



आयुक्त(अपील) कार्यालय,
Office of the Commissioner (Appeal),
केंद्रीय जीएसटी, अपील आयुक्तालय, अहमदाबाद
Central GST, Appeal Commissionerate, Ahmedabad
जीएसटी भवन, राजस्वमार्ग, अम्बावाडी अहमदाबाद 380015.
CGST Bhavan, Revenue Marg, Ambawadi, Ahmedabad 380015
☎ 07926305065- टैलेफैक्स 07926305136



DIN : 20211064SW0000777A64

स्पीड पोस्ट

- क फाइल संख्या : File No : GAPPL/COM/21/2020-Admin / 4005 TO 4009
- ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-003-APP-32/2021-22**
 दिनांक Date : **22-09-2021** जारी करने की तारीख Date of Issue 20.10.2021
- आयुक्त (अपील) द्वारा पारित
 Passed by **Shri Akhilesh Kumar**, Commissioner (Appeals)
- ग Arising out of Order-in-Original No. **01 to 03/GNR-II/DBS/2020-21** दिनांक: **30.06.2020** issued by
 Superintendent, CGST & Central Excise, AR-II, Division Gandhinagar
- घ नाम एवं पता Name & Address

Appellant: The Assistant Commissioner,
 CGST Division, Gandhinagar
 1st Floor, CGST Bhavan, Sector 10A,
 Gandhinagar 382010

Respondent: M/s Gujarat Informatics Limited
 (A Govt. of Gujarat Organization)
 Second Floor, Block No. 2, Karmayogi
 Bhavan, Sector 10A, Gandhinagar, Gujarat

कोई व्यक्ति इस अपील आदेश से असंतोष अनुभव करता है तो वह इस आदेश के प्रति यथार्थिती नीचे बताए गए सक्षम अधिकारी को अपील या पुनरीक्षण आवेदन प्रस्तुत कर सकता है।

Any person aggrieved by this Order-In-Appeal may file an appeal or revision application, as the one may be against such order, to the appropriate authority in the following way :

भारत सरकार का पुनरीक्षण आवेदन :

Revision application to Government of India :

(i) केन्द्रीय उत्पादन शुल्क अधिनियम, 1994 की धारा 35(1) के अन्तर्गत निम्नलिखित मामलों के बारे में पूर्वोक्त धारा 35(1) के प्रथम परन्तुक के अंतर्गत पुनरीक्षण आवेदन अधीन सचिव, भारत सरकार, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली : 110001 को की जानी चाहिए।

(i) A revision application lies to the Under Secretary, to the Govt. of India, Revision Application Unit Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi - 110 001 under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35 ibid :

(ii) यदि माल की हानि के मामले में जब ऐसी हानि कारखाने से किसी भण्डागार या अन्य कारखाने में या किसी भण्डागार से दूसरे भण्डागार में माल ले जाते हुए मार्ग में, या किसी भण्डागार या भण्डार में चाहे वह किसी कारखाने में या किसी भण्डागार में हो माल की प्रकिया के दौरान हुई हो।

(ii) In case of any loss of goods where the loss occur in transit from a factory to a warehouse or to another factory or from one warehouse to another during the course of processing of the goods in a warehouse or in storage whether in a factory or in a warehouse.



(क) भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित माल पर या माल के विनिर्माण में उपयोग शुल्क कच्चे माल पर उत्पादन शुल्क के रिबेट के मामले में जो भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित है।

(A) In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.

(ख) यदि शुल्क का भुगतान किए बिना भारत के बाहर (नेपाल या भूटान को) निर्यात किया गया माल हो।

(B) In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.

अंतिम उत्पादन की उत्पादन शुल्क के भुगतान के लिए जोड़यूटीक्रेडिटमान्य की गई है और ऐसे आदेश जो इस धारा एवं नियम के मुताबिक आयुक्त, अपील के द्वारा पारित हो समय पर या बाद में वित्त अधिनियम (नं. 2) 1998 धारा 109 द्वारा नियुक्त किए गए हों।

(c) Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under and such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec. 109 of the Finance (No. 2) Act, 1998.

(1) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 के नियम 9 के अंतर्गत विनिर्दिष्ट प्रपत्र संख्या ईए-8 में दो प्रतियों में, प्रेषित आदेश के प्रति आदेश प्रेषित दिनों के सेतीन मास के भीतर मूल-आदेश एवं अपील आदेश की दो-दो प्रतियों के साथ उचित आवेदन किया जाना चाहिए। उसके साथ खाता इकाई मुख्य शीर्ष के अंतर्गत धारा 35-इ में निर्धारित फी के भुगतान के सबूत के साथ टीआर-6 चालान की प्रति भी होनी चाहिए।

The above application shall be made in duplicate in Form No. EA-8 as specified under Rule, 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the OIO and Order-In-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.

