CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI
REGIONAL BENCH

Service Tax Appeal No. 85741 of 2014

(Arising out of Order-in-Original No. 08/AC/COMMR/Th-II/ST/2013 dated 02.12.2013 passed by Commissioner of Central Excise, Thane-II)

M/s. HDFC Bank Ltd. **Appellant**
Kamala Mills Compound,
Trade World 'C' Wing,
10th floor, Senapati Bapat Marg,
Lower Parel,
Mumbai 400 013.

Vs.

Commissioner of Cen. Excise, Thane-II **Respondent**
3rd floor, Navprabhat Chambers,
Ranade Road, Dadar (W),
Mumbai 400 028.

Appearance:

Shri Abhishek A. Rastogi with Shri Pratyush Sana, Advocates, for the Appellant
Shri M.K. Sarangi, Additional Commissioner, Authorised Representative for the Respondent

CORAM:

Hon'ble Mr. S.K. Mohanty, Member (Judicial)
Hon'ble Mr. Sanjiv Srivastava, Member (Technical)

FINAL ORDER NO. **A/86593/2019**

Date of Hearing: 13.05.2019
Date of Decision: 13.09.2019

PER: SANJIV SRIVASTAVA

This appeal is directed against the Order in Original No 08/AC/Commr/Th-II/ST/2013 dtd 02.12.2013 of Commissioner Central Excise Thane – II. By the impugned order Commissioner held as follows:

"In the facts and circumstances of this case, which have been noted, discussed and found in the foregoing paragraphs-

i. I determine and confirm the demand of unpaid payable service tax totalling to Rs 36,26,02,574/-

(Rupees Thirty Six Crore Twenty Six Lakhs Two Thousand Five Hundred Seventy Four Only) under Section 73(2) of Chapter V of the Finance Act, 1994 for being recovered from M/s HDFC Bank Limited Kamala Mills, Trade World, C Wing, 10th Floor, Senapati Bapat Marg, Lower Parel, Mumbai 400013 along with accrued interest thereon at the applicable rate under Section 75 thereof;

ii. *I impose the mandated penalty of Rs 36,26,02,574/- (Rupees Thirty Six Crore Twenty Six Lakhs Two Thousand Five Hundred Seventy Four Only) under Section 78 of Chapter V of Finance Act, 1994 upon M/s HDFC Bank Limited Kamala Mills, Trade World, C Wing, 10th Floor, Senapati Bapat Marg, Lower Parel, Mumbai 400013; and*

iii. *I impose a penalty of Rs 5000/- (Rupees Five Thousand Only) under Section 77(2) of Chapter V of Finance Act, 1994 for each infraction committed by M/s HDFC Bank Limited Kamala Mills, Trade World, C Wing, 10th Floor, Senapati Bapat Marg, Lower Parel, Mumbai 400013 under Section 70 of Chapter V of Finance Act, 1994 by filing incorrect ST-3 returns for the period from April 2008 to March 2011; and impose a penalty of Rs 10,000/- (Rupees Ten Thousand Only) under Section 77(2) of Chapter V of Finance Act, 1994 for each default committed by M/s HDFC Bank Limited Kamala Mills, Trade World, C Wing, 10th Floor, Senapati Bapat Marg, Lower Parel, Mumbai 400013 under Section 70 of Chapter V of Finance Act, 1994 by filing incorrect ST-3 returns for the period from April 2011 to March 2012."*

2.1 During the course of EA-2000 Audit conducted for the period 2008-11 it was observed that appellant is in the business of vehicle finance. They are having tie up with the various vehicle dealers for financing the vehicles. They are issuing advertisement jointly for promoting the dealers business and sharing the expenses. They were also taking

CENVAT Credit on the portion of advertisement expenses incurred by them in respect of the advertisements jointly issued by them and the vehicle dealers. They are receiving certain amount of commission for each vehicle sold by the dealer and financed by them. They are accounting the commission received as subvention income.

2.2 Revenue was of the view that the services provided by the appellant to the vehicle dealers was appropriately classifiable under the taxable category "Business Auxiliary Service" as defined by Section 65(105)(zzb) of Finance Act, 1994 read with 65(19) ibid. Appellants have earned the amounts as indicated in table below as subvention income on which service tax as indicated is payable-

Financial Year	Subvention Income	Service Tax in Rs
2008-09	86,89,42,011	10,74,01,233
2009-10	53,20,72,666	5,48,03,485
2010-11	71,08,59,101	7,32,18,487
2011-12	93,62,95,205	9,64,38,406
2012-13 (upto June 2012)	24,87,13,290	3,07,40,963
Total		36,26,02,574

2.3 A show cause notice dated 6th February 2013, was issued to the appellant asking them t6o show cause as to why the amount of tax short/ not paid by them should not be demanded and recovered from them under proviso to Section 73(1) of Finance Act, 1994 along with applicable interest as per Section 75 ibid. The notice also proposed penalties under Section 76, 77 & 78 of the Finance Act, 1994.

2.4 The show cause notice was adjudicated as per the impugned order. Aggrieved by the order Appellant has filed this appeal.

