M/s.Dauphine Travel Marketing Pvt.Ltd. And Ors. Vs Commissioner of Central Goods & Service Tax

Court: Customs, Excise And Service Tax Appellate, New Delhi

Date of Decision: July 10, 2024

Acts Referred: Finance Act, 1994 â€" Section 65, 65B(44), 65(E)(e), 65(47), 65(48), 65(105)(zze), 66D, 67(1), 73(1)
Service Tax (Determination of Value) Rules,) 2006 â€" Rule 5(1)
Transfer of Property Act, 1882 â€" Section 3

Hon'ble Judges: Binu Tamta, Member (J); Hemambika R. Priya, Member (T)

Bench: Division Bench

Advocate: Ashok Batra, Sakshi Khanna, Rajeev Kapoor

Final Decision: Allowed

Judgement

Binu Tamta, J

1. Separate appeals have been filed by the company, M/s.Dauphine Travel Marketing Pvt. Ltd., DTMPL and two Directors viz. Shri Joginder Solanki

and Shri Parveen Jain challenging the Order-in-Original No.96/2018-ST dated 08.10.2018 confirming the demand of service tax along with penalty and

interest.

2. The facts of the case are that M/s. Dauphine Travel Marketing Pvt. Ltd. is engaged in trading of goods and services by adopting the multi-

marketing model, by enrolling new members upon payment of one time fees. To become a member of the company, a person is required to pay one

time membership fees, which at the relevant time was Rs.5,500/- and after successful payment, DTMPL provides a suit length of 3 Mts., a voucher

comprising of 4 days and 3 nights stay in a hotel for two adults and 2 kids upto the age of 8 years from M/s. Countrywide Holidays Pvt. Ltd., (CHPL)

and an accidental insurance policy of Rs.4 lakh for one year from M/s. National Insurance Co. Ltd., (NSIC). The DTMPL purchases all these

items/vouchers in bulk quantities and vouchers for stay in a hotel is provided for Rs.125/- from CHPL with a minimum guarantee of Rs.60,000/- for

potential customers. The members so enrolled may bring one or two more members like him for membership in the appellant company and the newly

added members also get the same package of the suit length, holiday vouchers and insurance policy. In the event of addition of the subsequent

member, the initial member gets commission of Rs.1,000/Rs.2,000/- from DTMPL, which is a chain level of multiplying the membership, which

continues till a member reaches upto the 16th level, where he could receive the incentive/commission of Rs.1.51 crores and after that the chain

terminates. On receipt of the payment of the membership fee, the member/agent is issued a welcome letter intimating the user I.D., Pass Word, etc.

and also enables the agent to know about the money, which is being deposited with DTMPL by him or by other members of his chain.

2.1. According to the DTMPL, they are engaged in trading of goods and services on the basis of multi-marketing model. Under the said business

model, the appellant purchases suit length from various vendors and holiday vouchers comprising of 4 days and 3 nights from CHPL and insurance

policies in bulk from NSIC. The goods i.e. suit length is not identified with DTMPL. The hotel voucher was identifiable with CHPL and the accidental

insurance policy was identified with M/s. National Insurance Company. It appears that there is no Ã¢â‚¬Ëœagreementâ€â„¢ governing the terms and

conditions of the activity rather there is a booklet/brochure of the company giving the literature of the company and the guidelines for operating the

business activity and enrolling the new members.

3. On the basis of a search conducted by the DGCEI at the premises of the DTMPL, it was found that they were engaged in the business of multi-

level marketing and involved in enrolling the new members upon payment of a one-time membership fee. During the disputed period, DTMPL

received a consideration in its bank account through demand drafts, which were collected by the agents.

