IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 06.04.2023

\+ **W.P.(C) 7542/2018**

MAHANAGAR TELEPHONE NIGAM LTD. ..... Petitioner

versus

UNION OF INDIA AND ORS. ..... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr. J.K. Mittal, Ms. Vandana Mittal & Ms. Aashna Suri, Advs.

For the Respondents : Mr. Vikas Kumar Sharma, Senior Panel Counsel with Mr. Piyush Mishra, Adv. for UOI.

Mr. Harpreet Singh, SSC with Ms. Suhani Mathur, Adv. for R-2&3.

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HON'BLE MR JUSTICE VIBHU BAKHRU
HON'BLE MR JUSTICE AMIT MAHAJAN

JUDGMENT

VIBHU BAKHRU, J

1. Mahanagar Telecom Nigam Ltd. (hereafter '**MTNL**') – a Government of India enterprise engaged in the business of providing telecom services to subscribers in Delhi and Mumbai – has filed the present petition impugning a show cause notice dated 22.05.2018

(hereafter '**the impugned show cause notice**') issued to it, as *ex facie* illegal and without jurisdiction.

2. MTNL also impugns Rule 3 of the Service Tax Rules, 1994 as being *ultra vires* Chapter V of the Finance Act, 1994 (hereafter '**the Act**'). In addition, MTNL also assails the Notification dated 10.02.2015 conferring jurisdiction on the Principal Director General, Directorate General of Central Excise Intelligence to assign show cause notices to Principal Commissioners Service Tax, Commissioners Service Tax, Principal Commissioners, and Commissioners of Central Excise to adjudicate the show cause notices issued by the Directorate General of Central Excise Intelligence.

3. MTNL is, essentially, aggrieved by the impugned show cause notice issued by respondent no.3 (Additional Director General, Director General of GST Intelligence) calling upon MTNL to show cause why service tax amounting to ₹56,61,37,440/- (Rupees Fifty-six Crores Sixty-one Lacs Thirty-seven Thousand Four Hundred Forty Only) inclusive of cess, should not be recovered from it along with interest under Section 73(1) of the Act. Further, MTNL was also called upon to show cause why penalty not be imposed under Sections 76 to 78 of the Act.

4. The principal controversy involved in the present case is whether MTNL is liable to pay service tax on the compensation of ₹458.04 crores received by it from the Government of India on surrender of spectrum – 800 MHz CDMA. The impugned show cause notice

proceeds on the basis that the surrender of spectrum against compensation is a "declared service" under Section 66E(e) of the Act and is thus chargeable to service tax.

5. MTNL seeks to assail the impugned show cause notice, essentially, on four fronts. First, it claims that the show cause notice has been issued beyond the period stipulated under Section 73(1) of the Act. It claims that the extended period of limitation in terms of the proviso to Section 73(1) of the Act is unavailable as it has not made any willful misstatement or suppressed any material fact to evade service tax.

6. Second, it is contended that the impugned show cause notice has been issued without the mandatory pre-consultation.

7. Third, that the compensation received for surrender of frequency is not a taxable service under Section 66E(e) of the Act. The transactions regarding assignment to use radio frequency spectrum and subsequent transfers were specifically included as a declared service by insertion of Clause (j) in Section 66E of the Act by the Finance Act, 2016 with effect from 14.05.2016. MTNL claims that the insertion of a specific clause covering the service clearly establishes that it was not a declared service prior to enactment of the Finance Act, 2016.

8. Lastly, MTNL also seeks to challenge the jurisdiction of respondent no.3 in issuing the impugned show cause notice and its further assignment for adjudication to the concerned officer. And, to that end has also challenged Rule 3 of the Service Tax Rules, 1994,

which empowers the Central Board of Excise and Customs to appoint such officers as it thinks fit for exercising the powers under the Act.

Factual Context

9. MTNL is a Government of India Enterprise. It was incorporated in the year 1986 as a company under the Companies Act, 1956, to provide telecommunication services in Delhi and Mumbai.

10. The Department of Telecommunication (hereafter '**the DoT**') granted license to MTNL to provide telecommunication services with effect from 01.04.1986 for an annual payment of ₹101/-. Thereafter, on 10.10.1997, the Ministry of Telecommunication, Government of India amended the conditions of the license granted to MTNL and enabled it to provide Cellular Mobile Services.

