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**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH**

3rd, 4th, & 5th Floor, Jai Centre, 34, P. D'Mello Road,
Poona Street, Masjid Bunder (East), Mumbai - 400 009.

Dated : 10-01-2014

From : The Assistant Registrar, CESTAT, MUMBAI.

To,

Pagariya Auto
Center

Opp. Akashwani,
Jalna Road,

Aurangabad-431005

Customs Excise & Service Tax
Appellate Tribunal
07 FEB 2014
West Block 2, P.K. Puram,
New Delhi-110066

In the matter of Pagariya Auto Center

Appellant / Applicant

V/S

CCE, AURANGABAD

Respondent

I am directed to transmit herewith a certified copy of order passed by the Tribunal under Section 35(1) of the central Excise Act, 1944, Section 129(B) of the Customs Act, 1962 and Finance Act, 1994 as mentioned below.

438/12

| Appeal No. | Application No. | Order No. | Date | Pronouncement Date |
|---------------|-----------------|---------------------|------------|--------------------|
| ST/103/10-MUM | | M/35/14/SMB/LB/C-IV | 12/09/2013 | 12-09-2013 |

Copy to :

1. Respondent

CCE, AURANGABAD
TOWN CENTRE IN 5, CIDCO,

AURANGABAD-431003

Advocate / Consultant

Economic Laws Practices

1502, Dalamal Towers,
Nariman Point,
Mumbai - 400 021

3. Authority

ONA : CCE(APPEALS), AURANGABAD

--- Registrar ---
TO CESTAT, New Delhi - West Block 2 II
R.K. Puram - New Delhi 110066.

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10/01/2014

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CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No.2, R. K. Puram, New Delhi, Court No. 1

Date of hearing/decision: 12.09.2013

Service Tax Appeal No. 103 of 2010-MUM.

M/s Pagariya Auto Center

Appellants

Vs.

CCE, Aurangabad

Respondent

Appearance:

Shri Sushant Murthy, Advocate for the appellant.

Shri S. K. Sinha, CDR, Sh. K.S. Mishra, Amresh Jain & Sh. Govind Dixit,
DRs for the Respondent

Coram: Hon'ble Mr. Justice G. Raghuram, President
Hon'ble Mr. Rakesh Kumar, Technical Member
Hon'ble Mr. Sahab Singh, Technical Member

Interim Order No. *m/35/14/smb/LB/C-IV*

Per: Justice G. Raghuram:

The learned single Member (Judicial) of the West Zonal Bench of this Tribunal by the order dated 12.10.2012 has referred to a Larger Bench, the issue:

"Whether the table space provided by the Automobile dealers to financial institutions fall under Business Auxiliary Service or not?"

2. The order of reference noticed a conflict in two decisions of this Tribunal pronounced by Division Benches, in *Tribhuvan Motors Ltd. vs. CST, Mangalore*¹ and in *Brij Motors P. Ltd. vs. CCE*².

¹ 2010 (17) STR 281

² 2012 (25) STR 489 (Tri. Del.)

