System

आयुक्त का कार्यालय केंद्रीय वस्तु एवं सेवा कर एवं उत्पाद शुल्क ,अहमदाबाद उत्तर, कस्टम हॉउस(तल प्रथम) नवरंगपुरा- अहमदाबाद ,380009		Office of the Commissioner of Central Goods & Services Tax & Central Excise, Ahmedabad North, Custom House(1st Floor) Navrangpura, Ahmedabad-380009
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निबन्धित पावती डाक द्वारा / By REGISTERED POST AD

फा .सं/. F.NO.STC/15-01/OA/2021 DIN : 20220164WT000000E6A6

आदेश की तारीख़ / Date of Order : 07.01.2022

जारी करने की तारीख़ / Date of Issue : 11.01.2022

द्वारा पारित/Passed by -

उपेन्द्र सिंह यादव / UPENDRA SINGH YADAV

आयुक्त / COMMISSIONER

मूल आदेश संख्या /

ORDER-IN-ORIGINAL No. AHM-EXCUS-002-COMMR–49/2021-22

जिस व्यक्ति(यों) को यह प्रति भेजी जाती है, उसे व्यक्तिगत प्रयोग के लिए निःशुल्क प्रदान की जाती है।

This copy is granted free of charge for private use of the person(s) to whom it is sent.

2. इस आदेश से असंतुष्ट कोई भी व्यक्ति -इस आदेश की प्राप्ति से तीन माह के भीतर सीमा शुल्क ,उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण ,अहमदाबाद पीठ को इस आदेश के विरुद्ध अपील कर सकता है। अपील सहायक रजिस्ट्रार ,सीमा शुल्क ,उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण , द्वितीय तल, बाहुमली भवन असरवा, गिरधर नगर पुल के पास, गिरधर नगर, अहमदाबाद, गुजरात 380004 को संबोधित होनी चाहिए।

Any person deeming himself aggrieved by this Order may appeal against this Order to the Customs, Excise and Service Tax Appellate Tribunal, Ahmedabad Bench within three months from the date of its communication. The appeal must be addressed to the Assistant Registrar, Customs, Excise and Service Tax Appellate Tribunal, 2nd Floor, Bahumali Bhavan Asarwa, Near Girdhar Nagar Bridge, Girdhar Nagar, Ahmedabad, Gujarat 380004.

इस आदेश के विरुद्ध अपील न्यायाधिकरण में अपील करने से पहले मांगे गये शुल्क के 7.5% का भुगतान करना होगा, जहाँ शुल्क यानि की विवादग्रस्त शुल्क या विवादग्रस्त शुल्क एवं दंड या विवादग्रस्त दंड शामिल है ।

An appeal against this order shall lie before the Tribunal on payment of 7.5% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute.

(as per amendment in Section 35F of Central Excise Act,1944 dated 06.08.2014)

3. उक्त अपील प्रारूप सं .इ.ए 3.में दाखिल की जानी चाहिए। उसपर केन्द्रीय उत्पाद शुल्क (अपील) नियमावली 2001 ,के नियम 3 के उप नियम (2)में विनिर्दिष्ट व्यक्तियों द्वारा

ORDER-IN-ORIGINAL No. AHM-EXCUS-002-COMMR- 49 /2021-22

M/s Bharti Cellular Limited, Bharti House, Nr. Income Tax Circle, Ashram Road, Ahmedabad-380 009, were issued SCN No. STC/15-01/2021 dated 23.04.2021 by the Commissioner, Central GST & Central Excise, Ahmedabad North, Ahmedabad..

BRIEF FACTS OF THE CASE PERTAINING TO THE SCN ISSUED TO M/S BHARTI CELLULAR LIMITED ARE AS FOLLOWS:

M/s Bharti Cellular Limited, Bharti House, Nr. Income Tax Circle, Ashram Road, Ahmedabad-380 009, (hereinafter referred to as the 'Assessee' for the sake of brevity) are engaged in providing taxable services, and are holding Service Tax Registration No. AAACB0874CST006.

2. Analysis of "Sales/Gross Receipts from Services (Value from ITR)", the "Total Amount Paid/Credited under 194C, 194H, 194I, 194J" and "Gross value of Services Provided" in respect of M/s Bharti Cellular Limited was undertaken by the Central Board of Direct Taxes (CBDT) for the F.Y. 2015-16 & 2016-17, and details of said analysis were shared by the CBDT with the Central Board of Indirect Taxes (CBIC).

3. As per the records available with the Divisional office of Division-VII and on going through the Third Party Data provided by CBDT of the said assessee for the F.Y.2015-16 & 2016-17, the total sales of service (Value from ITR/ Form 26) were found to be not tallying with Gross Value of Service Provided, as declared in ST-3 Return of the F.Y. 2015-16 & 2016-17. Therefore, it appeared that the said assessee had declared less/not declared any taxable value in their Service Tax Returns (ST-3) for the F.Y. 2015-16 & 2016-17 as compared to the Service related taxable value declared in their Income Tax Return (ITR)/Form 26AS for the F.Y. 2015-16 & 2016-17. The difference in value as observed for FY 2015-16 & 2016-17 was as under:

Sr. No.	F.Y.	Taxable value as per ST3 returns (in Rs.)	Gross Receipts from services(Value from ITR/26AS) (in Rs.)	Difference between value of services from ITR/26AS and Gross Value in Service Tax Provided (In Rs.	Resultant Service Tax Short Paid (in Rs.)
1	2015-16	0/-	17,90,63,852	17,90,63,852	2,59,64,259
2	2016-17	0/-	20,35,08,924	20,35,08,924	3,05,26,339
			TOTAL	38,25,72,776	5,64,90,598

Therefore, it appeared that the said assessee had short paid service tax to the extent of Rs. 5,64,90,598/- (including Cess) on the differential value of Rs. 38,25,72,776/-.