11. By a letter dated 03.04.2014, the DoT informed MTNL that the Telecom Regulatory Authority of India (hereafter 'TRAI') had recommended that the DoT withdraw MTNL's entire spectrum holding in the 800 MHz band, and requested it to provide its comments, if any, regarding this recommendation. In response to the aforesaid communication, MTNL furnished its comments to the DoT on 21.04.2014, *inter alia*, stating that the spectrum was allotted to it up to 09.10.2017 and the said period had not expired. The spectrum was used for carrying CDMA services and it had made significant capital investment for providing such services. MTNL claimed that if the allocated spectrum is prematurely surrendered, it must be reimbursed/compensated with an amount equal to the value of the

spectrum for the remaining period of the license at a value determined at the auction rate of 800 MHz.

12. On 18.08.2015, the DoT issued a letter stating that the Union Cabinet, in a meeting held on 05.08.2015, had approved financial support to Bharat Sanchar Nigam Limited (BSNL) and MTNL in lieu of surrender of the 800 MHz CDMA carriers. An amount of ₹458.04 crores was approved to be given to MTNL in this regard.

13. On 28.03.2016, the DoT issued an order informing the sanction of the competent authority for payment of an amount of ₹4,28,95,00,000/- as financial support to MTNL for giving up the CDMA spectrum in 800 MHz band. A similar order dated 16.06.2016 was issued for payment of the balance amount of ₹29,09,00,000/-.

14. Respondent no.2 issued summons dated 14.09.2016 and 23.09.2016 under Section 14 of the Central Excise Act, 1944 read with Section 83 of the Act, to the officers of MTNL with respect to an 'enquiry case' regarding evasion of service tax and contravention of the provision of the Act and the Rules made thereunder. By a letter dated 23.09.2016, MTNL filed its response to the said summons. It provided documents relating to the surrender of 800 MHz CDMA and the details of the payments received for the same.

15. Thereafter, respondent no. 2 sent a letter dated 23.09.2016 to MTNL stating that it appeared that MTNL was liable to pay service tax for providing taxable service by way of surrender of Spectrum Rights

to the DoT and seeking a time frame within which MTNL would discharge its service tax liability.

16. On the same date, that is, 23.09.2016, the officers of respondent no.2 recorded the statement of one Mr. S.S. Banjara, Deputy General Manager, MTNL. However, according to MTNL, Mr. Banjara was neither summoned nor had dealt with the relevant subject. Subsequently, he sent a retraction letter dated 18.10.2016.

17. Thereafter, respondent no.2 issued summons dated 19.10.2016 and 27.10.2016 under Section 14 of the Central Excise Act, 1944 in regard to the inquiry relating to alleged evasion of service tax/contravention of provisions of the Act and the Rules made thereunder. Subsequently, on 27.10.2016 and 28.10.2016, statement of one Mr. Sultan Ahmed, General Manager (Finance) of MTNL was recorded.

18. In response to a letter sent by the Senior Intelligence Officer, Directorate General of Central Excise Intelligence (respondent no.2), the DoT sent a letter dated 31.10.2016, informing respondent no.2 regarding the amount of financial support to MTNL along with a copy of the Cabinet Note.

19. On 22.05.2018, respondent no.3 issued a show cause notice to MTNL by invoking the extended period of limitation provided under Section 73 of the Act read with Section 174 of the CGST Act, 2017 proposing to raise a demand of ₹56,61,37,440/- on account of service tax (inclusive of cess). This demand was computed on the amount

received by MTNL as financial support for surrendering the CDMA spectrum, as the value of service.

Reasons & Conclusion

20. The first and foremost question to be addressed is whether the impugned show cause notice was issued beyond the period stipulated under Section 73(1) of the Act. The impugned show cause notice refers to a note prepared by MTNL on 16.04.2014 in the context of the DoT taking back the entire spectrum holding in 800 MHz by way of surrender of carriers allotted to MTNL. The said note indicates that in the year 1998-99, MTNL was allowed to deploy CDMA services under basic service license issued by the Government of India in the service areas of Delhi and Mumbai. MTNL was allotted CDMA carriers/spectrum (800 MHz, two carriers in each service area) for rolling out its services.

