CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
OLD RED BUILDING, 38,M.G.Marg,CIVIL LINES, ALLAHABAD

Dated: 27/04/2016

To

Appellant as per address in table below

Respondent as per address in table below

Final Order No. A/ 70150-70152/2016 DB dated 27/4/2016

I am directed to transmit herewith a certified copy of order passed by the Tribunal under section 35-C(1) of the **Central Excise and Salt Act, 1944.**

Asstt. Registrar

Application	Appeal	Name and Address of Appellant
	ST/1483-1485/2010	SHIEL AUTOS PRAKASH ENCLAVE BYE PASS ROAD,AGRA
	Name and Address of Respondent	COMMISSIONER OF CENTRAL EXCISE, KANPUR 117/7, SARVODAYA NAGAR KANPUR

Other Appellants and Respondents as per Annexure

Copy To

3Advocate(s) / Consultant(s SB K.DUTTA&ASSOCIATES
D-34, LGF JANGPURA EXTN
NEW DELHI

4 Bar Association, CESTAT, ALLAHABAD
5 Director Publications, Customs, Excise. I.P. Estate, Delhi

6 M/s Centax Publications Pvt. Ltd., 1512-B, Bhishm Pitamah Marg, New Delhi-3

7 Company Law Institute of India Pvt. Ltd., No.2 (old no.36), Vaithyaram Street, T. Nagar, Chennai-17

8 Taxmann Allied Service Pvt. Ltd., 59/32, New Rohtak Road, New Delhi-110005

9 Easy Service Tax Online Dot Com Pvt. Ltd., 407A, Iscon Mall, Satellite Road, Ahmedabad-15

10 LAWCRUX Advisors Pvt. Ltd., LAW House, 1-8, Sector-10, Faridabad 121003 (Haryana)

11 TaxIndiaOnline.com Pvt. Ltd., 2nd Floor. Vasant Arcade, Vasant Kunj, New Delhi - 110070

12 Mark Professional Services Pvt. Ltd., 108, Everest Block, Aditya Enclave, Hyderabad - 38
13 The ICFAI society, 52, Nagarjuna Hill,Punjagutta Hyderabad.-500082
14 C.D.R. 15 Office Copy 16 Guard File

Asstt. Registrar
Regional Bench, Allahabad

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,
REGIONAL BENCH : ALLAHABAD

S.T. Appeal Nos.1483-1485/10

Arising out of O/A Nos.333,334 & 335/ST/APPL/KNP/2010 dated 30.06.2010 passed by Commr. (Appeals) of Customs & Central Excise, Kanpur.

For approval and signature:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. ASHOK KUMAR ARYA, MEMBER (TECHNICAL)

1.	Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	: No
2.	Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	: Yes
3.	Whether His Lordship wishes to see the fair copy of the Order?	: Seen
4.	Whether Order is to be circulated to the Departmental Authorities?	: Yes

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M/s Shiel Autos

...APPELLANT(S)

VERSUS

Commr. of Central Excise, Kanpur

RESPONDENT (S)

APPEARANCE

None for the Appellant (s)
Shri A. K. Goswami, Addl..Commr. (A.R.) for the Department

CORAM:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. ASHOK KUMAR ARYA, MEMBER (TECHNICAL)

DATE OF HEARING : 25. 02. 2016

DATE OF PRONOUNCEMENT : 27-04-2016

Final ORDER NO. 70150-70152/2016

Per Mr. Anil Choudhary :

The appellant is in appeal against common Orders-in-Appeal dated 30.06.2010 whereby liability to service tax was confirmed under the classification "Business Auxiliary Service " (BAS) for commission received from banks and financial institutions.

2. The brief facts are that the Revenue on the basis of information that banks and financial institutions were paying commission to the direct selling agent (s) and most of these direct selling agents are not paying service tax on the commission received by them from banks or financial institutions, collected information from the banks and Institutions. Whereas on the basis of details received from ICICI Bank Ltd., it appeared that the appellants have received the commission of Rs.10,69,054/- during the period 23.10.03 to 11.12.07. SCN dated 18.02.2008 was issued as it appeared to Revenue that the appellant was required to pay service tax on this commission earned calculated at Rs.1,17,078/- inclusive of cess. It further appeared that the appellant is not entitled to basic exemption under Notification No.6/2005-ST as they were using brand name of another, that is ICICI Bank Ltd. and it further appeared that the appellant had deliberately and willfully suppressed the disclosure of the transaction and not paid service tax. Accordingly, it was proposed to demand service tax of Rs.1,17,078/- along with interest and further penalty was posed under Sections 76,78 and for contravention of the provisions of Section 70 of

the Finance Act. Two more similar show cause notices were issued as under for similar receipts :

SCN dt.	Commission from	Gross received (Rs.)	Service tax (Rs.)	Period
10.04.08	Bajaj Auto Ltd.	11,16,519/-	1,17,008/-	July/03 to Oct/07
18.02.08	HDFC Bank	3,92,116/-	42,593/-	Mar./05 to Sep./06

3. The appellant contested the show-cause notices by filing reply stating therein that they are automobile dealer and not financing agent or insurance agent. Their business is selling vehicles. They have let only the financing agency to use their premises in order to promote the sale of vehicles. There is no principal agent relationship in the agreement with the finance company. They are not providing any service of any nature to any of the financing company. They only act as a channel between the customer or a prospective customer of the vehicle and the bank or financial company. For that, they are not rendering any service for and on behalf of the banks, and as such no service tax is exigable. They are only getting share of income from banks/finance companies out of their income. The amount received by them is in the nature of incentive and the same is not equal to commission. Further, such receipts are disclosed in the account and balance sheets as "incentive from finances".

