

West Block No.2, R.K.Puram, New Delhi

Date of hearing: 21.06.2017

Appeal No. ST/3932/2012-CU[DB]

M/s. Govan Travels ... Appellant

CCE Delhi ... Respondent

Present Shri P.K. Sahu, Advocate for the appellant

Present Shri Amresh Jain, DR for the respondent

Coram: Hon'ble Mr. D.M. Misra, Member (Judicial)
Hon'ble Mr. Ashok K. Arya, Member (Technical)

Per Ashok K. Arya:

1. M/s. Govan Travels (proprietor M/s. Dalmia Bharat Sugar and Industries Ltd.) is in appeal vide Order-in-Appeal No. 98/2011 dated 31.08.2012 whereunder the order in original no. 16/11 dated 03.05.2011 confirming the demand of service tax of Rs.2,59,195/- along with interest and penalty of Rs. 3 lakhs imposed has been sustained.
2. The brief facts are that:-
 - i) The appellants are rendering services of air travel agent to their customers and are registered with service tax department.

- ii) The appellant utilized computer reservation software provided by Galileo for booking of air tickets for their customers.
 - iii) As there were other CRS (Computer reservation software) system namely ABACUS and AMADUS available, M/s. Galileo paid the incentive (commission) to the appellant assessee for continued usage and patronage of M/s. Galileo's CRS system, which is also known as GDS - Global distribution system.
 - iv) The department's stand is that the incentive (Commission) received from Galileo India Pvt. Ltd. (Galileo) by the appellant assessee is in connection with the services provided by Galileo and therefore, the incentive received will attract the service tax under the category of 'business auxiliary services' in terms of Section 65 (105) (zzb) of Finance Act 1994 (w.e.f. 01.07.2003). The department therefore, issued show cause notices (SCN) dated 05.03.2009, 13.04.2010 and 18.04.2011 thus demanding service tax totalling to Rs.2,59,195/-.
 - v) These show cause notices were adjudicated by the impugned order in original which confirmed the demand of service tax along with interest and also imposed penalty of Rs.3 lakhs.
 - vi) The appellant, therefore, is now in appeal before the Tribunal.
3. With the above background of facts, both the sides represented by Shri P.K. Sahu, Ld. Advocate for the appellant

and Shri Amresh Jain, Ld. DR for the respondent have been heard.

4. The main pleadings of the Ld. Advocate of the appellant are that:

- i) They are not doing any promotional activity or marketing activity for M/s. Galileo, whose CRS was also known as GDS – Global Distribution Systems, which they are using.
- ii) The Ld. Advocate for the appellant / assessee submitted that GDS or CRS is a network applied by a company that enables automated transaction between the travel services namely, transport.
- iii) M/s. Galileo has provided free of cost computer software and internet connectivity for using their CRS / GDS system which is located outside India for making bookings on different travel segments.
- iv) There is no evidence that the appellant marketed or promoted sale of said CRS / GDS software system in India.
- v) There is no term in the contracts suggesting that the appellant acted as an agent of Galileo and did not conduct any activity which can be covered as business auxiliary services.

5. The Ld. DR for the Revenue reiterates the findings of the impugned order.

6. After having carefully considered the facts of the case and submissions of both the sides including from the document namely **Galileo by Travelport; Offer to M/s. Dalmia Cement Bharat Ltd.** (who is the group to which the appellant belongs

to) **(Offer no. ITQPL / BOM / 022-755)** it appears that M/s. Dalmia Cement (Bharat) Ltd. and InterGlobe Technology Quotient Private Ltd. (ITQPL) join hands **in marketing and promotion of Galileo India in exchange for a support fee.**

These wordings – “marketing and promotion for the support fee”, which are part of the offer [accepted by M/s. Dalmia Cement (Bharat) Ltd. by putting their signature and seal], give substantial support to the fact that elements of marketing and promotion of Galileo (who are providing subject CRS /GDS to the appellant) in India are the consideration for incentive (commission) payable to the appellant. This offer document is on record and is part of the compilation submitted by the Ld. Advocate during the hearing. In this offer document it is specifically mentioned at its para 5 that **M/s. Dalmia Cement Bharat Ltd. accepts this offer, along with all the conditions mentioned.**

7. Further, from the facts, it appears that there is a special relationship between the appellant and M/s. Galileo whose CRS system the appellant is using. The incentive which has been called by the Department as commission is the consideration for giving certain kind of marketing and promotional support to the software product (CRS / GDS) pertaining to Galileo.

8. The definition of business auxiliary service given in section 65 (19) of Finance Act 1994 inter alia says that:

"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 or services, which are inputs for the client; or*
- (v) *production or processing of goods for, or 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 activity that amounts to "manufacture" of excisable goods.*

8.1. From the above definition, it is clear that any service which is incidental or ancillary to any activity specified in sub clause (i) & (ii) of the definition [which pertain to promotion or marketing or sale of goods produced / provided pertaining to the client (in the present case Galileo)] or promotion or marketing of services provided by the client (here it is Galileo) would be covered under the definition of 'Business Auxiliary Services' and the consideration received for said services will be chargeable to service tax under 'Business Auxiliary Services'. The Tribunal in the case of ***D. Pauls Consumer Benefit Consumer Benefit Ltd. Vs. CCE New Delhi vide Final order no. 50861/2017*** has held that such services as provided by the present assessee / appellant is covered by the category of "Business Auxiliary Services' as defined under section 65 of the Finance Act 1994. In the said decision, the Tribunal observes as under:

