

**IN THE CUSTOMS, EXCISE AND SERVICE TAX
APPELLATE TRIBUNAL
SOUTH ZONAL BENCH AT CHENNAI
[COURT III : Division Bench B1]**

Appeal Nos.: ST/00470/2009, ST/41507/2013, ST/40987/2015

Sl. No.	Appeal No.	Appellant	Respondent
1.	ST/470/2009	M/s. IndusInd Bank Ltd., Chennai	The Commissioner of Service Tax, Chennai
Arising out of Order-in-Original No. 11/2009 dated 14.05.2009 passed by the Commissioner of Service Tax, Chennai			
2.	ST/41507/2013	The Commissioner of Service Tax, Chennai	M/s. Ashok Leyland Finance Ltd., Chennai (now merged with 'M/s. IndusInd Bank Ltd.')
Arising out of Order-in-Appeal No. 148/2013 (M-ST) dated 21.02.2013 passed by the Commissioner of Central Excise (Appeals), Chennai			
3.	ST/40987/2015	M/s. Ashok Leyland Finance Ltd., Chennai (now merged with 'M/s. IndusInd Bank Ltd.')	The Commissioner of Service Tax, Chennai
Arising out of Order-in-Appeal No. 61/2015 (STA-II) dated 13.02.2015 passed by the Commissioner of Service Tax (Appeals-II), Chennai			

Appearance:-

Shri. V. S. Manoj, Advocate
for the Appellant

Shri. A. Cletus, ADC (AR) [Sl. No. 1]
Shri. B. Balamurugan, AC (AR) [Sl. Nos. 2 & 3]
for the Respondent

CORAM:

Hon'ble Ms. Sulekha Beevi C.S., Member (Judicial)
Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)

Date of Hearing: 18.12.2018

Date of Pronouncement: **29.01.2019**

Final Order Nos. **40178-40180 / 2019**

Per Bench :

The issue involved in all these appeals being the same, they are heard together and disposed of by this common order. The

parties are hereinafter referred to as 'assessee' and 'Department' for the sake of convenience.

2. M/s. Ashok Leyland Finance Ltd. (a unit of M/s. IndusInd Bank Ltd. which later also merged with M/s. IndusInd Bank Ltd.) is engaged in providing Banking and other Financial Services. They have obtained Registration for providing such services.

3.1 The Audit group of the Service Tax Commissionerate, Chennai, during the audit of accounts of the assessee, noticed that the assessee had received amount towards dealer commission and had not discharged service tax on the same. The Department was of the view that the amount so received would fall under the category of Business Auxiliary Services (BAS) and that appellant is liable to pay service tax on the commission received.

3.2 After due process of law, the Original Authority confirmed the demand, interest and imposed penalties. Appeal No. ST/470/2009 is filed by assessee against the Order passed by Commissioner who confirmed demand, interest and penalty under Section 78 of the Finance Act, 1994. The Commissioner dropped the proposal to impose penalty under Section 76 *ibid* against which Department has filed Appeal No. ST/41507/2013. Appeal No. ST/41507/2013 arises

out of the Order passed by Commissioner (Appeals) who upheld the Order passed by the adjudicating authority confirming demand, interest and penalties for the period from April 2008 to June 2009. Hence, these appeals.

4.1 On behalf of the assessee, Ld. Counsel Shri. V. S. Manoj appeared and argued the matter. He submitted that the assessee is engaged in lending business. Merely because the appellant received some amount from the dealer for disbursement of loan to purchasers of vehicle, the Department is alleging that such amount is received as commission for promoting the business of the dealer. They facilitated loan for the borrowers who intend to purchase vehicles from the dealer. They are not engaged in promoting, marketing or selling any goods to the dealer. The disbursement of loan to the dealer to purchase the vehicle cannot be construed as an act of promoting the business of the dealer. The transaction of disbursing loan takes place only when there is an intention of the borrower to buy a vehicle and also concurrence from the bank to provide the loan. In essence, the activity of the appellant is only disbursement of loan. The loan amount is given by issuing a cheque to the dealer. This is done only to ensure that the amount is not used

by the borrower for any other purpose. This ensures recovery of the loan since the vehicle is regarded as the security of the loan.

4.2 Though the assessee receives some amount from the dealer, the same cannot be construed as a commission received for promoting the business of the dealer so as to fall under Business Auxiliary Services. The dealer is not a client of the assessee/Bank and instead, it is the borrower who is the client of the assessee/Bank. There is no service provider-client relationship between the assessee and the dealer. Therefore, the commission received does not have the character of consideration, as envisaged in the Finance Act, 1994.

4.3 The Show Cause Notice has been issued alleging that the appellant is engaged in promotion of the business of the dealer. However, the Original Authority has confirmed the demand holding that the appellant has acted as a Commission Agent. This finding is beyond the allegations raised in the Show Cause Notice and therefore, cannot sustain.