3.1 Appellant have in the appeal filed challenged the impugned order stating that-

i. They had extended credit facility to the purchaser of vehicle for which consideration is received in the form of “interest subvention” from the vehicle dealer in lieu of “interest on loan” receivable from the borrower in normal course. For them it is consideration towards lending of money and nothing but the interest income, and not subjected to tax.

ii. In case of Cauvery Spinning and Weaving Mills Ltd [340 ITR %%)] it was held that to call an amount received as interest at least one of the condition should be satisfied that the amount has been received as due on account of any money either borrowed or debt incurred. In the present case the debt is incurred when bank has extended credit for payment purchase price of vehicle. Same has been inserted by way of section 65B(30) in Finance Act, 1994,

“interest” means interest payable in any manner in respect of any money borrowed or debt incurred (including deposit, claim or similar right or obligation) but does not include any service fee or other charge in respect of the money borrowed or debt incurred or in respect of any credit facility which has not been utilized.”

iii. While the nature of income received is interest but since the interest on loan amount in this case is not received from the borrower but is received from the dealer/ manufacturer, it is called subvention income.

iv. Law do not prescribe that the interest income should have been received from the borrower only. It only says that interest is excluded from purview of service tax.

v. Nomenclature cannot alter the nature of transaction. When law does not mandates that the interest has to be paid by the borrower only than Commissioner stating that interest should have been received from the borrower only cannot be correct.

vi. Impugned order do not specifically hold that amount is intrinsically in nature of interest on loan.

vii. Impugned order has wrongly held that subvention income is received by the appellant for promoting the business of manufacturer/ vehicle dealer. The amount received is not for promoting the business of vehicle manufacturer/ dealer.

viii. During the course of business operations, they enter into contractual arrangements with the vehicle manufacturers/ dealers for agreeing to special fiancé schemes under which vehicles are made available against loans. Loans are offered at nil or low rate of interest and differential interest component which is otherwise recoverable from the borrower is made goods by the manufacturer/ dealer. This amount paid by the manufacturer/ dealer is termed as subvention income and recorded under the head of *"interest income"* by them.

ix. Appellant and vehicle manufacturer/ dealer jointly agree to a financing scheme where they jointly promote their own business activities. Vehicle manufacturer/ dealer promote their sale and they their lending business. Artificially vivisecting a single transaction to make the appellant as service provider in one occasion and recipient of service in another is not permissible in law.

x. For levy of service tax it is intrinsic to have an element of provision of service. In absence of element of providing a service, there cannot be levy of service tax. In the present case there is no rendition of service since the consideration received from the activity of lending by appellant is only the interest and it does not contains any amount for providing the service.

xi. They rely on the dictionary meaning of the term "service" and also TRU Circular dated 28.06.2006 to support the above preposition. They also rely on the following decisions in their support.

a. Thyssenkrupp Jbm Private Limited [2005 (180) ELT 285 (Commr Appl)]
b. Magus Construction Pvt Ltd [2008 (11) STR 225 (Gau)]
c. Rohan Builders Ltd [2009 (13) STR 56 (T-Bang)]

xii. Subvention do not arise due to any marketing service by the appellant to any third person but has direct correlation to its own business activities. They being banking company neither have any expertise or are equipped with any facility to market the motor vehicles. They only promote their financial products and not the vehicles sold by the dealers/ manufacturers. Their role is limited to that of financier in the low cost financing schemes. Thus if it is argued that there is promotion at all they are promoting their own business. For the limited purposes of promotion of its financial products, undertaken jointly with the dealers/ manufacturers, they can by no stretch of imagination be said to be promoting the business of the dealers. They would rely upon the following decisions in their support:

a. Phase 1 Entertainment Pvt Ltd [2008 (12) STR 174 (T-Bang)]
b. Saturday Club Ltd [2006 (3) STR 305 (Cal)]
c. Dalhousie Institute [2006 (3) STR 311 (Cal)]
d. India International Centre [2007 (7) STR 235 (T-Del)]

xiii. As per Oxford dictionary *"interest is money charges or paid for use of money".* In view of the above definition subvention income earned by them is akin to interest. It is to compensate them for the losses incurred by them for providing loans to customers at subsidised rates.

xiv. As per the definition of subvention as pr Blacks Law Dictionary (Eight Edition) and The Oxford English Reference Dictionary, it is apparent that subvention is a form of monetary assistance or aid, typically

extended by government, and implies that costs and expenses that have been incurred by a person which have to be made goods. In simplest term it is subsidy, which is meant to tide over costs/ expenses and render a transaction as not one for loss.

xv. The SCN is vague and does not set out the basis for the demand., accordingly cannot be sustained in view of the decisions as following:

a. Rajmal Lakhichand [2010 (255) ELT 357 (Bom)]
b. Flemingo DFS Pvt Ltd [2010 (251) ELT 348 (Mad)]
c. Sunder Silk Mills 9P) Ltd [2003 (153) ELT 176 (T-Bang)]

xvi. The SCN is barred by limitation as extended period of limitation cannot be invoked in the present facts of case-

a. That during the period of dispute they were not under the obligation to disclose the fact of receipt of subvention incomes as these amounts were not attributable to rendition of any taxable service.
b. They had been filing the periodic returns during the entire period and hence no intention to evade payment of duty can be attributed to them {Punjab Laminates Pvt Ltd [2006 (7) SCC 431], Pahwa Chemicals Private Ltd [2005 (189) ELT 257 (SC)], Anand Nishikawa Co Ltd [2005 (188) ELT 149 (SC)]}
c. They were under bonafide belief that no service tax was payable by them on the subvention income hence extended period of limitation could not be invoked for demanding service tax {Surat Textile Mills Ltd [2004 (167) ELT 379 (SC)], Chamundi Die Cast (P) Ltd [2007 (215) ELT 169 (SC)]}
d. Since the issue involved is one of interpretation of law extended period could not have been

invoked {Shri Shakti LPG Ltd [2005 (187) ELT 487 (T-Bang)], NRC {2007 (5) STR 308 (T-Mum)]

xvii. Since the demand is not sustainable so the demand of interest to fails.

