CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD

REGIONAL BENCH - COURT NO.I

Service Tax Appeal No.70633 of 2019

(Arising out of Order-in-Appeal No.125/ST/Alld/2019 dated 20/05/2019 passed by Commissioner (Appeals) Central Excise & CGST, Allahabad)

Commissioner of Central Excise & CGST, Kanpur .....**Appellant**
(117/7, Sarvodaya Nagar, Kanpur-208005)

VERSUS

M/s KTL Pvt. Ltd., ...**Respondent**

(14/145, The Mall Road, Kanpur)

APPEARANCE:

Shri Santosh Kumar, Authorised Representative for the Appellant
None, for the Respondent

CORAM: HON'BLE MR. P.K. CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO.70922/2024

DATE OF HEARING : 22 November, 2024
DATE OF DECISION : 22 November, 2024

SANJIV SRIVASTAVA:

This appeal filed by revenue is directed against Order-in-Appeal No.125/ST/A1ld/2019 dated 20.05.2019 of the Commissioner (Appeals) CGST & Central Excise Allahabad. By the impugned order, the appeal filed by the respondent against Order-in-Original No.11/JC/ST/2018-19 dated 15.02.2019 holding as follows has been allowed:

"ORDER

(1) I confirm the demand of Service Tax amounting to Rs.1,55,43,396/- (Rupees Ore Crore, fifty five lakh, forty three thousand and three hundred and ninety six only) and order for recovery from them under Section 73(2) of the

Finance Act, 1994 read with Section 174 of Central Goods and Service Tax Act, 2017.

(2) I confirm the demand of interest and order for its recovery at the appropriate rate for the relevant period of payment of Service Tax under the provisions of Section 75 of the Finance Act, 1994 read with Section 174 of Central Goods and Service Tax Act, 2017.

(3) I also impose penalty of Rs. 1,55,43,396/- [Rupees One Crore, fifty five lakh, forty three thousand and three hundred and ninety six Rs only) upon the party under Section 78 of the Finance Act, 1994 read with Section 174 of Central Goods and Service Tax Act, 2017, for willful suppression of facts with intent to evade the payment of Service Tax and for the contravention of the various provisions the Finance Act, 1994 and the Service Tax Rules, 1994.

(4) I however, refrain to impose the penalty under Section 76 of the Finance Act, 1994 read with Section 174 of Central Goods and Service Tax Act, 2017.

(5) I also impose a penalty of Rs. 10,000/- (Rupees ten thousand only) upon the party under Section 77(2) of the Finance Act, 1994 read with Section 174 of Central Goods and Service Tax Act, 2017."

2.1 The respondent is an authorized dealer of M/s Maruti Suzuki India Limited M/s MSIL) and engaged in the business of trading of cars, accessories & spare parts of cars and servicing of cars. They were also registered, vide centralized Service Tax Code AAACK9621QST003, for services (such as, servicing of motor cars, commercial training & coaching service, business auxiliary service, transport of goods by road service and business support service) taxable under the Finance Act, 1994 .

2.2 On the basis of information that authorized dealers of various car manufacturers were not paying Service Tax on the amount (over & above the ex-showroom price indicated in the sale invoice) in the name of handling/ logistic/ facilitation/ post-sale/ vehicle delivery/ incidental charges, from their customers, at the time of sale of vehicle for facilitating smooth & hassle free delivery of the cars, the Kanpur Regional Unit of the Directorate General of GST Intelligence initiated an enquiry against the respondent.

2.3 After completion of the enquiry, it was observed that the respondent had not paid Service Tax (including Cesses) of Rs.1,55,43,396/- on the logistic charges of Rs.12,57,55,627/- collected by them during 01.07.2012 to 31.03.2015.

2.4 A Show Cause Notice dated 14.06.2017 was issued to the respondent asking them to show cause as to why

(I) *Service Tax liability amounting to Rs, 1,55,43,396/- (Rupees Ore Crore, fifty five lakh, forty three thousand and three hundred and ninety six only) (Inclusive of Service Tax amounting to Rs.1,50,90,676/- Education Ciss amounting to Rs.3,01,813/ & Sec. & Higher Edu. Cess amounting to Rs. 1,50,907/-) not paid by them during the period from 01.07.2012 to 31.03.2015, should not be demanded and recovered from them by invoking extended period under proviso to Section 73(1) of the Finance Act, 1994;*

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

(III) *Penalty under Section 76 of Finance Act, 1994 should not be imposed upon them for their failure to collect and pay the service tax, in accordance with the provisions of Section 68 of the Finance Act, 1994 read with Rule 6 of the Service Tax Rules, 1994;*

(IV) *Penalty under Section 77(2) of the Finance Act, 1994 should not be imposed upon them for their various acts of omission and commission as discussed above;*

(V) *Penalty under Section 78 of Finance Act, 1994 should not be imposed upon them for suppressing the gross value and tax liability on taxable services*

2.5 The Adjudicating Authority vide order in original referred in para 1 above, confirmed the demand of Service Tax (including Cesses) of Rs.1,55,43,396/ - alongwith interest and imposed penalties under Sections 77(2) & 78 of the Act.

