

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
BANGALORE**

REGIONAL BENCH - COURT NO. 1

Service Tax Appeal No. 816 of 2009

[Arising out of Order-in-Appeal No. 25/2009 dated
09/01/2009 passed by CCE(Appeals), Mangalore]

Shri Suraj

M/S, TUFF COATS,
PLOT, NO-M-3, INDUSTRIAL ESTATE,
YEYYADY, MANGALORE – 575 008.

Appellant(s)

VERSUS

C.C.E. & S.T.-MANGALORE

7TH FLOOR...TRADE CENTRE,
BUNTS HOSTEL RD.,
MANGALORE,
KARNATAKA
575003

Respondent(s)

APPEARANCE:

Shri Akbar Basha, CA for the Appellant

Shri P. Gopakumar, Addl. Commissioner(AR) for the Respondent

CORAM:

HON'BLE MR. RAMESH NAIR, JUDICIAL MEMBER

HON'BLE MR. P. ANJANI KUMAR, TECHNICAL MEMBER

Final Order No: 20106 / 2022

Date of Hearing: 21/03/2022

Date of Decision: 24/03/2022

Per : RAMESH NAIR

The brief facts of the case are that the appellant is a proprietor engaged in the activity of providing powder coating and anodising of aluminium goods supplied by their client on job work basis. They are also using some chemicals for carrying out such job work and charging job work charges which includes labour + cost of material used for job work. The case of the Department is that the said activity falls under the category of production or processing on behalf of the client

which is specified under one of the services of Business Auxiliary Service (BAS) and the same is chargeable to service tax. Accordingly, the adjudicating authority has confirmed the demand of service tax. The learned Commissioner(Appeals), on an appeal filed by the appellant, upheld the Order-in-Original except the penalty imposed under Section 76, which was set aside. Being aggrieved by the Order-in-Appeal dt. 09/01/2009, the appellant preferred the present appeal.

2. Shri Akbar Basha, learned Chartered Accountant appearing on behalf of the appellant submits that the appellant is carrying out the job work with material such as chemicals for powder coating and anodizing on aluminium supplied by their client; since the activity is with material and the appellant is paying VAT, the same is correctly classifiable as Works Contract Service (WCS). The WCS was not taxable during the relevant period i.e. 16/06/2005 to 13/03/2006; therefore the service is not taxable. He placed reliance on the following judgments:-

- i. CCE&Cus., Kerala Vs. Larsen & Toubro Ltd. [2015(39) STR 913 (SC)]
- ii. Hindustan Aeronautics Ltd. Vs. CST-I [2017-TIOL-3591-CESTAT-BANG]
- iii. Commissioner Vs. Daelim Industries Co. Ltd. [2004(170) ELT A181(SC)]
- iv. Petrofac International Ltd. Vs. CCE, Cochin [2006(3) STR 234 (Tri. Bang.)]
- v. CCE, Noida Vs. Falx Engineering Ltd. [2006(1) STR 208 (Tri. Del.)]

3. Shri P. Gopakumar, learned Additional Commissioner(AR) appearing on behalf of the Revenue reiterates the findings of the impugned order. He submits that the major material on which the job work was carried out i.e. aluminium goods was supplied by the client of the appellant; the appellant have merely carried out the processing of powder coating and anodizing, thereafter the same was returned to the

appellant's client. He further submitted that this activity is clearly covered under "production or processing on behalf of the client" and the same is covered under BAS and therefore the same is taxable. He submitted that similar activity has been considered under Business Auxiliary Services in various judgments. He placed reliance on the following judgments:-

- i. MR & Sons Vs. CC, Ahmedabad [2018(8) TMI 32 – CESTAT Ahmedabad]
- ii. PSL Corrosion Control Services Ltd. Vs. CCE&C, Daman [2008(8) TMI 72 – CESTAT Ahmedabad]
- iii. Shri AG Shibu and Shri TH Muhammed Ali Vs. CC,E&ST, Cochin [2008(1) TMI 265 – CESTAT Bangalore]
- iv. AG Shibu Vs. CC,CE&ST, Cochin [2008(1) TMI 105 – CESTAT Bangalore]

4. We have carefully considered the submissions made by both sides and perused the records. We find that the appellant has admittedly carried out the job work of powder coating and anodizing on the aluminium goods supplied by their client. The appellant is doing the job work against the job work charges mutually decided by the appellant and the client. The activity of powder coating and anodizing is clearly an activity of production or processing on behalf of the client since the same is carried out on the basis of job work. This Tribunal has considered the issue in similar facts in various judgments and came to conclusion that the similar activity is classifiable as 'production or processing of goods on behalf of the client' under the main head of service viz. BAS and accordingly the same is liable to service tax.

