

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Decided on: 01.03.2017

+ **W.P.(C) 6560/2015**

COMPETENT AUTOMOBILES CO. LTD. Petitioner

Through: Sh. S.C. Ladi, Sr. Advocate with Sh.
Rajesh Jain and Sh. Virag Tiwari, Advocates.

Versus

COMMISSIONER OF SERVICE TAX Respondent

Through: Sh. Sanjeev Narula, CGSC.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE NAJMI WAZIRI

MR. JUSTICE S. RAVINDRA BHAT

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1. The petitioner in these writ proceedings seeks an order for quashing of summons, requiring it to appear and produce documents in connection with the service tax demands outstanding against it.

2. The brief facts of the case are that the petitioner is an authorized dealer *inter alia* of Maruti Suzuki India Limited (MSIL) and in that capacity sells its cars. In the course of business, Maruti Finance, a unit of Maruti Udyog Limited (MUL) paid certain amounts of commission to the petitioner; the commercial activity underlying this transaction falls within the description of “business auxiliary service” under Section 65(105) of the Finance Act, 1994. Therefore, service tax is payable by the petitioner. A Show Cause Notice was issued to the petitioner by the Commissioner of Service Tax on 21.12.2006

and proceedings were initiated for non-payment of tax for the period February 2004 to March 2006. After considering the submissions of the petitioner, the Commissioner of Sales Tax took note of the legislative changes brought about by amendment with effect from 10.09.2004 to the Finance Act, 1994 and determined the demand at ₹1,56,48,080.91/- together with interest and appropriated a sum of ₹1,24,65,694.27/- which had been deposited during the pendency of the proceedings.

3. The order-in-original dated 25.09.2007 was sought to be enforced by the Commissioner through letter dated 25.09.2012, requiring the petitioner to deposit ₹31,82,386.64/-. Claiming to be aggrieved, the petitioner filed W.P.(C) 8089/2012 before this Court. This was, however, permitted to be withdrawn on 08.12.2012 and the petitioner was granted liberty to appeal against the order-in-original. Accordingly, it preferred an appeal before the Customs, Excise and Service Tax Appellate Tribunal (“CESTAT”). This was, however, dismissed by CESTAT on the ground of inordinate delay (of 1916 days), which the tribunal refused to condone. The petitioner, who filed W.P.(C) 8089/2012, challenged that order – dated 29.01.2014 before this Court. The Court found no ground to interfere with the CESTAT’s order and accordingly rejected the writ petition.

4. In these circumstances, the petitioner, on 04.09.2014, moved what it claimed was a rectification application in which it was stated *inter alia* as follows:

“8. The whole issue which surfaces in this case is as to whether the applicant can be asked to deposit the service tax of Rs.31,82,356.64 once again when the same stood deposited by

Maruti Udyog Ltd. which has been confirmed by Maruti Suzuki India Ltd. vide their certificate dated 27.05.2009. Reference is also invited to the e-mail dated 17.05.2004, wherein as regards the applicability of Service Tax on the Maruti Finance payout, it was confirmed that Maruti Udyog Ltd. is depositing the applicable service tax. Evidence of deposit of this amount in the form of TR-6 have already been placed on record. Collection of service tax from the applicant when the same stood by Maruti Udyog Ltd. would not only be violative of Article 265 of the Constitution of India but would also be an unjust enrichment to the department.

9. *Coming back to the order dated 21.12.2012 passed by the Hon'ble High Court in Writ Petition No.8089 of 2014, the applicant would request your good self to make necessary amendment/rectification to the order of 25.09.2012. This prayer is made because the time period of two years to seek rectification/amendment u/s 74 of the Act is still available to the applicant as the order whose rectification is sought was passed on 25.09.2012."*

5. This "application for rectification" was followed up by reminders dated 26.09.2014, 30.10.2014 and 21.11.2014. Aggrieved by the inaction, the petitioner approaches this Court for a direction to quash the summons. The principal ground urged is that for the relevant period, the service tax demanded, i.e. in respect of the amount of ₹31,83,356/-, service tax had been deposited by MUL.

