CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
New Delhi

PRINCIPAL BENCH – COURT NO. 3

SERVICE TAX APPEAL NO. 50984 Of 2018

[Arising out of OIA- BHO-EXCUS-001-APP-624-17-18 dated 22.01.2018 passed by the Commissioner of Customs, Goods Service Tax, Central Excise, Bhopal]

Surjeet Auto Private Limited **Appellant**
7- Lala lajpat colony, Raisen Road
Bhopal-M.P

Versus

Commissioner of Central Goods, Service Central Excise **Respondent**
CGST Bhavan, Near Paryavas Bhavan, Jail Road
Bhopal (MP)

APPEARANCE:
None for the appellant
Ms. Jaya Kumari, Authorized Representative for the Respondent

CORAM :

HON'BLE MS. BINU TAMTA, MEMBER (JUDICIAL)
HON'BLE MS. HEMAMBIKA R.PRIYA, MEMBER (TECHNICAL)

FINAL ORDER No. 56217/2024

Date of Hearing: 16/04/2024

Date of Decision: 02.08.2024

HEMAMBIKA R. PRIYA

The present appeal has been filed by the appellant M/s Surjeet Auto Private Limited (hereinafter referred to as the appellant) to assail the Order-in-Appeal No. BHO-EXCUS-001-APP-624-17-18 dated 22.01.2018 wherein the Commissioner (Appeals) imposed penalty of Rs. 12,51,647/- under Section 78 of the Finance Act, 1994.

2. The brief facts of the case are that the appellant is engaged in the business of trading of Hyundai cars, accessories and spare and servicing of car. They are registered with the Service Tax department under the category of business auxiliary services, and repair, reconditioning, restoration or decoration or any other similar services of any motor vehicle.

2.1 An investigation was conducted against the appellant and it was found that the appellant had collected certain amount from their customers as ' logistic charges' which is against the service of loading, unloading, upkeep and washing etc., of the car sold to the customer. It was alleged by the officers that the activity of logistic/handling services carried out by the appellant for the customer in lieu of a consideration constituted service as envisaged in clause 44 of Section 65(B) of Finance Act, 1994 and therefore, it is liable for levy service tax. The appellant paid an amount of Rs.19,64,254/- before the issuance of a show cause notice dated 09.02.2017.

2.2 The adjudicating authority held that providing logistics services by the car dealer to the customer is an activity which constituted service as defined under sub-section 44 of the section 65(B) of the Finance Act, 1994 and since it is not included in the value of cars sold, service tax is leviable on the same. The original adjudicating authority also held that though penalty under section 78 of the Finance Act and Section 70 of the Act read-with rule 7 and 4A of the Service Tax rules, 1994 are not applicable, penalty under section 77 of the Finance Act, 1994 is applicable in the case since the entire demand and the interest is not paid by the appellant before the issuance of the show cause

notice. The adjudicating authority held that 97% of the tax was voluntarily paid before the issuance of the show cause notice and therefore, the appellant is eligible for reduce confirmed as penalty under section 76 of the Finance Act, and imposed only 5% of the demand confirmed as penalty amounting to Rs. 1,00,585/-with an option to pay penalty reduced to 25% if paid within one month of the receipt of the order.

2.3 The Department filed a review appeal before the Commissioner (Appeals) who, vide the impugned order imposed mandatory penalty under section 78 of the Finance Act. The present appeal is filed against the said impugned order-in appeal.

3. We have heard the Learned Authorized Representative and as no one has been appearing on behalf of the appellant for the hearings despite giving more than five (5) opportunities, we are proceeding to decide the issue on merits.

4. The grounds of appeal as elaborated in the memorandum of appeal submitted that appellant is a recognized dealer of Hyundai Motors Limited and is engaged in buying and selling Hyundai branded car. They also provide repairing and maintenance service of such car and it is a part of dealership activity as is the general norm of dealers of motor vehicles. The activity of sale of car is not covered in the ambit of service tax. The appellants purchase Hyundai car from the manufacturer and sell them to the customers as per the conditions and agreement between the manufacturer and the dealer. Further, the cars/four wheelers received from the company need to be kept safely and before the final delivery to the customer, the same needs to be washed and cleaned properly for such unloading, safe keeping and

cleaning purposes, the appellant dealer incur expenditure which is accounted by them in their books under the heading handling/logistic charges. There is no dispute to the fact that the expenditure is incurred before the sale of the car and in fact the services of loading, unloading, safe keeping in the godown and cleaning before the sale, are services received by the dealer and they are not providing any service to anybody. In fact, it is not even known to them that which customer is going to buy which car and all those pre-delivery expenses are part of the cost of the goods sold by the dealer. The manufacturer allows the dealer to collect the amount from the customer on account of these logistics/handling charges incurred by them and such collection is made at the time of the sale of the vehicle. The customers come into the picture only at the time of the sale and no service is provided to the customers at the time of incurring logistics charges. This legal position had been categorically clarified vide Circular No. 699/15/2003-CX dated 05-03-2003. The non-applicability of service tax on pre-delivery expenses incurred by a dealer of motor vehicles is confirmed in the following case law;

