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

Application No.ST/MISC/40793/2017
Appeal No.ST/330/2012

[Arising out of Order-in-Original No.14/2012 dt.21.2.2012 passed by the Commissioner of Central Excise, Chennai – III Commissionerate]

Commissioner of GST & CE
Chennai South Appellant

Versus

Redington (India) Ltd. Respondent

Appearance:

Shri S.Govindarajan, AC (AR)
For the Appellant

Shri C.Manickam, Sh.Ajay Kumar Gupta, Advocate &
Shri D.Senthil Nathan, Consultant
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 :29.10.2018

Per Bench

FINAL ORDER No. 42883/2018

Brief facts are that the respondents, M/s.Redington (India) Ltd are engaged in the business of distributing computer hardware and software of various manufacturers such as M/s.Hewlett Packard, IBM, Microsoft, etc. They are also engaged in maintenance and repair for these products during the warranty period as well as post warranty period. On intelligence that the respondents are not paying service tax on services rendered to M/s.Hewlett Packard India Sales (P) Ltd, the officers visited the premises and recovered documents and recorded the statements. It appeared that the respondents are authorised distributors of the products of M/s.Hewlett Packard India Sales (P) Ltd (for short "HP") for products like commercial desktop PCs, servers, notebook computers including spares, accessories and peripherals. The agreement between HP and the respondents contained details relating to products, Services, HP list price, Discounts, Volume, Warranty, Installation, Software license terms, other obligations and services that were made available to the distributors/resellers through HP Asia Pacific Partnership Portal, a HP website of the internet available only to registered users. It was seen that net sale price for re-sellers was arrived at after deducting discounts and rebates, etc. The discount so deducted and allowed to distributors included 1% additional discount given to volume distributors for providing reseller sell-through reports as inventory reports on weekly basis to HP.

2. From the foregoing it appeared that respondents as distributors were receiving 1% volume discount on the total turnover made, in respect of HP Products and that **this was not a trade or sales discount but a commission** for providing HP with strategic market information to enable them to maximize the salesof HP products wherever required. The department was of the view, that respondent

were providing Business Auxiliary Service to M/s.HP.Therefore a Show Cause Notice was issued proposing to demand the service tax alongwith interest and for imposing penalties. After due process of law, the original authority dropped the proceedings holding that 1% discount is not consideration received for rendering services and hence not taxable. Aggrieved, the department is now before the Tribunal.

3. The Ld.AR, Sh.S.Govindarajan reiterated the grounds of appeal. He submitted that the findings of the adjudicating authority that respondents are not rendering any taxable services is erroneous in law. As per the agreement viz. HP Purchase Agreement : AG401 dated 01.12.2003, respondent was appointed as an Authorised Reseller / Volume Distributor for purchasing / selling HP products and services at applicable discounts. As per Clause 7 of Volume Distributor Programme Terms of the said agreement, out of the total discount offered, 1% discount is for providing HP or HP’s designate with Reseller sell-through and inventory reports in a format specified by HP on a weekly basis. The vital strategic market information to enable HP to maximize the sales of their products and ensure availability of the products wherever required, is not a mere transaction of sale and purchase of products as claimed by the respondent or as observed erroneously by the Adjudicating Authority but is in the nature of service falling under Business Auxiliary Service.

3.1 As per the definition of Business Auxiliary Service, any service in relation to promotion or marketing or sale of goods produced or provided by or belonging to the client would fall under the category of

