

**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. I

DATE OF HEARING/DECISION : 26/07/2018.

Service Tax Appeal No. 1605 of 2011

[Arising out of the Order-in-Appeal No. 405/BK/GGN/2011 dated 27/09/2011 passed by The Commissioner of Central Excise (Appeals), Delhi – III, Gurgaon.]

Shri Amit Sondhi, Proprietor] M/s AA and Associates]	Appellant
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Versus

CST, Delhi	Respondent
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Appearance

Shri Kunal Tandon, Advocate – for the appellant.

Shri G.R. Singh, Authorized Representative (DR) – for the Respondent.

**CORAM: Hon’ble Shri Anil Choudhary, Member (Judicial)
Hon’ble Shri C.L. Mahar, Member (Technical)**

Final Order No. 53030/2018 Dated : 26/07/2018

Per. Anil Choudhary :-

The issue involved in this appeal is whether the appellant is chargeable to service tax in its activity of working as distributor/marketing agent of M/s Amway India Enterprises Pvt. Ltd., Plot No. 5, DDA Local Shopping Centre, Okhla Commercial Complex, Phase II, New Delhi – 110 020 (herein after referred to as the “company”) and are getting commission in lieu of

providing the said services but are not paying Service Tax on the commission received from the company. The services of commission/marketing agents are covered under the taxable category of "Business Auxiliary Services". This resulted in to initiation of enquiry under Section 14 of the Central Excise Act, 1944, as made applicable to Service Tax matters by virtue of Chapter V of the Finance Act, 1994.

2. In the course of enquiry and scrutiny of documents revealed that the appellant has entered in to an agreement with the company to act as distributor of the company's products. The company is a manufacturer/importer of various types of products which are sold to the ultimate customers by direct selling method. In direct selling, the company appoints various direct sellers/distributors. The distributors are entitled to purchase and sell goods manufactured/imported by the company. The products are sold to these distributors at a price below the MRP, which is referred to as distributor price (DP). The company while selling the goods to its distributors pays VAT/Sales Tax on the same. The difference between the price at which the distributor purchase the goods from the company and then sells the same to the buyers is considered as retail profit of the distributor.

3. The distributors also introduce new distributors to the company and the new distributor further refers another distributor, thus, a chain of distributors is formed, which is called a group. The distributors of a group; apart from earning retail

profit as mentioned above, also get a turnover commission as reflects from pamphlet of the company enclosed with (RUD-5). This turnover commission is distributed amount the members of that particular group. The quantum of commission that accrues to a distributor is on slab basis, based on monthly group purchase of Amway products by a distributor and his downstream group. Thus, it appears that the distributor, while acting in the individual capacity as well as in the group, is entitled to the commission which is based on the quantum of the purchase of the products of the company. It also appear that the distributor also provides the services of evaluation of prospective customers/distributors and introduction of the same to the company, who in turn also cause promotion or marketing of sale of goods produced or provided by the company.

4. It appear to Revenue that the appellant is liable to pay service tax on the commission received to the tune of Rs. 67,52,975/- for the extended period 2003-2004 to 2007-2008. Accordingly show cause notice was issued demanding service tax of Rs. 6,97,165/- + education cess etc. and further penalty was proposed.

5. The show cause notice was adjudicated on contest confirming the proposed demand and further penalty was imposed under Section 77 (1a) readwith Section 77 (2) and further penalty of Rs. 7,10,184/-. Being aggrieved the appellant preferred appeal before Commissioner (Appeals) to the impugned

order dated 27th September 2011 have been pleased to reject the appeal.