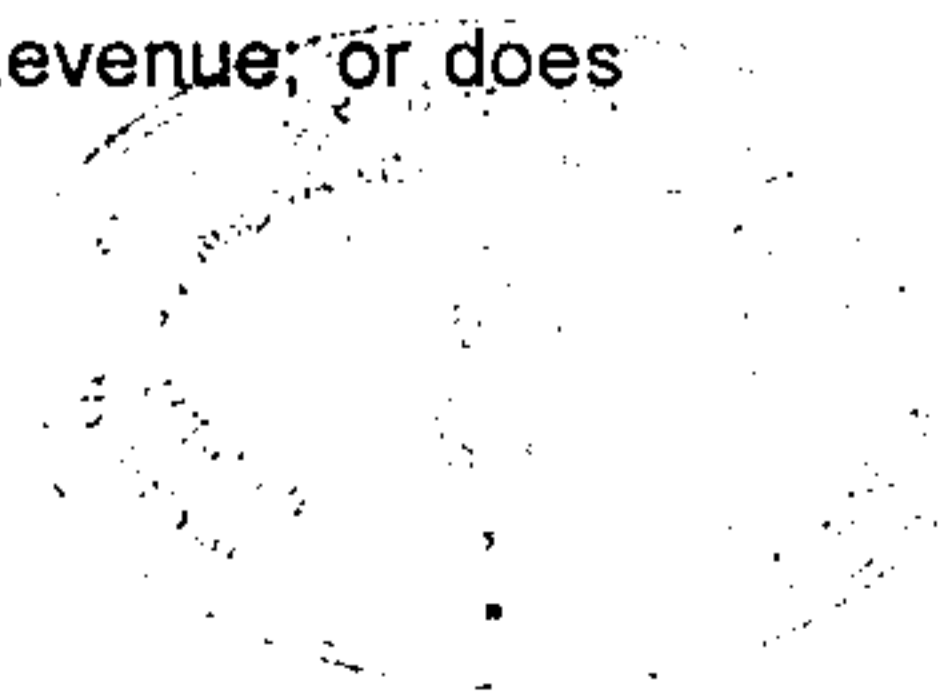


3. The relevant facts in brief in ST Appeal No. 103/2010 (in which the order of reference was recorded) may be noticed. Revenue proceeded against the appellant/ assessee by issuing a show cause notice dated 23.10.2008 proposing to levy service tax besides interest and penalties as indicated therein for having provided Business Auxiliary Service (BAS) [defined in Section 65(19) of the Finance Act, 1994 (the Act), read with Section 65 (105) (zzb)], during 01.07.2003 to 31.03.2008, by way of providing the business of banks/ financial institutions, namely of providing loans to customers including by providing a space (to the banks/financial institutions) in the premises of the assessee. The assessee contested. After a due process, the proceedings culminated in the adjudication order dated 31.07.2009 which assessed a service tax liability of Rs. 5,86,848/- besides interest and penalties as specified therein including penalty of an amount equivalent to the tax assessed, under section 78 of the Act. The adjudication order also appropriated Rs. 91,298/-, remitted by the assessee during the course of proceedings.

4. Aggrieved, the assessee unsuccessfully preferred appeal which was rejected by the Commissioner (Appeals), Aurangabad by order dated 02.12.2009. The assessee therefore preferred a further appeal to this Tribunal.

5. In the context of the core issue presented before the Tribunal, what is involved is a classification dispute, as to whether the transaction in issue, (between the assessee and the banking / financial institutions) falls within the fold of BAS, a taxable service defined under Section 65(19) and enumerated in Section 65(105)(zzb), as contended by Revenue; or does






not so constitute the specified taxable service, as contended by the assessee.

6. In light of the provisions of Section 86(7) of the Act, the relevant provisions in the Central Excise Act, 1944 relating to hearing of appeals and making orders therein are applicable to proceedings before this Tribunal while hearing appeals under the Act. Sub-section (3) of Section 35D of the Central Excise Act, 1944 enumerates the classes of cases which may be disposed of by a Bench comprising a single Member and cases which ought to be disposed of by Division Bench. Accordingly, classification and valuation disputes must be resolved by a Division Bench.

7. It is therefore clear that the jurisdiction to adjudicate upon a dispute involving classification of services is conferred to a Division Bench. The substantive appeal ought therefore to have been placed before the Id. Division Bench for adjudication. It however appears that neither the assessee nor Revenue had sensitized the Id. single Member to this legal position. In any event, since the Id. single Member did not adjudicate upon the merits of the appeal, no issue as to an exercise in excess of jurisdiction arises. The order has merely referred a conflict of opinion between judgments of this Tribunal for reference to a larger Bench. The order of reference is therefore not *per se* invalid, in the circumstances.


