Service Tax: SMS 'termination' charges taxable: CESTAT

The appellant is a telecom operator engaged in providing various telecom services to its subscribers and to other telecom operators. The present case relates to one particular service viz., SMS termination service rendered by the appellant to other telecom operators. For this service the appellant charges SMS termination charges which is a charge payable by the originating telecom operators (whose subscriber sends an SMS) to the terminating telecom operators (in whose network the SMS is delivered or terminated).

Thus, the SMS termination charges are payable by the originating telecom operators to the terminating telecom operator for the service provided by the terminating telecom operator.

The termination charges are governed by the guidelines issued by the Telecom Regulatory Authority of India (TRAI). The actual charge of SMS termination service between the operators began with effect from 01/04/2011.

Although some operators agreed to pay for SMS termination service to the terminating telecom operators i.e. the appellant in this case, whereas the following six operators did not sign any agreement with the appellant for payment of termination charges nor did they pay any such charges for the termination services received from the appellants.

- Aircel Cellular Ltd. (Aircel Cellular)
- Tata Teleservices Ltd.,
- Reliance Communications Ltd. and Reliance Telecom Ltd.,
- Loop Mobile (India) Ltd., (Loop Mobile)
- Sistema Shyam Teleservices Ltd., (SSTL)
- Mahanagar Telephone Nigam Ltd., (MTNL)

The case of the appellant is that TRAI regulations allowed SMS termination charges to be under "forbearance" meaning thereby that TRAI had not notified any interconnection charges and the service provider was free to fix any charge. Appellant had informed the telecom operators to enter into an agreement with them and specified the charges recoverable. They also threatened the telecom operators with disconnection of services. However, the Telecom Disputes Settlement & Appellate Tribunal (TDSAT) New Delhi, vide interim orders, directed the appellant to continue to provide SMS termination services and also ordered to collect a charge of five paise per SMS prospectively from the date of filing of petition.

Proceedings against the appellant were initiated for not paying service tax on the SMS termination services provided by them and which culminated in the impugned order confirming the demand of service tax of Rs.4,28,05,261/- for the period July 2011 to September 2012. However, the demand of service tax of Rs.76,21,255/- for the period April 2011 to June 2011 was dropped by the Commissioner for the reason that the appellant had not received any consideration for services and, therefore, liability for payment of service tax did not arise under Rule 9 of the Point of Taxation Rules, 2011 as they stood during the relevant time.
The appellant challenges this order before the CESTAT.

Some definitions & extracts from the Point of Taxation Rules, 2011 for reference - Rule 2 (c) defines 'continuous supply of service' as:

(c) "Continuous supply of service" means any service which is provided or to be provided continuously under a contract for a period exceeding three months, or where the Central Government, by a notification in the Official Gazette prescribes provision of a particular service to be a continuous supply of service, whether or not subject to any condition.

Thereafter with effect from 01/04/2012 the definition was amended to read as:

(c) "continuous supply of service" means any service which is provided or agreed to be provided continuously **or** on recurrent basis, under a contract, for a period exceeding three months with the obligation for payment periodically or form time to time **or** where the Central Government by a notification in the official gazette prescribes provision of a particular service to be a continuous supply of service whether or not subject to any condition.

6. **Determination of point of taxation in case of continuous supply of service**; Not withstanding anything contained in rule 3, 4, or 8 in case of continuous supply of service, the point of taxation shall be –

(a) the time when the invoice for the service provided or to be provided is issued;

Provided that where the invoice is not issued within fourteen days of the completion of the provision of the service, the point of taxation shall be date of such completion

(b) In a case, where the person providing the service, receives a payment before the time specified in clause(a) The time when he receives such payment to the extent of such payment.

Explanation 1: For the purpose of this rule, where the provision of the whole or part of the service is determined periodically on the completion of an event in terms of a contract, which requires the service receiver to make any payment to service provider, the date of completion of each such event as specified in the contract shall be deemed to be the date of completion of provision of service.