4. The show cause notice dated 23.11.2017 was issued for the period 2012-13 to 2016-17. The allegation was that DTMPL was engaged in providing

Ã¢â‚¬Å“Franchise ServiceÃ¢â‚¬ under Section 65(105)(zze) of the Finance Act, 1994, The Act for the period (upto 30.06.2012) and thereafter, the

Ã¢â‚¬Å“serviceÃ¢â‚¬ as defined under Section 65B(44) and Ã¢â‚¬Å“declared servicesÃ¢â‚¬ as defined under Section 65(E)(e) of the Act by adopting multi-level

marketing business but has not paid service tax on the amount received for providing the said service. Hence, demand of service tax amounting to

Rs.59,18,51,175/- was made on DTMPL along with interest and penalty and also on the Directors.

5. The main allegation as worded in the show cause notice are quoted below:-

Ã¢â‚¬Å“36 (g) Accordingly, all along from 01.04.2012 to 31.03.2017 M/s. DTMPL provided taxable service since,

(1) the collective aspects indicate that in the period from 01.04.2012 onwards there appear to be arrangements signifying existence of

agreements in which the joining members paid consideration as joining/membership fee to M/s DTMPL who granted representational right

covered in the scope of expression ""to sell or manufacture goods or to provide service or undertake anÃƒÂ½ process identified with M/s

DTMPL, whether or not a trade mark, service mark, trade name or logo or any such symbol, as the case may be, is involved"", leading to

existence of Ã¢â‚¬Å“FranchiseÃ¢â‚¬ as defined in Sec 65(47) of the Finance Act, and that M/s DTMPL entered into franchise with the member who

joined on payment of the one-time membership fee such that M/s. DTMPL were the ""franchisor"" and the member(s) were the ""franchisee"" as

defined in section 65(48) of the Act, and this amounted to service provided or to be provided to a franchisee by the franchisor in relation to

franchise which was a taxable service in terms of Section 65(105)(zze) of the Finance Act, 1994. It also appears that the Central

Government has not appointed the date with effect from which the provision of Section 65 A of the Finance Act (Chapter V) shall not apply;

and

(2) notwithstanding the above, the collective aspects also indicate that in the period upto 31.03.2017, M/s DTMPL offered a packaged

business opportunity plan for earning income to avail which one paid in advance a one-time membership fee. This was activity carried out

by a person for another for consideration. Notwithstanding this, it further also appears that in accepting the consideration of one-time

joining/membership fee, M/s DTMPL agreed to the obligation to do an act(s) so as to give effect tÃƒ the business plan, including acts of

providing to each member the enabling rights (including representational rights of the nature described in Section 65(47) of the Finance

Act), providing to each member the necessary support to enable the efficient execution of enrollment of new members (if introduced by the

existing members), providing assistance of training and/or the DTN/DTM Force to benefit the customer/member/distributor, paying the

eligible incentive/leadership commission/monthly incentive including to members' nominees. This constitutes a declared service under section

66E(e) of the Finance Act of ""agreeing to the obligation .. to do an act"". Since the package invariably consisted of a business

opportunity/plan, it was not an activity which can be said to constitute merely a transfer of title in goods or immovable property by way of

sale, gift or in any other manner or such transfer, delivery or supply of any goods which is deemed to be a sale, within the meaning of

clause (2GA) of Article 366 of the constitution. The nature of this activity and/or declared service provided by M/s. DTMPL was neither in

the Negative List of services under Section 66D nor covered under any of the exemptions and was covered under the definition of Service in

Section 65B(44) of the Finance Act, 1994.