8. The specific issue referred to this larger Bench, is, in our considered view, incoherently structured. Provision of table space by automobile dealers to financial institutions may have several underlying purposes and may be predicated upon varieties of transactional instruments. Such a provision (of table space) may be incidental to lease of immovable property



by the automobile dealer to the bank/ financial institutions or it may be an incidental facility provided under a comprehensive agreement between the parties, whereunder the automobile dealer (under the terms of agreement between the parties, oral or written) undertakes to provide/ offer a raft of services, some or all of which may be taxable services; including BAS. Mere provision of table space would provide no valuable input which permits identification of the character of the transaction for classification into one or the other or not any, taxable service.

9. In every case, where proceedings are initiated by Revenue against automobile dealers on a premise that there is an extent contractual relationship between the dealer and a bank / financial institution, whether involving a table space or otherwise, the primary analysis must involve a consideration of the relevant transactional document/ agreement/ MOU, between the parties, to identify the essential nature of the transaction. On such primary analysis of the transactional documents, the distillate of the transaction as ascertained by the adjudicating authority must be considered against the appropriate taxable service, in terms of its definition. After this process, the adjudicating authority if reasonably satisfied that the transaction falls within a specific taxable services, may proceed to assessment of tax, interest and penalties, as appropriate under law. The importance of the series of adjudicatory steps illustratively indicated by us, is a *sine qua non* of a rational adjudication process.

10. We will now proceed to an analysis of the conflict in opinion noticed in the order of reference. Ld. Counsel for the appellant/ assessee and the Id. DR refer to other judgments of this Tribunal which have taken one view



or the other. We, therefore, consider the several decisions of this Tribunal which have considered facilities provided by automobile dealers to banks or financial institutions with or without provision of a space in the dealer's premises, as BAS, and in what circumstances. The decisions cited at the bar are *CCE, Jaipur-I vs. Chambal Motors (P) Ltd.*³; *Silicon Honda vs. Commissioner*⁴; *Commissioner vs. Chadha Auto Agencies*⁵; *Roshan Motors Ltd. vs. CST, Mangalore*⁶; *Tribhuvan Motors Ltd. vs. CST, Mangalore*⁷; *TVS Motors Co. Ltd. vs. CCE, Chennai-III*⁸; *South City Motors Limited vs. CST, Delhi*⁹ and *Chambal Motors (P) Ltd. vs. CCE, Jaipur*¹⁰. We notice that the decisions of this Tribunal in *Roshan Motors Ltd.*; *South City Motors Ltd.*; *TVS Motor Co. Ltd.* and *Brij Motors Pvt. Ltd.* have concluded that the transaction in issue in the facts apparent in those appeals, were classifiable as BAS. A contrary view is recorded in *Silicon Honda, Chadha Auto Agencies and Tribhuvan Motors.*

11. The earliest of the decisions referred before us is the decision in *Silicon Honda*. This is a judgment of a Id. single Member. We notice that in this appeal, the assessee's challenge to the adjudication order was on the basis that the conclusion that the assessee had provided BAS was erroneous since Revenue had concluded that the assessee had provided BAS by acting as a commission agent to a bank/ financial institution and table space was also provided to representatives of such bank / financial institution. The appeal was allowed by this Tribunal with the observation

³ 2008 (9) STR 275 (Tri. Del.)

⁴ 2007 (7) STR 475

⁵ 2009 (11) STR 643

⁶ 2009 (13) STR 667

⁷ 2010 (17) STR 281

⁸ 2012 (28) STR 127 (Tri. Chennai)

⁹ 2012 (25) STR 483

¹⁰ 2013 (31) STR 245 (Tri. Del.)

that the adjudication order had failed to refer to any evidence as to financial institutions paying commission to the assessee for providing loan to their customers, who are secured through the efforts of the assessee and there was no record of the assessee's efforts in having provided any such service to the financial institutions. It was held that mere presence of the financial institutions in the assessee's premises and receiving a consideration for lease of table space, would not amount to BAS. This judgment is therefore not an authority for a principle that all transactions between an automobile dealer and bank/ financial institutions, involving presence of such financial institutions in the premise of the dealer, would amount to BAS. There can be no dispute that mere providing of a table space in an assessee premises would not *per se* amount to BAS.

