CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
OLD RED BUILDING, 38, M.G.MARG, CIVIL LINE, ALLAHABAD-211001
REGIONAL BENCH, ALLAHABAD

DIVISION BENCH

Appeal No.ST/1094/2010-CU (DB)
Appeal No.ST/57/2012-CU (DB)

(Arising out of OIO No.13/Commr./ST/GZB/2010 dt.3.5.2010 and OIO No.5/Commr./ST/GZB/2011-12 dt.30.9.2011 passed by the Commissioner, Customs, Central Excise & Service Tax, Ghaziabad)

Date of hearing/Decision:27.12.2018

M/s. Uttam Toyota **Appellant**
Vs.
CCE & ST, Ghaziabad **Respondent**

Present for the Appellant: Shri B.L.Narasimhan & Utkarsh Malviya, Advocates
Present for the Respondent: Shri Pawan Kumar Singh, AR

Coram: Hon'ble Mr. Ashok Jindal, Member (Judicial)
Hon'ble Mr.Anil G.Shakkarwar, Member (Technical)

FINAL ORDER NO-70226-70227 / 2019

PER: ASHOK JINDAL

The appellant has filed these two appeals against impugned orders wherein the demand on account of denial of credit and demand of service tax sought to be confirmed along with interest and penalties imposed on the appellant.

2. As both the appeals are arising out of the common issues, therefore, both the appeals are decided by a common order.

3. The brief facts of the case are that an audit team conducted in the appellant's unit in September, 2007 and noticed that the appellant has wrongly availed Cenvat credit and has not paid service tax under the category of Business Auxiliary Service. Therefore, two show cause notices for the period October,2003 to March, 2008 and April, 2009 to March, 2010 were issued to deny the credit inadmissible to the appellant and to demand service tax

under the category of Business Auxiliary Service. The matters were adjudicated and the demand on account of service tax under the category of Business Auxiliary Service and denial of credit on various input services were confirmed along with interest and penalties were also imposed. Against those orders, the appellant is in appeal before us.

4. Heard the parties and considered the submissions.

5. The credit sought to be denied on the following services as given in chart below:-

<table>
<tr><th rowspan="2">Category of service</th><th colspan="2">Amount</th><th rowspan="2" colspan="2">Reasons for Denial in Order-in-Original</th><th rowspan="2" colspan="2">Reason for Denial in SCN</th></tr>
<tr><th>ST/1094/10</th><th>ST/57/2012</th></tr>
<tr><td>Repairs and Maintenance Service of Audio System</td><td>22,815/-</td><td>11,978/-</td><td colspan="2">Not related to Output Service</td><td colspan="2">Appears Inadmissible</td></tr>
<tr><td>Event Management</td><td>28,87,785/-</td><td>3,08,114/-</td><td colspan="2">No Evidence to establish nexus between input service.</td><td colspan="2">Reimbursed by the manufacturer therefore not admissible</td></tr>
<tr><td>Advertising Service</td><td>6,63,815/-</td><td>46,372/-</td><td colspan="2">No evidence to establish between input and output service</td><td colspan="2">Reimbursed by the manufacturer therefore not admissible</td></tr>
<tr><td rowspan="2">Chartered Accountant Service</td><td rowspan="2">4,601/- (reversed by the Appellant)</td><td rowspan="2">32,950/-</td><td rowspan="2" colspan="2">Not having been utilized at the premises of providing output services.</td><td>E/1094/10</td><td>E/57/12</td></tr>
<tr><td>No allegation</td><td>Place of receipt not available</td></tr>
<tr><td>Security Service</td><td>3,10,664/-</td><td>1,44,496/-</td><td colspan="2">No evidence, if these services are received at Ghaziabad showroom or outside</td><td colspan="2">No allegation</td></tr>
<tr><td>Insurance Service</td><td>2,93,302/-</td><td rowspan="3">1,52,985/-</td><td colspan="2">No evidence if these services are received at Ghaziabad Showroom or Outside</td><td colspan="2">No Allegation</td></tr>
<tr><td>Repairs & Maintenance service</td><td>64,857/-</td><td colspan="2">No evidence if these services are received at Ghaziabad Showroom or outside</td><td colspan="2">No Allegation</td></tr>
<tr><td>Test inspection Services</td><td>-----</td><td colspan="2">No evidence if these services are received at Ghaziabad Showroom or outside</td><td colspan="2">No allegation</td></tr>
<tr><td>Air Travel Agent Services</td><td>6,953/-</td><td>-----</td><td colspan="2">No evidence if these services are received at Ghaziabad Showroom or outside</td><td colspan="2">No Allegation</td></tr>
<tr><td></td><td></td><td></td><td>E/1094/10</td><td>E/57/12</td><td colspan="2"></td></tr>
</table>

Consultancy Services	3,835/-	32,267/-	No evidence if these services are received at Ghaziabad Showroom or outside	Amount has been reimbursed by the manufacturer	No Allegation
Credit already Reversed	2,55,166/-	---	----		---
Total Cenvat credit denied in Order-in-Original	45,11,232/-	10,38,938/-	----		----

6. Further the demand of service tax has been confirmed on the following grounds:

(i) Demand of service tax along with interest on the commission received as insurance 'pay out' from insurance companies and banks during the period from October, 2003 to March, 2008 under the category of Business Auxiliary Service.

