CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI
PRINCIPAL BENCH, COURT NO. 3

SERVICE TAX APPEAL NO. 53525 OF 2018

[Arising out of Order-in-Original No. DL-GST-WEST-COM-17-17-18 dated 25.07.2018 passed by the Commissioner, Central Tax , Delhi]

M/S DIVINE AUTOTECH PRIVATE LIMITED **Appellant**
GI, GT Karnal Road Industrial Area,
Azadpur, Delhi-110033

Vs.

COMMISSIONER OF CENTRAL TAX- **Respondent**
Delhi West, 5th Floor, EIL Annexe Building
Bhikaji Cama Place, R K Puram
New Delhi-110066

Appearance:
Shri Atul Gupta and Anmol Gupta, Chartered Accountants for the appellant.
Shri Anand Narayan, Authorized Representative for the Department.

CORAM:
HON'BLE MS. BINU TAMTA, MEMBER (JUDICIAL)
HON'BLE MR. P. V. SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER NO. 55937 /2024

Date of Hearing : 24/05/2024
Date of Decision : 27/06/2024

P V SUBBA RAO:

1. M/s Divine Autotech Private Limited[1] is engaged in sales and service of 'Renault cars'. It is registered with the central excise department for providing various services and has been paying service tax and filing returns as required. Its accounts for the Period from April, 2011 to March, 2015 were examined by the department and the figures indicated in their ST-3 returns were compared with its balance

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1 The appellant

sheets and copies of Forms 26-AS. After analyzing the data, the department came to the tentative conclusion that the appellant had not paid service tax on the total value of services provided by it.

2. Accordingly, a show cause notice[2] dated 12.12.2016 was issued by the Commissioner of service tax, Delhi III to the appellant demanding differential service tax or Rs. 43,78,435/- under Section 73 (1) of the Finance Act, 1994[3] invoking extended period of limitation. Interest was demanded on this amount under section 75 of the Finance Act and a penalty of an equal amount equal to service tax demanded was proposed to be imposed under section 78. In the SCN it was also proposed to deny CENVAT credit of Rs. 1,28,80,013/- to the appellant and recover the same under rule 14 of the CENVAT Credit Rules, 2004[4] along with interest and impose penalty of equal amount under rule 15(3) of CCR read with section 78 of the Finance Act. It was also proposed to impose penalty under section 77 of the Finance Act. The appellant resisted the proposals in the SCN in its written reply and during the personal hearing. However, these proposals were confirmed by the Commissioner through an order dated 25.07.2018[5]. To assail the impugned order the appellant filed this appeal.

3. We have heard the learned counsel for the appellant and the learned authorized representative appearing for the department and perused the records.

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2 SCN
3 Finance Act
4 CCR
5 impugned order

4. During the relevant period, the balance sheets and profit and loss accounts of the appellant showed income from sale of goods, sale of services and other operating revenue. It is undisputed that the revenue related to the sale of goods was not exigible to service tax. The appellant had paid service tax on the amounts received for sale of services and part of the amount received as other operating revenue. Thus, the taxable value shows in the ST-3 returns was equal to the total value of sale of services and part of the other operating revenue. According to the appellant, part of the other operating revenue was received on account of providing taxable services and, accordingly, it paid service tax to that extent and there is no dispute about this. The SCN has taken the entire operating revenue and the receipts on account of sale of services as the revenue received for sale of services and, accordingly, demanded service tax. The details are as follows:

Financial Year	Value as per Balance Sheet (Profit & Loss Account)				Taxable value shown in ST-3 returns	Difference	Rate of service tax	Service tax payable on difference
	Sales of Product (sales part)	Sale of service	Other operating revenue	Total taxable value				
2011-12	14,51,24,135	10,17,714	59,52,959	69,70,673	10,17,673	59,53,000	10.3%	6,13,159
2012-13	1,74,06,43,252	1,53,38,896	1,45,31,353	2,98,70,249	2,33,96,301	64,73,948	12.36%	8,00,180
2013-14	1,97,53,90,176	4,42,86,915	1,72,85,396	6,15,72,311	5,73,98,505	41,73,806	12.36%	5,15,882
2014-15	1,34,31,26,013	7,90,26,595	1,60,13,593	9,50,40,188	7,52,24,546	1,98,15,642	12.36%	24,49,213
Total	**5,20,42,83,576**	**13,96,70,120**	**5,37,83,301**	**19,34,53,421**	**15,70,37,025**	**3,64,16,396**		**43,78,434**