As per Section 68 of the Finance Act, 1994 provides that 'every person liable to pay service tax shall pay service tax at the rate specified in Section 66B in such manner and within such period which is prescribed under Rule 6 of the Service tax Rules 1994. Therefore, it appeared that the assessee had short paid service tax as tabulated above.

5. The provisions of Section 70 (Furnishing of Returns) of the Finance Act,1994 reads as follows:

(1) Every person liable to pay the service tax shall himself assess the tax due on the services provided by him and shall furnish to the Superintendent of Central Excise, a return in such form and in such manner and at such frequency and with such late fee not exceeding twenty thousand rupees, for delayed furnishing of return, as may be prescribed.

(2) The person or class of persons notified under sub-section (2) of section 69, shall furnish to the Superintendent of Central Excise, a return in such form and in such manner and at such frequency as may be prescribed.

6. As per the provisions of *Section 73(1)* of the Finance Act,1994 where any Service Tax has not been levied or paid or has been short levied or short paid by reasons of willful mis-statement or suppression of facts with intent to evade payment of Service Tax, the Central Excise Officer may within five years from the relevant date, serve a notice on the person chargeable with Service Tax which has not been levied or paid or which has been short levied or short paid requiring him to show cause why he should not pay the amount specified in the notice.

7. As per Rule 6 of the Service Tax Rules, 1994, the Service Tax shall be paid to the credit of the Central Government by 5th day of the month, immediately following the said calendar month in which the payments are received, towards the value of taxable service. Rule 7 of the Service Tax Rules, 1994 stipulates that assessee shall submit their Service Tax returns in the form ST-3 within the prescribed time.

8. From the documentary evidence available at the relevant time, it appeared that the said assessee had failed to pay/short paid/deposit Service Tax to the extent of Rs. 5,64,90,598/- (including Cess) which was arrived at on the basis of difference of taxable value declared in their ST-3 returns during the Financial Year FY 2015-16 & 2016-17 vis-à-vis their ITR/Form 26AS. The said short payment appeared to have been done with intent to evade payment of Service Tax. Accordingly, it appeared that the said assessee had failed to discharge the Service Tax liability of Rs. 5,64,90,598/- (including Cess) worked out on value of Rs. 38,25,72,776/- and therefore, Service Tax was required to be demanded/recovered from them under Section 73(1) of the Finance Act, 1994 read with Section 68 of the Finance Act, 1994.

9. Therefore, it appeared that the said assessee had (i) Failed to declare correctly, assess and pay the service tax due on the taxable services provided by them and to maintain records and furnish returns, in such form i.e. ST-3 and in such manner and at such frequency, as required under Section 70 of the Finance Act, 1994 read with Rule 6 & 7 of the Service Tax Rules, 1994; (ii) Failed to determine the correct value of taxable service provided by them under Section 67 of the Finance Act, 1994; (iii) Failed to pay the Service Tax correctly at the appropriate rate within the prescribed time in the manner and at the rate as provided under the said provision of Section

66B and Section 68 of the Finance Act, 1994 and Rules 2 & 6 of the Service Tax Rules, 1994 in as much as they had not paid service tax as worked out in the Table for Financial Year 2015-16 & 2016-17; (iv) All these acts of contravention of the provisions of Section 68, and 70 of the Finance Act, 1994 read with rule 6, and 7 of Service Tax Rules, 1994 appeared to be punishable under the provisions of Section 78 of the Finance Act, 1994 as amended from time to time; (vi) The said assessee also appeared liable to pay interest at the appropriate rates for the period from due date of payment of service tax till the date of actual payment as per the provisions of Section 75 of the Finance Act, 1994; (vii) The said assessee also appeared to have contravened Section 77 of the Finance Act, 1994 in as much as they did not provide required data /documents as called for, from them.

10. It had been noticed that at no point of time, the assessee had disclosed full, true and correct information about the value of the services provided by them or intimated to the Department regarding receipt/providing of Services of the differential value, that had come to the notice of the Department only after going through the Third Party CBDT data generated for the Financial Year 2015-16 & 2016-17. From the evidences gathered/ available at the relevant time, it appeared that the said assessee had knowingly suppressed the facts regarding receipt of/providing of services by them, and thereby not paid/short paid/not deposited Service Tax thereof to the extent of Rs. 5,64,90,598/-. Thus, it appeared that there was a deliberate withholding of essential and material information from the department about service provided and value realized by the assessee which were in direct contradiction with the spirit of self assessment and faith reposed in the service provider by the government.

11. As per Section 75 ibid every person liable to pay the tax in accordance with the provisions of Section 68, or rules made there under, who fails to credit the tax or any part thereof to the account of the Central Government within the period prescribed, is liable to pay simple interest (as such rate not below ten per cent and not exceeding thirty six per cent per annum, as is for the time being fixed by the Central Government, by Notification in the Official Gazette) for the period by which such crediting of the tax or any part thereof is delayed. It appeared that the said assessee had short paid/not-paid Service Tax of Rs. 5,64,90,598/- on the actual value received towards taxable services provided which appeared to be recoverable under proviso to Section 73(1) of the Finance Act,1994 along with interest under Section 75 ibid not paid by them under Section 68 of the Finance Act read with Rule 6 of Service Tax Rules, 1994 inasmuch as the said assessee had suppressed the facts from the department and had contravened the provisions with an intent to evade payment of Service Tax. The said assessee had not discharged their Service tax liability and hence was liable to pay interest under Section 75 of the Finance Act.

