CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI
REGIONAL BENCH - COURT NO. I

Service Tax Appeal No. 85702 of 2016

(Arising out of Order-in-Original No. PUN-EXCUS-001-PR.COM-094-15-16 dt. 19.01.2016 passed by the learned Principal Commissioner, Customs, Central Excise & Service Tax, Pune-I Commissionerate, Pune)

M/s My Car (Pune) Pvt. Limited, Pune .... Appellant
SR No.131, Hissa No.2/3/4/6/1,3,4,5,6,
Mumbai-Bangalore-Pune Bypass,
Wakad, Pune-411 057

Versus

Pr. Commissioner Customs, Central Excise & Service Tax, Pune-I .... Respondent
ICE House, 41-A, Sasson Road,
Opp. Wadia College, Pune - 411001.

Appearance:

Shri Dharmendra Srivastava, Advocate for the Appellant

Shri Prabhakar Sharma, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)
HON'BLE MR. M.M. PARTHIBAN, MEMBER (TECHNICAL)

FINAL ORDER NO. A/85973/2023

Date of Hearing: 28.02.2023
Date of Decision: 19.06.2023

Per: M.M. Parthiban

This appeal has been filed by M/s My Car (Pune) Private Limited, Pune (referred to as Appellants) against the Order-in-Original No. PUN-EXCUS-001-PR.COM-094-15-16 dt. 19.01.2016 (referred to as impugned order) passed by the learned Principal Commissioner, Customs, Central Excise & Service Tax, Pune-I Commissionerate, Pune.

2.1. Briefly stated, the facts of the case are that the appellant herein is registered with the jurisdictional Commissionerate under service tax registration No.AAECM2713MST002 for providing taxable services under the category 'Authorized service station', 'Business auxiliary service' and 'Renting of immovable property' enumerated under Section 65 (105) of the Finance Act, 1994.

2.2. The appellants are engaged in sale and purchase of motor cars of M/s. Maruti Suzuki India Ltd., (MSIL) under the brand name "Maruti", since March 2007. They are also running 'authorised service station' for Maruti vehicles sold by them and also for the vehicles sold by other dealers in India. They have rented out some portion of the premises on lease. On scrutiny of the appellant's records during an Audit conducted by the Department, as well as on the basis of Audit report No.59/2012-13 (Para1) dated 04.05.2012 and the ST Returns filed, it appeared that the appellants had short paid service tax during the period 2007-2008 (October, 2007 to March, 2008) to 2012-2013 (upto June, 2012). Accordingly, show cause notice proceedings were initiated by the Department demanding service tax along with interest and penalty vide Show Cause-Cum-Demand Notice No.53/ST/Gr.VII/COMMR./ ADJ/2013 dated 22.4. 2013. Upon consideration of the reply of the appellant dated 9.7.2013 and after giving personal hearing to the appellant on 05.09.2013, the Commissioner adjudicated the case confirming the adjudged demands of service tax besides imposition of penalty vide Order-in-Original No. PUN-EXCUS-001-COM-029-13-14 dated 07.11.2013 as follows:

Description	**Proposal/Amount demanded in SCN**	**Amount confirmed in the O-in-O**
Service tax on 'Business Auxiliary service'	Rs.1,84,53,424	Rs.1,84,53,424
Service tax on 'Authorised service station'	Rs.32,38,391	Rs.32,38,391
Service tax on 'Renting of immovable property'	Rs.12,26,689	Rs.11,24,288
Interest	U/sec.75	Interest confirmed u/Sec.75
Penalty	U/sec.76,77 &78	Rs.2,28,16,103 u/sec.78 & Rs.10,000/- u/sec.77

2.3. Aggrieved against the above order in original dated 07.11.2013, the appellant had preferred appeal before this tribunal. The matter was then heard by the Tribunal and a final order dated 04.02.2015 was passed in Appeal No. ST/85473/2014-Mum by allowing the appeal by way of remand. The Principal Commissioner, Pune-I had duly considered the directions given by this Tribunal and passed an adjudication order-in-original No. PUN-EXCUS-001-COM-094-15-16 dated 19.01.2016 in *de novo* proceedings after considering the reply of the appellants dated 20.4.2015 and duly giving a personal hearing to them on 29.09.2015.

