CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH AT HYDERABAD
Division Bench - Court – I

SERVICE TAX APPEAL No. 609 OF 2009

(Arising out of Order-in-Original No. 26/2009-ST, dated 31.03.2009 passed by Commissioner of Customs, Central Excise & Service Tax, Hyderabad-II)

POOJA MARKETING AGENCIES .. **APPELLANT**
Smt Parmeet Kaur Bagga,
Plot No. 400, Road No. 14,
Banjara Hills,
HYDERABAD – 500 004.

Vs.

Commissioner of Central Excise, Customs .. **RESPONDENT**
& Service Tax, Hyderabad-II,
L.B. Stadium Road,
Basheerbagh,
HYDERABAD – 500 004.
Telangana

APPEARANCE:
Shri M. Venkatram Reddy, Advocate for the appellant.
Shri A. Rangadham, Superintendent/AR for the respondent

CORAM: HON'BLE Mr. ASHOK JINDAL, MEMBER (JUDICIAL)
HON'BLE Mr. P.V. SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER No. A/30875/2020

DATE OF HEARING: 11.02.2020
DATE OF DECISION: 11.02.2020

[ORDER PER Mr. P. VENKATA SUBBA RAO)

1. This appeal is filed against Order-in-Original No. 26/2009-ST, dated 31.03.2009.

2. Heard both sides and perused the records.

3. The appellant herein were investigated by the Department on the basis of specific intelligence and it was found that the appellant were rendering "Business Auxiliary Services" to M/s Shaw Wallace & Company Limited, M/s Shaw Wallace Distilleries Limited; M/s Gemini Distilleries Private Limited and M/s Hindustan Dorr Oliver Limited in the form of "Sales Promotion Agency" but without registering themselves with the Department for payment of service tax and without paying the service tax. Thus, they appeared to have contravened provisions of Sections 68, 69 and 70 of the Finance Act, 1994. After investigation and procuring necessary details from the appellant, a show cause notice dated 17.10.2008 was issued demanding an amount of Rs. 52,82,725/- as service tax (including Education Cess) on the service charges received by them during the period 01.07.2003 to 31.03.2005 under the proviso to Section 73 of the Finance Act, 1994, invoking extended period of limitation. The Show Cause Notice also sought to demand interest under section 75 of the Finance Act, 1994 and impose penalties upon the appellant under Sections 76, 77 & 78 of the Finance Act, 1994. After following due process, the Ld. Commissioner, by the impugned order, has confirmed the demand and interest and imposed penalties as proposed. Aggrieved, this appeal is filed by the appellant.

4. Ld. Counsel for the appellant does not dispute that they had rendered services to the aforesaid companies and have received payments as indicated in the show cause notice. His argument is that the services which they have rendered are not classifiable as "Business Auxiliary Services" at all and therefore no service tax is payable. Consequently, the question of interest and penalties does not arise. He would submit that in the State of Andhra Pradesh, only one organisation viz; Andhra Pradesh Beverages Corporation Limited (APBCL) has right to sell Indian Made Foreign Liquors (IMFL) in retail. Therefore, all distilleries can only sell their IMFL to M/s APBCL. They have been employed by their service recipients to liaison and coordinate with M/s APBCL to market their liquor. He would take us through their agreement with M/s Shaw Wallace Distilleries Limited (SWDL), one of the service recipients, to argue that although the agreement is titled agreement for sales promotion, in effect there cannot be any sales promotion or marketing in this case because there was only one customer. There is no scope for expanding the customer base for any of the distilleries. The responsibilities of the appellant would include constantly liaisoning with APBCL, obtaining feed back on various important factors, procure sufficient quantity of orders for every month, maintain effective follow up to ensure that any charges required by APBCL with regard to pricing, packing, supply source etc., are speedily cleared etc. They were required to place excise duty paid indents with M/s Shaw Wallace Distilleries Limited (SWDL). It is further laid down in clause E-4 of the agreement that any promotional/marketing activities to be undertaken for these brands have to be cleared by the marketing departments of SWDL. Clause E-5 further states that the responsibility of secondary sales at various APBCL depots shall be entirely of the appellant. It further states that the manpower employed to promote these brands shall be on the appellant's roll and SWDL shall have no liability. Liaison with APBCL would be the promoter's (i.e. the appellant's) responsibility. They were also required to send weekly/ fortnightly/ monthly reports to SWDL and follow up payments from APBCL.