12. No data was shared by the CBDT, for the period 2017-18 (upto June-2017) and the assessee had failed to provide any information regarding rendering of taxable service for this

period, therefore, at the time of issuance of SCN it was not possible to quantify short payment of Service Tax, if any, for the period 2017-18 (upto June-2017).

Unquantified demand at the time of issuance of SCN.

Para 2.8 of the Master Circular No. 1053/02/2017-CX dated 10.03.2017 issue by the CBEC, New Delhi clarified that:

'2.8 Quantification of duty demanded: It is desirable that the demand is quantified in the SCN, however if due to some genuine grounds it is not possible to quantify the short levy at the time of issue of SCN, the SCN would not be considered as invalid. It would still be desirable that the principles and manner of computing the amounts due from the noticee are clearly laid down in this part of the SCN. In the case of Gwalior Rayon Mfg. (Wvg.) Co. Vs .UOI, 1982 (010) ELT 0844 (MP), the Madhya Pradesh High Court at Jabalpur affirms the same position that merely because necessary particulars have not been stated in the show cause notice, it could not be a valid ground for quashing the notice, because it is open to the petitioner to seek further particulars, if any, that may be necessary for it to show cause if the same is deficient.'

13. The "Total Amount Paid/Credited Under Section 194C,194H,194I,194J OR Sales/Gross Receipts From Services (From ITR)" for the assessment year 2017-18 (upto June-2017) had not been disclosed thereof by the Income Tax Department, nor the reason for the non disclosure was made known to this department. The assessee had also failed to provide the required information even after the issuance of letters and summons from the Department and the assessable value for the year 2017-18 (upto June-2017) was not ascertainable at the time of issuance of this Show Cause Notice. If any other amount was to be disclosed by the Income Tax Department or any other sources/agencies, against the said assessee, action was to be initiated against the said assessee under the proviso to Section 73(1) of the Finance Act 1994 read with para 2.8 of the Master Circular No. 1053/02/2017-CX dated 10.03.2017, in as much as the Service Tax liability arising in future, for the period 2017-18 (upto June-2017) covered under subject Show Cause Notice, was to be recovered from the assessee.

14. All the above acts of contravention on the part of the said assessee resulted into non-payment of Service Tax and they appeared to have been committed by way of suppression of material facts and contravention of provisions of Finance Act, 1994 with an intent to evade payment of Service Tax as discussed in the foregoing paras and therefore, the Service Tax amounting to Rs. 5,64,90,598/- (inclusive of Cess) not paid was required to be demanded and recovered from them under the proviso to Section 73(1) of the Finance Act, 1994 alongwith interest thereof at appropriate rate under the provisions of Section 75 of the Finance Act, 1994.

15 All these acts of contravention of the provisions of Section 67, Section 68 and Section 70 of the Finance Act, 1994 read with Rule 6 & Rule 7 of the Service Tax Rules, 1994 appeared to be punishable under the provisions of Section 76 and 77 of the Finance Act, 1994 as amended from time to time. In view of the above, it appeared that the said assessee had

contravened the provisions of Finance Act, 1994 and the rules made there under. All the contraventions and violations made by the said assessee appeared to have rendered the assessee liable to penalty under Section 76 & Section 77 of the Finance Act.

16. In addition to the contravention, omission and commission on the part of the said assessee as stated in the foregoing paras, it appeared that the said assessee had willfully suppressed the facts, nature and value of service provided by them with an intent to evade the payment of Service Tax thus rendering them liable for penalty under Section 78 of the Finance Act,1994.

17. The pre-SCN consultation was fixed on 23.01.2021, but the same was not attended by the assessee.

18. Therefore, Show Cause Notice dated 23.04.2021 was issued to the assessee asking them as to why:

(i) Service Tax of Rs. 5,64,90,598/- short/ not paid, should not be confirmed and recovered from them under proviso to Sub-section (1) of Section 73 of Finance Act,1994.

(ii) Interest at the appropriate rate should not be demanded and recovered from them under Section 75 of the Finance Act,1994;

(iii) Penalty should not be imposed upon them under the provision of Section 78 of the Finance Act, 1994.

(iv) Penalty under the provisions of Section 77(2) of the Finance Act, 1994, should not be imposed on them for their failure to assess their correct Service tax liability and their failure to file correct Service Tax Returns, as required under Section 70 of the Finance Act, 1994 read with Rule 7 of the Service Tax Rules1994.

DEFENCE REPLY:

19. The assessee vide letter dated 12.05.2021 and 23.07.2021 submitted their written submission, wherein they interalia stated that:

- They stated that M/s Bharti Cellular Limited was incorporated on 20.03.1992 and was engaged in, *inter alia*, providing Telecommunication services, which got merged with M/s Bharti Tele-Ventures Limited w.e.f. 09.06.2005 and thereafter the name of entity M/s Bharti Tele-Ventures Limited got changed to M/s Bharti Airtel Limited w.e.f. 24.04.2006 and was having Service Registration number AAACB2894GST004 in Gujarat circle which later got merged with centralized service tax registration number AAACB2894GST036 in Gurgaon, Haryana w.e.f. 01.10.2009. They have further stated that M/s Bharti Airtel Limited, is the surviving entity and is engaged in, *inter alia*, providing Telecommunication services. They have enclosed a copy of the order of Delhi High Court approving amalgamation of M/s Bharti Cellular Limited with M/s Bharti Tele-Ventures Limited. They have also enclosed name

change certificate of M/s Bharti Tele-Ventures Limited to M/s Bharti Airtel Limited and copy of centralized certificate.