(2) रिविजन आवेदन के साथ जहाँ संलग्न कर एक लाख रुपये या उससे कम हो तो रुपये 200/- फीस भुगतान की जाए और जहाँ संलग्न कर एक लाख से ज्यादा हो तो 1000/- की फीस भुगतान की जाए।

The revision application shall be accompanied by a fee of Rs. 200/- where the amount involved is Rupees One Lac or less and Rs. 1,000/- where the amount involved is more than Rupees One Lac.

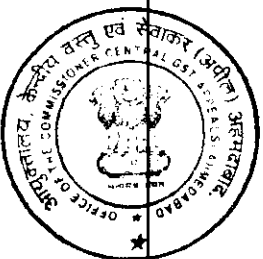
सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवा कर अपीलीय न्यायाधिकरण के प्रति अपील:-
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1944 की धारा 35-बी/35-इ के अंतर्गत:-

Under Section 35B/ 35E of CEA, 1944 an appeal lies to :-

(क) उक्त लिखित परिच्छेद 2 (1) क में बताए अनुसार के अलावा की अपील, अपील के मामले में सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवा कर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, अहमदाबाद में 2nd माला, बहुमाली भवन, असरवा, गिरधरनागर, अहमदाबाद-380004

(a) To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at 2nd floor, Bahumali Bhawan, Asarwa, Girdhar Nagar, Ahmedabad : 380004. in case of appeals other than as mentioned in para-2(i) (a) above.



The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 as prescribed under Rule 6 of Central Excise(Appeal) Rules, 2001 and shall be accompanied against (one which at least should be accompanied by a fee of Rs.1,000/-, Rs.5,000/- and Rs.10,000/- where amount of duty / penalty / demand / refund is upto 5 Lac, 5 Lac to 50 Lac and above 50 Lac respectively in the form of crossed bank draft in favour of Asstt. Registrar of a branch of any nominate public sector bank of the place where the bench of any nominate public sector bank of the place where the bench of the Tribunal is situated.

- (3) यदि इस आदेश में कई मूल आदेशों का समावेश होता है तो प्रत्येक मूल आदेश के लिए फीस का भुगतान उपर्युक्त ढंग से किया जाना चाहिए इस तथ्य के होते हुए भी कि लिखा पढी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरणको एक अपील या केन्द्रीय सरकारको एक आवेदन किया जाता है।

In case of the order covers a number of order-in-Original, fee for each O.I.O. should be paid in the aforesaid manner notwithstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filled to avoid scriptoria work if excising Rs. 1 lacs fee of Rs.100/- for each.

- (4) न्यायालय शुल्कअधिनियम 1970 यथासंशोधित की अनुसूची-1 के अंतर्गतनिर्धारितकिए अनुसारउक्तआवेदन या मूलआदेश यथास्थितिनिर्णयनप्राधिकारी के आदेशमेंप्रत्येक की एक प्रतिपर रु.6.50 पैसेकान्यायालय शुल्कटिकटलगाहोनाचाहिए।

One copy of application or O.I.O. as the case may be, and the order of the adjournment authority shall a court fee stamp of Rs.6.50 paise as prescribed under scheduled-I item of the court fee Act, 1975 as amended.

- (5) इनओरसंबंधितमामलोंकोनियंत्रण करनेवालेनियमों की ओरभी ध्यानआकर्षितकियाजाताहैजोरीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवंसेवाकरअपीलीय न्यायाधिकरण (कार्याविधि) नियम, 1982 मेंनिहितहै।

Attention is invited to the rules covering these and other related matter contended in the Customs, Excise & Service Tax Appellate Tribunal (Procedure) Rules, 1982.

- (11) सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवंसेवाकरअपीलीय न्यायाधिकरण(सिस्टेट),के प्रतिअपीलो के मामलेमेंकर्तव्यमांग(Demand) एवंदंड(Penalty) का10%पूर्वजमाकरनाअनिवार्यहै। हालांकि, अधिकतमपूर्वजमा10 करोड़रुपएहै।(Section 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

केन्द्रीयउत्पादशुल्कऔरसेवाकरकेअंतर्गत, शामिलहोगा "कर्तव्यकीमांग"(Duty Demanded)-

- (i) (Section) खंड 11D केतहतनिर्धारितराशि;
- (ii) लियागलतसेनवैटक्रेडिटकीराशि;
- (iii) सेनवैटक्रेडिटनियमोंकेनियम 6 केतहतदेयराशि.

यहपूर्वजमा 'लंबितअपील' मेंपहलेपूर्वजमाकीतुलनामें, अपील' दाखिलकरनेकेलिएपूर्वशर्तबनादियागयाहै.

For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shall not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT. (Section 35 C (2A) and 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

Under Central Excise and Service Tax, "Duty demanded" shall include:

- (xvi) amount determined under Section 11 D;
- (xvii) amount of erroneous Cenvat Credit taken;
- (xviii) amount payable under Rule 6 of the Cenvat Credit Rules.