Business Auxiliary Service. Therefore when the respondents are furnishing strategic inventory reports on weekly basis, in a format specified by HP, the same is service incidental or auxiliary or promotion or marketing or sale of goods produced by HP and the 1% discount received by the respondents from HP is chargeable to service tax under Business Auxiliary Service. It is submitted that in a similar case involving M/s.HP and the respondent pertaining to the 1% discount offered to the dealer / distributor as in the present case, the CESTAT, Bangalore **[2003(162) ELT 399(T)]** considered the issue of includibility of the said 1% additional discount paid to the assesse as a distributor / dealer in the assessable value of the excisable goods manufactured by M/s.HP. In the said case, the Hon'ble Tribunal held that the reports sent by the dealers, are in the nature of market intelligence, which did not benefit the dealers, but are benefiting HP exclusively in effectively moving his products in the marketing chain *vis-à-vis* the competitors and the 1% discount is not a discount and only a remuneration in the nature of commission and therefore liable to be included in the assessable value. This decision was upheld by the Hon'ble Supreme Court **[2004 (167) ELT A137(S.C.)].**That therefore, the adjudicating authority ought to have held that the activities carried out by the respondent is not a discount, but commission charged to service tax.

4. The Ld.Counsel Shri C.Manickam, Shri Ajay Kumar Gupta, Advocate & Shri D.Senthil Nathan, Consultant appeared and argued for the respondents. It is submitted by Shri C.Manickam, Ld.Advocate that as per the terms and conditions of the agreement entered by the

respondent with M/s.HP, the respondent was entitled for 30% of the trade discount and out of this, 1% discount was given to volume distributors for providing reseller sell on the basis of reports and inventory reports submitted to M/s.HP. The adjudicating authority has rightly dropped the proceedings finding that the respondent was neither commission agent nor was rendering any Business Auxiliary Service. The relationship between the respondent and M/s.HP is that of manufacture and buyer and merely because an inventory report is furnished to the manufacturer in regard to the sale of goods, it cannot be said that the appellant has rendered any services to M/s.HP. The decision of the ***Tribunal, Bangalore rendered in 2003 (162) E.L.T.399 (Tri.-Bang)*** relied in the grounds of appeal by the department, has held that the 1% discount does not fall in category of permissible discount to be excluded from the assessable value of goods manufactured by HP in terms of Section 4 of Central Excise Act, 1944. For this very same reason, the said discount, if any, has to be included in the assessable value by the manufacturer namely M/s.HP Ltd. Thus the discount is subject to payment of Central Excise duty. The same cannot be subject to service tax in the hands of respondent as this respondent has not rendered any service in regard to this 1% discount. The 1% value addition (discount) is a value addition on goods and is liable to excise duty and not for service tax. The adjudicating authority has considered all these in detail and has correctly dropped the demand.

5. Heard both sides.

6.1 The allegation in the Show Cause Notice is that the respondents are liable to pay service tax on 1% discount given by M/s.HP. It is the case of department that since the respondents are giving weekly reports with regard to sales / inventory to HP, this amounts to services in the form of market research and therefore the said discount is a commission received for providing Business Auxiliary Service. For better appreciation, the definition of "Business Auxiliary Service" as it stood during the relevant period is reproduced as under :-

"As per Section 65 (19) of Finance Act, 1994 "Business Auxiliary Service" means any service in relation to –

(i) promotion or marketing or sale of goods produced or provided by or belonging to the client; or

(ii) promotion or marketing of service provided by the client; or

(iii) any customer care service provided on behalf of the client; or

(iv) … … … … … … … … …

(v) … … … … … … … … …

(vi) provision of service on behalf of the client; or

(vii) a service incidental or auxiliary to any activity specified in sub-clauses (i) to (vi), such as billing, issue or collection or recovery of cheques, payments, maintenance of accounts and remittance, inventory management, evaluation or development of prospective customer or vendor, public relation services, management or supervision, and includes services as a commission agent, but does not include any activity that amounts to manufacture of excisable goods.