On a specific query from the Bench as to how they are getting paid for their services, the Ld. Counsel submits that they get paid @ Rs. 8/- per case as service charges. The relevant clause H of the agreement is as follows:

> *"SERVICE CHARGES:*
>
> *In consideration of Promoter discharging the above mentioned responsibilities and requirements, the Promoter shall be paid remuneration @ Rs. 8/- per case as service charges on the secondary sales of our brands during the duration of this agreement. The said charges shall be subject to TDS at actual as applicable in force and review from time to time. The service charges shall be paid on submission of depot wise secondary sale duly authenticated by SWDL's Area Manager and the payment shall be made by 10th of every consecutive month.*
>
> *Over and above, the service charges payable to the promoter as per the above mentioned clause, no other form of remuneration or service charges shall be payable by SWDL to the Promoter.*
>
> *All expenses on account of offices, manpower, telephone, postage, incidental and all other forms of outgoings will be entirely to the Promoter's amount.*
>
> *All salaries, travel expenditure of executives, office maintenance, incidental expenses at APBCL, shall be paid promptly in time by the promoter for smooth operations of the business."*

5. Ld. Counsel would submit that although their agreement is titled as "Agreement for Sales Promotion" in fact there cannot be any sales promotion because there is no open market for the product and there is only one customer viz; Andhra Pradesh Beverages Corporation Limited (APBCL) for the entire state. Therefore, as can be seen from the above activities, the nature of their activities is one of the liaisoning with the single buyer, following up the payments, etc. He would argue that in view of the above, there is no sales promotion/marketing activity undertaken by them.

6. The definition of "Business Auxiliary Service" during the relevant period was as follows:"

"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. *Service in relation to promotion or marketing of service provided by the client includes any service provided in relation to promotion or marketing of games of change, organised, conducted or promoted by the client, in whatever form or by whatever name called, whether or not conducted online, including lottery, lotto, bingo;*

iii. *Any customer care service provided on behalf of the client or*

iv. *Procurement of goods of 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 (iv) such as*

   a. *Billing,*
   b. *Issue or collection or recovery of cheques,*
   c. *Payments,*
   d. *Maintenance of accounts and remittance,*
   e. *Inventory management,*
   f. *Evaluation or development of prospective customer or vendor,*
   g. *Public relation services,*
   h. *Management or supervision,*
   i. *And includes services as a commission agent, but does not include any activity that amounts to "manufacture" of excisable goods.*

7. Ld. Counsel would argue that the services rendered by them do not fall under the aforesaid categories of services and therefore service tax can not be levied under the head "Business Auxiliary Services". He would, therefore, submit that the entire demand is without any basis and needs to be set aside. He would also submit that the invocation of extended period of limitation by the Commissioner is illegal and unwarranted and the demand should fail on that account as well. For these reasons, he would also contest the levy of penalties under Sections 76, 77 & 78 of the Finance Act, 1994.

8. Ld. DR reiterates the findings of the adjudicating authority. He would submit that the agreements which the appellant had entered into various distilleries were for sales promotion and marketing. They were getting paid @ Rs. 8/- per case of the marketed product. Although there was only one buyer viz; M/s APBCL, there were several sellers, some of whom have employed the appellant as their sales promotion/marketing agent. Not only is the agreement meant for sales promotion, a bare perusal of the agreement would show that the pith and substance of the agreement is of sales promotion and marketing activity. In the course of sales promotion and marketing, the person who is marketing the products also liaisons with the customers in any such agreement and collects information regarding orders, etc. and sends the reports to the principal company. Therefore, there is no force in the argument of the appellant that they were not rendering the job of sales promotion and marketing, when their own agreements with their principals show that their job is one of the sales promoter and they are getting paid based on the quantity of goods sold. Therefore, the demand and interest have been rightly confirmed by the adjudicating authority.

