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

Dated: 30/12/2015

To

Appellant as per address in table below

Respondent as per address in table below

Final Order No. A/ 70110-70111/2015 &STAY ORDER 70044-45/2015&MISC ORDER 70042-70043/2015 dated 17/12/2015

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/SPS

Application	Appeal	Name and Address of Appellant
ST/COD/54241 &55415/2014 ST/STAY/54240 &55414/2014	ST/53789&54708/2014	SH PARTHO BOSE 9,GOPAL NAGAR KANPUR ROAD LUCKNOW(UP)
		NEELAM SRIVASTAVA H.NO 923, MAHESH NIWAS MANAS NAGAR KRISHNA NAGAR LUCKNOW

Name and Address of Respondent: CCE, LUCKNOW 7-A ASHOK MARG LUCKNOW(UP)

Other Appellants and Respondents as per Annexure

Copy To

3Advocate(s) / Consultant(s): SH VINEET KR SINGH,ADV
5, NARAIN NAGAR
SECTOR-11, INDIRA NAGAR
LUCKNOW(UP)

4 Bar Association, CESTAT, Delhi
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/SPS
Regional Bench, Allahabad

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
Old Red Building, 38 M.G. Marg, Civil Lines, Allahabad

DATE OF HEARING/DECISION : 17/12/2015.

Service Tax COD Application No. 54241 and 55415 of 2014 with Stay Application No. 54240 and 55414 of 2014 in Appeal No. 53789 and 54708 of 2014

[Arising out of the Order-In-Appeal No. 101-104/ST/LKO/2013 dated 23/12/2013 passed by The Commissioner (Appeals), Central Excise & Service Tax, Lucknow.]

For Approval and signature :
Hon'ble Shri Anil Choudhary, Member (Judicial)
Hon'ble Shri B. Ravichandran, 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 would be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	: Yes
3.	Whether their Lordships wish to see the fair copy of the order?	: Seen.
4.	Whether order is to be circulated to the Department Authorities?	: Yes.

Shri Partho Bose]
Ms. Neelam Srivastava] Appellants

Versus

CCE, Lucknow Respondent

Appearance

Shri Vineet Kumar Singh, Advocate – for the appellants.

Shri D.K. Sinha, Authorized Representative (DR) – for the Respondent.

CORAM : **Hon'ble Shri Anil Choudhary, Member (Judicial)**
Hon'ble Shri B. Ravichandran, Member (Technical)

Final Order No. 70110-70111/2015 Dated : 17/12/2015
Misc Order No. 70042-70043/2015
Stay order No 70044-70045/2015

Per. Anil Choudhary :-

The appellants herein are the business associates of Amway India Enterprises Pvt. Ltd. (Amway for short), as business associates of Amway they earned both discount and commission. The appellants are in appeal against order-in-appeal passed by the Commissioner (Appeals), wherein the demand of service tax is confirmed both on the discount and commission.

2. The learned Counsel informed that in the case of similar situated assesses, vide final order No. 51818-51855 dated 9/6/2015 passed by coordinate Bench of this Tribunal at Delhi, had allowed the appeals by way of remand holding that service tax is not payable on the Trade discount earned and profit on Trading in Amway goods. But the same is taxable on the commission earned from activity of sponsoring new distributors and commission earned on turnover achieved by them and accordingly remanded with direction to recalculate the tax liability. The learned Counsel of the appellants are similarly situated. There is some delay in filing of appeal, they plead have not deliberately delayed, may be condoned for the interest of justice and a similar order of remand may be passed in this appeal.

Learned AR for Revenue relies on the impugned order.

4. Having considered the rival contentions, we condone the delay of 35 days in respect of both the appellants - assesses for the interest of justice, but impose a cost of Rs. 2,000/- (Rupees Two Thousand) each on the appellants, payable within six weeks in 'Prime Minister's Relief Fund' and compliance of the same to be filed to the concerned Adjudicating Authority. We also allow the appeal by way of remand directing the Adjudicating Authority to recalculate the tax liability in terms of the directions contained in earlier order of this Tribunal, being final order dated 09/06/2015. The relevant paras are quoted for reference –

> "12. According to the Department, the activity of the assessees is promotion or marketing or sale of the goods produced or provided by or belonging to the client. In our view, the activity which is covered under Section 19(I) is in relation to the promotion or marketing or sale of the goods produced by the client or provided by the client or belonging to the client. This expression, in our view, would not cover the sale of the goods by a person, which belong to him, as the activity of the promotion or marketing or sale of the goods by a person belonging to him would not constitute service. The assessees in these cases are distributors, who purchase the goods from Amway at the Distributors Acquisition Price (DAP)) and sell the same in retail at price not exceeding MRP fixed by the Amway. This activity of the Distributors, in our view, cannot be treated as promotion, marketing or sale of the goods produced or provided by or belonging to the client (Amway), as the sale of the goods purchased by the Distributors from Amway is not the sale of

the goods belonging to their client Amway. Once the Amway products have been purchased by a Distributor from Amway, those products cease to belong to Amway, but belong to the Distributor and sale of these goods by the Distributor would not constitute service to Amway. For the same reason, any incentive or commission received by a Distributor from Amway for buying certain quantum of goods from Amway during a month can not be treated as the consideration received for promotion or marketing or sale of the goods produced by or provided by or belonging to the client, more so, as this commission is not linked to the goods sold by the Distributor, but is linked to the goods purchased by the Distributor from Amway during a month and is in the nature of volume discount. Therefore, no service tax is chargeable on the profit earned by the distributors from sale of the goods in retail which had been purchased by them from Amway and on the commission earned by them every month on purchase of certain quantum of goods from Amway.