- They stated that the allegations made in the SCN are perverse, factually incorrect, illegal and unsustainable as same have been made on assumptions and presumptions and without any independent examination of facts and without appreciating the applicable law and underlying facts.
- They contended that they were not given pre-notice consultation opportunity, such consultation was mandatory as per the CBEC's circular before issuance of the notice of more than 50 lacs. A pre-Show Cause consultation was provided to them on the very same date of issuance of SCN i.e. 23.04.2021, but the same was not attended by them.

- They have further contended that the department was aware of the fact that the pre-SCN consultation notice was not served upon them on mail. The department rushed into issuance of captioned Show Cause Notice on 23.04.2021 instead of re-attempting the delivery of the pre-SCN consultation notice by any other means such as Speed-post, by hand delivery etc.

- They stated that the pre-SCN consultation notice was sent on Email address AAACB0874CST006 @ hotmail.com which did not pertain to them. In event, where a pre SCN consultation notice was not served upon them, then the question of attending the same did not arise. The approach of department while issuing the captioned SCN clearly establishes that the same was issued without following the principle of natural justice, without adhering to the binding circulars and processes laid down in this regard and with a pre-mediated mind.

- They have relied upon the following decisions of High Courts in the case of M/s. *Amadeus India Pvt. Ltd. v. Pr. Commissioner, Central Excise, Service Tax and Central Tax Commissionerate, 2019 (25) G.S.T.L. 486 (Del.)* and the Hon'ble Madras High Court in the case of *Tube Investment of India Ltd. v. Union of India, 2018 (16) G.S.T.L. 376 (Mad.), who* taking note of the above-mentioned Master Circular, and the binding nature of the same, have held that a pre-show cause notice consultation is mandatory in cases involving demand of duty above Rs. 50 Lakhs and a show cause notice issued without this is bad in law and is liable to be quashed.

- They contended that they have not been supplied RUDs alongwith SCN, in the absence of any RUDs/evidence or basis of computation for the allegations made in the SCN, they are unable to justly and effectively defend itself against the allegations made in the impugned SCN.

- They stated that the SCN had merely presumed that the entity M/s Bharti Cellular Limited had filed its Service tax return for the said periods and instead of providing the same along with the SCN, the department had mentioned in the SCN that these returns are available with

the assessee. Whereas on the date of issuance of this SCN and the period under dispute, the legal entity in the name of M/s Bharti Cellular Limited was not in existence (as the same was merged with M/s Bharti Televentures Limited (now M/s Bharti Airtel Limited) and was also not required to file separate Service tax return in its name.

- They also stated that it is trite law that the principle of natural justice requires that the information that has been used for raising an allegation against a person, must be clearly known to that person. It is only then that the person will have a fair opportunity to defend, correct or contradict such information. Unless such information is made available to the person against whom an allegation has been made, it cannot be said that a reasonable opportunity has been given to the person to defend himself.

- In this regard, they have placed reliance on the judgement in the matter of *Tribhuvandas Bhimji Zaveri vs. Collector of Central Excise [1997 (92) E.L.T. 467 (S.C.)]*, wherein, the Hon'ble Supreme Court has held that non supply of RUDs severely prejudices the right of an assessee to provide proper explanation to the allegations made by the Department or to decide if any other action needs to be taken and thus, violates principles of natural justice. Reliance has also been placed by them on the following judgements:
  - *Kothari Filaments v. CC 2009 (233) E.L.T. 289 (S.C.)*
  - *Mozart Global Furniture v. State Tax Officer (Intelligence), SGST Deptt., Nilambur, 2020 (33) G.S.T.L. 3 (Ker.)*
  - *BNS Import Export v. UOI, 2018 (362) E.L.T. 398 (Bom.)*
  - *Kemtech International Private Limited and Others v. Commissioner of Customs (I&G), (2014) 14 SCC 552;*
  - *Sahi Ram v. Avatar Singh and Others, (1999) 4 SCC 511*
  - *Kellogg India Pvt. Ltd. vs. Union of India [2007 (8) S.T.R. 84 (Bom.)]*
  - *Rajesh Kumar Agarwal vs. Commissioner of C. Ex., New Delhi [2015 (321) E.L.T. 313 (Tri. – Del.)]*
  - *Bhagirathi Iron & Steel Pvt. Ltd. vs. Commissioner of C. Ex., Meerut [2010 (261) E.L.T. 654 (Tri. – Del.)]*

- They stated that M/s Bharti Cellular Limited was not in existence (as the same was merged with M/s Bharti Televentures Limited (now M/s Bharti Airtel Limited) and therefore was also not required to file separate Service tax return and income tax return in its name. In fact, no separate income tax return or service tax return was also filed by the entity M/s Bharti Cellular Limited. They have further stated that on the basis of the information available and to their knowledge, M/s Bharti Cellular Limited had never applied nor had any login credential of ACES website (the portal required for filing Service Tax return for the period under dispute). Also, M/s Bharti Cellular Limited had not filed a separate income tax return. the only possible documents on the basis of which the impugned SCN could have been issued (basis our own assessment) must be the Form 26AS of BCL.