इसइस आदेश के प्रति अपील प्राधिकरण के समक्ष जहाँ शुल्क अथवा शुल्क या दण्ड विवादित हो तो माँग किए गए शुल्क के 10% भुगतान पर और जहाँ केवल दण्ड विवादित हो तब दण्ड के 10% भुगतान पर की जा सकती है।

In view of above, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where one is in dispute."

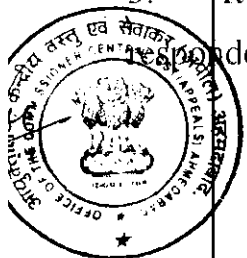


ORDER-IN-APPEAL

The present appeal has been filed by the Assistant Commissioner, Central GST, Gandhinagar Division, Commissionerate- Gandhinagar (hereinafter referred to as the appellant) against Order in Original No. 01-03/GNR-II/DBS/2020-21 dated 02.07.2020 [hereinafter referred to as "*impugned order*"] passed by the Superintendent, Central GST- AR-II, Division: Gandhinagar, Commissionerate- Gandhinagar [hereinafter referred to as "*adjudicating authority*"] in the case of M/s.Gujarat Informatics Limited (A Govt. of Gujarat Organisation), 2nd Floor, Block No.2, Karmayogi Bhavan, Sector-10 A, Gandhinagar, Gujarat [hereinafter referred to as the respondent].

2. The facts of the case, in brief, is that the respondent was having Service Tax Registration No.AABCG5863BST001 for providing "Business Auxiliary Service" (hereinafter also referred to as 'BAS'). The respondent is a Nodal Agency, i.e., Central Purchase Organisation for Government of Gujarat, which helps various Govt. Departments/Organisations/Offices to procure Computer Hardware and LAN equipments. For procurement of Hardware/Software, they are charging Service charges from the departments and they are paying Service Tax on such charges. The respondent was subjected to Departmental Audit in the course of which it was found that they were receiving income under the head of Loyalty Bonus under HP MVC (Most Valued Customer) contract from F.Y. 2007-08 onwards. For obtaining genuine products at a reasonable price for their customers, the respondent have entered into an agreement with M/s.H.P India Sales Pvt Ltd (hereinafter also referred to as 'HP') and got themselves enrolled with HP as "Most Valued Customer" (hereinafter also referred to as MVC). The departments are directly purchasing the printers and cartridges directly from HP though HP is registered supply reseller under the agreement with the respondent. Thus, the departments get products at reasonable price from HP supplied reseller as negotiated by the respondent under the MVC program. Under this agreement, for the role of the respondent HP has agreed to pay loyalty rebate (bonus) ranging from 1% to 5% depending upon the business to the respondent.

3. It was observed by the audit officers that the loyalty bonus received by the respondent against service provided for promotion or marketing or sale of goods of



goods produced/provided by M/s.HP which was taxable under Business Auxiliary Service (BAS) as defined under erstwhile Section 65 (19) of the Finance Act, 1994. It was alleged that the respondent had not paid Service Tax under the category of BAS on the loyalty bonus received by them. Therefore, the respondent was issued SCN proposing recovery of Service Tax along with interest and penalties were also proposed. The respondent had continued to follow the same practice of receiving Loyalty Bonus but not paying Service Tax on the same. Therefore, the respondent was issued three periodical SCNs dated 22.04.2014, 19.10.2015 and 06.04.2016 under Section 73(1)/75 of the Finance Act, 1994 demanding Service Tax amounting to Rs.2,67,148/-, Rs.13,595/- and Rs.18,835/- respectively for the financial year 2012-13, 2013-14 and 2014-15 for non payment of Service Tax under BAS as defined under Section 65(105)(zzb) of the Finance Act, 1994. From 01.07.2012 the service provided by the respondent was neither covered under the Negative List under Section 66D of the Finance Act, 1994 nor exempted under Notification No. 25/2012-ST dated 20.6.2012 and was therefore, covered under the ambit of taxable services for the period 01.07.2012 onwards.

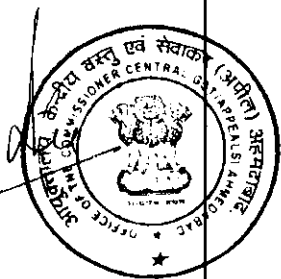
4. The respondent was issued first SCN on 17.10.2012 which was adjudicated vide OIO No. AHM-STX-003-ADC-043-13 dated 20.09.2013 and the demand for service tax on Loyalty Bonus was confirmed under Section 73(1) along with Interest and penalties were also imposed. The respondent, in the present appeals, challenged the OIO before the Commissioner (Appeals), Ahmedabad who vide OIA No. AHM-EXCUS-003-APP-026-13-14 dated 25.05.2014 held that Loyalty Rebate (Bonus) is not chargeable to Service Tax under BAS and therefore, set aside the order of the adjudicating authority and allowed the appeal. The appeal by the department against the said OIA before the CESTAT was dismissed vide Order No. A/11976-12018/2018 dated 20.9.2018 on monetary grounds.