5.1. In the case of MR & Sons Vs. CC, Ahmedabad (supra), the Tribunal considered the similar situation and passed the following judgment:-

4. We have carefully considered the submission made by both the sides and perused the records. We find that the appellant have carried out the processing of

machining, drilling, shot blasting and painting, thereafter, the resultant product is final part of wind turbine which is a final product, hence the process under taken by the appellant, in our view it clearly falls under the category of production. The Division Bench of this Tribunal in the case of PSL Corrosion Control Services Ltd (Supra) held that even mere epoxy coating made on steel bars supplied by the client is amount to production and accordingly liable for service tax under Business Auxiliary Services. The Tribunal passed a very reasoned order in this case after analyzing various other judgments of this Tribunal and in the present case, it is not the case of appellant that the activity carried out by them is amount to manufacture in terms of Section 2(f) of Central Excise Act, 1994, therefore, the issue related to the dispute that whether the activities is processing or production on behalf of client. This issue has been dealt with by this Tribunal in the case of PSL Corrosion Control Services Ltd (Supra) wherein, the Tribunal passed following order:

9. *We find that the expressions 'production' and 'manufacture' are not synonymous with each other and cannot be held to be interchangeable in the context of the present statute, though broadly speaking and from a prudent ordinary man's point of view, they may mean same. As is settled law that when an expression is defined in the statute, the same has to be understood and interpreted in the light of the language used in the definition.*

10. *The 'manufacture' stands defined in terms of the provisions of Section 2(f) of the Central Excise Act. Section 65(19) of the Finance Act, 1994 defines the 'Business Auxiliary Service' as "production of goods", which does not amount to manufacture in terms of Section 2(f) of Central Excise Act. As such, it becomes clear that any production of goods, which amount to manufacture by passing strict test of Section 2(f) would not be covered by the expression "production of goods". Every production may not necessarily amount to manufacture but every manufacture would be covered by the*

expression 'production'. As observed by the Hon'ble Supreme Court in the case of Tara Agencies referred supra, the expression 'production' has a wider meaning than the word 'manufacture'. If the meaning of the expression 'production' as appearing in the definition of the above Services has to be limited to the fact that that the activity must result in emergence of new goods i.e. manufacture than the clarification below the definition of the said services excluding the activity amounting to manufacture within the meaning of clause (f) of Section 2 of Central Excise Act would become otiose. A cumulative reading of the definition and the definition in sub-rule (v) given at the end leads to only one and inevitable conclusion that the 'production of goods', which may not amount to manufacture in strict sense of Section 2(f) would also be covered by the said category of services. So, even if the Tribunal has held in their own case that activity undertaken by them does not amount to manufacture in terms of Section 2(f), the same would not mean the same may not amount to 'production' of goods in the light of the definition "Business Auxiliary Service". In fact, we may have some insight of the Legislative intent by giving careful thought to the above definition. It seems that legislation was aware of the overlapping of the two expressions 'production' and 'manufacture' and in their wisdom, they have excluded the activities of production of goods which may amount to manufacture within the meaning of Section 2(f) of the Central Excise Act from the said definition. The use of different expression i.e. "production of goods" which may not amount to manufacture, by the Legislature, in its wisdom, only throws light upon the Legislative intent that the 'production' activity which may not be covered by Section 2(f) and may not be liable to pay excise duty in terms of that Act would get covered by the definition of "Business Auxiliary Service". As such, on this point, we do not find any force in the plea of the learned Advocate.

11. *It has been further argued before us that as per definition of 'Business Auxiliary Service', production of goods has to be 'on behalf of client'. The expression 'on behalf of client' necessarily implies a third party arrangement, that is the producer, the client and the person for whom the goods are purchased. In the instant case, they are producing the goods on job work on principal to principal basis and the said activity is not being undertaken by them in the capacity of agent on behalf of its principal for supply to a third party. For the above proposition, reliance stands placed upon the Board's Circular No. B2/8/2004-TRU dated 10-9-04 as also the Board's letter F.No. 127/171/2007-CX.4 dated 18-7-07. For better appreciation, we reproduce the relevant contents of both the documents :*

Board's Circular No. B2/8/2004-TUR, dated 10-9-04 :

"18.2..... Similarly, if a commercial concern produces goods on behalf of the client or provides service on behalf of a client, such activities would come under the scope of this service, unless the activity of service provider amount to manufacture in terms of the central excise law. The aim of all such activities is production of goods or provision of services, the whole or part of which is being carried out by the service provider i.e. the agent on behalf of the client ".