5. During audit, the appellant was asked to submit copies of invoices/ bills on the strength of which it had availed CENVAT credit during the period 2011-12 to 2014-15 and the appellant was unable to provide them at that time and, therefore, the entire CENVAT credit

availed during the entire period was sought to be denied in the SCN the details of which are as follows:

FY	Paid by CENVAT credit
2011-12	1,00,699
2012-13	32,96,154
2013-14	68,09,927
2014-15	55,12,879
Grand Total	**1,57,19,659**

6. According to the learned chartered accountant the appellant had provided copies of invoices and documents to the Commissioner during personal hearing but the Commissioner had not considered them while passing the impugned order denying the CENVAT credit has been denied and proposed to be recovered.

7. We have gone through the impugned order and at page 53 of the order the Commissioner recorded as under:

> " However, at the time of personal hearing, they have submitted copies of bills/invoices against which they have availed CENVAT credit for going through the copy of bills/ invoices it is noticed that the assesse has submitted in discharge copies of bills for value. Further, in some bills/ invoices it was noticed that figures of the bills/ invoices does not match the figures provided in details on the basis of which credit has been taken, name, address and service tax registration number of the issuer of the invoices for the purpose of input services is missing/ incomplete or illegible. Some bills/ invoices have been used for taking input credit dispute of the fact that no bill/ invoices number is mentioned on these bills/ invoices and also the nature of the service mentioned in some bills/ invoices does not qualify as input services."

8. It is evident from the above part of the impugned order that the Commissioner had not considered any of the bills or invoices submitted

by the appellant and has, based on same general observations, denied the entire CENVAT credit. If SCN is issued and Revenue seeks to deny CENVAT credit taken on the strength of any invoice, it is for the Revenue to specify as to why CENVAT credit against each of the invoices is being denied and the legal basis for such denial. Sadly, none of the details are available and, therefore, the matter insofar as the denial of CENVAT credit is concerned, has to remanded to the Commissioner to re-examine the invoices and indicate the invoices on which she decides to deny CENVAT credit giving specific reasons. Needless to say to the extent no ground for denial of credit is established on any invoice, CENVAT credit cannot be denied.

9. Insofar as the demand of service tax is concerned, the dispute is only with respect to the other operating revenue. The show cause notice assumes that this entire revenue was received for providing taxable services. There is no basis for such a presumption. Learned chartered accountant submits that it's records provided at the time of audit gave not only the aggregate figures but also the details of why various incomes were received. He submitted before us six different heads of account under which the incomes were received and which were accounted for as "other operating revenue". These add up to the disputed amount on which service tax has been demanded. We now proceed to discuss each of these.

Booking Cancellation Charges

10. The appellant sells cars and when booking car, the customers pay on advance. If the customer cancels his booking, an amount is charged

on account of cancellation which is referred to as "booking cancellation charges". The Commissioner classified this service as a declared service under Section 66E(e) of the Finance Act as "agreeing to the obligation to refrain from an act or to tolerate an act or situation or to do an act." Therefore, the Commissioner confirmed a demand on the amounts received on this account. Learned Chartered Accountant submits that the confirmation of demand in this head is not correct because section 66E(e) was not invoked in the SCN and the Commissioner could not have gone beyond the scope of SCN. He also submits that this section had not existed prior to 01.07.2012 and, therefore, demand could not have been confirmed at any head for the period April, 2011 to June, 2012. For the period after 01.07.2012, the appellant submits that any compensation received for reneging from a contract can only be considered as damages. Such amounts, being in the nature of compensation and not a consideration for service, no service tax could be charged on them. He relies on the following case laws:

(i) **South Eastern Coalfields Limited vs. Commissioner of C. Ex. & ST., Raipur.[6]**

