

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
New Delhi

PRINCIPAL BENCH – COURT NO. 4

Service Tax Appeal No. 50731 Of 2019

[Arising out of Order-in-Appeal No. 1227-CRM-ST-JDR-2018 dated 12.11.2018 passed by the Commissioner (Appeals) of Central Goods, Service Tax, Jodhpur]

Harvinder Kaur Malhotra

B-370, Sudarshana Nagar,
Bikaner, Rajasthan

: Appellant

Vs

**Commissioner of Central GST &
Central Excise, Jodhpur**

G-105, New Industrial Area, Opp.
Diesel Shed, Basni, Jodhpur, Rajasthan

: Respondent

APPEARANCE:

Shri Ajay K. Mishra, Advocate for the Appellant

Shri Rajeev Kapoor, Authorized Representative for the Respondent

CORAM :

HON'BLE DR. RACHNA GUPTA, MEMBER (JUDICIAL)

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

FINAL ORDER No. 50520/2025

Date of Hearing:09.01.2025

Date of Decision:25.04.2025

HEMAMBIKA R. PRIYA

The present appeal has been filed by Harvinder Kaur Malhotra¹ to assail the Order-in-Appeal No. 1227-CRM-ST-JDR-2018 dated 12.11.2018 wherein the Commissioner (Appeals) has confirmed the demand of Rs. 2,38,366/- along with interest and imposed equivalent penalty under Section 78 and penalty of Rs. 20,000/- under Section 77 of the Finance Act, 1994.

1 The appellant

2. The brief facts of the case are that the appellant is an individual lady, engaged in marketing and sale of consumer products of AMWAY in the capacity of an authorized distributor. The appellant received income from AMWAY under three distinct heads viz., 1. Personal Performance Commission (PPC) 2. Sales Commission and 3. Leadership Development Commission. Based on scrutiny of third party data viz., Form 26AS, the department observed that the appellant was engaged in providing taxable services in the category of "Business Auxiliary Service" and allied services, without obtaining requisite registration and without payment of service tax. On completion of investigations, Show Cause Notice No. C. No. IV(11)108/Gr. VII/TP/HKM/BKN/2016/3971 dated 07.12.2016 was issued to the appellant proposing recovery of service tax amounting to Rs. 4,85,669/- on the commission received from Amway during the period FY 2011-12 to FY 2015-16, in terms of proviso to Section 73(1) of the Finance Act, 1994 along with interest and proposing penalty. Vide Order-in-Original No. 01/2018-ST(Demand)-Asstt. Commr. dated 15.01.2018, the demand of Rs. 4,34,045/- was confirmed, extending the cum tax value benefit claimed by the appellant and ordering for its recovery along with interest under Section 75. Rs. 1,08,353/- which had already been deposited by the appellant was appropriated. A penalty of Rs. 4,34,045/- i. e. equal to the amount of Service Tax was also imposed under Section 78 of the Finance Act, 1994. In addition, penalties of Rs. 10,000/- were also imposed under Section 77(1)(a) and 77 (2) of the Finance Act, 1994 respectively. Being aggrieved by the said order, the appellant preferred an appeal before the Commissioner (Appeals) who in turn, disposed the appeal vide

impugned Order-in-Appeal dated 12.11.2018 denying relief in following terms:

- i. Cum Tax benefit cannot be extended as the appellant has not produced any evidence that the value is inclusive of service tax.
- ii. Penalty imposed under Section 78 was upheld as there was deliberate default in compliance of law on the part of appellant.
- iii. Penalty imposed under Section 77(1)(a) and 77(2) upheld on the ground that the appellant failed to obtain service tax registration and file ST-3 returns.

Aggrieved by the said order, the appellant has filed the present appeal.

3. Learned counsel for the appellant submitted that the extended period of limitation was not applicable as the issue involved interpretation of law and there was no intent to evade payment of tax. In this regard, learned counsel placed reliance on the decision in **M/s Charanjeet Singh Khanuja & others vs C.S.T.**² involving identical issue, wherein, relying on the judgment of Apex Court in the case of **Continental Foundation Joint Venture Vs. CCE, Chandigarh**³ it was held that when there is scope for doubt in the mind of an assessee on a particular issue, the longer limitation period, under proviso to Section 11 A(1) cannot be invoked and the ratio of this judgement of the Apex Court was squarely applicable to the facts of this case.

