IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA

REGIONAL BENCH – COURT NO.2

Service Tax Appeal No.06 of 2010

(Arising out of Order-in-Original No.98/Commr./Bol/09 dated 22.09.2009 passed by Commissioner of Central Excise, Bolpur)

M/s Jai Balaji Industries Limited
Lenin Sarani, Dist,.-Burdwan, Durgapur-713210

Appellant

VERSUS

Commissioner of Central Excise, Bolpur
Nanoor Chandidas Road, SIAN, Bolpur, Dist.-Birbhum, Pin-731204

Respondent

APPERANCE :

Shri A.K.Prasad, Advocate and Shri S.Mohapatra G.M. for the Appellant
Shri J.Chattopadhyay, Authorized Representative for the Respondent

CORAM:
HON'BLE MR.ASHOK JINDAL, MEMBER (JUDICIAL)
HON'BLE MR.RAJEEV TANDON, MEMBER (TECHNICAL)

FINAL ORDER NO……75321/2023

DATE OF HEARING : 13 .04.2023
DATE OF DECISION : 13 .04.2023

Per Ashok Jindal :

The appellant is in appeal against the impugned order demanding service tax under the category of "Business Auxiliary Service" under Section 65 (19) of the Finance Act, 1994 from the appellant for their activity rendering as commission agent during the period 2003-04 and 2004-05.

2. The facts of the case are that the appellant is engaged in the manufacture of Sponge iron, Pig iron, M.S.Ingots, M.S.Billets etc. as well as various other activities. During the impugned period, the appellant was also receiving commission for sale and purchase of various goods and providing other services to their clients by way of commission. The "Business Auxiliary Service" was brought into service

tax net w.e.f. 01.07.2003 under Section 65 (19) of the Finance Act, 1994.

3. The revenue took a view of the activity undertaken by the appellant against under the category of "Business Auxiliary Service". Therefore, a show-cause notice dated 26.09.2008 was issued to the appellant to demand of service tax on commission received by them during the period 2003-04 and 2004-05 under "Business Auxiliary Service" under Section 65 (19) of the Finance Act, 1994.

4. The show-cause notice was contested by the appellant by way of reply justifying that prior to 01.07.2003, the "Business Auxiliary Services" were not in the statutory book, therefore, no service tax is payable by them for the period prior to 01.07.2003. It is also contended that from 01.07.2003 to till 08.07.2004, they were not liable to pay service tax on commission agent services in view of Notification No.13/2003-ST dated 20.06.2003. For any service rendered post 08.07.2004, it was contended by them the same is barred by limitation. The adjudicating authority, after taking note of defence taken by the appellant passed the impugned order confirming demand of service tax of Rs.1,32,42,153/- along with interest and penalties under various Sections of the Finance Act, 1994.

5. Aggrieved by such order, the appellant is before us.

6. Shri A.K.Prasad, Ld.Advocate appearing on behalf of the appellant, submits that prior to 01.07.2003, they were not liable to pay service tax as "Business Auxiliary Service" but for the period post 01.07.2003 to till 08.07.2004, the said service was not taxable. It is his contention that they were entitled to get the benefit of Notification

No.13/2003-ST dated 20.06.2003. He also submits that the Audit took place on 02.02.2005 and 06.10.2005 for the period 2003-04 and 2004-05 respectively. During the Audit, they had provided of material records, namely, balance sheet, service tax returns and payments of service tax made by them. The show-cause notice has been issued on 26.09.2008. The said show-cause notice is barred by limitation. Finally, he relies on the decision of the Tribunal in the case of Brindco Sales Limited Vs. Commissioner of Service Tax, Delhi reported in 2015 (40) STR 986 (Tri.-Del.). He also relies on the decision of the Tribunal in the case of Sales India Private Limited Vs. Commissioner of Service Tax, Ahmedabad reported in 2023-TIOL-186-CESTAT-AHM.

7. On the other hand, the ld.A.R. for the Revenue, supports the impugned order and drew our attention to some of the invoices showing that these invoices are not for commission on sale/purchase on behalf of the third party. He also submits that on these invoices, payments were made on lump sum basis, the same cannot be termed as sale effected by the appellant.

