CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL CHENNAI

REGIONAL BENCH – COURT NO. III

SERVICE TAX APPEAL No.41317 of 2015

[Arising out of Order-in-Original No.MAD-CEX-000-COM-03-2015 dated 06.03.2015 passed by the Commissioner of GST & Central Excise, Madurai)

Mr. G. Sakthivel **Appellant**
1/242B, Manthaiamman Koil Street,
Samantham,
Madurai 625 009.

Vs

The Commissioner of GST & Central Excise, **Respondent**
Madurai Commissionerate
Central Revenue Building,
No.4, Lal Bahadur Shastri Road, Bibilulum,
Madurai 625 002.

SERVICE TAX APPEAL No.41821 of 2015

(Arising out of Order-in-Appeal No.50/2015 dated 18.05.2015 passed by the Commissioner of Central Excise (Appeals-I), Coimbatore at Madurai)

Mr. S.Subburayalu **Appellant**
No.4, I Block Top Floor,
Section Anirudh, Vasudhara,
84, T.P.K. Road, Andalpuram,
Madurai 625 003.

Vs

The Commissioner of GST & Central Excise, **Respondent**
Madurai Commissionerate
Central Revenue Building,
No.4, Lal Bahadur Shastri Road, Bibilulum,
Madurai 625 002.

SERVICE TAX APPEAL No.42396 of 2016

(Arising out of Order-in-Appeal No.107/2016 dated 23.09.2016 passed by the Commissioner of Central Excise (Appeals-I), Coimbatore at Madurai)

Mr. A. Athinarayanan **Appellant**
42/31, Sahayamatha Street,
Gnanaolivupuram
Madurai 625 016.

Vs

The Commissioner of GST & Central Excise, **Respondent**
Madurai Commissionerate
Central Revenue Building,
No.4, Lal Bahadur Shastri Road, Bibilulum,
Madurai 625 002.

SERVICE TAX APPEAL No.42397 of 2016

(Arising out of Order-in-Appeal No.108/2016 dated 23.09.2016 passed by the Commissioner of Central Excise (Appeals-I), Coimbatore at Madurai)

Mr. M. Arulprakasam **Appellant**
96/62, Harvey Nagar,
4th Cross Street, Arasaradi,
Madurai-625 016.

Vs

The Commissioner of GST & Central Excise, **Respondent**
Madurai Commissionerate
Central Revenue Building,
No.4, Lal Bahadur Shastri Road, Bibilulum,
Madurai 625 002.

SERVICE TAX APPEAL No.40628 of 2018

(Arising out of Order-in-Appeal No.274/2017 dated 28.12.2017 passed by the Commissioner of Central Excise (Appeals-I), Coimbatore at Madurai)

Mr. S.Subburayalu **Appellant**
Vasundhara Agirini Apartments,
Thaniya MS,1 TPK Road, Andalpuram,
Madurai 625 003.

Vs

The Commissioner of GST & Central Excise, **Respondent**
Madurai Commissionerate
Central Revenue Building,
No.4, Lal Bahadur Shastri Road, Bibilulum,
Madurai 625 002.

APPEARANCE:

Shri N. Viswanathan, Advocate
For the Appellant

Shri Arul C. Durairaj, Superintendent (AR)
For the Respondent

CORAM:

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

Date of Hearing : 22.04.2022
Date of Pronouncement: 18.05.2022

FINAL ORDER No. 40178-40182 / 2022

PER : SULEKHA BEEVI, C.S.

The issue involved in all these appeals being the same, they were heard together and disposed by this common order.

2. The appellants were issued show cause notices for different periods demanding service tax under the category of 'Man Power Recruitment or Supply Agency Service'. The Assistant Commissioner of Central Excise, Madurai visited the premises of M/s.TAFE Equipment Ltd., Kalladipatti (hereinafter to referred to as TAFE/service recipient) and observed that TAFE had entered into contracts with various persons for supply of man power for utilizing such man power in their factory. Verification of the accounts revealed that such contractors, who are appellants herein, had neither got themselves registered with the department as service provider nor had they paid any service tax

on the value received from TAFE for providing taxable services. The details of the agreement entered into between TAFE and the appellants were called for and examined. The Department entertained a view that the activity would be taxable under 'Man Power Recruitment or Supply Agency Service'. Show cause notices were issued and after due process of law, the original authority confirmed the demand, interest and imposed penalties. Aggrieved by such order (OIO No.3/2015), the appellant has filed Appeal No.ST/41317/2015. Against other Original-in-Orders, the respective appellants filed appeals before the Commissioner (Appeals) who upheld the same. The details of the appeals, period involved and the amounts confirmed are given in the table below :

