

CORPORATE OFFICE, TAXATION SECTION  
1<sup>ST</sup> FLOOR, BHARAT SANCHAR BHAWAN,  
JANPATH, NEW DELHI-110001



BHARAT SANCHAR NIGAM LIMITED  
[A Government of India Enterprise]

No.1002-05/2011-12/Taxation/BSNL/242

Dated: 07/06/2012

To

CGMs of Telecom Circles/ Metro Districts/Maintenance Regions/ Project Circles/ Task Force/  
Data Network/ NCES/ ALTTC/BRBRAITT/ NATFM/Q&A/ T&D/ Telecom Stores/ Telecom  
Factories/ CPAO (ITI Bills)/ IT Circle Pune/ AGM (R&P) Corporate Office.

**Sub.: Case regarding non-payment of Service tax on discount given to PCO  
holders under defined rates charged from PCO operators.**

Kindly find enclosed herewith copy of Order in appeal No. 168/2011 dated 01.12.2011,  
wherein BSNL appeal for non applicability of service tax on the commission retained by  
STD/PCO operator has been decided in favour of BSNL.

The Commissioner (Appeals), O/o Commissioner of Central Excise (Appeals),  
Mangalore, has passed an order and held that **valuation for service tax is to be based on the  
amount received by the telegraphic service provider from the subscriber (PCO operator)  
and not on the basis of amount charged by the PCO operator from the customers/users.**

Hence, it is requested to kindly bring this to the notice of all concerned for information  
and to produce the same before adjudicating authorities and appellate authorities, as and when  
required. Status/ outcome of the similar cases may be updated to this office.

This issues with the approval of competent authority.

Encl.: As above

  
(Yashwant Nath Singh)  
GM (Taxation)

Copy for information and necessary action to:-

1. IFAs of All circles of BSNL
2. ED (F) and all PGM (F)/ Sr. GM (F)/ GM (F) of BSNL Corporate Office.

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1/12/12



GOVERNMENT OF INDIA  
MINISTRY OF FINANCE  
DEPARTMENT OF REVENUE  
OFFICE OF THE COMMISSIONER OF CENTRAL EXCISE (APPEALS),  
MANGALORE,

V FLOOR, TRADE CENTRE, BUNTS HOSTEL ROAD, MANGALORE - 575 003  
TELEPHONE No: 0824- 2447623 FAX: 0824- 2448443  
E MAIL ID: appeals\_mangalore@yahoo.com

A.No.170/10/MY/ST

Passed on: 01-12-2011  
Issued on: 01-12-2011

ORDER - IN - APPEAL NO.168/2011

M/s. Bharath Sanchar Nigam Ltd. Mandya Telecom District, telephone exchange building, mandya-071-401 (hereinafter referred to as the appellant) has filed this appeal No.170/10/MY/ST against the Order-In-Original No.02/ADC/ST/2010 dated 27/28-01-2010 passed by the Additional Commissioner of Central Excise and Service Tax, Mysore, Mysore Commission rate (hereinafter referred to as the respondent).

2. Brief facts of the case:

The appellant are the holders of Service Tax Registration Certificate under the category of rendering Telecommunication services. On verification of the records of the appellant it was observed that with effect from 01/01/2008 had introduced a credit call scheme for PCOs whereby they

were deducting the credit calls from the gross calls made at the PCO and paying service tax on the net calls, similarly, with effect from 09/2008, they introduced a discount scheme for PCOs whereby they were deducting the discount calls from the gross calls made at the PCO and paying service tax on the net calls. By these the appellant failed to declare the full value of taxable service in as much as they have excluded the credit/discount calls extended by them to PCO operators during the period from January 2008 to March 2009. Hence a Show Cause Notice was issued and the same was decided vide the OIO referred above, confirming and demanding service tax of Rs. 22m37m760/- with interest. Penalty under the provisions of Section 77(2) and under Section 78 was also imposed.

