14

TELEGRAM : CEGCANAL
Website : www.cestat.gov.in

REGISTERED / AD
Email : delhi@cestat.gov.in

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

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

CUSTOMS APPEAL BRANCH

Appeal No. ST/46 /2008 - CU[DB]
ST/262/06, ST/CROSS/258/06

Date **29/06/2011**

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

To :
M/S AJMER AUTOMOBILES [P] LTD.
OPPOSITE POWER HOUSE, AJMER, RAJASTHAN

M/S AJMER AUTOMOBILES [P] LTD. Appellant

Vs

C.C.E. JAIPUR II Respondent

I am directed to transmit herewith a certified copy of **Final order No.ST/256-57 2011 CU[DB]** dated 28.06.11 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
C.C.E. JAIPUR II
N.C.R.BUILDING, STATUE
CIRCLE, "C" SCHEME, JAIPUR
302005.

2. Adv. / Consult
MR.A.K.BATRA & ASSOCIATES
A-36, FIRST FLOOR, RAJOURI GARDEN,
RING ROAD, N DELHI.

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)

IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi – 110 066.

COURT NO. IV

Date of Hearing : 22.2.2011
Date of Pronouncement: 28/6/11

Service Tax Appeal No. 262 of 2006 with Cross Objection 258 of 2006

[Arising out of the Order-in-Appeal No. 267(HKS)/ST/JPR-II/2006 dated 10.4.2006 passed by the Commissioner, Central Excise, Jaipur-II]

Coram:

Hon'ble Mr. Ashok Jindal, Member (Judicial)
Hon'ble Mr. Mathew John, Member (Technical)

1.	Whether Press Reporter may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	Yes
2.	Whether it would be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	~~No~~ yes
3.	Whether their Whether their Lordships wish to see the fair copy of the order?	Seen
4.	Whether order is to be circulated to the Department Authorities?	No

CCE, Jaipur — Appellant

Vs.

M/s Ajmer Automobiles (P) Ltd. — Respondent

Appearance:

Appeared for Appellant : Shri Sumit Kumar, DR
Appeared for Respondent : Shri Vikas, Advocate

Service Tax Appeal No. 46 of 2008

(Arising out of Order-in-Original No. 135/07-Commissioner(ST) dated 25.10.2007 passed by the Commissioner, Central Excise, Jaipur-II)

M/s Ajmer Automobiles (P) Ltd. — Appellant

Vs.

CCE, Jaipur-II — Respondent

Appearance:

Appeared for Appellant : Shri Vikas, Advocate
Appeared for Respondent : Shri Sumit Kumar, DR

CORAM: Hon'ble Mr. Ashok Jindal, Member (Judicial)
Hon'ble Mr. Mathew John, Member (Technical)

Final Order No. ST/256-257/11 dated 28.6.11

Per Mathew John:

In this proceeding two appeals and one cross objection are being decided. One is Appeal No. 262/2006 filed by the Department against Order-in-Appeal No.267 (HKS) CE JPR-II/2006 dated 10-04-2006 issued by Commissioner (Appeal), Jaipur-II. Against this Appeal M/s Ajmer Automobiles have filed cross-objection. The second Appeal ST/46/2008-SM filed by M/s Ajmer Automobiles (P) Ltd against the Order-in-Original 135/07-Commissioner (ST) dated 25-10-2007 passed by the Commissioner of Service Tax, Jaipur-II under section 84 of Finance Act 1994.

2. Both these Appeals originated from SCN C. No. V (ST) 187/AJM/2005 dated 10-08-2005 and the first decision was by Joint Commissioner vide Order No. 09/ST/JP-II/2005 - Joint Commissioner dated 25-11-2005. (In some places this date is shown as 23-12-2005 which is the date of issue of order whereas 25-11-05 is the date of the decision). The order portion is reproduced below.