4. The show-cause notices were adjudicated vide Order-In-Original dated 03.12.09 and the proposed demands were confirmed along with equal amount of penalty under Section 78. Further, equal amount of

penalty was imposed under Section 76 and further penalty of Rs.1000/- was imposed for failure to take the service tax registration and to assess the service tax liability and not submitting ST-3 Returns.

5. Being aggrieved, the appellant preferred appeal before ld.Commissioner (Appeals), who vide the impugned order was pleased to confirm the demand but was pleased to drop the penalty under Section 76 holding that there is no scope for imposing double penalty both under Section 76 and 78. The ld. Commissioner (Appeals) also observed that the contention of the appellant that they have only provided space to the financial institution is not tenable in the absence of any written agreement. Further, the receipt of commission from the bank is not on the basis of space occupied in the premises of the appellant but is on the quantum of finance sanctioned to the customers of the appellant, who purchased vehicle. It was also held that the activity of the appellant amounts to direct selling agent of the bank/institution. Reliance was placed on the rulings of this Tribunal in the cases of Malpani Finance Vs. CCE : 2008 (10) STR 300 (Tri.-Del.) and Bridgestone Financial Services Vs. CCE : 2007 (8) STR 505 (Tri.).

6. Being aggrieved, the appellant is in appeal before this Tribunal.

7. The appellant is absent in spite of notice and was also absent on previous four dates. Hence, the appeals are taken up for exparte disposal with assistance of ld.A.R. for Revenue.

8. The appellants have raised the following grounds :-

(i) There is failure of natural justice, further enquiry not made from Banks, if service tax on the transaction was paid by them ;

(ii) The SCN dated 18.02.2008 is time barred as the demand pertains to the period 2003 to 2007, beyond one year prescribed under Section 73, extended period is not invokable ;

(iii) Commission received is disclosed in profit and loss account, balance sheet as "Incentive from Finance" ;

(iv) Banks/Finance Companies have already paid service tax on the commission paid by them ;

(v) Appellant is not acting on behalf of Bank, as the customers of appellant are free to get finance from any Bank/Finance Company of their choice ;

(vi) Liability to service tax, if any, is on Bank/Financial Institutions. Appellants have not charged or collected any service tax ;

(vii) The payments received from Bank and Financial Industries, are not related to any service provided by appellant, hence, not taxable. Appellant is not promoting the business of Bank/Financial Institutions.

(viii) Tax was not paid due to interpretation of taxing entry and not on account of any malafide or suppression as such neither extended period is invokable nor penalty is imposable.

9. The ld.A.R. for Revenue relies on the impugned order. He further relies on ruling of Division Bench of this Tribunal in the case of

Commr. of S.Tax Vs. M/s Jay Bharat Automobiles Ltd. : 2016 (41) STR 311 in which I (Anil Choudhary) was also a Member.

10. Having considered the rival contentions, we find that the appellants have not produced any agreement between them and Bank/Financial Industries to the effect that there is agreement to provide only space/venue to the Bank/Financial Institution in the appellant's premises. We further notice from the statement of commission paid by ICICI Bank, that the amount varies month to month. In some months, commission is less than Rs.1,000/- whereas in some months it exceeds Rs.30,000/-. Thus the documents on record prove that commission/incentive earned by appellant depends on level of business generated for the Bank/Finance Company. Thus, the activity without any doubt falls under BAS for "promoting or marketing of service provided by client". We also take notice of the Larger Bench decision of this Tribunal dated 12.09.2013 as reported in 2014 (33) STR 506, wherein taking notice of several conflicting decisions of Tribunal, the Larger Bench observed as follows :

> "**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".

11. Thus, we find that there was interpretational issue, as to liability to service tax in the matter, as is evident by the nature of activity and clarification by the Larger Bench of this Tribunal. Accordingly, we hold

(i) Service tax is payable under the category of BAS under Section 65 (19), by the appellant for the normal period ;

(ii) Extended period is not invokable ;

(iii) Penalties imposed are set aside.

12. Thus, the appeals are allowed in part as indicated above.

(Pronounced in the open Court on 27.04.2016)

Sd/-
(ASHOK K. ARYA)
MEMBER (TECHNICAL)

Sd/-
(ANIL CHOUDHARY)
MEMBER (JUDICIAL)

प्रमाणित प्रति / Certified True Copy
6.5.16
सहायक पंजीकार / Asstt. Registrar
सीमाशुल्क, उत्पादशुल्क एवं सेवा कर
अपील अधिकरण / (C.E.S.T.A.T.)
38, एम. जी. मार्ग, इलाहाबाद-211001
38, M. G. MARG, ALLAHABAD-211001