- They stated that no independent verification was undertaken by the tax department before issuing this SCN. The department had just presumed that M/s Bharti Cellular Limited had filed their Service tax return and Income tax return for the period under dispute and rushed into issuance of captioned SCN without verifying their own records or asking further information from CBDT/assessee in this regard.

- They stated that the differences in turnover between ST-3 and ITR /26AS, as alleged in the SCN, and seeking recovery under Service tax is merely on an assumption that the activity appears to be "service". In this regard Hon'ble CESTAT in Kush Constructions Vs. CGST NACIN 2019 (24) GSTL 606 (Tri – All), has held that Revenue cannot raise the demand on the basis of such difference without examining the reason and without establishing that the entire/ part amount received by the appellant as reflected in said returns in the Form 26AS is consideration for taxable services provided. They should not presume that the difference was because of any exemption or abatement, since it is not legal to presume that the entire differential amount was on account of consideration for providing taxable services.

- They also stated that the Plethora of judicial pronouncements has also settled this law that no demand of service tax can be confirmed on the basis of amounts shown as receivables in the Income Tax Returns.
    - J.I Jesudasan vs. CCE 2015 (38) S.T.R 1099 (Tri.Chennai);
    - Alpha Management Consultant P. Ltd vs. CST 2006 (6) STR 181 (Tri.Bang);
    - Tempest Advertising (P) Ltd. v. CCE 2007 (5) STR 312 (Tri.-Bang.);
    - Turret Industrial Security vs. CCE 2008 (9) S.T.R. 564 (Tri-Kolkata).

- They stated that the notice issuing authority has to first satisfy itself on the matter and then only to proceed with the issuance of the SCN. However, this had not happened in their case. They have relied on the following cases wherein the SCNs were held to be invalid on this ground itself:
    - Swastik Tin Works v. CCE, 1986(25) ELT 798 (Tri.)
    - Indian Plastics Ltd. v. CCE, 1988 (35) ELT 434 (Tri.);
    - Ram Steel Rolling and Forging Mills v. Commissioner 2006 (204) ELT 87 (Tri.Mum)
    - Shree Uma Foundries Pvt. Ltd. v. CCE, 2008 (222) ELT 317
    - Kirloskar Pneumatic Co. Ltd. v. CCE, 2011 (22) S.T.R. 121 (Tri. – Mum)

- They sated that the Department has erred in issuing the impugned SCN by simply adopting certain assumptions and presumptions. Accordingly, the impugned SCN is vague and thus, the same is liable to be set aside on this short ground itself.

They contended that the department was aware of the fact that M/s. Bharti Cellular Limited were merged with M/s. Bharti Televentures Limited w.e.f. 09.06.2005, there after name of M/s. Bharti Televentures Limited got changed to M/s. Bharti Airtel Limited w.e.f. 24.04.2006 and was having Service Registration number AAACB2894GST004 in Gujarat circle which later got merged with centralized service tax registration number AAACB2894GST036 in Gurgaon,

Haryana w.e.f. 01.10.2009, the department proceeded with issuance of impugned SCN which completely lacks Jurisdiction. As only the Commissioner having jurisdiction over the centralized Service tax registration of M/s Bharti Airtel Limited is competent to issue notice and decide the matter. Accordingly, the present SCN exceeds jurisdiction and is thus, liable to be dropped.

- They Further submitted that, owing to pending past income tax litigation of entity M/s Bharti Cellular Limited, it has not been possible to surrender the PAN number (AAACB0874C) of M/s Bharti Cellular Limited. The tax credits appearing in 26AS of M/s Bharti Cellular Limited is on account of inadvertent TDS return filed by the Tax deductors in the old PAN of M/s Bharti Cellular Limited instead of new PAN of M/s Bharti Airtel Limited i.e. AAACB2894G despite the fact that the Invoices for these services were raised by M/s Bharti Airtel Limited.

- They stated that the Income as well as the TDS appearing in 26AS of M/s Bharti cellular Limited was offered to tax under the PAN of M/s Bharti Airtel Limited. They submitted sample Income Tax Assessment Order of M/s Bharti Airtel Limited for AY 2012-13 as per Annexure –11 to their reply. They have also submitted few sample Invoices of their customers as per Annexure - 12. They further stated that it can be observed that these Invoices were raised by M/s Bharti Airtel Limited and appropriate taxes on the same was also discharged by M/s Bharti Airtel Limited. They have also stated that that Service Tax Audit of M/s Bharti Airtel Limited for the period April 2014 to June 2017 has already been completed.

- They stated that the impugned SCN exceeded its jurisdiction and is thus, liable to be dropped. Reliance in this regard is placed on the cases of:
    - *CCE, Bangalore v. ECOF Industries Pvt. Ltd. - 2012 (277) E.L.T. 317 (Kar.)*
    - *United Phosphorus Ltd. v. CCE, Surat- 2013 (30) S.T.R. 509 (Tri.-Ahmd.)*
    - *Ericson India Pvt. Ltd. v. CCE & ST, Hyderabad - 2011 (24) S.T.R. 346 (Tri.-Bang.)*
    - *CST, Ahmedabad v. Godfrey Philips India Ltd. - 2009 (239) E.L.T. 323 (Tribunal)*
    - *Eveready Industries India Ltd. v. CCE, Chennai - 2010 (249) E.L.T. 85 (Tri-Chennai) = 2011 (22) S.T.R. 502 (Tribunal)*
    - *H&R Johnson (India) Ltd. v. CCE, Raigad - 2013-TIOL-1577- CESTAT-MUM*