6. Being aggrieved, the appeal before this Tribunal. The learned Counsel states that the issue is no longer res-integra and this Tribunal have in its judgment in the case of **Charanjeet Singh Khanuja vs. CST, Indore/Lucknow/Jaipur/Ludhiana** by order dated 09/06/2015 reported at **2016 (41) S.T.R. 213 (Tri. – Del.)** have decided the issue held as below :-

"12. According to the Department, the activity of the assesseees is "promotion or marketing or sale of the goods produced or provided by or belonging to the client." In our view, the activity which is covered under Section 19(i) is in relation to the promotion or marketing or sale of the goods produced by the client or provided by the client or belonging to the client. This expression, in our view, would not cover the sale of the goods by a person, which belong to him, as the activity of the promotion or marketing or sale of the goods by a person belonging to him would not constitute service. The assesseees in these cases are distributors, who purchase the goods from Amway at the Distributors' Acquisition Price (DAP)) and sell the same in retail at price not exceeding MRP fixed by the Amway. This activity of the Distributors, in our view, cannot be treated as promotion, marketing or sale of the goods produced or provided by or belonging to the client (Amway), as the sale of the goods purchased by the Distributors from Amway is not the sale of the goods belonging to their client - Amway. Once the Amway products have been purchased by a Distributor from Amway, those products cease to belong to Amway, but belong to the Distributor and sale of these goods by the Distributor would not constitute service to Amway. For the same reason, any incentive or commission received by a Distributor from Amway for buying certain quantum of goods from Amway during a month can not be treated as the consideration received for promotion or

marketing or sale of the goods produced by or provided by or belonging to the client, more so, as this commission is not linked to the goods sold by the Distributor, but is linked to the goods purchased by the Distributor from Amway during a month and is in the nature of volume discount. Therefore, no service tax is chargeable on the profit earned by the distributors from sale of the goods in retail which had been purchased by them from Amway and on the commission earned by them every month on purchase of certain quantum of goods from Amway.

13. However, activity of a Distributor of identifying other persons, who can be roped in for sale of the Amway products/marketing of the Amway products and who on being sponsored by that Distributor are appointed by Amway as second level of distributors is, in our view, the activity of marketing or sale of the goods belonging to Amway and the commission received by the Distributor from Amway, which is linked to the performance of his sales group (group of the second level of distributors appointed on being sponsored by the Distributor) would have to be treated as consideration for Business Auxiliary Service of sales promotion provided to Amway. Therefore, service tax would be chargeable on the commission received by a Distributor from Amway on the products purchased by his sales group. However, in the impugned orders Service tax has been demanded on the gross amount of commission and no distinction has been made between the commission earned by a Distributor from Amway based on his own volume of purchase from Amway and the commission earned by him on the basis of the volume of purchases of Amway products made by his sales group i.e. group of second level of Distributors appointed by Amway on being sponsored by the Distributor. For quantifying the Service tax demand on the commission received from Amway on the volume of purchase made by the distributors sponsored /enrolled by a particular distributor i.e. the Distributor's sales group, these matters would have to be remanded to the Original Adjudicating Authority.

14. Another objection raised by the appellants in Appeals Nos. ST/138 and 139/2009, ST/406/2010, ST/522 to 525/2010,

ST/257, 259, 433, 473, 502, 580, 1123, 1383, 1781 & 1802/2011, ST/56, 86, 126, 645/2012 and ST/1723-1724, 2337 and 2810/2012 and the respondents in Appeals Nos. ST/851 to 854, 863, 864, 865, 866, 867, 868, 869, 870 and 878/2012 is that the assesseees are individuals and during the period till 30-4-2006, Service tax was chargeable only on the services provided to a client by a commercial concern in relation to Business Auxiliary Service and the individual persons cannot be treated as Business concern. We do not accept this plea as a business concern can be a proprietary firm also which is owned by an individual and there is no difference between proprietary firm owned by a person and that person. When an individual engages himself in a commercial activity, he has to be treated as business or commercial concern. Therefore, notwithstanding the fact that w.e.f. 1-5-2006 the term, 'commercial concern' in Section 65(105)(zzb) was replaced by 'any person', we are of the view that even during the period prior to 1-5-2006, the Business Auxiliary Service, even if provided by an individual to a client, was taxable. Moreover, in this group of appeals, the Appellants in Appeal No. ST/257/2011 and ST/259/2011 are proprietary firms who, without any doubt, are commercial concerns.