xviii. Penalty cannot be levied in terms of the following decisions-

a. H M M Ltd [1995 (76) ELT 497 (SC)]
b. Coolade Beverages Ltd [2004 (172) ELT 451 (ALL)]
c. Guru Instrument [1998 (104) ELT (ALL)}
d. Smitha Shetty [2004 (156) ELT 84 (T)] approved in [2004 (174) ELT 313]
e. Tamil Nadu Housing Board [1994 (74) ELT 9 (SC)]
f. Hindustan Steel Ltd [1978 (2) ELT 159 (SC)]
g. Port Officer [2010 (257) ELT 37 (Guj)]
h. Transpek Industries Ltd [1999 (108) ELT 562]
i. Paramjit Sandhu Engg [1999 (30) RLT 595]
j. Avon Scales Co [1999 (31) RLT 373]
k. Mechanico Enterprises [1998 (26) RLT 386].

4.1 We have heard Shri Abhishek A Rastogi and Shri Pratyush Sana, Advocates for the Appellant and Shri M K Sarangi Additional Commissioner, Authorized Representative for the revenue.

4.2 Arguing for the Appellants learned Counsel submitted that-

- The issue in the present case has been adjudicated by the tribunal in case M/s IndusInd Bank Ltd (earlier M/s Ashok Leyland Finance Ltd) 2019 (2) TMI 26;
- True nature and character of payment cannot be determined merely based on nomenclature, intention of contracting parties and transaction under relevant legislations/ regulatory bodies will have to be considered;
- The applicable laws do not mandate that the “interest” on loans has to be paid necessarily by the

borrower. RBI on contrary recognizes subvention on price for payment offered by automobile dealers and manufacturers as part of lending activity carried out by banks. {RBI Clarification dated 17th September 2013}

- None of literary sources i.e. Black's Law Dictionary, Cambridge English Dictionary, Merriam Webster Dictionary, the term subvention has been given the colour of a consideration for service.
- Finance Minister has in Budget Speech 2008-09 referred to interest subvention
- There is total absence of barter in joint agreement to financing scheme. Thus there is no service provider/ service recipient relationship between the appellant or the automobile dealer/ manufacturer.
- Income from the fund based transactions such as advances, loans, bill discounting have been exempted from service tax. Whereas, fees based services resulting in income from processing charges, issuing charge etc are historically subjected to service tax. Subvention income is an income generated from fund based services and accordingly should not be subjected to service tax.
- From the communications between the vehicle manufacturers/ dealers and them, it is evident that interest subvention is nothing but an interest on loan, and is recorded as interest income in their books of accounts.
- Subvention income is an interest income in the books of account and not asset as per RBI report vide memo No DBR. BP>No 3465/21.07/001/2015-16 dated 8.09.2015.
- Auto loan under subvention scheme is provided under a fixed rate of interest.
- The upfront payment made by manufacturer/ dealer is accepted by them towards interest against loan amount. It is for this reason, that the Bank is available to give the benefit of lower rate of interest

to its customers. (at times rates go below the base rate prescribed by RBI)

- Evidence suggests that the subvention income is not in the nature of discount from the dealer. In fact the appellant treats subvention as income from interest on loans and advances in its books, evidences the true nature subvention income as interest income for them.
- Subvention income is not to be treated as closure fees.
- Decision of Tribunal in case of Tat Motors Ltd [2019 (1) TMI 511] has not considered the arguments pertaining to dealer subvention. These arguments have been placed on record for consideration of the bench now. It is not the case that they have received this income as finance charges from the customers. Accordingly it will be unfair to treat subvention income as finance charges on principal amount recovered by the bank. To this effect this decision is sub silent and should not be applied to their case.
- Demand in any case prior to July 2011 is barred by limitation as extended period of limitation cannot be invoked in the facts and circumstances of this case.

4.3 Arguing for the revenue learned Authorized Representative submitted that-

- The appellant are in the business of financing vehicles. As per the business model followed, they have tied up with vehicle manufacturers/ dealers for financing, they issue joint advertisement and manufacturers/ dealer for financing at rate lower than normal bank rate promote their business. They had taken the CENVAT Credit with respect to service tax paid on advertising invoice. During audit it was found that received some amount of commission from car manufacturer/ dealers i.e. subvention income shown as “income” in the Book of Accounts. As per revenue said amount received is consideration

for providing services under category of *"Business Auxiliary Service".*

- In such schemes as per the adjudication order, appellants extend loan to the customers of the vehicle manufacturer/ dealer at Nil or low rate of interest. The manufacturers/ dealers share the part of advertisement cost, an also pay them commission. Since the appellant are promoting the business of the vehicle manufacturer/ dealer, they are providing the services to the vehicle manufacturer/ dealer which is classifiable as *"Business Auxiliary Service".*
- Appellants have in their submissions, sought to project that the service tax is sought to be levied on the interest income. In fact there is no demand on the interest income. Interest against the loan taken by the borrower/ vehicle purchaser is not subject matter of dispute, but the issue is in respect of the commission received by them from the dealers shown as subvention income.
- The arguments advanced that this income is shown as interest in the book of accounts, is irrelevant, when the nature of consideration is examined. Even as per admitted facts said amount has been paid by the dealer to Banks for increasing their sales. They have shown distinct amount against "dealer commission" and "subvention income".
- Loan amount less the subvention income and other expenses are disbursed to the dealer against the hypothecation deed executed with the customer, though for the customer the price of vehicle remains the same.
- Comparison sought with farm subsidy by referring to Finance Minister speech is totally irrelevant.
- Appellants contention that they are showing 'subvention income" against "interest on advance" hence should not be subjected to tax. They have vehemently submitted that the amount charge was equivalent to the amount foregone, by them, by

extending the loan to customer of vehicle manufacturer/ dealer, as interest, by providing loan at lower rate of interest. In case of Housing Development Corporation Ltd (HUDCO) [2012 (26) STR 531 (T-Mum)], it was held that said fees is charged for prepayment is in lieu of some value added service. It was held that the method of calculation of charges in case of pre-payment based on the outstanding loan is not relevant.

