CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
<u>ALLAHABAD</u>

REGIONAL BENCH – COURT NO.I

Service Tax Appeal No.715 of 2011

(Arising out of Order-in-Original No.27/Commr./LKO/ST/2010 dated 31/08/2010 passed by Commissioner, Customs, Central Excise & Service Tax, Lucknow)

M/s U.P. State Food & Essential Commodities Corporation Ltd. …..Appellant

17, Gokly Marg, Lucknow

VERSUS

Commissioner of Central Excise, Lucknow …..Respondent

7A, Ashok Marg, Lucknow (U.P.)

<u>APPEARANCE:</u>

Shri Shambhu Chopra, Advocate for Appellant
Shri Sandeep Kumar Singh, Authorized Representative for Respondent

CORAM :
Hon'ble Mrs. ARCHANA WADHWA, MEMBER (JUDICIAL)
Hon'ble Mr. ANIL G. SHAKKARWAR, MEMBER (TECHNICAL)

DATE OF HEARING : 26 June, 2019
DATE OF DECISION : 26 June, 2019

FINAL ORDER NO. **71285 / 2019**

ARCHANA WADHWA

After hearing both the sides, we find that the appellant, which is a Government Company, is primarily engaged in procurement/purchase of food grains and essential commodities etc and distribution of the same to the financially weaker section of the society. Apart from that they entered into an agreement with M/s Coal India Ltd. for supply of coal, on their behalf, to various brick fields. For the said purpose they were paid consideration by M/s Coal India Ltd.

2. Revenue by entertaining a view that the said services provided by the appellant to M/s Coal India Ltd. falls under the category of 'Business Auxiliary Service' and the appellant was liable to pay service tax on the same raised the demand for the period 2005-06 to 2007-08, by way of issuance of show cause notice dated 24 August, 2009 by invoking longer period of limitation.

3. The appellant during the course of adjudication took a categorical stand that they are not providing any service to M/s Coal India Ltd. and distribution of the coal on behalf of the said M/s Coal India Ltd. in terms of their agreement is their statutory duty. As such, they are performing the sovereign function and no service tax can be confirmed against them. They also relied upon boards Circular No.89/7/2006-ST dated 18 December, 2006 laying down that the fee charged for the sovereign activity would not be taxable. The demand was also assailed on the point of limitation.

4. The pleas raised by the appellant do not find favour with the Adjudicating Authority who vide his impugned order confirmed the demand of duty of Rs.45,98,065.00/- (Forty five lakh ninety eight thousand sixty five only) and imposed penalties under Section 77 & 78 of the Finance Act, 1994. It is seen that while imposing penalties Commissioner observed that penalty has been reduced taking lenient view and he has given the noticee, the benefit under Section 80 of the Finance Act, 1994. The said order of the Commissioner is impugned before us by the assessee.

5. Learned advocate Shri Shambhu Chopra appearing on behalf of the appellant has reiterated their stand of reliance

on the Boards Circular and submitted that the activity of the appellant being a sovereign activity was not taxable.

We have examined the said circular and find that the same relates to the fees charged by Government Authorities for doing the Sovereign Act, for which the said authority were responsible. Such fees charged by the Authorities stands further deposited by them in the Government treasury. In the present case the prime function of the appellant is not the distribution of coal by M/s Coal India Ltd. The said activity being undertaken by them in terms of the contract by M/s Coal India Ltd. for which purpose they are being paid by M/s Coal India Ltd. It is not fee, which is being deposited by them to Government exchequer but is consideration, which is being retained by them. As such, Board's circular is not applicable.