3. The appellant being aggrieved by the order-in-original filed appeal along with stay application before me on 12/03/2010 on the following grounds:

i) that the taxable services have been rendered by the PCO operators in terms of Section 65(109)(zzzx) under the category of "telecommunication services" as defined under Section 65(109a) of the Finance Act, hence the demand has to be made on the PCO operators and not on them;

ii) that the gross amount charged is the after amount after discount and no additional amount is received by them; the discounted rate is only received from the PCO operator which form the gross amount charged and is same accounted in their books of the account

iii) that in terms of business plan the PCO operators are to charge their customer at the prescribed maximum rate, the difference between the maximum price collected from the customers and the discount is the profit earned by the PCO operator and it is not an additional consideration from the PCO operator to them.

iv) that they are liable to pay service tax only on the payment that are received as per rule 6 of STR,1994, and they do not receive other than what is charged from the PCO operators, hence the question of payment of service tax on the discount does not arise.

v) that they entered into an agreement with the PCO operators and said agreement is on a Principal to Principal basis and no relationship of Principal and agent between them.

vi) that the value determined is incorrect, and the value of services provided to the PCO Operators has to be adopted for business purposes, under a separate class and a separate plan and hence even if rule 3(a) of STR,2006 applied in their case, no further liability of service tax would arise, further the amount charged to the PCO operators is more than the cost of providing the taxable service then also rule 3(b) is also satisfied by them.

vii) that no further expenditure or cost are incurred for providing the services to the PCO operators, hence rule 5(1) not applicable in their case.

viii) that they are Government owned Public Sector undertaking have no reason whatsoever to adopt methods which are not legitimate and to evade taxes.

ix) that they have not suppressed any information from the department as they have been paying service tax and filing the ST-3 returns regularly since 1994 and they have provided the required information as sought the department vide their letter dated 31/10/2008, on 02/12/2008, that they were of the bonafide belief that they were liable to pay service tax only on the value received form PCO operators and no intention to evade payment of service tax. Further they relied following case laws

- a) CCE VS Chemphar Drugs & Liniments, 1989(40)ELT 276(SC)
- b) Padmini Products Vs CCE, 1989(43)ELT 195(SC)
- c) CCE VS H.M.M Ltd 1995(76)ELT 497(sc)
- d) Pushpam Pharmaceuticals Co. Vs CCE, Bombay 1995(78)ELT 401(sc)
- e) Ugam Chand Bhandari VS CCE 2004(167)ELT 491(SC)

viii) that the difference in the amount collected from the customer of the PCO operator and the discount price provided by them is the profit of the PCO operators and is not liable for service tax confirmed against them, hence, they are not subjected to penalty under Section 78 of the Finance Act and also no interest can be demanded from them under Section 75 of the Finance Act since no service tax is liable to be paid in this case. They relied following case laws:

- a) Tamil Nadu Housing Board vs CCE, Madras 1994(74)ELT 9(SC)
- b) Coca Cola Beverages Ltd 2004(172)ELT 451 (ALL HC)
- c) Padmini Products V CCE, 1989(43)ELT 195 (SC)
- d) Flyingman Air Courier Pvt Ltd vs CCE, JAIPUR, 2004(170)ELT 417
- e) CCE, JALANDHAR, VS Darmania Enterprises, Gurdaspur 2009 (14) STR ,741 (P&H)
- f) Hindustan Steel Ltd Vs The State of Orissa, 1978(2)ELT 159 (SC)

ix) They lastly requested order of the Additional Commissioner may be set aside in respect of demand of service tax, interest on the tax and imposition of penalty.

S/Shri. Anil Kumar B., and Nirmla Chopra, Advocates of AKB Associates appeared for personal hearing conducted on 24-11-2011. They reiterated the grounds of appeal. They also submitted a common written submission for all such similar issues at the time of personal hearing for consideration. They have submitted the copy of decision of Hon'ble CESTAT, Principal Bench, New Delhi in the case of Bharti Infotel Limited Vs. Commissioner of Central Excise, Bhopal-2006 (1) STR 107 (Tri-Del). They have also submitted the copies of Stay Order No. 153/2011, 521 & 522 issued by the Hon'ble CESTAT, Bangalore.

### 3. Findings:

I have carefully gone through the records of the case, the submissions made by the appellant and the case laws cited by them. In view of the findings below, I waive the pre deposit and take up the case for final decision.

The issue to be decided is whether the appellant has to pay service tax on the credit calls/discount calls allowed to the Public Call Operators (PCOs.)

