

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL SOUTH
ZONAL BENCH
CHENNAI**

Appeal No.ST/192, 193/2011

[Arising out of Order-in-Appeal No.110 & 111/2010 dt. 06.12.2010 passed by
Commissioner (Appeals), Central Excise & Service Tax, LTU, Chennai]

Hyundai Motor India Ltd.

Appellant

Versus

Commissioner of Central Excise & ST, LTU,
Chennai

Respondent

Appearance :

Shri S. Muthuvenkatraman, Advocate
For the Appellant

Shri R. Subramaniyan, AC (AR)
For the Respondent

CORAM :

Hon'ble Ms. Sulekha Beevi C.S., Member (Judicial)
Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)

Date of hearing / decision : 27.06.2018

FINAL ORDER No. 41882-41883 / 2018

Per Bench

Both the appeals reflecting the same appellant and identical issue, they
are taken up together for common disposal.

2. The facts of the case are that Hyundai Motor India Ltd. (HMIL), the
appellants herein have company owned show rooms and workshops at Chennai
and Delhi. They are registered with the department under the category of

“Authorized Service Station Service” and “Business Auxiliary Service” (BAS). Pursuant to investigations conducted by the DGCEI, it appeared that the Chennai show room (Appellant 1) of the appellants advised their customers to approach the HDFC for taking insurance policies for the vehicles. So also, it appeared that the Delhi show room (Appellant 2) of the appellants advised their customers to approach the HDFC Chubbs or UIIC for taking insurance policies for their vehicles. It further appeared that there was a Business Referral Arrangement between both these appellants and HDFC Chubb, as per which for consideration for the payment of Referral Fee, appellants would provide HDFC Chubb with access to their updated customer data basis. The Referral Fee would be paid by HDFC Chubb on the basis of Gross Written Premium (GWP) generated and realized by them on fresh policies issued by them for the first time to customers using the said customer data base, on the condition that such fee payable would not exceed 10% of the GWP. Department took the view that this activity of both the appellants are in the nature of promoting and marketing of insurance products and services provided by HDFC Chubb and would therefore fall under the category of “Business Auxiliary Service” (BAS) as in Section 65 (19) of the Finance Act, 1994. A show cause notice dt. 21.10.2008 was issued to Appellant-I proposing recovery of service tax amounting to Rs.7,31,883/- with interest and imposition of penalties under various provisions of law. Another show cause notice dt. 28.1.2009 was issued to Appellant-II proposing recovery of service tax amounting to Rs.4,30,562/- with interest and penalties. On adjudication of these notices, original authority confirmed demands of service tax of Rs.6,12,558/- and Rs.4,02,886/- respectively with interest and also imposed penalties under

Section 76, 77 & 78 of the Act. In appeal, Commissioner (Appeals) vide a common impugned order Nos.110 & 111/2010 dt. 06.12.2010 upheld the orders of original authority and rejected their appeals. Hence these appellants are before this forum.

3. Today when the matter came up for hearing, on behalf of the appellants, Ld. Counsel Shri S. Muthuvenkatraman made oral and written submissions which can be broadly summarized as under :

- i) No relationship in nature of principal and client exist between HMIL and HDFC - hence order deeming that commission received in capacity of 'commission agent' is erroneous.
- ii) Reading definition of BAS – intention of legislature is to tax only third party who acts as an agent for / behalf of principal who undertake to sell or distribute goods or alternatively undertakes provision or receipt of services on their behalf for any consideration.
- iii) Commission is for service rendered for selling / distribution of goods under an agreement between principal and agent, principal has right over goods / services, empowers agent to undertake promotional and marketing activities.
- iv) Contractual arrangement in only to extent of sharing database with HDFC
- v) Service not rendered as commission agent
- vi) Point No.6 of agreement clearly indicates that appellants were not promoting the services of HDFC Chubb :

“You shall not in any manner solicit or procure insurance business for or on behalf of HDFC Chubb. Further you shall not at any time hold yourself out to be a licensed insurance agent of HDFC Chubb during the terms of the agreement”.

- vii Order-in-appeal has merely relied on Order-in-Original.
 - viii. Para 12 of OIA, listing several activities as if performed by HMIL is contrary to facts – as no such service is being rendered by HMIL except sharing customer database. Finding to that effect is on presumption.
 - ix. Reliance is placed on *Tribhuvan Motors Vs. CCE* – 2010 TIOL – 57 – CESTAT as per which payment received from financial institution by authorised dealers of motor vehicles for counter/table space provided for business would not amount to promotion of services and would not fall under BAS.
 - x. Interpretation of law involved, penalty is not imposable and extended period not invocable.
 - xi) After the first show cause notice dated 21.10.2008 was issued to the Chennai showroom of the appellant, a second show cause notice dated 28.1.2009 was issued to the Delhi show room of the appellant. The second SCN is therefore time-barred.
4. On the other hand, Ld. A.R Shri R.Subramaniyan supports the impugned orders.
5. Heard both sides.
6. Perusal of the agreement reveals that it is not the case that appellants had provided their updated customer data base for a onetime fee. On the other hand, HDFC Chubb became entitled to access to the customer data base of the

appellants and the Referral Fee was paid only as and when the former could generate and realize fresh car insurance policies. Based on that information, the appellants may not have actively promoted the insurance policies of HDFC Chubb. But in restricting their data base access only to HDFC Chubb, that too on real time basis and they enabled the latter to have access to a pool of new vehicle buyers who would obviously also need first time car insurance. The appellants have, in our view, therefore promoted the business of HDFC Chubb and for which services they were given agreed upon payment for every car insured by HDFC Chubb.

7. Ld. Advocate has placed reliance on *Tribhuvan Motors* – 2010-TIOL-57-CESTAT to contend that payments received from financial institutions by authorized dealers of motor vehicles for space provided for business would not fall under BAS. Due to conflicting decisions on this issue, the matter had been referred to the Larger Bench of the Tribunal which, in *Pagariaya Auto Centre Vs CCE Aurangabad* – 2014 (33) STR 506 (Tri.-LB), inter alia held that the identification of the transaction and its appropriate classification as the taxable Business Auxiliary Service (BAS) or otherwise must clearly depend upon a careful analysis of the relevant transactional documents. In the present appeal, we find that the transactional documents and other evidences on record indicate a substantial activity falling within the contours of the definition of “Business Auxiliary Service” in Section 65 (19) of the Finance Act, 1994. Hence we do not find merit in the plea made by the appellant that the impugned activity would not fall within the fold of BAS. We therefore do not find any infirmity with that portion

of the impugned order confirming / upholding the tax liabilities of Rs.6,12,558/- and Rs.4,02,886 with interest. So ordered.

8. However on the matter of penalty, we find that the issue *per se* was mired in confusion and litigation. As earlier noted, the Larger Bench of the Tribunal was constituted only in the wake of conflicting decisions of the coordinate Benches. In such a scenario, it has to be held that appellants had a reasonable cause for their failure to discharge tax liability and given the benefit of doubt. In the event, we find that that the penalties confirmed / upheld against the appellants cannot sustain and will require to be set aside, which we hereby do. Appeals are therefore partly allowed on above terms. So ordered.

(dictated and pronounced in court)

(Madhu Mohan Damodhar)
Member (Technical)

(Sulekha Beevi C.S.)
Member (Judicial)

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