- The issue is squarely covered by the decision in case of Speed Finance Service [2017-TIOL-2548-CESTA-DEL], Toyota Lakozy Pvt Ltd [2017 (52) STR 299 (T-Mum)] & Tata Motors Ltd [2019 (1) TMI 511].
- The issue in case of IndusInd Bank Ltd relied upon by the Appellants is not the same. The illustration given in para 12.1 & 12.2 does not show how it is similar to the present case, rather the issue there was a simple loan agreement and if at all it involved any payment by consumer stores/ construction companies is not forthcoming.
- Since appellants had never disclosed the fact in respect of *"subvention income"* to the department in any manner prescribed in ST-3 returns they have suppressed the facts from department which came to light only by the way of audit. Hence extended period of limitation has been rightly be invoked for making the demand. On the issue of limitation they would rely on the decision in following cases-
    - City Financial Consumer Finance India Ltd [2017-TIOL-2363-CESTAT-DEL]
    - Reliant Advertising [2013 (31) STR 166 (T-Del)]
    - Vodafone Digilink [2011 (24) STR 562 (T-Del)]
    - Bharat Sanchar Nigam Ltd [2011-TIOL-552-CESTAT-MUM]
    - Rennaissance Leasing & Finance Pvt Ltd [207 STR 4 (T-Del)]
    - Lakhan Singh [2016 (46) STR 297 (T-Del)]

5.1 We have considered the impugned order and the submissions made in appeal, during course of argument of appeals and in written submissions filed.

5.2 The issue for consideration is whether the amounts received by the Appellants from the vehicle manufacturer/ dealer and accounted by them in their book of accounts as subvention income should be subjected to service tax under the category of 'Business Auxiliary Services' as defined by Section 65 (19) of Finance Act, 1994. Section 65 (19) of the Finance Act, 1994 is reproduced below:

*"**"Business Auxiliary Service"** means any service in relation to, —*

(i) promotion or marketing or sale of goods produced or provided by or belonging to the client; or

(ii) promotion or marketing of service provided by the client; or

*[**Explanation** – For the removal of doubts, it is hereby declared that for the purposes of this sub-clause, "service in relation to promotion or marketing of service provided by the client" includes any service provided in relation to promotion or marketing of games of change, organised, conducted or promoted by the client, in whatever form or by whatever name called, whether or not conducted online, including lottery, lotto, bingo;]*

(iii) any customer care service provided on behalf of the client; or

(iv) procurement of goods or services, which are inputs for the client; or

*[**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; 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.

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

(a) "Commission Agent" *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 — means any*

(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, 1994;*

(c)"Manufacture" *has the meaning assigned to it in clause (f) of Section 2 of the Central Excise Act, 1944;"*

The taxable service in relation to "Business Auxiliary Service" is defined by Section 65(105)(zzb) as follows:

"Taxable Service" *means any service provided or to be provided to a client by any person in relation to business auxiliary service.*

5.3 The case of revenue in the present case is that appellants have entered into agreement with various vehicle manufacturers/ dealer for providing the loan to the customers/ clients of vehicle manufacturers/ dealers at a rate lower than the rate at which they grant the loan for purchase of motor vehicles to their client in general. For the provision o such loans they get certain amounts termed as “subvention income” from the vehicle manufacturers/ dealers. To promote the sale of the vehicles against said loans at reduced rate of interest appellants and the vehicle manufacturers/ dealers make joint advertisements on cost sharing basis. By the said provision of the loans at reduced rate of interest and joint advertisements made it is contended that appellants are promoting the sale of motor vehicles by the vehicle manufacturer/ dealer, and hence are covered by the definition of “Business Auxiliary Service”. The amount so received by the appellants from the vehicle manufacturers/ dealers for the provision of such loans at reduced rate and accounted by them as “subvention income”, is the consideration for provision of the said service and subjected to service tax.

5.4 Appellants have contested stating that there is no service provider/ recipient relationship between them and the vehicle manufacturer/ dealer both of them are acting independently to promote the cause of their business. They are in business of marketing their financial products i.e. the vehicle loans and vehicle manufacturer/ dealer are selling their vehicles. Both of them are interested in promoting their business independently. Commissioner has in para 15 to 18 his order considered the above submissions and recorded-

“15. The arrangement, which has been noted is not in dispute. A question, which comes to mind is if the income is in the nature of interest then why is it recorded in the books of accounts of the noticee as subvention charges. The noticee, in consultation with the manufacturer or the

vehicle dealers, prepares vehicle financing special schemes, which provide for no interest or very low interest. So, the noticee receives either no interest or very low interest, which can be accounted as interest income in the books of accounts of noticee. The noticee receives subvention income out of the commission, which is paid by the noticee to the manufacturer or the car dealers. The noticee says that it is the manufacturer or the vehicle dealer, who promotes their business, not vice versa. If this is true then no explanation arises why the manufacturer as well as car dealers would part with a proportion of their commission, receivable from the noticee. Another question, which arises simultaneously, is why the manufacturer and vehicle dealer also share the advertisement costs to promote the business of the noticee. The noticee provides no explanation to these questions. They have no answer to offer.