"(i) I confirm the demand of Rs.2,43,406/- (Rupees two lakh forty three thousand four hundred and six only) payable on an amount of Rs.32,85,982/- (cum service tax valued) received by the assessee as commission from finance companies other than Maruti Finance under Section 73(1) of the Chapter V of the Finance Act, 1944 read with Section 67 of the Act and hold that the same is recoverable with interest as applicable under Section 75 ibid.

(ii) I drop the demand of Rs.1,66,885/- (on providing Business auxiliary services on the amount received by them as commission from Maruti Finance), Rs.1,20,917/- (on account of extended warranty) and Rs.61,688/- (on account of free services performed by the assessee) raised on the assessee.

(iii) I impose a penalty on the assessee under Section 75A ibid amounting to Rs.500/- for failure to obtain registration in respect of Business Auxiliary services.

(iv) I impose a penalty of Rs.100/- per day under Section 76 ibid for not depositing the service tax due, which shall continue till the amount is deposited by the assessee but which shall not exceed Rs.2,43,406/- (Rupees two lakh forty three thousand four hundred and six only).

(iv) I impose a penalty of Rs.2,43,406/- (Rupees two lakh forty three thousand four hundred and six only) under Section 78 ibid on the assessee.

(vi) I also impose a penalty of Rs.1000/- on the assessee under Section 77 ibid for contravening provisions of Section 70 read with Rule 7 of the Service Tax Rules, 1944."

3. Against this order the party went in Appeal. The Commissioner (Appeal) by his order dated 31.3.06 set aside the order of the Joint Commissioner. The operative part of the order is reproduced below :-

> "I have carefully gone through the case records and submissions made by the appellants at the time of personal hearing as well as in their appeal memo. The issue involved in this case is whether the so called incentive/commission/income received from various finance Co. and Banks would be chargeable to Service Tax as 'Business Auxiliary service.' The appellants have disputed their Service Tax liability and denied that they have rendered any services to finance Co. and Banks as they have not received any amount in excess to cost of car. I find that to raise/receive any amount from any one, there must be some documents in the form of invoice/debit notes etc. There is nothing on record to show that such type of documents have been raised by the appellants. Even there was no such allegation against the appellants. No evidence contrary to the claim of the appellants is available on record that they have received any amount in excess of the cost of car from the finance Co./Banks. Therefore, the allegation against the appellants that they have

received incentive/commission/income from finance Co./Banks chargeable to Service Tax under 'Business Auxiliary Service' category does not hold goods and accordingly the demand confirmed against the appellants does not sustain and so does the penalty.

In view of the above, the impugned order is set aside."

4. Aggrieved by this order the revenue has filed Appeal No. 262/2006 before the Tribunal.

5. In the meanwhile Commissioner issued a SCN dated 30-07-2007 for review of the Order dated 25-11-2005 of the Joint Commissioner. This SCN was decided by order dated 23-10-2007. The operative part of the order is as below:

"(1) I confirm the demand of Rs.1,66,885/- from the assessee on the amount received by the from Maruti Finance Ltd. under Section 73(1) of the Chapter V of the Finance Act, 1994 read with Section 67 of the Act and hold that the same is recoverable with interest as applicable under Section 75 ibid.

(2) I impose a penalty of Rs.1,66,885/- under Section 78 ibid on the assessee."

6. Aggrieved by this order M/s Ajmer Automobiles have filed Appeal No. ST.46/2008-SM.

7. When the SCN dated 30-07-2007 was issued the order-in-original dated 25-11-2005 was already set aside by order dated 31-03-2006 and the original order was non-est. So a review of the order was not sustainable. So the Order-in-Original dated 23.10.2007 issued by the Commissioner is not maintainable. However, the same matter is the subject matter of Appeal No. 262/2006 filed by the department which is maintainable.

8. Now, the Appeal filed by the department against order of Commissioner (Appeal) is to be decided.

9. It may be noted that the issued involved in this case is whether service tax need to be paid on Commission received by dealers of motor vehicles from finance companies, through the manufacturer of vehicles, for marketing of vehicles loans of the finance companies to the customers who buy vehicles from the dealer. This issue already stands decided in **Roshan Motors Ltd. Vs. CCE, Meerut**- 2009 (13) STR 667.