² 2016 (41) STR 213 (Tri. Del.)

³ 2007-TIOL-152-SC-CX

4. Learned counsel further submitted that the appellate authority, while, determining the service tax liability has stated that no evidence has been produced to show that value is inclusive of service tax, hence, no cum tax benefit was extended. He contended that the issue of admissibility of extending cum tax benefit which was denied by the adjudicating authority whereas the benefit had been extended and the same had attained finality as this aspect was not agitated by the Revenue before the appellate authority. Therefore, the learned counsel contended that the appellate authority has traversed beyond the subject matter of appeal, which is legally not sustainable. He submitted that the decision in **Amrit Agro Industries Limited vs. Commissioner of Central Excise, Ghaziabad**⁴ and **Assistant Collector of Central Excise vs. Bata India Ltd.**⁵ are not relevant to present case as said judgements were rendered in the context of pre-amended Section 4 of the Central Excise Act, 1944, where, assessable value was based upon wholesale price and not transaction value as per the amended Section 4. Learned counsel relied on paras 4 & 8 of the decision in the case of **Hi-Line Pens Ltd. Vs CCE & ST, Delhi**⁶.

5. Learned Authorized Representative for the Department submitted that the appellant in the present case was a distributor, who purchases goods from Amway at the Distributors Acquisition Price (DAP)) and sells the same in retail at price not exceeding MRP fixed by the Amway. This activity of the Distributor, cannot be treated as promotion, marketing or sale of the goods produced or provided by or belonging to the client (Amway), as the sale of the goods purchased

4 **2007 (210) E.L.T. 183 (S.C.)**

5 **1996 (84) ELT 164 (S.C.)**

6 **2007 (210) E.L.T. 183 (S.C.)**

by the Distributor from Amway is not the sale of the goods belonging to her client, i. e. Amway. Ld. AR stated that the amount of 'Personal Performance Commission' received by the appellant is clearly excludible for computing the consideration received towards provisioning of taxable service, if any. The issue of taxability of commission earned by distributor every month on purchase of certain quantum of goods from Amway stands settled. The discount received by the appellant under the description of "Personal Performance commission' is liable to be excluded for the purpose of computing aggregate value of taxable service provided by them. He further submitted that the appellant has claimed the benefit of cum tax, and for claiming the cum tax benefit, the value should be inclusive of tax. In this case, the appellant has not produced any evidence that the value is inclusive of tax. Therefore, the benefit of cum tax from gross value cannot be extended. Ld. AR submitted that the service tax liability for the entire period from FY 2010-11 to 2015-16 amounts to Rs. 2,38,366/-. The appellant is liable to pay service tax of Rs.2,38,366/- along with interest. He also stated that as the appellant had not informed the department regarding the material facts, hence the extended period had been correctly invoked and the interest and penalty correctly imposed.

6. On careful consideration of the submission made by both the sides, we find that the activity of the appellant is the activity of marketing or sale of the goods belonging to Amway and the commission received by the Distributor from Amway, is linked to the performance of his sales group is liable to be treated as consideration for Business Auxiliary Service of sales promotion provided to

Amway. Therefore, service tax would be chargeable on the commission received by a Distributor from Amway on the products purchased by his sales group. In this context, we note that the appellant is a similarly placed distributor of Amway India Enterprise Pvt Ltd, as the various distributors involved in the judgment of **Charanjeet Singh Khanuja vs Commissioner of Central Excise and Service Tax, Indore**⁷. The relevant paras of the said judgement the Division Bench of this Tribunal is reproduced hereinafter:

"9. The appellants in the appeals ST/138 and 139/2009, ST/406/2010, ST/522 to 525, 257, 259, 433, 473, 502, 580, 1123, 1383, 1781 & 1802/2011, ST/56, 86, 126, 645/2012 and ST/1723-1724, 2337 and 2810/2012 and the respondents in the Appeals Nos. ST/851 to 854, 863, 864, 865, 866, 867, 868, 869, 870 and 878/2012 filed by the Revenue are distributors of Amway India Enterprises Pvt. Ltd. Amway operate their business of selling of their products under a Business Plan called Multi-Level Marketing. As per the "Business Starter Guide of Amway India Enterprises Pvt. Ltd." placed on record, they appoint Distributors, who purchase their products and sell the same at the price not exceeding the MRP fixed by the Amway. The Distributors, in turn, can sponsor a second level of distributor who are also appointed as distributors by Amway and besides selling the Amway products purchased Amway, they also promote the marketing of the Amway products. As per the Amway Business Plan, a distributor has three streams of income - (a) a distributor of Amway products purchases the products from Amway at the Distributions' Acquisition Price (DAP) and sells them in retail at the price not exceeding the MRP as fixed by the Amway. The difference between the retail sale price and the DAP is the Distributor's profit margin. (b) Besides above, the Distributor also gets a commission from Amway from 6% to 21%

7 [2015 (6) TMI 585 - CESTAT NEW DELHI]

depending upon the purchases of Amway products during the month for sale or for personal consumption. Thus, depending upon the purchases made by the distributor during a month from Amway, he gets a commission/bonus varying from 6% to 21%. This is the second stream of income of the distributor; (c) A Distributor also gets monthly commission on the basis of the success and productivity as defined by the products' sales of the distributors appointed through him which constitute his sales group.

10. In these cases, the Service tax has been demanded on the gross amount of commission received by each of the Distributors (assesseees) of Amway during the period of dispute, as mentioned in the Chart in para 2 above. The department's contention is that these commission received by the assesseees from Amway are in respect of the Business Auxiliary Service provided by them to Amway. On the other hand, the contention of the assesseees is that their activity is not covered by the definition of Business Auxiliary Service as given under Section 65(105)(zzb) read with Section 65(19) of the Finance Act, 1994.

11. In terms of Section 65(105)(zzb), the service provided to a client by Commercial concern in relation to the Business Auxiliary Service is taxable. The term "Business Auxiliary Service" is defined under Section 65(19) of the Finance Act, 1994 as under:-

"Section 65(19) : "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

Explanation. - For the removal of doubts, it is hereby declared that for the purposes of this sub-clause, "service in relation to promotion or marketing of service provided by the client" includes any service provided in relation to promotion or marketing of games of chance, organized, conducted or

promoted by the client, in whatever form or by whatever name called, whether or not conducted online, including lottery, lotto, bingo;

(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

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12. According to the Department, the activity of the assesseees is "promotion or marketing or sale of the goods produced or provided by or belonging to the client." In our view, the activity which is covered under Section 19(i) is in relation to the promotion or marketing or sale of the goods produced by the client or provided by the client or belonging to the client. This expression, in our view, would not cover the sale of the goods by a person, which belong to him, as the activity of the promotion or marketing or sale of the goods by a person belonging to him would not constitute service. The assesseees in these cases are distributors, who purchase the goods from Amway at the Distributors' Acquisition Price (DAP)) and sell the same in retail at price not exceeding MRP fixed by the Amway. This activity of the Distributors, in our view, cannot be treated as promotion, marketing or sale of the goods produced or provided by or belonging to the client (Amway), as the sale of the goods purchased by the Distributors from Amway is not the sale of the goods belonging to their client - Amway. Once the Amway products have been purchased by a Distributor from Amway, those products cease to belong to Amway, but belong to the Distributor and sale of these goods by the Distributor would not constitute service to Amway. For the same reason, any incentive or commission received by a Distributor from Amway for buying certain quantum of goods from Amway during a month cannot be treated as the consideration received for promotion or marketing or sale of the goods produced by or provided by or

belonging to the client, more so, as this commission is not linked to the goods sold by the Distributor, but is linked to the goods purchased by the Distributor from Amway during a month and is in the nature of volume discount. Therefore, no service tax is chargeable on the profit earned by the distributors from sale of the goods in retail which had been purchased by them from Amway and on the commission earned by them every month on purchase of certain quantum of goods from Amway.

