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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/727 /2007 - CU[DB]   Date **08/04/2011**

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

To :
C.C.E. CHANDIGARH

C.R. BUILDING, PLOT NO. 19, SECTOR 17-C,
CHANDIGARH 160017

C.C.E. CHANDIGARH   Appellant

Vs

M/S KRISHNA AUTOMOBILES   Respondent

I am directed to transmit herewith a certified copy of **Final order No.ST/150/ 2011 CU[DB]** dated 07.04.11

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
M/S KRISHNA AUTOMOBILES
PLOT NO 177/E, INDL-AREA,
PHASE-I, CHANDIGARH.

2. Adv. / Consult : Mr. Nikhil Agarwal, Adv. Building No 10, 18th floor Tower-C DLF cyber city Gurgaon
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. M/s. Deeparchie Publications, M-93, Marg. 46, Saket, New Delhi 110017
9. Taxmann Allied Service Pvt Ltd., 59/32, New Rohtak Road, New Delhi - 110005
10. Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road, Ahmedabad-15
11. LAWCRUX Advisors Pvt Ltd, LAW House,1-8,Sector - 10, Faridabad 121003 (Haryana)
12. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor,Vasant Arcade,Nelson Mandela Road, Vasant Kunj, New Delhi - 110070
13. Office Copy
14. Guard file

Assistant Registrar
(Customs Appeal Branch)

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI
Court No.IV

ST/Cross No.53/2008, ST/Appeal No.727/2007

(Arising out of order in appeal No.404/CE/CHD/07 dated 17.9.07 passed by the Commissioner of Central Excise (Appeals), Chandigarh)

Date of Hearing : 2.2.2011
Date of Pronouncement: 7.4.2011.

For Approval and signature:

Hon'ble Mr D.N. Panda, Judicial Member
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?

CCE, Chandigarh — Appellants

Vs

M/s Krishna Automobiles — Respondent

Appeared for the Appellant: Shri Sumit Kumar, SDR
Appeared for the Respondent: Shri Nikhil Agarwal, Advocate

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

Final ORDER No. ST/150/11

Per Mathew John:

This is an appeal by Revenue against the order of Commissioner of Central Excise (Appeals), Chandigarh who reversed an order passed by the Adjudicating Authority.

2. The matter relates to the period 01-07-2003 to 08-07-2004. The question involved is whether the service provided by the Respondent is eligible for exemption under Notification 13/2003-ST Dated 20-06-2003. This notification provides exemption for services provided by Commission Agents. The Revenue contests that the Respondents were not acting as a commission agent. The Respondent contests that they were providing the services of a Commission Agent.

3. The Respondents have an agreement with M/s JCB India Ltd (hereinafter referred to as "JCBI"), who manufacture and sell Construction & Earthmoving Machine equipment.

4. The Respondents do lot of activities to promote sales of the products in a territory assigned to them. For some part of the sales they are acting as an Authorized Dealer. In such cases they buy the machines from JCBI and sell it to customers after loading a profit margin as agreed to between the parties. This part of the sales is not presently before us in any dispute. The dispute is about that part of the sales effected by JCBI directly in the territory assigned to the Respondent. For such sales the Respondents get a commission from JCBI as a percentage of the value of the sales. The question is whether such commission is eligible for exemption under notification 13/2003-ST.

5. The question before us is determinable based on the contract between the two parties and hardly on anything else. So we

consider it to proper to reproduce the relevant portion of the contract which is reproduced below:

"DEALER AGREEMENT

This Agreement ("Agreement") is entered into at New Delhi on this 10th day of September 2003

By and between

JCB INDIA LIMITED, a company registered under the Companies Act of 1956, having its registered office at A-36, Mohan Co-operative Industrial Estate, Mathura Road, New Delhi - 110044 (hereinafter referred to as JCBI, which expression shall, unless repugnant to the context, mean and include its successors and assigns): and

M/s Krishna Automobiles, a partnership firm having its Head Office at 177-E, Industrial Area, Phase-I, Chandigarh (hereinafter referred to as "KRISHNA" which expression shall, unless repugnant to the meaning and context, mean and include its successors and permitted assigns (legal heirs, executors in case of individual)

Jointly referred to as Parties and individually as Party.