2.4. The Tribunal in its order 04.02.2015, in respect of the service tax liability on 'Renting of immovable properties' had observed as follows:

"5.1. As regards the demand of service tax on 'Renting of Immovable Property', we find that the appellant had discharged the service tax liability as and when the rental income were received and the details of the challans for the payments made are available. A few of these challans were produced before us. Therefore, the demand of service tax on the entire amount without giving any credit for the payments already made is incorrect in law. It is also seen that the appellants have short paid the service tax on these heads in a few years namely October 2007 to March 2008, 2008-09 and 2010-11, and they have excess paid service tax in 2009-10, 2011-12 and April 2012 to June 2012. The appellant has sought to adjust excess payment with the short payments. This is not permissible. The excess payments have to be claimed by way of refund and short payments have to be made good by the appellant to the department as principles of unjust enrichment might be involved in any refund claim. Nevertheless, the appellant has to be given due credit for the payments already made. Inasmuch as this has not been done, the ***matter has to go back to the Adjudicating Authority for recomputation of the correct service tax demand****."*

Accordingly, the Pr. Commissioner in his *de novo* proceedings had recalculated the service tax liability on 'Renting of immovable properties', duly taking into account the total service tax payable of Rs. 30,49,699/- for the period 2007-2008 to 2012-2013 (Upto June, 2012) and the actual service tax paid by the appellants for Rs.28,18,156/- in 39 nos. of GAR-7 challans, and finally arrived at the amount of service tax short paid as Rs.2,37,553/-.

2.5. Similarly the Tribunal in its order 04.02.2015, had given its findings in respect of the service tax liability on 'Authorised to Service Station' as follows:

"5.2. Similarly, in respect of demand under the taxable service category of 'Authorised Service Station', here also we find that the appellant has discharged part of the service tax liability through Cenvat credit account and part in cash. However, due credit for these payments have not been given by the Adjudicating Authority for the reason that the payments through Cenvat credit was not correctly reflected in the ST-3 returns filed by the appellant, even though for the period of the return, the total amount of Cenvat credit utilised in payment of service tax was reflected. If the appellant had debited Cenvat credit account, the said fact could be easily verified from the Cenvat credit register maintained by the appellant. They have also discharged part of the tax liability in cash through TR-6 challan which could be verified from the TR-6 challans. ***The Adjudicating Authority should have verified the claims of the appellant in this regard and should have given them the benefit wherever the tax liability has been discharged****.* ***Inasmuch this exercise has not been undertaken by the Adjudicating Authority, the demand in its entirety cannot be sustained.*** *According to the appellant, the net payment required to be made after making adjustment for excess payment towards short payment is Rs.1,66,669/-. However, such adjustments are not permissible. Wherever there are short payments, they have to be made good by the appellant by paying through cash or Cenvat*

credit along with interest thereon and wherever there is excess payment, the appellant has to make a claim for refund of the same in accordance with law."

The Pr. Commissioner in his *de novo* proceedings had recalculated the service tax liability on 'Authorised Service Station', duly taking into account the total service tax payable of Rs. 2,05,90,951/- for the period 2007-2008 to 2012-2013 (Upto June, 2012) and the actual service tax paid by the appellants for an amount of Rs.1,52,88,630/- in 62 nos. of GAR-7 challans, and Rs.52,36,128/- paid through Cenvat credits and finally arrived at the amount of service tax short paid as Rs.3,77,161/-.

