CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
BANGALORE

REGIONAL BENCH - COURT NO. 1

Service Tax Appeal No. 21617 of 2016

[Arising out of Order-in-Original No. COC-EXCUS-000-COM-25/2016-17 dated 28/06/2016 passed by the Commissioner of Central Excise, Customs and Service Tax, Cochin]

D.V Pawan Kumar, Proprietor
Vaishnavi Distributors
Door No. 81-51-02, Venkateswara Nagar
Rajahmundry – 533 103

Appellant(s)

VERSUS

C.C., C.E. & S.T-Cochin
C.R Building, I.S Press Road,
Ernakulam,
Cochin – 682 018
Kerala

Respondent(s)

Appearance:

Shri. K. Parameswaran, Advocate for the Appellant

Shri. P. Rama Holla, Superintendent (AR) for the Respondent

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

Final Order No. 20011 / 2022

Date of Hearing: 31/12/2021
Date of Decision: 07/01/2022

Per : P. DINESHA

Brief facts relevant for our consideration are that an agreement was entered into between the Cochin Port Road Company Ltd. (CPRCL for short), a subsidiary of National Highways Authority of India (NHAI) and M/s. Vaishnavi Distributors, represented by the appellant-proprietor, for collection of Toll on behalf of CPRCL at the rates prescribed by the Government. From the Toll amount so collected, the appellant was to remit the quoted amount in installments as per the relevant schedule in the agreement. This prompted Revenue to issue show-cause notice dated 13/02/2015 wherein it was proposed *inter alia* that the appellant was acting as an intermediary and was instrumental in the collection of toll from the vehicles passing through the Edapally – Aroor Stretch of the NH-47 which was classifiable under taxable service category of Business Auxiliary Service (BAS) as defined in Section 65(19) of the Finance Act, 1994 (as amended). It was also pointed out in the show-cause notice that the appellant had contravened the provisions of Section 68 *ibid* read with Rule 6 of the Service Tax Rules, 1994, Section 69 *ibid* read with Rule 4 *ibid* and Section 70 *ibid* read with Rule 7 *ibid* and consequently it was proposed to classify the activity carried out by the appellant under BAS, to demand Rs. 83,22,991/- (Rupees Eighty Three Lakhs Twenty Two Thousand Nine Hundred and Ninety One only) being service tax and Education Cess and Secondary & Higher Education Cess, apart from interest under Section 77 and penalties under Section 76, 77 and 78 *ibid.*

2. The appellant filed a detailed reply to the above show-cause notice seriously rebutting the Revenue's proposal of demanding service tax, but however, vide impugned Order-in-Original No. COC-EXCUS-000-COM-25/2016-17 dated 28/06/2016, the Commissioner of Central Excise, Customs and Service Tax, Cochin confirmed the demand after classifying the activity under BAS, along with interest as proposed and penalties under Section 77(1)(a), 77(2) and 78 ibid. Aggrieved by the above, the appellant has preferred this appeal.

3. Heard Shri K. Parameswaran, learned Advocate for the appellant

and Shri P. Rama Holla, learned DR for the Revenue.

4. Learned advocate would submit at the outset that the issue of eligibility to service tax on the Toll collected is no more *res integra* as the same stands covered by the decisions/orders of various judicial fora viz;-

a. CST Vs. Ideal Road Builders Pvt. Ltd. - 2018 (12) G.S.T.L 192 (Tri.-Mumbai)

b. Mateshwari Indrani Contractors Pvt. Ltd. Vs. CCE & ST – 2018-TIOL-2608-CESTAT-DEL.

c. M/s. Chawanda Associates & M/s. Ridhi Siddhi Associates Vs. CST-2019-TIOL-1091-CESTAT-DEL.

d. Swarna Tollway (Pvt.) Ltd. Vs. CCE – 2011 (24) STR 738 which has been upheld by the Hon'ble Andhra Pradesh High Court and reported in 2013 (31) STR 419

e. Pahwa Chemicals Pvt. Ltd. Vs. CCE – 2005 (189) ELT 257 (SC)

f. CCE Vs. ITC Limited – 2010 (257) ELT 514 (Kar.) with decision of Hon'ble Supreme Court as reported in 2013 (295) ELT A64 (SC)

4.1. Learned advocate would also rely on the Circular issued by the Board viz. Circular No. 152/3/2012-ST dated 22/02/2012 in support of his contention that CPRCL is a Special Purpose Vehicle (SPV) and wholly owned subsidiary of NHAI and hence not an agent of NHAI. Per contra, learned AR supported the findings in the Order-in-Original and also contended that the service is not figuring in the Negative List and therefore the appellant was liable to service tax.