9. On the question of invocation of extended period of limitation, the appellant had never obtained service tax registration or approached the department or disclose to the department in any manner regarding their activity and therefore extended period of limitation has been correctly invoked for suppression of the information as well as the evident intent to evade payment of service tax. Accordingly, the penalties have also been correctly imposed.

10. We have considered the arguments on both sides and perused the records. "Business Auxiliary Service" is defined during the relevant period included the services related to promotion or marketing or sales of goods produced or provided by or belonging to the client. The agreements which have been entered into clearly state that the appellant has been employed as a promoter of the products of their clients. The argument of the Ld. Counsel is that since there is only one customer viz; APBCL, there is no scope of marketing. It is true that there is only one customer viz; APBCL in the State of Andhra Pradesh who purchases IMFL from various distilleries and in turn would sell it in retail. Therefore, it is in the interest of every distillery to ensure that they sell more to the customer of APBCL. This is sought to be done, inter alia, by close coordination with the retailers, to ensure maximum quantities of their client's products are ordered by the retailer from the depots of APBCL. For this purpose, they need to promote and market their goods to the sole customer. The responsibilities of the appellant under the agreement with SWDL were as follows:

1. "The Promoter will constantly liaise with APBCL Headquarters.
2. As liquor ordering is centralised at APBCL Headquarters at Hyderabad, the Promoter will get himself acquainted with all the offices and subordinate staff for the purpose and attend the following:-

a) Obtain feedback on various important factors, as communicated to various APBCL depots.

b) Procure sufficient quantity of orders every month for various products registered with the department for supplies.

c) Maintain effective follow up to ensure that any changes required by SWDL with regard to pricing, packing, supply source, etc. are speedily cleared. Matters pertaining to complaints, etc. if any, shall also be followed up to our satisfaction.

3. The promoter shall place Excise duty paid indents with our unit to effect supplies.

4. Any promotional/marketing activities to be undertaken for these brands will have to be cleared by our marketing departments before implementation.

5. (a) Responsibility of secondary sales at various APBCL depots shall be entirely Promoter.

(b) Manpower employed to promote these brands shall be on the Promoter's role and Shaw Wallace Distilleries Limited shall have no liability.

(c) Liaison with APBCL will be Promoter's responsibility.

(d) Inter depot stock transfer if any, will be to the Promoter's account subject to a maximum of Rs. 2.40 lacs per year.

6. The promoter shall send weekly/fortnightly/monthly reports to Shaw Wallace Distilleries Limited on all the activities carried out in the market, APBCL, Excise etc."

(6) PAYMENTS:

The promoter will ensure

(i) To obtain payment from APBCL of pending bills within the stipulated time and forward the same to us immediately.

(ii) To ascertain reasons and solve all matters pertaining to overdue outstanding, if any.

(iii) Details of actual expenditure incurred on account of manpower, infrastructure, promotional activities, depot maintenance, incidental expenses and all other relevant expenses have to be furnished to SWDL on a monthly basis.

(7) APBCL DEPOT OPERATIONS

In the APBCL depots, Promoter will be responsible for the following functions:

(i) Provide information on the inventory levels of our products and ensure that sufficient stock of our products is maintained at all depots.

(ii) Coordination with the concerned Depot Managers, to ensure that sufficient quantity of our products are maintained always.

(iii) EVCs duty certified are sent by the depots to the supplying distillery, as per the excise Rules/Acts.

(8) RETAIL OPERATIONS:

(i) Close coordination with the retails, to ensure that maximum quantities of our products are ordered from the depots.

