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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066

CUSTOMS APPEAL BRANCH

Appeal No. ST/1477/2010 - CU[DB] Date **23/11/2011**

Assistant Registrar
C.E.S.T.A.T, New Delhi

To :
M/S BRIJ MOTORS PVT. LTD.,

A-1, LAWYER'S COLONY AGRA.

M/S BRIJ MOTORS PVT. LTD., Appellant

Vs

C.C.E. KANPUR Respondent

I am directed to transmit herewith a certified copy of **Final order No.ST/601/ 2011 CU[DB]** dated 22.11.2011 passed by the Tribunal under **Section 129, (B) of the Customs Act,1962 & Financial Act 1994 relating to Service Tax**

Assistant Registrar
(Customs Appeal Branch)

Copy to :

1. Respondent
C.C.E. KANPUR
117/7, SARVODAYA NAGAR,
KANPUR 208005.

2. Adv. / Consult
MR.BRIJESH VERMA & ASSOCIATES
609, VITH FLOOR, MARUTI PLAZA, BEHIND
CENTRAL EXCISE DEPTT, SANJAY PLACE,AGRA.

3. C.D.R
4. Bar association, CESTAT, New Delhi
5. Director Publications, Customs, Excise. I.P. Estate, New Delhi
6. M/s Centax Publictions Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi -
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,Above Star India Bazar,Satellite Road, Ahmedabad-15
10. LAWCRUX Advisors Pvt Ltd, LAW House,1-8,Sector - 10, Faridabad 121003 (Haryana)
11. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor,Vasant Arcade,Nelson Mandela Road, Vasant Kunj, New Delhi - 110070
12. Office Copy
13. Guard file

Assistant Registrar
(Customs Appeal Branch)

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI
Court No.III

ST/Appeal No.1477/2010

(Arising out of order in appeal No.294/ST/Appl/KNP/2010 dated 22.6.2010 passed by the Commissioner of Customs & Central Excise, Kanpur)

Date of Hearing:30.6.2011
Order pronounced on: 22-11-2011.

For Approval and signature:

Hon'ble Mr D.N. Panda, Member Judicial
Hon'ble Mr.Mathew John, Technical Member

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1. Whether Press Reporters may be allowed to see The order for publication as per Rule 27 of the CESTAT(Procedure) Rules, 1982?

2. Whether it would be released under Rule 27 of the CESTAT (Procedure) rules, 1982 for publication in any authoritative report or not?

3. Whether their lordships wish to see the fair copy of the order?

4. Whether order is to be circulated to the Department Authorities?

M/s Brij Motors Private Ltd — Appellants

Vs

CCE, Kanpur — Respondent

Appeared for the Appellant: Shri Brijesh C. Verma Rep.
Appeared for the Respondent: Shri Sumit Kumar,SDR
Shri Amrish Jain, SDR

Coram: **Hon'ble Shri D.N. Panda, Member Judicial**
Hon'ble Shri Mathew John, Member Technical

Final ORDER No. ST/601/11

Per Mathew John:

The Appellants had entered into agreement with ICICI Bank to provide sourcing and referral business to promote market loan from the bank to potential customers by setting up "ready to interact" outlets in the premises of the Appellants who is in the primary business of selling automobiles. For loan taken by the customers, these appellants got commission from the bank. The issue in this appeal is whether service tax is to be paid on such commission categorizing the activity of the Appellants as "business auxiliary service".

2. The entry for Business Auxiliary service in Finance Act, 1994 during 01-07-2003 to 09-09-2004 was as under:-

"Business Auxiliary Service' means any service in relation to:-

a) Promotion or marketing or sale of goods produced or provided by or belonging to the client; or
b) Promotion or marketing of service provided by the client; or
c) Any customer care service provided on behalf of the client; or
d) Any incidental or auxiliary support service such as billing, collection or recovery of cheques, accounts and remittance, evaluation of prospective customer and public relation services, and includes service as a commission agent, but does not include any information technology service.

3. The entry for Business Auxiliary service from 10-09-2004 is as under:

"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) Procurement of goods of services, which are inputs for the client; or
v) Production of goods on behalf of the client; or
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 information technology services and any activity that amounts to manufacture within the meaning of clause (f) of Section 2 of the Central Excise Act, 1944."

