

2013 (2) ECS (204) (Tri - Mum)

**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST REGIONAL BENCH AT MUMBAI**

M/s Shoppers Stop Ltd.

Versus

Commissioner of Service Tax, Mumbai - II

Applications No. : ST/S/1330/12 in Appeal No. ST/401/12

Arising out of : Order – in – Original NO. 35/ST/SB/2011-12 dated 14.03.2012.

Passed by: The Commissioner (TAR) of Service Tax, Mumbai

Date of Hearing: 21.03.2013

Date of Decision: 21.03.2013

M/s Shoppers Stop Ltd. Appellant

Versus

Commissioner of Service Tax, Respondent
Mumbai - II

Represented by:

Shri S.S. Gupta, C.A. – Appellant

Shri Rakesh Goyal, Addl. Cmmr. – Respondent

CORAM

HON'BLE SHRI P.R. CHANDRASEKHARAN, MEMBER (TECHNICAL)

HON'BLE SHRI ANIL COUDHARY, MEMBER (JUDICIAL)

ORDER NO. S/447/13/CSTB/C-I

“Thus the service provided by the appellant prima facie come under the category of BSS as the appellant seems to provide both infrastructural support services and accounting and processing of transactions.” [Para 5.4]

“From the facts available on record it is seen that the matter came to light only when the department started investigation into the activities of the appellant. Therefore, it can not be concluded at this stage that there was no suppression of facts on the part of the appellant.” [Para 5.5]

Per: Shri P.R. Chandrasekharan, Member (Technical)

1. The appeal and stay application are directed against Order – in – Original No. 35/ST/SB/2011-12 dated 1.3 2012 passed by the Commissioner (TAR), Mumbai.
2. The appellant M/s Shoppers Stop Ltd., Malad West, Mumbai, (SSL in short) are in the business of operating and running retail stores where goods of various brands, varieties, description, etc. are sold under one roof. They grant concession to various concessionaires for the display, demonstration and sale of the products from the retail stores operated by SSL. The consideration for the concession is received as a percentage of the value of the goods sold subject to a minimum amount. The appellant did not discharge any service tax on a consideration of Rs. 27,86,81,505/- received during 1.5.06 to 31.05.07. The department was of the view that the said service rendered by M/s SSL falls within the category of 'Business Support Services' (BSS in short) and accordingly, a show cause notice dated 22.10.2009 was issued, to the appellant demanding service tax of Rs. 3,44,45,034/- along with interest thereon and also proposing to impose penalties under the provisions of Finance act, 1994. The notice was adjudicated and the service rendered was classified under BSS and the service tax demand was confirmed along with interest thereon and penalties were also imposed. Aggrieved of the same the appellant is before us.
3. The Id. Consultant for the appellant made the following submissions : -

- 1) The adjudication by the Commissioner is without jurisdiction as the Chief Commissioner of Central Excise does not have the power to delegate the adjudication to the said Commissioner;
 - 2) The transaction is one of sale and purchase of goods and VAT has been paid by the appellant. As per the concessionaire agreement, the products will be sold by the concessionaire to the appellant and the appellant will in turn sell the products to the customers and VAT has been paid on these transactions and therefore, there is no scope for service tax levy.
 - 3) With effect from 1.6.07, they are discharging service tax on the same activity under the category of "renting of immovable property" and the department has not disputed the payment of service tax under the category of renting of immovable property and therefore, the department cannot classify the same activity under a different category of service for the pervious period.
 - 4) The service provided by the appellant does not include telephone and internet services, security services, etc. or infrastructural support services as contemplated under BSS.
 - 5) The entire demand is time barred as the appellant was under the bona fide belief that they were not liable to service for the period prior to 1.6.07 when renting of immovable property was brought under the tax net and the payment of service tax under the said category was not objected to by the department.
 - 6) The penalty should have been waived under section 80 of the Finance Act, 1994.
4. The Id. Additional Commissioner (AR) appearing for the Revenue on the other hand strongly refutes the contentions raised by the Id. Consultant and submits as follows:-
- a) From the concessionaire agreement, it can be seen that the agreement provides for the right to display and sell the concessionaire's products in appellant's premises and there is no renting of space involved.
 - b) The concessionaires use the common facility provided by the appellant for the billing and collection of the sale proceeds of the goods sold.