5. In view of the above facts the adjudicating authority vide the impugned OIO held that Service Tax was not chargeable on Loyalty Rebate (Bonus) and dropped the demand and vacated the proceedings initiated against the respondent vide SCNs dated 22.04.2014, 19.10.2015 and 06.04.2016.

Being aggrieved with the impugned order, the appellant has filed the instant appeal on the following grounds:



- A. As per the provisions of Section 67 of the Finance Act, 1994 where Service Tax is chargeable on any taxable service with reference to its value, then such value shall, be the gross amount charge by the service provider for such service provided or to be provided by him. The definition of the term 'consideration' is quite wide, which includes any amount which is payable or paid in the context of the taxable service.
- B. The respondent had received income for promotion or marketing or sale of their goods and have subsequently collected amount from HP and M/s.Samsung India Pvt Ltd. All such commission/Royalty/discount/bonus which are in the nature of BAS as received by the respondent and therefore, the gross amount charged and collected by them from their buyers are liable to be considered for charging service tax. The income received by the respondent in terms of percentage of sale is categorically covered under the consideration as it is directly in relation to the taxable service and has clear nexus.
- C. The impugned order is non-speaking, cryptic and obscure and therefore, suffers from severe legal infirmities. The adjudicating authority has simply dropped the demand treating no consideration in this regard. He has not examined the activity of the respondent in terms of taxable activity. The adjudicating authority has dropped the demands merely by relying upon OIA No. AHM-EXCUS-002-APP-026-13-14 dated 25.05.2014 in the case of the respondent on similar issue.
- D. The adjudicating authority has simply failed to observe the legal principle that without similarity of the facts, decision rendered in different case cannot be applied in the name of judicial discipline.
- E. The appellant had filed appeal before the Hon'ble CESTAT , Ahmedabad against the said OIA which was however dismissed on monetary grounds. The decision of the CESTAT has not been accepted by the department in principle and on merit and therefore, the issue was not contested further and the principle of res-judicata will not be applicable.



F. They rely upon the decision of the Hon'ble in the following cases : 1) Surendra Singh Rathore Vs. CCE, Jaipur-I reported at 2014 (34) STR 147 (Tri.-Del) and 2) Nirmal Devi reported at 2015 (38) STR 1113 (Commr. Appl.).

6.1 In view of the above grounds, it has been prayed by the appellant that the impugned order be set-aside to the extent it pertains to dropping of demand of Service Tax Amounting to Rs.2,67,148 raised by SCN dated 22.04.2014; penalty be imposed under Section 76,77 and 78 of the Finance Act, 1994; and interest under Section 75 of the Finance Act, 1994 may be ordered.

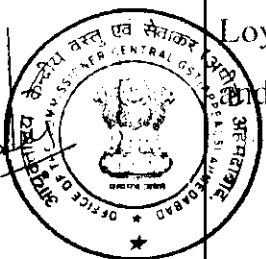
7. The respondent filed their cross-objections to the appeals vide their letter dated 03.03.2021 wherein they, inter alia, submitted that :

- i. They are the nodal agency of Government of Gujarat helping various government departments/organizations/office to procure Computer Hardware and LAN equipment. They purchased/procured printer cartridges from HP and Samsung India Pvt Ltd at reasonable rate for various government departments. For this they entered in to MVC program with vendors/suppliers. The government departments are directly purchasing the printers and cartridges from HP through their registered supply reseller under the agreement with them (GIL). Under this agreement HP has agreed to pay them (GIL) charges i.e. Loyalty or Rebate (Bonus) ranging from 1% to 5% depending upon the business.
- ii. They do not promote or market or sell goods produced, provided or belonging to a client, but it is only in the interest of various govt. departments/office that they procure the goods at a lesser rate from sellers through open competitive bidding. The intention is not to promote, market or sell goods of the aforesaid sellers.
- iii. They have not provided any service to the vendors and they have also not raised any Tax Invoice or Debit Invoice for the activity for which they have charged loyalty or rebate. This fact is also not disputed in the SCN. Considering these facts, the said activity for charging Loyalty or Rebate cannot be considered as taxable service, as they have not provided any service to the vendors and the service is provided to the government



departments or offices only and for this they are regularly paying service tax. Therefore, considering the said activity as taxable service would be factually wrong and legally incorrect. The issue is squarely covered by the decision in the case of : 1) EURO RSCG Advertising Ltd Vs. Commissioner, reported at 2007 (7) STR 277 (Tribunal); 2) P.Gautam and Co Vs. Commissioner, reported at 2011 (24) STR 447 (Tribunal); 3) Grey Worldwide (I) Pvt Ltd Vs. Commissioner, reported at 2015 (37) STR 597 (Tribunal).