Board's letter F.No. 127/171/2007-CX.4, dated 18-7-04 :

"3..... Further, the activity also does not qualify to be called as provision of service on behalf of the client. This is because the taxable activity envisaged under this category of 'business auxiliary service' is that while the 'client' is obliged to provide some service to a 3rd person but instead of the client providing such service, the service provider provides the such service to the 3rd person, on behalf of the client, i.e. acting

as an agent of the client. Admittedly, in the present case, there is no 3rd person. Thus, the activity so undertaken does not fall under business auxiliary service or any other existing taxable services”.

12. *Learned SDR submits that admittedly, the appellants are not buying, producing the new coated bars themselves, neither are they selling the coated bars in the market. Said activity of coating is being done by them for others and as such, it has to be held as if the same has been done on behalf of their clients.*

13. *We find that the coating is being done by the appellants on the bars supplied by M/s. L.& T and M/s. H.C.C. who have been awarded the contract for construction of roads, bridges etc. As per the terms and specifications prescribed by M/s. Maharashtra State Road Development Corporation Ltd. to the main contractors that is M/s. H.C.C. and M/s. L & T, the said contractors shall produce certificate from FBE Coating agencies that the quality of powder epoxy material and other components of FBE conform to relevant I.S. Standard. Such certificates shall accompany each lot of coated bars leaving the plant for work site. The contractor may also carry out such tests at plant jointly or separately of coating agency to confirm use of proper quality of coating material. The coated reinforced bars shall be tested at plant site by the contractor, test results shall be jointly signed by authorized representative of contractor and the coating agency. As such, even if the appellant’s plea that the expression ‘on behalf of their clients’ involves third party agreement is accepted, the same is satisfied in the present case. Admittedly, the contractors have to use powder epoxy coated bars in the construction of roads, bridges etc. Instead of doing the coating themselves the same is being done by the appellants on their behalf. As such, it can be safely concluded that the said service stands rendered by the appellants on behalf of L & T, H.C.C., H.P.P. etc. to the State Road*

Development Corporation Ltd. to whom the said main contractors are rendering service of construction. The adjudicating authority has referred to the definition of the word 'client' as appearing in the Shorter Oxford English Dictionary, 5th Edition 2002. As per the said definition, the 'client' means - 'a person using the service of any professional'. In the present case, the appellant is a company having expertise in the FBE coating and are professional in the fields. Their services are being used by the main contractors in furtherance of providing their service to the State Road Development Corporation Ltd. As such, the said main contractors instead of themselves doing the job of epoxy coating are getting the same done from the appellants by utilizing their services. As such, we do not find any merits in the second limb of the argument advanced by the learned Advocate, Shri B.L. Narasimhan.

14. *It further stands argued before us that inasmuch as the definition of 'business auxiliary service' was amended with effect from June, 2005 so as to include the production of goods "for the clients" , and inasmuch as they are producing the goods for the main contractors, they can be held liable to pay duty only from June, 2005 as the said amendment cannot be made retrospective. As we have already observed that the appellant's activities were covered even under un-amended definition of 'business auxiliary service', the above argument of the learned Advocate does not carry much weight.*

15. *Having discussed the various issues in the preceding paragraphs, we hold that the appellants are liable to pay service tax in respect of the activity undertaken by them during the relevant period. However, the quantum of such tax is required to be re-quantified by extending the benefit of Cenvat credit of duty on coating material used for epoxy coating and the credit in respect of other input services as available during the relevant period. Though the said plea*

stands accepted by the Commissioner in his impugned order on principle, the same stands rejected on the ground that no documents were produced in support of the above claim. Surprisingly, the Commissioner while observing that the appellant shall produce documentary evidence in support of this claim before the jurisdictional Central Excise officer, who shall allow such benefit in accordance with law after verifying the genuineness of the documents has confirmed the demand of duty as proposed in the notice without extending the benefit. We are of the view that there being no dispute about availability of the said benefit, the demand of duty is required to be re-quantified.

16. *The appellants have further submitted that the services provided prior to 10-9-04, that is, when the levy of business auxiliary service came into effect are required to be excluded. The Commissioner has denied the benefit on the ground that they have not produced any detail of the same. The demand is required to be re-quantified on this count also. Similarly, the benefit of 'cum-service tax value' in terms of Explanation 2 to Section 67 of the Finance Act, 1994 also does not stand extended to the appellants, which would also affect the re-quantification of demand.*

In view of the above, we remand the matter to the original adjudicating authority for re-quantification of the demand by extending the above benefit to the appellants.