2.6. As regards the service tax liability on 'Business Auxiliary Services', this Tribunal had given the following order:

"5.3. The main and the last issue pertains to demand of service tax under the category of Business Auxiliary Service. As against the total demand of Rs.1,84,53,425/- the appellant has conceded their liability on the income received under PDI charges which is Rs.4,85,94,830/-. As regards miscellaneous income of Rs.28,40,620/- the appellants claim is that this income is derived from sale of scrap and nothing to do with any service rendered. This is a verifiable fact and the appellant has to lead evidence in support of the how the income has originated and corresponding bills/invoices issued towards this income. The main dispute relates to incentive received from Maruti Suzuki Ltd. The appellants claim is that this income is nothing but trade discount received by them which is in the nature of quantity discount and has been passed on to the appellant by Maruti Suzuki Ltd. by way of credit notes. It is also the submission that the credit notes indicate the period to which the discount relates and the corresponding discount circular issued by Maruti Suzuki Ltd. It is also submitted that they have made correspondence with the Maruti Suzuki Ltd. which would clearly indicate that the amount, even though described as incentive, is in fact a trade discount. However, it is clearly submitted that the correspondence with Maruti Suzuki Ltd. were not furnished before the Adjudicating Authority at the time of adjudication. Therefore, the appellant should be given a fair opportunity of producing these documents to satisfy the Adjudicating Authority with respect to their contention that these are nothing but trade discounts. Alternately, the department can also find out from the excise authorities in charge of Maruti Suzuki Ltd. as to how the amount given by way of incentives has been treated for excise purposes. If the amount is already included in the value of cars sold and duty liability discharged, the question of subjecting the same under Business Auxiliary Service would not arise. If no excise liability has been discharged, then also it can be verified that whether the incentive given has been treated as trade discount for excise purposes. If it is so, then the question of demanding service tax under Business Auxiliary Service would not arise at all. These factors which are relevant for consideration have not been taken into account while passing the impugned order. Therefore, ***in the interest of justice, the matter has to go back to the Adjudicating Authority for considering the various contentions raised by the appellant****. The appellant is also at liberty to produce whatever documentary evidence they want to rely upon in support of their contention. The Adjudicating Authority also shall verify from the Jurisdictional authorities of*

Maruti Suzuki Ltd. as to how the incentive given to the appellant by Maruti Suzuki Ltd. was treated for excise purposes and thereafter, ***the Adjudicating Authority shall pass a reasoned order after giving a reasonable opportunity to the appellant of being heard****."*

The Pr. Commissioner in his *de novo* proceedings had come to a conclusion that the various post sale commission/incentives paid by M/s MSIL to the appellants are towards sales promotion activity of the dealer and these were in addition to discount amount referred in the invoice of M/s MSIL. Hence, he concluded that it is not in connection with sale of vehicle by M/s MSIL to the dealer but these are relating to the further sale of vehicle or marketing/sales promotion of Maruti brand vehicles and such amounts were given on the basis of sale targets achieved by the dealer, not on the basis of their purchase from M/s MSIL. Further, he states that from the documents submitted by the appellant, the extended warranty obviously would not have been included in the assessable value of the vehicle sold by M/s MSIL to its dealers and therefore payment of central excise duty thereon does not arise. The consideration received against extended warranty service is therefore a taxable service and it should be taxed proportionately at the end of both original manufacturer and the dealer.

The Principal Commissioner also came to the conclusion that most of the schemes, discounts, incentives (such as cash back incentive scheme for retail target achievement, RMK claim, ISL claim, Exchange bonus, RIPS incentive on SX4 model, incentive scheme of GM&TL for model SX4 etc.) have specific objectives. Hence, it appeared to him that M/s MSIL had paid such consideration to the appellants with the objective of promoting the sale of their products through the dealer. Thus he concluded that the incentives earned by the appellants are nothing but commission earned for performing tasks beyond the scope of a dealer. On the basis such discussions, he finally concluded that the discounts are meant to incentivize the performance of the dealer for carrying out specific tasks well beyond the scope of normal dealer. Accordingly, he calculated the amount of service tax payable on business actually services as Rs.1,29,32,934/- in the impugned order.