Sl No.	Appellant	Appeal No.	Impugned Order-in-Original/Appeal No./dt.	Amount of Service Tax involved Rs.	Period covered
1	G.Sakthivel	ST/41317/2015	O-in-O No. 3/2015 dt.06.03.2015	73,36,946/-	**04/08 to 06/12**
2	S.Subburayulu	ST/41821/2015	O-in-A No. 50/2015 dt.18.05.2015	4,26,125/-	**04/11 to 03/12**
3	R.Athinarayanan	ST/42396/2016	O-in-A No.107/2016 dt.23.09.2015	5,35,737/-	**04/12 to 03/13**
4	M.Arulprakasam	ST/42397/2016	O-in-A No.108/2016 dt.23.09.2016	7,74,114/-	**04/12 to 03/13**
5	S.Subburayulu	ST/40628/2018	O-in-A No.274/2017 dt.28.12.2017	2,16,328/-	**04/12 to 03/13**

3. Ld. Counsel Shri N. Viswanathan appeared and argued for the appellants. He submitted that the appellants had undertaken the activity in the nature of assembling etc. in the manufacture of tractors for M/s.TAFE. They had entered into contracts with TAFE on principal-

to-principal basis using their own employees. The control and supervision of these employees was with them. Further, payment made by TAFE was on piece rate basis i.e. per tractor assembled/processed/manufactured. For these reasons, the activity does not fall within the definition of "Man Power Recruitment and Supply Agency Service". He referred to the definition which reads as under :

> **"9. Definitions relating to 'Manpower Recruitment or Supply Agency' Service :**
>
> (i) Statutory definition as amended with effect from 16.05.2008 is :
>
> "manpower recruitment or supply agency" means any *person* engaged in providing any service, directly or indirectly, in any manner for recruitment or supply of manpower, temporarily or otherwise, to any other person"
>
> (ii) Taxable Service : As per Section 65 (105)(l) of the Finance Act, 1994, taxable service means "service provided or to be provided to any person by a manpower 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";

4. The Department overlooking the fact that M/s.TAFE had outsourced the work of process of manufacture of tractors on principal-to-principal basis without involving any supply of man power for TAFE, has taken an erroneous view that appellants are providing man power supply services which attract levy of service tax.

5. The Ld. Counsel submitted that on similar set of facts in earlier appeals of the same appellants as well as others who had been

providing similar activity to TAFE, the Tribunal vide Final Order Nos.40359-40367/2019 dated 19.02.2019, Final Order Nos.41762-41771/2021 dated 23.08.2021 and Final Order Nos.41888-41889/2021 dated 26.08.2021 had allowed the appeals by setting aside the demand for the period prior to June 2012. For the period after June 2012, the matter was remanded to the adjudicating authority. The Tribunal in the said final orders had relied upon the decision in the case of *Bhagyashree Enterprises VS CCE Pune-I* - 2017 (3) GSTL 515 (Tri.-Mumbai) and observed that the activity provided by the appellant would not attract levy of service tax under the category of 'Man Power Recruitment and Supply Agency Service'.

6. In addition to the above, the Ld. Counsel submitted that the issue raised is fully covered in favour of the appellant in terms of CBEC Circular No.190/9/2015-ST 15.12.2015 clarifying the position under the negative list-based service tax regime with effect from 01.07.2012 which reads as under :

> "2. The matter has been examined. The nature of manpower supply service is quite distinct from the service of job work. The *essential characteristics of manpower supply service* are that the supplier provides manpower which is at the disposal and temporarily under effective control of the service recipient during the period of contract. Service providers accountability is only to the extent and quality of manpower. Deployment of manpower normally rests with the service recipient. The value of service has a direct correlation to manpower deployed, i.e., manpower deployed multiplied by the rate. In other words, manpower supplier will charge for supply of manpower even if manpower remains idle.
>
> 2.1 On the other hand, the *essential characteristics of job work* service are that service provider is assigned a job e.g. fabrication/stitching, labeling etc. of garments in case of apparel. Service provider is accountable for the job he undertakes. It is for the service provider to decide how he deploys and uses his manpower.