(ii) Demand of service tax along with interest on the commission received as bank 'pay out' from banking companies and banks during the period October, 2003 to March, 2008 Business Auxiliary Service.

(iii) Demand of service tax on the amount received by the appellant against the warranty charges received by the appellant from M/s.TKML on behalf whom the appellant is providing customer care services.

(iv) Demand service tax along with interest on the value of amount payable towards the value of spare parts/consumables utilized during the course of provision of services in the capacity of 'Authorized Service Station.

(v) Demand of service tax on the incentive received by the appellant from M/s.TKML for excess sale of vehicles under the category of Business Auxiliary Service.

7. All issues are dealt with by us separately as under:-

Denial of Cenvat credit on various services

(a) The credit sought to be denied on the above services on the ground that these services has no nexus with manufacturing activities of the appellant, therefore, they do not qualify as input service as per Rule 2(l) of Cenvat Credit Rules, 2004.

We have seen that the credit cannot be denied to the appellant as all these services has been availed by the appellant in the course of their business of manufacturing in terms of the decision of Hon'ble Bombay High court in the case of Ultratech Cement Ltd.-2010 (260) ELT 369 (Bom.) wherein it was held hat any service availed by the assessee during the course of their business of manufacturing, the assessee is entitled to avail credit. Therefore, on this ground, the credit cannot be denied to the appellant.

(b) We further take note of the fact that the credit sought to be denied on the services, namely, Chartered Accountant Service, Security Service, Insurance Service, Repairs and Maintenance Service, Test Inspection Service, Air Travel Agent Services and Consultancy Services on the ground that the said services have been availed by the appellant outside their unit. We find that there is no provision in the Cenvat Credit Rules to deny credit if any service is availed outside the business premises. In fact, the assessee can avail the service outside the factory premises during the course of their business of manufacturing. Admittedly, the said services have been received by the assessee during the course of their business of manufacturing, therefore, they are entitled to avail credit on these services.

(c) Further, as the appellant has already reversed the credit of Rs.2,55,166/-, therefore, the same is not the subject matter before us. Therefore, we are not discussing the said issue.

Demand of service tax

(i) (a) We further take note of the fact that the demand of service tax has been confirmed on account of commission recovered from insurance companies and banks during the period October, 2003 to March, 2008 under the category of Business Auxiliary Service.

(b) We find that in the show cause notices, the demand was proposed to be confirmed under the category of Business Auxiliary Service. The adjudicating authority has confirmed the demand as Insurance Auxiliary Service, therefore the demand is not sustainable as the adjudicating authority has gone beyond the scope of show cause notice. Moreover, when there are two categories of services, therefore, the demand cannot be confirmed by invoking the extended period of limitation. It is a fact on record that for the period October, 2003 to March, 2008, the show cause notice was issued to the appellant on 30.3.2008, therefore, the said demand is barred by limitation.

(ii) The demand sought to be confirmed on account of commission as insurance pay out from insurance companies and banks during the period October, 2003 to March, 2008 under the category of Business Auxiliary Service.

8. We find that it is the contention of the appellant that the appellant has not provided any service in the nature of Business Auxiliary Service to the banks and the appellant did not have agreement with the bank to act as their agents and they are only carrying out an executory function such as to collect forms from the customers, who wanted purchase the vehicles on loan, forward it to the bank and to get the papers signed from the customers and for these activities some amount was paid by the banks to the appellant. The appellant is not doing any promotion or marketing service on behalf of the said banks. Similar issue came up before this Tribunal in the case of Ashok Auto Sales Ltd. and vide Final Order No.ST/A/71867-71868/2017-CU (DB) dt.27.6.201, wherein the assessee was engaged in the same activity of providing table space, carrying out minimal paper work etc. for the banks and for the same, consideration was received from the bank. In the said case, this Tribunal held that the assessee was not providing Business Auxiliary services to the bank and hence, no service tax is leviable. Relying on the decision of this Tribunal in the case of Ashok Auto Sales Ltd.(supra), the service tax is not payable by the appellant.

(iii) The demand of service tax sought to be confirmed on an amount received by the appellant against warranty charges received by the appellant from M/s.TKML on behalf of whom the appellant is providing customer care services.