Explanation.— For the removal of doubts, it is hereby declared that for the purposes of this clause, —

(a) " commission agent" means any person who acts on behalf of another person and causes sale or purchase of goods, or provision on receipt of services, for a consideration, and includes any person who, while acting on behalf of another person —

(i) deals with goods or services or documents of title to such goods or services; or

(ii) collects payment of sale price of such goods or services; or

(iii) guarantees for collection or payment for such goods or services; or

(iv) undertakes any activities relating to such sale or purchase of such goods or services;"

6.2 During the period of dispute the service tax was exigible only to the categories of services which were listed in Section 65 of the Finance Act, 1994. During the material period the value of taxable service for charging service tax was arrived at as under :

> "(1) Subject to the provisions of this Chapter, where service tax is chargeable on any taxable service with reference to its value, then such value shall, —
>
> (i) in a case where the provision of service is for a consideration in money, be the gross amount charged by the service provider for such service provided or to be provided by him;
>
> (ii) in a case where the provision of service is for a consideration not wholly or partly consisting of money, be such amount in money as, with the addition of service tax charged, is equivalent to the consideration;
>
> (iii) in a case where the provision of service is for a consideration which is not ascertainable, be the amount as may be determined in the prescribed manner.
>
> (2) Where the gross amount charged by a service provider, for the service provided or to be provided is inclusive of service tax payable, the value of such taxable service shall be such amount as, with the addition of tax payable, is equal to the gross amount charged.
>
> (3) The gross amount charged for the taxable service shall include any amount received towards the taxable service before, during or after provision of such service.
>
> (4) Subject to the provisions of sub-sections (1), (2) and (3), the value shall be determined in such manner as may be prescribed."

6.3 For the purpose of Section 67 ibid, the definition of "consideration" is defined as under :

(i) Any amount that is payable for the taxable services provided or to be provided;

(ii) Any reimbursable expenditure or cost incurred by the service provider and charged, in the course of providing or agreeing to provide a taxable service, except in such circumstances, and subject to such conditions, as may be prescribed;

(iii) Any amount retained by the lottery distributor or selling agent from gross sale amount of lottery ticket in addition to the fee or commission, if any, or, as the case may be, the discount received, that is to say, the difference in the face value of lottery ticket and the price at which the distributor or selling agent gets such ticket.

6.4 Duties of excise have been made leviable on goods manufactured or produced, under the provisions of the Central Excise Act, 1944, as amended. For the purpose of working out the duty of excise chargeable on any excisable goods, as per Section 4 of the Central Excise Act, inter alia, such value shall —

(a) in a case where the goods are sold by the assessee, for delivery at the time and place of the removal, the assessee and the buyer of the goods are not related and the price is the sole consideration for the sale, be the transaction value;

(b) in any other case, including the case where the goods are not sold, be the value determined in such manner as may be prescribed.

6.5 For the removal of doubts, *Explanation* to Section 4 (1) declares that that the price-cum duty of the excisable goods sold by the assessee shall be the price actually paid to him for the goods sold and the money value of the additional consideration, if any, following directly or indirectly from the buyer to the assessee in connection with the sale of such goods, and such price-cum-duty, excluding sales tax and other taxes, if any, actually paid, shall be deemed to include the duty payable on such goods.

6.6 For the purpose of Section 4 ibid, "transaction value" is defined 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."

6.7 Further clarity in respect of valuation for the purposes of levy of Central Excise duty is brought about in Central Excise Valuation Rules, 2000. So also, Service Tax (Determination of Value) Rules, 2006 have been introduced vide Notification No.12/2006-ST dt. 19.4.2006.

6.8 The important takeaway from these discussions on the differing nature of assessable value, one for the purpose of levy of Central Excise duty and the other for levy of service tax, is that they are two different and distinct entities. This indeed has to be so, since the purpose of levy of central excise duty is to levy tax on production or manufacture of excisable goods in India whereas service tax is a levy on service, which by its very intrinsic nature cannot then be an activity amounting to "manufacture" and subject to Central Excise levy.

6.9 The basic nature of service tax was dealt with by the Hon'ble Apex Court in the case of *All India Federation of Tax Practitioners Vs UOI* – 2007 (7) STR 625 (S.C.) wherein it was inter alia held as under :

> "**8.** As stated above, service tax is VAT. Just as excise duty is a tax on value addition on goods, service tax is on value addition by rendition of services. Therefore, for our understanding, broadly "services" fall into

> two categories, namely, property based services and performance based services. Property based services cover service providers such as architects, interior designers, real estate agents, construction services, mandapwalas etc.. Performance based services are services provided by service providers like stock-brokers, practising chartered accountants, practising cost accountants, security agencies, tour operators, event managers, travel agents etc."