"4. Shri Ajay Jawatkar, learned counsel, at the strength of the written submission, submits that there is no marketing done

by the assessee-Appellants for the GDS/CRS. They have tied up with the airlines. It is the choice of the assessee-Appellants to book the ticket under any software of GDS/CRS. The customer does not know under which system the ticket was booked. No charges were taken from the customer for using the software of the said companies. The assessee-Appellants are not promoting the business of the said GDS/CRS companies by booking segments using the said product. At the strength of the written submission, he also submits that the amount received from GDS/CRS cannot be treated as deemed commission. So, the amount received is not taxable as no service has been provided. This is merely an incentive. The incentive received for usage of GDS/CRS does not attract the Service Tax. There is no promotion or marketing of business of GDS/CRS service provider as ultimate customer buying air ticket is not concerned from what GDS/CRS he is being provided air ticket. The assessee-Appellants are in no way connected to the service rendered to the customers nor is billed to the customers. He also relied upon the ratio of the Tribunal in the case of **Kerala Publicity Bureau vs Commissioner of Central Excise, 2007 (10) STT 457 (Bang. CESTAT)**. Lastly, he made a request that the impugned order may kindly be set aside. On the other hand, the learned DR for the Department, relied upon the impugned order and submits that the commission received for GDS/CRS usage is fully covered under the heading "Business Auxiliary Services". Hence, the demand of Service Tax was rightly confirmed by the lower authorities on this issue.

5. After hearing the rival submissions and on perusal of record, it appears that the assessee-Appellants are travel agent and providing the tickets for air as well as railways. They also act as the „Rail Travel Agent“s Service“ which is covered under Section 65(87) of the Finance Act, 1994 and liable to pay the Service Tax. Regarding the commission/incentive received from GDS/CRS, it may be stated that the said GDS/CRS companies are providing

adequate free of cost computers with essential accessories and software to the travel agents at their premises. These computers are connected worldwide to the GDS/CRS, which linked to ticket sales offices of various airlines, hotels and car rental agencies spread across the world. They are by using these GDS/CRS for booking tickets, receiving incentives from the said companies for every segment booked by them. Hence, the service provided by the assessee-Appellants has rightly been covered under the heading "Business Auxiliary Service" as defined under Section 65(19) of the Finance Act, 1994. Thus, we are of the view that the assessee-Appellants being providing „Tour Operator"s Service", the commission received by them is for "Business Auxiliary Service" under Section 73(1) of the Finance Act, 1994. The case law cited by the learned counsel for the assessee-Appellants is not applicable in the instant case as the same was dealing with the advertising agencies. So, on the facts, the ratio laid down in the said case is not applicable to the present case.

6. Needless to mention that in the "Central Excise, Customs & Service Tax Budget, 2016-17 (published by the legal Matrix Publications, Delhi-9, on page 258)" makes a reference to High Level Committee and states that certain issues were clarified and there in paragraph 15.1.2, it was mentioned that:

"15.1.2 It is clarified that incentives received by the Air Travel Agents (ATAs) from the Companies providing Computer Reservation System (CCRS) are for using the software and platform provided by the CCRS like Galileo, Amadeus, etc. The CCRS are providing these incentives either for achieving the targeted booking of air tickets or for loyalty for booking of air tickets using their software system. Thus, the service provided by CCRS is to the Airlines and Air Travel Agent is promoting the service provided by CCRS to Air lines. Thus, the service provided by the ATAs to CCRS is neither covered in the negative list (Section 66D of the Finance Act, 1994) nor exempt by

a notification. Therefore, service tax is leviable on the same."

7. In view of the above, we find no reason to interfere with the impugned order and uphold the same along with the reasons mentioned therein."

8.2. In the light of above discussions and the Tribunal's observations (Supra) the subject activities of the appellant are covered by 'Business Auxiliary Services' under section 65(19) of the Finance Act 1994 read with section 65(105) (zzb) of the Finance Act 1994 and is liable to levy of service tax.

9. The Revenue has imposed penalty of Rs. 3 lakhs on the appellant under section 78 of the Finance Act 1994. As per the provisions of section 78 of the Finance Act 1994, penalty imposed is to be equivalent to the amount of service tax confirmed against the appellant. In the present case, the demand confirmed is of Rs.2,59,195/- whereas the penalty has been imposed of Rs. 3 lakhs, the said penalty therefore, is reduced to Rs. 2,59,195/-. As the penalty has been revised, in the light of the decision of the Hon'ble High Court in the case of **CCE & Service Tax Vapi Vs. Sudhir Gensets Ltd. 2014 (304) ELT 251 (Guj.)**, the appellant is eligible for the option to pay 25% penalty if the conditions laid down under section 78 are fulfilled. Consequently, the appellant is given the benefit of option to discharge 25% of penalty on fulfillment of the conditions provided under Section 78 of the Finance Act.

10. In the result, impugned order is modified to above effect and the appeal stands disposed of accordingly.

[Order Pronounced in the open court on 04.09.2017]

(Ashok K. Arya)
Member (Technical)

(D.M. Misra)
Member (Judicial)

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