

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL, MUMBAI**

REGIONAL BENCH - COURT NO. I

Service Tax Appeal No. 86385 of 2013

(Arising out of Order-in-Original No. 11/ST/2012 dated 24.12.2012
passed by the Commissioner of Central Excise, Customs & Service
Tax, Nashik)

M/s Sargam Retails Pvt. Ltd..... Appellant

Versus

Commissioner of Central Excise, Nashik.... Respondent

Appearance:

Shri Prashant Patankar, Advocate for the Appellant

Shri M.K. Sarangi, Authorized Representative for the Respondent

CORAM:

HON'BLE DR. D.M. MISRA, MEMBER (JUDICIAL)

HON'BLE MR. C.J. MATHEW, MEMBER (TECHNICAL)

FINAL ORDER NO. A/86082/2019

Date of Hearing: 12.12.2018

Date of Decision: 07.06.2019

Per: Dr. D.M. Misra

This is an appeal filed against Order-in-Original No. 11/ST/2012 dated 24.12.2012 passed by the Commissioner of Central Excise, Customs & Service Tax, Nashik.

2. Briefly stated the facts of the case are that the appellants are dealers of M/s Fast Track Packers Pvt. Ltd. for the product Gai Chhap Jarda and sale/distribute major portion

of the said product. On the basis of statement of Shri Rajesh Omprakash Malpani on 03.12.2009 before the Income Tax authorities relating to unaccounted receipt/cash collected in connection with sale of excisable goods, investigation was initiated against the appellant by the Central Excise Department. During the course of investigation, it revealed that the appellant had arrangement with some dealers to market the product on their behalf and collect the sale proceeds for them for which an amount of Rs.505/- for bulk pack of 1500 Badshah Khaini pouches and Rs.1000/- for bulk pack of 3000 Badshah Khaini pouches was charged by them. The activity rendered by the appellant was alleged to fall under the scope of 'Support Service of Business or Commerce' as defined under Section 65(104c) of the Finance Act, 1994 and the consideration received thereof is chargeable to Service Tax. On the basis of statements and further investigation, it was alleged that the appellant had collected total amount of Rs.6,17,07,457/- involving Service Tax of Rs.70,13,483/-. Further, it is alleged that they have also collected an amount of Rs.15,20,000/- as consideration towards the provision of such service to one M/s Rajendra Trading Company, on which Service Tax amount involved was Rs.1,41,940/-, but not paid the Service Tax, which was proposed to be recovered from them. On adjudication, the total demand of Rs.71,55,424/- was confirmed with interest and penalty and the amounts paid by the Appellant has been appropriated. Hence, the present appeal.

3. At the outset, the learned Advocate Shri Prashant Patankar for the appellant submitted that confirmation of Rs.1,41,940/- is non competition fee charged and received by the appellant from M/s Rajendra Trading Company cannot be chargeable to Service Tax. It is his argument that the view expressed in *Jamna Auto Industries Ltd. – 2017 (5) GSTL 410 (Tri-Del)* cannot be made applicable as it has not taken any consideration the earlier precedents on the subject. Also, he has submitted that appeal against the said judgment of the Tribunal has been admitted by the Hon'ble Supreme Court. Further, he has submitted that confirmation of Service Tax of Rs.70,13,483/- on the consideration of Rs.6,70,07,437/- related to the product 'Badshah Khaini' has been wrongly confirmed for sale of the said product in certain areas of Karnataka. He has submitted that there is no written agreement and no rights have been surrendered by the dealers who were marketing of the goods. The said amount has not been received from any specific entity under non-competition agreement with dealers, even though the appellant described it as "non-competition fees" primarily for the reason that the said amount had been collected from scattered dealers and wholesalers of Badshah Khaini under the threat of competition. There has been no specific agreement with any dealer, wholesaler or retailer in this regard. Further, he has submitted that the income disclosed to Income Tax authorities cannot be considered as receipt against some specific services without evidence. In support, he has referred to the judgment of this Tribunal in the case of *Commissioner*

of Central Excise, Ludhiana Vs. Mayfair Resorts m- 2011 (21) STR 581 (Tri-Del) and Commissioner of Central Excise, Ludhiana Vs. Zoloto Industries - 2013 (294) ELT 455 (Tri-Del). The learned Advocate further submitted that in the impugned order, the learned Commissioner has noted that the issue was not regarding the non-competition of appellant but from the statements of various dealers, it is concluded that the appellant had approached the dealers with a clear proposal to support their business by way of providing every infrastructure like, transport, manpower and other expertise in such matters. He has submitted that thus the said activity of non-competition cannot remotely be considered as positive action of rendering service, therefore non-competition fees are not liable to Service Tax under 'Support Service of Business or Commerce'. Further, he has submitted that there are inherent contradictions in the findings of the Commissioner, therefore, the order is liable to be set aside. Further, he has submitted that the demand notice was issued to them on 5.9.2011 for the period April, 2007 to October, 2009 hence barred by limitation.

