

2013 (1) ECS (133) (Tri-Mum)

IN THE CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI

Automotive Manufacturers Pvt. Ltd.

Versus

Commissioner of Central Excise, Nagpur

Application :
ST/Stay-2762/2012

in Appeal:
ST/783/2012

Arising out of: Order-in-Original No. 48/ST/2012/C dated 31.08.2012

Passed by: Commissioner of Customs & Central Excise, Nagpur

Date of hearing : 17.12.2012
Date pronounced:15.1.2013

Automotive Manufacturers Pvt. Ltd.

Appellant – Represented by:
Ms. Puloma Dalai, C.A.

Versus

Commissioner of Central Excise
Nagpur

Respondent – Represented by:
Mr. V.K. Agarwal.
Addl. Commissioner (A.R)

CORAM:

Shri P.R. Chandrasekharan, Member (Technical)
Shri Anil Chaudhary, Member (Judicial)

ORDER NO. S/23/13/CSTB/C-I

“Thus, from the agreement it is evident that the appellant undertakes not only sale of the goods but also undertakes certain services such as sales promotion, after-sale service, advertising, etc. Business Auxiliary Service is defined in Section 65 (19) of the Finance Act, 1994 and includes promotion or marketing or sale of goods produced or provided by or belonging to the client or provision of service on behalf

of the client. Thus, the activities undertaken by the appellant prima facie comes under the category of “Business Auxiliary Service” and they are liable to discharge service tax on the consideration received in respect of this activity.” [Para 5.2]

Per: P.R. Chandrasekharan:

1. The appeal and stay application are directed against Order-in-Original No. 48/ST/2012/C dated 31.08.2012 passed by the Commissioner of Customs & Central Excise, Nagpur.
2. The appellant M/s. Automotive Manufacturers, Nagpur is registered with the Central Excise department for service tax purposes under the category of ‘Authorised Service Station Services’. They also undertake the job of servicing of the vehicles of Ashok Leyland and are receiving commission from the principal. They also provide certain services to finance companies who finance purchase of vehicles and receive commission from them. Inasmuch as the appellant was not paying service tax on some of these activities, they were directed to get themselves registered under the category of ‘Business Auxiliary Services’ and also to furnish the copy of the balance sheet and copy of the agreements with the financiers and their principals along with the statement of monetary receipts of the commissions received. The appellant replied to the department stating that their Mumbai office has paid service tax on the commission received from their principal, M/s Ashok Leyland Ltd., and hence they are not required to discharge any service tax liability. The balance sheet of the appellants were compared with the ST-3 returns filed by them for the years 2007-08 to 2009-10. It was seen that the commission amounts received shown in the balance sheets was more than the taxable value shown in the ST-3 returns filed with the department. Statement of the Branch Manager and Authorised Signatory of the appellant was recorded wherein he inter alia stated that they have a centralized billing of sales of Leyland vehicles in the State of Maharashtra at Kurla, Mumbai and their office in Mumbai accounts for the sale of vehicles. Thereafter, the commission received from the Mumbai office is distributed to all the branches by way of credit notes which is reflected in the respective balance sheets and in the P & L accounts of the Nagpur branch. When the Manager was asked to reconcile the difference in the figures reflected in the ST-3 return and in the balance sheet, he was unable to reconcile the same. He also confirmed that they have not paid any service tax under the category of Business Auxiliary Service’ on the amount of commission received during the period from 2006-07 to 2010-11. Accordingly, a show cause notice dated 20.10.2011 was issued to the appellant demanding service tax amount of Rs. 90,15,754/- under the category of Business Auxiliary Service’ along with interest thereon under Section 73 read with

Section 75 of the Finance Act, 1994 and also proposing to impose penalties on the appellant under Section 76, 77 and 78 of the said Finance Act. The notice was adjudicated vide the impugned order wherein the service tax demand was confirmed along with interest thereon and penalties were imposed under Sections 76, 77 and 78 of the Finance Act, 1994. Hence the appellant is before us.

3. The learned counsel for the appellant submits that the commission received shown in the balance sheet of the Nagpur branch is the commission which they have received from their Mumbai office and it is only an inter branch transfer and, therefore, the question of payment of any service tax does not arise. The company is following a centralised billing system for the purpose of sale of vehicles manufactured by M/s Ashok Leyland and all these purchase and sales are accounted at its Kurla, Mumbai office and the trading profit generated from this trading activity is shared among the various branches of the appellant company based on the number of vehicles sold by each branch in each month. Thus the so called commission received is nothing but a trading profit/margin and is not in respect of providing any service per se. The learned counsel for the appellant also submits that they have not suppressed any facts from the department and they were under the bona fide belief that the trading profit earned by them is not liable to service tax and, therefore, invoking of the extended period of time is incorrect and cannot be upheld. Accordingly, she pleads for grant of stay. The learned counsel also relies on the decision of the Tribunal in the case of ITC Ltd. vs. Commissioner of Central Excise & Service Tax, Patna. 2010 (20) STR 847 (Tri. - Kolkata); Commissioner of Central Excise, Hyderabad vs. Universal Travels 2010 (18) STR 157 (Tri. Bang.) and Precot Mills Ltd. vs. Commissioner of Central Excise, Tirupati 2006 (2) STR 495 (Tri. Bang.) in support of his contentions.
4. The learned Additional Commissioner (AR) appearing for the Revenue, on the other hand, strongly refutes the argument put forth by the learned counsel for the appellant. He submits that adequate opportunities were given to the appellant to explain the difference in the figures reflected in the balance sheet and in the ST-3 returns. The Branch Manager at Nagpur could not explain the difference between the two figures and he has also confirmed that they are not paying any service tax on the commission received from their head office and there is no evidence led by the party to show that service tax liability has been discharged at Mumbai in respect of the commission received relating to sale of Ashok Leyland vehicles. Therefore, he prays for putting the appellant to terms.
5. We have carefully considered the submissions made by both the sides.