16. It is wrong on the part of the noticee to plead that in this arrangement of things the noticee does not render any service to the manufacturer and vehicle dealers. In this scheme of things, the rendering of service is from both the sides. While the dealers and manufacturer promote the business of the noticee, it is the noticee who also promotes the business of the manufacturer and vehicle dealers. The availability of nil or very low interest to buy vehicle enable the dealers to enhance their business of vehicle selling. The facility of these special schemes serve as special purpose vehicle (SPV) or platform, whereon, the business of the manufacturer and the vehicle dealers get promoted. It is for this reason that this arrangement is always between the noticee and the manufacturer and vehicle dealers only.

17. since the schemes of the noticee and the arrangement entered into between the noticee with the manufacturer and the vehicle dealers, in the process, enables the enhancement of vehicle sales of manufacturer/ vehicle dealers the noticee renders service, which

promotes or markets the vehicles and their availability at loans with nil or very low interest. The rendering of the business auxiliary service by the noticee gets rendered to these manufacturers and the vehicle dealers.

18. In view thereof, it is noticee, who also renders the business auxiliary service to the manufacturer and vehicle dealers within the meaning and comprehension of Section 65(19) and Section 65(105)(zzb) of Chapter V of the Finance Act, 1994. The subvention income which is received by the noticee out of the commission earned by the manufacturer and vehicle dealers is the consideration for rendering the business auxiliary service. The deduction out of the commission earned by the manufacturer and vehicle dealers is termed by the noticee as the subvention income in their account books."

To further clarify upon the arguments as recorded by the Commissioner in his order for purpose of holding the services provided by the Appellant, under the category of Business Auxiliary Services, let us explain the scheme by a very crude example of two persons say A and B, one having a business of selling fabric and other having the business of tailoring. Both enter into agreement that, to the customers of A, who purchase fabric from A, and on recommendation of A, B will do tailoring at 50% of the normal tailoring charges. For providing the tailoring facilities to the customers of A at reduced rate, A will pay B certain amount. The question akin to the issue under consideration is whether B, is providing any services to A, by providing tailoring facility to the customers of A at reduced rate. In normal course of business both A and B both being independent entities are interested in promoting their business. However by providing the tailoring facility to the customers of A at rates lower than the rates at which B normally provides to independent customers, B definitely promotes the sale of fabric by A. B can always argue that in process they have promoted their business. It is settled principle in market that there are no

free lunches. Any facility provided by an business entity to its client/ customer whether it is business or an individual comes with the associated cost. The associated cost is the consideration for provision of the said facility. Thus by providing or agreeing to provide the loans at lower rate/ nil rate to the customers of vehicle manufacturer/ dealers. Appellants have promoted the sale of the vehicle in the hands of such vehicle manufacturer/ dealer. Hence we have no hesitation in holding that the facility of nil/ low interest rate provided by the appellants to the customers of vehicle manufacturer is service classifiable under the category of “Business Auxiliary Service” as defined by Section 65(19) of the Finance Act, 1994, and the amount paid by the vehicle manufacturer/ dealer and accounted by the appellants as subvention income is the consideration for the provision of such service.

5.5 Appellants have strenuously argued before us that the amounts received by them from the vehicle manufacturers/ dealers is nothing but the loss of interest, they would have suffered on account of providing the loans at the reduced rate of interest. They have even submitted the calculations showing that that the amounts received by them are nothing but equivalent to yearly loss of interest against the loan extended, projected on the date of sanction/ disbursement of loan. They have referred to the clarifications issued by the Reserve Bank of India that subvention amount should be taken into account for determination of the interest rate. Hence they argue that since the subvention income is nothing but interest against the advances the same should not be subjected to service tax. We are not in agreement with the submissions made by the appellants. Once we hold that the amounts received by the appellants as *“subvention charges”* are consideration for providing the business auxiliary services, the manner in which they are determined are irrelevant. They may be equivalent to difference of their interest earning on loan extended in normal course and under the

special scheme or can be more or less than that is immaterial for treating it is as consideration for providing the service. Same view has been expressed by the tribunal in case of HUDCO [2012 (26) STR 531 (T-Mum)] in following words:

"14. *The two decisions of the European Court cited by the ld. Counsel are not appropriate since they do not really relate to Banking & other Financial Services. Further without comparing statutory provisions, it will not be appropriate to rely upon the decision of the European Court, for Indian cases. The appellants also relied upon the decision of Hon'ble High Court of Madras in the case of Edupuganti Pitchayya & Ors v. Gonuguntla Venkata Ranga Row, dt. 20-10-43. In that case, Hon'ble High Court took a view that out of the amount collected over and above the principal is in the nature of interest and it denotes consideration of or otherwise in respect of loan or retention by one party of some of money or other property belonging to another. This was submitted to support the view that prepayment charges and reset charges are nothing but interest. In this case, prepayment/reset charges are not in the nature of interest at all but is in the nature of charge for early closure of loan/resetting of loan and is relatable to lending since it either closes the loan or charges the terms and hence it cannot be equated with interest at all. It has to be noted that in the case of prepayment, interest is collected separately till the date of prepayment. It is also not necessary that when a loan is prepaid or reset, the lender suffers. In fact, foreclosure by prepayment and reset are relatable to lending and if an application for processing a loan application is chargeable to Service Tax and processing fee charged for foreclosure/prepayment of loan or reset of interest would also be chargeable. In fact, we are unable to see what is the difference between the liability of Service Tax in respect of application of a loan where the processing fee is charged which is independent of loan and over and above*

the interest, when we see here also it is over and above the interest. The processing fee is charged for considering the various aspects such as credit worthiness of the borrower repaying capacity of the borrower, period of loan vis-à-vis repaying capacity of the borrower, quality of assets of the borrower etc. When the proposal is made for prepayment of loan or resetting, processing the application is involved. Therefore, there is definitely an element of service in prepayment of loan or resetting of interest. As already discussed earlier, the definition covers any activity in relation to lending.

