

**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
KOLKATA
EASTERN ZONAL BENCH: KOLKATA**

Service Tax Appeal No. 102 & 104 of 2010

(Arising out of Order-in-Original No. 41/Commr/ST/Kol/2009-10 dated 14.01.2010 passed by Commissioner of Service Tax, Kolkata.)

Commissioner of Service Tax, Kolkata.
M/s Dewar Garage Limited
4, Council House Street, Kolkata-700001.

...Appellant (s)

VERSUS

M/s Dewar Garage Limited
Commissioner of Service Tax, Kolkata.
180, Shantipally Rajdanga Main Road, 3rd Floor, Kolkata-700107.

..Respondent(s)

APPEARANCE :

Shri A Roy, Authorized Representative for the Appellant/Revenue
Shri Arun Agarwal & Ms. Pinky Agarwal, both Chartered Accountants for the
Respondent/Assessee

CORAM:

HON'BLE MR. P. K. CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. K. ANPAZHAKAN MEMBER (TECHNICAL)

FINAL ORDER No.....75944-75945/2023

DATE OF HEARING : 05.06.2023

DATE OF PRONOUNCEMENT: 28.06.2023

PER K. Anpazhakan :

M/s Dewars Garage (The Appellant) are engaged in sale of various vehicles as dealers of the manufacturers Maruti, under a 'Dealership Agreement'. A Show Cause Notice dated 16.10.2008 was issued to the Appellant on the ground that they have rendered promotional or marketing activities for the finance companies by providing space in their premises and helping them to provide auto loans to customers. The department considered the consideration received by them as the value of taxable service rendered as 'Commission Agent' and liable to

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service tax under the category of 'Business Auxiliary Service', w.e.f.16'06'2005. Accordingly, the Notice demanded service tax of Rs. 1,78,87,178/-, for the period 2003-04 to 2007-08 . The Notice was adjudicated and the demand of service tax of Rs.1,78,87,178/- was confirmed, under the category of 'BAS, along with interest and penalty under Section 78 of the Finance Act,1994 was imposed," vide Order-in-Original dated 14.01.2010.No penalty was imposed under Section 76 of the Finance Act. The Appellant filed the present appeal against the impugned order. The Department file appeal against non-imposition of penalty under section 76 of the Finance Act, 1994.

2. In their submissions, the Appellant stated that they did not undertake any 'Commission agents' service for the Financing Institutions / Banks. In the Notice, it was alleged that they were 'commission agent' for different financial institutions/ banks for arranging auto loans to customers. The term 'commission agent' was initially not defined under service tax. A definition was inserted w.e.f. 16.06.2005, which defined 'commission agent' a follows:-

"commission agent" means any person who acts on behalf of another person and causes sale or purchase of goods, or provision or receipt of services, for a consideration, and includes any person who, while acting of behalf of another person.-

- (i) Deals with goods or services or documents of title to such goods or services; or
- (ii)Collects payment of sale price of such goods or services; or
- (iii) Guarantees for collection or payment for such goods or services; or

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- (iv) Undertakes any activities relating to such sale or purchase of such goods or services;

In the case under consideration, the Appellant was not undertaking any of the above activities and hence cannot be considered as 'commission agent'. In fact, there was no agreement between appellants and the banks for provision of such services.

3. The Appellant stated that they were merely providing space to the financial institutions / banks in their premises and consideration received for the same cannot be considered as amount received towards rendering of Business Auxiliary Service.

4. The Appellant cited Board's Circular No. 87/05/2006-ST dated 06.11.2006, where para 4 of the Circular states that the automobile dealers when help buyers of the vehicle for arranging finance and that the dealer have tie-up with Banks/ Non-Banking Finance Companies. This activity is considered as to promote or market the services provided by the financial institution and are covered under taxable service, namely, the 'Business Auxiliary Service'. The Appellant stated that they were not advising the customers to approach such financial companies for taking loans. The choice of the particular finance company was entirely at the discretion of the customer. The Appellant did not play any role in this regard. Therefore, the Appellant contended that they were not promoting/marketing the services of financial institutions/ banks.

6. The Appellant cited the decision of the Larger bench of Tribunal in the case of 'Pagaria Auto Centre' with identical facts, wherein it was

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held that providing space to finance institutions by Auto companies would not be liable to service tax under the category of BAS.