Whereas JCB is inter alia engaged in manufacture of Construction & Earthmoving Machines viz. Excavator-cum-Loaders. Excavators, Loaders & Loadalls, including spare parts and accessories thereof ["Products"] and is desirous of marketing its Products throughout the territory of India; and

Whereas, JCBI is desirous of appointing an Authorized Dealer for sale and service of its Products (more specifically detailed in Schedule 1 attached hereto) on the terms and conditions contained herein; and

Whereas, KRISHNA has represented to JCBI that it is competent to discharge the obligations under this Agreement and possesses the requisite infrastructure to effectively discharge the obligations of an Authorized Dealer, and JCBI acting on the said representation hereby appoints KRISHNA as its Authorized Dealer, on the terms and conditions contained hereunder.

Now, therefore the Parties agree and covenant as under:

A APPOINTMENT OF DEALER

1. *JCBI hereby appoints KRISHNA as its Authorized Dealer (hereinafter referred to as "Dealer") which expression shall mean and include its branches/outlets, agents acting under and authorized by it (details interalia, per Schedule II & III), for the Products as specified in Schedule 1 attached hereto for the territory of Punjab-1 comprising of whole of Chandigarh UT, Districts of Punjab, Haryana & Himachal Pradesh as listed in Annexure-A, on the terms and conditions mutually agreed and covenanted herein and the Dealer hereby accepts such appointment and agrees to undertake the responsibilities and obligations hereunder:*

2. *Parties unequivocally agree that JCBI in its sole discretion shall be entitled to or in any manner curtail, delete or in any manner alter the geographical limits of the Territory without assigning any reasons or incurring any liability whatsoever, after giving a prior written notice of one month to the Dealer.*

3. *Dealer undertakes not to directly or indirectly, independently or jointly or otherwise in any manner promote, sell the Product outside the territory without prior written permission of JCBI. This is without prejudice to JCBI's other rights/remedies in the matter.*

4. *Dealer agrees that notwithstanding anything contained in this Agreement, JCBI has a right to market, sell and carry out after sale service of Products directly or through any other dealer within the Territory.*

5. *JCBI as its sole discretion may discontinue or change design of Products without incurring any liability for Products ordered on or delivered by JCBI.*

OBLIGATIONS OF THE DEALER

6. *The Dealer shall make best possible efforts to promote and develop the market for sale of Products within its Territory.*

7. *The Dealer undertakes not to deal in any manner (i) the products which are similar to the 'products' or JCBI or its competing products including parts and falling within the scope of construction, earth moving and mining equipment, as understood in the industry.*

8. *The Dealer shall render an efficient after sale service for the Products within the Territory, as per the guidelines issued by the JCBI from time to time.*

9. *The Dealer shall maintain*
   - *(a) Premises suitable for display, storage/sale and service of Products as per the satisfaction and specification of JCBI and shall not utilize the said premises for the purpose other than which is specified expressly in this Agreement.*
   - *(b) Adequately trained staff for marketing and selling of Products and all necessary mechanical and engineering infrastructure and skilled manpower to carry out repairs, replacement and after sale service of Products, as per specifications of JCBI. The*

establishment of Dealer and the infrastructure therein shall be operational during all normal business hours and shall be subject to periodical inspection by JCBI.

10. The Dealer shall maintain and display adequate signs in order to identity itself as Authorized Dealer of Products of JCBI. Each sign shall be of good appearances, in a prominent and appropriate location and shall be strictly in conformity with the Corporate identity Policy/Manual as enforced by JCBI from time to time.

11. The Dealer shall furnish to JCBI, in formats prescribed by JCBI, detailed statement of its financial status and its business activity including sale reports and or such other reports/statements as JCBI may ask for, from time to time.

12. The Dealer shall, at its own cost, maintain a stock of the Products as is deemed adequate by JCBI for effective sale, after sale service and repairs of the Products, to be carried out as per the guidelines issued by JCBI from time to time.

13. The Dealer shall at all time keep available, in good condition, adequate number of all models of Products for purpose of demonstration to potential customer, if so desired by JCBI.

14. The Dealer shall, to the satisfaction of JCBI, set up an efficient, effective and speedy mechanism for receipt and disposal of complaints against the Products and request regarding sale, service and repair of Products.

15. The Dealer shall utilize only such spare parts for sale; servicing, repair or replacement as are supplied by JCBI or so authorized for said use by JCBI.

16. The Dealer shall always conduct his business with integrity and with good business sense and shall not in any case act in any manner detrimental to the interest and goodwill of JCBI.