18.1 *Reset charges/prepayment charges charged to the customers by the appellant is in the nature of additional interest only and therefore not liable to Service Tax.*

18.2 *The appellant has contended that the said charges are calculated taking into consideration the rate of interest and loan amount. Thus, they are in the nature of additional interest and not liable to Service tax.*

18.3 *It has already been discussed that the prepayment charges are the charges for allowing the facility of prepayment of loan. Similarly, reset charges are the charges levied by the appellant for restructuring the interest rate.* ***The method of calculating the charges has no bearing on the nature of service provided. Just because the charges have been calculated based on the outstanding loan amount and the interest rate prevalent at that time will not change the head of income from service charges to interest.***

18.4 *Interest is nothing but the time-compensation for somebody's money being retained by somebody else. The longer the period of retention, the higher will be the interest amount. In this background, the prepayment charges can never be considered to be in the nature of interest as prepayment only means payment before time. This should ideally result in refund of interest and not the demand for more interest because the borrowed money is being paid back before time."*

We have followed the said decision in case Bank of Baroda [Final Order No A/86424/2019 dated 21.08.2019] and in case of LIC Housing Finance Ltd [Final Order No. A/86425-86428/2019 dated 21.08.2019]. Thus we are not in position to agree with the argument of the appellants by which they contend that these subvention charges are nothing but interest on advances and hence exempt from payment of service tax.

5.6 We also find that issue under consideration has earlier been adjudged by the tribunal in the following cases:-

Speed Finance Service [2017-TIOL-2548-CESTAT-DEL]

"5. We have heard both sides and perused the records. The fact is not under dispute that the appellant had received the full commission amount from the bank for providing the business auxiliary service and that the subvention charges were debited by the bank from the appellant's account in order to pay the same to its customers. Such subvention charges collected are part of the commission, which falls under the taxable category of 'business auxiliary service'. In this context, the Tribunal in the case of Commissioner of Service Tax, Mumbai vs. J.M.D. Marketing Pvt. Ltd. – 2016 (46) S.T.R. 504 (Tri.-Mumbai) has held that the assessee would be liable to pay service tax on gross amount of commission received from banks for marketing of products. With regard to the submissions of the ld. Advocate that since no tax was deducted at source by the bank from the commission amount for income tax purpose, the same should not be considered for computation of the service tax liability, we are of the view that the Income Tax provisions are applicable entirely on different circumstances and the statute deals with payment of tax on the earning of income of the assessee concerned; whereas, contrary is the case under the Finance Act, where-under service tax is levied on the provisions of taxable service by the assessee.

Hence, the service tax demand confirmed by the authorities below will be sustainable on merits."

City Financial Consumer Finance India Ltd {2017-TIOL-2363-CESTAT-Del]

"Brief facts of the case are that the appellant is a NonBanking Finance Company and is engaged, inter alia, in the business of providing various types of loans to its customers. The appellant is registered with the Service Tax Department under the category of Banking and Other Financial Services. The appellant avails cenvat credit of service tax paid on input services, used by it for providing such output service. The Service Tax Commissionerate, New Delhi conducted audit of the records maintained by the appellant for the period 16.08.2001 to 31.03.2005. During the course of audit, it was observed that in lieu of financing of home appliances, the appellant also received remittances as commission from the manufacturers and dealers, in the nature of interest under the nomenclature of 'subvention income'. The service tax attributable to such service was deposited by the appellant in respect of the manufactures, other than M/s. L.G. Electronics Ltd. Further, it was also observed by the Audit, that the appellant did not maintain separate records of inputs / input services used for providing both taxable as well as exempted services.

3. The ld. Advocate appearing for the appellant submitted that the appellant is not contesting confirmation of the adjudged demand on merits. However, he submitted that the proceedings initiated by the Department for confirmation of the demand is barred by limitation of time inasmuch as receipt of the subvention amount during the disputed period were reflected in the periodical ST-3 returns filed by the appellant. He also submitted that based on the audit report, the Department had issued the SCN on 16.01.2008 and based on same set of facts, another SCN was issued on 23.10.2009, which is clearly barred by limitation of time, having been issued after one

year from the date of knowledge. Thus, he submits that the allegation of separation of facts with intent to evade payment of service tax cannot be leveled against the appellant and accordingly, the adjudged demand cannot be sustained. To support his stand that the SCN is barred by limitation of time, the ld. Advocate has relied on the judgment of Supreme Court in the case of P and B Pharmaceuticals Pvt. Ltd. Vs. Collector, reported in 2003 (153) E.L.T. 14 (SC.); ECE Industries Ltd. Vs. Commissioner, reported in 2004 (164) E.L.T., 236 (S.C.); Hyderabad Polymers Pvt. Ltd. Vs. Commissioner, reported in 2004 (166) E.L.T. 151 (S.C.); and Nizam Sugar Factory Vs. Collector of Central Excise, reported in 2006 (197) E.L.T. 465 (S.C.).”

