CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH
BANGALORE

Appeal(s) Involved:

ST/304/2007-DB

[Arising out of Order-in-Appeal No. 178/2007 dated 04/04/2007 passed by the Commissioner of Central Excise, Mangalore]

C.C.E. & S.T.-Mangalore 7th Floor, Trade Centre, Bunts Hostel Road, Mangalore – 575 003, Karnataka	**Appellant(s)**

Versus

Ruchi Infrastructure, Panambur, Mangalore	**Respondent(s)**

Appearance:

Smt Kavita Poduwal, Superintendent (AR)	For the Appellant
Shri G. Shivadass, Advocate World Trade Centre No.404-406, 4th Floor, South Wing Brigade Gateway Campus No.26/1, Dr. Rajkumar Road, Malleswaram Bangalore – 560 009 Karanataka	For the Respondent

Date of Hearing: 10/07/2018
Date of Decision:16/07/2018

CORAM:
HON'BLE SHRI S.S GARG, JUDICIAL MEMBER
HON'BLE SHRI P. ANJANI KUMAR, TECHNICAL MEMBER

Final Order No. 20973/2018

Per: P. ANJANI KUMAR

Respondents are owners of liquid storage tanks at various Sea Ports and other places in India and are carrying on the business of renting out such storage tanks. M/s. Adept Agencies Pvt. Ltd. are engaged in the business of providing various services connected with edible oil handling, its storage and forwarding at various terminal storages in India. The respondents have entered into an agreement with M/s. Adept Agencies Pvt. Ltd. for renting out of storage tanks located at various Terminals, providing services of handling cargo, loading unloading, etc. to the users/importers who have entered into an agreement with the respondent. In lieu of sole rights, the respondents charged them Rs. 1,00,000/- (Rupees One Lakh) per month. M/s. Adept Agencies are providing required storage services to the users/importers of the respondent and are paying service tax on such provision of service.

2. The Department issued a show-cause notice dated 11.05.2005 to the respondents demanding a service tax of Rs. 32,11,458/- (Rupees Thirty Two Lakhs Eleven Thousand Four Hundred and Fifty Eight only) and educational cess of Rs. 11,709/- (Rupees Eleven Thousand Seven Hundred and Nine only) under the category of 'Storage and Warehousing Service' for the period 16.08.2002 to November 2004 while seeking to levy interest and penalties. The Additional Commissioner, Mangalore vide Order-in-Original No. 32/2006 dated 30.10.2006 has confirmed the demand along with interest and penalty. The learned Commissioner (Appeals) on an appeal filed by the respondents has set aside the entire demand. On this the Department has filed the

present appeal on the following grounds:

(a) M/s. Adept Agencies Pvt. Ltd. were not dealing with the users of storage and warehousing infrastructure of the respondents directly. There is an agreement between M/s. Adept Agencies and the respondents.

(b) M/s. Adept Agencies were paying a sum of Rs. 1,00,000/- (Rupees One Lakh only) to the respondents for providing the exclusive right. This was evidenced by Shri Parag Chowdhary, Terminal Manager in his statement dated 01.10.2004 and a statement of Shri Deepak Gatti in his statement dated 12.10.2004 and by the agreement.

(c) There is no agreement between the users of the storage and warehousing infrastructure and M/s. Adept Agencies.

(d) The respondents have made arrangement for the supply of service element by giving exclusive rights to another party and are receiving monetary consideration.

(e) Though Adept Agencies receive the amount and receive the service charges from the users, the respondents have also made a profit in this margin.

(f) The agreement between Adept Agencies and the respondents are in the nature of principal and the agent.

(g) As per the authorization license issued to the respondent, the respondents are to be held strictly responsible for safe custody of bonded goods and are responsible for the safe custody of the goods as well as for legal implication.

(h) In terms of Board's Circular B/11/01/2002 TRU dated 01.08.2002, the respondents had made arrangement for loading, stacking, unloading etc. through M/s. Adept Agencies are required to pay service tax.

(i) Though M/s. Adapt Agencies have taken a separate registration, the services provided by the respondents is not mere renting but it is storage and warehousing services.

3. The counsel for the respondents submitted that they are engaged in constructing storage tanks for liquid cargo for use by importers for storage of oil; they have in turn entered into an agreement with M/s. Adept Agencies for providing loading, unloading, storage handling with respect to warehousing operations; as the respondents have given them the sole authority, they are receiving a consideration of Rs. 1,00,000/- (Rupees One Lakh only); the respondents only rent out the storage tanks to the different importers; the activity to be classified under 'storage or warehousing service' should satisfy the ingredients of the definition of "Storage or Warehousing Service" as provided under Section 65(102) of the Finance Act 1994 read with Section 65 (105) (zza) of the Finance Act 1994; the Commissioner (Appeals) has given a clear finding in their favour and stating that *"I am therefore of the view that the Department is not correct in slapping tax liability on the appellant without first establishing that they are providing taxable services on their own account. Even if there exist contractual liability for providing services or responsibilities as custodian on the appellants for providing these services, this is not enough to attract liability unless it is established that the*

appellants are actually providing the services and receiving remuneration for the same. This is not established. The case record on the contrary show that the appellants are raising bills for storage only charging on the basis of tank capacity occupies for number of days. No charges are attributable to any service provided."