- c) The consideration received is either by way of a minimum guarantee amount or as a percentage of the value of goods sold which clearly indicates that there is no renting of any space and the consideration has no linkage to the area of the space rented.
- d) The concessionaires use the infrastructural facility provided by the appellant by way of air – conditional atmosphere, common lighting, security and other facilities.

Accordingly he submits that the service rendered by the appellant merits classification under BSS and the appellant be put to terms.

- 5. We have carefully considered the submissions made by both the sides and have also perused the concessionaire agreement entered into with one of the concessionaires, M/s Luxor Writing Instruments Pvt. Ltd.
- 5.1. The issue relating to jurisdiction has already been considered by this Tribunal vide Order No. M/322-362/13/CSTB/C – I dated 21.02.2013 and has been held in favour of Revenue.
- 5.2. The argument of the appellant that the transaction is one of sale and not of service is not borne out from the conduct of the appellant. From 1.6.07 onwards, the appellant has discharged service tax on the said activity under “renting the immovable property” service. If that be so, they can not contend that for the previous period, the activity is one of sale and not of service.
- 5.3. As per the concession agreement, the appellant has permitted and granted to the Concessionaire, a right to display and demonstrate the Products from the Stores operated by the appellant from the Display counters demarcated in the Stores and therefore to sell the Products to the appellant. In consideration thereof, the concessionaire is obliged to pay a percentage of the sale on a monthly basis to the appellant, subject to a minimum guarantee amount. From the above agreement, it is seen that there is no renting of space per se to the concessionaire and there is no charging of any rental amount based on the area of space rented out. Therefore, the activity undertaken by the appellant prima facie does not come under the category of renting of immovable property.
- 5.4. Though as per the agreement, the concessionaire has to insure the goods kept for display and sale on their own account and has to design/decorate the display

counters and should pay for their own telephone connections, the concessionaires use the Retail Store facility of the appellant which includes a host a common facilities such as air – conditioned and well – lit atmosphere, security and insurance for the entire building, common facility for the customers who are visiting the retail mall such as drinking water, toilet, lift / escalator facility for easy movement, common billing and collection facilities in respect of the goods sold, and so on. Customers visit a retail man because of the variety of goods offered for sale of reputed brands under one roof, the comfortable atmosphere for shopping, facility for small children by way of play area, etc. who accompany the parents, facility for food / beverages etc. by way of food courts and so on. There is no denial of the fact it is because of these facilities, customers are attracted to Retail Malls. All these come under the category of infrastructural facilities. As per section 65 (104c) of the Finance Act, 1994, “support services for business or commerce” means services provided in relation to business or commerce and includes evaluation of prospective customers, telemarketing, processing of purchase orders and fulfillment 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. “As per Explanation, “ infrastructural support services” includes providing office space along with office utilities, reception with competent personnel to handle messages, secretarial services, internet and telecom facilities, pantry and security. Thus the service provided by the appellant prima facie come under the category of BSS as the appellant seems to provide both infrastructural support services and accounting and processing of transactions.

- 5.5. As regards the time bar issue raised by the appellant, it is a question of both fact and law and can be gone into in detail at the time of final hearing. In any case, it is not the case of the appellant that they had disclosed the facts relating to their activities to the department on their own. From the facts available on record it is seen that the matter came to light only when the department started investigation into the activities of the appellant. Therefore, it can not be concluded at this stage that there was no suppression of facts on the part of the appellant.
- 5.6. The appellant has not pleaded any financial hardship. As per the decision of the Hon’ble High Court of Andhra Pradesh in the case of SQL Star International Ltd. – 2012 (25) STR 113 (AP) prima facie case, balance of convenience and irreparable loss of Revenue have to be taken into account while considering grant of interim stay.

6. From the foregoing discussion, we have come to the preliminary conclusion that there is no prima facie case in favour of the appellant and there is no financial hardship pleaded. Therefore, the balance of convenience lies in favour of Revenue. Accordingly we direct the appellant to make a pre – deposit of 50% of the service tax demand confirmed against the appellant within a period of eight weeks and report compliance on 22nd May 2013. On such compliance, pre – deposit of balance of dues adjudged against the appellant shall stand waived and recovery thereof stayed during the pendency of the appeal.

(Operative part pronounced in the court)