2.7. On the above basis, the Pr. Commissioner, in the impugned order dt. 19.01.2016 had re-computed the service tax liability on the following services:
(i) 'Renting of immovable properties' services as Rs.2,37,553/-;
(ii)'Authorised Service Station' services as Rs. 3,77,161/-; and
(iii) 'Business Auxiliary Services' as Rs.1,29,32,934/-

Besides the above confirmation of the demands of service tax, he also imposed penalty of Rs.1,31,41,219/- under Section 78, and penalty of Rs.10,000/- for failure to file ST-3 returns in time under Section 77 of the Finance Act, 1994.

3. Being aggrieved by the impugned order, the appellants have preferred to file this appeal before the Tribunal. The learned counsel for the appellants during the hearing before us had submitted that they have admitted the service tax liability in respect of recalculated amount in respect of 'Renting of immovable properties' services as Rs.2,37,553/- and 'Authorised Service Station' services as Rs. 3,77,161/-. However, as against the confirmation of service tax demands against the services of Business Auxiliary service for Rs.1,29,32,934/- they contended that no service tax is payable, as major part of the amounts confirmed is relatable to various incentives/commission received by the appellants from the M/s MSIL which are claimed by the Department as amount received for the services rendered in connection with sales promotion/marketing of the vehicles manufactured by them.

4. The learned Authorised Representative for the department reiterated the findings in the impugned order and stated that the appellants are liable to pay service tax and penalties adjudged in the impugned order.

5.1. We have carefully considered the submissions made by both sides.

5.2. We are prima facie of the view that this Tribunal in its earlier order dated 04.02.2015 had gone though the various issues arising in this case and gave specific directions as stated in the paragraphs 2.4. to 2.6. We find that as regards the service tax demand in respect of liability on 'Renting of immovable properties' it is for recomputation of correct service tax demand. Similarly, in respect of service tax demanded on 'Authorised Service Station' it is for verification of tax payments claimed by the appellant and for determining the actual service tax liable to be paid after adjusting for tax payment made by the appellants both in cash through challans and payment made through Cenvat credit by debit in Cenvat credit register. We find that this exercise was carried over in the impugned order and the recalculated amount in respect of 'Renting of immovable properties' services as Rs.2,37,553/- and 'Authorised Service Station' services as Rs. 3,77,161/- is acceptable to the appellants and they are not contesting the demand of service tax on the above two aspects. Accordingly, we find that there is no need for us to further examine on the above two issues.

5.3. Further, in respect of service tax liability on 'Business Auxiliary Services', the matter was sent for de novo proceedings to take into consideration the various contentions raised by the appellants and to pass a reasoned order, after giving reasonable opportunity of personal hearing to the appellants. Accordingly, the impugned order re-determined the amount of service tax payable on business actually services as Rs.1,29,32,934/-. However, we find that such recalculated amount of service tax payable on business auxiliary services were not acceptable to the appellants and they had contended this demand in this appeal before the Tribunal. Thus, we take up this issue for our detailed examination.

6.1. Section 65(19) of the Finance Act, 1994 defines the term "business auxiliary service" 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) promotion or marketing of service provided by the client; or

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

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

Explanation - For the removal of doubts, it is hereby declared that for the purposes of this sub-clause, "inputs" means all goods or services intended for use by the client;

(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 (vi), such as billing, issue or collection or recovery of cheques, payments, maintenance of accounts and remittance, inventory management, evaluation or development of prospective customer or vendor, public relation services, management or supervision, and includes services as a commission agent, but does not include any activity that amounts to "manufacture" of excisable goods.

Explanation - For the removal of doubts, it is hereby declared that for the purposes of this clause, -

(a) "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 on 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
(iv) undertakes any activities relating to such sale or purchase of such goods or services;

> (b) "Excisable Goods" has the meaning assigned to it in clause (d) of Section 2 of the Central Excise Act, 1994;
>
> (c)"Manufacture" has the meaning assigned to it in clause (f) of Section 2 of the Central Excise Act, 1944;

Further, Section 65(105) (zzb) of the Finance Act, 1994 also provides for the taxable service in respect of the above service as follows:

> "**Taxable Service**" means any service provided or to be provided, to a client by any person in relation to business auxiliary service.