(ii) **Krishnapatnam Port. Vo. Ltd. vs. Commissioner of C. Ex. & ST, Guntur[7]**

(iii) **Madhya Pradesh Poorva Kshetra Vidyut Vitran Co. Limited vs. Commissioner of CGST & Central Excsie, Jabalpur[8]**

11. We have considered the impugned order and the submissions on both sides on this question. Any contract has a consideration by each

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6 **2021 (55) GSTL 549 (Tri-Del.)**
7 **2023 (72) GSTL 259 (Tri.-Hyd)**
8 **2022 (67) GSTL 86 (Tri.-Del.)**

side to the other. If 'A' agrees to sell his car to 'B' for an amount of 5 lakhs, 5 lakhs is the consideration which 'A' receives and car is the consideration which 'B' receives. In addition to the consideration there are various other clauses in a contract which must be complied with. Among these, are clauses on how to deal with a situation if one of the parties reneges or fails to perform. The non-defaulting party in such a case is entitled to damages from the defaulting party. This damage could be in the form of un-liquidated damages where the quantum of damages is decided by a Court of Law. The damages could also be in the form of liquidated damages in which case the amount to be paid as compensation is decided before hand and indicated in the contract itself. Liquidated damages are not a consideration for contract of service but a compensation for breaking the contract. Where a customer books a car, he enters into a contract agreeing to buy it. If he reneges on this contract, an amount is recovered as damages which in this case is called as "booking cancellation charges". It needs to be noted that a consideration is the purpose of the contract the damages are penalty for breaking it. Therefore, booking cancellation charges being in the nature of damages are not a consideration for the contract. Section 66E(e) of the Act covers such cases where an agreement is entered into to refrain from an act or to tolerate an act, i.e. where the consideration is to refrain from an act. Here, there is no agreement to cancel the booking. The agreement is to book the car and subsequently buy it. By cancellation, the buyer goes back on his promise to buy the car and the cancellation charges are in the form of compensation. This issue has been dealt with at length and decided in favour of the assesse in **South Eastern Coalfields** and other case laws. The CBEC has also

vide Circular No. 178/10/2022-GST dated August 03, 2022 confirmed this legal position. Therefore, the demand of service on the amounts received on this account needs to be set aside.

Price difference & Corporate Discount

12. The appellant received from the manufacturer various discounts for buying cars in bulk and meeting several sales targets. These amounts were recorded in its ledgers copies of which were provided to the Commissioner during the hearing. A certificate from the CA dated 17.06.2019 was also provided along with undertaking by the DGM Finance of manufacturer that the amounts given to the appellant are the discount or incentive based on the quantity purchased by the appellant. However, the Commissioner confirmed the demand on this amount. Learned CA submits that incentives received from manufacturers of automobile are trade discount and not exigible to service tax relies on the following case law:

(i) Rohan Motors Ltd. vs. Commissioner of Central Excise, Dehradun[9]

(ii) Prem Motors Pvt Ltd. vs. Commissioner of C. Ex& CGST, Jaipur[10].

13. We have considered the submissions on both sides regarding the amounts received under this head. It is a well settled legal principle that any amount received by an automobile dealer from the manufacturer as trade discount including quantity discount (which is a trade discount given on the basis of volume of purchase) are not amounts received for providing any taxable service but purely

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9 2021 (45) GSTL 315 (Tri.-Del.)
10 2023 (73) GSTL 97 (Tri.-Del.)

discounts received on account of the trade and meeting certain sales targets. Such amounts cannot be charged to service tax and, therefore, the demand on this account needs to be set aside.

Balance Written Back

14. Learned chartered accountant for the appellant submits that these amounts were received from old debtors whose bad debts were written off. After the debts were written off, the debtors, however, repaid these debts and they have been taken into account as other income. Learned chartered accountant submits that there is no service component involved in receiving these amounts and, therefore, no service tax can be charged. However, the Commissioner confirmed the demand stating that the appellant had not submitted any supporting evidence to their claim.