12. In *Chambal Motors 2008 (9) STR 275* this Tribunal had set aside the order of the Commissioner (Appeals) and remitted the matter to that authority for reconsideration of the appeals afresh in the light of the observations by this Tribunal. The facts in this case as revealed from the judgment may be noticed. The adjudicating authority confirmed the demand of tax, interest and penalty, for the assessee having provided BAS. The assessee (automobile dealer) had received commission from the bank during the relevant period in connection with advancing loans to its customers who desire to purchase vehicle from the assessee, the dealer. The Tribunal observed that the appellate Commissioner had proceeded on an erroneous basis that a bank cannot avail BAS as a client; that from the nature of the agreements between the parties, it is apparent that the assessee had entered into an agreement with the bank to provide services in relation to marketing of the banking and finance services provided by the




bank and had received commission for providing such services. The assessee had also undertaken to process the applications and after scrutiny and forward the applications to the bank. The Tribunal observed that these factual circumstances not having been considered by the Commissioner (Appeals), the orders were unsustainable. While remitting the matter for de-novo consideration, the Tribunal directed the Commissioner (Appeals) to consider the nature of the arrangement between the parties; to ascertain whether any commission was being paid by the bank; whether the amounts were directly given to the customer of the assessee under some tripartite agreement; and whether the amounts became payable to the assessee and if so on what basis. The Tribunal directed the Commissioner (Appeals) to analyse the nature of the transactions to identify whether the activities fall within BAS.

13. In **Chadha Auto Agencies** the assessee was alleged to have been arranging loans from various financial institutions/ banks for hire purchase, to its customers and to be promoting/ marketing the products / services of financial institutions/ banks and receiving consideration described variously as pay out/ incentive/ commission from financial institutions/ banks. Revenue categorised this activity as BAS. The assessee contested the classification. While the adjudicating authority held in favour of Revenue, the Commissioner (Appeals) allowed the appeal of the assessee and concluded that the remuneration received by the assessee was towards "Business support service"; and that Revenue also failed to establish BAS. The appellate authority recorded a finding that the assessee had merely provided space and furniture to financial institutions to sell their products. Dismissing the further appeal by Revenue, the Tribunal concurred with the



appellate authority that financial institutions had remunerated the assessee only for having occupied the table space provided in its premises. In the context of the analysis of facts in this judgment, in our considered view the judgment does not posit a ratio constituting an exposition of the various indicia that go into classification of every transaction between an automobile dealer and a bank, as BAS. The conclusion in the judgment of this Tribunal is thus fact centric.

14. *Roshan Motors Limited* (supra) concluded that the assessee had provided BAS. The analysis of facts disclosed that the assessee entered into an agreement with financial institutions for arranging finance for buyers of vehicles, the basic business of the assessee; that representatives of financial institutions were accommodated in the assessee's premises; prospective buyers of vehicles were introduced by the assessee to finance companies; and the assessee was also assisting buyers in processing their documents for obtaining loans. For these the assessee received a fee from financing companies. On this factual matrix, the Tribunal concluded that the assessee was interpositioned between finance companies and their customers, to promote the products / services of finance companies and assessee received remuneration for providing such services, which amount to marketing and therefore to BAS. Though also fact centric, this decision propounds a ratio that promotion or marketing of financial products or services offered by banks or financial institutions falls within BAS and the consideration received therefor comprises gross income for taxable services provided.



15. The decision in *Brij Motors Pvt. Ltd. vs. CCE, Kanpur*¹¹ also went in favour of Revenue and the service provided therein were held to constitute BAS. Analysing the relevant facts, this Tribunal concluded that banks/ financial companies were clients of the assessee and the assessee was promoting their service namely sanction of car loans. The fact that the relevant provision – Section 65(19) was amended w.e.f. 10.09.2004 to include incidental or auxiliary services in relation to the defined service and the amendment had also included services such as collection or recovery of cheques, did not circumscribe the ambit of the extant definition, observed the Tribunal and concluded that the activities of the assessee were covered within the defined BAS, namely promotion and marketing of services provided by the client. The earlier decisions of this Tribunal in *Bridgestone Financial Services vs. Commissioner*¹² and in *Roshan Motors Limited* (supra) were referred to with approval.