15. Another point of dispute is as to whether duty exemption under notification No. 5/2006-ST would be admissible to the Distributors in this group of cases. In this regard, the Department's plea is that this exemption is not applicable when the taxable service is provided by a person under a brand name/trade name, whether registered or not, of another person and in this group of cases, the Distributors have promoted the sale/marketing of branded products. This plea of the Department is not correct, as in these cases the distributors are engaged in promoting sales/marketing of the products of Amway and they are not marketing or promoting any taxable service which is branded and the brand name belongs to another person. Marketing or sale promotion of branded products by a person/commission agent does not amount to providing branded service by him and hence, marketing or sales promotion of a branded product does not come under the exclusion category as mentioned in the proviso to Notification No. 6/05-S.T. In this

group of cases, the eligibility of the Distributors (assesseees) for the exemption Notification No. 6/2005-S.T. has not been examined and for this purpose also, these matters have to be remanded to the Original Adjudicating Authority.

16. Another plea raised in these appeals is regarding limitation. It is the contention of the assesseees that there was absolutely no suppression or misstatement of facts or deliberate contravention of the provisions of the Finance Act, 1994 or of the Rules made thereunder with intent to evade payment of Service tax. The Department's contention, on the other hand, is that the assesseees neither obtained service tax registration nor did they declare their activities to the jurisdictional Service tax authorities nor did they file ST-3 Return and, therefore, they are guilty of suppression of relevant facts and deliberate violation of the provisions of Finance Act, 1994 and of the Rules made thereunder with intent to evade payment of tax. On considering the rival submissions on this point, we are of the view merely because the assesseees did not apply for Service Tax Registration or did not file ST-3 Returns or did not declare their activities to the jurisdictional central excise authorities, it cannot be inferred that this was a willful act with intent to evade payment of service tax. We also take notice of the fact that in respect of appeals filed by the Revenue, the Commissioner (Appeals) after analyzing the activities of the assesseees had taken the view that the same is not covered by the definition of "Business Auxiliary Service" under Section 65(105)(zzb) read with Section 65(19) of the Finance Act, 1994. When on the issue involved in this group of cases, there were two views in the Department itself, it cannot be said that on the question as to whether the activity of the assesseees was taxable under Section 65(105)(zzb) read with Section 65(19) of the Finance Act, 1994, there was no scope for doubt. As held by the Apex Court in the case of *Continental Foundation Joint Venture v. CCE, Chandigarh* reported in [2007 \(216\) E.L.T. 177](#) (S.C.) when there is scope for doubt in the mind of an assessee on a particular issue, the longer limitation period, under proviso to Section 11A(1) cannot be invoked and in our view, the ratio of this judgment of the Apex Court is applicable to the facts of these cases. Therefore, the longer

limitation period of 5 years under proviso to Section 73(1) of the Finance Act, 1994 would not be invocable and duty can be demanded only for normal limitation period of one year from the relevant date.

17. In view of the above discussion, the impugned orders passed by the Commissioner (Appeals) are set aside and the matters are remanded to the Original Adjudicating Authority for *de novo* adjudication strictly in terms of our observations and directions in this order. The appeals filed by the Distributors (assessee) as well as those filed by the Department stand disposed of as above”.

7. The learned DR does not dispute the law laid down by the Tribunal in the above-mentioned case of **Charanjeet Singh Khanuja** (supra).

8. Accordingly, we set aside the impugned order and remand the matter to the Adjudicating Authority to decide the show cause notice *denovo* after hearing the appellant, pursuing any reply filed or to be filed alongwith evidences, if any, and pass the reasoned order in accordance with law.

9. The appellant is also directed to appeal before the concerned Adjudicating Authority within a period of 45 days from the date of receipt of copy of this order and seek opportunity of hearing.

(Operative part of the order pronounced in open court.)

(C.L. Mahar)
Member (Technical)
PK

(Anil Choudhary)
Member (Judicial)