- **M/s Automotive Manufacturers Pvt. Ltd V/s CCE, Nagpur reported in 2015(38) STR-119.**
- **M/s Indian Oil Corporation Ltd V/s CCE reported in 2015(38) STR-501.**

4.1 It has been further submitted that the appellant had deposited the entire demand of service tax (almost 97% and 3% left out due to calculation mistake. In addition, it is pleaded that even if any demand was to be confirmed, it should have been restricted to normal period of one year as the adjudicating authority had observed in para 15 of the OIO that there is no mens-rea involved in the case. The fact that

two audit teams had also visited the appellant is also acknowledged by the adjudicating authority, consequently, the demand should have been restricted to normal period.

4.2 Further, it has been submitted that the normal penalty imposed under section 76 was paid by the appellant in the anticipation that the entire proceeding will culminate in its entirely by paying of another Rs.25,000/- in addition to the amount already paid by them. In view of the above, they have prayed for setting aside the impugned order.

5. Learned Authorized Representative for the Department submitted that the case was booked by DGCEI and investigation revealed that the appellant has not paid service tax on the logistic charges. Subsequently they paid the service tax of Rs. 20,11,690/- for the period 2012-13 to 2015-16(up to 25.01.2016). The appellant did not disclose the said amount in the returns filed by them. They neither paid Service tax nor VAT on such logistics charges. The appellant's submission that there was confusion is not acceptable, as they had never approached the department for any clarification about the levy. Consequently, he submitted that this was a case of suppression warranting invocation of extended period and imposition of mandatory penalty under section 78 of the Act. Ld. AR placed on the decision of the Mumbai Bench of the Tribunal in the case of **M/s L'OREAL India Ltd. Vs. CCE, Pune-I reported in 2015(330) E.L.T. 253(Tri.-Mumbai).**

6. Ld. AR further submitted that the plea of the appellant for waiver of penalty is not tenable as the payment was made only after

the audit by the department. In support of his submission, Ld. AR relied upon the following decisions:-

- **UOI Vs Rajasthan Spinning and Weaving Mills reported in 2009(238)ELT 3 (SC)**
- **CCE, Bangalore-II Vs Asithom Instrument Transformers reported in 2015 (322) ELT 297 (Kar).**

7. We have gone through the appeal memorandum and the arguments of the Ld AR. The issue before us is whether the amounts collected as 'logistics handling expenses' by the appellant is exigible to service tax. The period under dispute 2012-13 to 2015-16 includes both pre negative and Negative list regime. It needs to be determined as what were the nature of these charges. We note that the Department has observed that the appellant was charging extra for the service of loading, unloading, upkeep and washing etc., of the car sold to the customer. It has been alleged by the department that the activity of logistic/handling in lieu of a consideration constituted service as envisaged in clause 44 of Section 65(B) of Finance Act, 1994 and therefore, is liable for levy service tax. The adjudicating authority has held that providing logistics services by the car dealer to the customer is an activity which constituted service as defined under sub-section 44 of the section 65(B) of the Finance Act, 1994. In the instant case, it is noted that he appellant, as authorised dealer of cars, collected logistic charges/handling charges from their customers on account of the sales activity. These are pre-sales activity, the value of which is part of the value of the goods sold, and leviable to VAT.

8. In this context, for 1.4.2012-30.06.2024 (pre-negative list period), we note that the Tribunal in **CCE v. Seva Automotives**

Private Limited [2007 (7) STR 276 (Mum-Trib)] held that "in view of the finding of the lower appellate authority that handling charges are in relation to sale and not in relation to any services provided by the respondents and further, prima facie, the revenue has not been able to show that the handling charges on which the Service tax has been demanded by the adjudicating authority is in the nature of repair charges liable to Service tax". Similarly in **Automotive Manufacturers Private Ltd v. CCE [2015-TIOL-390 CESTAT-MUM]** the Tribunal held "Therefore, we do not understand how service tax levy would apply especially when the goods are subject to sales tax/VAT on a value inclusive of handling charges." In view of the above decisions, it cannot be held that handling charges are not exigible to service tax.