13. However, activity of a Distributor of identifying other persons, who can be roped in for sale of the Amway products/marketing of the Amway products and who on being sponsored by that Distributor are appointed by Amway as second level of distributors is, in our view, the activity of marketing or sale of the goods belonging to Amway and the commission received by the Distributor from Amway, which is linked to the performance of his sales group (group of the second level of distributors appointed on being sponsored by the Distributor) would have to be treated as consideration for Business Auxiliary Service of sales promotion provided to Amway. Therefore, service tax would be chargeable on the commission received by a Distributor from Amway on the products purchased by his sales group. However, in the impugned orders service tax has been demanded on the gross amount of

commission and no distinction has been made between the commission earned by a Distributor from Amway based on his own volume of purchase from Amway and the commission earned by him on the basis of the volume of purchases of Amway products made by his sales group i.e. group of second level of Distributors appointed by Amway on being sponsored by the Distributor. For quantifying the service tax demand on the commission received from Amway on the volume of purchase made by the distributors sponsored /enrolled by a particular distributor i.e. the Distributors sales group, these matters would have to be remanded to the Original Adjudicating Authority.

14. Another objection raised by the appellants in appeals nos. ST/138 and 139/2009, ST/406/2010, ST/522 to 525/2010, ST/257,259, 433,473,502,580,1123,1383,1781 & 1802/2011, ST/56, 86, 126, 645/2012 and ST/1723-1724, 2337 and 2810/2012 and the respondents in appeals nos. ST/851 to 854, 863, 864, 865, 866, 867, 868, 869, 870 and 878/2012 is that the assesses are individuals and during the period till 30.04.2006, service tax was chargeable only on the services provided to a client by a commercial concern in relation to Business Auxiliary Service and the individual persons cannot be treated as Business concern. We do not accept this plea as a business concern can be a proprietary firm also which is owned by an individual and there is no difference between proprietary firm owned by a person and that person. When an individual engages himself in a commercial activity, he has to be treated as business or commercial concern. Therefore, notwithstanding the fact that w.e.f. 1.5.2006 the term, commercial concern in Section 65(105)(zzb) was replaced by any person, we are of the view that even during the period prior to 1.5.2006, the Business Auxiliary Service, even if provided by an individual to a client, was taxable. Moreover, in this group of appeals, the

Appellants in Appeal No.ST/257/2011 and ST/259/2011 are proprietary firms who, without any doubt, are commercial concerns.

15. Another point of dispute is as to whether duty exemption under notification no.5/2006-ST would be admissible to the Distributors in this group of cases. In this regard, the Departments plea is that this exemption is not applicable when the taxable service is provided by a person under a brand name/trade name, whether registered or not, of another person and in this group of cases, the Distributors have promoted the sale/marketing of branded products. This plea of the Department is not correct, as in these cases the distributors are engaged in promoting sales/marketing of the products of Amway and they are not marketing or promoting any taxable service which is branded and the brand name belongs to another person. Marketing or sale promotion of branded products by a person/ commission agent does not amount to providing branded service by him and hence, marketing or sales promotion of a branded product does not come under the exclusion category as mentioned in the proviso to notification no.6/05-ST. In this group of cases, the eligibility of the Distributors (assessees) for the exemption notification no.6/2005-ST has not been examined and for this purpose also, these matters have to be remanded to the Original Adjudicating Authority.

16. Another plea raised in these appeals is regarding limitation. It is the contention of the assesses that there was absolutely no suppression or misstatement of facts or deliberate contravention of the provisions of the Finance Act, 1994 or of the Rules made thereunder with intent to evade payment of service tax. The Departments contention, on the other hand, is that the assesses neither obtained service tax registration nor did they declare their activities to the jurisdictional service tax authorities nor did they file

ST-3 Return and, therefore, they are guilty of suppression of relevant facts and deliberate violation of the provisions of Finance Act, 1994 and of the Rules made thereunder with intent to evade payment of tax. On considering the rival submissions on this point, we are of the view merely because the assesses did not apply for Service Tax Registration or did not file ST-3 Returns or did not declare their activities to the jurisdictional central excise authorities, it cannot be inferred that this was a wilful act with intent to evade payment of service tax. We also take notice of the fact that in respect of appeals filed by the Revenue, the Commissioner (Appeals) after analyzing the activities of the assesses had taken the view that the same is not covered by the definition of Business Auxiliary Service under Section 65(105) (zzb) read with Section 65(19) of the Finance Act, 1994. When on the issue involved in this group of cases, there were two views in the Department itself, it cannot be said that on the question as to whether the activity of the assessees was taxable under Section 65(105)(zzb) read with Section 65(19) of the Finance Act, 1994, there was no scope for doubt. As held by the Apex Court in the case of Continental Foundation Joint Venture Vs. CCE, Chandigarh reported in 2007 (216) ELT 177 (SC) = 2007-TIOL-152-SC-CX when there is scope for doubt in the mind of an assessee on a particular issue, the longer limitation period, under proviso to Section 11 A(1)cannot be invoked and in our view, the ratio of this judgement of the Apex Court is applicable to the facts of these cases. Therefore, the longer limitation period of 5 years under proviso to Section 73(1) of the Finance Act, 1994 would not be invokable and duty can be demanded only for normal limitation period of one year from the relevant date".

. Both the condonation applications alongwith stay applications and appeals are disposed of.

(Order dictated and pronounced in the open court.)

Sd/-

(Anil Choudhary)
Member (Judicial)

Sd/-

(B. Ravichandran)
Member (Technical)

PK

प्रमाणित प्रति / Certified True Copy
19.1.16
सहायक पंजीकार / Asstt. Registrar
सीमाशुल्क, उत्पाद शुल्क एवं सेवा कर अपीलीय अधिकरण / (C.E.S.T.A.T.)
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