The appellants are a Public Sector Undertaking of the Government of India. They are engaged in providing telecommunication services to its customers. They are registered with the Service Tax Department. Prior to January 2008, the PCO operators were billed on the gross metered calls at the tariff in force. The service tax was paid on the entire amount collected from the PCO operator as the commission was given to the PCO operator after taking into the books of accounts. From January 2008, the appellant changed their business model from commission based to credit call based

billing. In this method, the bills were issued after allowing appropriate credit calls, billing the net calls at the tariff in force including service tax. Service tax was collected on the net calls billed and the same was remitted to the Government. There is no dispute as to the fact that the appellant has discharged the service tax on the amount collected from the PCO operators. I have gone through the decision of the Hon'ble CESTAT, Principal Bench New Delhi in the case of Bharti Infotel Limited Vs. Commissioner of Central Excise, Bhopal (2006 (1) STR 107 (Tri.-Del) submitted by the appellant which is reproduced below:

*"Valuation (Service tax)-Telegraphic service-PCO operator-Valuation to be based on amount received by telegraphic service provider from subscriber (PCO operator), and not on the basis of amount charged by the PCO operator from the customers/users-Section 67 of Finance Act, 1994."*

*valuation of service provided by the appellant to the subscriber cannot be based on amount charged by the PCO operator from the customer. In the present proceeding, the additional service tax is demanded on this basis. It is clearly contrary to the scheme of valuation provided in the Act."*

I have also gone through the letter wherein the Chief Commissioner of Customs and Central Excise, Visakhapatnam communicated to various Commissionerates vide letter C.No. V/30/61/2009 CC (VZ) dated 18-04-2011:

*"It is to inform that CESTAT, New Delhi in the case of Bharati Infotel Ltd. Vs. Commissioner of Central Excise, Bhopal (reported in 2006 (1) STR 107 (Tri. Delhi)-2005-TIOL-819-CESTAT-Del held that valuation is to be based on the amount received by the telegraphic service provider from*

the subscriber (PCO Operator) and not on the basis of amount charged by the PCO operator from the customers/users. In this connection, vide letter F.No. III (20) RC/CESTAT/02/2005 dated 08-02-2011 (copy enclosed for ready reference), Bhopal Commissionerate informed that the Board has decided not to file appeal before the Supreme Court and hence CESTAT judgement in the case of Bharati Infotel attained the finality. Therefore issues pending in this regard may be disposed off at the earliest."

I have also gone through the recent Stay Order copies submitted by the appellant. The Hon'ble CESTAT, Bangalore while granting Stay Order No. 153/2011 dated 17-1-2011 to M/s BSNL on similar issue observed that:

*"We find that Board's Circular and the decision of the co-ordinate Bench in the case of Bharti Infotel Ltd (supra), prima-facie cover the issue in favor of the assessee. At this juncture, we find that the appellant has made out a prima-facie for the waiver of pre-deposit of the amount involved. In view of this, the application for waiver of pre-deposit of the amounts involved is allowed and recovery thereof stayed till disposal of the appeal."*

Therefore, I find that the above decisions above are squarely applicable in the present case also.

In view of the above findings, I pass the following order

#### ORDER

I allow the appeal No A.No.170/10/MY/ST filed by M/s Bharath Sanchar Nigam Ltd. . Mandya Telecom District, Telephone Exchange Building,



Mandya-571 401 against the Order-In-Original No. 02/ADC/ST/2010 dated 27/28-01-2010 passed by the Additional Commissioner of Central Excise and Service Tax, Mysore, Mysore Commission rate

Sd/-

(K.C. GUPTA)

COMMISSIONER (APPEALS)

MANGALORE

To

1. M/s Bharath Sanchar Nigam Ltd.

BSNL Bhavan, B.M.Road, Hassan -573217 (By RPAD)

2. M/s AKB Associates, Advocates & Consultants

#211, "Commerce House", 9/1 Cunningham Road,

Bangalore-560 082

Copy submitted:

1. The Chief Commissioner of Central Excise, Mysore

2. The Commissioner of Central Excise, (Review), Mysore.

Copy to

1. The Joint Commissioner of Central Excise, Mysore

2. Assistant Commissioner of Central Excise, Hassan

3. Master File.