

Bharti Airtel challenges GST-levy on telecom licence-fees, spectrum usage charges; seeks refund

Madras HC, hears a batch of writ petitions filed by Bharti Airtel (Petitioner) challenging GST levy on Licence Fee (LF) and Spectrum Usage Charges (SUC) payable to Department of Telecommunications (DoT) under reverse charge along with relevant notifications and circular; In addition, assessee also challenges (i) Section 168 of CGST Act which provides unfettered power to CBIC to issue binding circulars on the adjudicating and appellate authorities, (ii) Rule 90(3) of CGST Rules and para 12 of Circular No. 125/44/2019-GST to the extent it provides that re-submission of refund application, pursuant to a deficiency memo, should be treated as fresh refund claim application for computing the limitation period and payment of interest; Assessee, who was awarded telecom licence and spectrum, has been discharging 18% GST on LF and SUC by adopting conservative approach and deposited GST for period of July 2017 to April 2018, under Service Head '9984', which pertains to telecommunication services but Revenue rejected all the refund claims filed by the Petitioner for the State of Tamil Nadu; Petitioner submits (i) the relationship between DoT and Petitioner is not in nature of service provider – service recipient and as such payment of LF is not for any service rendered by DoT, (ii) GST levy is not possible on Spectrum as it is not even a resource, (iii) the attempt to tax the amount paid as LF and SUC is beyond the charging section as it cannot be regarded as a supply of services, (iv) Since LF and SUC are payable in terms of licence that has been issued to Petitioner by the Govt. and GST is credited to Consolidated Fund of India, Revenue by seeking to charge GST on its own revenue is merely seeking to enhance the revenue which was otherwise capped under the licence agreement, (v) LF and SUC collected by DoT is a compulsory exaction of money by a public authority for public purposes enforceable by law and therefore, is in the nature of a tax; Petitioner inter-alia argues that residual entry of Service Rate Notification was modified from time to time, however, upto December 31, 2018, CGST rate for services under this entry (Leasing or rental service without operator) was specifically aligned to goods and since present case is a pure service (being transaction without involvement of any goods), this entry was inapplicable till said date; HC issues notice to Revenue and lists the matter on September 13.

Bharti Airtel Limited v. UOI

The matter is before Division Bench comprising of Chief Justice Sanjib Banerjee and Justice Senthilkumar Ramamoorthy.

Sr. Advocate Tarun Gulati along with Advocates Nikhil Gupta, Vipin Upadhyay and Aswini. S are appearing on behalf of the Petitioner.

The information contained in the above alert is source based.

Issue

(i) Assessee is challenging the levy of GST by the Department of Telecom (DoT) in the capacity of public authority, on activity of awarding telecom licence and spectrum usage rights to telecom service providers (like assessee) u/s 4 of the Telegraph Act, 1885 and the Indian Wireless Telegraphy Act, 1933.



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(ii) Assessee also challenges the Addl. Commissioner (A) order rejecting a cumulative refund of Rs. 73,21,29,546/- of the GST erroneously paid by it on the Licence Fees (LF) and Spectrum Usage Charges (SUC) to the Government, for being illegal, perverse and being passed without any independent application of mind.

(iii) Thereby, assessee challenges Section 168 of CGST Act which provides unfettered power to CBIC to issue binding circulars on the adjudicating and appellate authorities, unlike Section 37B of the Central Excise Act/151A of the Customs Act.

(iv) Assessee also assails Rule 90(3) of CGST Rules being ultra vires to CGST Act and para 12 of Circular No. 125/44/2019-GST to the extent it provides that re-submission of refund application, pursuant to a deficiency memo, should be treated as fresh refund claim application for computing the limitation period and payment of interest.

Facts

Assessee was awarded with a telecom licence and assigned Spectrum by the DoT for which paid it LF and SUC, which are paid as a share of Adjusted Gross Revenue (AGR) every quarter as per the terms of the Unified Access Services Licence (UASL). After the enactment of GST, assessee paid 18% GST on LF and SUC under reverse charge (amounting to Rs. 73,21,29,546) by adopting conservative approach on account of ongoing ambiguity on taxability of these charges in the entire industry. However, assessee inadvertently deposited this amount under Service Head '9984', which pertains to telecommunication services.

