**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL**
**SOUTH ZONAL BENCH**
**CHENNAI**

**Appeal No.ST/176/2012**

[Arising out of Order-in-Original No.3/2011 dt. 25.11.2011 passed by Commissioner of Central Excise, Madurai]

Cauvery Enterprises — Appellant

Versus

Commissioner of Service Tax,
Madurai — Respondent

Appearance :

Shri M.S. Srinivasa, Advocate,
Shri H.Y. Raju, Advocate
For the Appellant

Shri B. Balamurugan, AC (AR)
For the Respondent

**CORAM :**

**Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)**
**Hon'ble Shri P. Dinesha, Member (Judicial)**

Date of hearing / decision : 10.08.2018

**FINAL ORDER No. 42252 / 2018**

**Per Madhu Mohan Damodhar**

The appellants were holding service tax registration for "Cargo Handling Service". During the audit of accounts of M/s.TATA Coffee Ltd. (TATA, for short), it emerged that appellants were performing certain tasks in the factory of TATA mainly in processing of coffee beans. Department took the view that appellants were providing ‘Manpower Recruitment or Supply Agency Service’ falling within the scope of Section 65 (68) of the Finance Act, 1994 and the taxable service thereof defined in Section 65 (105) (k). Accordingly, proceedings were initiated against the appellants by way of issue of show cause notice dt. 19.8.2010 to them, inter alia proposing demand of an amount of Rs.61,40,412/- towards service tax for the period June 2005 to March 2010 with interest thereon and imposition of penalties under Section 76, 77 & 78 of the Finance Act, 1994. In adjudication, the Commissioner vide impugned order dt. 25.11.2011 upheld the proposals in the SCN and also imposed penalty under Section 78 of the Act and penalty under Section 77 ibid. However, penal proceedings proposed under Section 76 ibid was dropped. Aggrieved, the appellants are before this forum.

2.1 When the matter came up for hearing, on behalf of the appellants, Ld. Advocate Shri M.S. Srinivasa took us through various contracts and agreements with TATA filed in page 69 onwards of the paper book. He submitted a compilation containing copies of such agreements and also sample copies of bills to highlight that the payments were made only towards the contracted work and not against manpower supply. He submitted that the agreements were essential for carrying out specified activities on contract basis for manufacture of instant coffee.

2.2 Ld. Advocate submits that as per the Process Agreement dt. 15.09.2007, on page 82 of the appeal book, the appellants were required to take out licenses and clearances for carrying out the said activity. It was also mandated that appellant shall not sub-contract any of the activity. Appellant was required to attend all regular maintenance works relating to machinery used for the said activities during the course of processing.

2.3 Ld. Advocate submits that as per the contract dt. 24.7.2006 for packing (available on page 75 of the appeal book), the appellant was required to carry out job work packing and to undertake incidental process of loading and unloading. The agreement refers to the appellant as “Packer”, appellant was required to obtain necessary licenses and clearances for carrying out the said activity of packing and to ensure compliance with the statutory requirements. It was mandated that appellant shall not sub contract any of the aforesaid operations without the permission of TATA. Appellant shall be reimbursed with electricity, water, security charges etc. incurred for undertaking packing operation. Appellant was required to carry out maintenance of machine at their cost. Consideration was paid on per kg basis. Similarly, loading and unloading activity was to be paid on per ton / per truck / container basis.

2.4 The agreement dt. 30.09.2006 on page 89 of the paper book was for maintenance of Effluent Treatment Plant (ETP). The contract was for managing and maintaining the ETP on daily basis in three shift of operations. The agreement refers to appellant as “Consultant” and makes it incumbent on them to assess quantity of chemicals required, and dose the same most economically for treatment of the effluents. It is agreed upon that the treated effluent should meet with all the norms and standards laid down by Pollution Control Board. Appellant is given responsibility to liaise with the Pollution control Board and assist TATA to obtain all requisite licenses and approvals. It is agreed that all chemicals required for the E.T.P operation will be supplied by TATA. The consideration termed as "Consultation fee and work charges" was to be paid on monthly basis at Rs.45,000/-. As per the contract awarded by Rajshree Sugars & Chemicals Ltd. (RSCL), the said contract was for maintenance of Bagasse yard, feeding the Bagasse into boiler and handling boiler operations during season. The consideration for carrying out these activities was on payment of all inclusive charge of Rs.0.84 per MT of cane being crushed.

2.5 Ld. Advocate contends that the agreements therefore are not for supply of manpower but for execution or to actualize the contracted work or job for which consideration is paid not on the basis of man hours or man days but on the basis of quantity viz. per ton or kg.