- They stated that the impugned SCN seeking recovery of Service tax does not emphasize the nature of activity carried out by the assessee which can be classifiable under a particular head of "service" to make it taxable. Hon'ble CESTAT, Delhi in Deltax Enterprises vs. CCE, Delhi 2018 (10) GSTL 392 (Tri – Del) had elaborated that no service tax liability can be fastened on an unidentified service. There is no provision for such summary assumption under the Finance Act, 1994. Thus, Assessment cannot be extended solely on the income tax return without identifying the specific taxable service. Thus, unless the activity is described in detail and examined in terms of section 65B(44) of Finance Act i.e. satisfying all the

attributes of the term "service", no demand or recovery can be made on a mere presumption, ignoring the exemptions and abatements.

- They stated that the alleged demand has not been calculated correctly by the department and the alleged Service tax liability has been overstated.

- They further contended without prejudice to their submission that the demand raised in the impugned SCN for the period prior to 01.10.2015 is illegal, erroneous and beyond the provisions of the Act as the same extends even beyond the extended period of limitation prescribed under Section 73 of the Act as it stood during the relevant time.

- They stated that the demand of interest is dependent upon liability for payment of Service Tax. If there is no tax liability, no interest can be demanded. As submitted in the preceding paragraphs, the demand against them for short payment of Service Tax is not sustainable. Since no tax is recoverable, the question of recovery of interest does not arise. In this regard, they have relied upon the following judgements:
    - *Pratibha Processors vs. Union of India [1996 (88) E.L.T. 12 (SC)]*
    - *Sanjay Dhanuka vs. Collector of Customs [2001 (133) E.L.T. 263 (Cal.)]*
    - *Commissioner of Customs, Chennai vs. Jayathi Krishna & Co. [2000 (119) E.L.T. 4 (SC)]*

- They stated that when Service Tax itself is not payable, imposition of penalty under the Act is unsustainable and is liable to be dropped. In this regard, reliance is placed on the judgement in the case of *Collector of Central Excise vs. H.M.M. Limited [1995 (76) E.L.T. 497 (SC)]* wherein the Apex Court has held that penalty could not be levied when the demand itself is unsustainable.

- They have further tendered arguments that they were not required to file separate Service tax Return in the name of erstwhile entity M/s Bharti Cellular Limited, hence the alleged proposal of penalty u/s 77 is devoid of merit.

The assessee filed an additional reply dated 08.12.2021, wherein they stated that:

- They further stated that the pre-SCN consultation was required to be adhered to before issuance of SCN. They have relied upon the decision of Hon'ble Gujarat High Court in the case of M/s. Dharamshil Agencies v. Union of India [R/SLP No. 8255 of 2019 decided on July 23, 2021], wherein Hon'ble High Court set aside the SCN on the ground that Petitioner was not granted an adequate opportunity for the consultation prior to the issuance of SCN.

- They stated that the CBIC has issued instruction dated 26th October 2021 to deal with indiscreet Show Cause Notices (SCN's) issued by the Service Tax Authorities. The CBIC instructions are binding on the Assessing Officer to follow the same. Under the impugned

SCN, CBIC's instruction has not been followed, since no clarification / reconciliation statement was sought from the Assessee, the proceedings initiated against the Company are liable to be dropped.

- Lasty, they requested to drop the proceedings in view of their submissions.

PERSONAL HEARING:

20. Personal Hearing was granted to the assessee on 09.12.2021. Shri Pankaj Agrawal, DGM Finance and Shri Jethanand Pariyani, Manager appeared for personal hearing on behalf the assessee. They informed that the during the relevant period their business had closed, therefore, there was no question of any revenue arising on account of provision of service. They stated that M/s. Bharti Cellular had shut office in 2005. They requested to drop the proceedings on account of there being no merits in allegations levelled in the SCN.

DISCUSSION AND FINDINGS:

21. I have carefully gone through the facts of the case and records available in the case file, which include the SCN, the defence replies dated 12.05.2021, 23.07.2021 and 08.12.2021, documents and oral submission made by the assessee during the personal hearing.

22. On going through the SCN, I find that basically the essence of the case is that data of Sales /Gross receipt from services/ Total Amount Paid/Credited under 194C, 194H, 194I, 194J" were shared by the CBDT for FY 2015-16 to 2016-17, wherein substantial income of Rs. 38,25,72,776/- appeared to have been received by the assessee for the Financial Year 2015-16 & 2016-17 for providing the taxable services. Therefore, the subject SCN was issued. Accordingly, I find that the issue which requires determination as of now is whether the assessee is liable to pay service tax on the taxable value of value of Rs. 38,25,72,776/- for the Financial Year 2015-16 & 2016-17 under proviso to section 73(1) of Finance Act, 1994 or not.