> Service recipient is concerned only as regard the job work. In other words service receiver is not concerned about the manpower. The value of service is function of quantum of job work undertaken, i.e. number of pieces fabricated etc. It is immaterial as to whether the job worker undertakes job work in his premises or in the premises of service receiver."

7. Ld. Counsel also relied upon the decision of the Hon'ble Supreme Court in *Commissioner Vs Surya Trading & Services* – 2018 (15) GSTL J209 (SC) and also the following decisions :

(a) *Shiv Narayanan Bansal Vs CCE* [2013 (31) STR 747]

(b) *SS Trust Vs CCE* [2014 (36) STR 83, which was affirmed by the Hon'ble Bombay High Court in *CCE Vs SS Trust* [2016 (410STR 806.

(c) *Om Enterprises VS CCE* [2018 (17) GSTL 260

d) *Shailu Traders vs. CCE* [2018 (10) GSTL 462]

8. Ld. Counsel submitted that consequent to the change of law with effect from 01.07.2012, the appellants have started paying service tax on the amounts received from TAFE. They have also registered with the department and are filing statutory returns. However, in addition to contesting the issue as to whether they are liable to pay service tax for the period after June 2012, the appellants also contest the correctness of the quantification of the demand for the periods after June 2012 upto March 2013. The adjudicating authority has arrived at the taxable value by taking the receipts shown in Profit and Loss Account. Thus, the taxable value has been arrived by including sundry creditors and other receipts which is wholly erroneous. He submitted that for the period after June 2012, the matters may be remanded for

requantifying the taxable value also. He prayed that the appeals may be allowed.

9. Ld. A.R Shri Arul C. Durairaj supported the findings in the impugned order.

10. Heard both sides. From the table shown in para (2) above, it can be seen that the period involved is from April 2008 to March 2013. The Tribunal in similar cases, wherein contactors had provided services to TAFE and income was received on piece rate, had observed that the contractors were liable to execute the work for TAFE and are responsible for the defect, if any. It was held that the activity would not fall within the definition of "Man Power Recruitment or Supply Agency Services". In similar matters vide Final Order Nos.40359-40367/2019 dated 19.02.2019 where the period involved is prior to June 2012 (name of the appellants are : G. Ramakrishnan, K. Balakrishnan, P. Kannusamy, M. Arulprakasam, R. Athinarayanan and S. Subburayalu), the Tribunal had set aside the demand relying upon the decision in the case of *Bhagyashree Enterprises* (supra). The observations made in the said final order read as under :

> "On perusal of the preamble of the agreement itself it is seen that appellant is an independent contractor appointed for executing work that are entrusted to him by TAFE. So also, at clause 3 as well as clause 7, it is stipulated that appellant shall be responsible for the defect in executing the works. Appellant executes the works along with other workers and merely because he has engaged other workers in executing the work, it cannot be said that he is the supplier of man power. In clause 11 of the agreement, it is stated that the company will have privity of contract with the contractor

> only and will give instructions only to the appellant/contractor and has nothing to do with the conditions of employment of the workers who work with appellant. Reliance placed by the department in clause 14, in our view, is misconceived. It can be seen that while the workers are engaged to work within the manufacturing activity premises they have to abide by certain labour legislations. Merely taking such licence or abiding by such labour law, it cannot be said that the contract for executing works within the manufacturing activity would be supply of man power. The argument of Ld.A.R is that original authority has observed that the agreement is tailor-made for specific purpose, however we find that no evidence has been brought forth by the department to prove that the agreement per se was not followed in its letter and spirit or for that matter, there is no evidence that has been unearthed by the department contrary to the piece rate payment being made to the appellants and that payments were not for man hour or per persons supplied. There being so, the conclusions that have been arrived by lower authorities can at best be termed as presumptive without any evidential or legal basis. The decision relied by Ld. AR is not on facts. The decision relied upon by the Ld. Counsel for appellants especially that of the decision in the case of *Bhagyashree Enterprises* (supra) covers the issue under consideration. Following the same, we are of the considered view that demand cannot sustain. Impugned orders are set aside. Appeals are allowed with consequential benefits, if any, as per law."