4.4 The other allegation raised in the Show Cause Notice is that the appellant has given reduction in the interest rate. This is factually wrong. The appellant applies RBI guidelines on giving the loans and therefore, is not reducing the interest rates while

disbursing the vehicle loans. The understanding with the vehicle dealer is that when the vehicle loan is disbursed to rural areas, the assessee will be eligible for commission. However, this commission is not for promotion of the business of the vehicle dealer. He argued that the Commissioner (Appeals) in Order-in-Appeal No. 148/2013 dated 21.02.2013 has rightly analysed the facts and held that the activity does not fall under the definition of BAS.

4.5 The appellant is engaged in rendering Banking or other Financial Services only. The collection of interest falls under this category and appellant is discharging the service tax on this amount. When the appellant has discharged service tax on the interest collected on vehicle loans under the category of Banking or other Financial Services, the Department cannot vivisect the transaction of lending activity to fall partly under BAS for the commission/discount received. The discount received, if at all, does not come from the client (borrower) but is offered by the dealer. The discount is not a commission and therefore, not chargeable to service tax.

4.6 He also argued on the ground of limitation. The Department does not have a case that the appellant has not reflected the discount

received in their accounts. The appellant has not discharged service tax only under the *bona fide* belief that the discount received by them is not subject to levy of service tax. They have been paying service tax on Banking or other Financial Services. Therefore, the Show Cause Notice alleging suppression of facts with intention to evade payment of service tax and invoking the extended period cannot sustain.

5.1 Ld. ARs Shri. A. Cletus as well as Shri. B. Balamurugan appeared on behalf of the Department in the appeals. The Department argued that the success of the dealer in selling more vehicles is only if he has a tie-up with the Bank/financer. Although the loan is intended for the purchase of the vehicle, the cheque is given in the name of the dealer. While making such payment by cheque, the assessee deducts commission/price discount which is offered by the dealer. This shows that the assessee promotes the business of the dealer. Such discount offered is in the nature of a commission for promotion, marketing and selling of the goods of the client viz., Dealer and thus falls within the definition of BAS.

5.2 Shri. A. Cletus referred to an example with regard to the tie-up that Engineering Colleges have with companies for the purpose

of placement for students. These Engineering Colleges pay an amount to the HR Department of the companies. The loan amount can be considered as a commission received by the companies. In the same way, the Bank cuts (retains) the commission while issuing the cheque and this is the commission paid by the dealer to the assessee/Bank. As per the definition of BAS, activity of Commission Agent is also included. The commission is received from the dealer whose business is promoted by the assessee. Therefore, the demand has been rightly confirmed by the adjudicating authority. It is also argued that the Commissioner (Appeals) has wrongly set aside the demand, interest and penalties in Order-in-Appeal No. 148/2013.

5.3 With regard to the issue of limitation, it is argued by the Department that the assessee did not declare the amount of commission collected by them in their ST-3 returns. This is suppression of facts and therefore, the Show Cause Notice issued invoking the extended period is correct and proper.

6. Heard both sides.

7. The issue in dispute is whether the amount received from the dealers by the assessee/Bank (financer) is subject to levy of service tax under the category of BAS.

8. The assessee is engaged in the activity of Banking or other Financial Services and is registered under this category. They are discharging service tax under this category. They have entered into an understanding with the vehicle dealers and by such understanding, when the assessee/Bank disburses loan to the borrower, a small amount is retained by the assessee. The assessee contends that this is merely a discount and not a commission or consideration for services. The Department contends that the amount received is commission paid for services rendered under BAS. The amount is reflected in the assessee's financial statements as dealership commission. The question is whether the amount received attains the character of consideration and also whether the activity falls under BAS.

9. In the present case, when a vehicle is purchased by a customer, he approaches the assessee/Bank for the purpose of availing loan. The vehicle is a collateral security for disbursing the loan and mostly hypothecated with the bank. The cheque is issued in the name of the dealer which is one of the main reasons that the Department has alleged that the activity of the appellant is to promote the business of the dealer. It can be reasonably understood that when the loan is in the nature of a vehicle loan, the same can

only be used for purchase of vehicle. So also the vehicle has to be hypothecated with the bank. Thus, the bank, in order to make sure that the loan is used only for the purpose of purchase of the vehicle, issues the cheque in the name of the dealer. This would ensure that they can seize the vehicle and recover the loan in case of default. So, merely because the cheque has been issued in the name of the dealer, it cannot be said that the appellant is promoting the business of the vehicle dealer.

