CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
BANGALORE

Regional Bench COURT-2

Service Tax Appeal No. 857 of 2010

[Arising out of the Order-in-Revision Nos. 02/2010 dated 23.02.2010 passed by the Commissioner of Central Excise & Service Tax, Mangalore]

M/S. Urmila Kothari & Co
C/o West End Minerals,
Baithkol, Karwar, Karnataka **......Appellant**

VERSUS

Commissioner of Central Excise & Service tax,
Mangalore
7th Floor, Trade Centre, Bunts Hostel Road,
Dakshina Kannada,
Karnataka – 575003 **.....Respondent**

AND

Service Tax Appeal No. 3097 of 2011

[Arising out of the Order-in-Appeal No. 131/2011 dated 29.08.2011 passed by the Commissioner of Central Excise(Appeals), Mangalore]

M/S. Urmila Kothari & Co
C/o West End Minerals,
Baithkol, Karwar **......Appellant**

VERSUS

Commissioner of Central Excise & Service Tax
7th Floor, Trade Centre, Bunts Hostel Road,
Dakshina kannada,
Karnataka – 575003 **.....Respondent**

Appearance:
Shri. M.S. Nagaraja, Advocate for the Appellant
Shri. Rajesh Shastry, Authorized Representative for Respondent

Coram:

Hon'ble Mr. P.A. Augustian, Member (Judicial)
Hon'ble Mr. Pullela Nageswara Rao, Member (Technical)

Final Order Nos. 21704-21705 of 2024

Date Of Hearing:14.06.2024
Date Of Decision:14.06.2024

Per: Pullela Nageswara Rao

M/s. Urmila Kothari & Co., the appellant was issued a show cause notice (SCN) alleging that the services of providing 'loaders with operators' for loading of salt and rock phosphate received by M/s. Solaris Chem Tech at Karwar Port wharf, loading/unloading and stacking at their salt godown are classifiable under 'Cargo Handling Service' as defined under section 65(23) r/w section 65(105)(zr) of the Finance Act, 1994.

2. The show cause notice was adjudicated and the proceedings were dropped by the Adjudicating Authority holding that the services provided are rightly classifiable under "Supply of Tangible Goods" and this service is leviable to service tax only from 16.05.2008. The Commissioner of Central Excise and Service Tax reviewed the order of the original Adjudicating Authority under Section 84 of the Finance Act, 1994 and passed the impugned Order-in-Revision No. 02/2010 dated 23.02.2010, wherein, *inter alia* it was held that; the service provided by M/s Urmila Kothari & Company is classified under "Cargo Handling Service", confirmed the service tax demand under proviso to section 73(1) along with interest under section 75 and imposed penalties under Section 77 and 78 of the Finance Act, 1994. Aggrieved by the impugned order the appellant filed Appeal No. E/857/2010, before this Tribunal.

3. The appellants in the appeal memorandum have submitted that M/s. Solaris Chem Tech Ltd (earlier M/s. BILT Chemicals Ltd.) awarded a contract to the appellant for providing of 'loader with operator' for loading of salt and rock phosphate at Karwar Port Wharf and for shifting of salt, making ramps and other allied activities in their salt godown. The show cause notice relied on the agreement dated 31.12.2001, which was further extended to 05.09.2005; as per the nature and scope of the agreement/contract the appellant has to provide 'loader with operator' in good condition and the payment for the loader with operator is based on the bill of lading quantity @ Rs.12/- per PMT and in respect of salt and rock phosphate for the loading and for shifting of salt, making ramps and other allied activities in their salt godown, they are paying Rs. 971/- per hour for the work done by the loader; the rates are inclusive of running and operating cost, the appellant has to ensure regular maintenance of the loader and trouble free service; in case of loader breakdown the appellant shall immediately arrange for repair and maintenance and replace the loader, if in case it is not repairable; the appellant shall ensure to have all statutory documents of the loader like licence from the RTO, road taxes, insurance and tax certificates; the scope of agreement is for providing 2(two) loaders with operators and not for service of loading or unloading of cargo; the agreement is for supply of 'loaders with operators' and the subsequent use of loaders by the service receivers is not relevant to determine the nature and classification of taxable service; the Adjudicating Authority in his order as recorded that the appellant has supplied loaders with operators to M/s. Solaris Chem Tech Ltd., while retaining right of possession and effective control; the payments are made based on the

bill of lading quantity and stacking of the goods into godown; therefore what they have supplied is only 'supply of tangible goods' service and not 'cargo handling service', hence, the original Adjudicating Authority has dropped the proceedings.