Against such GST levy, assessee approached the Delhi HC issued notice to the Government and the Department in both these writs and presently, these writ petitions are pending. Thereafter, assessee filed 5 refund claims in respective States for the period of July 2017 to April 2018 seeking refund of GST paid on LF and SUC. However, all these refund claims claim of Rs. 53,39,53,574 (first 3 refund claims, i.e., for months July 2017, October 2017 and January 2018) and Rs. 19,85,71,972 (remaining 2 i.e. for months of March 2018 and April 2018) were rejected vide Order-in-Appeals dated November 27, 2020 and March 18, 2021 passed by Addl. Commissioner (A) and Jt. Commissioner (A). The reasons were:- (i) the LF and SUC are liable to GST under reverse charge and therefore, refund is not maintainable, (ii) on assessee's contention that there was no rate of tax notified by the Respondents for LF and SUC prior to January 01, 2019, amendment to S. No. 17(viii) of the Service Rate Notification vide Notification No. 27/2018-CT (Rate) was only clarificatory in nature and therefore, 18% rate should be applicable from 01.07.2017 itself, (iii) the Orissa AAAR ruling in Penguin Trading and Agencies Limited [TS-976-AAAR-2019-NT].

Hence, the writ petitions.

Assessee's Contentions

(i) The GST levy for grant of telecom licences and allocation of spectrum for use under the Telegraph Act, 1885 is without authority of law.



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(ii) The functions/ activities performed by the DoT are statutory functions and not services in the course or furtherance of any business.

(iii) The LF and SUC are paid as a share of revenue and the same is an appropriation for the purposes of the government revenue and not payment for any service.

(iv) The Impugned Notification [Serial No. 17 (viii) of Notification No. 11/2017-CT (Rate)] and Circular [Para 12 of the Circular No. 125/44/2019-GST] which deem all such payment of fees to attract GST are ultra vires CGST Act, Articles 14, 19(1)(g), 265 and 300A of the Constitution. Further, the Impugned Orders should also be quashed and amount already deposited by the Petitioner should be refunded with consequential relief.

(v) The view that GST is leviable on any payment in lieu of any licence granted, and spectrum allocated by the Government is inconsistent with the position that any payment made as a quid pro quo for the service received from the Government has to be regarded as a consideration for that service. The requirement for quid pro quo is not satisfied in the case of fees paid for grants of licences or permissions or SUC where such fees are in the nature of regulatory fees. The relationship between the DoT and the assessee is not in nature of service provider – service recipient and the payment of such Licence Fees is not for any service rendered by the DoT.

(vi) The LF and SUC collected by the DoT is a compulsory exaction of money by a public authority for public purposes enforceable by law and is therefore, in the nature of a tax.

(vii) The GST levy is also not possible on Spectrum as it is not even a resource. The fact that Spectrum, defined as a range of radio frequencies is just a bounded numerical range, but those numbers are no more than a connotation of any other physical unit like seconds, meters or kilograms, it is not a resource other than an audible sound.

(viii) Both the LF and SUC charged as well as the GST are credited to the Consolidated Fund of India. Thus, the Revenue by seeking to charge GST on its own revenue is merely seeking to enhance the revenue which was otherwise capped under the licence agreement.

(ix) In 26th GST Council Meeting, the Council itself has itself taken a view that GST is not leviable on the licence fees and the same should apply in respect of the LF and SUC.

(x) The levy of GST on the LF and SUC is confirmed under the Heading 9973 of the Service Rate Notification i.e. “Leasing or rental services with or without operator” primarily on the premise that same are within the ambit of taxing statute and is clearly mentioned as services at Serial No. 258 of the Annexure to Service Rate Notification. However, mere mention of licensing services or telecommunication spectrum in the classification schedule would not make their supply taxable.

(xi) No rate of tax has been prescribed in the Service Rate Notification No. 11/2017-CT(Rate) for the activities undertaken by DOT and thus, the levy of GST on LF and SUC is legally not sustainable. The activities of DoT are erroneously classified at Serial No. 258 of the Annexure to Service Rate Notification (i.e. 997338 - Licensing services for right to use other natural resources including telecommunication



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spectrum.) which falls under the Heading 9973 (i.e. Leasing or rental services with or without operator), till 31.12.2018, there was no rate of tax prescribed for services which do not involve any underlying supply of goods. Thus, it is evident that there was no rate of tax prescribed for the activities undertaken by DoT till 31.12.2018. Accordingly, GST was not applicable on the LF and SUC paid by the Petitioner to the DoT.

xii) The AAAR order in Penguin Trading and Agencies Limited [TS-976-AAAR-2019-NT] has been issued on some different issue and context and the same is statutorily not binding in present case.

(xiii) Since it is a settled position of law that amount paid under mistake of fact or law is amount paid without authority of law, wherein Article 265 of the Constitution of India gets attracted. Accordingly, the amount of LF and SUC paid inadvertently, under a mistake, deserves to be refunded.

High Court Observation

Hearing the contentions of Assessee, the Court issued notice to the non-appearing respondents and permitted private notice as well. Further, HC directed the Revenue to file counter-affidavits within 4 weeks and listed the matter on September 13, 2021.