Toyota Lakozy Pvt Ltd [2017 (52) STR 299 (T-Mum)] &

“7. Appellant, admittedly, assists customers who desire to have their vehicles financed by bringing financial institutions and buyers together. For this, financial institutions offer them a commission on the loan amount sanctioned of which a portion is passed on the customer as an upfront subvention of the total interest payable. The appellant pays tax only on the actual commission received and the impugned order has confirmed tax of ` 18,28,528/- and ` 3,80,825/- for the two periods in dispute. Learned Authorized Representative relies upon Jaybharat Automobiles Limited v. Commissioner of Service Tax, Mumbai [2015-TIOL-1570-CESTAT-MUM] to contest the claim of appellant that the subvented component is not received as consideration by appellant. Further reliance was placed on Joshi Auto Zone Pvt. Ltd. v. Commissioner of Central Excise, Chandigarh [2016 (42) S.T.R. 739 (Tri.-Del.)] and on HBL Global Pvt. Ltd. v. Additional Commissioner of Income Tax [ITA No. 386/Mum/10]. Learned Chartered Accountant has sought to distinguish the factual position in these cases from those of the appellant.

8. We have perused the decisions cited by both sides. One of the essential requirements in taxing of services is the existence of 'service-provider' and 'recipient of service' with the latter making over the agreed upon consideration to the former. Appellant, admittedly, markets products of financial institutions for which they are entitled to a commission. There is common ground here on the taxability of commission as received. However, the appellant claims to have waived a portion of the commission otherwise receivable which the bank then uses to reduce the consideration that it receives for such financing from customers. It would appear that consideration not received by the appellant from the financial institutions for one service is adjusted to compensate for the reduced consideration received by the financial institution for another service rendered to another recipient."

JMD Marketing [2016 (46) STR 504 (T-Mum)]

"6. *During arguments, the respondents admitted that the banks are deducting TDS on the whole of the commission including the subvention. The respondents also submitted that the amount of subvention was directly paid by the bank to the customers taking loan and the respondents have never received the amount.*

7. *We find that this issue is already settled by the decision of the Tribunal in the case of CCE, Jaipur-I v. Chambal Motors (P) Ltd. reported in 2008 (9) S.T.R. 275. The Tribunal held as under :-*

"6. It is obvious from the reasoning adopted by the Commissioner (Appeals) that he has proceeded on totally an erroneous footing that, a bank cannot avail of 'Business Auxiliary Services' as a client. From the nature of agreements on record including the franchisee agreement in the third appeal, it is clear that the assessees were, under an agreement with the bank had undertaken to provide service in relation to promotion or marketing of the 'Banking and Financial Services' provided by the banks.

The banks were providing services under the category 'Banking and Other Financial Services' falling in Clause (12) of Section 65. In relation to those services, the respondent-assessees were providing services for promotion or marketing of the banking and other financial services provided by the banks. The banks were, therefore, their clients being recipient of such services from the respondents. It has come in evidence that the respondents were required to obtain loan applications from their customers who desired to avail loans from the banks. The respondents had undertaken to process those applications and after scrutiny forward them to the bank. Admittedly, for such services, they were paid commission by the bank, which was reflected in their account. Once consideration accrued to them, as against the services provided by them to the bank, by way of commission, it was hardly of any consequence how a portion of that commission, which as per the particulars provided by the Bank was given as "pay out" to assessees in respect of which even the TDS was deducted, was spent by them. If they chose to give some amount from that gross commission amount to their customers either directly or through the bank, it would not change the nature of the receipts in their hand."

In another case, i.e. Em Pee Motors Ltd. v. CCE, Chandigarh reported in 2012 (25) S.T.R. 68, the Tribunal held as under :-

"4. Considered arguments of both sides. It is very clear that as per Section 67 of Finance Act, 1994 Service Tax shall be paid on the gross amount charged by the service provider. It is also noticed that as per the submission of the appellant, the TDS certificate was issued by the Bank in the name of the appellant for deduction of income-tax on the full amount paid to the appellant. This means that while filing income-tax return, he is taking the credit for entire TDS including the amount deducted on account of payments directly made to the customers. Therefore, this is an arrangement where the appellant decided to get the

benefit of deduction of TDS for the whole amount for income-tax purpose but to pay Service Tax only on the amount net of subvention. Thus there is a inherent contradiction in the stand that is being taken by the appellant before the two tax authorities. The arrangement made for the purpose of reducing incidence of income-tax is not a subject matter of these proceedings.

5. We are of the view that the amount paid by the bank for the services rendered by the appellant and reflected as receipts in the books of accounts of the appellant, should be subjected to Service Tax and therefore, the orders passed by the lower authorities is maintainable and thus appeal filed by the appellant is rejected.""

Tata Motors Ltd [2019 (1) TMI 511]

"5.13 In respect of dealer subvention income, the appellant states that the same is an interest income. The interest does not arise on account of any loan simplicitor. They recover from the vehicle purchaser, finance charges on the principal amount. Where a prospective purchaser is unwilling to pay at the said rate, the dealers in order to increase their sales, agree to bear part of these finance charges. It is clear that the real cost/ value of the services provided by the assessee is worth 9% of the principal amount. Therefore, the entire amount shall in toto form' the gross amount charged' for, the purpose of determining taxable value under Section 67, even if the dealer undertakes to pay part of the financial charges on behalf of the vehicle purchaser."

In view of the discussions as above we hold the demand of service tax in under the category of Business Auxiliary Services on the amounts received as subvention income by the Appellants on merits.