After considering the exhaustive submissions made by both sides, the Bench referred to the above definition and rule & *inter alia* observed thus –

Merits:

+ The definition has two parts. The second part covers those cases of *"continuous supply of service"* where the Central Government by a notification prescribes a particular service to be a "continuous supply of service".

The telecommunication service has been notified as "continuous supply of service" under Notification No. 38/2012-ST dated 20/06/2012.

+ From the explanation (to rule 6 of Point of Taxation Rules, 2011), it is clear that in the present case the same does not apply. This is because the provision of service is not determined periodically in terms of any contract, which requires service receivers to make any payment. As there is no such contract requiring service receiver to make any payment, the point of taxation is to be determined in terms of clause (a) of Rule 6.

+ Under Rule 6(a), where a continuous supply of a notified service is provided under a contract, the determining point is date of issue of invoice. The fact remains that service was provided under a contract; the absence of consideration clause in the contracts does not come in the way of determining the point of taxation under Rule 6 (a). Undoubtedly therefore, in the present case the service is provided when the invoice is issued. From 01/04/2012 the definition of continuous supply of service was amended but as far as the present case is concerned, it is clear that since there was no contract requiring a service receiver to make any payment, such service would mean any service which is provided or deemed to be provided continuously and is notified under a notification.

Therefore, in view of the above, it is apparent that the point of taxation will be when the invoice for the service provided is issued.

+ From the demand letters issued by the appellant to various telecom operators, we find that they contained all the details required in an invoice. The demand letters give the name and address of the service provider as well as the service receivers. The description and value of service provided is also mentioned by the appellant in the demand letter. As regards the service tax payable, we are of the view that once the value is known as well as the rate of tax, the actual amount of service tax payable becomes quite obvious.

The demand letters complied with the substantive provisions of Rule 4A and therefore, may be considered as invoices. Formal invoices were not issued by the appellant because service receivers were not ready to enter into a contract with the appellant even though they were receiving service continuously from the appellant. Therefore, we hold that service tax is payable by the appellant on the basis of the demand letters.

Limitation:

+ Actual charge of SMS termination service began between the operators only with effect from 01/04/2011. The appellant also started charging the operators from 1/4/2011. It is clearly been brought out in para 23 of the impugned order that the appellant never declared the provision of service rendered or taxable value in the service tax returns filed with the department.

Failure to fulfill this legal obligation cast on the service provider is a case of suppression of facts especially when the appellant had raised demand letters on the service receivers quantifying the charges payable for the services rendered by the appellant.

+ Department cannot be expected to know that this service was provided, in the regime of self-assessment. Therefore there was clear suppression of facts because the assessee is aware that service tax is payable on the service provided. Even if there was a doubt in the mind of the appellant as to when service tax was to be paid, it could have at least declared the nature of service being provided. In these circumstances, extended time period has been rightly invoked.

Valuation - invocation of s.67 (1) (iii) instead of 67(1)(i) of FA, 1994:

+ The value has already been ascertained by the appellant. In the circumstances, Section 67 (1) (i) which says that value shall be the gross amount charged by the service provider, would be applicable. In the present case, the appellant has charged the service tax and quantified the same in the demand letters. In our view, invocation of wrong sub-clause for determination of value does not make the charge itself invalid.

+ As the service provider has issued demand letters quantifying the SMS termination charges of Rs.0.10 per SMS with effect from 01/04/2011 and equivalent charges have been paid by some other telecom operators, we find nothing wrong in taking the value as charged by the appellant in the demand letters which may be treated as an invoice.

Whether value is to be considered as cum-tax?

The demand letters clearly mention that the value charged and demanded from the customers, i.e. service recipients is exclusive of service tax. Therefore, plea is rejected.

TDSAT order:

A dispute regarding amount of charges payable is pending before TDSAT. Therefore, the appellant is at liberty to claim consequential refund if ultimately the charges fixed by TDSAT are lower than Rs.0.10 per SMS/MMS.

The Appeal was dismissed.