2.6 The issue involved in this appeal is no longer *res integra* and is settled in favour of the appellants in a number of decisions for example, in the following cases :

i. INDIRA INDUSTRIAL LABOUR WELFARE ASSOCIATION Vs. CCE & ST, CHENNAI-III – 1018 (6) TMI 1363-CESTAT CHENNAI

ii. A.MALATHY, PROPRIETRIX OF ARUN ENTERPRISES Vs. CCE, CHENNAI – 2018 (3) TMI 1005-CESTAT CHENNAI

iii. BHAGYASHREE ENTERPRISES Vs. CCE, PUNE-I – 2017 (3) G.S.T.L. 515 (Tri.- Mumbai)

iv. DHANASHREE ENTERPRISES Vs. CCE, PUNE-I – 2017 (5) G.S.TL.2012 (Tri.- Mumbai)

v. INGLE & SONS Vs. CCE, NAGPUR – 2018(4) TMI 540-CESTAT MUMBAI

vi. DIVYA ENTERPRISES Vs. CCE, MANGALORE – 2010(19) S.T.R.370 (Tri.-Bang.)

vii. RITESH ENTERPRISES AND ANOTHER Vs. CCE, BANGALORE-2010-TIOL-539-CESTAT-BANG.

viii. H.T.SHINDE Vs.CCE, PUNE-III – 2016 (1) TMI 621 – CESTAT MUMBAI

ix. SHRI HEMANT V DESHMUKH AND SHRI BALARAM V JAT Vs. CCE, GOA – 2014 (7) TMI 116 – CESTAT MUMBAI

2.7 Apart from merits the demand is also liable to be set aside on limitation. In their application dt. 18.1.2006 appellant had in fact applied for registration under both 'Manpower Recruitment or Supply Agency Service' and 'Cargo Handling Service', however, the department chose to issue registration only for Cargo Handling Services. Appellant therefore had bonafide belief that they were not providing any manpower supply and not liable to pay any tax under that head. Further, the issue is one of classification of service involving interpretation giving rise to many decisions of Tribunal which are in favour of appellants. Therefore invocation of longer period of limitation and imposition of penalty are not sustainable.

3. On the other hand, Ld. A.R Shri B. Balamurugan supports the impugned order. Ld. A.R draws attention to para 5.1 of the impugned order where the adjudicating authority has analyzed the issue and found that the "manpower requirement would be informed to appellants for adequate deployment of the work force and that the role played by appellants is only to depute / supply adequate manpower, skilled and unskilled to the premises of TATA / Rajshree to undertake jobs assigned to them for execution". He also draws our attention to para 5.2 of the impugned order where the adjudicating authority has held that "Cauvery charged and collected service tax from TATA but they did not pay the same to Government account.....".

4. Heard both sides and have gone through the facts of the case.

5.1 The period of dispute is June 2005 to March 2010. Manpower Recruitment and Supply Agency Service was made exigible to service tax w.e.f. 7.7.1997. The definition of this service in Section 65 (68) of the Finance Act, 1994 has undergone a number of changes since its inception. However, prior to 16.06.2005 the said service was defined as under :

> "Manpower recruitment or supply agency" means any *commercial concern* engaged in providing any service, directly or indirectly, in any manner for recruitment or supply of manpower, temporarily or otherwise, *to a client*.

5.2 With effect from 1.5.2006, the words "commercial concern" were substituted by the words "***person***". W.e.f. 16.05.2008, the words "to a client", were replaced by words "***to any other person***". The scope of taxable service was given in Section 65 (105) (k) of the Act and after the amendment caused about on 16.6.2005, 1.5.2006, 1.6.2007 and 16.5.2008, the said provision read as under :

> "(k) to any person, by a manpower recruitment or supply agency in relation to the recruitment or supply of manpower, temporarily or otherwise, in any manner;
>
> *Explanation*: For the removal of doubts, it is hereby declared that for the purposes of this sub-clause, recruitment or supply of manpower includes services in relation to pre-recruitment screening, verification of the credentials and antecedents of the candidate and authenticity of documents submitted by the candidate.

It is therefore evident that the taxable service requires supply of manpower temporarily or otherwise.

5.3 At the same time, there are a number of services which require engagement of manpower at the premises of the client. In our view, supply of manpower service would necessarily entail supply of manpower, temporarily or otherwise. In fact, we find from Section 2 (1) (g) of Service Tax Rules, 1994 had supply of manpower as under :-

> (g) "supply of manpower" means supply of manpower, temporarily or otherwise, to another person to work under his superintendence or control.

5.4 The distinction therefore has to be made for performance of a specific service by employing manpower working under the superintendence and control of the service provider only. By implication, to fall under the category of manpower supply service, payments must be made by the service recipient related to the number of men / labourers supplied during a specified period. However, when the service provider is contracted not with completion of a particular task and is paid on the basis of quantum of work carried out and not on the number of men / labourers supplied, such a service cannot then fall under the ambit of 'Manpower Recruitment or Supply Agency Service'.

5.5 We find that higher appellate forums, in a number of decisions some of which have been relied upon by the Ld. Advocate, have consistently held that even when labourers are supplied to actualize the contracted work but such manpower is not at the disposal or effective control of the service recipient during the period of contract, but with the service provider themselves and consideration paid is not on the basis of number of persons employed but on the basis of work executed, such activity cannot be called as "Manpower Recruitment or Supply Agency Service".