4. The learned counsel during hearing reiterated the submissions in the appeal memorandum and further submits that; The adjudicating authority has recorded that M/s. Urmila Kothari and company has supplied loaders with operators to M/s. Solaris Chem Tech Limited, while retaining the effective control and right of possession; the payments were received on the tonnage of goods handled by the loader as per the quantity in the bill of lading and stacking of goods at the godown was on the basis of hours of work done by loader; therefore what was supplied was only 'tangible goods service' and not 'cargo handling service', accordingly the proceedings were dropped; the Commissioner in the impugned Revision Order has recorded the nature of transactions and has concluded that the object of the contract was not supply of the loaders but handling of the cargo and that the equipment supplied by the service provider are used specifically for loading, transportation, unloading, stacking, etc.; hence the learned Commissioner has admitted that the service provider has arranged and supplied loaders with operators and the nature of service was supply of loaders with operators and not execution of work of loading or stacking; the pith and substance of the agreement was supply of 'loaders with operators' and maintaining them in good condition; hence the object and subject of the contract was hiring of Loaders with operators; both the contracts did not impose any further obligation on the supplier of loaders; the contractual obligation of supplier was only supply of

loaders with operators in good working condition, the nature of subsequent use of the loader by the service receiver is not relevant to determine the nature and classification of the taxable service; the service of supply of tangible goods ends with the supply of loaders with operators; the purpose and manner of utilization of the loaders by the recipient of service does not alter the nature and scope of services provided by the appellant; it is well settled law the subject and object of the contract has to be ascertained from the terms and conditions of the contract; The Hon'ble Supreme Court in the case of **M/s. Super Poly Fabriks Ltd., Vs. CCE- 2008 (10) STR (SC)**, has held that there cannot be any doubt whatsoever that a document has to be read as a whole, the purport and object with which the parties thereto enter into a contract are to be ascertained only from the terms and conditions thereof neither the nomenclature of the document nor any particular activity undertaken by the parties to the contracts would be decisive.

5. In this regard the learned counsel draws our attention to the definition of 'cargo handling service' which is as under;

> *Section 65 (23) "cargo handling service" means loading, unloading, packing or unpacking of cargo and includes cargo handling services provided for freight in special containers or for non-containerized freight, services provided by a container freight terminal or any other freight terminal, for all modes of transport and cargo handling service incidental to freight, but does not include handling of export cargo or passenger baggage or mere transportation of goods.*

Section 65 (105) (zr) - "Taxable service" means any service provided or to be provided to any person by a cargo handling agency in relation to cargo handling services.

6. The learned counsel submits that supply of Loaders with operators by the service receiver cannot be said to be cargo handling service. Further the learned counsel submits that the activity of "supply of tangible goods" for use is a taxable service from 16.5.2008. Section 65(105) (zzzzj) of the Finance Act, 1994 defines taxable service of supply of tangible goods as under;

"Taxable service" means any service provided or to be provided to any person, by any other person in relation to supply of tangible goods including machinery, equipment and appliances for use, without transferring right of possession and effective control of such machinery, equipment and appliance.

7. Further the learned counsel draws our attention to CBEC Circular *No. M.F.(D.R.) Letter D.O.F. No. 334/1/2008-TRU dated 29.2.2008 wherein it is clarified in Para 4.4 as under:*

4.4 Supply of tangible goods for use service

4.4.1 Transfer of right to use any goods is leviable to sales tax/VAT as deemed sale of goods (Article 366 (29A) (d) of the Constitution of India). Transfer of Right to use involves transfer of both possession and control of goods to the user of the goods.