8. Heard both sides and considered the submissions.

9. On the basis of records placed before us and the arguments advanced by both the sides, the sole issues are as under :

(a) Whether the appellant is liable to pay service tax under Section 65 (19) of the Finance Act, 1994 as "Business Auxiliary Service" during the impugned period or not ?

(b) Whether for the period prior to 01.07.2003, the appellant was liable to pay service tax under "Business Auxiliary Service" or not ?

(c) Whether the demands raised against the appellant are barred by limitation or not ?

(d) Whether in the facts and circumstances of the case, the appellant is liable to pay interest on the impugned demand and is to be penalized or not ?

Issue No (a)

10. We find that in this case, "Business Auxiliary Service" has been introduced w.e.f. 01.07.2003 through Section 65 (19) of the Finance Act, 1994, which is as under :

"2.4 As per definition of "Business Auxiliary Service" as defined under Section 65 (19) of the Finance Act, 1994, 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 services provided by the client ; or

(iii) Any customer care service provided on behalf of the client ; or

(iv) Any incidental or auxiliary support service such billing, collection or recovery of cheques, accounts and remittance, evaluation of prospective customer and public relation services and includes services as a commission agent but does not include any information technology service ;

And as amended by the Finance (No.2) Act, 2004, w.e.f. 10.09.2004, the following services are also included in the "Business Auxiliary Service" ;

(v) procurement of goods or services which are inputs for the client ; or

(vi) production of goods on behalf of the client ; or

(vii) provision of service on behalf of the client ; or

(viii) a service incidental or auxiliary to any activity specified in sub-clauses (i) to (vii), such as billing, issue or collection or recovery of cheques, payments, maintenance of account and remittance, inventory management, evaluation or development of prospective customer or vendor, public relation services, management or supervision."

On going through the said definition, we find that the activity taken by the appellant, is squarely covered under the definition of "Business Auxiliary Service" as provided under Section 65 (19) of the Finance Act, 1994. Further, we find that the Notification No.13/2003-ST dated 20.06.2003 came into effect, which is reproduced below :

"Business auxiliary services provided commission agents - Exempted

In exercise of the powers conferred by Section 93 of the Finance Act, 1994 (32 of 1994), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts the business auxiliary services provided by a commission agent from the service tax leviable thereon under sub-section (2) of Section 66 of the said Act.

Explanation – For the purposes of this notification, "commission agent" means a person who causes sale or purchase of goods, on behalf of another person for a consideration which is based on the quantum of such sale or purchase.

2. This notification shall come into force on the on the 1st day of July, 2003."

As per the said Notification, any business auxiliary service provided by a commission agent is exempted from payment of service tax and "commissioner agent" has been defined therein.

11. The said issue has come up before the Tribunal in the case of Brindco Sales Ltd. (supra) wherein this Tribunal has observed as under:

*"**5.** We have considered the contention of both sides. We also perused a representative agreement that the appellant entered into with Konkan Agro Marine Industries (P) Ltd., Delhi in terms of which the appellant agreed to perform the undermentioned functions :*

(a) To procure all orders independently and arrange for completion of necessary excise formalities/payment of excise duties prior to dispatch frm KAM distillery, where necessary.

(b) To make all arrangements for distributing the products in the Territory as instructed by KAM.

(c) To raise the invoices on behalf of KAM for all sales effected.

(d) To collect payment from customers on due dates of invoices.

(e) To obtain Delhi Excise Licence on behalf of KAM as may be required and to renew the same from time to time for operating a depot in the Territory for stocking, trading and distribution of its products.

(f) To register KAM under the local Sales Tax Act (LST) and also under the Central Sales Tax Act (CST).

(g) To ensure compliance by KAM with various regulations of Local and Central Sales Tax Acts and Rules, COMMISSION AGENT agrees to maintain statutory records at the depot and also to attend to various functions/matters as mentioned in Annexure 'A'.

(h) To adhere to the general procedure of operation as described by KAM in Annexure 'B'.

(i) To maintain statutory and proper books of account and records, and to submit appropriate reports/returns as required under any local laws or regulations in force and which KAM is required to comply with. Besides, COMMISSION AGENT shall on a periodic basis submit reports and reconciliation.