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3.1. The respondents further submitted that the other Agency is providing storage and warehousing services on their own account and paying service tax on remuneration received; the Department's case therefore cannot be sustained unless receipts of M/s. Adept Agency Pvt. Ltd. are clubbed with that of the appellants for treating the clubbed amount as receipt for services of storage and warehousing; no service charges have been collected by the appellants and consequently they are not liable to pay any service tax on their rent receipts; Ownership of storage and warehousing infrastructure and connected pipelines etc is not the basis on which service tax liability is created; Liability is created only when a taxable service is provided and compensatory remuneration is received; for the purpose of providing storage and warehousing services ownership of facilities is not an essential requirement; it is therefore perfectly acceptable if the owner receives rent only and another service provider provides services and receives taxable remuneration; Rental income accruing to owner cannot be taxed unless it is proved that service provider is acting as an agent of the owner; findings recorded at Para 61 of the O-I-O are therefore, entirely without a legal basis.

3.2. The counsel further submitted that they have rental contracts separately with the importers and they have nothing to do with the storage handling, loading unloading etc i.e. operations provided by M/s. Adept Agency Pvt. Ltd; therefore, no service tax is payable by them; as alleged by the Department, M/s. Adept Agency Pvt. Ltd., as far as providing of taxable services is concerned, are not the agents of the respondents.

4. The learned DR has submitted that the respondents are performing the functions of warehouse and storage of liquid cargo in tanks even though they are in the business of renting of storage tanks; as per the agreements, the obligation of the respondents is not pure renting; all activities which are in the nature of warehousing, except insurance, are being performed by the respondents; the obligations of the respondents in terms of the agreement entered into with M/s. Adept Agencies include the services covered under storage and warehousing; Board's Circular F.No. B11/1/2002-TRU dated 01.08.2002, quoted in the Order-in-Original,clearly says that "Essential test is whether the storage keeper provides security of goods, stacking, loading/unloading of goods in the storage area." The clarification at para 5 of Board's circular applicable to the cases where the storage owner only rents the storage premises and all other facilities are arranged by the user of the premises himself which is not the case in the instant case; the agreements between the respondents and the users of the tanks cannot be read in isolation; on one hand, the respondents entered into an agreement with the user to rent out the tanks and on the other hand receives Rs. 1,00,000/- (Rupees One Lakh) per month from M/s. Adept Agency for not allowing others to provide services like loading, unloading, clearing, delivery of cargo

etc; therefore, the users of tank have no choice but to utilize such services from M/s. Adept Agencies only. Therefore, the agreement between the respondents and M/s. Adept Agencies is only a veil to evade tax under the service of "storage and warehousing" by showing renting of tanks and others services are not provided by the respondents; when the agreements are read together the veil disappears and clarification given by the Board would not come to the aid of the noticee. The learned DR has concluded by showing that the relationship between the respondents and M/s. Adept Agencies Pvt. Ltd. is one of a principal and agent and therefore the respondents are liable to pay service tax as rightly demanded and confirmed by the Order-in-Original.

4.1. At this juncture, the learned counsel for the respondents has pointed out that the respondents have their operations all over the country and in no other places other than Mangalore the Department has raised the demands against the respondents on the same issue. A perusal of the agreement clearly brings out the activities undertaken by the respondents and M/s. Adept Agencies Pvt. Ltd; In para 1 of the agreement, it is clearly enunciated the services that shall be provided by M/s. Adept Agencies, as below.

i. Loading and unloading of cargo from vessel/tankers
ii. Pumping the cargo to storage tanks, heating the cargo, if required.
iii. Making the deliveries of the cargo.
iv. Loading the cargo in tankers/railway rakes.
v. Weighment of the cargo.

vi. Keeping records of the cargo, deliveries etc.

vii. Coordinating with the surveyor.

viii. Cleaning of the tankers, pipeline and pigging operations.

And at para 8 it is categorically mentioned that the respondents will collect only rental charges from the importers/users of other storage tanks and charges for the above services shall be billed and cleared by the second party from the importers/users, therefore the Department's contentions are incorrect and the order of the learned Commissioner (Appeals) is legal and proper.