13. However, activity of a Distributor of identifying other persons, who can be roped in for sale of the Amway products/marketing of the Amway products and who on being sponsored by that Distributor are appointed by Amway as second level of distributors is, in our view, the activity of marketing or sale of the goods belonging to Amway and the commission received by the Distributor from Amway, which is linked to the performance of his sales group (group of the second level of distributors appointed on being sponsored by the Distributor) would have to be treated as consideration for Business Auxiliary Service of sales promotion provided to Amway. Therefore, service tax would be chargeable on the commission received by a Distributor from Amway on the products purchased by his sales group. However, in the impugned orders Service tax has been demanded on the gross amount of commission and no distinction has been made between the commission earned by a Distributor from Amway based on his own volume of purchase from Amway and the commission earned by him on the basis of the volume of purchases of Amway products made by his sales group i.e. group of second level of Distributors appointed by Amway on being sponsored by the Distributor. For quantifying the Service tax demand on the commission received from Amway on the volume of purchase made by the distributors sponsored /enrolled by a particular distributor i.e. the Distributor's sales group, these matters would have to be remanded to the Original Adjudicating Authority.

14. Another objection raised by the appellants in Appeals Nos. ST/138 and 139/2009, ST/406/2010, ST/522 to 525/2010, ST/257, 259, 433, 473, 502, 580, 1123, 1383, 1781 & 1802/2011, ST/56, 86, 126, 645/2012 and ST/1723-1724, 2337 and 2810/2012 and the respondents in Appeals Nos. ST/851 to 854, 863, 864, 865, 866, 867, 868, 869, 870 and 878/2012 is that the assesseees are individuals and during the period till 30-4-2006, Service tax was chargeable only on the services provided to a client by a commercial concern in relation to Business Auxiliary Service and the individual persons cannot be treated as Business concern. We do not accept this plea as a business concern can be a proprietary firm also which is owned by an individual and there is no difference between proprietary firm owned by a person and that person. When an individual engages himself in a commercial activity, he has to be treated as business or commercial concern. Therefore, notwithstanding the fact that w.e.f. 1-5-2006 the term, 'commercial concern' in Section 65(105)(zzb) was replaced by 'any person', we are of the view that even during the period prior to 1-5-2006, the Business Auxiliary Service, even if provided by an individual to a client, was taxable. Moreover, in this group of appeals, the Appellants in Appeal No. ST/257/2011 and ST/259/2011 are proprietary firms who, without any doubt, are commercial concerns."

7. Following the above decision, the Tribunal in its decision in the case of **M/s Manish Kumar Khaptawala, Pragna Arunkumar Patakh, Ravi Prakash, Smita Verma, Master Bhavna N Patel, Binal Manoj versus C.C.E. & S.T. - Surat-I, C.S.T., Service Tax – Ahmedabad⁸** held that the appellant was liable to pay service tax. In

8 [2015 (6) TMI 585 - CESTAT NEW DELHI]

view of the above, we hold that the appellant was liable to pay service tax on the said commission amount.

8. As regards the issue of cum duty benefit, we note that the Hon'ble Supreme Court in its judgment in **Commissioner of Central Excise Vs. Maruti Udyog Ltd.**,⁹ granted the cum-duty benefits to the assessee, holding as follows:

"4. A reading of the aforesaid Section clearly indicates that the wholesale price which a charged is deemed to be the value for the purpose of levy of excise duty, but the element of excise duty, sales tax or other taxes which is included in the wholesale price is to be excluded in arriving at the excisable value. This Section has been so construed by this Court in *Asstt. Collector of Central Excise and Ors. v. Bata India Ltd.*, [1996] 4 SCC 563, and it is thus clear that when cum-duty price is charged, then in arriving at the excisable value of the goods the element of duty which is payable has to be excluded. The Tribunal has, therefore, rightly proceeded on the basis that the amount realised by the respondent from the sale of scrap has to be regarded as a normal wholesale price and in determining the value on which excise duty is payable the element of excise duty which must be regarded as having been incorporated in the sale price, must be excluded. There is nothing to show that once the demand was raised by the Department, the respondent sought to recover the same from the purchaser of scrap. The facts indicate that after the sale transaction was completed, the purchaser was under no obligation to pay any extra amount to the seller, namely, the respondent. In such a transaction, it is the seller who takes on the obligation of paying all taxes on the goods sold and in such a case the said taxes on the goods sold are to be deducted under Section 4(4)(d)(ii) and this is precisely what has been directed by the Tribunal. There is also nothing to show that the sale price was not cum-duty.