The said decision was later followed by the Tribunal in Final Order No.41762-41771/2021 dt. 23.08.2021 wherein the period involved is from April 2009 to June 2012. The appellants in the said batch of cases are M. Arul Prakasam, S. Subburayalu, G. Ramakrishnan, R. Athinarayanan and P. Kannusamy. Following the decisions of the Tribunal in the above stated final orders, we are of the considered opinion that the demand prior to June 2012 cannot sustain and requires to be set aside, which we hereby do. Ordered accordingly.

11. However, we have to say that there is change of law with effect from 01.07.2012. It is submitted by the Ld. Counsel for appellants that appellants have obtained registration with the department and has

started paying service tax. In similar matters for the period after June 2012, the Tribunal vide Final Order No.41888-41889/2021 dt.26.08.2021 has remanded the matter to the adjudicating authority for re-computation of the service tax after granting cum tax benefit. The relevant paragraphs of the above said final order are reproduced as under :

> "7. Following the same, we are of the view that the demand prior to 2012 cannot sustain and requires to be set aside which we hereby do.
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> 8. The ld. Counsel has submitted that they are not contesting the liability after 2012. It is also argued by him that they have discharged the service tax liability and the matter may be remanded to verify the same and also to look into the issue of cum-tax benefit. On perusal of the impugned order, it is seen that though the appellant has raised this contention, the same has not been considered by the authorities below. The matter with regard to the period after 2012 is remanded to the adjudicating authority who shall determine afresh the duty demand for the period after 1.7.2012 and examine whether service tax on these services has been discharged. The cum-tax benefit contention shall also be looked into. With regard to the penalty imposed after the period 2012, we are of the opinion that being an interpretational issue the appellant cannot be saddled with the guilt of intention to evade tax. Further, there is no allegation or finding of any positive act on the part of the appellant of willful suppression to evade service tax. On such score, imposition of penalty is unwarranted and requires to be set aside which we hereby do.
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> 9. The demand, interest and penalties for the period prior to 1.7.2012 is set aside. For the period after 1.7.2012 the matter is remanded to the adjudicating authority who shall redetermine the duty as directed above. The penalties for the period after 1.7.2012 is also set aside. The impugned orders are modified in above terms. The appeals are partly allowed and partly remanded."

12. However, it has to be stated that in the present case the appellants besides contesting the correctness of the quantification of the demand, have also contested the liability to pay service tax on the basis of the Board's Circular No.190/9/2015-ST dated 15.12.2015. We are of the considered opinion that for the period w.e.f. 1.7.2012 the

matters require to be remanded to the adjudicating authority who is directed to reconsider the issue as to whether the demand of service tax will sustain or not on the basis of the clarification issued in the above said Board circular. In case, the demand is sustainable, the adjudicating authority has to look into the correctness of the quantification of the demand. Ordered accordingly.

13. The issue being purely interpretational and the appellants having taken registration after 2012, we are of the opinion that the penalty imposed is unwarranted. The Tribunal in the final order dt. 26.08.2021 for the period after 2012 has set aside penalty imposed. Following the same, we are of the considered opinion that for the period after 2012, the penalties are required to be set aside, which we hereby do so. In the remand proceedings, the adjudicating authority shall look into as to whether the demand of service tax is legal and proper and also the correctness of the quantification.

14. Thus, the appeals for the period prior to June 2012 are allowed with consequential relief, if any. For the period after June 2012, the matter is remanded to the adjudicating authority and penalties imposed are set aside.

15. In the result,

(i) Appeal **ST/41317/2015** filed by G. Sakthivel is allowed with consequential relief, if any.

(ii) Appeal **ST/41821/2015** filed by S. Subburayulu is allowed with consequential relief, if any.

(iii) Appeal **ST/42396/2016** filed by R. Athinarayanan is partly allowed by setting aside demand prior to 1.7.2012 and penalty and partly remanded to the adjudicating authority, as above.

(iv) Appeal **ST/42397/2016** filed by M. Arulprakasam is partly allowed by setting aside demand prior to 1.7.2012 and penalty and partly remanded to the adjudicating authority, as above.

(v) Appeal **ST/40628/2018** filed by S.Subburayalu is partly allowed by setting aside demand and penalty and partly remanded to the adjudicating authority, as above.

(Pronounced in court on 18.05.2022)

(**SULEKHA BEEVI C.S.**)
MEMBER (JUDICIAL)

(**RAJU**)
MEMBER (TECHNICAL)

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