4.4.2 Excavators, wheel loaders, dump trucks, crawler carriers, compaction equipment, cranes, etc., offshore construction vessels and barges, geo- technical vessels, tug and barge flotillas, rigs and high value machineries are supplied for use, with no legal *right of possession and effective control* ***. Transaction of allowing another person to use the goods, without giving legal right of possession and effective control, not being treated as sale of goods, is treated as service.***

4.4.3 ***Proposal is to levy Service tax on such services provided in relation to supply of tangible goods including machinery, equipment and appliances for use with no legal right of possession or effective contro****l. Supply of tangible goods for use and leviable to VAT/sales tax as deemed sale of goods, is not covered under the scope of the proposed service. Whether a transaction involves transfer of possession and control is a question of fact and is to be decided based on the terms of the contract and other material facts. This could be ascertainable from the fact whether or not VAT is payable or paid."*

8. The learned counsel submits that; the appellant has supplied loaders with operators for use by the service receiver round the clock during salt and rock phosphate shipments and at their godown for shifting salt, proper stacking and making ramps to stack the salt properly; the loaders are supplied without transferring the right of possession and effective control; the manner and extent of use of the loaders and operators was by the service receiver.

9. The learned counsel relied on the decision of Hon'ble High Court of Bombay in the case of **Indian National Ship Owners Association Vs. Union of India-2009 (14) STR 289 (Bom),** wherein the Hon'ble High Court has analyzed the scope of taxable service under "Supply of Tangible Goods" vis-a-vis service in relation to "mining of minerals, oil or gas". Paras 37 and 38 The judgment are reproduced below:

"37. Entry (zzzzj) is entirely a new entry. Whereas entry (zzzy) covers services provided to any person in relation to mining of mineral, oil or gas, services covered by entry (zzzzj) can be identified by the presence of two characteristics namely (a) supply of tangible goods including machinery, equipment and appliances for use, (b) there is no transfer of right of possession and effective control of such machinery, equipment and appliances. According to the members of the 1st petitioner, they supply offshore support vessels to carry out jobs like anchor handling, towing of vessels, supply to rig or platform, diving support, firefighting etc. Their marine construction barges support offshore construction, provide accommodation, crane support and stoppage area on main deck or equipment. Their harbour tugs are deployed for piloting big vessels in and out of the harbour and for husbanding main fleet. They give vessels on time charter basis to oil and gas producers to carry out offshore exploration and production activities. The right of possession in and effective control of such machinery, equipment and appliances is not parted with. Therefore, those activities clearly fall in entry (zzzzj) and the services rendered by the members of the 1st petitioner have been specifically brought to the levy of Service Tax only upon the insertion of this new entry.

38. If the Department's contention is accepted that would mean that the activities of the members of the 1st petitioner are covered by entry (zzzy) and entry (zzzzj). Such a result is difficult to comprehend because entry (zzzzj) is not a specie of what is covered by entry (zzzy). Introduction of new entry and inclusion of certain services in that entry would presuppose that there was no earlier entry covering the said services. Therefore, prior to introduction of entry (zzzzi), the services rendered by the members of the 1st petitioner were not taxable. Creation of new entry is not by way of amending the earlier entry. It is not a carve out of the earlier entry. Therefore, the services rendered by the members of the 1st petitioner cannot be brought to tax under that entry."