The findings of the learned Principal Commissioner concludes that various incentives/commission received by the appellant from M/s MSIL are for the services rendered to them in connection with sales promotion/marketing of the vehicles manufactured by them as discussed in detail in impugned order and as briefly stated in para 2.6 above and recalculates the service tax payable by the appellant.

6.2. We find that the relevant sub-clause invoked in the impugned order is relating to "(i) promotion or marketing or sale of goods produced or provided by or belonging to the client". From the discussion in impugned order at para 22.05.05 with illustrated invoice, it is very clear that M/s MSIL is the manufacturer of car and they sell the car to the appellants under an invoice indicating the assessable value and various components of additions and deductions with Net invoice value for such sale. Subsequently, when the appellant is able to sell the car to the ultimate customer, then a separate invoice is being raised by the appellant and on which applicable VAT/Sales Tax is payable. Hence, the nature of transaction in the case is principal-to-principal basis. Further, in order to subject a particular activity of the appellant for the levy of service tax, it has to satisfy the various elements of taxable service i.e., (i) there shall be a service provider and a service receiver/client (ii) a service is required to be provided by the appellant to a client (iii) such service shall be in relation to business auxiliary services. In this transaction we find that firstly the sale of cars takes place from the manufacturer to the appellant-car dealer. Depending upon the various factors weighed upon by an individual end consumer, he purchases particular car/vehicle. In this process of sale of car, the appellant undertakes various activities to enable such sale of cars to ultimate end customer.

The trade discount, incentives and commission offered by the car manufacturer M/s MSIL is in accordance with the agreement of the scheme announced by

them. The Department does not dispute that there was such agreements, scheme between the appellant in the car manufacturers and the account of the appellant only reflect the actual discount allowed to them. The Department's argument is that the said discount/commission is in view of services rendered by the appellant by way of popularisation of the sales and consumption of the products by the end customer. We find it difficult to accept the conclusion arrived at in the impugned order that all the discounts/commission/incentives given by the manufacturer for the various types of targets achieved in terms of the number of vehicles sold under a particular model/category, consistent achievement of targets by each quarter, exchange bonus etc., are to be treated as compensation for the services rendered by the appellants by way of popularization of sales and purchase of the cars of the manufacturer. The element of sales promotion or marketing services is involved only when the appellants provide some service to the end customer in sale of the cars. If the discounts/commission/incentives are given in terms of the specific schemes or an agreement entered by the manufacturer of car with the appellants, then such transaction cannot be overstretched to categorize it as service for the purpose of charging service tax. This aspect has been explained in the CBIC Circular No. 87/05/2006-ST dated 6.11.2006 as follows:

"Circular No. 87/05/2006-S.T.,
dated 6-11-2006

F. No. 137/128/2006-CX. 4
Government of India
Ministry of Finance (Department of Revenue)
Central Board of Excise & Customs, New Delhi
***

Subject : Service tax issues relating to authorized motor vehicle dealers and service stations - Reg.

It has been brought to the notice of the Board that certain doubts have arisen in respect to activities undertaken by authorized motor vehicle dealers and service stations. The issues are as mentioned below:-

(a) Whether the mark-up (profit) on the spare parts sold by a service station during the servicing of vehicles is liable to payment of service tax?

(b) Whether exemption can be claimed on the cost of consumables that get consumed during the course of providing service?

(c) Whether 'free services' given by the authorized dealers (for which they are reimbursed by the vehicle manufacturers) are subjected to service tax?

(d) Whether the commission received by the automobile dealers from Banks /Non Banking Financial Companies (NBFC), for introducing the customers seeking finances / loans to such banks / NBFCs is to be subjected to service tax? Further, in case part of these incentives are passed on by the dealers to the customers, whether tax would be leviable

only on that part of incentive, which is retained by the dealers or whether it would be on full amount?