6. Learned counsel for the petitioner contends that the respondents' inaction and deliberate refusal to verify and cross-check its assertions that for the concerned period, service tax in fact had been deposited by MUL, is arbitrary. In this regard, learned counsel relies upon the certificate of MUL/Maruti Finance and T.R. Challans that were deposited with the service tax department on 08.03.2011. This could have been verified and the

3. The total amount received by MSIL from the finance companies as commission up to 9.9.2004 was Rs.1,44,37,72,022.84/- on which service tax paid by MSIL was Rs.11,55,01,761.83/-.

4. Out of this amount, MSIL shared the commission with its various dealers including your company.

5. During the period February, 2004 to August 2004, out of the commission received, we paid the following amounts to you:-

S.No	Dealer Code	For Code	City	Month	Amt. paid by MSIL for business done
1.	0806	08	Delhi	Feb-04	37,19,646.00
2.	0806	08	Delhi	Mar-04	69,04,412.00
3.	0806	08	Delhi	Apr-04	62,84,777.05
4.	0806	08	Delhi	May-04	51,33,513.38
5.	0806	08	Delhi	Jun-04	50,32,486.11
6.	0806	08	Delhi	Jul-04	65,96,022.39
7.	0806	08	Delhi	Aug-04	61,08,977.52
				Total	3,97,79,834.45

6. M/s. Competent Automobiles Co. Ltd. has informed MSIL that the service tax on the said amount of Rs.3,97,79,834.45 works out to Rs.31,83,356/-. The said amount of Rs.3,97,79,834.45/- paid to M/s. Competent Automobiles Co. Ltd. formed part of the total amount of Rs.1,44,37,72,022.84/-

received by MSIL on which MSIL paid the service tax of Rs.11,55,01,761.83/-.

7. The said payment of service tax by MSIL was only against the commission received towards marketing & selling of auto retail loans of the Finance Companies.

8. The above service tax was paid to the Service Tax Department and has not been claimed as refund by MSIL.

For Maruti Suzuki India Ltd.

Sd/-

Anil Sahani

DGM-Finance”

7. It is contended that in the light of the above clarification, the obdurate refusal of the respondents/service tax department to look into the matter for examining whether in fact service tax was paid in order to avoid double tax for the same transaction, is utterly arbitrary and that for these reasons, the demand has to be quashed.

8. Learned counsel for the respondents contend that the present proceeding by way of petition under Article 226 is gross abuse of the process of Court. Highlighting that the petitioner's previous two writ petitions were not entertained, firstly on account of availability of alternative remedy and the second one due to the dismissal of its appeal, it is argued that the devious manner of seeking relief that is forbidden by law, adopted in this case, is to style a representation as a rectification of a final order. The petitioner had availed of all possible opportunities to contend that it had complied with, either on its own account or either by the adjustment of payments made by

MSIL or Maruti Finance, towards the service tax liability for the relevant period, in both the original Show Cause Notice proceedings as well as in compliance with the demands made. Having failed in its endeavors, it approached this Court, which relegated it to the normal alternative remedy of an appeal. In those proceedings too, the petitioner could not succeed and no relief was forthcoming. Its appeal was rejected on the ground of delay.

9. Counsel contends that the petitioner's attempt to have the matter reexamined on merits failed with the dismissal of its second writ petition before this Court. In these circumstances, the method adopted to contend that the service tax liability (in respect of which it had all the opportunity to say that demands were satisfied) cannot be enforced, is untenable. Learned counsel submitted that what cannot be achieved directly cannot be achieved indirectly. It was also urged that in the absence of any clarity by Maruti that service tax towards the commission paid was in fact deducted towards the commission made over to the petitioner, the relief claimed cannot be granted in these proceedings. It was submitted that the proper mechanism to work-out the claim such as the one made out by the petitioner in this case was of refund. There too, the petitioner failed to avail of the remedies, which has since been rendered time-barred. In the circumstances, no relief can be granted in the absence of any material or admission which shows that ₹31.82 lakhs was ever received by the service tax department.

