* includes carrier services including a leased circuit or a dedicated link including a speech circuit, data circuit or a telegraph circuit; private network services including provision of wired or wireless telecommunication link between specified points for the exclusive use of the client; data transmission services including provision of access to wired or wireless facilities and services specifically designed for efficient transmission of data; but does not include service provided *inter alia* by any person in relation to internet telecommunication service referred to in sub-clause (zzzu) of clause (105).

10. The term leased circuit under Section 65(60) of the Finance Act, 1994 on the other hand means a dedicated link provided between two fixed locations for exclusive use of the subscriber and includes a speech circuit, a data circuit or a telegraph circuit.

11. The services availed by the Appellant from Verizon Inc USA, being a private dedicated bandwidth, are more specifically covered as a Leased Circuit (upto 31 May 2007) and thereafter as Telecommunication service.

12. However, under both the above categories, as per the statutory definition, the service provider needs to be a telegraph authority. The 'Telegraph authority' has been defined inter alia, to include a person who is granted a license under the Indian Telegraph Act, 1885. In the present case, Verizon Inc has not been granted such license. Therefore, it would not qualify to be telegraph authority and therefore any services provided by them will not be liable to service tax. The above view is supported by the following:

- (a) Circular: 137/21/2011-S.T. dated 15.07.2011 (pg no. 13 of compilation)
- (b) Circular: 137/21/2011-S.T. dated 19.12.2011 (pg no. 14 of compilation)
- (c) TCS E-Serve Ltd. vs Commissioner of Service Tax, Mumbai, 2014 (33) STR 641 (Tri-Mumbai) (pg no. 15 of compilation)
- (d) Vodafone Essar Mobile vs C.S.T., Delhi, 2017 (6) G.S.T.L. 67 (Tri. - Del.)(pg no. 18 of compilation)
- (e) Autodesk India Pvt. Ltd. vs Commissioner of Service Tax, Delhi, 2019 (20) G.S.T.L. 581 (Tri. - Del.) (pg no. 20 of compilation)

13. In any case the Appellant submits that service tax if at all applicable on the services availed from Verizon Inc USA, will be available as 'cenvat credit' to the Appellant, as services availed from Verizon Inc USA are used by the Appellant for providing taxable

output services. Further, the Appellant being a 100% Export Oriented Software Technology Park Unit, it would be entitled for refund of any such unutilized service tax paid on its input services. Thus, there exists a direct case of revenue neutrality. In this situation, invocation of extended period and levy of penalties including mandatory penalty is not be justified.

14. The Appellant relies on the following judgements:

- (a) J.P.P. Mills Pvt. Ltd. vs Commissioner of Central Excise, Salem, 2016 (46) S.T.R. 317 (Tri. - Chennai) (pg no. 23 of compilation)
- (b) Nirlon Ltd. vs Commissioner of Central Excise, Mumbai, 2015 (320) E.L.T. 22 (S.C.) (pg no. 26 of compilation)
- (c) Asmitha Microfin Ltd. vs Commr. of Cus., C. Ex. & S.T., Hyderabad-III, 2020 (33) G.S.T.L. 250 (Tri. - Hyd.) (pg no. 29 of compilation)
- (d) ABB Ltd vs C.C.E. & S.T. LTU Bangalore, 2019 (24) G.S.T.L. 55 (Tri.-Bang.) (pg no. 32 of compilation)

15. In any case, for the dispute on classification, the Appellant cannot be attributed with the charge of suppression or willful mis-statement justifying invocation of extended period of limitation or levy of penalties.

16. Without prejudice to the above, the Appellant prays for invoking Section 80 of the Finance Act, 1994 for waiver of penalties.

17. For the submissions made hereinabove, the Appellant prays that their appeal be allowed with consequential relief.

18. Learned AR relies on the impugned order.

19. We find that the issue herein is squarely covered by the precedent ruling of this Tribunal, co-ordinate bench in TCS E-Serve Ltd vs. Commissioner of Service Tax, Mumbai 2014(33) STR 641(Tri-Mumbai). In the facts of the said case TCS E-Serve was engaged in providing call centre services, collection and sales services and computerised data processing services to various customers in India

and abroad, were registered with the department of service tax under the category of 'BAS' & 'BSS'. During the course of business, TCS received international private leased circuit services from M/s Verizon Communications, Singapore Pte Ltd. and had made payments for the same to the foreign service provider located outside India, revenue had demanded service tax on the said service tax under RCM in terms of Section 66A for the "Leased Circuit"/"Telecommunication service" received from M/s Verizon Communications Singapore Pte Ltd. This Tribunal held that service tax liability does not arise under Section 66A of the Finance Act, if service is not specified under Section 65(105) of the Finance Act. The Tribunal relied on the ruling of Hon'ble Andhra Pradesh High Court in Karvy Consultants Ltd. 2006(1)S.T.R.7(A.P.), wherein the question involved was levy on service of banking & financial transaction under taken by Karvy Consultants Ltd, which was registered as NBFC, but their principal business was not of receiving deposit/lending. The High Court has held that the service provider should be both a company and with principle business of receiving deposit/lending. Mere registration as an NBFC is not enough under the provision of service tax for levy. Applying the ratio, the Tribunal held that it is not enough that the service provider provides lease services but it should also be a 'Telegraph Authority' as defined in the Act. Unless both the conditions are cumulative satisfied, service tax levy is not attracted.

20. We find that the aforementioned decision in TCS E-Serve applies to the facts of the present case on all four.

21. In view of our findings and observations, we allow the appeal and set aside the impugned order. As the appeal is allowed on merits, we leave the question of limitation open.

(order pronounced in the open Court on 01.03.2023)

Anil Choudhary
Member(Judicial)

P. V. SUBBA RAO
Member(Technical)

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