23. I find that the assessee in their aforementioned replies, has contended that M/s. Bharti Cellular Limited (Registration No. AAACB0874CST006) were merged with M/s. Bharti Televentures Limited w.e.f. 09.06.2005 as per the Amalgamation Order of High Court of Delhi, and there after name of M/s. Bharti Televentures Limited had got changed to M/s. Bharti Airtel Limited w.e.f. 24.04.2006 and which were having Service Registration number AAACB2894GST004 in Gujarat circle. Later on, they had got Centralized service tax registration number AAACB2894GST036 in Gurgaon, Haryana w.e.f. 01.10.2009. Hence, they have strongly contended that M/s. Bharti Cellular Limited had no existence at the relevant time as alleged in the SCN. Further, they have objected that the department has no jurisdiction to issue impugned SCN in the matter on this ground. They have also argued that the SCN has been issued only on assumptions and presumptions and without any independent examination of facts and without appreciating the applicable law and underlying facts. They have also contested that they were

not given the opportunity of pre-scn consultation hearing, which was mandatory on part of the department. The department was aware of non service of notice of pre-scn consultation upon them. The notice sent on mail ID was not known to them and not pertained to them. They have also contended that the SCN has been issued without following the departmental instruction and without verification of the facts. They have also contended that they were not provided the RUD, hence they were not able to defend their case effectively, which is against the principle of natural justice. However, the assessee has stated the some of their customers have inadvertently mentioned/used the PAN of M/s. Bharti Cellular Limited while deducting the TDS, instead of M/s. Bharti Airtel Limited; therefore, the income appears to have been received by M/s. Bharti Cellular Limited. They have also stated that the said PAN was not surrendered by them due to pending Income Tax Litigation. I find that the assessee has furnished various documents in their support and cited various case laws in support of their arguments.

24. I find that the difference in taxable value as per data of ITR/26AS vis-à-vis ST-3 data has been worked out and accordingly SCN seeking demand and recovery of service tax on differential value was issued. I also find that SCN clearly states the source of information received for working out the difference in taxable value (CBDT Data). The said information has been tabulated in the SCN. I find that the taxable value as per ST-3 Returns has been shown as zero, as the same was not available in the system. Now, I find that the assessee has submitted the copy of Form 26AS for FY 2015-16 and 2016-17, and on perusing the same, evidently it is seen that the assessee has been paid amount and TDS has been deducted under 194C and 194J against the PAN No. AAACB0874C, on which M/s. Bharti Cellular Limited were having Service tax registration number AAACB0874CST006. It is also evident that the amount of credit or amount paid to them is found to be tallying exactly with the amount shown in the SCN. I find that this clearly demonstrates the SCN has been issued on factual data and not on assumptions or presumptions as has been alleged by the assessee. Further, I do not find any force behind the contention that they have not been provided RUD and therefore they were not able to defend their case effectively. They were in fact in possession of all the documents and information which the department had access to. In this regard, the department had also replied to them vide letter F.No. STC/15-01/OA.2021 dated 10.06.2021.

25. I find that as per Form 26AS, the assessee has received the payment and TDS has been deducted under Section 194C and 194J of Income Tax Act. As per the provisions of Section 194C and 194J, the person liable to pay sum to contractor for carrying out of 'work' (service) or to professional or technical person as "fees", would deduct the TDS from the sum payable to such person. I find that with introduction of negative list based service tax regime w.e.f 01.07.2012, any service which do not fall within negative list or exempt under mega exemption notification, qualify as service under Section 65B(44) and liable to service tax under Section 65B(51) of Finance Act, 1994. Therefore, I find that the any income shown under 194C and 194J

for the activity being in nature of service, is liable to service tax unless it is shown falling under negative list or mega exemption notification.

26. It is also evident from the department's letter F.No. STC/15-01/OA/2021 dated 10.06.2021, the pre-SCN consultation notice was sent to the assessee on their registered email ID of M/s. Bharti Cellular Limited available with the department. The party's contention is not correct and without any verification of facts at their end.

27. I find that the assessee has submitted various document in their support, some of which I would like to discuss as follows:

27.1 The assessee has submitted the copy of Delhi High Court's order date 21.02.2005 in CP NO. 287 to 289/2004. On perusing the same, I find that the High Court has approved the amalgamation of M/s. Bharti Cellular Ltd with M/s. Bharti Tele-Ventures Ltd. Based on this order, Registrar Of Company, NCT Of Delhi & Haryana has issued "Certificate of Registration Orders of Court Confirming Amalgamation of Companies" dated 09.06.2005.

27.2 The assessee has also submitted copy of letter dated 26.12.2005 addressed to the Assistant Commissioner of Service Tax, Central Excise Bhavan, Ambawadi, Ahmedabad, wherein they had requested to continue their Centralised Registration No. AAACB2894GST004 in Gujarat Ahmedabad in the name of M/s. Bharti Tele-Ventures Limited, Ahmedabad consequent upon the amalgamation of M/s. Bharti Cellular Limited (Regn. No. AAACB0874CST006) with its holding company M/s. Bharti Tele-Ventures Limited.

27.3 The Assessee has submitted copy of Certificate of Incorporation consequent upon change in Name (CIN No. L74899dl1995plc070609) date 24.04.2006, certifying the change of name of M/s. Bharti Tele-Ventures Ltd to M/s. Bharti Airtel Limited.

27.4 Further, on perusing the copy of letter 27.10.2009 of the assessee, addressed to Office of the Commissioner of Service Tax, Ahmedabad, it is seen that they had surrendered their Centralised Registration No. AAACB2894GST004 dated 26.07.2005 for Gujarat office, on obtaining of Centralised Registration No. AAACB2894GST036 effective from 01.10.2009, in Gurgaon, Haryana for Pan India Operations.

27.5 The assessee has also submitted copy of Order dated 26.07.2018 issued by the Assistant Commissioner of Income Tax, Circle 4(2), New Delhi, under Income Tax Act. On perusing, the same, it is seen the income tax department had allowed the TDS credit of M/s. Bharti Cellular Limited for AY 2012-13 to M/s. Bharti Airtel Limited, observing that the corresponding income pertaining to the said TDS was also claimed by M/s. Bharti Airtel Limited in their ITR.