(ii) quick liquidation of stocks, from the retails, to ensure further ordering for our products and monitoring the shelf off-take of our products vis-a-vis competition brands and advise remedial measures wherever necessary.

(iii.) Providing feedback on complaints, if any, regarding quality, packing etc. and resolving such problems to the satisfaction of the concerned retailers and of the company, in consultation with the Company.

(9) SALES/MARKETING PROMOTIONAL ACTIVITIES

I. In order to improve secondary and tertiary sales of our brands listed in Annexure A which may undergo changes from time to time, you will give us your proposals in writing. After due consideration, we will advise you in writing as to the details of such promotions which you could operate.

II. All sales/promotional expenses incurred for creating demand for its brands shall be reimbursed to the promoter which should be used only for promoting SWDL brands and no part of the promotion amount shall be retained by the promoter.

III. Details of the approved sales/marketing promotion operated by the promoters shall be made available to SWDL."

IV. It is promoter's responsibility to reconcile the promotional expenditure with the company books of accounts, on a monthly basis, failing which no claim shall be reimbursed to the promoter in the subsequent month. The details of undisbursed/ unclaimed cheques along with bank pass book details to be furnished to SWDL on monthly basis. Undisbursed/unclaimed cheques shall be paid back to SWDL by the promoter.

(10) GENERAL

(i) The Promoter shall not undertake similar appointments with any others in the business of IMFL, Rum and Beer during the period of this agreement.

(ii) The promoter shall keep the company informed about competitors' activities with regard to their products' pricing, packaging, promotions, sourcing etc. which can make an impact on SWDL's business.

(iii) The promoter shall keep the company informed about the changes in his organisation promptly.

(iv) The promoter shall not assign, delegate or otherwise deal with all the or any of your rights or obligations under this appointment without the Company's prior consent.

(v) The Promoter shall not appoint any sub-agent without the company's prior consent.

(vi) The Promoter must open separate bank account to meet the Sales Promotional activities expenses. Shaw Wallace Distilleries Limited shall send cheques only to that account and Shaw Wallace Distilleries Limited shall also monitor the transactions of the said account."

11. For the aforesaid services, the Promoter i.e. the appellant got paid at Rs.8/- per case as service charges on the secondary sales of their brands during the period of agreement. All these factors make it abundantly clear that not only is the agreement titled as sales promotion agreement but the responsibilities of the appellant or that of sales promotion, there may be some other related incidental responsibilities and the payment to the appellant is based on the sales of the products. Although there is only one wholesale buyer, APBCL, their orders depend on the orders which the retailers place on the depots of APBCL. The appellant was specifically required to ensure that the retailers place maximum quantities of the client's products on APBCL depots. We have no doubt in our mind that the services rendered by the appellant are in the nature of promotion and marketing of the clients' products. In view of this, we find on merits that the appellant is liable to pay service tax under "Business Auxiliary Services" for the services rendered by them.

12. On the question of invocation of extended period of limitation, we find that the appellant has not taken the registration nor disclosed the nature of their activities to the Service Tax Department at any stage. It is only on the basis of specific intelligence and follow up of investigations that it has come to the light that the appellant was rendering Business Auxiliary

Services and has neither obtained registration nor filed returns nor has paid any service tax whatsoever. In view of the above, we find that the appellant has suppressed these facts and therefore the invocation of extended period of limitation under Section 73 is correct and proper. Consequently, the confirmation of interest is also liable to be upheld. The penalties imposed under sections 76, 77 & 78 of the Finance Act, 1994 also require no interference.

13. In view of the above, we find that the impugned order is correct and proper and does not require any interference. Accordingly, the impugned order is upheld and the appeal is rejected.

(Operative portion of the order pronounced in open court on conclusion of hearing)

(ASHOK JINDAL)
(MEMBER (JUDICIAL)

(P. VENKATA SUBBA RAO)
MEMBER (TECHNICAL)

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