

2012 (25) S.T.R. 483 (Tri. - Del.)

IN THE CESTAT, PRINCIPAL BENCH, NEW DELHI

[COURT NO. III]

S/Shri D.N. Panda, Member (J) and Mathew John, Member (T)

SOUTH CITY MOTORS LTD.

Versus

COMMISSIONER OF SERVICE TAX, DELHI

*Final Order No. ST/602/2011(PB), dated 22-11-2011 in Appeal No.
ST/493/2010*

CASES CITED

- Bridgestone Financial Services v. Commissioner — 2007 (8) S.T.R. 505
(Tribunal) — *Relied on*.....
- Commissioner v. Chambal Motors Pvt. Ltd. — 2008 (9) S.T.R. 275
(Tribunal) — *Referred*.....
- Commissioner v. Hira Automobiles Ltd. — 2009 (16) S.T.R. 408 (Tribunal)
— *Referred*.....
- Commissioner v. Sanfin — 2009 (13) S.T.R. 551 (Tribunal) — *Referred*.....
- Commissioner v. Vinayak Leasing and Finance — 2009 (13) S.T.R. 35
(Tribunal) — *Referred*.....
- Cross Road Auto Pvt. Ltd. v. Commissioner — 2009 (15) S.T.R. 181
(Tribunal) — *Referred*.....
- Indian National Shipowners' Association v. Union of India — 2009 (14)
S.T.R. 289 (Bom.) — **Distinguished**.....
- Malpani Finance v. Commissioner — 2008 (10) S.T.R. 300 (Tribunal) —
Referred.....
- Roshan Motors Ltd. v. Commissioner — 2009 (13) S.T.R. 667 (Tribunal)
— *Relied on*.....
- S.R. Kalyanakrishnan v. Commissioner — 2008 (9) S.T.R. 255 (Tribunal)
— *Referred*.....
- Silicon Honda v. Commissioner — 2007 (7) S.T.R. 475 (Tri.-Bang.) —
Referred.....
- Suchitra Components Ltd. v. Commissioner — 2008 (11) S.T.R. 430
(S.C.) = 2007 (208) E.L.T. 321 (S.C.) — *Referred*.....

DEPARTMENTAL CLARIFICATION CITED

C.B.E. & C. Circular No. 87/05/2006-S.T., dated 6-11-2006.....

REPRESENTED BY : Shri J.K. Mittal, Advocate, for the Appellant.

Shri Sumit Kumar, DR, for the Respondent.

[Order per : Mathew John, Member (T)]. - The Appellants are dealers of Ford Motor vehicles and they had entered into agreements with different banks such as HDFC Bank, ICICI Bank, ABN Amro Bank,

Chartered Bank and Citi Bank and also with Non-Banking Financial Companies; (NBFCs) such as Ford Credit Kotak Mahindra Ltd. to market car-loan to potential customers. For loan taken by the customers, these appellants got commission from the banks and NBFCs. The issue in this appeal is whether service tax is to be paid on such commission categorizing the activity of the Appellants as "business auxiliary service".

2. The activities carried out by the Appellants, as stated briefly in the impugned order, are briefly as under :

Name of the Bank/Company	Scope of the serviced provided by SCML as per the agreement entered with the Bank/Company
Citi Bank	(i) To facilitate certain activities of the Bank and representing that it has requisite infrastructure, staff and expertise to carry out the services in an efficient manner; (ii) To act as a facilitator for the prospective customers; (iii) To scrutinize the application, interview the borrowers, find out the authenticity/veracity of data/information; (iv) To take due and proper care and custody of the post-dated cheques/documents and other materials collected from customers.
HDFC Bank	To market various types of services and all overdrafts products the bank may launch from time to time.
ICICI Bank	To arrange for finance and granting of loans, to provide certain services relating to the granting of loans, for and on behalf of the ICICI Bank. To forward the duly completed loan application and initial documents to ICICI bank. To collect from each customer service charges, security charges and other amounts.
Forward Credit Kotak Mahindra Ltd.	To execute the Ford India Ltd. dealer's sale and service agreement
Standard Chartered Bank	To market various schemes including various loans schemes for different types of loans/credit facilities. To follow up enquiries and also to identify to the bank potential customer for the said schemes.

3. As per the statement of facts in the Appeal Memo submitted by the Appellants they were doing the following activities :

"The appellant is doing certain other activities for these banks

such as to act as a facilitator for prospective customers so that loan amount is distributed to the authenticated owner/seller and car purchaser, ensure that registration book and insurance certificate is duly endorsed in the name of the bank, assist the bank in connection with efforts, enforcement of securities, repossession of car, sale of repossessed car, recovery of outstanding loans and remittance of any loan instalments collected, securitizing the applications, interview the borrowers and to find out authenticity/veracity of date/information given by the borrowers, collect the post-dated cheque requires by the bank towards the repayment of loan, collect the applicable stamp charges from the borrowers."