21. The DoT, by its letter dated 18.06.2013, indicated that CDMA spectrum was not part of the basic service license as it was included in Cellular Mobile Telephone Service (CMTS) License under dual technology.

22. Thereafter, on the recommendation of TRAI, MTNL constituted a committee to suggest further course of action to protect its interest in the evolving technological landscape and regulatory regime. The said Committee recommended that CDMA services be discontinued; the CDMA spectrum be returned to the Government of India; and in lieu of the same, MTNL may demand "*reimbursement/compensation*

equivalent to the value of spectrum for the remaining period of license i.e. upto 09-10-2017 at the rate of auction determined price of 800 MHz spectrum." Following the aforesaid recommendation, the management of MTNL communicated to the DoT that it may be reimbursed compensation equivalent to the value of the spectrum for the remaining period of license at the auction determined price of 800 MHz spectrum.

23. On 23.07.2015, the DoT communicated to MTNL that the entire spectrum held by MTNL in 800 MHz band was put to auction and the payment of compensation would be dealt with separately. MTNL was required to provide the date for vacating the carriers in the given spectrum for the purpose of determining the period of use of the spectrum by the successful bidder.

24. Subsequently, by a letter dated 18.08.2015, the DoT communicated the Cabinet's approval for the proposal for payment of compensation of ₹458.05 crores to MTNL for surrendering of 800 MHz CDMA carriers. This was followed by communications dated 28.03.2016 and 16.06.2016 issued by the DoT conveying the sanction for payment of ₹428.95 crores and ₹29.09 crores to MTNL for surrender of the spectrum (800 MHz). These amounts were credited to the bank accounts of MTNL on 30.03.2016 and 17.07.2016 respectively.

25. The impugned show cause notice also sets out the statements made by various employees of MTNL examined by the respondents. These officials of MTNL confirmed that MTNL had received the compensation as stated above for surrender of 800 MHz bands. The

same was reflected as income in MTNL's books of accounts for the financial year 2015-16. It is material to note that the concerned officials of MTNL had also stated that as per their understanding, the compensation received by MTNL was not chargeable to service tax.

26. The impugned show cause notice was issued on 22.05.2018, which was admittedly beyond the period of one year from the relevant date as defined in under Section 73 of the Act. According to the respondents, the extended period of limitation under the proviso to Section 73(1) of the Act is applicable. This assertion is founded on the allegation that MTNL had suppressed material facts from the Service Tax Department regarding surrender of spectrum as a taxable service, and the receipt of consideration.

27. At this stage, it would be relevant to refer to Section 73(1) of the Act as was applicable at the material time:

> "**Section 73. Recovery of service tax not levied or paid or short-levied or short-paid or erroneously refunded.**— (1) Where any Service Tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, Central Excise Officer may, within one year from the relevant date, serve notice on the person chargeable with the Service Tax which has not been levied or paid or which has been short-levied or short-paid or the person to whom such tax refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice:
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> Provided that where any Service Tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of—
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> (a) fraud; or
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> (b) collusion; or
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> (c) wilful misstatement; or
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> (d) suppression of facts; or

> (e) contravention of any of the provisions of this Chapter or of the rules made thereunder with intent to evade payment of Service Tax, by the person chargeable with the Service Tax or his agent, the provisions of this sub-section shall have effect, as if, for the words "one year", the words "five years" had been substituted.
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> *Explanation*— Where the service of the notice is stayed by an order of a court, the period of such stay shall be excluded in computing the aforesaid period of eighteen months or five years, as the case may be."

28. In terms of the proviso to Section 73(1) of the Act, the extended period of limitation is applicable only in cases where service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of fraud, or collusion, or wilful misstatement, or suppression of facts, or contravention of any provisions of the Act or the Rules made thereunder with an intent to evade payment of service tax. However, the impugned show cause notice does not contain any allegation of fraud, collusion, or wilful misstatement on the part of MTNL. The impugned show cause notice alleges that the extended period of limitation is applicable as MTNL had suppressed the material facts and had contravened the provisions of the Act with an intent to evade service tax. Thus, the main question to be addressed is whether the allegation that MTNL had suppressed material facts for evading its tax liability, is sustainable.