9. Post 01.07.2012, in order to qualify as a 'service', the activity has to satisfy three limbs of the definition of service viz., there has to be a service provided by a provider to a recipient, there has to be a monetary consideration and the service has to be provided in the taxable territory of India. Logistics/Handling charges are collected while selling of cars to the customers and not otherwise. Therefore, even if one has to consider the logistics/handling charges to be a consideration for a service, it is imperative to note that this handling activity is coupled with sale of car and would be called as bundled service as defined under section 66F of Finance Act, 1994. In this context as well, we observe that receipt of logistics/handling charges is naturally bundled with sale of cars since majority of similar service providers in the industry would receive the said amounts. Accordingly, provision of above activities and sale of vehicles has to be treated as

provision of single service which gives such bundle its essential character. And in the present case, the activity of selling of cars is essential and undertaking of above activities is incidental to the sale. Therefore, above activities has to be bundled with sale of cars and it should be treated as sale of cars only. That being a case, service tax is not leviable on logistics/handling charges, since sale of cars is covered under the exclusion part of service definition given under section 65B (44) of Finance Act, 1994 i.e. transfer of title in goods. Consequently, they will obviously form part of the value of the goods when they are subsequently sold and consequently sales tax/VAT would apply and not service tax.

10. In this context we note that CBEC vide its Circular No. 699/15/2003-CX., dated 5-3-2003 clarified that "it is envisaged appears that any activity of sales dealer at the pre-sale stage or at the time of sale will not come under the purview of service tax." We are of the opinion that this circular has clearly clarified that such pre-sale charges are not leviable to service tax, and the logistics/handling activities are all pre-sale activities and hence are not leviable to service tax.

11. In this context, we also observe that the Tribunal in Indian Oil Corporation Ltd v. CCE 2015 (38) STR 501 (Tri. - Mumbai) held that "whatever expenses have been incurred before transfer of the goods, form part of the sale price of goods". Similar view was held by the coordinate bench of this Tribunal in **M/S Premier Car Sales Ltd., Vs Commissioner (Audit), CGST & Central Excise, Lucknow** [2024 (6) TMI 1 - CESTAT ALLAHABAD] has held as follows:-

"15. Appellants had been recovering logistic charges from the buyers of the car. It is the case of the Department that the Appellants had not deposited service tax on such logistic charges. The learned Commissioner has held that the Appellants have charged the logistics charges over and above the ex-showroom price of car. If logistic charges were part of the transaction value, then it could have been included in the sale value and mentioned in the sale invoice but Appellants had separately charged logistic charges and issued separate invoice in this regard. It has therefore been held that it is a pure service taxable under the provisions of Finance Act, 1994 and these logistics charges are not the part of transaction/sale value, rather logistics charges are the amount charged from the customers in view of services related to logistics charges. Appellants have submitted that they have collected logistics charges as part of transaction value at the time of sale of vehicle. These charges are part of sale invoice and VAT is collected on the same. They also submitted that there can be no service till the goods are sold to another person.

16. We have perused the copy of invoice for sale of car as well as invoice for logistic charges. Both these invoices have been raised simultaneously at the time of sale of vehicle. We also note that the VAT Tribunal vide order dt. 25-01-2014, in their own case for A/Y 2009-10, had held that the logistic charges recovered at the time of sale of car is liable to be included in the sale price of vehicle. It therefore held that VAT was payable on logistic charges. It is the settled principal of law that service tax and VAT are mutually exclusive and a transaction can either be taxed under service tax or under VAT. Once VAT has been paid, service tax cannot be demanded.

17. The Hon'ble Delhi High Court in the case of ***Tim Delhi Airport Advertising Pvt. Ltd. Vs. Special Commr –II 2016 (44) S.T.R 399 (Del.)*** held that levy of service tax and VAT are mutually exclusive. The intention of the party to the transaction

would be material. If a transaction has been held to be one of providing services, then the same was not chargeable to VAT.

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20. In view of above, we hold that service tax could not have been demanded on logistic charges; particularly when Appellants have paid VAT on the same, Department has not been able to specify the nature of service provided and the order of Commissioner (Appeals) in another case has been accepted by the Department."

12. We also note that the impugned order has observed that the said charges did not form a part of sale value of the vehicle and were collected separately. However, in this context, we note that the said charges are incurred in respect of all cars which are to be sold by the dealer. The expenses incurred in this regard are passed by the original authority to the customer and collected as part of the sale value of the car. The bifurcation of the expenses and its separate accounting in the books of accounts does not amount to provision of service.

13. In view of the above settled legal position, we hold that the impugned order is liable to be set aside and is accordingly set aside. The appeal is allowed, with consequential relief.

(Order pronounced in the open Court on 02.08.2024)

(BINU TAMTA)
MEMBER (JUDICIAL)

(HEMAMBIKA R. PRIYA)
MEMBER (TECHNICAL)

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