

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

COURT NO. IV

DATE OF HEARING/DECISION : 22/02/2018.

Service Tax Appeal No. 81 of 2012

[Arising out of the Order-in-Original No. 11/AKM/CST (Adj.)/2011 dated 03/10/2011 passed by The Commissioner (Adjudication), Service Tax, New Delhi.]

M/s Team HR Services Ltd.

Appellant

Versus

CST, Delhi – I

Respondent

Appearance

S/Shri N. Venkataraman, Senior Advocate, Satish Kumar, Advocate and Parvesh Khandelwal, Consultant– for the appellant.

S/Shri Amresh Jain and Sanjay Jain, Authorized Representative (DRs) – for the Respondent.

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

Final Order No. 50801/2018 Dated : 22/02/2018

Per. B. Ravichandran :-

The appellant is aggrieved by the order dated 03/10/2011 of Commissioner (Adjudication), Service Tax, New Delhi.

2. The brief facts of the case are that the appellants entered into an agreement with M/s ICICI Bank to market the products of the bank with reference to car loans, retail finance, two wheelers

loans, personal loans, home loans etc. They received consideration as a percentage of commission for the services rendered to ICICI Bank. The Revenue entertained a view that the appellants provided taxable service under the category of Business Auxiliary Service during the period 01/07/2003 to 31/03/2005 and initiated demand proceedings by issuing show cause notice dated 28/07/2008. The appellant contested the demand. The case was adjudicated resulting in the impugned order. The Original Authority held that the activity of the appellant are squarely covered under the category of BAS in terms of Section 65 (19) readwith Section 65 (105) (zzb) of the Finance Act, 1994. It is categorically held that the appellants were engaged in promotion or marketing of service provided by the appellant (ICICI Bank). The service tax demand was confirmed alongwith penalties under Section 76, 77 and 78 of Finance Act, 1994.

3. The learned Counsel appearing for the appellant contested the impugned order on the ground that they have essentially provided operational assistance for marketing the various financial products of the bank. Such services are specifically covered for taxability under the category of Business Support Services in terms of Section 65 (104) (c) of the Finance Act, 1994 introduced only w.e.f. 01/05/2006. Prior to that date, there can be no tax liability under the general category of marketing under BAS. He submitted that the sales team of the appellant is to act as per the specific directions of the bank and the restriction

so stipulated in terms of the agreement make it clear that the appellants do not enjoy any freedom or flexibility in carrying out the activities of marketing assistance to the client. Drawing our attention to various clauses of the agreement, the learned Counsel submitted that the appellants are strictly bound by the instruction, procedure and guidelines laid down by the appellant for the purpose of marketing the products of the client. The level of control and monitoring exercised by the client bank will reveal that they are only providing an assistance to the marketing of the product and not engaged in such marketing or promotion of services as a principal. Making such distinction in terms of the agreement, the learned Counsel submitted that they cannot be taxed under general category of market promotion under BAS. Their services are liable to be taxed only as BSS only w.e.f. 01/05/2006.

4. Contesting the demand on limitation as well as imposition of penalties, learned Counsel submitted that the appellants executed the work in terms of the agreement. In respect of similar agreement for another person with the same bank, the matter reached the Tribunal in the case of **Wings Group of Companies vs. CST, Bangalore – 2008 (12) S.T.R. 287 (Tri. – Bang.)**, wherein the Tribunal held that the appellants are not liable to tax under BAS. The Tribunal relied on the earlier decision in **S.R. Kalyaniakrishnan vs. CCE, Cochin – 2008 (9) S.T.R. 255 (Tri.)**. As such, the question of providing marketing assistance to banks by various persons were subject matter of

litigation and even if the matter is to be held against appellants on merit there is no element of fraud or suppression that can be alleged to invoke the demand for extended period. On the same ground, he pleaded for setting aside the penalties imposed on the appellant also.

5. The learned AR strongly contested the appeal both on merit as well as on limitation. On merit, he submitted that the various terms of the agreement and the essence of the agreement will reveal that the appellants are engaged in marketing the financial products of the client bank. Specifically drawing our attention to the scope of the agreement as given in the preamble and clause 2.1, 8.1, 9.3 and 10.1 of the said agreement, the learned AR submitted that the terms of the agreement admit no doubt regarding the overall scope of the work by the appellant and this is essentially a marketing activity of the financial products of the client bank. The appellant is not providing only operational assistance of such marketing. He contested the submission of the appellant on this ground stating that without support of the written terms of the agreement such attempt to read down the scope of work cannot be accepted. Referring to the decision relied on by the appellant, he submitted that the decision in **S.R. Kalyaniakrishnan** (supra) is specifically with reference to only verification of correctness and authenticity of information provided by the seekers of loan from the client bank. The single Member decision in the case of **Wings Group of Companies** (supra) relied on this decision without distinguishing the facts. In

any case the terms of the present agreement are clear and the decision in **S.R. Kalyaniakrishnan** (supra) has no application to the present case.