29. It is relevant to note that the impugned show cause notice sets out the statement of various officials, who were examined by the respondents. Mr. S.S. Banjara, who was responsible for compliance of service tax matters, had stated that the service tax liability could not be discharged due to proper awareness and that the said issue was decided

by Sh. Sultan Ahmed, who was at the material time holding the post of General Manager (Finance), MTNL. Sh. Sultan Ahmed, in his statement, categorically stated that as per his understanding, service tax was not leviable in the present case. The impugned show cause notice indicates that the respondents did not accept the said statement. The respondents reasoned that if MTNL believed that service tax was not attracted then it would have approached the jurisdictional service tax authority for clarification, as any person acting with common prudence would. But it had not done so. On the basis of the said reasoning, the respondents formed an opinion that MTNL had suppressed facts and had consciously contravened the provisions of the Act with an intent to evade service tax.

30. The conclusion that MTNL had suppressed material facts or had contravened the provisions of the Act with an intent to evade service tax is not supported by any material on record. The statements of the officials of MTNL – which are relied upon by the respondents – clearly indicate that it was their understanding that service tax was not chargeable on compensation or financial support received for surrendering the spectrum.

31. Indisputably, the contention that service tax is not chargeable on the compensation received is not without substance. Since it was MTNL's understanding that the compensation received was not a consideration for any taxable service but for the surrender of spectrum, MTNL could not be expected to disclose the compensation as

consideration for service in its Service Tax Returns. Plainly, there was no requirement for MTNL to do so.

32. As noted above, the impugned show cause notice discloses that the respondents had faulted MTNL for not approaching the service tax authorities for clarification. The respondents have surmised that this would have been the normal course for any person acting with common prudence. However, it is apparent from the statements of various employees of MTNL that MTNL did not believe that the amount of compensation was chargeable to service tax and therefore, there was no requirement for seeking clarifications. Further, there is no provision in the Act which contemplates any procedure for seeking clarification from jurisdictional service tax authority. Clearly, the reasoning that MTNL ought to have approached the service tax authority for clarification, is fallacious.

33. It is also important to note that MTNL had declared the receipt of compensation as income in its books of accounts. The final accounts of MTNL are in public domain. In the circumstances, the allegation that MTNL had suppressed any material facts from the Service Tax Department is wholly without any basis.

34. Mr. Harpreet Singh, learned counsel appearing for the respondents, submitted that the allegation that MTNL had suppressed material facts was based on non-disclosure of the receipt of compensation in its service tax returns. However, he did not contest the contention that there is no provision in the Act to disclose receipt of any

funds in the service tax returns, which are not regarded as consideration for rendering services (whether taxable or exempt). In the circumstances, there is no basis for the allegation that MTNL had suppressed any material facts. Mere non-disclosure of a receipt, which a party believes is not chargeable to service tax, in the service tax returns, would not constitute suppression of facts within the proviso to Section 73(1) of the Act, unless it is, *ex facie*, clear that the receipt is on account of taxable services or it is unreasonable for any assessee to believe that the receipt does not fall in the net of service tax. In cases where there is a substantial dispute as to whether receipt of any amount is on account of taxable service – as in the present case – the non-disclosure of the same in the service tax return cannot, absent anything more, lead to the conclusion that the assessee is guilty of suppression of facts to evade tax.

35. In ***Pushpam Pharmaceutical Company v. Collector of Central Excise, Bombay***[1] the Supreme Court had interpreted the proviso to Section 11A of the Central Excise Act, 1944, which is similarly worded as the proviso to Section 73(1) of the Act, and observed as under:

> "4. Section 11A empowers the Department to re-open proceedings if the levy has been short-levied or not levied within six months from the relevant date. But the proviso carves out an exception and permits the authority to exercise this power within five years from the relevant date in the circumstances mentioned in the proviso, one of it being suppression of facts. The meaning of the word both in law and even otherwise is well known. In normal understanding it is not different that what is explained in various dictionaries unless of course the context in which it has been used indicates otherwise. A perusal of the proviso indicates that it has

[1] ***1995 Supp (3) SCC 462***

> been used in company of such strong words as fraud, collusion or willful default. In fact it is the mildest expression used in the proviso. Yet the surroundings in which it has been used it has to be construed strictly. It does not mean any omission. The act must be deliberate. In taxation, it can have only one meaning that the correct information was not disclosed deliberately to escape from payment of duty. Where facts are known to both the parties the omission by one to do what he might have done and not that he must have done, does not render it suppression."
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> (emphasis supplied)

36. The aforesaid decision was followed by the Supreme Court in its later decision in ***Anand Nishikawa Co. Ltd. v. Commissioner of Central Excise, Meerut***[2].

