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

ST/CO/2 & 3/2012 and ST/537 and 538/2011

(Arising out of Order-in-Appeal Nos. 99 and 100/2011 (MST) dated 28.6.2011 passed by the Commissioner of Central Excise (Appeals), Chennai)

Commissioner of GST and Central Excise
Chennai Appellant

Vs.

M/s. Vivek Ltd. Respondent

Appearance

Shri S. Govindarajan, AC (AR) for the Appellant
Shri M. Kannan, Advocate 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: **03.09.2018**

Final Order Nos. **42350-42351 / 2018**

Per Bench

The issue arises for consideration in both these appeals being the same, they were heard together and are disposed by this common order.

2. The respondents are engaged in the business of trading in consumer durables like TV, Fridge, Air-conditioning etc. In such activity, they also undertake warranty services and

annual maintenance service. Based on specific intelligence that the respondents are providing taxable services under the category of Business Auxiliary Services and have not obtained registration and not paid service tax, the DGCEI conducted investigations. It was ascertained that the respondents have tie-up with various financial institutions for financing their customers for purchase of consumer durables from their showroom. The customers those who intend to purchase consumer durables avail loan facility from such financial institutions. Department was of the view that the respondent has provided Business Auxiliary Service (BAS) as appellants were receiving commission from the financial institutions. Show cause notices were issued for the period October 2003 to September 2008 as well as for October 2008 to July 2009. After due process of law, the original authority confirmed the demand raised under BAS along with interest and imposed penalties. Against this, the respondent filed appeals before Commissioner (Appeals), who allowed the appeals holding that the said activity does not fall under BAS. Hence department is now before the Tribunal.

3. The ld. AR Shri S.Govindarajan supported the grounds filed in the appeal. He submitted that the respondents have tie-up with banks / financial institutions and customers who approach to buy consumer durables are able to avail loan from

such banks / financial institutions. By this activity they were promoting the business of such financial institutions. The respondents were receiving commission / incentive from such financial institutions. The respondents have not paid the service tax on the incentives received from them and have suppressed the fact with intent to evade the payment of the service tax. He relied upon the decision of the Larger Bench of the Tribunal in the case of Pagariya Auto Center Vs. Commissioner of Central Excise, Aurangabad – 2014 (33) STR 506 (Tri. LB) and argued that when commission / incentive is received by the dealer from the banks / financial institutions for promotion of their business, the activity would fall under BAS.

4. The ld. counsel Shri M. Kannan appeared on behalf of the respondent. He reiterated the contentions stated in the cross-objection. Besides, he submitted that in the case of Pagariya Auto Center (supra) the Tribunal had observed that each case has to be decided on the basis of the documents and facts. In the present case, the department has analyzed only the documents entered by the respondents with ICICI bank and has not looked into any other document. Further, the service tax liability is required to be paid on receipt basis whereas the Order-in-Original seeks to confirm the demand based on accruals in the books of accounts of the respondent. Though

this was pointed out and brought to the notice of the department, the same was not considered. That in some instances, the accruals were reversed as there was no hope of realizing the amount accrued. The department has not considered the plea of the respondents. He argued that the demand has to be restricted based on service charges received and not accrued. To support his contention, he relied on the decision of the tribunal in La Freightlift P. Ltd. Vs. Commissioner of Service Tax, Chennai – 009 (1) STR 513 (Tri. Chen.). The ld. counsel also argued to set aside the penalties. He submitted that the issue was interpretational one and that it had travelled upto the Larger Bench. In fact, the Commissioner (Appeals) had set aside the demand observing that the activity does not fall under BAS. Being interpretational issue, the penalties may be set aside by invoking Section 80 of the Finance Act, 1994.

5. Heard both sides.

6. The original authority had confirmed the demand holding that the activity would fall under BAS. In Pagariya Auto Center (supra), the Larger Bench had observed that the court has to look into facts / documents to analyse whether the said activity falls within BAS. The Tribunal in the case of Commissioner of Central Excise Vs. Vasanth & Co. – 2018 (7) TMI 1220 – CESTAT Chennai had remanded the matter directing to

scrutinize the documents so as to analyze whether the case would fall under Pagariya Auto Center (supra). In the present case also, we find that the issue requires to be remanded to the adjudicating authority for the reason that the respondent has argued that the department has not looked into any other document except the document respondent has entered with ICICI Bank. All the documents on which the demand has been raised have to be looked into. We are of the view that the respondent has to be given a chance to establish their case by furnishing further evidence if necessary. Another reason for remand is that the adjudication order seeks to confirm the demand on accrual basis whereas during the relevant period, service tax is required to be paid on receipt basis. This aspect also requires verification for quantification of the demand if any. In the event, we find that the issue requires to be remanded to the adjudicating authority for fresh consideration and for considering whether the issue laid down in Pagariya Auto Center (supra) applies to the facts of the case are not.

7. The ld. counsel for respondent has argued to set aside the penalties. As narrated above, it can be seen that the issue was contentious and there were conflicting decisions. The Commissioner (Appeals) had set aside the demand. The issue had travelled upto the Larger Bench of the Tribunal. Being an interpretational issue, we find that the respondent has put

forward reasonable cause to set aside the penalties and we find that no penalty can be imposed on the respondent. Though we remand the matter for fresh consideration but no penalty can be imposed in the remand proceedings. The impugned order is set aside and the appeal is remanded for reconsideration. However, the penalties are set aside. The cross-objections filed by the respondent are disposed of accordingly.

(Operative portion of the order was pronounced in open court)

(**Madhu Mohan Damodhar**)
Member (Technical)

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

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