17. The Dealer shall permit the authorized representative of JCBI, at all reasonable times, to inspect its premises, stocks, books of accounts. Dealer shall preserve all records for at least eight preceding years and the records of Dealer may be examined and audited by JCBI at such intervals as may be deemed fit by JCBI. The dealer will be obliged to maintain proper accounts and furnish the copies thereof to JCBI after end of each year or at the frequency as required by JCBI.

18. The Dealer shall keep confidential all information, proprietary or otherwise, technical, financial or otherwise received by him from JCBI under this Agreement and shall not disclose the same to anyone, save as necessary to execute this Agreement. Any breach hereof by Dealer or Personnel shall constitute a material breach of this Agreement.

19. Dealer may with prior written consent of JCBI and whenever found necessary and expedient by JCBI, open branches/outlets which shall also be bound by the terms and condition of this Agreement.

C. *PURCHASE ORDER AND DELIVERY*

20. JCBI shall make all reasonable efforts to fulfill the orders accepted.

21. The complete payment towards the Products ordered shall be made in a manner acceptable to JCBI as per the *policy communicated by JCBI to dealer from time to time. Any delay in remitting full payment by the due date shall entail overdue interest liability on the dealer.*

In case the Dealer refuses to accept delivery of the Products for any reason, whatsoever, the Dealer shall return to JCBI at its designated place the Products, as its own cost (including refund of freight and insurance cost incurred by JCBI for dispatch from JCBI point to the dealer) and under transit insurance, within 7 days from the refusal to accept the Products. The Parties agree that the obligation of the Dealer to return the Products to JCBI is an addition to and without prejudice to other remedies available to JCBI under law.

22. *The Dealer represents and warrants that the Products ordered for by the Dealer are for sale in the ordinary course of business and Dealer has complied with all legal pre-requisites for such sales. Such representation shall form part of each order placed with JCBI.*

23. *The dealer shall provide for adequate capital funds, lines of credit and net worth sufficient to fulfill its obligations under their Agreement, as per the guidelines established by JCBI and communicated to the Dealer from time to time.*

24. *JCBI may, in its sole discretion and absolute discretion, require the Dealer and the Dealer shall furnish a security to JCBI on the terms and conditions as specified by JCBI. The security may carry a fair rate of interest.*

The Dealer undertakes and agrees on the lien of JCBI on the machines and parts in Dealer stock and on the sundry debtors of the Dealer with the aim to cover the Exposure of the JCBI on the Dealer in terms of outstanding *payments for the Product supplies and JCBI would have an absolute liberty to exercise their right in this regard to recover their dues at any time on JCBI's sole discretion. This in without prejudice to additional security which may be sought by JCBI at its discretion in terms of aforesaid clauses of the Agreement.*

25. Notwithstanding anything to the contrary contained in this Agreement Dealer will be entitled to a margin on all such Products of the JCBI which are sold by the Dealer at such rates as may be decided by the JCBI from time to time. JCBI will charge the dealer what is described as the dealer's net price. The dealer will be obliged to sell the products at a price not higher than the recommended retail price as fixed by JCBI. The recommended retail price is the basic price charged by the dealer net of any taxes. The dealer may also be entitled to an overriding commission in line with the policy announced by JCBI from time to time on this matter on the products directly retailed by JCBI in the territory wherein the essential principle would be that the dealer is actively involved in the process of order procurement and payment collection in favor of JCBI.

26. The terms of sale by JCBI will be on ex-Works/Depot basis. Products ordered by the Dealer and delivered by JCBI to the common carrier shall tantamount to delivery of the product to the authorized transporter of the dealer and JCBI shall not be responsible for any delay or damage in shipment.

The dealer shall within 7 days of receipt of the Products notify JCBI of any defect in or damage, shortage to the Products, falling which the Products shall be deemed to have reached in good condition and free from any damage or defect and the Dealer shall have no legal *or other recourse against JCBI, save as except expressly/provided hereunder.*

27. The Dealer will ensure that there is compliance of all statutory requirements emanating from sales made by JCBI to the dealer or to the customer within the dealer territory and will include collection of statutory Form C / D etc.

28. Notwithstanding anything contained in the above, JCBI's obligations under this section will be subject to the force majeure clause i.e. any liability on JCBI will be excluded on account of any cause beyond the control of JCBI, including act of God or that of any law, rule regulation or Govt. or statutory policy.

28A The provisions mentioned hereinabove are also applicable for all such orders, collected by the dealer on behalf of the company and forwarded to JCBI for execution. The dealer is liable to oversee effective delivery of products and collection of payments and any other statutory forms and dues, if any, favouring JCBI and forwarding the same to JCBI forthwith.