16. In *TVS Motor Co. Ltd.* (supra), the analysis of facts revealed that the assessee was providing services to banks and insurance companies and was receiving referral charges for the same. On analysis of the relevant transactional documents on record the Tribunal concluded that the agreements revealed close association of the assessee with banks/ financial institutions for promotion and marketing of banking and financial services; that a nexus of the service provided by the assessee as input for providing the output of banking and financial services is also revealed; that under the agreements, the assessee was required to inform its dealers and authorised service centres about the arrangement with the financial

¹¹ 2012 (25) STR 489 (Tri. Del.)


¹² 2007 (8) STR 505 (Trib.)



institutions and the buyers of vehicles must also be informed about availability of financial facilities. The dealers and authorised service centres of the assessee were also required to sensitise customers about the lending facilities offered by financial institutions. On a conspectus of the revealed factual situation, the Tribunal concluded that the assessee was promoting and marketing the services of banks and insurance companies, was a link in the economic activity carried on by them and was therefore providing the taxable BAS.

17. In *South City Motors Ltd. vs. CST, Delhi*, the assessee had entered into agreements with different banks and financial institutions to market car loan products offered by the banks/ financial institutions to its customers and received a commission for providing the service. The Tribunal tabulated the scope of the services provided and noticed that these included facilitating certain activities of banks; scrutiny of applications; interview borrowers to verify credit worthiness; taking due and proper care and custody of post dated cheques/ documents etc. collected from customers; market various types of services provided by financial institutions; and marketing various schemes including loan schemes. On this factual matrix the Tribunal concluded that the taxable BAS was provided.

18. In *Tribhuvan Motors Limited* (supra), the assessee's appeal was allowed and the adjudication order concluding that BAS was provided, was reversed. Before this Tribunal there was no contest by Revenue that the assessee had provided any service apart from providing table space for the financial institution, in its premises. The assessee had contended that the



payment was towards rent and not for any services rendered. Concurring with the assessee and negating the claim of Revenue, the Tribunal held that from a perusal of the adjudication order; the grounds of appeal; and the order of the Commissioner (Appeals), there is no evidence of financial institutions having paid commission to the assessee for arranging loans to the assessee's customers and therefore payments by financial institutions was only towards rental for the space provided and this *per se* did not amount to BAS.

19. In *CCE, Jaipur-I vs. Chambal Motors (P) Ltd. -2008 (9) STR 275 (Tri. Del.)* this Tribunal concluded that since the assessees were arranging finance and thereby promoting products of financial institutions, they were providing BAS.

20. On a consideration of the apparent conflict of opinion in the decisions mentioned in the order of reference and the other decisions which were cited at bar, it is clear that no uniform principle emerges as would guide determination of whether a particular transaction involving an interface between an automobile dealer and bank or financial institution would *per se* amount to BAS. The identification of the transaction and its appropriate classification as the taxable BAS or otherwise must clearly depend upon a careful analysis of the relevant transactional documents. Only such scrutiny and analysis would ensure rational classification of the transaction.

21. Where mere space is provided along with furniture for facilitating accommodation of representatives of financial institutions in the premises of an automobile dealer and consideration is received for that singular activity, such consideration may perhaps constitute a rent for the provision

of space and associated amenities. Such restricted relationship/ transaction may not amount to BAS. If on the other hand, the transactional documents and other evidence on record indicates a substantial activity falling within the contours of any of the integers of the definition of BAS, spelt out in Section 65(19), then it would be legitimate to conclude that BAS is provided.

22. We answer the reference accordingly. The appeal stand remitted to the appropriate Bench in the West Zonal Bench of this Tribunal for adjudication on merits and in the light of the observations and principles spelt out in this order.

Sd
(Justice G. Raghuram)
President

Sd
(Rakesh Kumar)
Technical Member

Sd
(Sahab Singh)
Technical Member

Pant

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Customs, Excise & Service Tax
Appellate Tribunal

13 JUN 2014