5. Heard both sides and perused the records of the case. The brief issue to be decided in this case is as to whether the amounts received by the respondents from M/s. Adept agencies Pvt. Ltd. should suffer service tax and as to whether the respondents are performing any such storage and warehousing services to the customers through M/s. Adept Agencies on a principal to agent basis. On going through the agreement between the respondents and the M/s. Adept Agencies Pvt. Ltd., it is seen that M/s. Adept Agencies are required to provide various services as enumerated in para 1 of the agreement and as submitted by the learned counsel for the respondents, the respondents will collect only rental charges from the importers. We find that the agreement nowhere mentions that M/s. Adept Agencies Pvt. Ltd. shall render the services listed therein as agents of the respondents. Going by the nature of the agreement it is clearly seen that the agreement is on a principal to principal basis. As observed by the learned Commissioner

(Appeals), we find that M/s. Adept Agencies Pvt. Ltd. is dealing with users of storage and warehousing infrastructure of the respondent directly and collecting service charges on their own account and also paying service tax on the same. We also find that the Department has not made out a case that M/s. Adept Agency is a creation of the respondent for purpose of splitting the income for evading tax. Going by the facts of the case, it appears that M/s. Adept Agency is an independent and unrelated organization dealing with respondents and users on a principal to principal basis. A analogy can be drawn at this juncture of a mandap keeper who provides space for conducting marriages, functions, parties etc; should clients require any catering services for such ceremony there is normally a designated colour for the mandap and the client can avail his services.

5.1. In common parlance for this purpose the mandap keeper is not referred to or understood to be providing a catering service. In the instant case also the respondents are owners of storage tanks and rent out the same to different importers. It may be a fact that as custodian of tanks there might be obligation under Customs law for safety, security, duty liability etc. But for the services which are performed and which can be categorized under the heading of 'Storage and Warehousing services' they have an agreement with M/s. Adept Agencies to perform such functions in relation to the tanks owned by them to their prospective customers. We find that the clarification given by the CBEC vide circular referred above makes the issue very clear. The relevant portion of the circular is attracted hereunder:

"3. Storage and warehousing service for all kinds of goods are provided by public warehouses, private warehouses, by agencies such as the Central Ware Housing Corporation, Air Port Authorities, Railways, Inland Container Depots, Container Freight Stations, storage godown and tankers operated by private individuals etc. The storage and warehousing service provider normally make arrangement for space to keep the goods, loading, unloading and stacking of goods in the storage area, keeps inventory of goods, makes security arrangements and provide insurance cover etc. Service provided in ports has already been covered under the category of port service.

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5. It has been stated that in some case a storage owner only rents the storage premises. He does not provide any service such as loading/unloading, stacking, security etc. A point has been raised as to whether service tax would be leviable in such cases. It is clarified that mere renting of space cannot be said to be in the nature of service provided for storage or warehousing of goods. Essential test is whether the storage keeper provides for security of goods, stacking, loading/unloading of goods in the storage area."

5.2. We find that the respondents have rightly relied upon the ratio of the judgment in the following cases:

a. *Finolex Industries Ltd. Vs. CCE, Pune reported in 2007 (7) STR 408 (Tri.-Mumbai)*
b. *M/s. Inox Air Products Limited Vs. CCE, Raigad reported at 2014 (36) S.T.R. 391 (Tri.-Mum.)*

c. *Shipping Corporation of India Limited Vs. CCE & ST, Mumbai – 2014 (33) S.T.R. 552 (Tri.-Mum.)*
d. *Inox Air Products Limited Vs. CCE, Raigad – 2015 (38) S.T.R. 179 (Tri.-Mum.)*
e. *Antony Garages Pvt. Ltd. Vs. CCE, Raigad – 2015 (38) S.T.R. 49 (Tri.-Mum.)*
f. *Gujarat Chem Port Terminal Co. Ltd. Vs. CCE, Vadodara-II – 2008 (9) S.T.R. 386 (Tri.-Ahmd.)*
g. *Ashok Agarwal vs. CCE, Jaipur-I – 2012 (28) S.T.R. 362 (Tri.-Del.)*
h. *CCE, Ludhiana Vs. Gill Godown – 2011 (24) S.T.R. 226 (Tri.-Del.)*
i. *Cochin Port Trust Vs. CCE, Cochin – 2011 (21) S.T.R. 25 (Tri.-Bangalore)*

6. Going by the facts of the case, the submissions of the respondents and the ratio of the case-law cited above we clearly find that the respondents cannot be asked to pay service tax under the category of 'Storage and Warehousing Service'. Also coming to the bar of limitation, the respondents have submitted that they have been issued the service tax registration on 21.11.2000 based on the agreement between the respondents and the Adept Agencies. A show-cause notice has been issued on 11.05.2005 clearly beyond the normal period. As the Department was having knowledge of the agreement between respondents and the Adept Agencies Pvt. Ltd as early as 21.11.2002, issuance of show-cause notice for extended period that too solely based upon the agreement between the respondents and M/s. Adept Agencies is not acceptable. Therefore we find that the issue is barred by

limitation.

7. In view of the above, we find that the appeal filed by the Department does not survive on merits and also on limitation. The order of the learned Commissioner (Appeals) does not require to be interfered. Therefore the appeal filed by the Department is rejected.

(Order pronounced in Open Court on **16/07/2018**)

(P. ANJANI KUMAR)
TECHNICAL MEMBER

(S.S GARG)
JUDICIAL MEMBER

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