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

Appeal No.ST/221/2012

[Arising out of Order-in-Appeal No.1/2012 dt. 12.01.2012 passed by Commissioner of Customs, Central Excise & Service Tax (Appeals), Coimbatore]

Sana Engineering Company Appellant

Versus

Commissioner of Central Excise and Service Tax,
Coimbatore Respondent

Appearance :

Shri M. Saravanan, Consultant
For the Appellant

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

CORAM :

Hon'ble Ms. Sulekha Beevi, C.S., Member (Judicial)
Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)

Date of hearing / decision : 24.09.2018

FINAL ORDER No. 42466 / 2018

Per Bench

The facts of the case are that pursuant to audit conducted of M/s.Sana Engineering company, the appellants herein, it was noticed from ledger accounts and trial balance that assessee had collected amounts towards use of cranes and torex with operator, manpower and supervision, either on single use basis or on monthly or specified period basis. Department took the view that such charges are collected attract levy of service tax under the category of ‘Business Support Service’; that however appellants had not mentioned in the ST-3 Returns for the years 2007-08 and 2008-09 about such services provided and nor have they discharged service tax liability thereon. Accordingly, show cause notice dt. 15.04.2010 was issued to appellants *inter alia,* proposing demand of service tax liability of Rs.23,83,626/- and Education Cess of Rs.47,673/- and Higher Educational Cess of 15,487/- totalling to Rs.24,46,786/- for the period 01.05.2006 to 15.05.2008 with interest thereon. The notice also proposed imposition of penalties under Section 76, 78 of the Finance Act, 1994. In adjudication, original authority vide order dt.10.12.2010 confirmed demand of service tax / cess as proposed in the notice with interest thereon and also imposed equal penalty under Section 78 of the Act. On appeal, the Commissioner (Appeals) vide impugned order dt. 12.01.2012 upheld the order of original authority and rejected the appeal. Hence the appellants are before this forum.

2. Today when the matter came up for hearing, on behalf of the appellant, Ld. consultant Shri M. Saravanan made various submissions and contentions which can be broadly summarized as under :

i) The activity will not fall under “Business Support Service” as they are not rendering any support service to any business entity. This activity is specifically falls under ‘ Supply of Tangible Goods Service’ and it is taxable with effect from 16.05.2008 only and not prior to this date.

ii) The Board vide Circular No.334/1/2008 TRU dated 29.09.2008 has clarified that transfer of Supply of Tangible Goods without transferring right of possession and effective control of such machinery, equipment and appliances is a service and it will attract service tax under the category "Supply of Tangible Goods with effect from 16.05.2008.

iii) When a new category of service is brought under the service tax net, the same can be taxed only with effect from the date on which the new service is brought under service tax net. One cannot claim prior to the introduction of new service, the same was taxable under different existing category. The Hon'ble HighCourt in the case of *Indian National Shipowners' Association Vs. Union of India* – 2009 (14) S.T.R. 289 (Bom.) held that when there is a new entry and inclusion of certain services in that entry presupposes that there was no earlier entry covering such services. Similar view was held in the following decisions:-

1. *Commissioner of Central Excise, Mumbai Vs. Ebay India Pvt. Ltd.* – 2014 (35) S.T.R. 590 (Tri. - Mumbai)

2. *SAP India Pvt. Ltd. Vs. Commissioner of C.Ex., Bangalore – III* – 2011 (21) S.T.R.303 (Tri.- Bang.)

3. On the other hand, Ld. A.R Shri B. Balamurugan supports the impugned order. He draws our attention to the definition of "Business Support Service" to contend that it is an inclusive definition and hence all services provided in relation to business or commerce will fall under the ambit of the said service tax category. Ld. A.R also drew our attention to para-23 of the impugned order wherein the Commissioner (Appeals) has pointed out that introduction of new services by carving out or specifically brought out does not absolve the appellants from the tax liability for the earlier period under any other category and that giving of cranes including operator manpower and supervision to their customers is an

activity which will definitely fall under the category of 'Business Support Service' which is taxable w.e.f. 1.5.2006.

3. Heard both sides and have gone through facts.

4.1 The definition of "Business Support Service" as given in Section 65 (104c) of the Act as under :

> "[104c] "support services of business or commerce" means services provided in relation to business or commerce and includes evaluation of prospective customers, telemarketing, processing of purchase orders and fulfilment services, information and tracking of delivery schedules, managing distribution and logistics, customer relationship management services, accounting and processing of transactions, {Operational or administrative assistance in any manner}, formulation of customer service and pricing policies, infrastructural support services and other transaction processing.
>
> *Explanation.* – For the purposes of this clause, the expression "infrastructural support services" includes providing office along with office utilities, lounge, reception with competent personnel to handle messages, secretarial services, internet and telecom facilities, pantry and security"

4.2 The 'taxable service' is defined in Section 65 (105) (zzzq) as under :

> "[zzzq] to any person, by any other person, in relation to support services of business or commerce, in any manner."

4.3 We find that the main ground on which the tax demand has been confirmed and upheld by both the lower authorities is based on the wordings in the BSS, "any service provided in relation to business or commerce". It has also been argued that the definition is inclusive in nature and not restricted to the said category of services as mentioned therein.

4.4 In our view, though the definition of BSS is no doubt an inclusive definition, it only means that the type of activities that would come within the fold of that category will necessarily have to be of the kith and kin or similar to the examples listed therein. We see the list includes —

- Evaluation of prospective customers;
- Telemarketing;
- Processing of purchase orders and fulfilment services;
- Information and tracking of delivery schedules;
- Managing distribution and logistics;
- Customer relationship management services;
- Accounting and processing of transactions;
- Formulation of customer service and pricing policies;
- Infrastructural support services and other transaction processing.

Thus, for any other activity to find a fit within this definition of "BSS" such activity should pertain to the same class or category or genus as the list of examples given in the definition. This is the basic all important maxim of *ejusdem generis*. The following exposition of the rule is found in Brooms Legal Maxims, Twelfth Edition, pg. 429 :

> "It is a rule laid down by Lord Bacon, that *copulatio verborum indicat acceptationem in eodum sensu* — the coupling of words together shows that they are to be understood in the same sense. And, where the meaning of a particular word is doubtful or obscure, or where a particular expression when taken singly is inoperative, the intention of the party who used it may frequently be ascertained by looking at adjoining words, or at expressions occurring in other parts of the same instrument, for *quæ non valeant singular juncta juvant* – words which are ineffective when taken singly operate when taken conjointly: one provision of a deed, or other instrument, must be construed by the bearing it will have upon another."

4.5 In the circumstances, by no stretch of imagination can renting of cranes be called an activity of the same genre as the other examples listed in the definition of "Business Support Service" in Section 65 (104c) of the Act. This being so, we are afraid that the attempt to rope in the impugned activity of the appellant within the ambit of BSS cannot sustain. If the argument adopted by the lower authorities that all services for business and commerce will fall within the scope of Section 65 (104c) is to be accepted, there would not have been a need for the legislature to carve out so many types of services, which in the most, are performed only in relation to business or commerce.

5. In view of the discussions herein above, we find that the impugned order will require to be set aside, which we hereby do. Appeal is allowed with consequential benefits, if any, as per law.

(operative part of the order pronounced in court)

(Madhu Mohan Damodhar)
Member (Technical)

(Sulekha Beevi, C.S)
Member (Judicial)

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