

**IN THE CUSTOMS, EXCISE AND SERVICE TAX
APPELLATE TRIBUNAL
SOUTH ZONAL BENCH AT CHENNAI**

Appeal Nos.: E/00449/2010 & E/41210/2017

Sl. No.	Appeal No.	Appellant	Respondent
1.	E/449/2010	M/s. NCR Corporation India Pvt. Ltd.	The Commissioner of Central Excise, Puducherry
Arising out of Order-in-Appeal No. 95/2010 dt. 20.04.2010 passed by the Commissioner of Central Excise, Puducherry			
2.	E/41210/2017	M/s. NCR Corporation India Pvt. Ltd.	The Commissioner of Central Excise, Puducherry
Arising out of Order-in-Original No. 06/2017 (C) (CEx.) dt. 21.02.2017 passed by the Commissioner of Central Excise, Puducherry			

Appearance:-

Shri. M. N. Bharathi, Advocate
for the Appellant
Shri. A. Cletus, ADC (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: **27.08.2018**

Date of Pronouncement: **06.09.2018**

Final Order No. **42346-42347 / 2018**

Per Bench :

Both these appeals relate to the same appellant and involve identical issues. They are thus taken up together for common disposal.

2.1 The facts of the case are that appellants are manufacturers of Automatic Teller Machines (ATMs). The present dispute revolves around the contract entered into between the appellant and State Bank of India and their associates. As per the agreement entered into by the appellant with the banks, the latter were required to make payment for warranty services half-yearly in arrears, the price of which was not included in the price of the ATM and was required to be paid separately by the banks.

2.2 Further, after expiry of the warranty service period of two years, the banks were required to make payments to the appellant towards "Second Line Maintenance" (annual maintenance contract) for three years. The Department took the view that the said charges, though being recovered separately, are required to be included in the assessable value of the ATMs in terms of Section 4 of the Central Excise Act, 1944. Accordingly, a Show Cause Notice dt. 27.04.2007 was issued to the appellants *inter alia* proposing recovery of differential duty of Rs. 25,116/- with interest thereon for the period April 2006 as also imposition of penalties under various provisions of law. In adjudication, the Original Authority vide Order dated 31.07.2008 confirmed this proposal for recovery of differential duty and also imposed penalty under Rule 25 of the Central Excise Rules,

2002. In appeal, the Commissioner (Appeals) vide the impugned Order dated 20.04.2010 upheld the Order of the Original Authority. Hence, Appeal No. E/449/2010.

3. Another Show Cause Notice dated 04.10.2006 along with the corrigendum dated 13.06.2007 was issued to the appellants on the same dispute proposing recovery of duty liability of Rs. 1,58,99,446/- with interest thereon for the period May, 2003 to March, 2006 along with interest thereon and also imposition of penalty under various provisions of law. In adjudication, the Commissioner vide the impugned Order dated 21.02.2017 confirmed the demand proposed in the Notice with interest and also imposed equal penalty under Section 11AC of the Act. Hence, Appeal No. E/41210/2017.

4. When the matter came up for hearing, on behalf of the appellants Ld. Advocate Shri. M. N. Bharathi made a number of submissions which are broadly summarized hereinbelow :

- (i) There is an obligatory warranty period of 30 days and further warranty period of two years and three years which are optional only and therefore, the price of the ATM is independent of warranty services of two years and three years.

- (ii) The appellant pays service tax for the rate of warranty charges accepted for two years and three years. It may also be seen that the warranty charges quoted are per annum and it does not depend on the price of the ATM.
- (iii) The price payable by the buyer on a product shall include only services which are in connection with the sale. It is submitted that the disputed warranty services cannot be considered as in connection with the sale for the following reasons :
 - (iv) If the service is part of sale consideration it need not be quoted separately.
 - (v) The rates quoted are per annum. If it is a price on the goods sold, it should be mentioned as a consolidate amount and not per annum. According to the agreement, the service charges are to be paid half-yearly in arrears.
 - (vi) The contract for sale is independent of contract for warranty and second line maintenance. Section 4 is subject to charging provision contained in Section 3 and must therefore be read in the context of Section 3 and not *dehors* the same. In other words, the cost of the service is not part of the sale of the goods and thus do not form part of the assessable value.

(vii) It is not mandatory on the part of SBI to obtain the warranty services for the machines supplied by the appellant i.e., it is open to SBI to secure the services from any source if it chooses to do so by rejecting the bid submitted by the appellant in respect of the services. Similarly, the appellant has also offered services to the goods (ATMs) supplied by other parties.

(viii) The appellant is regularly paying service tax on such maintenance services rendered by them.

(ix) The demand is barred by limitation. Appellants were under *bona fide* belief that they were liable to pay service tax only and that the value is not required to be included in the assessable value for purposes of excise duty. For the same reason, penalty is also not leviable.

5. On the other hand, on behalf of the Department, the Ld. AR Shri. A. Cletus, supports the impugned Orders. He also made various submissions which can be broadly summarized as under :

(i) The warranty charges are not “optional charges” as made out by the appellants;

(ii) For each of the items supplied by appellant, the “Master Solutions Agreement” provides for separate charges for warranty/second line maintenance which shall be undertaken by the appellant for the period of five years cumulatively from the date of installation of the ATMs. Hence, the warranty/second line maintenance agreed to be provided by appellant is compulsorily connected with the supply of ATMs.