37. In ***Cosmic Dye Chemical v. Collector of Central Excise, Bombay***[3], the Supreme Court had, in the context of the proviso to Section 11A of the Central Excise and Salt Act, 1944, which is similarly worded as the proviso to Section 73(1) of the Act, held "*It is, therefore, not correct to say that there can be a suppression or misstatement of fact, which is not wilful and yet constitutes a permissible ground for the purpose of the proviso to Section 11-A. Misstatement or suppression of fact must be wilful*."

38. In ***Uniworth Textiles Limited v. Commissioner of Central Excise, Raipur***[4], the Supreme Court referred to the earlier decision in ***Cosmic Dye Chemical***[3] and explained that non-declaration would not establish any willful withholding of information if the assessee was in

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[2] ***(2005) 7 SCC 749***
[3] ***(1995) 6 SCC 117***
[4] ***(2013) 9 SCC 753***

a *bona fide* belief that the item not disclosed did not attract tax. The relevant extract of the said decision is set out below:

> "18. We are in complete agreement with the principle enunciated in the above decisions, in light of the proviso to Section 11-A of the Central Excise Act, 1944. However, before extending it to the Act, we would like to point out the niceties that separate the analogous provisions of the two, an issue which received the indulgence of this Court in ***Associated Cement Companies Ltd. Vs. Commissioner of Customs*** in the following words:-
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> > "53 ….Our attention was drawn to the cases of ***CCE v. Chemphar Drugs and Liniments***, ***Cosmic Dye Chemical v. CCE***, ***Padmini Products v. CCE***, ***T.N. Housing Board v. CCE*** and ***CCE v. H. M. M. Ltd.***. In all these cases the Court was concerned with the applicability of the proviso to Section 11-A of the Central Excise Act which, like in the case of the Customs Act, contemplated the increase in the period of limitation for issuing a show-cause notice in the case of non-levy or short-levy to five years from a normal period of six months...
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> > 54. While interpreting the said provision in each of the aforesaid cases, it was observed by this Court that for proviso to Section 11-A to be invoked, the intention to evade payment of duty must be shown. This has been clearly brought out in ***Cosmic Dye Chemical case*** where the Tribunal had held that so far as fraud, suppression or misstatement of facts was concerned the question of intent was immaterial. While disagreeing with the aforesaid interpretation this Court at p. 119 observed as follows: (SCC para 6)
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> > > '6. Now so far as fraud and collusion are concerned, it is evident that the requisite intent, i.e., intent to evade duty is built into these very words. So far as misstatement or suppression of facts are concerned, they are clearly qualified by the word "wilful" preceding the words "misstatement or suppression of facts" which means with intent to evade duty. The next set of words "contravention of any of the provisions of this Act or Rules" are again qualified by the

> immediately following words "with intent to evade payment of duty". It is, therefore, not correct to say that there can be a suppression or misstatement of fact, which is not wilful and yet constitutes a permissible ground for the purpose of the proviso to Section 11- A. Misstatement or suppression of fact must be wilful.'

The aforesaid observations show that the words 'with intent to evade payment of duty' were of utmost relevance while construing the earlier expression regarding the misstatement or suppression of facts contained in the proviso. Reading the proviso as a whole the Court held that intent to evade duty was essentially before the proviso could be invoked.

> *55. Though it was sought to be contended that Section 28 of the Customs Act is in pari materia with Section 11-A of the Excise Act, we find there is one material difference in the language of the two provisions and that is the words "with intent to evade payment of duty" occurring in proviso to Section 11-A of the Excise Act which are missing in Section 28(1) of the Customs Act and the proviso in particular…*
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> *56. The proviso to Section 28 can inter alia be invoked when any duty has not been levied or has been short-levied by reason of collusion or any wilful misstatement or suppression of facts by the importer or the exporter, his agent or employee. Even if both the expressions "misstatement" and "suppression of facts" are to be qualified by the word "wilful", as was done in the* ***Cosmic Dye Chemical case*** *while construing the proviso to Section 11-A, the making of such a wilful misstatement or suppression of facts would attract the provisions of Section 28 of the Customs Act. In each of these appeals it will have to be seen as a fact whether there has been a non-levy or short-levy and whether that has been by reason of collusion or any wilful misstatement or suppression of facts by the importer or his agent or employee."*
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> *(emphasis supplied)*"