10. From the narrative, it is apparent that this is the third writ petition in sequence as it were for the same relief. On the first occasion, the petitioner had approached this Court, aggrieved by the demands made pursuant to the orders-in-original. That order-in-original had attained finality in 2007 itself.

The petitioner claimed to be aggrieved by a demand dated 25.09.2012 for the sum outstanding, i.e. ₹31.82 lakhs. This Court refused to entertain the matter and permitted withdrawal of the writ petition. The petitioner thereafter approached the CESTAT, which dismissed the appeal on the ground of delay. The Court too upheld that order of dismissal. On 04.08.2014, this Court dismissed W.P.(C) 4880/2012; this Court had on that occasion, observed as follows:

“This writ petition is directed against the order dated 29.01.2014 passed by the Customs Excise and Service Tax Appellate Tribunal, whereby the petitioner’s application for condonation of delay being condonation application No. 57231/2013 in the Service Tax Appeal No. 56682/2013 was dismissed on the ground of there being no satisfactory explanation for condoning the delay. The fact of the matter is that the adjudication order was passed on 27.09.2007. The normal period during which the appeal could have been filed was three months. The appeal was actually filed on 03.04.2013 which ipso facto is hopelessly barred by limitation. The Tribunal has examined the matter and has come to the conclusion that there is no satisfactory cause shown by the petitioner for condoning the delay. We do not see any reason to interfere with the conclusion of the Tribunal in this matter. It must be noted that we are examining a writ petition and not an appeal. Consequently, we do not even have to examine as to whether the order passed by the Tribunal is right or wrong but as to whether it is legal or illegal. We do not find any illegality in the impugned order.

The writ petition is dismissed.”

11. In the above circumstances, for the first time, the petitioner asserted in reply to the demand made pursuant to the outstanding amounts payable that

MUL had already deposited the relevant amount. In alleged proof of this assertion, a certificate, dated 27.05.2009 by MSIL was relied upon. This certificate was sought to be used in answer to a demand by the Superintendent, Service Tax dated 18.02.2011. In the circumstances, the petitioner's constant refrain is that with the deposit of service tax liabilities by the MSIL/MUL, it cannot be asked to satisfy the outstanding demand as that would amount to double taxation. Now, whilst facially at least, the argument and claims of the petitioner seem merited, a closer analysis would reveal that they are essentially unsound. Concededly, the transaction, which is subjected to service tax, is the commission paid to MUL of which it shares a percentage with the petitioner. The service tax liabilities discharged by MUL/MSIL would refer to the amounts constituting the proportion of the commission it retains and discloses as the consideration/service received, for which tax is to be paid. There is no positive assertion that the amount or the portion of the commission, which is apparently of a substantial percentage to the petitioner are also deducted in service tax. In other words, the service tax returns of MUL/MSIL would reflect the amounts received and retained by it and not necessarily include within the turnover the amounts received in aggregate. Therefore, the petitioner's contention that MUL/MSIL had paid for the transaction so as to absolve it of its liability to satisfy the demands is clearly unfounded.

12. This Court is further of the opinion that the procedural history of the case is such that the petitioner had several statutory remedies – not just the appeal which it preferred belatedly but even an application for refund. If in reality it possessed proof to show that MSIL or someone else had discharged

the liability on its behalf, its inaction in availing those remedies implies that the matter attained finality some time in 2008-09. Its present attempt – a third one at that - to seek the same relief but by presenting a different dimension is clearly misconceived if not an abuse of the process of court. For these reasons, the writ petition cannot be entertained and is consequently dismissed.

**S. RAVINDRA BHAT
(JUDGE)**

**NAJMI WAZIRI
(JUDGE)**

MARCH 01, 2017

