

**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH: KOLKATA
Appeal No. ST/76289/2018**

(Arising out of Order-in-Appeal No. 18/DIB/CE(A)/GHY/18 dated 28/03/2018 passed by the Commissioner (Appeals), Central Excise, Customs and Service Tax, Kolkata)

M/s. Jaybee Auto Agencies Pvt. Ltd.,

....Appellant (s)

Vs.

Commissioner of Central Excise & ST, Dibrugarh

....Respondent (s)

Appearance:

Sri D. Sahu, Adv. for the Appellant (s)

Shri A.Roy, Supdt (AR) for the Respondent(s)

CORAM:

HON'BLE SHRI P.K.CHOUDHARY, MEMBER(JUDICIAL)

Date of Hearing :- 15.02.2019

ORDER NO. FO No. 75199/2019

PER SHRI P.K.CHOUDHARY

Briefly stated the facts of the case are that the appellant is an authorized dealer of M/s. Maruti Suzuki India Limited and PIAGGO. That the appellant has regularly filed the ST-3 Returns. During an audit, some discrepancies were found in respect of taxable service received under the reverse charge mechanism w.e.f. 01.07.2012. Show Cause Notice dated 23.11.2016 was issued covering the period from October, 2013 to September, 2015 alleging wrong availment of Cenvat credit and also discrepancy in the figures shown in the ST-3 Returns as compared with the figures in the financial statement of the appellant. The Adjudicating Authority confirmed the demand of Rs.3,51,181/- and Rs. 6,23,437/- along with interest and imposed a penalty of equal amount under Section 78. On appeal, the Learned

Commissioner (Appeals) modified the adjudication order and passed the following orders;

"11.5 I have carefully gone through the calculation sheet, corresponding ST-3 Returns and Balance Sheet submitted by the appellant with the appeal. I find that at pages 4 of the SCN in the table, below para 9, calculation of demand has been shown. In the said table in first column and 6th row it has been mentioned 'Less accrual basis commission (paid next year i.e. 2015-16)'. In the said row under column having heading Gross amount as per B/S an amount of Rs. 399951/- has been shown and in the next column i.e. Service Tax liability as per B/S in the 6th row an amount of Rs. 49434/- is mentioned. I find that while the amount of Rs. 399951/- has been reduced from the total value the amount of Rs. 49434/- has been added which should have been deducted as this is the tax on the value for which the commission was paid in the next year. Hence the appellant's contention is acceptable and an amount of Rs. 98868/- has to be reduced from the service tax liability. I further find that while taking details of service tax paid as per column 4 against payment through CENVAT credit amount of Rs. 122913/- has been shown. However on going through the ST-3 returns it has been noticed that in addition to the service tax, amounts of Rs. 3689 and Rs. 10883/- during the Financial years 2013-14 and 2014-15 have also been debited for EC and S&HEC payment which has not been taken into account while calculating the service tax liability. These amounts are also to be reduced from their service tax liability. Regarding the calculation mistake on receipt of "Security Service" under reverse charge mechanism during 2014-15 as urged by the appellant, I find that it cannot be verified as the appellant have not submitted any basis as from where they have arrived to the figure of Rs. 9, 10,180/-. Hence

the figure of Rs. 112500/- in place of Rs. 123563/- as claimed by the appellant could not be considered.

12. Regarding imposition of penalty under Section 78 of the FA, 1994, I find that since invocation of extended period is legally justified in the instant case for suppression of facts, the penalty imposed under Section 78(1) of the FA, 1994 is also legally tenable.

11. Regarding charging of interest, I find that Section 75 of the Finance Act, 1994 provides mandatory provision for interest for non-payment / delayed payment of service tax. As such the appellant is liable to pay interest for non-payment / delayed payment of service tax.

12. In view of the above discussions, I uphold the order of adjudicating authority with partial modification of para 39(a) and 39(d) of the impugned order as below-

39(a) A demand of Rs. 2,37,741/- is confirmed against the appellant in terms of Section 73(2) of the Finance Act, 1994. The amount of Rs. 2,11,859/- paid by the appellant is appropriated.

39(d) Penalty of Rs. 861178/- under the provision of Section 78 of the Finance Act, 1994 is imposed on the appellant."

The appellant being aggrieved is in appeal before the Tribunal.

2. The Ld. Adv. appearing on behalf of the appellants filed the Reconciliation Statement along with photocopy of the TR-6 challans to explain the discrepancies as pointed out by the Lower Authorities.

3. The Learned DR reiterates the orders of the Lower Authorities.

4. Heard both sides and perused the appeal records.

5. I find that the demand of the amount of Rs. 1,39,322/- arose out of calculation mistake in the year 2014-15, while deducting-commission paid of Rs. 49,434/-which has been inadvertently added twice (Table-II) and CENVAT Credit of Rs. 3,689/- and Rs.10,883/- had been allowed less in the year 2013-14 and 2014-15, respectively,

thereby causing demand of Rs. 1,39,322/- which is not payable by the appellant and the demand of Rs. 1,39,322/- is liable to be set aside. Further, Security Service charges under reverse charge mechanism, 75% of Service Tax on gross amount which should be Rs. 9,10,180/- and service tax arises thereon Rs. 1,12,500/- instead of Rs. 1,23,563/- as wrongly calculated by the Department which requires rectification in the demand. Under the above circumstances, no demand was payable by the appellant.

6. It is further observed that the appellants have taken and utilized CENVAT credit on receipt of "Security Agency Service" while providing the exempted service namely "Trading of Goods" and taxable service such as vehicle repairing service and business auxiliary service. The applicant have claimed that services of only 4 guards are utilized in their Show Room and Godown pertaining to trading activities. They have also contended that they maintain separate Accounts for exempted service and reversed an amount of Rs. 90,012/-.

7. On perusal of records I do not find any element of mis-statement, suppression of facts etc. with an intent to evade payment for service tax. Accordingly the penalty imposed under Section 78 is liable to be set aside. In view of the above discussions, the penalty imposed under Section 78 is set aside. The appeal filed by the appellant is disposed of in the above terms.

(Dictated and pronounced in the open court.)

(P.K.Choudhary)
Member(Judicial)

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