10. The Ld DR assails the finding of the Commissioner (Appeals) that there was no evidence of receipt of any commission by the respondent from finance companies. He relies on the entries in the books of accounts of the Respondent.

11. During the hearing the Counsel for the Respondent did not rebut the argument of the Revenue that commission was actually received. The main arguments raised by the Respondent are,-

(i) Section 73 (1) (a) of the Finance Act 1944 was substituted w.e.f. 10-09-2004 and therefore the SCN issued on 10-08-2005 invoking, this provision is not maintainable.

(ii) Under the revised provision 73(1) in force on the date of issue of the SCN, it is necessary to prove suppression of information to invoke extended period of time. No suppression of information is involved because the entire record was produced to the audit party and replies to queries raised by the Audit party were given promptly.

12. We also take note of the argument raised in Appeal Memo that the commission received by the Appellant was out of the commission received by Maruti Udyog Ltd. from the Finance companies on which Maruti Udyog Ltd. had paid Service Tax. It is decided by the Tribunal in Popular Vehicles and Services Ltd. Vs. CCE Kochi – 2010 (18) STR 493 that in such situation tax is not payable again on the same amount. It is to be kept in mind that during the relevant period Cenvat credit scheme was not applicable for service tax.

13. The Ld DR replied arguing that a wrong section mentioned in the SCN cannot be fatal to the proceedings so long as there is a provision available in the statute book on the date of issue of SCN which would sustain the SCN if the facts relevant for understanding the offence and the nature of offence are stated in the SCN though with an error in section number. He relies on the following case law in the matter:-

(1) **CCE Vs. Pradyumna Steel Ltd.** – 1996 (82) ELT 441 (SC).

(2) **CCE Vs. Lanjekar Sales Corporation** – 2007 (210) ELT 79.

(3) **LVR & Dong-In Stone Ltd. Vs. CC** – 1994 (73) ELT 377.

14. He also argues that was suppression of information by the respondent in as much as the commission received by the Respondent from the finance companies were never disclosed in ST-3 return.

Making records available during the course of audit is not a sufficient ground to exonerate the respondent from the charge of suppression.

15. He further submits that para 2 of the Show Cause Notice gives the details of suppression and the words "suppressed" and "evaded the payment of service tax." are used many times and the argument of the Appellant that there was no allegation in the Show Cause Notice regarding suppression is not correct.

16. Considered arguments on both sides.

17. It is a settled position as argued by the Ld. DR that mere mention of wrong section number in the Show Cause Notice cannot invalidate the Show Cause Notice so long as the acts constituting the offence is explained and the acts constituted an offence within the meaning of the correct section that was in force at the time of issue of Show Cause Notice. In the case, Section 73 (1) (a) of the Finance Act which was in force at the time when the short levy occurred was quoted. The section is force at the time of issue of notice should have been quoted. But this wrong mention of the section is not fatal to the Show Cause Notice so long as the ingredients of the new provision under Section 73 (1) are satisfied.

18. The new section requires that Notice can be issued invoking the extended period only if there was suppression of information. In this case the information regarding commission received and also about

payments received from the manufacturer was not disclosed in the service tax returns. This cannot considered as suppression with intent to evade tax, because the Assessee had a *bona fide* belief that they were not liable to pay tax on the amount received by them out of commission received by Maruti Udyog Ltd. on which Maruti Udyog Ltd. had paid Service tax. So this is not a fit case to invoke the extended period alleging suppression.

19. So the Appeal fails on account of time bar and also on merits.

20. Appeal No. 262/2006 files by the Revenue and cross-objection filed by the Respondent are disposed of accordingly. The Appeal No. 46/2008 filed by M/s Ajmer Automobiles also is disposed of in the above terms.

(Pronounced on 28/6/11)

(Ashok Jindal)
Member (Judicial)

~~(Mathew John)~~
Member (Technical)

RM