The above interpretation was further amplified and reiterated by the Hon'ble Apex Court in their judgement in the case of *Association of Leasing & Financial Service Companies Vs UOI* - 2010 (20) STR 417 (SC) wherein it was inter alia held as under :

> ".....service tax is an economic concept based on the principle of equivalence in a sense that consumption of goods and consumption of services are similar as they both satisfy human needs. Today with the technological advancement there is a very thin line which divides a "sale" from "service". That, applying the principle of equivalence, there is no difference between production or manufacture of saleable goods and production of marketable/saleable services in the form of an activity undertaken by the service provider for consideration, which correspondingly stands consumed by the service receiver. It is this principle of equivalence which is inbuilt into the concept of service tax under the Finance Act, 1994. That service tax is, therefore, a tax on an activity. That, service tax is a value added tax. The value addition is on account of the activity which provides value addition, for example, an activity undertaken by a chartered accountant or a broker is an activity undertaken by him based on his performance and skill. This is from the point of view of the professional. However, from the point of view of his client, the chartered accountant/broker is his service provider. The value addition comes in on account of the activity undertaken by the professional like tax planning, advising, consultation etc. It gives value addition to the goods manufactured or produced or sold. Thus, service tax is imposed every time service is rendered to the customer/client. This is clear from the provisions of Section 65(105)(zm) of the Finance Act, 1994 (as amended). Thus, the taxable event is each exercise/activity undertaken by the service provider and each time service tax gets attracted......"

6.10 Viewed in this light, a value or consideration undisputedly forming part of assessable value for purposes of levy of central excise duty cannot then be also considered as part of the value of taxable service for levy of service tax. This is in keeping with the fundamental principle that the same activity cannot be considered as manufacture and subjected to excise levy and at the same time considered to be a service and subjected to service tax. In fact, the process amounting to "manufacture" is kept specifically out of the scope of Section 65 (19) of Finance Act, 1994 which prescribes service tax liability on processing of goods not amounting to manufacture.

6.11 It has been consistently laid down by the Tribunal, in a plethora of decisions, that consideration which is subject to payment of excise duty is not liable for payment of service tax liability. Some of such decisions, correctly cited by the Ld. Advocate for respondents, are as under :

1) Allengers Medical Systems Ltd. Vs CCE Chandigarh
2009 (14) STR 235 (Tri.-Del.)

2) Alidhara Texspin Engineers Vs CCE & Customs, Vapi
2010 (20) STR 315 (Tri.-Ahmd.)

3) Sharma and Associates Firetech Pvt. Ltd. Vs CCE Indore
2017 (51) STR 289 (Tri.-Del.)

4) Vidarbha Grindeers (P) Ltd. Vs CCE Nagpur
2015 (40) STR 331 (Tri.-Mumbai)

In *Jubiliant Industries Vs CCE Ghaziabad* – 2013 (31) STR 181 (Tri.-Del.), the Tribunal categorically held that same activity cannot be considered as manufacturing and subjected to Central Excise levy and also considered as service and subjected to Service Tax.

6.12 Even in the post-negative list regime effective from 1.7.2012, "any process amounting to manufacture or production of goods" is also falling under one of the Negative list of Services under Section 66D (f) of the Finance Act, 1994 as amended.

