IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

TAX APPEAL No.456 of 2010

==========

COMMISSIONER OF SERVICE TAX, AHMEDABAD - Appellant(s)
Versus
M/S BACHA FINLEASE - Opponent(s)

==========

Appearance:
MR DARSHAN M PARIKH for Appellant(s) : 1,
None for Opponent(s) : 1,

==========

CORAM : HONOURABLE MS.JUSTICE HARSHA DEVANI

and

HONOURABLE MR.JUSTICE H.B.ANTANI

Date: 12/01/2011

ORAL ORDER

(Per: HONOURABLE MS.JUSTICE HARSHA DEVANI)

1. In this appeal under Section 35G of the Central Excise Act, 1944, the Commissioner of Service Tax, Ahmedabad has challenged the order dated 11th August, 2009 made by the Customs, Excise and Service Tax Appellate Tribunal West Zonal Bench, Ahmedabad, (the Tribunal) proposing the following question:-

> *"Where the Tribunal was right in holding that the Notification No.6/05-ST, dated 01.03.2005 was applicable in the facts of the case and whether the Assessee was entitled to exemption from payment of Service Tax when assessee being DSA (Direct Selling Agent) of the registered banks was in business of promoting business of a 'registered'/Branded' entity and were therefore liable to pay Service Tax without any exemption?"*

2. The respondent-assessee is engaged in the

business of promotion/marketing of business of ICICI Bank Ltd. and getting commission/incentive from ICICI Bank Ltd. This type of business and service is covered under the category of Business Auxiliary Services. The Directorate General of Central Excise Intelligence on the basis of information, initiated proceedings against the respondent-assessee by issuance of show cause notice, which culminated into an order made by the adjudicating authority demanding service tax along with interest and penalties. Being aggrieved, the assessee went in appeal to the Commissioner (Appeals) who allowed the appeal. The revenue carried the matter in appeal before the Tribunal, which came to be dismissed.

3. Mr. Darshan Parikh, learned senior standing counsel, appearing on behalf of the appellant has reiterated the grounds stated in the memo of appeal.

4. As can be seen from the order made by the Commissioner (Appeals), before the Commissioner (Appeals), on behalf of the assessee reliance had been placed upon Notification No.6/2005-Service Tax dated 1st March 2005 issued in exercise of powers under sub-section (1) of section 93 of the Finance Act, 1994 whereby the Central Government has exempted taxable services of aggregate value not exceeding four lakh rupees in any financial year from the whole of the service tax leviable

thereon under section 66 of the Finance Act. The Commissioner (Appeals) took note of the fact that in the present case the aggregate value of services, quantified by the department comes to Rs.1,98,543/- which is below Rs.4,00,000/- and held that the assessee was eligible to get exemption under the said notification and allowed the appeal with consequential relief.

5. As can be seen from the impugned order of the Tribunal, before the Tribunal it was contended on behalf of the revenue that since the plea as regards availability of the above notification was not taken before the original adjudicating authority, the Commissioner (Appeals) was not justified in extending the benefit of the notification to the assessee. The Tribunal has repelled the said contention on the ground that claiming benefit under a notification is a legal plea and can be raised for the first time even at appeal stage. The Tribunal was of the view that merely because the assessee did not claim the same before the original Adjudicating Authority and raised the issue for the first time before the Commissioner (Appeals), cannot be held to be a ground for denying the benefit of the notification, if the same is otherwise available.

6. Facts are not in dispute. It is an admitted position that the aggregate value of services in the case of the assessee as quantified by the

department is Rs.1,98,543/-. Notification No.6/2005-Service Tax dated 1st March, 2005 exempts taxable services of aggregate value not exceeding four lakh rupees in any financial year from the whole of the service tax leviable thereon under section 66 of the Finance Act. In the present case, admittedly the aggregate value of taxable services in the whole of the financial year is below Rs.4,00,000/-. In the circumstances, no infirmity can be found in the impugned order of the Tribunal in holding that merely because the benefit under the notification was not claimed before the original Adjudicating Authority is no ground for denying benefit under the notification if the assessee is otherwise entitled to the same. On behalf of the revenue nothing has been pointed out to indicate that the assessee is otherwise not entitled to the benefit of the notification. In the memo of appeal a ground has been raised that the assessee was promoting the business of a registered/branded entity and was liable to pay service tax from the first amount. However, no such contention appears to have been raised before the Tribunal. Moreover, a perusal of the show cause notice indicates that no such ground has been taken in the show cause notice also. In the circumstances, since the said ground does not arise out of the impugned order of the Tribunal, it is not permissible for the appellant to take such a plea for the first time

before this Court, more so, since the same would also involve disputed questions of fact.

7. In view of the above discussion, it is not possible to state that the impugned order gives rise to any question of law, much less, a substantial question of law, warranting interference. The appeal is, accordingly, dismissed.

(HARSHA DEVANI, J.)

(H.B.ANTANI, J.)

Hitesh