- iv. The bonus is received by them based on the agreement entered for supply of genuine products to the Governmental Departments or offices. Such bonus is names as "Loyalty or Rebate (Bonus)" by the department. Such Loyalty or Rebate received by them cannot be considered as consideration received for service provided for promotion or marketing of sale of goods. Rather, the charges are received based on the agreement for supplying genuine products at reasonable rates and not for the purpose of promotion of products of the vendors.
- v. There was a principal to principal relationship between them and the government department or offices. Therefore, the charges received by them should be categorized as "Incentive" and not as 'Business Auxiliary Services". Since they did not provide any services directly to the supplier of the computer hardware and equipment and the amount received by them is not related to service under Business Auxiliary Services. They rely upon the decision of the Commissioner (Appeals) in OIA No. 16(RDN)ST/JPR-11/2013 dated 15.01.2013 in the case of LMJ Services Ltd wherein it was held that "*As there was principal to principal relationship between the assessee and MUL, the incentive income was not liable to service tax under BAS*".
- vi. They also rely upon the decision of the Commissioner (Appeals), Ahmedabad in their case on the same issue in OIA No. AHM-EXCUS-003-APP-026-13-14 dated 26.05.2014. They also rely upon the decision of the Hon'ble Tribunal in the case of Commissioner Vs. RMG Connect, reported at 2011 (24) STR 447 (Tribunal).
- vii. Without prejudice to the above, in case the activity is considered as Taxable Service and Service Tax liability arises, then the amount collected as Loyalty or Rebate (Bonus) should be considered as inclusive of service tax and service tax liability should be calculated accordingly. They rely upon



the following decisions : (I) Bhagwati Security Services Vs. Commissioner of C.Ex., Meerut-I reported at 2006 (3) STR 762 (Tri.-Del); (II) Central Excise & Customs, Patna Vs. Advantage Media Consultants reported at 2008-TMI-4195.

- viii. Since they are not liable to pay service tax, they are also not liable to pay interest too as the same can be imposed only on the amount of service tax.
- ix. Penalty cannot be imposed as there is no non-payment or short payment of service tax. Further, for imposing penalty there should be an intention to evade payment of service tax on their part. They have always been and still are under the bonafide belief that they are not liable to pay service tax. They rely upon the decision in the case of Hindustan Steel Ltd Vs. The State of Orissa reported in AIR 1970 (SC) 253.
- x. The allegation regarding non-submission of documents or details is factually wrong and the proposal to impose penalty under Section 77(1) of the Finance Act, 1994 is without legal basis.
- xi. For imposing penalty under Section 78 there should be an intention to evade payment of service tax or there should be suppression or concealment of material facts. There is only a bald allegation of suppression of facts/income and the department has not brought on record any evidence in this regard. Therefore, the demand is liable to be dropped on this count alone.
- xii. There being no suppression with an intention to evade service tax penalty cannot be imposed under Section 78.
- xiii. They rely upon the decision in the case of Pahwa Chemicals Vs. CCE reported at 2005 (189) ELT 275 (SC) and in the case of Ispat industries Ltd Vs. CCE reported at 2006 (199) ELT 509 (T).
- xiv. Penalty under Section 76 and 78 of the Finance Act, 1994 cannot be imposed simultaneously.

8. Personal Hearing in the case was held on 16.09.2021 through virtual mode. Shri Sourabh Singhal, CA, appeared on behalf of the respondent and reiterated the submissions made in cross-objection to the appeal.

9. I have gone through the facts of the case, submissions made in the Appeal Memorandum, and the cross-objection of the respondent, the submissions made by them at the time of personal hearing and evidences available on records. The



issue which requires to be decided in the case is whether the Loyalty/Rebate (Bonus) received by the respondent from the suppliers HP and Samsung under the MVC contract is chargeable to Service Tax under the category of Business Auxiliary Service.

10. I find that the respondent was issued first SCN on 17.10.2012 which was adjudicated vide OIO No. AHM-STX-003-ADC-043-13 dated 20.09.2013 and the demand for service tax on Loyalty Bonus was confirmed under Section 73(1) along with Interest and penalties were also imposed. The said OIO was set aside by the Commissioner (Appeals), Ahmedabad vide OIA No. AHM-EXCUS-003-APP-026-13-14 dated 25.05.2014 and it was held that Loyalty Rebate (Bonus) is not chargeable to Service Tax under BAS. The appeal by the department against the said OIA before the CESTAT was dismissed vide Order No. A/11976-12018/2018 dated 20.9.2018 on monetary grounds. The appellant have contended that the order of the Hon'ble CESTAT has not been accepted on principle and merits but on monetary grounds. The impugned order which has been challenged in the present appeal is pertaining to the demand of Service Tax Amounting to Rs.2,67,148 for the F.Y. 2012-13 raised by SCN dated 22.04.2014.