(e) Whether service tax is chargeable on the amounts received for servicing /repair of the commercial vehicles?

2. The issues have been examined. As regards, the issue relating to sale of spare parts and consumables, Notification No. 12/2003-S.T., dated 20-6-2003, exempts service tax to the extent of value of the goods and materials sold by the service provider to the service recipient, if documentary proof of such sale exists and no credit of excise duty paid on such spares or consumables have been taken. It may, however be pertinent to note that for availing such exemption, the goods must be sold and consequently, they must be available (whether independently or as a part used for repair of a vehicle) for sale. In other words, the exemption would not be available to such consumables which have been consumed during the process of providing service and are not available for sale.

3. As regards 'free servicing' (where the customer does not pay any charges) of the motor vehicles, normally the service charges are reimbursement by the vehicle manufacturers, who promises such a facility to attract customer. As the law does not in any way restricts the levy of service tax only on the service charges received from the recipient of the service, therefore, such reimbursements are subject to service tax.

4. In some cases, the automobile dealers help the buyers of the vehicles for arranging the finances. For this, they have a tie-up with Banks / Non-banking Finance Companies. The customers are advised by the dealers to approach such financial companies for taking loans. The automobile dealers get commission from such financial companies for directing the customers to the latter. By this activity, the automobile dealers 'promote or market the services provided by their customer (i.e., the financial institution), and are therefore covered under 'taxable service', namely, the "Business auxiliary service". The tax is payable on the gross commission received by the automobile dealer. In some cases, the dealers share part of their commission with their customers to attract them. However, this is an independent transaction between the automobile dealer and the purchaser of the vehicle, and does not involve the service rendered by the automobile dealer to the finance company. Therefore, the tax payable by the dealer would be on the gross amount received from the financial company and not on the balance amount, i.e., after excluding the amount that he passes on to the customer.

5. As regards the applicability of service tax on the activity of servicing /repairing of the commercial vehicles, it is clarified that as regards 'authorized service stations', the taxable service, *means any service provided or to be provided, to a customer, by an authorized service station, in relation to any service, repair, reconditioning or restoration of motor cars, light motor vehicles or two wheeled motor vehicles, in any manner*. Further, a 'light motor vehicle' *means any motor vehicle constructed or adapted to carry more than six messengers, but not more than twelve passengers, excluding driver*. Similarly, as per the 'Motor Vehicle Act', a *'motor car means any motor vehicle other than a transport vehicles, omnibus, road-roller, tractor, motor cycle or invalid carriage*'. In other words, servicing, repair, reconditioning or restoration of specified types of vehicles (whether they are used for commercial purposes or not) fall under the category of taxable services. However, servicing of vehicles like trucks is not within the ambit of service tax.

6. Trade and filed formations may be advised accordingly.

7. Hindi version will follow."

It can be seen from the above clarification issued by CBIC, that the discount/ commission/incentives given for sale of cars in the case before us, is no way comparable to services provided to customers at "free of charge" for which reimbursement are given by the car manufacturer. Similarly, this is not the case where the appellant is advising the end customers to buy the cars supplied by the manufacturer amongst various choices available to the customer in the car market for earning the commission/incentives which could be treated as sales promotion. As the present case of incentives/ commission is solely related to trade discounts for sale of cars in accordance with the regular practice as well as the agreement/schemes that were in vogue in the industry, we do not treat the same as compensation received by the appellant for any services provided to the car manufacturer M/s MSIL.