27.6 The assessee has also submitted the copy of Final Audit Report No. 68/2019-20 dated

18.11.2019 in respect of M/s. Bharti Airtel Limited, Gurugram, Haryana (Registration No. AAACB2894GST036). On perusing the audit report, it is discerned that the audit had covered the period form 2014-15 to 2017-18 (upto June 2017), it is also seen that the SCNs have been issued to M/s. Bharti Airtel Limited on the audit observations, which were not agreed upon by them.

28. Having considered these factual and documentary evidences available on records and as produced by the assessee, I find that the assessee i.e. M/s. Bharti Cellular had no separate existence in jurisdiction of Ahmedabad North Commissionerate, w.e.f 09.06.2005, which was amalgamated in M/s. Bharti Tele-Ventures Limited, subsequently they had changed their name to M/s. Bharti Airtel Limited. Since, M/s. Bharti Airtel Limited had obtained the centralized registration for Pan India Operation from Gurgaon Office, they had surrendered their registration in Ahmedabad, Gujarat Circle w.e.f 27.10.2009. Hence, I find that there is no separate existence of assessee in Ahmedabad and all the accounting records and operations and discharging of service tax liability were dealt from their Registered office at Gurgaon. It is also evident from Order dated 26.07.2018 of Assistant Commissioner, Income Tax that the income of the merged entity are being booked by M/s. Bharti Airtel Limited. Though, the order pertained to the period 2012-13, there is no reasons to believe that the same practice would not have followed for subsequent period. I find that it is the responsibility of M/s. Bharti Airtel Limited for discharging of service tax in respect of all income of its merged entities after amalgamation of the same. I therefore find that Ahmedabad North Commissionerate has no jurisdiction over M/s. Bharti Cellular Limited/ M/s. Bharti Tele-Ventures Limited or M/s, Bharti Airtel Limited after their pan India based service tax registration in Gurgaon, Haryana. I find that the SCN issued is without jurisdiction over the assessee and thus is liable to be dropped. I find that the Audit of M/s. Bharti Airtel Limited, Gurgaon has already been carried out by the department, which had covered the period from 2014-15 to 2017-18 (upto 2017). The department has issued SCNs to M/s. Bharti Airtel Limited, Gurgaon, on audit objections which were not agreed upon by them. As per the audit report, I find that the assessee had not agreed upon the observations viz. (i) wrong availment of cenvat credit exclusively used for J&K for providing exempt service, in terms of Rule 6(1) of Cenvat Credit Rules, 2004 (CCR) (ii) Exempted turnover not accounted for reversal of cenvat credit under Rule 6(3) of CCR. (iii) Non payment of Service tax on ECS bounce charges and cheque bounce charges from Customers (Section 66E(e)) (iv) Non reversal of Cenvat Credit on Capital Goods /inputs transferred to J& K circle from other states (v) Wrong availment of cenvat credit on "setting up of premises" (vi) Non payment/ short payment of service tax on Annual License fees, Spectrum Usage Charges based on Annual Gross Revenue payable to DOT (where data was provided by the assessee) (vii) Non payment/ short payment of service tax on Annual License fees, Spectrum Usage Charges based on Annual Gross Revenue payable to DOT (where data was not provided by the assessee- best judgment assessment) (viii) Non payment of service tax on income from "Renting of hardware" in terms of 66E(f) (ix) Non payment of

service tax on DOT charges i.e. One time Spectrum fess paid, Annual Licence fees paid & spectrum usage charges and other fees /charges paid in relation to J&K Telecom circle (x) Wrong availment/ utilization of Education Cess and Secondary higher Education Cess after 31.05.2015 (after abolition of EC & SHEC). Hence the SCNs have been issued by the jurisdictional authority Gurgaon. I find that the issue of subject SCN to M/s. Bharti Cellular Limited after audit of M/s. Bharti Airtel Limited, with which M/s. Bharti Cellular Limited was amalgamated, is also not correct, thus not justified.

29. In view of the facts and circumstances pertaining to the case, the demand is not tenable in law, accordingly I do not consider it necessary to delve in the merits of invoking extended period of limitation which has been discussed in the SCN at length and contested by the said assessee in their submissions. For the same reasons, I am also not entering into discussions on the need or otherwise of imposing penalty. Therefore, from the factual matrix and the question of law as discussed in the foregoing paras, I pass the following order: -

ORDER

I drop the proceedings initiated against M/s Bharti Cellular Limited, Bharti House, Nr. Income Tax Circle, Ashram Road, Ahmedabad-380 009, vide Show Cause Notice F. No. STC/15-01/ OA/2021 dated 23.04.2021.

(Upendra Singh Yadav)
Commissioner,
Central Excise & CGST,
Ahmedabad North.

By Regd. Post AD./Hand Delivery
F. No. STC/15-01/OA/2021

Date: .01.2022.

To
M/s Bharti Cellular Limited,
Bharti House,
Nr. Income Tax Circle,
Ashram Road, Ahmedabad-380 009

Copy for information to:

1 The Chief Commissioner of CGST & C. Ex., Ahmedabad Zone.
2 The Assistant Commissioner, CGST & C.Ex., Division-VII, Ahmedabad North.
3 The Superintendent, Range-I, Division-VII, Ahmedabad North.
4 The Superintendent (System), CGST, Ahmedabad North for uploading on website.
5 Guard File.