5. It will be useful here to refer to the observations of this Court in *Hindustan Sugar Mills v. State of Rajasthan and Ors.*, [1978] 4 SCC 271, at page 280, as follows:

"Take for example, excise duty payable by a dealer who is a manufacturer. When he sells goods manufactured by him, he always passes on the excise duty to the purchaser. Ordinarily it is not shown as a separate item in the bill, but it is included in the price charged by him. The 'sale price' in such a case could be the entire price inclusive of excise duty because that would be the consideration payable by the purchaser for the sale of the goods. True, the excise duty component of the price would

9 [2002 (141) ELT 3 (SC)]

not be an addition to the coffers of the dealer, as it would go to re-imburse him in respect of the excise duty already paid by him on the manufacture of the goods. But even so, it would be part of the 'sale price' because it forms a component of the consideration payable by the purchaser to the dealer. It is only as part of the consideration for the sale of the goods that the amount representing excise duty would be payable by the purchase:. There is no other manner of liability, statutory or otherwise, under which the purchaser would be liable to pay the amount of excise duty to the dealer. And, on this reasoning, it would make no difference whether the amount of excise duty is included in the price charged by the dealer or is shown as a separate item in the bill. In either case, it would be part of the 'sale price'....."

6. *The example given in the aforesaid decision is clearly applicable in the present case. The sale price realised by the respondent has to be regarded as the entire price inclusive of excise duty because it is the respondent who has, by necessary implication, taken on the liability to pay all taxes on the goods sold and has not sought to realise any sum in addition to the price obtained by it from the purchaser. The purchaser was under no obligation to pay any amount in excess of what had already been paid as the price of the scarp.*

7. *Under the circumstances, the Tribunal was right in directing that the 7. respondent is entitled to the benefit of Section 4(4)(d)(ii) of the Central Excises & Salt Act."*

9. Similarly, the Tribunal in **Panther Detective Services V. Commissioner of Central Excise, Kanpur**¹⁰ held that the only relief in regard to valuation that the appellants would be entitled to treat the total receipts as inclusive of service tax. It was accordingly ordered that the Revenue shall re-compute the tax amount in these appeals treating the total receipts as cum-tax. Similarly, in **Bhagawati Security Services V. Commissioner of Central Excise, Meerut - I**¹¹ the appellants had not raised any service tax bill to their service receivers. The Tribunal found that there was a force in the appellant's contention that if service tax is to be paid, it has to be worked out on

10 [2006 -TMI - 647 – CESTAT NEW DELHI]

11 [2006 (3) STR 763 (Tri. Del)]

the basis of gross amount received by them as being inclusive of service tax. In view of the above decisions, we hold that the appellant should be granted cum-duty benefit while calculating the demand. We also find the appellant's contentions that the Commissioner (Appeals) had indeed traversed beyond the appeal by denying the benefit granted in the Order-in-Original.

10. We now come to the issue of invocation of the extended period. It is important to note that the respondent is an individual, who cannot be faulted if she thought that she was only a dealer; a difference between the purchase price and the sale price or MRP is available to her and therefore, it cannot be said that there was an intention to evade service tax. The said issue arose only because Amway called such amount as 'commission' whereas the appellant simply sold the goods to the person who asked a product at a particular MRP. In this regard, we note that the Hon'ble Supreme Court in the case of **Continental Foundation Joint Venture v. CCE, Chandigarh**¹² held that when there is scope for doubt in the mind of an assessee on a particular issue, the longer limitation period, under proviso to Section 11A(1) cannot be invoked. In the instant case, it is apparent that the appellant was in doubt regarding the levability of service tax on the said transactions as she was under the impression that she was simply selling the goods at a higher MRP. We are of the opinion that the ratio of this judgement is applicable to the facts of this case. Therefore, the extended limitation period of 5 years under proviso to Section 73(1) of

12 [2007 (216) E.L.T. 177 (S.C.)]

the Finance Act, 1994 cannot be sustained. Accordingly, the penalty equivalent to duty is also set-aside.

11. In view of the above discussions, we uphold the demand on commission for the normal period, if any. The demand for the extended period is set aside along with penalties imposed on the appellant. The impugned order is modified to the extent indicated above and the appeal is allowed partially.

(Order pronounced in the open Court on 25.04.2025)

(DR. RACHNA GUPTA)
MEMBER (JUDICIAL)

(HEMAMBIKA R. PRIYA)
MEMBER (TECHNICAL)

G.Y.