Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench At Ahmedabad

REGIONAL BENCH- COURT NO. 2

Service Tax Appeal No. 11547 of 2016-DB
(Arising out of OIA-AHM-SVTAX-000-APP-007-16-17 Dated-27/04/2016 passed by Commissioner of Central Excise and Service Tax-AHMEDABAD)

Escape **........Appellant**
201,shubh House,77-swastik Society,
B/h St.xavier's Ladies Hostel, Navrangpura
AHMEDABAD, GUJARAT

VERSUS

Commissioner of Service Tax.-Ahmedabad **........Respondent**
3rd Floor, APM Building, Anandnagar Road, 100ft Road,
Opp. Sachin Towers Satellite, Ahmedabad-3800015

APPEARANCE:
None appeared for the Appellant
Shri. Rajesh R Kurup, Superintendent (AR) for the Respondent

CORAM: HON'BLE MR. SOMESH ARORA, MEMBER (JUDICIAL)
HON'BLE MR. C.L. MAHAR, MEMBER (TECHNICAL)

Final Order No. A/ 12361 /2023

DATE OF HEARING:05.10.2023
DATE OF DECISION:05.10.2023

C. L. MAHAR

The brief facts of the matter are that the appellant are engaged in providing service under the category of Air Travel Agents and holding service tax Registration for Air Travel Agent Service. The appellant is also engaged in carrying out business of booking/selling airline tickets through computer reservation system (CRS) software. The revenue has detected that the appellant received an amount of Rs. 3,45,522/- from M/s Amadeus India Private Limited as an incentive/commission for exceeding the target of the sale of air tickets. The revenue has entertained a view that the appellant has provided a Business Auxiliary Service to their principals namely M/s Amadeus India Private Limited in the form of promotion of their business and therefore a show cause notice demanding service tax of Rs. 42,707/- was issued under Section 73(1) of the Finance Act, 1994, interest and penal provisions of the Finance Act, 1994 have also been invoked.

2. The learned Advocate appearing for the appellant has submitted that the issue involved is no longer res-integra as the Larger Bench of Cestat in case of M/s Kafila Hospatility and Travel Pvt. Ltd. Vs. Commissioner of Service Tax, Delhi reported under 2021 (47) GSTL 140 (Tri-LB) has already decided the issue holding that the incentive provided by the principal to the Air Travel Agent engaged in selling of the tickets cannot be considered as a commission for promoting of business of their principals.

3. Having heard both the sides. We are of the view that the matter is no longer *res integra* as the issue has already been decided by the Larger Bench in case of the aforementioned decision of the case of M/s. Kafila Hospitality & Travels Pvt. Ltd. (supra), in favour of the appellant, the relevant extract of the same is reproduced below:-

Whether Incentives paid for achieving targets are taxable?

"72. The contention advanced by learned counsel of the interveners is that incentives cannot be construed as "consideration" and if it is so no service tax can be levied on this amount because under section 67 of the Finance Act, service tax is leviable on "consideration", which is the gross amount charged by the service provider for rendering a particular taxable service.

73. It would, therefore, be appropriate to examine the scope of the term "Incentives Incentives are generally given to encourage performance of a party. The factual position described above, reveals that incentives have been paid by the airlines or CRS Companies to travel agents when they achieve a pre-determined target of sales.

74. The relevant portion of section 67 of the Finance Act, on which reliance has been placed by learned counsel for the appellant, is reproduced below:

"67.(1) Subject to the provisions of this Chapter, where service tax is chargeable on any taxable service with reference to its value, then such value shall,-

> *(i) in a case where the provision of service is for a consideration in meney, be the gross amount charged by the service provider for such service provided or to be provided by him;*
>
> *(ii) in a case where the provision of service is for a consideration not wholly or partly consisting of money, be such amount in money as, with the addition of service tax charged, is equivalent to the consideration;*
>
> *(iii) in a case where the provision of service is for a consideration which is not ascertainable, be the amount as may be determined in the prescribed manner."*

(emphasis supplied)

75. Section 67 of the Act deals with valuation of taxable services for charging service tax. Sub-section (1) of section 67 provides that where service tax is chargeable on any taxable service with reference to its value, then such value shall where the provision of service is for a consideration in money, be the gross amount charged by the service provider for such service provided or to be provided by the service provider. It is, therefore, clear that only such amount is subject to service tax which represents consideration for provision of service and any other amount which is not a consideration for provision of service cannot be subjected to service tax

76. In this connection, it would be appropriate to refer to the decision of the Supreme Court in Union of India vs. Intercontinental Consultancy and Technocrats 2018 (10) G.S.T.L 401 (S.C) 2018-TIOL-76-SC-ST. The Supreme Court observed that service tax is on the value of taxable services and, therefore, it is the value of the services which are actually rendered which has to be ascertained for the purpose of calculating the service tax. It is for this reason that the expression "such occurring in section 67 of the Act assumes importance. The Supreme Court, therefore, observed that the authority has to find what is the gross amount charged for providing "such taxable services and so any other amount which is calculated not for providing such taxable service cannot be a part of that valuation as the amount is not calculated for providing such taxable service" This, according to the Supreme Court, ithe plain meaning attached to section 67, either prior to its amendment on 1 May 2006 or after this amendment