6. On going through the definition of 'Business Auxiliary Service', we note that the appellant's services are in relation to provisions of services on behalf of M/s Coal India Ltd. to distribute the coal for which duty is being assigned to the appellant on a consideration. Having provided such services on behalf of M/s Coal India Ltd. against consideration, the appellant have admittedly provided services falling under the category of 'Business Auxiliary Service'. Learned advocate has further referred to the fact that in the year 2008 w.e.f. 01 April, 2008 they were appointed as nodal agency by M/s Coal India Ltd. in which case it becomes their sovereign function to distribute the coal. The said plea of the appellant stands considered by the Adjudicating Authority who has observed that inasmuch as the demand is prior to 01 April, 2008 when appellants were appointed as nodal agency by M/s Coal India Ltd, it has to be held that prior to the said date they were

providing services covered by the definition of "Business Auxiliary Service". We find ourselves in agreement with the said argument of the Adjudicating Authority. We find no merits in the argument of the learned advocate Shri Shambhu Chopra that they have to be treated as a nodal agency w.e.f. 2005 itself when they started providing such services in terms of the letter of Chief Secretary of Uttar Pradesh issued to the District Magistrate directing that the appellant should be appointed as an agent for distribution of the coal. Admittedly said letter cannot be considered as a letter appointing the appellant as a nodal agency which was specifically done in the year April, 2008 itself.

7. The appellant have further referred to Notification No.13/2003-ST dated 20 June, 2003 which grants exemption to the commission earned by the commission agents. The terms commissions agent also stand explained in the said notification as a person who causes sale or purchase of the goods on behalf of another person for a consideration. Admittedly in the present case the appellant is neither doing the sale nor the purchase of any goods on behalf of any other person and as such cannot be held to be a commission agent. Their activity is for supervising the distribution of coal of M/s Coal India Ltd. against payments. As such, we find that the notification in question is not applicable to the facts of the present case.

8. Having held against the appellant on merits, we proceed to decide the limitation aspect of the demand being barred by limitation. The demand stands raised by way of issuance of show cause notice dated 24 August, 2009 for the period 2005-06 to 2007-08 was till 31 March, 2008 by invoking the longer period of limitation. Apart from the fact that the appellant is a public sector undertaking of

Government of Uttar Pradesh and as such cannot be attributed with any *mala fide,* we also note that the Commissioner in his impugned order has observed and thus I find that noticee may not have suppressed the facts, but because of their omission by not applying for registration non-filing of proper return, non-payment of service tax, non supply of proper information despite repeated correspondence by investigating agency and non-appearance in compliance of summons have lead to the suppression of facts by them. She has further observed that parties application seeking clarification from the department regarding their services is nothing but delaying tactics on the part of the noticee.

In the conclusion part of his order, it stands observed as under:-

> *"Keeping in view the facts that in a Government owned corporation there is no personal profit motive involved and also keeping in mind the fact the assessee tried to find out from the Department, the status of their tax liability I hold a lenient view regarding personal penalty on the corporation under Section 78 of the Finance Act, 1994. I hold that benefit of Section 80 can be extended in view of the discussion above."*

We do not find ourselves in agreement with the said findings of the Commissioner. On one hand the Adjudicating Authority is observing that there cannot be any suppression on the part of the assessee and on the other hand the longer period is being invoked on the sole ground of not taking of registration and non-filing of returns. It is well settled law that longer period of limitation is available to the Revenue only if there is a *mala fide* on the part of the assessee and evasion of tax with an intention not to pay the same. In the present case the Adjudicating Authority having himself held that there was no suppression on the part of the appellant, the longer period should not have been invoked. Apart from that we also note that the Commissioner has extended the benefit of Section 18 of the Finance Act to the appellant even though by extending such benefit she has imposed lesser penalty whereas such section requires no penalty. In any case having extended the benefit of Section 18 to the appellant, the Commissioner has himself agreed that there was no suppression or *mala fide*. Inasmuch as the demand in the present appeal stands raised beyond the period of one year, we hold the entire demand is barred by limitation and is required to be set aside. For the same reason, penalty imposed on the appellant is required to be set aside. We order accordingly and appeal is allowed in above terms.

(Dictated and Pronounced in open Court)

Sd/-
(Archana Wadhwa)
Member (Judicial)

Sd/-
(Anil G. Shakkarwar)
Member (Technical)

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