10. The learned counsel also relied on the case of **CCE Vs. Adani Gas Ltd-2020 GSTL 145 (SC),** wherein the honorable Supreme Court has analyzed the scope of the service of 'supply of tangible goods' as under;

> *"20. The taxable service is defined as a service which is provided or which is to be provided by any person to another "in relation to supply of tangible goods". The provision indicates that the goods may include machinery, equipment or appliances. The crucial ingredient of the definition is that the supply of tangible goods is for the use of another, without transferring the right of possession and effective control "of such machinery, equipment and appliances".*
>
> *Hence, in order to attract the definition of a taxable service under sub-clause (zzzzj), the ingredients that have to be fulfilled are :*
>
> *(i) The provision of a service;*
>
> *(ii) The service is provided by a person to another person;*
>
> *(iii) The service is provided in relation to the supply of tangible goods, including machinery, equipment and appliances;*
>
> *(iv) There is no transfer of the right of possession;*
>
> *v) Effective control over the goods continues to be with the service provider; and*
>
> *vi) The goods are supplied for use by the recipient of the service.*
>
> *There is an element of service which is the foundation for the levy the tax."*

11. The learned counsel submits that the activity of supply of loaders with operators is correctly classifiable under supply of tangible goods attracting levy of service tax from 16.05.2008, consequently the impugned order passed under section 84 of the Finance Act, 1994 revising Order-in-Original No.13/2009 AC dated 07.05.2009 and confirming the activity under the 'cargo handling service' with

consequential demand of service tax with interest and penalties is not correct on facts and in law.

12. Further the learned counsel submits that the show cause notice for the period December 2003 to February 2007 invoking the larger period of limitation was issued on 04.06.2008. The appellants voluntarily paid the entire amount of service tax amounting to Rs. 5,73,813/- as soon as the officers from the department advised payment of service tax; the payment of service tax and interest established the bona fides of the appellant; further the demand amount deposited stands appropriated in the Order-in-Revision dated 23.02.2010; it is an admitted fact that the learned adjudicating authority passed Order-in-Original No. 13/2009 dated 07.05.2009 and held that the appellants have provided service of supply of tangible goods, which was not liable to service tax for the period prior to 16.05.2008 and dropped the proceedings; the learned Commissioner initiated revision of the order of adjudicating authority in terms of section 84 of the Finance Act, 1994 and passed the impugned order holding contrary view and confirmed the demand of service tax under 'cargo handling service'; when the two adjudicating authorities have held diametrically opposite views and the appellant had paid the service tax and interest there is no basis and merit in allegation of fraud, collision, willful misstatement or suppression of facts or contravention of the provisions of the Finance Act, 1944 with intention to evade payment of tax.

13. In this regard the learned counsel submits that and there are conflicting views and scope for bona fide doubt as to taxability of an activity, the allegations of willful misstatement or suppression of facts

are contravention of the provisions of Finance Act, 1944 with intention to evade payment of tax or not sustainable, therefore in the facts of the present case there is no basis to invoke larger period of limitation. The entire demand of service tax is barred by limitation. The learned counsel in support of the above contention relied on the following decisions;

(i) Kiran Ispat Udyog Vs. CCE, Rajkot 2015 (321) ELT 182 (SC)

(ii) Jaiprakash Industries Vs. CCE, Chandigarh 2002(146) ELT481 (SC)

(iii) Larsen & Toubro Ltd., Vs. CCE, Pune-2007 (211) ELT 513 (SC)

(iv) Padmini Products. Vs. CCE- 1989 (43) ELT 195 (SC)

14. The learned counsel submits that in view of the contrary views and the facts of the case the penalties are required to be set aside in view of section 80 of the Finance Act, 1994. In this regard the learned counsel has relied on the decision of the Larger Bench of this Tribunal in M**/s.ETA Engineering Ltd., Vs. CE- 2006 (3) STR 429 (Tri- LB).**

Appeal No. ST/3097/2011 -Refund of Service Tax and Interest:

15. The facts of this appeal are that the appellants have deposited service tax and interest totally amounting to Rs. 5,73,138/- on the instructions of the officers of the department pending adjudication, the show cause notice was adjudicated, and it was held that supply of 'loaders with operators' was taxable under 'supply of tangible goods' attracting levy of service tax from 16.05.2008 and dropped further proceedings. Based on the above order the appellant submitted application for refund of Rs. 5,78,813/- on 07.09.2009. In the meantime, the Commissioner initiated revision proceedings under

section 84 of the Finance Act, 1994 and passed Order-in-Revision No. 02/2009 dated 23.02.2010 and appropriated the amounts deposited.