11. In the above backdrop of the facts, I proceed to examine the issue on merits. I find that the respondent is the Nodal Agency for the Government of Gujarat and is providing services to various government departments for procuring Computer Hardware and LAN Equipment from different suppliers and supply them to the government departments. They are charging Service Charge from the government departments and paying service tax on the same.

11.1 I find that the respondent have entered into an agreement with HP and Samsung under the Most Valued Customer program. The products specified to be sold by these vendors are in terms of the agreement i.e. genuine price and product. The government departments directly purchase the products from the vendors under the agreement with the respondent. All purchases from these vendors would be entitled to MVC program benefits and for their role the respondent would be paid Loyalty or Rebate (Bonus) ranging from 1% to 5% depending upon the business.



12. The period involved in the present appeal is that of F.Y. 2012-13 and therefore the issue requires to be examined in light of the provisions of the Finance Act, 1994 pre and post 01.07.2012 when changes to the Act came into force. Prior to 1.07.2012 BAS was defined in Section 65 (19) which reads as :

“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
- (v) production or processing of goods for, or on behalf of the client; or
- (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.

12.1 From 01.07.2012 in terms of Section 65B (44) of the Finance Act, 1994 any activity carried out by a person for another for consideration falls within the ambit of service and if not covered by the Negative List, the same is chargeable to Service Tax as per the provisions of Section 66B of the Finance Act, 1994.

12.2 The appellant have contended that the respondent is providing service of promotion or marketing or sales of the goods produced or provided by or belonging to the client for which they receive loyalty bonus. I find from the records that as per Condition No. 2 of the agreement (MOU Code VIP-WS5W2-01-GIL-100601) of the Respondent with Samsung “ *All payment would be released only on quarterly basis and GIL to raise debit note to SIEL for the same alongwith the proof of purchase order and invoice*”. Similarly, in the agreement between the respondent and HP, it is stated that a loyalty rebate will be paid only on quarterly basis and to GIL ranging from 1% to 5% depending upon the business/ value of supply to various government departments.

12.3 What clearly emerges from the above agreements between the respondent and the suppliers i.e. HP and Samsung is that the Loyalty Rebate (Bonus) is dependent upon the volume of business. It is also a matter of record that the government departments are directly purchasing the printers and cartridges from HP/Samsung under the agreement between the respondent and the vendors. The respondent have themselves submitted that they purchased/procured printer

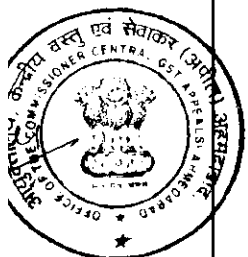


cartridges from HP and Samsung India Pvt Ltd at reasonable rate for various government departments. For this they entered in to MVC program with vendors/suppliers. Therefore, the very purpose of entering into the MVC program is for purchasing of goods from HP/Samsung for the government departments. So while the government departments get the benefit of reasonable rates for the products, HP and Samsung get the benefit of sales which is assured because of their agreement with the respondent. For ensuring that the procurement by the government departments is from HP and Samsung the respondent is paid Loyalty Rebate (Bonus) by HP and Samsung depending upon the volume of business.

12.4 I am, therefore, of the considered view that the activity of the respondent, for which they are getting paid the Loyalty Rebate (Bonus), is covered by the scope of Business Auxiliary Service prior to 10.07.2012. For the period subsequent to 01.07.2012, it is covered by the provisions of Section 65B (44) since the respondent is getting paid consideration in the form of Loyalty Rebate (Bonus) for their activity i.e. ensuring purchase of the products of HP and Samsung by the government departments. Therefore, the activity of the respondent is a taxable service and since the same is not covered by the Negative List it is chargeable to Service Tax as per the provisions of Section 66B of the Finance Act, 1994.

13. The above view is also supported by the decision of the Hon'ble Tribunal in the case of D. Pauls Consumer Benefit Ltd Vs. Commissioner of C.Ex, New Delhi reported at 2017 (52) STR 429 (Tri.-Del). In the said case, the Hon'ble Tribunal had in their judgement held that :

5. After hearing the rival submissions and on perusal of record, it appears that the assessee-appellants are travel agent and providing the tickets for air as well as railways. They also act as the 'Rail Travel Agent's Service' which is covered under Section 65(87) of the Finance Act, 1994 and liable to pay the Service Tax. Regarding the commission/incentive received from GDS/CRS, it may be stated that the said GDS/CRS companies are providing adequate free of cost computers with essential accessories and software to the travel agents at their premises. These computers are connected worldwide to the GDS/CRS, which linked to ticket sales offices of various airlines, hotels and car rental agencies spread across the world. They are by using these GDS/CRS for booking tickets, receiving incentives from the said companies for every segment booked by them. Hence, the service provided by the assessee-appellants has rightly been covered under the heading "Business Auxiliary Service" as defined under Section 65(19) of the Finance Act, 1994. Thus, we are of the view that the assessee-appellants being providing 'Tour Operator's Service', the commission received by them is for 'Business Auxiliary Service' under Section 73(1) of the Finance Act, 1994. The case law cited by the learned counsel for the assessee-appellants is not applicable in the instant case as the same was dealing with the advertising agencies. So, on the facts, the ratio laid



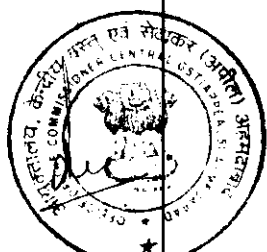
down in the said case is not applicable to the present case.

