CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

REGIONAL BENCH - COURT NO. 01

Service Tax Appeal No. 85582 Of 2016

(Arising out of Order-in-Appeal No. MUM-II-STAX-000-APP-55-15-16 dated 10.12.2015 passed by the Commissioner (Appeals), Service Tax-II)

M/s Phoenix Auto Pvt. Ltd. **.....Appellant**
Godrej Colliserseum Somaiya Hospital Road Off
Eastern Express Highway Sion (East),
Mumbai-400 070.

VERSUS

Commissioner of Central Excise-Thane-II **.....Respondent**
3rd Floor, Navprabhat Chamvers Ranade Road,
Dadar (West), Mumbi-400028.

Appearance:

Ms Puloma Dalal, Chartered Accountant for the Appellant
Shri Prabhakar Sharma, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. S K MOHANTY, MEMBER (JUDICIAL)
HON'BLE MR. C J MATHEW, MEMBER (TECHNICAL)

FINAL ORDER NO. A/86320/2022

Date of Hearing: 06.12.2022
Date of Decision:06.12.2022

PER : S.K. MOHANTY

Briefly stated, the facts of the case are that during the disputed period, the appellant was working as direct selling agent for arranging auto loans for various clients of the banks namely M/s. ICIC Bank, M/s. HDFC Bank Ltd. and M/s. GE Countrywide Financial Services.The appellant was also engaged in the business of promotion and marketing of the products of M/s. Hyundai Motors India Ltd. (M/s. HMIL). The officers of DGCEI conducted an inquiry and observed that the appellant did not pay service tax attributable to provision of the taxable services during the period November 2004 to March 2006. For non-payment of service tax amount, the department initiated show cause proceedings against the appellant, which culminated into the adjudication order dated 28.04.2010, wherein the original authority had confirmed service tax demand of Rs.19,50,821/- along with interest and also imposed penalties under Section 76, 77 & 78 of the Finance Act, 1994 on the appellant. Appeal filed by the appellant was disposed of by the learned Commissioner (Appeals) vide the impugned order dated 10.12.2015. In the said order, the learned Commissioner (Appeals) has upheld the adjudged demands confirmed on the appellant and modified the original order in reducing the quantum of penalty under Section 78 *ibid* to Rs.19,50,821/-. Feeling aggrieved with the impugned order, the appellant has preferred this appeal before the Tribunal.

2. Learned Chartered Accountant appearing for the appellant submitted that with regard to the services provided by the appellant to the Banks and Financial Institutions for arranging auto loans etc., the appellant had already discharged the service tax liability of Rs.14,06,890/- along with interest. She further submitted that levy of service tax on such activity was highly contentious and the issue was finally resolved by the larger Bench of Tribunal in the case of *Pagariya Auto Center Vs. Commissioner of C. Ex., Aurangabad* – 2014 (33) S.T.R. 506 (Tri.LB). Accordingly, she pleaded that the extended period of limitation cannot be invoked and the benefit provided under Section 80 *ibid* should be available to the appellant for non-imposition

of penalties under Section 76, 77 & 78 *ibid*. With regard to service tax demand of Rs.5,43,922/- confirmed on earning of incentives, she submitted that as per the agreement entered into between the appellant and M/s. HMIL, the appellant had sold the vehicles under its own invoices and since the relationship between the appellant and the car dealer was on principle to principle basis, the incentives earned on sale of vehicle should not be considered as a service, for the purpose of levy of service tax thereon. To support such stand, the learned Chartered Accountant has relied upon the decisions of this Tribunal in the case of *Commissioner of Service Tax, Mumbai Vs. Sai Service Station Ltd.* [2013-TIOL-1436-CESTAT-MUM], *M/s. Sharayu Motors Vs. Commissioner of Service Tax, Mumbai* – [2016-TIOL-132-CESTAT-MUM], *M/s. Pratap Singh & Sons Vs. CCE-Mumbai-I* – [2006-TIOL-1646-CESTAT-Mum] and *M/s. Euro RSCG Advertising Ltd. & M/s. Marketing Consultants & Agencies Ltd.* [2007-TIOL- 495-CESTAT-Bang.].

3. On the contrary, learned AR appearing for Revenue reiterated the findings recorded in the impugned order and supports confirmation of adjudged demands on the appellant.