5.1 We have also perused the agreements entered into between the appellant and M/s Ashok Leyland Ltd. i.e. the dealership agreement. As per the said agreement apart from selling the vehicles of M/s. Ashok Leyland Ltd. in the areas specified in the agreement, the appellant is also required to undertake “sales promotion activities” for vehicles of M/s Ashok Leyland Ltd. by way of advertisements and other promotional measures. They are also required to undertake after-sale services in respect of Ashok Leyland vehicles sold by them. The dealer is also required to attend to customer complaints with view to protecting the goodwill of Ashok Leyland. These terms and conditions are specifically stated in Article 15 of the agreements dealing with sales and service which specifically provides as follows:

“a. Sales.

The MAIN DEALER shall canvas in the said TERRITORY and promote sales of the said products and shall for that purpose employ at his expense the salesmen as may be considered necessary and commensurate with the volume of business, to cover thoroughly the said TERRITORY.

b. Service

The MAIN DEALER shall provide adequate service for products sold in the TERRITORY including those, which have been sold either by AL or by other AL vehicle Dealers. The MAIN DEALER for that purpose shall maintain at all outlets AL recommended Minimum Stock Level of Leyparts at all times and employ at his expenses, qualified, skilled service men as advised by AL from time to time. The MAIN DEALER shall have the servicemen properly trained by AL to provide effective after sales service. The MAIN DEALER shall also ensure that pre-delivery inspection and free services are done to all products sold/operated in the country.

The MAIN DEALER shall also employ at his expenses, a qualified Service Engineer together with a service van and tools to ensure that all the users of the products in the TERRITORY are assisted adequately to maintain such products in sound mechanical condition and the warranty obligations receive due attention.”

5.2 As per article 18 the appellant has to undertake advertisement of Ashok Leyland products in the territory to the extent and in such manner as may be reasonably required by Ashok Leyland. Thus, from the agreement it is evident that the appellant undertakes not only sale of the goods but also undertakes certain services such as sales promotion, after-sale service, advertising, etc. Business Auxiliary Service is defined in Section 65 (19) of the

Finance Act, 1994 and includes promotion or marketing or sale of goods produced or provided by or belonging to the client or provision of service on behalf of the client. Thus, the activities undertaken by the appellant prima facie comes under the category of “Business Auxiliary Service” and they are liable to discharge service tax on the consideration received in respect of this activity. No evidence has been placed before us to show that the appellant has discharged service tax liability on this activity either at Nagpur or at Mumbai. Therefore, we are prima facie of the view that the appellant has not made out any case for grant of complete waiver from pre-deposit of the dues adjudged against them.

5.3 As regards the reliance placed on the decisions in the case of ITC Ltd, Precot Mills and Universal Travels cited supra, we find that the facts are distinct and distinguishable. In these cases what was involved was merely sale of goods and not rendering of any service. That is not the case before us. Therefore, reliance placed on these judgments is of no help to the appellant. Therefore, we are prima facie of the view that appellant has not made out any case for complete waiver of the pre-deposit of the dues adjudged.

5.4 The appellant has also not pleaded any financial hardship. The hon’ble High Court of Andhra Pradesh in the case of SQL Star International Ltd. vs. Commissioner of Customs, Hyderabad 2012 (276) ELT 465 (AP) held that while considering the application for stay or for dispensing with the requirement of pre-deposit, the following principles should be kept in mind.

“14. The following principles should be kept in mind while considering the applicants for stay or for dispensing with the requirement of pre-deposit under Section 35 F of the Act –

(1) Three aspects to be focused while dealing with the applications for dispensing of pre-deposit are : (a) prima facie case, (b) balance of convenience and (c) irreparable loss;

(2) Interim orders ought not to be granted merely because a prima facie case has been shown;

(3) The balance of convenience must be clearly in favour of making of an interim order and there should not be the slightest indication of a likelihood of prejudice to the interest of public revenue;

(4) While dealing with the applications, the twin requirements of consideration i.e. consideration of undue hardship, and imposition of conditions to safeguard the interests of revenue must be kept in view;

(5) While the Tribunal decides to grant full or partial stay, it has to impose such conditions as may be necessary to safeguard the interests of the revenue. This is an imperative requirement; and

(6) An appellate Tribunal, being a creature of the statute, cannot ignore the statutory guidance while exercising general power or expressly conferred incidental powers. [Commissioner of Central Excise, Guntur v. Sri Chaitanya Educational Committee, (2011) 38 VST 292 (A.P.) = 2011 (22) S.T.R. 135 (A.P.)]”

6. In view of the above, we direct the appellant to make a pre-deposit of 50% of the of the service tax adjudged against them within a period of eight weeks and report compliance on 2.3.2013. On such compliance, the balance of due adjudged shall stand waived and recovery thereof stayed during the pendency of the appeal.

(Pronounced in Court on 15.01.2013)