15. We have considered the demand on this account. What is important is to see as to why these amounts were received back. If these amounts were due from the debtors for providing taxable services and if no tax was paid on those amounts and, service tax has to be paid. On the other hand the service tax was already paid before these debts were written off no service tax needs to be paid. If any amount is received towards the sale of goods or for any purpose other than providing a taxable service no service tax can be charged on that amount.

16. In view of above, we find that this issue needs to be remanded to the Commissioner to give full opportunity to the appellant to provide details of the amounts received in each year and the purposes for which

they were due in the first place and if any taxable service was rendered. If the amounts were received for providing taxable service it needs to be seen that the service tax has already been paid in which case no service tax needs to be paid. Only in such cases where the amounts were received for providing taxable services and no service tax was already paid can service tax be confirmed.

Interest on Income tax refund

17. Learned chartered accountant submits that amount of Rs. 1,316 is received by the appellant during the 2013-14 as interest on account of delayed refund of income tax. Clearly, no service tax can be charged on this interest as no taxable service was provided. We, therefore, find that the demand on this account needs to be set aside and we do so.

Warranty Claims (Parts)

18. Learned chartered accountant submits that as a sales/ service provider the appellant was required to repair and service cars during the warranty period and the customers were not billed for such service. If any part of the car needed to be changed during such service they bill the customer for zero rupees. The cost of said parts is reimbursed by the manufacturer of the vehicle to the appellant because it was under warranty. The amounts which the appellant had received towards the cost of such parts were accounted for as warranty claim (parts).

19. We have considered these submissions and find that no service tax could have been demanded on the value of spare parts received by

the appellant from manufacturer as it was only a sort of reimbursement of the cost incurred by the appellant while servicing the cars during warranty service. The demand on this account needs to be set aside.

Procurement charges (Volume Discount-Paint)

20. Learned chartered accountant submits that the appellant consumes large amount of paints in servicing cars in its denting and painting jobs. The manufacturers of paints offer the appellant volume discount if it purchases large quantity of paints in a year. The amounts so received have been credited by the appellant as procurement charges (volume discount-paints). Clearly, no service tax could have been charged on this volume discount which the appellant had received from the paint manufacturers. The demand on this account needs to be dropped.

21. In view of the above, we find that the matter needs to be remanded to the Commissioner to re-determine the service tax demand as follows:

(a) The invoices submitted by the appellant for CENVAT credit must be examined and if CENVAT is denied it must be indicated specifying invoice wise reasons for such denial.

(b) The demand of service tax on the amounts returned back on account of re-paid written off debts needs to be examined entry wise. Wherever such amounts originally fell due on account of providing a taxable service and no service tax was paid on such amounts, service tax needs to be paid. In other cases, where the amounts were received back on account of sale of goods or provision of

service which is not taxable service or for any other reason, no service tax can be demanded.

(c) The rest of the demand of differential service tax on Rs. 43,78,434/- is set aside.

(d) Interest needs to be paid on any amount of service tax confirmed after the exercise as above and any amount of CENVAT credit denied after the exercise as above.

22. In view of above we partly allow the appeal and party remand it as follows:

(i) The demand of service tax on the amounts received as booking cancellation charges, price difference & corporate discount, interest on income tax refunds, warranty claims (parts), procurement charges for volume discount (paint) is set aside.

(ii) The demand of service tax on the amounts received as "balance returned back" is set aside except to the extent where such amounts were received on account of providing taxable services on which the service tax was not paid. The matter is remanded to the Commissioner to determine as to how much, if any, amount was received on account of providing taxable services.

(iii) The issue of denial of CENVAT credit is remanded to the Commissioner to indicate invoice wise reasons for denying the CENVAT credit. CENVAT credit cannot be denied on any invoice without giving the reasons.

(iv) Since bulk of the demand has already been set aside by us, we set aside all penalties invoking section 80.

(v) Interest as applicable needs to be paid on the amounts confirmed as service tax or denied as CENVAT credit after the aforesaid exercise.

(vi) The appeal is disposed of as above.

[Order pronounced on **27.06.2024**]

(BINU TAMTA)
MEMBER (JUDICIAL)

(P. V. SUBBA RAO)
MEMBER (TECHNICAL)

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