(i) In the balance sheets M/s.DTMPL also reflect income on account of ""Pay Out Charges under the head other income. Sh. Parveen Jain,

Director in statement dated 06.02.2017 explained that the income on account of pay out charges accrued to them on account of amounts

which were deducted from the commission of the distributor as M/s DTMPL had to incur expenditure in the form of bank charges, office

expenses etc. in distributing the commission to the distributors. It appears that this expenditure has been incurred by M/s DTMPL in paying

commission/incentive to persons from amongst those who had paid the one-time membership fee, which it was obliged to do, and therefore

the income under payout charges forms a part of gross consideration under Section 67(1) read with Rule 5(1) of Service Tax

(Determination of Value) Rules,) 2006.Ã¢â‚¬â€‹

6. On adjudication the impugned order was passed confirming the allegations and the demand for the period 1.4.2012 to 31. 03.2017 under the

category of Ã¢â‚¬Å“Franchise ServiceÃ¢â‚¬ (upto 30.06.2012) and for the subsequent period, it was held that the activity undertaken by DTMPL falls under

the definition of Ã¢â‚¬Å“serviceÃ¢â‚¬ and hence, the same is taxable under Section 66B of the Act. But did not find necessary to consider whether the

activity is the case of deemed service under Section 66E(e) of the Act. The invocation of the extended period of limitation was held invokable and

accordingly, the penalties were imposed on DTMPL as well as on the Directors. Thus demand of Rs.52,97,77,051/-was confirmed after extending the

benefit of cum-tax. Being aggrieved, the present appeals have been filed before this Tribunal.

7. Heard Shri Ashok Batra and Ms. Sakshi Khanna, Chartered Accountants, learned Counsel for the appellant and Shri Rajeev Kapoor, learned

Authorised Representative for the respondent.

8. Shri A.K. Batra, learned counsel for the appellant challenged the show cause notice on the ground that it is vague and does not specify the

taxability of the given transaction so as to make the DTMPL liable to pay service tax. On merits, he submitted that the activity undertaken by the

DTMPL is not liable to tax under the category of Ã¢â‚¬Å“Franchise ServiceÃ¢â‚¬ for the period 1.4.2012 to 30.06.2012 and the decision in the case of M/s.

Amway India Enterprises Pvt. Ltd. Vs. Commissioner of Service Tax, 2015(39) STR 1006 (Tri.-Delhi) is not applicable as in the said case there was

an agreement between the distributor and the DTMPL, whereby the distributor were selling the products owned by M/s.Amway India Enterprises

(supra). However, in the present case, neither there is any agreement between DTMPL and the members nor they are selling the products of

DTMPL, as DTMPL is not the owner of any product. In other words, this package was not sold by them through the agents/distributors. The agents

were only paying the amount for becoming the agent or being incorporated in the business structure of DTMPL. The submission is that it is the

DTMPL, who is selling the package consisting of three products as referred above. The DTMPL is not providing any representational rights to sell or

manufacture the goods or to provide any service or to undertake any process and, therefore, the activity does not constitute Ã¢â‚¬Å“Franchise ServiceÃ¢â‚¬.

Learned counsel then submitted that for the period 1.4.2012 to 31.3.2017, the activities undertaken by DTMPL is not liable to service tax under the

category of Ã¢â‚¬Ëœdeclared serviceÃ¢â‚¬â„¢ under Section 66E(e) of the Act, as DTMPL is not under any obligation to do an act or to tolerate an act. He

further emphasized that DTMPL is only a trader of products or services and selling the same to the customers and further giving them an option for

acting as marketing agent for DTMPL and it is they, who are under an obligation to satisfy certain criteria of the commission. On that basis, he

submitted that the activity of buying and selling the products or services is not exigible to service tax.

9. Learned counsel for the appellants submitted that at the most, the right to become marketing agent, on introduction of two customers, is an

actionable claim as defined under Section 3 of Ã¢â‚¬ËœTransfer of Property ActÃ¢â‚¬â„¢ and hence, the same is outside the ambit of service tax.

10. Learned counsel for the appellants next challenged the valuation of the total tax liability. He submitted that the membership fee is not a

consideration for any product provided by DTMPL but is a consideration for becoming an agent and the payment charges are the deductions from the

commission earned by the agents. Lastly, the learned counsel for the appellants challenged the invocation of extended period of limitation and

imposition of penalty, as according to him, the DTMPL believed that their business activity was not exigible to service tax. It is also his submission that

the show cause notice is barred by limitation, as the same is issued after a period of more than 6 years and, therefore, the liability, if any, shall be

computed only for the period between 23.05.2016 to 23.11.2017 as the show cause notice is required to be issued within a period of 18 months as per

Section 73(1) of the Act.