39. In ***Uniworth Textiles Limited***[4], the Supreme Court had also examined the various earlier decisions of the Court in the context of the

proviso to Section 28(1) of the Customs Act, 1962, which is also similarly worded as the proviso to Section 11A(1) of the Central Excise Act, 1944 as well as Section 73(1) of the Act. The Supreme Court had observed that "*For the operation of the proviso, the intention to deliberately default is a mandatory prerequisite*".

40. In ***Bharat Hotels Ltd. v. Commissioner of C. Ex. (Adjudication)***[5], a Coordinate Bench of this Court had referred to the decision in ***Uniworth Textiles Limited***[4] and observed as under:

> "26. Therefore, it is evident that failure to pay tax is not a justification for imposition of penalty. Also, the word "suppression" in the proviso to Section 11A(1) of the Excise Act has to be read in the context of other words in the proviso, i.e. "fraud, collusion, willful misstatement". As explained in *Uniworth* (supra), "misstatement or suppression of facts" does not mean any omission. It must be deliberate. In other words, there must be deliberate suppression of information for the purpose of evading of payment of duty. It connotes a positive act of the assessee to avoid paying excise duty. The terms "mis-statement" and "suppression of facts" are preceded by the expression "willful". The meaning which has to be ascribed is, deliberate action (or omission) and the presence of an intention. Thus, invocation of the extended limitation period under the proviso to Section 73(1) does not refer to a *scenario* where there is a mere omission or mere failure to pay duty or take out a license without the presence of such intention."

41. In the facts of this case, the impugned show cause notice does not disclose any material that could suggest that MTNL had knowingly and with a deliberate intent to evade the service tax, which it was aware would be leviable, suppressed the fact of receipt of consideration for rendering any taxable service. On the contrary, the statements of the

[5] ***2017 SCC OnLine Del 12813***

officials of MTNL, relied upon by the respondents, clearly indicate that they were under the belief that the receipt of compensation/financial support from the Government of India was not taxable. Absent any intention to evade tax, which may be evident from any material on record or from the conduct of an assessee, the extended period of limitation under the proviso to Section 73(1) of the Act is not applicable. The facts of the present case indicate that MTNL had made the receipt of compensation public by reflecting it in its final accounts as income. As stated above, merely because MTNL had not declared the receipt of compensation as payment for taxable service does not establish that it had willfully suppressed any material fact. MTNL's contention that the receipt is not taxable under the Act is a substantial one. No intent to evade tax can be inferred by non-disclosure of the receipt in the service tax return.

42. We agree with the contention that the impugned show cause notice was issued beyond the period of limitation and is, thus, liable to be set aside.

43. In view of the above, it is not necessary for this Court to address the other issues raised by MTNL. However, this Court also considers it apposite to consider the question whether the amount received by MTNL would be chargeable to service tax as a receipt for a declared service under Section 66E(e) of the Act. This is essentially for two reasons. First, the conclusion that the extended period of limitation does not apply also rests on the conclusion that MTNL's contention that the receipt is not taxable is a substantial one. Second, the question whether

MTNL has evaded any tax is the core issue of the controversy in this case.

44. According to the respondents, surrendering of the spectrum by MTNL means that MTNL had agreed to forbear using CDMA platform and this would constitute a declared service under Section 66E(e) of the Act. The relevant extract of the impugned show cause notice that articulates the reasons why the respondents contend that the consideration received by MTNL is chargeable to service tax is set out below:

> "(h) it further appears that in terms of provisions of Section *66* B of the Finance Act, 1994 effective from 01.07.2012, Service Tax is levied on the value of all services, other than those services specified in the negative list, provided or agreed to be provided in the taxable territory by one person to another. As per Section 65B(51) of the Act, ‘'taxable service’ means any service on which Service Tax is leviable under Section 66B. Further, in terms of Section 65B(44) of the Act, ‘service’ means any activity carried out by a person for another for consideration and includes a declared service. From this, it appears that ‘service’ has the following ingredients:- (a) It means any activity carried out by any person (b) The activity shall be carried out by one person for another person (c) The activity shall be carried out for a consideration. In terms of common understanding, activity would include an act done, a work done, a deed done, an operation carried out, execution of an act, provision of a facility etc. It is a term with wide connotations. Activity could be active or passive and would include forbearance to an act. Under the sub-section (e) of Section 66E of the Finance Act, the *"agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act"* constitutes specifically listed declared service.
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> (i) accordingly, it appears that the act of agreeing to surrender/ surrendering of the spectrum by MTNL, inter alia, meant that MTNL had to forbear using the CDMA platform, leading to opportunity cost and to making alternative arrangements for customer migration, as also to give up even before the allotted time of tenure was over, its right. Accordingly, it appears that the act of agreeing to surrender the

> spectrum before time is a service, as also a declared service under sub section (e) section 66E of the Act. It is apparently carried out by MTNL for another person for a consideration. It also appears that the definition of 'consideration' in Explanation (a) of Section 67 of the Act is inclusive, and it includes any amount that is payable for the taxable services provided or to be provided. It means everything, received or recoverable in return for a provision of service, provided or to be provided. Thus, it appears that above said agreeing to surrender/surrendering of spectrum by MTNL was against consideration received by them in the form of monetary compensation or financial support and MTNL appears liable to Service Tax under section 66B of the Act. MTNL were therefore, required to discharge the Service Tax liability on the said consideration which they did not do. It further appears that MTNL had given its agreement on 21.04.2014, therefore, the point of taxation is 21.04.2014 when provision of service is deemed to have been completed in terms of Rule 3(a) of the Point of Taxation Rules."

45. In the present case, MTNL was allocated CDMA spectrum in 800 MHz for two carriers of 1.25 MHz each in Delhi and Mumbai. The said spectrum was being used by MTNL in the licensed areas. The said spectrum was licensed till 09.10.2017 but MTNL had surrendered the same with effect from 21.04.2014. MTNL was provided the financial support on a *pro rata* basis for the unexpired period of three years and 173 days. The amount payable was worked out at the auction rate for the said spectrum. Undisputedly, the surrender of the spectrum or receipt of any value / financial support on account of the unexpired period of the allocation does not amount to any service as understood in the common parlance. It is, thus, relevant to refer to the term 'service' as defined under the Act. The said term is defined under Section 65B(44) of the Act as under:

> ***"Section 65B.*** *In this Chapter, unless the context otherwise requires, -*
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> *** *** ***

(44) "service" means any activity carried out by a person for another for consideration, and includes a declared service, but shall not include-

(*a*) an activity which constitutes merely,-

(i) a transfer of title in goods or immovable property, by way of sale, gift or in any other manner; or

(ii) such transfer, delivery or supply of any goods which is deemed to be a sale within the meaning of clause (29A) of article 366 of the Constitution; or

(iii) a transaction in money or actionable claim;

(b) a provision of service by an employee to the employer in the course of or in relation to his employment;

(c) fees taken in any Court or tribunal established under any law for the time being in force.

Explanation 1.-For the removal of doubts, it is hereby declared that nothing contained in this clause shall apply to,-

(A) the functions performed by the Members of Parliament, Members of State Legislature, Members of Panchayats, Members of Municipalities and Members of other local authorities who receive any consideration in performing the functions of that office as such member; or

(B) the duties performed by any person who holds any post in pursuance of the provisions of the Constitution in that capacity; or

(C) the duties performed by any person as a Chairperson or a Member or a Director in a body established by the Central Government or State Governments or local authority and who is not deemed as an employee before the commencement of this section.

Explanation 2.-For the purposes of this clause, the expression "transaction in money or actionable claim" shall not include—

(i) any activity relating to use of money or its conversion by cash or by any other mode, from one form, currency or denomination, to another form, currency or denomination for which a separate consideration is charged;

> (ii) any activity carried out, for a consideration, in relation to, or for facilitation of, a transaction in money or actionable claim, including the activity carried out-
>
> (*a*) *by a lottery distributor or selling agent on behalf of the State Government, in relation to promotion, marketing, organising, selling of lottery or facilitating in organising lottery of any kind, in any other manner, in accordance with the provisions of the Lotteries (Regulation) Act, 1998;*
>
> (b) by a foreman of chit fund for conducting or organising a chit in any manner.
>
> *Explanation 3.-For* the purposes of this Chapter,-
>
> (*a*) an unincorporated association or a body of persons, as the case may be, and a member thereof shall be treated as distinct persons;
>
> *(b)* an establishment of a person in the taxable territory and any of his other establishment in a non-taxable territory shall be treated as establishments of distinct persons.
>
> *Explanation 4.-A* person carrying on a business through a branch or agency or representational office in any territory shall be treated as having an establishment in that territory."