COMMISSION AGENT undertakes to employ enough manpower at its own cost to ensure smooth functioning of the stocking and distribution of the products. KAM shall however be free to engage additional manpower that may be required with a cost to be borne by KAM.

9. COMMISSION AGENT undertakes to invest/fund amount (required to be deposited for issue of Transport Passes to Trade/Institutions) at any point of time. Further COMMISSION AGENT undertakes to provide more funds (if mutually agreed) considering the growth in the volume or change in excise levies.

10. COMMISSION AGENT shall obtain such permissions, licenses and/or registrations and comply with such regulations as may be required from the Government/Local Bodies or any other Authority.

11. COMMISSION AGENT shall forthwith forward to KAM all documents, papers, orders, notices, etc. addressed to KAM and received by the COMMISSION AGENT for necessary action.

12. COMMISSION AGENT shall bear and pay all rents, electricity, water and other charges and outgoing including local and municipal taxes and levies in respect of the Depot.

Paragraph (c) of the Agreement reads as under :

c) In consideration of the above functions, to be carried by COMMISSION AGENT on behalf of KAM and in attending to the *day to day administration of the Depot storage facilities and effecting sales/collections on KAM's account, KAM agrees to pay COMMISSION AGENT the brand-wise fixed commission of Rs. 125/- per case on Smirnoff Vodka, Smirnoff Twist, Archers, Brakc & White and Vat 69 only and Rs. 35/- per case on Gilbeys Gln on total monthly sales, brand-wise of each of the product (subject to condition of tax at source, if applicable under the Indian Income Act) on all sales effected from the Depot under this Agreement. The brand-wise commission fixed above, can however be varies after mutual discussion agreements for any/all the brands and such changes will be formalized in writing.*

As the essential issue involved in this case is whether the appellant was entitled for the benefit of Notification No. 13/2003-ST it is convenient to reproduce the said Notification here :

In exercise of the powers conferred by section 93 of the Finance Act, 1994 (32 of 1994), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts the business auxiliary services provided by a commission agent from the service tax leviable thereon under sub-section (2) of section 66 of the said Act.

Explanation. - For the purposes of this notification, "commission agent" means a person who causes sale or purchase of goods, on behalf of another person for a consideration which is based on the quantum of such sale or purchase.

2. This notification shall come into force on the 1st day of July, 2003.

[Notification No. 13/2003-S.T., dated 20-6-2003]

It is evident from the Explanation contained in the said Notification that the Commission Agent means a person who causes sale or purchase of goods, on behalf of another person for *a consideration which is based on the quantum of such sale or purchase.*

It is evident from the provisions of the agreement quoted above that the appellant was causing sale or purchase of goods on behalf of its clients (liquor company). It is also evident that the consideration received by the appellant was based on the quantum of the goods sold. Therefore it satisfied the requirements of being categorised as commission agent as per the definition given in the said Notification. Though, admittedly, the appellant was rendering several other services also (all of which have been held to be covered under BAS by the adjudicating authority) that would not debar it from being called commission agent as the said Notification neither expressly nor impliedly states that a commission agent should not render any service which is not within the purview of a commission agent.

6. *……………………………………………………………*

7. *We find that primary adjudicating authority has denied the benefit of Notification No. 13/2003-ST to the appellant essentially by noting as under :*

21.2 ……………. However, if a service provider is primarily engaged in business promotion and sale is just a consequence of the various activities undertaken by him, it could not be considered that he is a commission agent primarily causing sale. The definition of commission agent in this notification would not cover a person who is primarily engaged in business promotion and not confined to sale of the goods.

21.3 ……………........ However, in the present case, the various activities undertaken by M/s. BSL are beyond the scope of function of commission agent. They are providing promotional activities, infrastructural support, promotional event management. …… Further since BSL was acting as Del Crederer *for its clients, it stood as guarantor about the solvency of purchaser. These activities are taxable under 'Business Auxiliary Services'. It is not a case that M/s. BSL were just supplementing the efforts of the clients for business promotion rather they were mainly responsible for undertaking the aforesaid promotional activities. These activities are beyond the scope of the function of commission agent as defined in the notification.*

21.4 ………….. Thus, the eligibility to the Notification is to be determined strictly in terms of the definition of commission agent provided in the Notification itself. This definition cannot be made wider by including activities which are not provided in the definition.