6.3. We also find that the dispute pertaining to the issue of service tax liability on discounts/commission offered to car dealers by manufacturer has attained finality in view of the decisions taken by this Tribunal and the Apex Court in a number of cases. In this connection, we refer to the decision of the Tribunal in the case of *Commissioner of Service Tax, Mumbai-I Vs. Sai Service Station Limited 2014 (35) S.T.R. 625 (Tri.-Mumbai), t*he relevant portion of the order is extracted below:

> *"14. In respect of the incentive on account of sales/target incentive, incentive on sale of vehicles and incentive on sale of spare parts for promoting and marketing the products of MUL, the contention is that these incentives are in the form of trade discount. The assessee respondent is the authorized dealer of car manufactured by MUL and are getting certain incentives in respect of sale target set out by the manufacturer. These targets are as per the circular issued by MUL. Hence these cannot be treated as business auxiliary service.*
>
> *…*
>
> *18. In respect of sales/target incentive, the Revenue wants to tax this activity under the category of business auxiliary service. We have gone through the circular issued by MUL which provides certain incentives in respect of cars sold by the assessee-respondent. These incentives are in the form of trade discount. In these circumstances, we find no infirmity in the adjudication order whereby the adjudicating authority dropped the demand. Hence, the appeal filed by the Revenue has no merit."*

We further find that this case was appealed before the Hon'ble Supreme Court in Civil Appeal No(s). 690-691 of 2015 and the Apex Court had ordered for remand of the matter to the Tribunal for afresh consideration only of the issue

of penalty on the appellant, as the same has not been considered in spite of rectification of mistake application having been filed.

6.4. Further, in the case of *Commissioner of Service Tax, Mumbai Vs. Jaybharat Automobiles Limited 2016 (41) S.T.R. 311 (Tri.-Mumbai),* the Tribunal has held as follows:

> "*6.5 On the appeal by Revenue on the issue of incentives received by the appellant from the car dealer, we find that the relationship between the appellant and the dealer is on a principal to principal basis. Only because some incentives/discounts are received by the appellant under various schemes of the manufacturer cannot lead to the conclusion that the incentive is received for promotion and marketing of goods. It is not material under what head the incentives are shown in the Ledgers, what is relevant is the nature of the transaction which is of sale. All manufacturers provide discount schemes to dealers. Such transactions cannot fall under the service category of Business Auxiliary Service when it is a normal market practice to offer discounts/institutions to the dealers. The issue is settled in the case of Sai Service Station (supra). Therefore, we reject the appeal of the department*."

6.5. Also, in the case of *Toyota Lakozy Auto Private Limited Vs. Commissioner of Service Tax & Central Excise, Mumbai-II & V 2017 (52) S.T.R.299 (Tri.-Mumbai),* the Tribunal has held as follows:

> *"However, in view of the settled position in the decisions of the Tribunal supra, we hold that the discounts received on procurement of vehicles from the manufacturer are not liable to tax as 'business auxiliary services' and set aside the demand on that head."*

6.6. We further find that in the case of *Autobahn Enterprises Pvt. Limited Vs. Commissioner of Service Tax, Mumbai-I 2022 (56) G.S.T.L. 312 (Tri.-Mumbai)* by referring to the decisions taken by the Tribunal in *Re Toyota Lakozy Auto Private Limited and Re Jaybharat Automobiles Limited,* the Tribunal has held as follows:

> *"6. From the decisions cited by Learned Chartered Accountant, we find that the dispute pertaining to discount offered to corporate customers has attained finality. In this connection, the decision of the Tribunal in re Toyota Lakozy Auto Pvt Ltd, which has referred to the other two decisions, observing that*
>
> > *'2. Separate appeals have been preferred against two orders-in-original pertaining to the period from July, 2004 to March, 2007 and from April, 2007 to March, 2011. The demands confirmed in the two appeals are ₹ 1,58,69,430/- and ₹1,57,12,236/-; the impugned order holds appellant liable to tax on*

commission earned on sale of cars, on facilitation charges collected from customers for registration of vehicles and commission foregone on loans marketed by appellant to customers. It is the contention of the appellant that these are not consideration leviable to tax and that, even if these are, the adjudicating authority has erred in computing the tax liability. As the issues in the two appeals are common, we dispose both by a common order.