D WARRANTY

29. JCBI shall from time to time notify Dealer of its warranty policy on the Products and the obligations of the Dealer thereunder and the Dealer shall comply with the said policy both in letter and in spirit.

30. Each Product shall be dispatched by JCBI in forms with the Warranty Policy and there shall be no other warranty on the Products whether express or implied as to the merchantability or fitness of the Product.

31. *The Dealer shall at the time of sale of Product forward the Warranty Certificate issued by JCBI, to the end user and shall affix his stamp thereon.*
Any claim under the warranty shall be made in the format prescribed by JCBI and within the time limit prescribed in the Warranty Policy.

D. JCBI – DEALER RELATIONSHIP.

32. *It is expressly understood and agreed by and between JCBI and the Dealer that their business relation is not that of a Principal - Agent but is on a Principal to Principal basis. The Dealer shall not expressly or by implication or conduct, under any circumstance represent to be an agent of JCB.*

33. *This Agreement does not in any manner purport to create any labour management relation between the Dealer and JCBI or between the dealer. Personnel and JCB and in no circumstances will the personnel of the Dealer be considered employees, servants or agents of JCBI.*

E. INTELLECTUAL PROPERTY RIGHTS

34. *The Dealer unequivocally agrees that the Trademarks, Brand names and other intellectual Property Rights of JCBI are the exclusive Property of JCBI and any right to use such property does not vest in the Dealer any right, proprietary or otherwise, in the intellectual Property Rights of JCBI.*

35. *The Dealer hereby undertakes;*

a) *Not to use the Trademarks or Brand Names or JCBI in any manner not so authorized by JCBI and shall use them only as authorized by JCBI,* *independent of any other Brand Name or Trade Names.*

b) *Not to use the Trademarks and Brand Names of JCBI in any manner detrimental to the name, goodwill or intrinsic value of JCBI Trade Marks and Brand Names.*

c) *Not to tamper with or in any manner alters or modifies the Trademarks and Brand Names affixed to the Products.*

36. *The Dealer shall immediately notify JCBI as to any misuse or unauthorized use of JCBI Trade Mark and Brand Names within his territory and shall assist JCBI, in any manner so required by JCBI, to contest such misuse or unauthorized used.*

37. *The Dealer shall, forthwith stop use of any or all Trade Marks and Brand Names of JCBI, upon termination / expiry of this Agreement.*

38. *The Dealer undertakes to hold in Trust, for and on behalf of JCBI, any and all intellectual Property of JCBI that may come into its possession.*

G. INDEMNITY

39. *The Dealer undertakes to indemnify and hold harmless JCBI against any losses, damages, penalties, third party liabilities arising out of any proceeding or actions arising out of or in connection with.*

a. *Any act of omission or commission or failure on part of the Dealer or otherwise to obtain any requisite permit/permission to comply with any mandate of law, in force from time to time.*

b. *Any damage, loss arising out of any act of omission or commission on the part of Dealer or his personnel;*

c. *Any unauthorized use or misuse of any Trade Mark, Brand Name, intellectual or other property of JCBI;*

d. *Any damage, claim, loss arising out of any breach of any of the terms of this Agreement and*

e. *Any third party claim or liability arising out of or in connection with any act of omission or commission on part of the Dealer, its agents, employees, servants and persons authorized by Dealer.*

f. *Any breach of the confidentiality clause contained herein.*

g. *The remedy of indemnification under this clause is in addition to and not in derogation of any other remedies available to JCBI under law.*

40. *The Dealer hereby unequivocally agrees and covenants that it shall have no claim against JCBI, save as expressly provided herein."*

6. There are more covenants in the agreement but those relate to termination of agreement and are hardly relevant for deciding the issue on hand. So those covenants are not reproduced.

7. At this stage it is proper to see the definition at section 65 (19) of Finance Act 1994, during the relevant time, relating to "business auxiliary service" under which the Revenue contests that the service will fall. The definition reads as under:-

> "(19) "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;

(iii) any customer care service provided by the client; or

(iv) any incidental or auxiliary support service such as bill, collection or recovery of cheques, accounts and remittances, evaluation of prospective customer and public relation services,

[*Explanation.*— For the removal of doubts, it is hereby declared that for the purposes of this clause, *'information technology'* means any service in relation to designing, developing or maintaining of computer software, or computerized data processing or system networking, or any other service primarily in relation to operation of computer systems"

8. Both Revenue and the Respondent agree that the service will fall within the scope of the above definition at 19 (i) above.