The appellants have submitted copies of the agreements with different parties. We have perused them. We do not find it necessary to reproduce it in the order.

4. The entry for Business Auxiliary Services in Finance Act, 1994 during 1-7-2003 to 9-9-2004 was as under :

"Business Auxiliary Service" means any service in relation to

:-

- (a) Promotion or marketing or sale of goods produced or provided by or belonging to the client; or
- (b) Promotion or marketing of service provided by the client; or
- (c) Any customer care service provided on behalf of the client; or
- (d) Any incidental or auxiliary support service such as billing, collection or recovery of cheques, accounts and remittance, evaluation of prospective customer and public relation services, and includes service as a commission agent, but does not include any information technology service.

5. The entry for Business Auxiliary Services from 10-9-2004 is as under :

"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 of services, which are inputs for the client; or
- (v) Production of goods 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 information technology services and any activity that amounts to manufacture within the meaning of clause (f) of Section 2 of the Central Excise Act, 1944."

6. After the changes brought in the definition as stated above, the appellants started paying service tax on commission received by them from banks and NBFCs. However, the Appellants were not paying any service tax on Commission received by them till 10-9-2004. The department made out a case that their activity amounted to "Business Auxiliary Service" even for the period prior to 10-9-2004 and issued a Show Cause Notice dated 20-4-2006 demanding such tax. The adjudicating authority examined the matter and issued an order confirming the tax demanded along with interest and also imposing penalties under Sections 76, 77 and 78 of Finance Act 1994. Aggrieved by the order, the Appellants filed an appeal with the Commissioner (Appeals) who rejected their appeal except to the extent that penalty under Section 76 was set aside. The Appellant is challenging this order by Commissioner (Appeals).

7. The main contentions of the Appellant are as follows :

- (i) The impugned order is not a speaking order because the Commissioner (Appeals) did not deal with the many issues raised by the Appellants.
- (ii) The activities carried out by the Appellants are not recorded anywhere by the lower authorities and examined correctly whether such activity is covered by the entry for Business Auxiliary Service. The Commissioner (Appeals) has recorded that the appellant had raised a contention that they were only providing table space to the Banks whereas no such contention was raised before the Commissioner (Appeal).
- (iii) The services provided by the Appellants are Business Support service which came into tax net only from 1-5-2006. For this argument the Counsel relies on the decisions in *S.R. Kalyanakrishnan v. C.C.E.* - 2008 (9) S.T.R. 255 and *C.C.E. v. Hira Automobiles* - 2009 (16) S.T.R. 408.
- (iv) Introduction of new entry and inclusion of certain services in that entry presupposes that there was no earlier entry covering such services as decided by Bombay High Court in the case of *Indian National Shipowners' Association v. UOI* - 2009 (14) S.T.R. 289 (Bom.) para 38.

- (v) Appellant had claimed exemption under Notification 8/2003-S.T., dated 20-6-2003. This matter has not been examined.
- (vi) In the facts of the case extended period of limitation cannot be invoked for raising demand. They submit that they were registered with department for paying service tax since 10-9-2004 and all the facts were known to the department. So Show Cause Notice issued on 20-4-2006 by invoking extended period of time is not maintainable.
- (vii) Board's clarification issued vide Circular No. 87/05/2006-S.T., dated 6-11-2006 is oppressive in nature and such circular cannot be given retrospective effect as held by the Apex Court in the case of *Suchitra Components Ltd. v. C.C.E.* - 2007 (208) E.L.T. 321 (S.C.) = 2008 (11) S.T.R. 430 (S.C.).
- (viii) The penalties imposed are not warranted because there was no fraud, suppression or misdeclaration by the Appellants. At any rate because of the confusion in the scope of the entry they are entitled to the benefit of Section 80 of the Finance Act, 1994 for waiving penalty.

8. He also submits that Commissioner (Appeals) did not appreciate the following grounds properly :

- (i) The demand was time barred;
- (ii) In identical situation the Tribunal had dropped demand in many cases like that of *Bridgestone Financial Services v. CST* - 2007 (8) S.T.R. 505 (Tri.) for the reason that extended period of five years cannot be invoked for demanding tax in this type of situation.

9. The Id. SDR points makes the following submissions.

- (i) Even in the Appeal memo before the Tribunal the Appellants are relying on the decision of the case of *M/s. Silicon Honda v. C.C.E.* [2007 (7) S.T.R. 475 (Tri. - Bang.)] and arguing that the mere fact that financial institutions being provided with space by the Appellant cannot amount to providing Business Auxiliary Service. The Commissioner (Appeals) has recorded in para 4 of the order that the Counsel Shri J.K. Mittal who appeared before him and pleaded that the appellant was merely providing table space. When such argument is raised even before the Tribunal in Appeal Memo, there is no reason to believe that the Commissioner (Appeals) imagined such submission and recorded it in the order. It appears that at that time the counsel thought that it was a good argument. Now he is just making a big issue of the argument recorded by the Commissioner (Appeals). The argument recorded cannot be fatal and the issue has to be examined with reference to the actual services provided by the Appellants.
- (ii) The adjudication order deals with each and every issue raised by the Appellants and a contention that the arguments were not re-

produced by Commissioner (Appeal) cannot be a reason to hold that the impugned order is not a speaking order. The order-in-appeal merges with the order-in-original and the two should be read together.