6. Needless to mention that in the 'Central Excise, Customs & Service Tax Budget, 2016-17 (published by the Legal Matrix Publications, Delhi-9, on Page 258)' makes a reference to High Level Committee and states that certain issues were clarified and there in Paragraph 15.1.2, it was mentioned that :

"15.1.2 It is clarified that incentives received by the Air Travel Agents (ATAs) from the Companies providing Computer Reservation System (CCRS) are for using the software and platform provided by the CCRS like Galileo, Amadeus, etc. The CCRS are providing these incentives either for achieving the targeted booking of air tickets or for loyalty for booking of air tickets using their software system. **Thus, the service provided by CCRS is to the Airlines and Air Travel Agent is promoting the service provided by CCRS to Airlines. Thus, the service provided by the ATAs to CCRS is neither covered in the negative list (Section 66D of the Finance Act, 1994) nor exempt by a notification. Therefore, service tax is leviable on the same.**" [emphasis supplied]

13.1 Relying upon the above judgement, a similar decision was passed by the Hon' ble Tribunal in the case of Govan Travels Vs. Commissioner of C.Ex, Delhi reported at 2018 (9) GSTL 268 (Tri.-Del.). Further, in the case of PL Worldways Limited Vs. Commissioner of Service Tax, Chennai reported at 2019 (26) GSTL 246 (Tri.-Chennai) the Hon'ble Tribunal had held that

5. Perusal of the impugned order reveals that the lower appellate authority, while upholding the adjudication order, had referred to earlier Order-in-Appeal dated 24-3-2010 in the case of *M/s. Agash Tour & Travels P. Ltd.* wherein the agreement between that appellant and Amadeus had been examined. The lower appellate authority in that order had concluded that the said appellant had used Amadeus software with the conditional agreement that though some other software were available, the condition being that "loyalty incentive" will be paid only on the tickets booked in the airlines specified by the software provider from whom the software developer will get commission. We find that in the grounds of appeal/statement of facts filed by the appellants herein before Commissioner (Appeals), seen in page 54 of the appeal paper book, that there was an agreement between them with Amadeus, whereby the latter was used in entire reservation agreement in Indian subcontinent and received loyalty incentive per segment booked on Amadeus. In the grounds of appeal filed before this forum, the appellants have argued that there is no promotion of service provided by Amadeus software. At the same time, appellants have not countered the findings of the lower appellate authority that the agreement is a conditional agreement and that loyalty incentive will only be paid on the tickets booked in the airlines specified by Amadeus based on achievement of segment volumes. **We are unable to fathom how in spite of such agreement between the appellant and Amadeus, there could have been any confusion that they were promoting the business of the latter and in such a situation how there could be any bona fide belief that the services are not in the nature of Business Auxiliary Service.** Viewed in this light, we find that the facts of the appeal before us are quite distinct from those in *Bharat Hotels* (supra) wherein the Hon'ble High Court of Delhi has found that the appellant was under *bona fide* belief that they were not



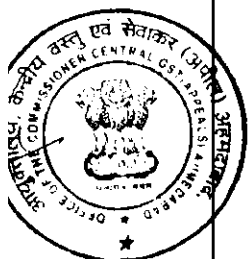
liable for payment of service tax. In the event, we are of the considered opinion that there is no infirmity in the order passed by the lower appellate authority confirming the invocation of extended period.
[emphasis supplied]

13.2 I find that the judgements of the Hon'ble Tribunal are squarely applicable to the facts of the present case and therefore, I hold that the activity of the respondent amounts to a taxable service in terms of Section 65 (19), for the period prior to 01.07.2012, and under Section 65B(44) of the Finance Act, 1994 for the subsequent period. Consequently, the respondent are liable to pay Service Tax thereon.

14. The respondent have in the cross objection filed by them contended that in case their activity is considered as Taxable Service and Service Tax liability arises, then the amount collected as Loyalty or Rebate (Bonus) should be considered as inclusive of service tax and service tax liability should be calculated accordingly. They rely upon the following decisions : (1) Bhagwati Security Services Vs. Commissioner of C.Ex., Meerut-I reported at 2006 (3) STR 762 (Tri.-Del); (II) Central Excise & Customs, Patna Vs. Advantage Media Consultants reported at 2008-TMI-4195.