2.6 Aggrieved respondent filed the appeal to Commissioner (Appeal), which has been allowed as per the impugned order

2.7 Aggrieved revenue has filed this appeal stating following grounds:

- If any amount realized from the customers over and above the amount of trading/sale of goods, the same could not be considered outside the purview of the Service Tax. In the instant case, respondent had collected the logistic charge over and above the ex-showroom price of the car which represents the sale price of the car at showroom and includes all the expenses incurred up to the show room. Moreover, in fact, it is the Maximum Retail Sale Price of the car. If it is a part of the sale/ transaction value i.e. ex-showroom price plus logistic charges, which means that they were selling the car beyond the ex-showroom price fixed by the manufacturer, which is not permissible as admitted by the representative of the assessee during enquiry
- Shri Indra Kumar Poddar, Director of respondent admitted that, respondent was collecting certain amounts over and above the Ex-showroom price under the guise of Logistic/handling Charges from their customers towards rendering service activities namely facilitation of Road Tax payment, issue of temporary registration/ registration certificate issued by RTO, arranging for finance, insurances, extended warranty facilities, bringing down the vehicle from their godown to their showroom/ customer's doorstep and hassle free delivery of the car and not paying Service Tax for such services provided. The aforesaid services are covered in the definition of 'Service' w.e.f. 01.07.2012 as defined under 65B(44) of the Finance Act, 1994 as mentioned above

- Respondent claimed that they had paid VAT on these charges, therefore, they were trying to justify that the amount of logistic charges were a part of sale/transaction value.
- The Impugned order has not considered the vital facts disclosed by the director of respondebt that the said amount was collected from the customers under the guise of logistic charges towards rendering service activities as mentioned above.
- Impugned order considered these services to be bundled together in the ordinary course of business of trading of goods (cars), covered in the negative list under 66D(e) of Finance Act'1994 read with Section 66F of ibid.
- Again, in the O-I-A itself at para 4.4 it has been mentioned that for services to be considered as bundled service, it is necessary that different elements are not available separately. Whereas, in the present case the amount of logistic/ handling charges are available separately and the same has been collected as over and above the Ex-showroom price.
- Thus impugned order is not legal and proper and should be set aside.

3.1 We have heard Shri Santosh Kumar, Authorized Representative for the revenue.

3.2 None appeared for the respondent despite notice.

3.3 Matter has been listed for hearing on number of occasions i.e. 08.12.2023, 05.01.2024, 24.01.2024, 15.02.2024, 16.04.2024, 17.05.2024, 05.06.2024, 12.08.2024, 04.10.2024 in past. None have appeared for respondent on any of the occasion. So the appeal has been taken up for consideration exparte in terms of Rule 21 of CESTAT Procedure Rules, 1982

4.1 We have considered the impugned order along with the submissions made in appeal and during the course of arguments

4.2 Impugned order records following findings:

"4.1 I have gone through the grounds of appeal, the averments made at the time of the personal hearing and all other material/ documents available on record. It is observed that:

(i) During the course of enquiry, the appellant had submitted that logistic charges were a part of the sale consideration and accordingly, they had paid VAT thereon. However, the Department considered the logistic charges as consideration for various activities carried out by the appellant, at the time of sale of cars, for facilitating smooth & hassle free delivery of cars. Since these activities were covered under the definition of "service" given in Section 65B(44) of the Act and were neither in the Negative List of Services (Section 66D of the Act) nor were exempted, Show Cause Notice dated 14.06.2017 was issued to the appellant;

(ii) It has been acknowledged in Paras 11, 12a & 12b of the Show Cause Notice dated 14.06.2017 that (a) the logistic charges were fixed by the car manufacturer, as their details were contained in the price list of the car manufacturer (b) the appellant had been collecting the same invariably from all their customers, (c) no separate invoice for the logistic charges, was issued and the appellant were collecting the same over & above the ex-showroom price for carrying out activities, such as, facilitation of Road Tax payment, issue of temporary registration, arranging of finance, insurances extended warranty facilities, bringing down the vehicle from the godown to the showroom/ customer's doorstep and hassle free delivery of the car and (d) on the logistic charges, the appellant had paid VAT; and

(iii) The appellant during the adjudication proceedings, had submitted that (a) they were not required to pay Service Tax on the logistic charges as the same were

part of the transaction value on which they had paid VAT, (b) the activity of trading of cars' is in the Negative List of Services (section 66D(e) of the Act). However, the Adjudicating Authority, without analyzing the submissions of the appellant, confirmed the demand of Service Tax and imposed penalties, simply on the grounds mentioned in the Show Cause Notice dated 14.06.2017

4.2 Thus, I find that there is no dispute that (i) the appellant had paid VAT on logistic charges which was included in the entire transaction value of the cars, (ii) the appellant had been collecting logistic charges invariably from all their customers and (iii) any activity carried out by the appellant for such logistic charges, was intricately linked with the activity of the trading of car and in fact, was incidental to the trading activity, as without the trading of car, the appellant could not have collected any logistic charges.