(iii) Instead of paying Central Excise Duty at around 16%, the noticee has chosen to discharge much lesser tax amount at around 8% on the pretext of paying service tax.

6. Heard both sides and have gone through the facts.

7. The provisions relating to valuation of excisable goods for the purposes of charging Central Excise Duty are governed by Section 4 of the Central Excise Act, 1944. In the ordinary course, as per Section 4(1)(a), the transaction value of the good sold by the assessee is to be adopted as the value for the purposes of levy of duty. The term “transaction value” is amplified and defined by Section 4(3)(d) which reads as under :

“(d) “transaction value” means the price actually paid or payable for the goods, when sold, and includes in addition to the amount charged as price, any amount that the buyer is liable to pay to, or on behalf of, the assessee, by reason of, or in connection with the sale, whether payable at the time of the sale or at any other

time, including, but not limited to, any amount charged for, or to make provision for, advertising or publicity, marketing and selling organization expenses, storage, outward handling, servicing, warranty, commission or any other matter; but does not include the amount of duty of excise, sales tax and other taxes, if any, actually paid or actually payable on such goods."

8. It is thus evident that while the transaction value would bring within its scope not the price actually paid but that which is actually payable. Amongst the other ingredients, charges towards warranty in connection with the sale, whether payable at the time of the sale or at any other time, etc., will form part of the transaction value. Only then will the transaction value become the assessable value for levy of Central Excise Duty.

9. Viewed in this light, we would then focus on the conditions of the sale. Para 5.2 of the Master Solutions Agreement which has been reproduced by the appellant in para 7 of the grounds of appeal is reproduced as under :

"5.2 Warranty period

The warranty services commence upon installation (irrespective of whether connectivity to SBI's ATM switch has been obtained or not) and shall be for a period of two years. However, the price of warranty services is not included in the price of the products and is payable separately by SBI as per agreed rates in addendum A. After the expiry of the warranty service period of two years, second line maintenance (annual maintenance contract) will be deemed effective.

Unless otherwise agreed between NCR and SBI, software, deliverable and supplies are warranted for a period of thirty (30) days from the date of delivery and services are warranted for a period of 30 days from the date of performance."

10. What comes to the fore is that the price of warranty services is **not** included in the price of the products and is payable separately by the bank as per agreed rates. Not only that, after expiry of warranty period of two years, the second line maintenance charges will also kick in. Discernibly, without agreement on payment of warranty charges for two years and second line maintenance charges after expiry of that period for another three years, the ATM machine is not sold. Evidently, the agreement to pay these warranty charges and their actual payment is nothing but a condition precedent to the same.

11. It is further seen that along with the ATM product order, the agreement comprises of a Master Solutions Agreement and the following addenda :

- Addendum A – ATM Product Order and Prices
- Addendum B – Second Line Maintenance Services (SLM)
- Addendum C – Site Installation Services (SIS)
- Addendum D – Managed Services
- Addendum E – Consumables Management
- Addendum F – Pricing Schedule for Managed Services

12. Addendum B relating to “second line maintenance services” is found in page 164 of the appeal papers onwards. The addendum describes the “Second Line Maintenance (SLM) Services” that appellant will provide to the bank and specifically indicates that they shall be provided as “SLM/warranty services” during the warranty period of two years and as SLM/maintenance service after expiry of the warranty period.

13. From the discussions hereinabove, it is clearly evident that it is mandatory for the buyers of the ATMs to also accept the warranty agreement referred to above and pay warranty charges for the first two years and second line maintenance charges for the next three. Although the amounts become payable only later, in our view, this would still come within the scope of the definition of the type of warranty charges that would be required to be incorporated into “transaction value” for the purposes of Section 4(3)(d) of the Act. We therefore find that both the appeals fail on merits and we do not find any infirmity in the demand of differential Central Excise Duty relating to the two impugned Orders.

14. The Ld. Advocate has been at pains to convince us that the proceedings are hit by limitation. Appellant has also brought to our

attention that they have paid up service tax on the impugned warranty charges. We find that this aspect has been thoroughly analysed by the adjudicating authority in the impugned Order relating to E/41210/2017. The appellant had not included warranty charges in the assessable value of the ATMs for the purpose of payment of Central Excise Duty. They have all along contended that they have not received any addition consideration on account of sale of ATMs to the banks. The issue came to light only on detailed scrutiny of records of the appellant. Even the plea of having paid service tax may not help their case as found by the adjudicating authority. Instead of paying 16% Central Excise Duty, the appellant only discharged a much lower rate of service tax at around 8%. We therefore find that the ingredients of attracting invocation of extended period, in particular suppression, are very much present in this case and hence, not only will the extended period of limitation provided under the Central Excise Act be applicable but also equal penalty under Section 11AC imposable. So ordered.

15. However, in respect of Appeal No. E/449/2010 which relates to a subsequent period, we are of the considered view that the penalty of Rs. 10,000/- imposed under Rule 25 of the Central Excise Rules,

2002 is unjustified and we, therefore, set aside the same. The appeal is partly allowed in the above terms.

16. To sum up :

(i) Appeal No. E/449/2010 is partly allowed only to the extent of setting aside the penalty under Rule 25 *ibid*.

(ii) Appeal No. E/41210/2017 is dismissed.

(Pronounced in open Court on 06.09.2018)

(Madhu Mohan Damodhar)
Member (Technical)

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

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