4. Heard both sides and perused the case records.

5. On perusal of the appeal records, we find that the appellant was in fact performing the job of direct sales agent for promoting and marketing the auto loans/finance products for the banks/financial institutions. The appellant assisted in sourcing the customers/clients for auto loan products of the financial institutions and facilitated the

customers in completion of all procedural formalities till the disbursement of loan and endorsement of the documents in favour of the financial institutions. On examination of the terms of the agreements entered into between the appellant and banks/financial institutions, it is evidently clear that the services are to be categorized as Business Auxiliary Service (BAS), defined under Section 65(19) read with Section 65 (105) (zzb) of the Finance Act, 1994. Classification claimed by the appellant under Business Support Service (BSS) would not merit consideration, in terms of the contractual norms provided in the agreements. Thus, we are of the view that the service tax demand of Rs.14,06,890/- along with interest confirmed on the appellant sustains. The appellant had also claimed that the adjudged amount towards service tax and interest confirmed in the impugned order had already been paid by it. Since, such aspect has to be checked at the original stage, we are of the view that for the purpose of ascertaining such deposit, as claimed by the appellant, the matter should be remanded to the original authority.

5.1 There were contradictory views expressed by the judicial forums with regard to classification of service under BAS or otherwise. The issue with regard to proper classification of service was the subject matter of dispute before the larger Bench of Tribunal in the case of *Pagariya Auto Center* (supra). For resolving the dispute, the Tribunal has held as under:-

> ***"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".*

5.2 Since the issue with regard to proper classification of service was highly contentious, owing to the reason of divergent views expressed by different Benches of the Tribunal, we are of the farm opinion that there was reasonable cause on the part of the appellant in not discharging the service tax liability within the stipulated time frame. Therefore, the benefit provided under Section 80 *ibid* should be available to the appellant for waiving the penalties imposed on it under Section 76, 77 & 78 *ibid.* We find that the Tribunal in the case of *Autobahn Enterprises Pvt. Ltd. Vs. Commr. Of Service Tax, Mumbai-I* – 2022 (56) G.S.T.L. 312 (Tri.-Mumbai) and *City Honda Vs. Commissioner of C. Ex., S.T. & Cus., Bangalore* – 2018 (9) G.S.T.L. 412 (Tri.-Bang.), on the identical set of facts, has set aside the penalties imposed on the appellants therein. Therefore, we hold that there is no infirmity in the impugned order, insofar as it has upheld confirmation of service tax demand of Rs.14,06,890/-. The penalties imposed on the appellant under Section 76, 77 & 78 *ibid* are set aside.

6. With regard to service tax demand of Rs.5,43,922/- confirmed on the appellant for provision of service to M/s. HMIL, we find that the activities undertaken by the appellant pursuant to the agreement

were in relation to sale of goods, which is a trading activity. The fact is not under dispute that for undertaking such activity, the appellant had discharged appropriate Sales Tax/Vat liability. Thus, under such circumstances, it cannot be said that the activities undertaken by the appellant should be treated as a 'service', more particularly as a 'taxable service', for payment of service tax thereon. We find that the ratio of the judgments relied upon by the learned Advocate supports the case of the appellant that the activities cannot be considered as a taxable service under the category of BAS. The Tribunal in the said relied upon judgments has categorically held that commission received on account of sale of vehicles/target incentive, sale of spare parts for promoting and marketing of products are in the form of trade discounts and cannot be treated as a taxable service under the category of BAS. Therefore, we are of the considered view that the service tax demand along with interest confirmed and penalties imposed on the appellant for carrying out the activities pursuant to the contract entered with M/s. HMIL would not be sustained for judicial scrutiny.

7. To sum up, the appeal is disposed of in the following manner:

(a) Service tax demand of Rs.14,06,890/- sustains. The matter is remanded to the original authority for the limited purpose of ascertaining the issue of payment made by the appellant towards the service tax along with interest demand confirmed in the original order. The penalties imposed under Section 76,77 & 78 ibid are set aside.

(b) The impugned order confirming the service tax demand of Rs.5,43,922/- along with interest and penalties is set aside.

8. In the result, the appeal is partly allowed in favour of the appellant.

(Operative portion of the order pronounced in the open court)

(C J Mathew)
Member (Technical)

(S.K.Mohanty)
Member(Judicial)

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