7. The Appellant contended that there was no suppression of fact, with an intention to evade payment of service tax available in this case. Hence, extended period cannot be invoked to demand service tax. It is a settled principle of law that extended period of limitation cannot be invoked in case of bonafide doubt regarding taxability/classification etc. In the instant case, there were conflicting decisions of Tribunal across the country which was put to rest after the decision of the Larger bench of the Tribunal. Therefore, extended period of limitation cannot be invoked in the instant case and hence demand for the period prior to Oct-Mar'07 is barred by limitation. Accordingly, imposing of penalty is also not valid. Reliance is placed on the following judgments;

i. Aadshwar
Motors Pvt.
Ltd., [2011
(24) STR 81
(Tri.-Ahmd)]

i. Ved
Automotives
[2016 (44) STR
140 (Tri.-All.)]

(i) Autobahn Enterprises Pvt. Ltd., [2022 (56) GSTL 312 (Tri.-
Bom.)]

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(ii) Sanghi Finance & Investment Ltd, [2022 (65) GSTL 95 (Tri.-Del.)]

8. The commission so received by the appellant was not taxable under BAS. If at all there was a liability, it could be taxable under the category of "Support services in relation to business or commerce" (BSS' here after) as defined in Section 65(105)(zzzq) of the Finance Act, 1994. Thus, it would at best be taxable w.e.f. 01.05.2006 which they have already paid. Reliance is placed on following judgments;

i) S.R. Kalyankrishnan reported in 2008 (9) STR 255 (Tri.-Bang.)-03.08.2007.

ii) Hira Automobiles Ltd., reported in 2009 (16) STR 408 (Tri.-Del)-02.11.2007

iii) Wings Group of Companies reported in 2008 (12) STR 287 (Tri.-Bang.)-21.04.2008.

9. The Ld A.R. reiterated the findings in the impugned order.

10. Heard both sides and perused the appeal records.

11. We observe that Appellant was only providing space to the finance companies who provide auto loans to the customers. They did not undertake any promotional or marketing activities for the finance companies. Their business is sale of Maruti Cars, as a dealer. A customer may choose to make full down payment or may choose to go for financing. In case he chooses to go for financing, he may choose any one of the choice of banks available with him, for which he collects information from the Appellant. Finance commission is received by the Appellant from various financing banks, which are chosen by the customer, in respect of the amount of finance provided by the finance

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companies to the customers. The appellants are not bound by any service agreement, to provide services to the financing banks in the nature of promotion or marketing of their loan products. Thus, the Appellant has not provided any 'Commission Agent' service liable to service tax under the category of BAS. We observe that the Appellant was not performing any of the activities of the commission agent .

12. We observe that the issue has already been settled by the decision of the Larger bench of Tribunal in the case of 'Pagaria Auto Centre' with identical facts, wherein it was held that providing space to finance institutions by Auto companies would not be liable to service tax under the category of BAS. For determining a service to be Business Auxiliary Service or not, certain principles were laid down by the Tribunal vide order dated 12.09.2013 reported in 2014 (33) STR 506 (Tri.-LB). Extract of the relevant para is reproduced below:

"20. On a consideration of the apparent conflict of opinion in the decisions mentioned in the order of reference and the other decisions which were cited at bar, it is clear that no uniform principle emerges as would guide determination of whether a particular transaction involving an interface between an automobile. Dealer and bank or financial institution would per se amount to BAS. The identification of the transaction and its appropriate classification as the taxable BAS or otherwise must clearly depend upon a careful analysis of the relevant transactional documents. Only such scrutiny and analysis would ensure rational classification of the transaction.

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21. Where mere space is provided along with furniture for facilitating accommodation of representatives of financial institutions in the premises of an automobile dealer and consideration is received for that singular activity, such consideration may perhaps constitute a rent for the provision of space and associated amenities. Such restricted relationship/transaction may not amount to BAS. If on the other hand, the transactional documents and other evidence on record indicates a substantial activity falling within the contours of any of the integers of the definition of BAS, spelt out in Section 65(19), then it would be legitimate to conclude that BAS is provided.” The ratio of the above judgment under identical facts and circumstances can be squarely applied in the case of the appellant. The appellants are also, merely providing the space to the representatives of financial institution and are not promoting or marketing the products or services of bank and financial institutions. Therefore, the same cannot be categorized as “Business Auxiliary Service.’.

13. Following the Larger Bench decision cited above, we hold that the Appellants were not liable to pay service tax under the category of BAS. Accordingly, we hold that the demands in the impugned order are liable to be set aside. Since the demand is not sustainable, the demand of interest and penalty also will not survive. The Department’s appeal praying for imposition of penalty under Section 76 of the Finance Act, 1994 also not sustainable.

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14. In view of the above discussion, we allow the appeal filed by the Appellant and reject the appeal filed by the department.

(Pronounced in the open court on.28.06.2023...)

Sd/-

(P. K. Choudhary)
Member (Judicial)

Sd/-
(K. Anpazhakan)
Member (Technical)

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