4. The department made out a case that their activity amounted to "Business Auxiliary Service" even for the period prior to 10-09-2004 and issued a Show Cause Notice dated 31-07-2007 demanding such tax for the period 20-10-04 to 18-12-07. The adjudicating authority examined the matter and issued an order confirming the tax demanded along with interest and also imposing penalties under sections 76, 77 and 78 of Finance Act 1994. Aggrieved by the order the Appellants filed an appeal with the Commissioner (Appeal) who rejected their appeal. The Appellant is challenging this order by Commissioner (Appeal).

5. The Appellants contest that their service is appropriately classifiable under Business Support Service. Such service came into tax net only from 01-05-06. He relies on the decision of the Tribunal in the case of S. R. Kalyan Krishnan Vs. CCE-2008 (09) STR 255 in this regard. He further points out that the adjudicating authority and the Appellate Authority did not examine the issue that out of the disputed amounts received Rs. 59436/- related to value of spare parts received from Hundyai Motors, incurred by them for executing the warranty obligations. He also has the contention that Rs. 191058/- was received as insurance Commission from Smt. Rekha Sharma which amount is already taxed in the hands of the insurance agent. There is also an argument regarding amounts paid to the person taking loan as incentive for taking the loan through them which amounts are called as subventions. Though these issues were raised before the

adjudicating authority, he did not examine these issues. These issues have not been examined by the Commissioner (Appeal) either.

6. He also submits that Commissioner (Appeal) did not appreciate the following grounds properly:-

(i) The demand was time barred;

(ii) In identical situation the Tribunal had dropped demand in many cases like that of,

(a) Bridgestone Financial Services Vs. CST- 2007 (8) STR 505 (2007)

(b) Chamundeswari Associates Vs. CCE -2008 (12) STR 623.

(c) Car World Autoline Vs. CCE-2007 (83) RLT 846

(d) Prabhat Financial Services Vs. CCE-2008 (9) STR 272.

7. The entry prior to 10-09-2004 covered "promotion or marketing of services provided by client". In this case the Banks/NBFCs were the client of the Appellant and the Appellant was promoting the services namely sanctioning of car-loans to the loan seekers. This part of the definition has remained the same prior to 10-09-2004 and thereafter. Clause (iv) of the definition of this service amplifying the scope of the primary entries to cover "collection or recovery of cheques, accounts and remittance, evaluation of prospective customer" also was in place prior to 10-09-2004. From 10-09-2004 "development of prospective customer" also is brought in. But even without this additional expression in the definition, the activities carried out by the Appellant was covered within the expression of "promotion and marketing of services provided by the client". Actually this matter is no longer res integra because the Tribunal has examined this issue and held that such services were covered under the scope of the definition of "Business Auxiliary Service" prior to 10-09-2004 as decided in the last para of the decision of the Tribunal in Bridgestone Financial Services Vs. CST- 2007 (8) STR 505 (2007). The Ld SDR points out that this matter is decided in favour of Revenue in the case of Roshan Motors Ltd Vs. CCE-2009 (13) STR 667 (Tri-Del).

8. Now the question to be examined is whether Notification 14/2004-ST or Notf 25/2004-ST provide any exemption to the tax liability of the Appellant. These claims are not seen in the Appeal Memo. But this case was argued after the case in City Motors and Financial Services was argued and the Counsel in this case adopted all the arguments raised by the counsel in that case.

9. Notification 14/2004-ST dated 10-09-2004 reads as under:

> *"In exercise of the powers conferred by sub-section (1) of section 93 of the Finance Act, 1994 (32 of 1994), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts taxable service provided to a client by a commercial concern in relation to the business auxiliary service, in so far as it relates to,-*
>
> *(a) procurement of goods or services, which are inputs for the client;*
>
> *(b) production of goods on behalf of the client;*
>
> *(c) provision of service on behalf of the client; or*
>
> *(d) a service incidental or auxiliary to any activity specified in (a) to (c) above,*
>
> *from the whole of the service tax leviable thereon under section 66 of the said Finance Act:*
>
> *Provided that nothing in this notification shall apply to,-*
>
> *(i) a factory registered under or governed by the Factories Act, 1948 (63 of 1948);*
>
> *(ii) a company established by or under the Companies Act, 1956 (1of 1956);*
>
> *(iii) a partnership firm, whether registered or not registered;*
>
> *(iv) a society registered under the Societies Registration Act, 1860 (21 of 1860) or under any law corresponding to that Act in force in any part of India;*
>
> *(v) a co-operative society established by or under any law;*
>
> *(vi) a corporation established by or under any law; or*
>
> *(vii) a body corporate established by or under any law,*

unless such factory, company, partnership firm, society, co-operative society, corporation or body corporate, as the case may be, provides any business auxiliary service in respect of any activity specified in (a) to (d) above in relation to agriculture, printing, textile processing or education."

