CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,

WEST BLOCK NO.2, R.K. PURAM, NEW DELHI-110066

BENCH-DB

COURT –III

**Service Tax Appeal No. ST/510/2012-ST [DB]**

[Arising out of Order-in-Original No. 03 & 04/AKM/CST/ADJ/2012 dated 19.01.2012 passed by the Commissioner (Adjudication) Service Tax, New Delhi]

M/s. City Financial Consumer Finance India Ltd ...Appellant

Vs.

C.S.T. New Delhi …Respondent

**Appearance:**

Mr. Tarun Gulati, Sparsh Bhargava and
Ms. Rachna Yadav, (Advocates) for the Appellant
Mr. Ranjan Khanna, D.R for the Respondent

**CORAM:**
Hon'ble Mr. S.K. Mohanty, Member (Judicial)
Hon’ble Mr. B. Ravichandran, Member (Technical)

Date of Hearing /Decision:23.12.2016

**Final Order No. 56481 /2016**

**PER:S.K. MOHANTY**

Brief facts of the case are that the appellant is a Non-Banking Finance Company and is engaged, *inter alia*, in the business of providing various types of loans to its customers. The appellant is registered with the Service Tax Department under the category of Banking and Other Financial Services. The appellant avails cenvat credit of service tax paid on input services, used by it for providing such output service. The Service Tax

Commissionerate, New Delhi conducted audit of the records maintained by the appellant for the period 16.08.2001 to 31.03.2005. During the course of audit, it was observed that in lieu of financing of home appliances, the appellant also received remittances as commission from the manufacturers and dealers, in the nature of interest under the nomenclature of 'subvention income'. The service tax attributable to such service was deposited by the appellant in respect of the manufactures, other than M/s.L.G. Electronics Ltd. Further, it was also observed by the Audit, that the appellant did not maintain separate records of inputs / input services used for providing both taxable as well as exempted services.

2. On the basis of audit objection, the Commissioner of Service Tax, New Delhi issued the SCN dated 16.01.2008 proposing recovery of service tax demand of Rs.99,88,880/- during the period October, 2004 to September, 2007. Subsequently, on the basis of further investigation, the DGCEI also issued a SCN dated 23.10.2009 proposing service tax demand of Rs.94,15,970/- for the period September, 2004 to March, 2009. The notice also proposed recovery of Rs. 65,030/- as wrongly utilized cenvat credit. Both the SCNs were issued on the ground that the appellant did not pay service tax on the commission received under the head subvention account for providing the services to its customers. The ld. Adjudicating Authority vide the impugned order dated 19.01.2012 has dropped the proceedings initiated in the SCN dated 16.01.2008. However, he has confirmed the service tax demand of Rs.94,15,969/- alongwith interest and imposed penalties under Section 77 & 78 of the Finance Act, 1994

as per the proposals made in the SCN dated 23.10.2009 issued by the DGCEI. Besides, the impugned order has also confirmed demand of service tax credit of Rs.65,030/- wrongly utilised by the appellant. Feeling aggrieved with the impugned order, the appellant has preferred the present appeal before the Tribunal.

3. The ld. Advocate appearing for the appellant submitted that the appellant is not contesting confirmation of the adjudged demand on merits. However, he submitted that the proceedings initiated by the Department for confirmation of the demand is barred by limitation of time inasmuch as receipt of the subvention amount during the disputed period were reflected in the periodical ST-3 returns filed by the appellant. He also submitted that based on the audit report, the Department had issued the SCN on 16.01.2008 and based on same set of facts, another SCN was issued on 23.10.2009, which is clearly barred by limitation of time, having been issued after one year from the date of knowledge. Thus, he submits that the allegation of separation of facts with intent to evade payment of service tax cannot be leveled against the appellant and accordingly, the adjudged demand cannot be sustained. To support his stand that the SCN is barred by limitation of time, the ld. Advocate has relied on the judgment of Supreme Court in the case of P and B Pharmaceuticals Pvt. Ltd. Vs. Collector, reported in 2003 (153) E.L.T. 14 (SC.); ECE Industries Ltd. Vs. Commissioner, reported in 2004 (164) E.L.T., 236 (S.C.); Hyderabad Polymers Pvt. Ltd. Vs. Commissioner, reported in 2004 (166) E.L.T. 151 (S.C.); and

Nizam Sugar Factory Vs. Collector of Central Excise, reported in 2006 (197) E.L.T. 465 (S.C.).

4. On the other hand, the ld. DR appearing for the respondent reiterated the findings recorded in the impugned order.

5. Heard both sides and perused the records.

6. On perusal of the case records, we find that the receipt of subvention amount was duly reflected by the appellant in the ST-3 Returns filed during the disputed period. In the notes appended to the said Returns, the appellant had explained the facts regarding payment of service tax on subvention/ manufacturer discount and also non-payment of service tax on such amount in some of the cases. The notes appended to the return for the period April 2007 to September 2007 are extracted herein below:-

> *"1. Subvention/manufacturer discount is in the nature of interest and is not liable to Service Tax. On Subvention/Manufacturer Discount amounting to Rs.9,88,55,203/-, customers have paid Service Tax of Rs.1,20,99,877/- and the same is being deposited with interest @13% p.a. U/s. 73A read with Section 73B of the Finance Act, 1994.*
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> *2. On Subvention / Manufacturer Discount amounting to Rs.3,95,85,247/-, customers have refused to pay Service Tax of Rs.48,45,234/-. However, the same has also been paid by us (with interest, if applicable) under protest without any admission or deemed admission on our part for liability to pay service tax. We reserve our right to apply for a full refund of the aforementioned amounts. Further this payment is made without prejudice to our right to appeal against any order*

*made by the Department in connection with the said proceedings."*

7. In view of the fact that receipt of subvention/manufacturer discount in the nature of interest was reflected by the appellant in the periodical ST-3 Returns, the charges of fraud, collusion, wilful mis-statement, suppression of facts etc. cannot be levelled against the appellant, justifying invocation of the extended period of limitation for issuance of show cause notice. Accordingly, the demand should be confined to the normal period of one year. Thus, the adjudged demand confirmed in the present case under the proviso to sub-section (1) of Section 73 of the Finance Act, 1994 is barred by limitation of time.

8. We also find that on similar set of facts, the Department had issued two Show cause notices, on 16.01.2008 & 23.10.2009, seeking confirmation of service tax demand for the period October, 2004 to September, 2007 and September, 2004 to March, 2007 respectively. While issuing the first show cause notice on 16.01.2008, the material facts were known to the Department. Issuance of second show cause notice on 23.10.2009 is clearly barred by limitation of time, having been issued beyond the period of one year from the relevant date. In this context, the Hon'ble Supreme Court in the case of Nizam Sugar Factory (supra) held that while issuing 2$^{nd}$ and 3$^{rd}$ show cause notices based on same / similar facts, the allegation of suppression of fact on the part of the assessee cannot be invoked as the material facts are already in the knowledge of the authorities. Therefore, we are of the considered view that the 2$^{nd}$

show cause notice dated 23.10.2009 issued by the Department for confirmation of Service Tax for the period September, 2004 to March, 2007 cannot be sustained on the ground of limitation.

9. In view of the foregoing, we set aside the impugned order and allow the appeal in favour of the appellant on the ground of limitation.

(Operative Portion pronounced in open court)

(**B. Ravichandran**)
Member(Technical)

(**S. K. Mohanty**)
Member (Judicial)

Anita