11. Learned Authorised Representative for the respondent relied on the finding of the Adjudicating Authority and the decision of M/s. Amway India

Enterprises Pvt. Ltd. (Supra).

12. In nutshell, the allegation of the Revenue is that the activity undertaken by DTMPL of enrolling the members falls under the category of

Ã¢â‚¬Å“Franchise ServiceÃ¢â‚¬ for the period during the Pre-Negative Era and as Ã¢â‚¬Å“declared servicesÃ¢â‚¬ under Section 66E(e) for the period Post-

Negative Era. To bring within the ambit of Ã¢â‚¬Ëœservice taxÃ¢â‚¬â„¢, it is necessary to analyse the specific factors or the principles, which would constitute

that services. The basic principle for a service to be taxable is that it is necessary that there should exist a service provider and a service recipient

relationship between the two parties, which, in the present case is missing.

13. From the impugned order, we find that there is no mention of any services, which DTMPL was liable to perform having received the amount,

which has been taken to be as a consideration and in absence thereof, DTMPL cannot be termed to be a Ã¢â‚¬ËœService ProviderÃ¢â‚¬â„¢, providing any

services to the members /agents. Though the receipt of membership fee by DTMPL can be regarded as income but it cannot be treated as a

consideration for rendering any services. In other words, the amount of Rs.5,500/- received by DTMPL is not a consideration in lieu of any services.

14. Without going into detailed discussion, we are of the view that the impugned order does not show any consideration whether the activity performed

by DTMPL satisfies the basic factors to be classified as Ã¢â‚¬Å“Franchise ServicesÃ¢â‚¬ or as Ã¢â‚¬Å“declared servicesÃ¢â‚¬ under Section 66E(e) of the Act.

The findings as recorded by the Adjudicating Authority are insufficient to impose levy of service tax in the present case.

15. We are afraid to say that the Adjudicating Authority have virtually copied the entire show cause notice and merely quoted the provisions of law

but failed to apply its mind to the applicability of the provisions of the Act defining the two services with reference to the actual activity undertaken by

DTMPL. In fact, it is not even evident as to who is the service provider or who is the service recipient and what is the nature of the services, for

which the consideration is being paid, if any. Instead of repeating the show cause notice in extenso, the Adjudicating Authority being the Original

Authority ought to have passed the order on a proper appreciation of the fundamentals of levying the service tax.

16. In the facts and circumstances of the case, we find that the proper course is to remand the matter back to the proper Adjudicating Authority to

decide the matter afresh giving substantial reasons as to how the activity of enrolling the members amounts to rendering the services for the purpose

of levying the service tax and consequently, the incidental issues of computation, limitation, interest and penalty on DTMPL and its Directors may be

re-considered. Similarly the plea of the show cause notice being vague has been dealt with by the Adjudicating Authority by merely stating that

extensive investigation has been conducted by the Department. We do not feel that it is the correct approach, as conducting investigation by the

Department is one thing and raising allegations in the show cause notice with reference to the statutory provisions and linking to the facts of the case

is another thing. Hence, the Adjudicating Authority on remand may de-novo examine the submissions of the learned counsel for the appellant that the

show cause notice is vague. We have not expressed any opinion on merits as to whether the appellant is liable to pay service tax and what has been

discussed is only for the purpose of remanding the matter. The Adjudicating Authority may consider the allegations raised by the Revenue with

reference to the provisions of law in the light of the facts of the present case and uninfluenced by any observation made in this order. The impugned

order is, therefore, set aside and the appeals are allowed by way of remand.

[Order pronounced on 10th July, 2024]