16. The adjudicating authority issued a show cause notices dated 29.10.2009 for rejection of the claim of refund and passed Order-in-Original No. 06/2010(R) AC dated 04.03.2010 rejecting their refund claim based on the Order-in-Revision No. 02/2010 dated 23.02.2010. The appellant challenged Order-in-Revision No. 02/2010 dated 23.02.2010 by filing an appeal No. ST/857/2010 before the Tribunal. The appellants also challenged Order-in-Original No.06/2010 AC dated 04.03.2010 before the Commissioner (Appeals) and the Commissioner (Appeals) vide the impugned Order-in-Original No.131/2011 dated 29.08.2011 rejected the appeal. The appellant submits that Rs. 5,73,813/- appropriated in Order-in-Revision No. 02/2010 dated 23.02.2010 is required to be refunded along with interest as applicable. The appellant submits that they are entitled to interest for the inordinate delay in refund of the amount in terms of section 11B of the Central Excise Act, 1994 as made applicable to service tax and the interest is payable from the date of expiry of 3(three) months from the date of submission of the application for refund on 07.09.2009 till the date of payment, in this regard the learned counsel relied on the following judgments;

(i) Ranbaxy Laboratories Ltd Vs. UOI -2011 (273) ELT 3 (SC)

(ii) UOI Vs. Hamdard (Waqf) Laboratories 2017 (51) STR 214 (SC)

17. The learned Authorized Representative (AR) for the Revenue reiterated the findings in the impugned order.

18. Heard both sides and perused the records.

19. We find that in this case the original adjudicating authority dropped the proceedings initiated against the appellant classifying the services provided by the appellant under 'cargo handling services' and held that the services are rightly classifiable under 'Supply of Tangible Goods' service leviable to service tax from 16.05.2008. Thereafter the order of the adjudicating authority was reviewed by the Commissioner and passed the Order-in-Revision No. 02 /2010 dated 23.02.2010 and held that the services provided by the appellant are rightly classifiable under 'cargo handling service.' The appellant based on the order of adjudicating authority dropping the proceedings has filed refund claim for the amount of Rs. 5,73,813/- which was paid and appropriated in the Order-in-Revision dated 23.02.2010. We find that the services provided by the appellant by supply of 'loaders with the operator' by retaining the right of possession and effective control are classifiable under 'Supply of Tangible goods' leviable to service tax from 16.05.2008. We also find that the appellants have supplied the loaders with operators and the contract between the appellant and M/s. Solaris Chem Tech is for supply of loaders with operators, there is no mention in the agreement as to the use of the loaders by the service receiver. We find that the appellant has relied on the case laws cited, supra wherein it is held that the contract has to be examined as a whole and the purpose and object of the contract has to be taken into consideration for classifying any of the service. We also find that the payment for the services provided by the appellant is based on the bill of lading quantity with regard to loading on the ship at Karwar Wharf port and on the basis of the man hours with respect of stacking and ramp formation at the godown of the service receiver. Further we find

that the agreement also covenants that in case of any breakdown of the loaders it is the responsibility of the appellant to send the replacement therefore we find the possession and effective control of the loaders was always with the appellant.

20. In view of the above discussion the Order-in-Revision classifying the services under 'cargo handling service' is not sustainable and the services are classifiable under 'supply of tangible goods' service leviable to service tax from 16.05.2008 as held by the adjudicating authority.

21. Accordingly, the impugned Order-in-Revision No. 02/2010 dated 23.02.2010 is set aside.

22. Consequently, Appeal Nos. ST/857/2010 and ST/3097/2011 are allowed with consequential relief, if any, as per law.

(Order pronounced in open court on 14.06.2024)

(P.A.Augustian)
Member (Judicial)

(Pullela Nageswara Rao)
Member (Technical)

Sasi