3. Appellant contends that ₹ 81,35,813/- and ₹ 1,21,47,133/- for the two periods has been wrongly subjected to tax because the agreement between the appellant and M/s. Toyota Kirloskar Motor Limited is one of supply of vehicles by the latter on 'principal-to-principal' basis on which title and risk, as per Agreement, are passed on to appellant when the vehicles are excise cleared and placed on common carrier. Depending on order quantity, the manufacturer raises invoices after according discounts which are designated as commission/incentive merely as a management terminology. Learned Chartered Accountant for appellant places reliance in the decisions of the Tribunal in Jaybharat Automobiles Limited v. Commissioner of Service Tax, Mumbai [2015-TIOL-1570-CESTAT-MUM = 2016 (41) S.T.R. 311 (Tri.)], Sai Service Station Limited v. Commissioner of Service Tax, Mumbai [2013-TIOL-1436- CESTAT-MUM = 2014 (35) S.T.R. 625 (Tri.)], Tradex Polymers Private Limited v. Commissioner of Service Tax, Ahmedabad [2014 (34) S.T.R. 416 (Tri.-Ahmd.)] and Garrisson Polysacks Private Ltd. v. Commissioner of Service Tax, Vadodara [2015 (39) S.T.R. 487 (Tri.-Ahmd.)].

In re Jaybharat Automobiles Limited, the Tribunal held that

> *"6.5 On the appeal by Revenue on the issue of incentives received by the appellant from the car dealer, we find that the relationship between the appellant and the dealer is on a principal to principal basis. …… The issue is settled in the case of Sai Service Station (supra). Therefore, we reject the appeal of the department."*

and in re Sai Service Station Limited it was held that

> *"14. In respect of the incentive on account of sales/target incentive, incentive on sale of vehicles and incentive on sale of spare parts for promoting and marketing the products of MUL, the contention is that these incentives are in the form of trade discount. … These targets are as per the circular issued by MUL. Hence these cannot be treated as business auxiliary service"*

10. To enable a re-visit of the taxability of sub vented amounts as well as the above-mentioned accounting entries, we deem it appropriate that the matter be remanded to the original authority for deciding afresh on the last two issues. The other two issues are not the subject of this remand as they stand decided in favour of appellant.' offers valid precedent.

7. Accordingly, the demand of ₹ 3,70,994/-, along with interest, and penalty under section 78 of Finance Act, 1994 fails to survive

…

9. Furthermore, finality was accorded to tax liability by circular no.87/05/2006-ST dated 6th November 2006 of Central Board of Excise and Customs. In view of the circumstances and the stand taken by the Tribunal in these several decisions, invoking of the extended period for the purpose of imposition of penalty is not sustainable. Accordingly, the penalty imposed under section 78 of Finance Act, 1994 is also set aside."

7.1. In view of the conclusions arrived by us and on the basis of the decisions taken by the Co-ordinate benches of the Tribunal in the aforesaid cases, we conclude that the demand of service tax for an amount of Rs. 1,29,32,934/- determined in the impugned order, in respect of taxable services under the category of 'business auxiliary services' along with interest, and penalty under Section 78 of Finance Act, 1994 fails to survive. However, the demands of service tax adjudged after recomputation of the actual tax liability in terms of the directions given by the Tribunal in its earlier order dated 04.02.2005 in respect of 'Renting of immovable properties' services as Rs.2,37,553/- and 'Authorised Service Station' services as Rs. 3,77,161/- in the impugned order is upheld. Similarly the penalty of Rs.10,000/- imposed on the appellants on the ground that there was a failure on the part of the appellant to file the ST-3 return, is also upheld.

7.2. In view of the above, the appeal filed by the appellant is party allowed to the above extent. Thus the appeal is disposed of in the above terms of the order.

(Order pronounced in the Court on 19.06.2023)

(S. K. Mohanty)
Member(Judicial)

(M. M. Parthiban)
Member (Technical)

Sinha