- (iii) Much is being made of the fact that two SCNs were issued in this regard one by the local Commissioner in charge of the unit and another by Directorate General of Central Excise Intelligence. He points out that this issue is examined para 8 of the adjudication order, and this also cannot be reason to hold that proceedings are bad in law.
- (iv) The activities done by the Appellant was for promotion and marketing of loans of the Banks and hence covered by the definition of Business Auxiliary Service as decided by the Tribunal in *Bridgestone Financial Services v. CST* - 2007 (8) S.T.R. 505, and *Roshan Motors Ltd. v. C.C.E.* - 2009 (13) S.T.R. 667 (Tri.-Del.);
- (v) It is pointed out that the Appellants did not take out any registration and declare to the Department the commissions received by them. So the extended period should be invoked in this case. He points out that the issue of suppression is discussed in detail in para 9.14 of the adjudication order.

10. The Id. SDR relies on the following decisions to buttress his argument that the impugned services would get classified under Business Auxiliary Services :

- (i) *Cross Road Auto Pvt. Ltd. v. C.C.E.* - 2009 (15) S.T.R. 181 (Tri.-Del.)
- (ii) *C.C.E. v. Sanfin* - 2009 (13) S.T.R. 551 (Tri.-Kol.)
- (iii) *C.C.E. v. Vinayak Leasing and Finance* - 2009 (13) S.T.R. 35 (Tri.-Del.);
- (iv) *C.C.E. v. Chambal Motors (P) Ltd.* - 2008 (9) S.T.R. 275 (Tri.-Del.)
- (v) *Malpani Finance v. C.C.E.* - 2008 (10) S.T.R. 300 (Tri.-Del.);
- (vi) *Roshan Motors Ltd. v. C.C.E.* - 2009 (13) S.T.R. 667 (Tri.-Del.).

11. The entry prior to 10-9-2004 covered "promotion or marketing of services provided by client". In this case the Banks/NBFCs were the client of the Appellant and the Appellant was promoting the services namely sanctioning of car-loans to the loan seekers. This part of the definition has remained the same prior to 10-9-2004 and thereafter. Clause (iv) of the definition of this service amplifying the scope of the primary entries to cover "collection or recovery of cheques, accounts and remittance, evaluation of prospective customer" also was in place prior to 10-9-2004. From 10-9-2004 "development of prospective customer" also is brought in. But even without this additional expression in the definition, the activities carried out by the Appellant was covered within the expression of "promotion and marketing of services provided by the client". Actually this matter is no longer *res integra* because the Tribunal

has examined this issue and held that such services were covered under the scope of the definition of "Business Auxiliary Service" prior to 10-9-2004 as decided in the last para of the decision of the Tribunal in *Bridgestone Financial Services v. CST - 2007 (8) S.T.R. 505*.

12. We note that both the entries for "Business Auxiliary Service" and "Business Support Service" have different objects. After the introduction of the new entry, there can be argument as to which entry covers the activity more appropriately. Such an issue is different from the type of new entries covered by the Mumbai High Court in the case of *Indian National Shipowners* case (supra) and this cannot be a reason to hold that the activities were not taxable prior to the introduction of the entry for "Business Support Services". We follow the decisions of the Tribunal in cases cited in para 10 above and hold that the service was classifiable under "Business Auxiliary Service" during the relevant period.

13. The period involved in this appeal is prior to 10-9-2004. The Show Cause Notice was issued on 20-4-2006. The Appellant is paying service tax from 10-9-2004. This matter relates to scope of the entry for "Business Auxiliary Services". There was considerable doubt about its coverage because of the very nature of the entry. There are contrary decisions of the Tribunal in the matter. In most of the decisions like *Bridgestone Financial Service* and *Roshan Motors Ltd.*, Tribunal has taken the view that it is a case involving interpretation of the taxing entry and no *mala fide* or element of suppression or mis-statement is involved. The Higher Courts have been taking the view that in such situations the extended period of time cannot be invoked for raising demand. In this case also the demand is raised beyond the time limit of one year and such demand cannot be sustained. However, demand if any, which is within the normal period of one year is sustainable. Interest is payable on such amount but no penalty is imposable.

14. So we partially allow the appeal of the Appellants with consequential relief if any.

(Pronounced on 22-11-2011)