4.3 Further, I find that the relevant statutory provisions of the Act pertaining to this case, are as under:

Section 65B(44): "service" means any activity carried out by a person for another for consideration, and includes a declared service, but shall not include -----

Section 66B: There shall be levied a tax (hereinafter referred to as the service tax) at the specified rate 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 and collected in such manner as may be prescribed.

Section66D: The negative list shall comprise of the following services, namely-

(e) trading of goods;

4.3.1 From the aforesaid statutory provisions, it is clear that trading of goods is service under Section 65B(44) of the Act, However, no Service Tax is leviable on this service *under Section 66B of the Act, as the same is covered under the Negative List.*

4.4 I find that in this case, the appellant, while carrying out the transaction with their customers, had carried out the activities of (i) trading of cars which is in the Negative List of Service Section 66D(e) of the Act) and (ii) facilitation of car delivery for which they had collected logistic charges (as part of the entire transaction), which is covered under Section 65B(44) of the Act and is neither in the Negative List of Services nor is exempted. Since these services are part & parcel of the same transaction, I, thus, find that these services are bundled together in the ordinary course of business. It has also been clarified by the Central Board of Excise & Customs, vide Para 9.2.4 of the Taxation of Services: An Education Guide", as under:

> ***9.2.4 Manner of determining if the services are bundled in the ordinary course of business***
>
> *Whether services are bundled in the ordinary course of business would depend upon the normal or frequent practices followed in the area of business to which services relate. Such normal and frequent practices adopted in a business can be ascertained from several indicators some of which are listed below*
>
> - *The perception of the consumer or the service receiver. If large number of service receivers of such bundle of services reasonably expect such services to be provided as a package then such a package could be treated as naturally bundled in the ordinary course of business.*
> - *Majority of service providers in a particular area of business provide similar bundle of services. For example, bundle of catering on board and transport by air is a bundle offered by a majority of airlines.*
> - *The nature of the various services in a bundle of services will also help in determining whether the services are bundled in the ordinary course of*

business. If the nature of Services is such that one of the services is the main service and the other services combined with such service are in the nature of incidental or ancillary services which help in better enjoyment of a main service. For example service of stay in a hotel is often combined with a service or laundering of 3-4 items of clothing free of cost per day. Such service is an ancillary service to the provision of hotel accommodation and the resultant package would be treated as services naturally bundled in the ordinary course of business.

- *Other illustrative indicators, not determinative but indicative of bundling of services in ordinary course of business are-*
    - *There is a single price or the customer pays the same amount, no matter how 7 much of the package they actually receive or use.*
    - *The elements are normally advertised as a package The different elements are not available separately.*
    - *The different elements are integral to one overall supply - if one or more is removed, the nature of the supply would be affected.*
- *No straight jacket formula can be laid down to determine whether a service is naturally bundled in the ordinary course of business. Each case has to be individually examined in the backdrop of several factors some of which are outlined above.*

4.4.1 From the aforesaid clarifications of the Central Board of Excise & Customs and the facts of the case discussed in the preceding paras, it is evident that the main service under the transaction of the appellant with their customer, is trading of car and other service of facilitation of car delivery is incidental or ancillary service which facilitates the provision of the main service. Further, I find that *classification of such bundled service is required to be decided under Section 66F(2) & Section 66F(3) of the Act which provides, as under:*

> *Section 66F: (2) Where a service is capable of differential treatment for any purpose based on its description, the most specific description shall be preferred over a more general description.*
>
> *(3) Subject to the provisions of sub-section (2), the taxability of a bundled service shall be determined in the following manner, namely :-*
>
> *(a) if various elements of such service are naturally bundled in the ordinary course of business, it shall be treated as provision of the single service which gives such bundle its essential character;*
>
> *(b) if various elements of such service are not naturally bundled in the ordinary course of business, it shall be treated as provision of the single service which results in highest liability of service tax.*
>
> *Explanation. - For the purposes of sub-section (3), the expression "bundled service" means a bundle of provision of various services wherein an element of provision of one service is combined with an element or elements of provision of any other service or services.*

4.4.2 Since, in this case it is the trading of cars which gives the bundle of services, its essential character, I, thus, find that the entire transaction of the appellant is required to be considered as trading of car, in the light of aforesaid provisions of Section 66F of the Act, and as such, the appellant had carried out the activity of trading of cars and had collected logistic charges for providing such service covered in the Negative List under Section 66D(e) of the Act, on which they were not required to pay any Service Tax. Thus, I find that confirmation of demand of Service Tax alongwith interest and the imposition of penalties, vide the impugned Order dated 15.02.2019, are unjustified."