17. *As regards the penalty, the appellants have contended that there was no intention on their part to evade payment of duty, which was not being paid on reasonable cause as they were under bona fide belief that the activity is not attracting, any duty, penalty should be set aside in terms of the provisions of Section 80 of the Finance Act 1994. Commissioner has observed that the appellants have not come forward on their own to seek clarification from the Department, which reflects upon their mala fide.*

However, from the peculiar facts of the case, we find that the appellant's activity of epoxy coating was admittedly in the knowledge of the Revenue, inasmuch as the litigation about the said activity amounting to manufacture or not, was going on between the Department and the appellants. With the introduction of the said services in the service tax net with effect from 10-9-04, even the Revenue never advised the appellants to start paying tax on the said activity. As the Revenue was aware of the appellant's activities, it cannot be said that was any suppression, misstatement or intent on their part to evade service tax. We, accordingly, do not find any reason for imposition of penalty upon the appellants and set aside the same in terms of Section 80 of the Finance Act, 1994.

18. *As a result, the appellants are held liable to pay duty, which is required to be re-quantified by the jurisdictional authorities, for which purpose the matter is being remanded & penalty is being set aside.*

19. *Appeal is disposed of in above terms.*

5. From the above judgment it can be seen that even mere epoxy coating was held to be production on behalf of the client, whereas in the present case much more processing of machining, shot blasting, drilling were carried out in addition to painting, therefore, in view of cited judgment the activity carried out by appellant are indeed falls under production. The service of production of goods on behalf of the client was very much taxable during the impugned period, therefore, it is legally liable to service tax. As regard the judgment relied upon by the CA, we find that it is Single Member judgment moreover the decision of PSL Corrosion Control Services Ltd (Supra) was not considered in Gedee Weiler Pvt. Ltd (Supra), therefore, the same is per in curium and cannot prevail, over, the Division Bench judgment in the case of PSL Corrosion Control Services Ltd (Supra) accordingly, we uphold the impugned order and dismiss the appeal.

5.2. From the above judgment, it can be seen that out of various activities, one activity was of painting on job work basis, which is akin to powder coating and anodizing. The Tribunal, after considering the decision in the case of PSL Corrosion Control Services Ltd. (supra), held that the similar activity is covered under production of goods under BAS. Following the said judgment, in the present case also being the similar activity, the process of Powder Coating and Anodizing being production on behalf of client clearly falls under BAS and hence the same is liable for service tax.

6.1. The appellant's main plea is the activity of job work since with material such as chemicals will fall under the "Works Contract Service" on the ground that on the said activity the appellant has discharged the VAT. In this regard, we go through the definition of Works Contract Service which is reproduced below:

Section 65(105)(zzzza) *to any person, by any other person in relation to the execution of a works contract, excluding works contract in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams.*

Explanation. - *For the purposes of this sub-clause, "works contract" means a contract wherein, —*

- (i) transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods, and*
- (ii) such contract is for the purposes of carrying out,*
 - (a) erection, commissioning or installation of plant, machinery, equipment or structures, whether pre-fabricated or otherwise, installation of electrical and electronic devices, plumbing, drain laying or other installations for transport of fluids, heating, ventilation or air-conditioning including related pipe work, duct work and sheet metal work, thermal insulation, sound insulation, fire proofing or water proofing, lift and escalator, fire escape staircases or elevators; or*

(b) construction of a new building or a civil structure or a part thereof, or of a pipeline or conduit, primarily for the purposes of commerce or industry; or
(c) construction of a new residential complex or a part thereof; or
(d) completion and finishing services, repair, alteration, renovation or restoration of or similar services, in relation to (b) and (c); or
(e) turnkey projects including engineering, procurement and construction or commissioning (EPC) projects;”

6.2. On going through the above definition, we find that the activity of the job work in the present case does not fall under Explanation clause (ii). As regard the clause (i), the necessary limb of the definition is the property in the goods must be transferred. In this case, claim of the appellant is that the property in the chemicals used for the job work stand transferred to the service recipient. Undisputedly the chemicals used for Powder Coating and anodizing is part of the service as the same gets consumed during the job work and lost its existence. Moreover the main aluminium goods is supplied by the client and it's property remains with the client before and after the job work. The cost of chemicals gets subsumed in the job work charges. For this reason also, it cannot be said that there is any transfer of property in goods from the hands of the appellant to his client. We are afraid that if this type of arrangement is treated as works contract service, then in every case of similar job work it will fall under Works Contract Service merely because small consumables are used in the job work on the main goods supplied by the client. In such case even the entry provided under Business Auxiliary service i.e. "Production and Processing on behalf of the client" will become redundant. Therefore, the submission of the appellant in this regard is not acceptable.

6.3. As per our above reasoning, the judgments cited by the learned consultant being on different facts are not applicable in the facts and circumstances of the present case.

7. In view of our above discussion and finding, the impugned order is upheld and appeal is dismissed.

(Order pronounced in open
court on 24/03/2022)

(RAMESH NAIR)
JUDICIAL MEMBER

(P. ANJANI KUMAR)
TECHNICAL MEMBER

Raja...