4. Per contra, learned AR for the Revenue has submitted that during the course of investigation by the Income Tax authorities, it was found that the appellant had unaccounted income of Rs.42.02 crores, as disclosed in the statements of Shri Rajesh Omprakash Malpani, Director. Further statements recorded by the Income Tax authorities and the statements recorded subsequently by the Central Excise Department

revealed that the appellant had provided market support service to dealers and the consideration amount was collected in cash and it was not accounted in their books of accounts, therefore, no written agreement was there in this regard. The amount collected as per non-competence agreement for the product Gai Chhap Jarda is Rs.15.02 lakhs and for the product Badshah Khaini is around Rs.6.07 cores. It is his contention that the appellant had recovered Rs.5.80 crores for supporting the business of dealers and additional amount of Rs.90,07,437/-, being the expenditure for recovery of such amount. It is his contention that the appellant handled the business of Badshah Khaini right from procurement of order from the buyers, arranging transport, manpower, distribution to different buyers, clearance of payment etc. Supporting the order of the adjudicating authority, the learned AR has further submitted that the appellant possessed necessary expertise, infrastructure and supported the business in marketing such product by the dealers for which they were compensated by such dealers, thus, the said activity rightly come under the scope of Support Service of Business or Commerce. In support, he has referred to the judgment of this Tribunal in *Jamna Auto Industries' case (supra)*. Further distinguishing the judgment of this Tribunal in the *Mayfair Resorts' case (supra)* cited on behalf of the appellant, he has submitted that in the said judgment, there was a letter dated 21.3.2005 to Commissioner of Income Tax, whereby, the amount of Rs.35.00 lakhs is said to be not attributable to consideration from the taxable service provided, but in the present case by

the statement dated 03.12.2009, it is clear that the amount has been collected as a consideration in cost to support of the business of the dealers with regard to the product Badshah Khaini. The learned AR further submitted that since the fact was not intimated to the Department and the appellant failed to file ST-3 returns, disclosing the said transaction, therefore, extended period of limitation has been rightly invoked against them.

5. Heard both sides and perused the records.

6. We find that the learned Commissioner in the impugned order has confirmed the total demand of Rs.71,55,424/- with equal amount of penalty and interest thereon observing that the service rendered by the Appellant is in the nature of Support Service of Business or Commerce. Out of the said amount confirmed, Service Tax of Rs.70,13,483/- is towards the total consideration of Rs.5,80,00,000/- received and expenditure of Rs.90,07,437/- incurred by the appellant in the collection of the said amount; Service Tax of Rs.1,41,940/- on the consideration amount of Rs.15,20,000/- collected from M/s Rajendra Trading Company. The contention of the appellant that, since both theses amounts have been received as non-competition fee, therefore, the same cannot be classified under the taxable category of Support Service of Business or Commerce. The Revenue, in addition to the argument that non-competition fees chargeable to Service Tax under taxable category of Support Service of Business or Commerce, has

also contended that the amounts collected from the dealers/retailers of the product 'Badshah Khaini, are in support of the business by way of providing necessary marketing infrastructural facility.

7. We find that the defense put up by the appellant before us in their grounds of appeal is that the amount collected by the appellant from M/s Rajendra Trading Company as well as from other dealers of Badshah Khaini are in the nature of fees relating to discourage of competition in promoting the sales of the said dealers/retailers. It is the contention of the appellant that such fees cannot be considered as consideration towards rendering Support Service of Business or Commerce. We find that this Tribunal in *Jamna Auto Industries' case (supra)* has considered the issue in similar circumstance and observed as below: -

“4. After having carefully considered the facts of the case and submissions of both the sides, it appears that the appellant's action and activity of having entered into non-compete agreement (called as non-compete agreement) with JSSL for which they received consideration of Rs. 5 crores, is a service giving support to the business and commercial activity of the other party viz. JSSL.

4.1 Section 65(104c) of the Finance Act, 1994 defines 'support services of business or commerce' as follows :

*"Section 65(104c) - **"Support Services of Business or Commerce"** means services provided in relation to business or commerce and includes evaluation of prospective customers, telemarketing, processing of purchase orders and fulfilment services, information and tracking of delivery schedules, managing distribution and logistics, customer relationship management services, accounting and processing of transactions, operational assistance for marketing, formulation of customer service and pricing policies, infrastructural support services and other transaction processing.*

Explanation - For the purposes of this clause, the expression "infrastructural support services"

includes providing office along with office utilities, lounge, reception with competent personnel to handle messages, secretarial services, internet and telecom facilities, pantry and security”

4.2 The ‘taxable service’ in this regard has been defined under Section 65(105)(zzzq) of the Finance Act, 1994 as follows :

“65(105) any service provided or to be provided (zzzq) to any person, by any other person, in relation to support services of business or commerce, in any manner;”