10. The Appellant is not in the business of providing any service of the category specified at (a) or (b) in the opening paragraph of the above notification. The Appellant is not providing any service to the loan seekers but are providing service to the bank. There is no contract between the loan seekers and the Appellant. Contract is between Appellant and the Banks. Payment for the service is made by the Appellant. So the activity does not fall under item (c). So the Appellant is not eligible for exemption under the above notification

11. Now the scope Notification 25/2004-ST dated 10-09-2004 is to be examined. This notification reads as under:

> *"In exercise of the powers conferred by sub-section (1) of section 93 of the Finance Act, 1994 (32 of 1994), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts that portion of the value of following taxable services, namely-*
>
> *(a) services provided to a customer, by a commissioning and installation agency in relation to erection;*
>
> *(b) services provided to any person, by a sub-broker in connection with the sale and purchase of securities listed on a recoginsed stock exchange;*
>
> *(c) services provided to any person by a multisystem operator in relation to cable services;*
>
> *(d) services provided to a client by a commercial concern in relation to the following business auxiliary services namely,-*
>
> *(i) procurement of goods or services, which are inputs for the client;*
>
> *(ii) production of goods on behalf of the client;*
>
> *(iii) provision of service on behalf of the client; or*
>
> *(iv) a service incidental or auxiliary to any activity specified in (i) to (iii) above;*

(e) services provided to a customer by anybody corporate or commercial concern, other than a banking company or a financial institution including a non-banking financial company, in relation to banking and other financial services;

(f) services provided to a customer by a banking company or a financial institution including a non-banking financial company in relation to financial services namely lending; issue of pay order, demand draft, cheque, letter of credit and bill of exchange; providing bank guarantee, over draft facility, bill discounting facility, safe deposit locker, safe vaults; operation of bank accounts;

(g) services provided to any person by a tour operator, other than a tour operator engaged in the business of operating tours in a tourist vehicle covered by a permit granted under the Motor Vehicles Act, 1988 or rules made thereunder, in relation to a tour; and

(h) service provided to a policy holder, by an insurer carrying on life insurance business in relation to the risk cover in life insurance,from the whole of service tax leviable thereon under section 66 of the said Act, which is received by the service provider prior to the 10th day of September, 2004."

12. This notification has two peculiarities as compared to ~~similar~~ usual exemption notifications. Firstly this notification is for value of taxable services rather than the service itself. Secondly the notification provides exemption for value of services received prior to 10-09-2004.The appellants are contesting that they are eligible for exemption as per clause (e) of the Notification. They submit that though their service is being classified by revenue in "Business Auxiliary Service", their service is in relation to banking and other financial service and they should be given the benefit of this notification.

13. This is a matter which was examined by the Hon'ble Kerala High Court in the case of CCE Versus Car World Autoline-2010 (17) S.T.R. 449 (Ker.) where the Court held that the exemption is available only to an assesse providing banking and Financial Services.

14. The period involved in this appeal is 20-10-2004 to 18-12-07. The Show Cause Notice was issued on 21-02-2008. As can be seen from the discussions above the matter was being interpreted by

judicial forums in different ways as may be seen from the decisions quoted by the Appellants. The Higher Courts have been taking the view that in such situations the extended period of time cannot be invoked for raising demand. Even in the case of Bridgestone Financial Service the Tribunal has given the benefit for such reason. So we are of the view that the demand in this case can be sustained only to the extent covered in the normal period of limitation. In such a situation penalties are not imposable either.

15. Further issues relating to value of spare parts, payments received out of insurance commission and the taxability of amounts of subventions need to be examined. For these purposes the matter is remanded to the adjudicating authority.

16. So we partially allow the appeal filed by the Appellants and the matter is remitted back to re-quantify the tax due from the appellants.

(Pronounced on----22-11-2011--------)

(D. N. Panda)
Member Judicial

(Mathew John)
Member Technical

MPS*