10.1 While issuing the cheque, the assessee retains a small amount which is offered as a discount/commission by the vehicle dealer. Merely because there is a flow of money from the dealer to the bank it cannot be said that the same is a consideration for service rendered. Every flow of money does not have the character of consideration. For rendering a service, there should be a relationship in the nature of service provider and service recipient. Further, the said service should fall within the category of BAS. For better appreciation, the definition of Business Auxiliary Services (BAS) as contained in Section 65(19) is reproduced as under :

“ SECTION [65. Definitions. — In this Chapter, unless the context otherwise requires, -

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[(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

[* * * *]

(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

[Explanation. — For the removal of doubts, it is hereby declared that for the purposes of this sub-clause, “inputs” means all goods or services intended for use by the client;]

[(v) production or processing of goods for, or on behalf of, the client;]

(vi) provision of service on behalf of the client; or

(vii) a service incidental or auxiliary to any activity specified in sub-clauses (i) to (vi), such as billing, issue or collection or recovery of cheques, payments, maintenance of accounts and remittance, inventory management, evaluation or development of prospective customer or vendor, public relation services, management or supervision, and includes services as a commission agent, [but does not include any activity that amounts to manufacture of excisable goods].

[Explanation. — For the removal of doubts, it is hereby declared that for the purposes of this clause, —

(a) *“commission agent” means any person who acts on behalf of another person and causes sale or purchase of goods, or provision or receipt of services, for a consideration, and includes any person who, while acting on behalf of another person —*

(i) deals with goods or services or documents of title to such goods or services; or

(ii) collects payment of sale price of such goods or services; or

(iii) guarantees for collection or payment for such goods or services; or

(iv) undertakes any activities relating to such sale or purchase of such goods or services;

[(b) “excisable goods” has the meaning assigned to it in clause (d) of section 2 of the Central Excise Act, 1944 (1 of 1944);

(c) “manufacture” has the meaning assigned to it in clause (f) of section 2 of the Central Excise Act, 1944 (1 of 1944)]”

10.2 The Show Cause Notice alleges that the services would fall under Sub-clause (i) of the above definition. The said Sub-Clause states that only when the service is promotion, marketing or sale of

goods produced or provided by belonging to the client, the service would be Business Auxiliary Services. In the present case, the vehicle dealer is not the client of the assessee. The borrower who is availing the loan is the client of the assessee/Bank.

11. Though in the Show Cause Notice it is alleged that the activity would fall under Sub-Clause (i) of Section 65(19), the Original Authority has held that the appellant is acting as a Commission Agent. The definition reproduced above will show that Commission Agent is a person who acts on behalf of another and causes sale or purchase of goods. The appellant, in the present case, undisputedly, is not acting on behalf of the vehicle dealer for the purchase or sale of vehicles. Merely because vehicle is intended to be purchased from the dealer, the Bank would not disburse the loan. The Bank has to be satisfied with other conditions like executing hypothecation agreement, etc. The ultimate decision to give loan rests with the Bank. This being so, it is not a service provided to the dealer, and the Bank is never a Commission Agent of the dealer. It is clear that the assessee is neither acting on behalf of dealer nor providing any service to dealer. Therefore, the assessee definitely does not fit into the category of Commission Agent or under the definition of BAS.

12.1 While analysing the activity of the appellant, we also take note of similar situations. It is ordinary for Consumer Stores such as Home appliance dealers to arrange loan facilities to the customer by having a tie-up with financiers/Banks. Whenever a customer approaches a Home appliance store to purchase any good like washing machine, refrigerator, etc., in case he intends to avail a loan for such purchase, the store may inform him that it would be easy for him to get loan from a particular bank/financer. The customer then approaches such bank/financer and avails the loan. The cheque or amount is usually given directly to the home appliance store and the goods purchased will be hypothecated with the bank. In such a situation, it cannot be said that the bank/financer is promoting the business of the Home appliance store. This arrangement merely facilitates the buyer to get the loan easily. The bank/financer is rendering the activity of disbursement of loan only.

12.2 Similarly, it is seen in the case of construction companies that they have tie-ups with certain banks in order to make the home loan hassle-free. It is usually advertised or informed to the prospective buyer that the project/land has been approved by particular banks. This will help the buyer to avail the loan hassle-free. The bank then gives the loan to the borrower and since the house/flat is the

security for the loan, the cheque is usually issued in the name of the construction company. Such arrangements cannot be considered as promotion of goods or services of the construction companies by the bank.

13. From the appreciation of facts and analyzation of the issue, we are of the considered opinion that the discount received by the assessee cannot be considered as a consideration for service. The activity, if any, does not fall under the definition of BAS.

14. Ld. Counsel has argued on the ground of limitation also. Since the issue on merits is found to be in favour of the assessee, we do not think it necessary to consider the issue on limitation. The impugned Orders in Appeal Nos. ST/470/2009 and ST/40987/2015 are set aside.

15. The appeals filed by the assessee are allowed with consequential reliefs, if any, as per law. The appeal filed by the Department is dismissed.

(Pronounced in open court on 29.01.2019)

(Madhu Mohan Damodhar)
Member (Technical)

(Sulekha Beevi C.S.)
Member (Judicial)

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