5.6 In fact, the CESTAT Chennai Bench of the Tribunal in a recent decision in *Indira Industrial Labour Welfare Association Vs CCE & ST Chennai – 2018 (6) TMI 1363 – CESTAT Chennai,* also relied upon supra by the Ld. Advocate, relying upon its own earlier decision in the case of *A. Malathy Vs CCE Chennai* vide Final Order No.40888/2018 dt. 13.3.2018 and also decision of CESTAT

Mumbai in *Bhagyashree Enterprises* - 2017 (3) TMI 786 CESTAT Mumbai has held as under :

"5.1 From a perusal of the contracts, two dated 06.08.2005 and one dated 24.08.2005, we find that the works contracted by BHEL to the appellant were "Material Handling Contract" and Mobile Crane Contract". Perusal of the work schedule rates and approximate quantum of work to be handled given in the annexures to the contract indicates that the rates are per M.T or per Sq. mtr. etc., but not on per man power supplied basis. In our view, therefore, the work contracted by BHEL to the appellant will not have essential characteristics of man power supply service.

5.2 True, the appellants supplied labourers to actualise the contracted work. However such man power is not at the disposal or effective control of the service recipient during the period of contract, but such control is still with the appellants themselves. The nature of services provided cannot then be brought within the fold of Man Power Supply Service. This is the very clarification given by the CBEC in their circular dt. 15.12.2015, relied upon by Ld. Consultant.

5.3 Although Ld. A.R has argued that appellant had not brought up this argument before the lower authorities, it must be kept in mind that the said Board's circular has been issued only after the passing of the impugned order. In any case, appellant is entitled to take a legal plea at any point of time.

5.4 We also find that the decisions relied upon by the Ld. Advocate support the stand of the appellant. This very Bench, in the case of *A. Malathy* (supra), has held as under :

"4. Heard both sides. The foremost issue for consideration is whether the activity of bagging and shipping work executed by the appellant as per the contract for bagging and shipping amounts to 'supply of man power' or not.

…. …… ….

**6.3** As regards the service tax liability under the category of manpower recruitment or supply agency service, for the services rendered to KLL, we find that the adjudicating authority has misconstrued the provisions and misdirected the findings to hold that the services would fall under the category of 'manpower recruitment or supply agency services'. On perusal of the agreement entered by the appellants with KLL, we find that the said agreement specifically indicates about the consideration to be paid to the appellants based upon the number of units produced in the factory premises of KLL and there is no restriction as to the specific number of employees

> to be brought for such purposes; and work force employed by the appellant was on the role of the appellant only and is supervised by the appellant. In our considered view this contract cannot be considered as a contract for supply of manpower to KLL. This, in our considered view is nothing but lumpsum work awarded to appellants by KLL. We find strong force in the contentions put forth by the learned Counsel that the issue is covered by the decision of *Divya Enterprises* (supra) and *Ritesh Enterprises* (supra)."
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> 5.5 In the event, we find in favour of the appellant. The impugned order cannot then sustain and is therefore set aside. Appeal is therefore allowed with consequential benefits, if any, as per law."

5.7 In the facts of appeal at hand, it is clear from the agreements and communication between the appellants and its service recipient that although there was indeed use of manpower, however that was only for the purpose of actualizing the work contracted to the appellant. This manpower was at all times under the control and superintendence of the appellants. The consideration for the work contracted was dependent upon the extent of work completed or executed and not on the basis of number of manpower supplied.

5.8 Ld. A.R has drawn our attention to the finding of adjudicating authority in para 5.2 of the impugned order that appellants had charged and collected service tax from TATA. In this regard, we find that the proceedings themselves have emanated out of the audit conducted of M/s.TATA Coffee Ltd. by the Office of the Commissioner of Central Excise, Madurai – II . A perusal of para-4 of the audit report dt. 8.1.2007 filed in page 52 of the paper book indicates that the Audit Group in fact found that appellants had provided services to TATA Coffee. It was surmised that the activity related to "maintenance service" rendered by them. There is no allegation whatsoever of appellants having rendered manpower recruitment or supply of agency service. The audit notes further suggest examination as to whether appellants are within the threshold exemption limit allowed to small service providers etc. It is also seen from records that at the instance of the department, TATA vide their letter dt. 30.5.2008 to the Superintendent of Central Excise, Theni Range submitted copies of statement of accounts for 2005-06, 2006-07 and 2007-08. These are seen in page 68 onwards of the appeal book. The details of the amounts paid by TATA to the appellant are also found therein. However the conclusion drawn by the adjudicating authority regarding collection of service tax by appellants is not borne out from these particulars of amounts paid by TATA Coffee etc. as found in page 94, 95, 106, 108 etc. of the appeal book.

6. In the light of the findings and conclusions herein above, and in particular, following the ratio of the case laws supra, we hold that the service rendered by the appellants are not in the nature of 'Manpower Recruitment of Supply Agency Service'. The impugned order to the contrary cannot then sustain and will have to be set aside, which we hereby do. Appeal is therefore allowed with consequential relief, if any, as per law.

(Operative part of the order pronounced in court)

**(P. Dinesha)**
**Member (Judicial)**

**(Madhu Mohan Damodhar)**
**Member (Technical)**

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