5. We have considered the rival contentions and have also gone through the documents as well as case-laws carefully. We find that learned coordinate Mumbai Bench in the case of **Ideal Road Builders**

Pvt. Ltd. (supra) has considered a similar issue, after considering agreement as well as various decisions/orders, has held as under:

> ***"4.2*** *We also find that the respondent's case is not even concerned with charging commission from NHAI or MSRDC unlike the judgments cited above. They stand on better footing than the cases cited by the Counsel for the respondents as in the present case they had secured the right to collect the toll from NHAI/MSRDC in a bid for lump-sum amount. This amount is to be paid to NHAI/MSRDC irrespective of any quantum of toll collection. The toll collection is not being done on commission basis or in lieu of any remuneration. All the proceeds of the toll collection belong to the respondents with no interference or right of NHAI/MSRDC. The income so generated is their own business income and NHAI/MSRDC has no right over such toll collection. The toll is not collected by the respondents as representative or agent of NHAI/MSRDC nor any commission in terms of quantum of amount or percentage is charged by the respondents from NHAI/MSRDC. They are liable only to pay the bid amount installment to NHAI/MSRDC irrespective of any collection which can in no way be said to be commission income. They have purchased the right to collect the toll in auction which in no way can be termed as rendering of service to NHAI or MSRDC. Rather the respondents in terms of the agreement are liable to pay the amount fixed at auction to the NHAI/MSRDC irrespective of the fact that such collection of Toll is profitable to them or not. This leaves no doubt that for the above reason also the Toll collection by the respondents is not arising from any "Business Auxiliary Service". We further find that even M/s. NHAI and MSRDC do not consider the toll collection by the respondents on their behalf as commission agent. They consider the respondents as in business of toll collection and even tax is collected at source u/s. 206C of the Income-tax Act from the instalments paid by the respondents. The said section is in respect of collection of tax of income tax at the time of receipt of amount. The respondents income is towards its own toll collection and they do not get any commission on account of collection of toll from NHAI/MSRDC. There is no deduction of tax at source under Section 194H which is towards collection of tax on commission income. Thus, the difference between the toll collection and the bid amount paid by the respondents to M/s. NHAI/MSRDC in no*

way can be termed as consideration for any service. The reliance placed by the Revenue upon Board Circular No. 152/3/2012-S.T., dated 22-2-2012 is not correct for the reason that the respondents has not collected such toll charges on commission or charges on behalf of NHAI/MSRDC. The toll collection is their own income and is not parted with NHAI/MSRDC as they are concerned only with the bid amount finalized in auction and therefore cannot be termed as activity of Business Auxiliary Service. In view of above findings and judgments cited by the respondents we hold that the activity of the respondent cannot be considered as "Business Auxiliary Service" and cannot be taxed to service tax. Thus, the appeals filed by the Revenue is not sustainable on merits and accordingly dismissed. Since we have held that the demand is not sustainable on merit, we therefore are not inclined to go into the other submissions made by the respondent M/s. MEP. In case of M/s. IRBPL we find that the demand apart on merits was also set aside by the Commissioner (Appeals) on time bar/limitation which has not been challenged by the Revenue in its appeal. We also find that the demands are time barred as the show cause notices for the later period were issued earlier which clearly shows that the Revenue was in knowledge of the facts. We thus hold that the demands are not sustainable on being time barred and the impugned order has been rightly set aside the demand on time bar also in case of M/s. IRBPL."

5.1. We also note that the Civil Appeal admitted by the Hon'ble Apex Court against the above order of the Mumbai Bench was subsequently withdrawn by the Revenue.

The above ruling has been followed by the coordinate New Delhi Bench of the Tribunal in the case of **M/s. Chawanda Associates & M/s. Ridhi Siddhi Associates** (supra) wherein the learned Bench has even considered the provisions post 01/07/2012; and has held as under:

"5. We have considered the rival contentions and perused the case records.

6. We find that the similar issue is already decided in case of

*Mateshwari Indrani Contractors Pvt. Ltd. - Final Order No. 52187/2018 dated 6/6/2018=**2018-TIOL-2608-CESAT-DEL.** All the issues, which are being contested in these appeals have been decided in favour of the appellants by this Tribunal. However, we find in these cases the period involved is also post 01/06/2012. We are in agreement with the contentions made by the ld. Advocate i.e. show cause notice does not whispers above the category under which the services are to be qualified. Post 01/06/2012. On the other hand, these are also statutory duties levied by the Government and accordingly, amended by the Notification No. 25/2012-ST dated 30/06/2012. We do not find any reason to differ with the contentions made by the ld. Advocate."*

6. From the above discussions, we find that the assertions of the learned advocate to be acceptable that the issue is no more *res integra* and covered in its favour since same was not distinguished nor any order to the contrary are furnished by the Revenue. We abiding by the ratio laid down therein, set aside the demand as well as the impugned order and allow the appeal of the appellant with consequential benefits, if any, as per law.

(Order was pronounced in the Open Court on **07/01/2022)**

(P. ANJANI KUMAR)
TECHNICAL MEMBER

(P. DINESHA)
JUDICIAL MEMBER

...iss