4.3 In view of the above definitions, ‘non-compete agreement’ which actually provided business and commercial support to other party viz. JSSL in relation to JSSL’s business and commerce, would be covered under the definition of ‘support service of business or commerce’ of Section 65(104c) and the corresponding taxable service of 65(105)(zzzq) of the Finance Act. Had there been no support, the appellant would not have got non-compete agreement fee of Rs. 5 crores. This non-compete agreement fee of Rs. 5 crores is the consideration for the support service provided to the business and commercial activities of JSSL, who is otherwise a competitor of the appellant as both parties to the agreement deal in the common business of designing, developing, manufacturing, marketing, selling, commercializing, distribution and promotion of automotive suspension systems. The appellant is one of the large suppliers of tapered leaf and parabolic springs to Tata Motors Ltd. On the other hand, M/s. JSSL is also engaged in the same business/commercial activities and it is also on record that JSSL is a wholly owned subsidiary of the appellant, M/s. Jamna Auto Industries Ltd. (JAIL).

5. Considering above discussion, there cannot be any doubt that the appellant’s action and activity of ‘entering into non-compete agreement with JSSL’ is nothing but a service covered by ‘support service of business and commerce’ as defined under Section 65(104c) read with Section 65(105) of Finance Act, 1994 and therefore, the consideration received for the said services is accordingly taxable. Consequently, the impugned order is sustained and the appeal dismissed as without merit. Cross-objections also stand disposed of accordingly.”

8. We do not find any reason to deviate from the aforesaid findings of the Tribunal. Besides, the Commissioner while recording the opinion that the services rendered by the appellant who are having necessary infrastructure facilities is also in the nature of Support Service of Business or Commerce has confirmed the demand observing as follows: -

“25.1 Against the above backdrop, I find that M/s. SRPL, being a huge organization related to marketing of tobacco products and having necessary expertise and infrastructure

forayed themselves into the territories operated by or under the C&F agents of the manufacture of the said tobacco products i.e. M/s. FPPL. It has been categorically established during investigation that the team of M/s. SRPL approached the dealers of the C&F agents of M/s. FPPL and offered them the service of procuring the purchase orders, providing the transport and manpower required to supply the tobacco product viz. 'BadshahaKhaini' and collection of amount against the sale of the said products. The said dealers who were smaller in terms of the infrastructural power of M/s. SRPL had to agree with the proposal of M/s. SRPL lest the business would be walloped by M/s. SRPL and they (dealers) would be soon out of business, M/s. SRPL by their proposal supported the smaller businesses of these dealers for which they would collect an agreed sum per bag of 'Badshaha Khaini' from the wholesalers/retailers of said dealers to whom the goods were sold. I find that M/s. SRPL by their above proposal created a win-win situation for the said dealers by which both the dealers and M/s. SRPL would co-exist and stand to gain in pure business terms. M/s. SRPL in their defence pleaded that the amounts so collected against the sale of 'Badshaha Khaini' was nothing but a non-competence charge. They stressed 'non competence' being not an activity needs to be regarded as antonym of 'action'. M/s. SRPL pleaded that absence of an action cannot be considered as provision of a service. I have carefully considered this aspect. I find that the present issue is not regarding 'non-competence' of M/s. SRPL in the area under operation of certain dealers engaged in sale of 'Badshaha Khaini'. The SCN relies on the statements of various dealers recorded during the investigation. The evidences that have surfaced clearly establish that M/s. SRPL being a huge organization having suitable infrastructure, in their bid to control the market, approached the dealers of C&F agents of M/s. FPPL with clear proposal to support their business by way of providing every infrastructure in lieu of which M/s. SRPL would collect certain amount per bag of 'BadshahaKhaini' sold to the wholesaler/retailers. M/s. SRPL, in this regard provided the transport, manpower and their expertise in such matter to impart a concrete shape to their proposal. Under no stretch of imagination, these activities can even be remotely considered as 'non action'. I find that M/s. SRPL by resorting to their plea of 'non competence' has tried to divert the attention of the adjudicating authority from the main issue. However department cannot fall prey to any rhetoric of illogical insertia. The activities carried out by M/s. SRPL and the consideration received by them was definitely against the support provided to the business of those dealers of C&F agents of M/s. FPPL and thus the activities that were carried out merit classification under 'Support Services of Business and Commerce' defined under section 65(104c) of Finance Act, 1994. Service Tax is leviable on the amount of Rs.5,80,00,000/- collected by M/s. SRPL from various dealers and wholesalers and retailers of the C&F agents of M/s. FPPL."

9. In their grounds of Appeal the Appellant has not rebutted the said finding of the Commissioner. In these circumstances, we do not find merit in the appeal. Consequently, the impugned Order is upheld and the Appeal is dismissed.

(Pronounced in court on 07.06.2019)

(Dr. D.M. Misra)
Member (Judicial)

(C.J. Mathew)
Member (Technical)

Sinha