6.13 As far back as 26.03.2001, a show cause notice had been issued to M/s.Hewlett Packard proposing to include the very same 1% commission amount, which is the subject matter in this appeal, as part of the assessable value for levy of Central Excise duty. The adjudicating Commissioner therein had concluded that 1% commission amount was not eligible deduction and Central Excise duty was to be paid on the said component. This decision was upheld by the Tribunal as mentioned above vide their decision on 09.05.2003 reported in 2003 (162) ELT 399 (Tri.-Bang.) and subsequently affirmed by the Hon'ble Apex Court on 06.02.2004 [2004 (167) ELT A137 (SC)]. The department should have taken precautionary measures to issue periodical SCNs on the very same issue from time to time pending final decision in the matter. This being the case, we are unable to fathom the how and why of the department having taken a stand contrary to that settled by the Hon'ble Apex Court on 06.02.2004 and deemed it proper to issue a SCN taking an antipodal and opposite proposition. Unless the said judgment of the Supreme Court has been further reviewed, or for that matter, the ratio laid down had been overturned by the Hon'ble Apex Court itself, which is certainly not the case here, there is no justification for the department to have initiated the impugned proceedings. In our view, seeking to tax a particular commission amount under excise duty on the one hand, and in respect of the identical transaction, demanding service tax liability on the very same amount, is nothing but an exercise in incredulity.

6.14 In any case, we do not find that there is any *quid pro quo* for this amount between the respondent and M/s.HP Ltd. so as to become an activity exigible to service tax under Business Auxiliary Service. We therefore do not find any infirmity with the following conclusions of the adjudicating authority :

13.8 To be taxable under the above categories the activities specified above should have been rendered on behalf of another person and the service provider should have been instrumental for causing sale or purchase of goods or services. In other words the activities should have been carried out as between a principal and an agent. Whereas in the instant case involving a transaction of sale or purchase, the relationship between Notice and HP was on principal to principal basis. Therefore the Noticee could not be construed as 'Commission Agent" and accordingly the 1% discount offered to them could not be regarded as Commission earned in the transaction.

14. In this connection I take support of the decision of Hon'ble CESTAT in the case of M/s.Pratap Singh & Sons Vs Commissioner of Central Excise, Mumbai-I, as reported in 2007 (5) STR 389 (Tri-Mumbai), wherein it was held as follows :

5. The appellant have purchased and sold from the principals as their distributor. On purchase of the goods, the ownership changes to the appellant and as owner, dealer or transferee of the goods, ***it was in his own interest to promote the sales activities and to make advertisement and keep the trained salesman and hence, they are part of the dealers job.*** *This cannot be treated as service rendered to the principals namely the manufacturers. If there was any special relationship or additional consideration leading to charging of lower price to the appellant, at the most, it can become an issue relating to valuation of the goods.* ***The discount given by the manufacturer cannot be taken as service charges.*** *The decision of the Commissioner (Appeals) in treating the appellant as provider of clearing and forwarding service is erroneous.*

15. From the above findings, I hold that there was no taxable services rendered by the Noticee in the said transaction. The value of consideration that should be reckoned for the purpose of taxation under Section 67, should relate to only to taxable services and not to any other amount and therefore the service tax demanded in the above said two notices does not arise and therefore liable to be dropped.

6.15 Further, there does not appear to be any dispute or allegation that the respondents were not filing the prescribed statutory returns with the department. Ld. Advocate for respondents has also contended that the department has issued notices on different dates namely, 07.12.2005, 23.02.2007, 14.02.2008, 27.02.2009 and 23.06.2009 for carrying out internal audit as well as CERA audit at their registered premises and the audit was conducted on 02.01.2006 to 04.01.2006, 12.03.2007 to 14.03.2007, 03.03.2008 to 05.03.2008, 26.03.2009 to 27.03.2009 and 06.07.2009 to 10.07.2009; that in the process of auditing, all the transactions were duly and properly audited by the Department; that such neither any attempt was made to conceal the facts nor to hide any information and the respondent had acted diligently in accordance with the provisions of law; that therefore it is submitted that there is no suppression of any information or facts. We find merit in these contentions also.

7. From the findings, discussions and conclusions herein above, we hold that the Commissioner has correctly applied the law after appreciating the facts of the case. We find no grounds to interfere with the impugned order. The appeal is dismissed. The miscellaneous application for change of cause title filed by department is allowed.

(Operative part of the order pronounced in open court)

(Madhu Mohan Damodhar)
Member (Technical)

(Sulekha Beevi C.S)
Member (Judicial)

VSR