4.3 We find that in their appeal revenue has wrongly observed that Commissioner (Appeal) has not considered the submissions made by the Director of the respondent in the statement recorded during the investigation. In fact the same have been recorded in para 4.1 (i) of the impugned order. When the impugned order has recorded the facts stated by the director during the enquiry, and has arrived at certain finding on the same, the finding if not perverse should not be challenged or disturbed. We do not find any perversity in the finding recorded by the Commissioner, on the nature of transaction made by the appellant in respect of provisions of these services. Findings of the appellate authority are based on logical appreciation of the facts and law on the subject.

4.4 In case of Premier Car Sales [Final Order No dated 24.04.2024] we have held as follows:

> ***"Issue No.2: Demand of service tax on logistic charges recovered from the buyers of car.***
>
> *15. Appellants had been recovering logistic charges from the buyers of the car. It is the case of the Department that the Appellants had not deposited service tax on such logistic charges. The learned Commissioner has held that the Appellants have charged the logistics charges over and above the exshowroom price of car. If logistic charges were part of the transaction value, then it could have been included in the sale value and mentioned in the sale invoice but Appellants had separately charged logistic charges and issued separate invoice in this regard. It has therefore been held that it is a pure service taxable under the provisions of Finance Act, 1994 and these logistics charges are not the part of transaction/sale value, rather logistics charges are the amount charged from the customers in view of services related to logistics charges. Appellants have submitted that they have collected logistics charges as part of transaction value at the time of sale of vehicle. These charges are part of sale invoice and VAT is collected on the same. They also*

submitted that there can be no service till the goods are sold to another person.

16. We have perused the copy of invoice for sale of car as well as invoice for logistic charges. Both these invoices have been raised simultaneously at the time of sale of vehicle. We also note that the VAT Tribunal vide order dt. 25-01-2014, in their own case for A/Y 2009-10, had held that the logistic charges recovered at the time of sale of car is liable to be included in the sale price of vehicle. It therefore held that VAT was payable on logistic charges. It is the settled principal of law that service tax and VAT are mutually exclusive and a transaction can either be taxed under service tax or under VAT. Once VAT has been paid, service tax cannot be demanded.

17. The Hon'ble Delhi High Court in the case of Tim Delhi Airport Advertising Pvt. Ltd. Vs. Special Commr –II 2016 (44) S.T.R 399 (Del.) held that levy of service tax and VAT are mutually exclusive. The intention of the party to the transaction would be material. If a transaction has been held to be one of providing services, then the same was not chargeable to VAT.

18. We also note that a similar issue had come up for consideration before the Commissioner (Appeals) in the case of Appellant's sister concern wherein the Lower Authorities had confirmed the demand of Rs.1.08 crore under Rule 6(3) of CCR, 2004 on receipt of logistic charges. Vide Order-in-Appeal No.282/ST/Appl/LKO/2019 dt. 31-05-2019, the Commissioner (Appeals) Lucknow held that the Appellants had been paying VAT on logistic charges. It is the settled law that VAT and service tax are mutually exclusive. Therefore demand of service tax has been set aside. Para 8 of the order reads as under:–

> *"Regarding demand of service tax on logistic charges, the appellant has produced copy of invoices raised by them which clearly show that the appellant has been paying*

VAT on the logistic charges. It is a settled law that VAT and service tax are mutually exclusive. Therefore, demand of service tax on logistic charges is not maintainable and the same is set aside".

19. On a specific query by the Bench, the learned Chartered Accountant informed that Department has not filed any appeal against the said order. It therefore appears that Department has accepted the said order.

20. In view of above, we hold that service tax could not have been demanded on logistic charges; particularly when Appellants have paid VAT on the same, Department has not been able to specify the nature of service provided and the order of Commissioner (Appeals) in another case has been accepted by the Department.

4.5 As have been noted in the para 18 of the above order, that similar order of the Commissioner (Appeal) dated 31.05.2019 has been accepted by the revenue and no appeal, then we are at loss to understand as to what prompted this appeal. The impugned order is dated 20.05.2019 and the order accepted by the revenue authorities is dated 31.05.2019. Revenue cannot adopt pick and chose approach while deciding to file the appeals on the same issue against the orders which are passed within a span of few days (Eleven days).

4.6 We do not find any merits in this appeal filed by the revenue.

5.1 Appeal is dismissed.

(Operative part of the order pronounced in open court)

(P.K. CHOUDHARY)
MEMBER (JUDICIAL)

(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

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