9. We find that the demand has been confirmed on an amount received by the appellant as Authorized Service Station from the manufacturers of the vehicles for the free services rendered by

them under-warranty which is required to be repaired if the vehicles comes to the appellant. The appellant undertakes replacement of spares and render services thereon and raised invoices upon M/s.TKML towards realization of the amount attributable to the said free service rendered to the customer. The said invoice separately shows the material portion as well as service portion and the same is reimbursed to the appellant. The demand has been raised by the on this amount received by the appellant from M/s.TKML. The said demand is not sustainable in terms of Circular No.96/7/2007-ST dt.23.8.2007 wherein the position has been explained, which is extracted below:-

Reference Code	Issue	Clarification
36.02	Whether servicing/repair of heavy vehicles like trucks by authorized service station is liable to service tax under Section 65 (105) (zo)	Service Tax is liable on services provided by an authorized service station to a customer in relation to service, repair, reconditioning or restoration of motor cars, light motor vehicles or two wheeled motor vehicles [Section 65 (105) (zo)]. Thus, servicing of heavy vehicles like trucks, not being one of the specified categories of motor vehicles, is at present not covered within the scope of the said taxable service.

10. Therefore, we hold that the demand on the services rendered by the appellant on account of warranty charges is not sustainable against the appellant.

(iv) The demand of service tax sought to be confirmed on the value of amount payable towards the value of spare parts/consumables utilized during the course of provision of services in the capacity of Authorized Service Station.

16. We find that the said issue has been examined by Hon'ble Allahabad High Court in the case of J.P.Transformers-2014 (36) STR 961 (All.), wherein the Hon'ble High Court has observed as under:-

> **"9.** In the present case, it has been found as a matter of fact that the value of the goods and materials utilized for repair of the transformers is separately disclosed in the agreement and is separately mentioned in the invoices of the assessee. The assessee has paid excise duty or, as the case may be, value added tax on goods used in the repairing process. It was in this factual background, on which there is no dispute, that the Tribunal held that Service Tax could not be demanded on that component representing the value of the goods and materials used for carrying out repairs. The mere fact that the cost of the various items was shown for the purpose of price variation was held not to make any difference to the legal position."

11. Further as per CBEC circular No.96/7/2007-ST dt.23.8.2007, wherein it has been clarified as under:-

"Service tax is not leviable on a transaction treated as sale of goods and subjected to levy of sales tax/VAT. Whether a given transaction between the service station and the customer is a sale or not, it is to be determined taking into account the real nature and material facts of the transaction. Payment of VAT/sales tax on a transaction indicates that the said transaction is treated as sale of goods."

12. In view of this, we hold that the service tax cannot be demanded from the appellant on the value of spare parts/consumables utilized during the course of provision of services in the capacity of Authorized Service Station.

(v) The demand of service tax on the incentive received by the appellant from M/s.TKML for excess sale of vehicles under the category of Business Auxiliary Service on the ground that the appellant is promoting and marketing the goods for M/s. TKML and the said amount is in the nature of consideration for the provision of such service.

13. We find that the appellant is only dealer of the vehicles of M/s.TKML for selling their vehicles and in the event when excess sales are effected by the appellant during certain period, some discounts were given to the appellant on bulk purchases, some incentive are passed on to the appellant to award as dealer. The service tax is leviable in terms of Section 65 (19) of the Finance Act, 1994 for promotion or marketing or sale of goods belonging to the client. In the present case, the appellant is acting on principal to principal basis and appellant buys vehicle from M/s.TKML subsequently sale them in the market, therefore, the appellant is getting incentive on account of discounts for excess sale effected by the appellant. Such amount of discount which cannot be held Business Auxiliary Service in terms of Section 65 (19) of the Finance Act, 1994 as the appellant is not promoting or marketing or selling the goods on behalf of their client. In fact, the appellant is marketing their own goods as the appellant is the owner of the goods in question. The said issue dealt with by this Tribunal in the case of Sai Service Station Ltd.-2014 (35) STR 625 (Tri.-Mum.)

wherein such sales incentives granted by the manufacturers to the dealers have been held out of ambit of service tax. Therefore, we hold that the demand of service on this ground is not sustainable against the appellant.

14. We further take note of the fact that the extended period of limitation is not invokable.

15. As we are holding that the credit cannot be denied to the appellant and no service tax can be demanded from the appellant, therefore, no penalty is imposable on the appellant.

16. In view of above discussion, we set aside the impugned orders and allow the appeals filed by the appellant.

(Operative of order was pronounced in the court)

(ANIL G.SHAKKARWAR) **(ASHOK JINDAL)**
MEMBER (TECHNICAL) **MEMBER (JUDICIAL)**

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