5.7 **Limitation and Penalties:** Appellant have contested the demand on the ground of limitation. They have contended that they were under the bonafide belief that no service tax was payable in respect of the

subvention income and also the issue was not free from doubts and was purely an interpretational issue. Thus relying on various decisions they have contended that the extended period of limitation in this case could not have been invoked for the purpose of demanding the service tax. For the same reason they contend that penalties under section 78 could not have been imposed on them. Commissioner has in para 20 & 23, discussed the issue of limitation and penalty under Section 78 as follows:

"20. The noticee had been aware of the true scope of these schemes and its twin benefits. They had also been aware how they all benefited from these schemes. They had also been aware that in the scheme of arrangement the noticee and also the vehicle dealer or manufacturer promoted business of one another. The promotion led to rendering of the defined taxable business auxiliary services, which was taxable and exigible to service tax. Despite such known taxability the noticee failed to the commandment of law. They did not even share the relevant facts of this rendering with the jurisdictional service tax authorities. Their ST3 returns and its accompaniments remained silent and, thus, untrue. In consequence, the curative mechanism of the proviso to Section 73(1) of Chapter V of Finance Act, 1994 has been rightly invoked to extend limitation from one year to five year to capture the escaped amounts of service tax.

23 The demands of the unpaid amounts of payable service tax have been determined together with accrued interest in invocation of the extended period of limitation, since, there had been suppression of relevant facts by the noticee despite being fully aware of the true scope and benefits of the special financial schemes promoted by them and manufacturer and vehicle dealers. These schemes promoted the business of vehicle sales, which benefitted the manufacturer and the vehicle dealers. In the process they had rendered the taxable business auxiliary services to the manufacturer and the vehicle dealers. Despite such

self awareness, they failed to pay service tax to their account of central government by or before the dates on which it had fallen due. This failure, in facts and circumstances of this case, is deliberate. The mandated penal visitation under section 78 of Chapter V of the Finance Act, 1994 would thus, occur upon the noticee. In view of the mandated imposition, the impassability of further penalty under Section 76 of Chapter V of the Finance Act, 1994 would not occur."

We are unable to agree with the contentions raised by the appellants on this count. They have not shown any reason for entertaining the so called bonafide belief that service tax was not payable in respect of the subvention income. On the contrary the fact is that they were availing the CENVAT credit in respect of input services received for providing these services. Appellants have and could not have denied the fact that they had availed CENVAT Credit in respect of the advertisements jointly issued by them along with the vehicle manufacturers/ dealers for the purpose of special schemes, offering interest at nil/ lower rate. Once they were availing the CENVAT Credit in respect of the input services for the output service provided, they cannot claim that they were under the bonafide belief that no service tax was payable in respect of the output services. The act of availing the CENVAT Credit defies the claim made by the appellant stating that issue was interpretational issue. Even if it was once they have availed the CENVAT Credit in respect of input services, the natural consequence is to pay service tax on the output services. We do not find that the judgements cited by the Appellant will advance their case in view of the admitted fact that they were taking the CENVAT Credit in respect of the input services. On the contrary we find that appellants had never made any declaration about the *"subvention income"* to the department in prescribed manner or on ST-3 returns being filed by them. Thus appellant have deliberately withheld the information in respect of the

subvention income recovered by them, from the department with the intention to evade payment of service tax. Hence we are of the opinion that extended period is rightly invoked for demanding service tax from the appellant. Same view has been expressed by this tribunal in the decisions relied upon by the Authorized Representative. Since we uphold that the demand by invoking extended period of limitation the penalty under Section 78 of Finance Act, 1994 to is sustained in light of the decision of Hon'ble Apex Court in case of Rajasthan Spinning and Weaving Mills [2008 (238) ELT 3 (SC)].

5.8 Penalty has been imposed by the Commissioner under Section 77 for various infractions noticed in complying with provision of law. For imposing penalty under Section 77 Commissioner has recorded as follows:

"24. The above acts of the notice further led to improper and incorrect filing of ST3 returns and its accompaniments as provided under Section 70 of Chapter V of Finance Act, 1994 in reading of Rule 7 of the Service Tax Rules, 194. There had been repeated infractions for the period April 2008 to June 2012. Each of these infractions would attract independent penalty under section 77 of Chapter V of Finance Act, 1994."

Penalty under Section 77 are civil in nature and are imposed for infractions noticed since by not making proper declarations in ST-3 returns appellants have contravened the provisions of Section 70 of Finance Act, 1994 read with rule 7 of Service Tax Rules, 1994 penalties as imposed by the Commissioner under Section 77(2) too are justified.

5.9 By the impugned order, interest under Section 75 on the amount short paid has also been demanded. The interest as provided by the statue is for the delay in the payment of tax from the due date. Since the demand has been upheld, demand for interest too is upheld. Same is the view expressed by the courts and tribunal in following decisions.

- P V Vikhe Patil SSK [2007 (215) ELT 23 (Bom)]
- Kanhai Ram Thakedar [2005 (185) ELT 3 (SC)]
- TCP Limited [2006 (1) STR 134 (T-Ahd)]
- Pepsi Cola Marketing Co [2007 (8) STR 246 (T-Ahd)]
- Ballarpur Industries Limited [2007 (5) STR 197 (T-Mum)]

6.1 In view of discussions as above we do not find any merits in the appeal filed and dismiss the same.

(Order pronounced in the open court on 13.09.2019)

(S.K. Mohanty)
Member (Judicial)

(Sanjiv Srivastava)
Member (Technical)

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