46. Thus, in order to constitute a 'service', the same must involve an activity carried out by a person for another. And the same should be for a consideration. The term 'service' also includes a "declared service"

47. Surrendering of spectrum would not in ordinary sense constitute an activity by one person for another. The respondents seek to include the same as a declared service, which by virtue of the definition of 'service' under Section 65B(44) of the Act is included as a 'service.

48. The expression 'declared service' is defined under Section 65B (22) of the Act as under:

> *"declared service" means any activity carried out by a person for another person for consideration and declared as such under Section 66E.*"

49. According to the respondents, the receipt of compensation is covered under clause (e) Section 66E of the Act. It is relevant to refer to said clause and the same is set out below:

> "**66-E. Declared services.** – The following shall constitute declared services, namely-
>
> *** *** ***
>
> (e) agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act;"

50. The first limb of Clause (e) of Section 66E of the Act relates to an obligation to refrain from an act or tolerate an act or a situation or to do any act. It is difficult to accept that MTNL had agreed to forbade doing any act as is contended on behalf of the respondents; it had merely agreed to surrender allocation of an asset. It did not agree to tolerate an act. The spectrum is a public asset and its allocation is controlled by the Government of India. A specific band was allocated to MTNL for providing telecommunication service. Since MTNL had made investments for rendering services using the allocated spectrum, the Government of India had decided to provide financial support on MTNL vacating the spectrum. It would be a stretch to construe this as forbearance of an act or tolerating an act.

51. It is also relevant to refer to Clause (j) of Section 66E of the Act, as introduced by the Finance Act, 2000. The said clause specifically declares the assignment of the right to use radio frequency or

subsequent transfer thereof as a declared service. Clause (j) of Section 66E of the Act reads as under:

> "**66E. Declared Services**. – The following shall constitute declared services, namely:-
>
> *** *** ***
>
> *(j)* assignment by the Government of the right to use the radio-frequency spectrum and subsequent transfers thereof."

52. Undisputedly, the act of transferring radio frequencies now falls within 'declared service' by virtue of clause (j) of Section 66E of the Act. There would be no reason for the Parliament to amend Section 66E of the Act to specifically include the assignment of the right to use radio frequency spectrum or its transfer as a separate 'declared service' if the same was covered under Section 66E(e) of the Act.

53. In ***Balaji Enterprises, Madras v Collector of Central Excise, Madras***[6], the Supreme Court considered the question whether the aluminium scrap generated during the manufacture of utensils and containers out of aluminium circles could be classified as "aluminium in crude form" under Tariff Item 27(a)(i) of the Central Excise Tariff as in force at the material time. One of the reasons that persuaded the Supreme Court to reject the contention was that the amendment to Item 27 (Aluminium) of the Central Excise Tariff by introduction of Entry (aa). The Supreme Court had observed that "*If 'Waste and Scrap' was*

[6] ***(1997) 5 SCC 268***

already included in Item No.27(A), there would not have been any need for making the entry (aa)".

54. Thus, in view of the above, the assignment by the Government of the right to use radio frequency spectrum or its subsequent transfer does not constitute declared service under Clause (e) of Section 66E of the Act; it does so under Clause (j) of Section 66E of the Act.

55. MTNL had received the compensation during the financial year 2015-16, which was prior to 14.05.2016 – the date on which the Finance Act, 2016 came into force and Clause (j) was introduced in Section 66E of the Act. Thus, the surrender of any right to use the spectrum by MTNL prior to the said date would not be chargeable to service tax.

56. In view of the above, the impugned show cause notice is set aside. It is not necessary to address the other issues raised in the petition.

57. The petition is disposed of in the aforesaid terms.

VIBHU BAKHRU, J

AMIT MAHAJAN, J

APRIL 06, 2023
'gsr'