77. Consideration, which is taxable under section 67 of the Finance Act, should be transaction specific Incentives, on the other hand, are based on general performance of the service provider and are not to related to any particular transaction of service. It needs to be noted that commission on the other hand, is dependent on each booking and not on the target. If the air travel agent does not achieve the predetermined target, incentives will not be paid to the travel agents

78. In this connection I will be appropriate to take note of the decision of the Federal Court of Australia AP Group. The Federal Countr Australia held that in order to levy tax, the payment must be attributable to a particular supply and not to supplies in general and so the target incentives paid by a motor vehicle manufacturer to a dealer would not quality as consideration as the incentives would be in relation to all supplies and not in relation to a particular supply. The relevant portion of the decision of the Federal Court is reproduced below:-

> *"17. Insofar as the Ford "retail target incentive" payments are concerned, Ford agreed with its dealers to pay certain sums of money to dealers which achieved monthly and quarterly sales targets that Ford set based on the dealer's size and past performance Targets were based on the number of cars sold to eligible customers in the qualifying period, not the value of the cars sold.*
>
> *Once a car was sold and delivered to an eligible customer the details would be entered into the vehicle information system and, in about the middle of the following month, based on the information so entered Ford would issue the dealer with a tax invoice for the incentive payment plus 10% GST and shortly thereafter pay that amount to the dealer.*
>
> *30. The Tribunal reached a different view about the Ford "retail target incentive payments. It reasoned as follows at [106]-108]:*
>
> *106. The last remaining payment type is Ford's retail target incentive payment. It is clear from the "Drive for Success" program that the payment is triggered at the time, and by reason, of the Applicant's recording of a level of new sales for a relevant period of eligible vehicles to eligible customers in excess of a specified target set by Fort. Significantly, though, and unlike the fleet rebates and the run-out model support payments, the target incentive payment has no nexus with any one particular supply. It is a payment made in connection with supplies generally, or perhaps more accurately, it is a payment made in connection with the making of supplies generally.*
>
> *53. On analysis, the so-called supplies for consideration identified by the Commissioner are nothing more than the encouragement of an overall business relationship between the manufacture and the dealer to the mutual benefit of both.*
>
> *The relationship involves a whole raft of obligation from one to the other all, presumably, with the ultimate objective of maximizing their respective commercial positions. As the AP Group put it, the overall relationship contemplates a continuing dialogue between wholesaler and retailer in which promises are routinely exchanged, but to characterize this dialogue as involving supply after supply is unrealistic and impractical. To characterize the payment of the incentives intended to encourage the overall relationship to operate efficiently as involving supplies for consideration equally unpersuasive.*

> *A dealer will always wish to sell as many cars as practicable and to move old stock to make way for new stock. So too a dealer will always wish its ordering arrangements to be the most efficient and economically beneficial to it. The manufacture will have the same objectives. It is this context which underpins the Tribunal's conclusion that the payments are not for the supply of anything by the dealer. As the Tribunal said at [86] the dealer (which must be inferred to act in an economically rational manner in the ordinary course) will always want to run the business in this way. The fact that the dealer receives a payment as an incentive when certain thresholds associated with running the business in this way does not mean that the dealer is supplying a service to the manufacturer for consideration. If the incentive payment were not available there is no basis to infer that the dealer would not behave in the same way for free. For these reasons there cannot be said to be any supply for consideration in these arrangements."*

79. Reference can also be made to the decision of this Tribunal in Rohan Motors Limited vs. Commissioner of Central Excise, Dehradun 2020 (12) TMI 1014 – CESTAT NES DELHI+ 2020-TIOL-1676-CESTAT-DEL.

The Tribunal held that incentives are not leviable to service tax. The relevant paragraph is reproduced below:-

> *"9. The first issue that arises for consideration is whether service tax would be leviable on incentives prior to July, 2012. 10. As noticed above, the appellant purchases vehicles from MUL and sells the same to the buyers. It is clear from the agreement that the appellant works on a principal to principal basis and not as an agent of MUL. This is for the reason that the agreement itself provides that the appellant has to undertake certain sales promotion activities as well. The carrying out of such activities by the appellant is for the mutual benefit of the business of the appellant as well as the business of MUL. The amount of incentives received on such account cannot, therefore, be treated as consideration for any service. The incentives received by the appellant cannot, therefore, be leviable to service tax."*

(emphasis supplied)

80. It, therefore, clearly transpires from the aforesaid decisions that incentives paid for achieving targets cannot termed as "consideration" and, therefore, are not levaible to service tax under section 67 of the Finance Act."

4. We follow the above decision of the Larger Bench and hold that the impugned Order-In-Appeal is without any merit and therefore, we set aside the same.

5. Accordingly, appeal is allowed.

(Operative portion pronounced in Open Court)

(SOMESH ARORA)
MEMBER (JUDICIAL)

(C. L. MAHAR)
MEMBER (TECHNICAL)

PRACHI