21.5 Thus, I hold that M/s. BSL were providing services taxable under the category 'Business Auxiliary Services' but they were not eligible for the benefit of Notification No. 13/2003, dated 20-6-2003.

The aforesaid observations/inferences of the primary adjudicating authority are fallacious/untenable because

(i) The definition of commission agent in Notification No. 13/2003-ST nowhere stipulates that a commission agent should primarily cause sale.

(ii) There is nothing in the said Notification to imply that a commission agent to be eligible for the benefit of the said notification should not render business auxiliary services which are beyond the scope of function of commission agent.

(iii) The adjudicating authority has in effect conceded that the appellant has provided certain business auxiliary services which are clearly within the ambit of the role of a commission agent. The notification exempts business auxiliary services provided by a commission agent (and not merely those business auxiliary services which are provided as a commission agent)."

We find that in case of Brindco Sales Ltd. (supra), the issue was examined by this Tribunal as observed as under :

> *"It is evident from the Explanation contained in the said Notification that the Commission Agent means a person who causes sale or purchase of goods, on behalf of another person for a consideration which is based on the quantum of such sale or purchase.*
>
> *It is evident from the provisions of the agreement quoted above that the appellant was causing sale or purchase of goods on behalf of its clients (liquor company). It is also evident that the consideration received by the appellant was based on the quantum of the goods sold. Therefore it satisfied the requirements of being categorised as commission agent as per the definition given in the said Notification. Though, admittedly, the appellant was rendering several other services also (all of which have been held to be covered under BAS by the adjudicating authority) that would not debar it from being called commission agent as the said Notification neither expressly nor impliedly states that a commission agent should not render any service which is not within the purview of a commission agent."*

In this case also, the appellant has affected the sales on behalf of third party and received commission which is covered as "commission agent" in terms of the Notification No.13/2003-ST dated 20.06.2003.

12. Therefore, following the decision of Brindco Sales Ltd. (supra), we hold that the appellant was not liable to pay service tax under the category of "Business Auxiliary Service" as commission agent during the period 01.07.2003 to 08.07.2004.

The issue is answered in favour of the appellant.

Issue No.(b)

13. It is fact on record that prior to 01.07.2003, "Business Auxiliary Service" was not in the statutory book, therefore, the question of demanding service tax for the period prior to 01.07.2003, does not arise.

14. In view of this, we hold that for the period prior to 01.07.2003, the appellant was not liable to pay service tax. Therefore, the said issue is answered in favour of the appellant. We also take note of the fact that all the records were placed by the appellant before the adjudicating authority, but the adjudicating authority did not take cognizance of the same. Therefore, the observation of the adjudicating authority that the records were placed before him are against the facts placed on record. Therefore, we hold that for the period prior to 01.07.2003, not service tax was payable by the appellant.

Issue No.(c)

15. We find that in this case, it is fact on record that the audit took place on 2nd February, 2005 and 6th October, 2005 for the period 2003-04 and 2004-05 respectively (impugned period) and a show-cause notice has been issued to the appellant on 26.09.2008 as it is not a case of suppression of facts by the appellant and all the facts are in the knowledge of the Department, therefore, we hold that all the demands are barred by limitation as the show-cause notice has been issued by invoking extended period of limitation.

16. Accordingly, the said issue is also answered in favour of the appellant.

Issue No.(d)

17. As the issues (a), (b) & (c), have been answered in fabour of the appellant, therefore, we hold that as the demand is not sustainable against the appellant, therefore, the appellant is not required to pay any interest and no penalties were imposable on the appellant.

18. In conclusion, we hold that no service tax is payable by the appellant for the impugned period against the impugned show-cause notice. Therefore, no interest and penalty is leviable on the appellant.

19. In view of the above, we set aside the impugned order and allow the appeal with consequential relief to the appellant, if any.

(Dictated and pronounced in the open court)

Sd/-
(Ashok Jindal)
Member (Judicial)

Sd/-
(Rajeev Tandon)
Member (Technical)

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