9. The other legal provision that is to be examined is Notification 13/2003-ST which is the real bone of contention. The text of the notification is reproduced below.

"Notification No. 13/2003-Service Tax

In exercise of the powers conferred by 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 the business auxiliary services provided by a commission agent from the service tax leviable thereon under sub-section (2) of section 66 of the said Act.

Explanation.- For the purposes of this notification, "commission agent" means a person who causes sale or purchase of goods, on behalf of another person for a consideration which is based on the quantum of such sale or purchase.

2. This notification shall come into force on the 1st day of July, 2003.

[F .No. B3/7/2003-TRU]"

10. Revenue relies on covenant 32 of the agreement reproduced above where it is specifically stated that either of the parties shall not act as an agent of the other. Since the Respondent could not have acted as an agent of JCBI, there cannot be a question of acting as a commission agent. Revenue also points out covenants 14, 15, A-9 etc to argue that the role of the Respondent was more than that of a Commission Agent

11. The Respondent on the other hand argues that they are satisfying each of the ingredients of the definition of Commission Agent in the notification. That is they-,

(i) cause sale of goods,
(ii) on behalf of JCBI
(iii) for a consideration which is based on the quantum of such sale.

12. On a careful scrutiny of covenant 25 of the agreement it can be seen that the Respondents are not causing the impugned sales. The impugned sales are caused by JCBI. Respondents are just given a compensation for his opportunity loss when JCBI directly sells to customers in the territory assigned to Respondents. The impugned sales are not made by the Respondents on behalf of JCBI. JCBI is directly selling the goods to customers. There is a consideration paid. This is for the efforts the Respondents make for popularising the products in the territory assigned to them and for the opportunity loss of not being able to get dealers margin if sales were made through the Respondents. This Commission is also for his efforts to procure the orders and in realization of sale proceeds. So the Commission cannot be called a sales commission.

13. We have examined the argument that the covenant 25 starts with the words "Notwithstanding anything to the contrary

contained in this Agreement". So it is argued that this covenant overrules covenant 32 which states that either of the party shall not act as the agent of the other. This is not an acceptable argument. Covenant 25 deals with dealer's margins. So the effect of the clause is that notwithstanding controls exercised by JCBI on final prices at which goods are sold, the Respondent will be eligible for a margin. Covenant 25 itself consists of 5 sentences. The notwithstanding clause applies only to the first sentence and not even to other sentences in the covenant. At any rate it cannot extend to covenant 32.

14. In the circumstances we are of the view that in the case of impugned sales made directly by JCBI in the territory assigned to the Respondents for which respondent is receiving commission under covenant 25 of the agreement, the Respondent is not acting as an agent of JCBI and the service provided cannot be considered as services provided by a commission agent.

15. We also note that none of the case laws quoted are on the issue in dispute. Some of the case laws quoted are in the matter of distinguishing the services of clearing and forwarding agent vis-à-vis commission agent. The issue in dispute depends on the terms of the contract. Since the terms of contracts in different cases will be different, there cannot be any uniform case law relating to such issues.

16. The Respondent has raised the argument that the demand is time barred. It is seen that these impugned Commissions were not reported in ST3 returns filed. An assessee on his own giving an interpretation of law and not bringing the relevant matters to the notice of the department will be a fit case for invoking extended period of time.

17. The Respondent has also raised the issue that the amounts realized has to be considered as cum-tax amount and tax liability should be re-computed on the basis of principle laid down in CCE Vs. Maruti Udyog Ltd-2002 (49) RLT1 SC. In this matter the

Respondent succeeds and the Revenue is directed to re-work the tax liability accordingly.

18. It is noticed that the order-in-original imposes penalty both under section 76 and 78 of Finance Act 1994. Since 10.5.2008, it is expressly provided in section 78 that penalties under section 76 and 78 cannot be imposed at the same time. Since these penalties are substantially for the same offence there is no reason to impose both the penalties even prior to that period. Therefore penalty under section 76 is waived. Penalty under section 78 will be equivalent to the tax liability as revised in terms of para 16 above.

19. Therefore the Appeal of revenue is partially allowed.

(Pronounced in the open Court on 7.4.2011.)

7.4.2011.
(D. N. Panda)
Member (Judicial)

7/4/11.
(Mathew John)
Member (Technical)