6. Contesting the appellant's plea on limitation and penalty, the learned AR submitted that there is no case for bonafide belief during the material time. The appellants have not discharged service tax during the material time and later when the demand was raised came with the explanation of bonafide belief which cannot be justified for the period under consideration. The decision of the Tribunal which is relied upon to support the claim the issue of interpretation is much later and not within the period of dispute. As such, a decision which came later could not have given a reasonable belief for earlier period. Learned AR submitted on merit also the decision of the Tribunal in **Wings Group of Companies** (supra) is not sustainable as relevant facts of that case has not been taken. Reliance was placed on the earlier decision without distinguishing the facts of the said appeal.

7. We have heard both the sides and perused the appeal record. Examining the merits of the case, we note that the appellants were engaged as a service provider to market the products of ICICI Bank. This is very clear from the scope of the agreement as given in the preamble as well as Clause 2.1 of the said agreement. We have closely read the terms of the agreement. It is apparent and clear that the said agreement is to market the financial products of the client bank. Regarding the

monitoring and strict regulation exercised by the ICICI Bank, we note that the same will not be a material fact to decide whether the appellant have undertaken the main work of marketing the financial products of the client bank. The client bank will certainly exercise various control on the service provider in their commercial interest and to upkeep their goodwill and brand name. That by itself will not make the activities of service provider as other than marketing service of the product. "Business Auxiliary Service" as defined clearly states that any service in relation "promotion or marketing of service provided by the client" shall be liable to tax. Having perused the terms of the agreement extensively, we have no doubt that the appellant did market the services provided by the client bank. It will not be correct to state that the appellant only provided operational assistance in such marketing. No such words were used in the terms of the agreement and in fact the agreement directly refers to the appellant as a service provider "to mark its products (ICICI Bank)". In fact Clause 9.3 readwith Clause 8.1 makes it apparently clear that the appellants are in fact engaged in promotion and marketing activity of the financial products of the client bank.

8. Regarding the claim of the appellant that their services are more specifically covered under BSS we note BSS is essentially an outsourced service and the reliance placed on "operational assistance for marketing" is on a very narrow campus not covering all activities of marketing. In the present case, the

appellants are in fact engaged in marketing and not simple operational assistance for marketing. As such, in view of these detailed analysis, we are convinced that the appellants have no case on merits.

9. The appellants strongly submitted regarding limitation and penalty. We note that there were some element of overlapping statutory scope of tax liability both under business auxiliary service and business support service. In fact large number of litigations are only with reference to distinction between business auxiliary service and business support service. All these disputes were after the introduction of BSS after 01/05/2006.

10. Though, we find substantial force in the submission by the Revenue regarding the correctness or applicability of the single member decision in **Wings Group of Companies** (supra), the fact remains such decision created an inference that similar services by other companies are not liable to be taxed under BAS. We note that the scope of agreement dealt with in the said decision appears to be same as could be seen from para 1 of the said decision. However, reliance placed by the said decision on the decision in **S.R. Kalyaniakrishnan** (supra) appears to be not factually applicable. Without further commenting on the merits of the said decisions, we are only concerned with possibility of certain interpretation during the time. These factors lead us to conclude that the appellants cannot be put to tax liability and penalty by invoking provisions like suppression of fact, mis-

representation with intend to evade payment of service tax in terms of proviso to Section 73 (1) of the Act. We note that the present proceedings are initiated after audit of the records of the appellant during the month of July, 2006. The demand for extended period and penalties were mainly sustained by the Original Authority on the ground that the appellants are governed by self-assessment procedure and, as such, the responsibility is on the appellant to pay correct tax and file correct returns. On this basis, due to non-payment of tax and non-filing of returns, the Original Authority held against the appellant both on limitation and penalties.

11. Based on the discussion, we have recorded above, we find that while on merit, the appellants are not having the case, on limitation, they have case against invoking the provision of Section 73 (1) proviso. Accordingly, the impugned order is set aside only on the question of limitation and the appeal is allowed to that extend.

(Order dictated and pronounced in open court.)

(S.K. Mohanty)
Member (Judicial)

(B. Ravichandran)
Member (Technical)

PK