14.1 I find that in the case of Mackintosh Burn Ltd Vs. Commissioner of Service Tax, Kolkata reported at 2020 (35) GSTL 409 (Tri.-Kolkata) the Hon'ble Tribunal had at para 8 of their judgement held that :

“Coming to the issue of admissibility of cum-duty value while computing the duty liability, the Ld. AR submits that in view of the suppression of facts resorted by the appellants, such benefit cannot be extended in view of the findings of the certain *fora*. However, we find that the appellants are a Public Sector Undertaking and as such, as held by the Tribunal as well as various Courts *mens rea* cannot be assumed in respect of PSUs. It was consistently held that no particular person or officer could be benefited by such suppression/misdeclaration by the Organization. Therefore, we find that the appellants are entitled to the benefit of cum-duty price. The amounts received by them by the appellants from their customers should be treated to be inclusive of Service Tax and accordingly, the liability of Service Tax recalculated. For this purpose, also the impugned order needs to go back to the Adjudicating Authority. In view of our findings suppression, etc., cannot be imputed to the



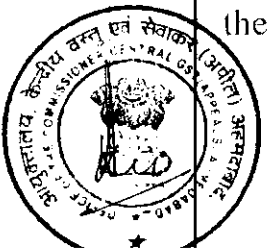
appellant. Penalty imposed is not sustainable however, they shall be liable to pay interest on the duty arise at in terms of the above. It is needless to say that the appellants shall be provided with an opportunity to be heard/represented."

14.2 A similar view was taken by the Hon 'ble Tribunal in the case of Gulmohar Park Mall Pvt Ltd Vs. Commr. Of C.Ex., Ahmedabad-I reported at 2019 (26) GSTL 94 (Tri.-Ahmd). In the said case, the Hon'ble Tribunal had held at para 5 of their judgement that :

The next issue raised by the appellant relates to the benefit of cum-duty price. The fact that the appellant has paid the Service Tax on his own violation after the enactment of the retrospective amendment to the Finance Act has not been disputed. There is no assertion from the Revenue that the amount paid by the appellant has been collected from its client by the appellant. In these circumstances, benefit of cum-duty value has to be extended and appeal of this count is allowed.

14.3 I find that on the issue involved in the present case the respondent had earlier succeeded in appeal before the Commissioner (Appeals), Ahmedabad and the appeal of the department (appellant in the present case) was dismissed by the Hon 'ble Tribunal. Therefore, the respondent were not liable to Service Tax and in such circumstances, it cannot be expected of the respondent to pay service tax. Further, since the department was already aware that the respondent was receiving Loyalty Rebate (Bonus) and not paying service tax on the same, it cannot also be said that there was suppression on the part of the respondent. For these reasons, I find that, in view of the above decision of the Hon'ble Tribunal, the respondent are entitled to the benefit of cum-duty price and their service tax liability is required to be re-determined by treating the Loyalty Rebate (Bonus) received by them as inclusive of Service Tax.

14.4 Further, in view of the above facts as well as in the light of the above decision of the Hon'ble Tribunal I have no hesitation in holding that while the respondent are liable to pay interest on the Service Tax determined to be payable, they are not liable to any penalty.



15. In view of the above discussions, the order passed by the adjudicating authority needs to be remanded back to him for re-determining the Service Tax payable by the respondent by treating the amount of Loyalty Rebate (Bonus) received by them as being inclusive of Service Tax.

16. Accordingly, the impugned order is set aside and the appeal of the appellant is allowed by way remand.

17. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।

The appeal filed by the appellant stands disposed off in above terms.

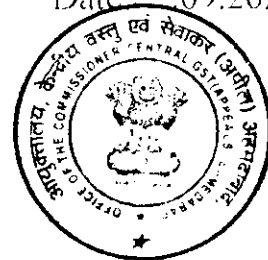
Akhilesh Kumar
(Akhilesh Kumar)
Commissioner (Appeals)
22nd September 2021

Attested:

N. Suryanarayanan. Iyer

(N.Suryanarayanan. Iyer)
Superintendent(Appeals),
CGST, Ahmedabad.

Date: 09.2021.



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To
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CGST, Division -Gandhinagar,
1st Floor, Central CGST Bhavan
Sector 10A, Gandhinagar -382 010

Appellant

M/s. Gujarat Informatics Limited,
(A Govt. of Gujarat Undertaking),
Second Floor, Block No.2,
D-Wing, Karmayogi Bhavan,
Sector- 10A
Gandhinagar- 382 010.

Respondent

Copy to:

- 1) The Chief Commissioner, Central GST, Ahmedabad Zone.
- 2) The Commissioner, CGST, Gandhinagar.
- 3) The Assistant Commissioner (HQ System), CGST, Gandhinagar.
(for uploading the OIA)

- 4) Guard File.
- 5) P.A. File.