CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

NEW DELHI

PRINCIPAL BENCH – COURT NO. – IV

Service Tax Appeal No. 51796 of 2018 [DB]

[Arising out of Order-in-Appeal No. BHO-EXCUS-002-APP-515-17-18 dated 22.03.2018 passed by the Commissioner of CGST, Central Excise and Customs, Raipur]

M/s. Bridge Track & Tower Private Limited **...Appellant**
Plot No.10 & 11, Sector-A,
Urla Industrial Area,
Raipur - 493221

VERSUS

Commissioner of Central Excise and Service Tax, Raipur **...Respondent**
Central Excise Building, Dhamtari Road,
Tikrapara, Raipur,
Chhattisgarh - 492001

APPEARANCE:
Shri Abhas Mishra, Advocate for the Appellant
Shri Manoj Kumar, Authorized Representative for the Respondent

CORAM:
HON'BLE DR. RACHNA GUPTA, MEMBER (JUDICIAL)
HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)

DATE OF HEARING: 21.11.2023
DATE OF DECISION: **20.03.2024**

FINAL ORDER No. 55444/2024

DR. RACHNA GUPTA

The appellant herein is engaged in manufacture of Metal Linker, Spike screw, MS Waste and Scrap etc. During the audit of appellants' record, department observed that the appellant has received purchase orders from various customers like M/s. Indian Railways, M/s. L&T Ltd., M/s. Rourkela Steel Plant etc, towards supply of elastic rail clips and metal liners. The prices in the said purchase order were found to be on FOR basis (excluding freight). Department also observed that from their buyers, the appellants have collected an amount in excess of actual freight incurred by them towards the transportation and delivery of goods to said buyers in lieu of having arranged and facilitating the transportation and delivery of the goods for them. This activity was alleged to fall under the scope of Business Auxiliary Activity. Resultantly, vide Show Cause Notice No. 5009 dated 09.02.2016, service tax amounting to Rs.10,05,498/- along with the proportionate interest and appropriate penalties was proposed. The proposal was initially confirmed vide Order-in-Original No.7835 dated 06.07.2017. The appeal against the said order has been rejected by Commissioner (Appeals). Being aggrieved, the appellant is before this Tribunal.

2. We have heard Shri Abhas Mishra, learned Advocate for the appellant and Shri Manoj Kumar, learned Authorized Representative for the respondent.

3. Learned counsel for the appellant has mentioned that the show cause notice was issued alleging the amount in question to have been charged by the appellant for rendering Business Auxiliary Services. However, Commissioner (Appeals) has held the said amount to be a difference between the actual freight paid to the transporter and gross freight collected from the buyers of the goods to be nothing but the brokerage or commission. Since, the service tax liability though has been confirmed but on a ground different from the one which was taken in the show cause notice. The order under challenge is not sustainable for the findings being beyond the scope of show cause notice. Learned counsel has relied upon the following decisions:

(i) SACI Allied Products Ltd. Vs. CCE reported as 2005 (183) ELT 225 (SC)

(ii) CCE Vs. Toyo Engineering India reported as 2006 (201) ELT 513 (SC)

(iii) CCE Vs. Shital International reported as 2010 (259) ELT 165 (SC)

(iv) Balaji Contractor Vs. CCE, Jaipur-II reported as 2017 (52) STR 259 (Tri. Del.)

3.1 With respect to the merits of the case, while impressing upon the definition of "service" given under Section 65B(44) of the Finance Act, 1994, it is mentioned that collection of excess freight charged cannot be termed as the amount of consideration for rendering service. The decision of this Tribunal in the case of **Commissioner of Service Tax, New Delhi Vs. Karam Freight Movers reported as 2017 (4) GSTL 215 (Tri. Del.)** is relied upon. With these submissions, the order under challenge is prayed to be set aside and the appeal is prayed to be allowed.

4. While rebutting these submissions, learned Departmental Representative has mentioned that the department proceeded for the impugned demand for the period July, 2012 to November, 2015 holding that the amount retained by the appellant from the freight charged is towards the service charges on account of processing and facilitating the transportation of finished goods cleared from appellant's factory to the point of delivery. This activity of facilitation is rightly proposed in the show cause notice as Business Auxiliary Services defined under Section 65(19) of the Finance Act. It is impressed upon that since the appellants have procured the Transport Services from various transporters and they have collected certain amount, as freight, from the buyers of the finished goods but have paid less than said amount to the transporter, the difference is definitely the consideration for facilitating the buyers for arranging the transporters for the delivery of goods to them of FOR basis. Impressing upon no infirmity in the order challenge, appeal is prayed to be dismissed.

5. Having heard the rival contentions and perusing the records, we observe and hold as follows:

5.1 The allegations against the appellants are that the appellants arranging the transportation for delivery of goods manufactured by them to their clients/buyers so as to facilitate those buyers, have generated some income by retaining some part of the freight charges as were received from their buyers while making payments to the transporters. We observe that show cause notice alleged the said amount to be a consideration for rendering a Business Auxiliary Service. The order under challenge has held the said amount to be a brokerage or commission. This particular perusal is sufficient for us to hold that Commissioner (Appeals) has gone beyond the scope of show cause notice which is not at all permissible. Confirming a demand on a different count which was not brought to the notice of the assessee/appellant before confirmation of the service tax amounts to confirmation of tax under new categories and the same is not legally permissible as it was held by this Tribunal in the case of **Balaji Contractor (supra).** Hon'ble Supreme Court also in the case of **Commissioner of Customs, Mumbai Vs. Toyo Engineering India Limited reported as 2006 (201) ELT 513 (SC)** has held that the department cannot travel beyond the scope of show cause notice. These observations are sufficient to set aside the order under challenge.

5.2 Coming to the merits of the case, there is an agreement of the appellant with its buyers to deliver the goods manufactured by the appellant on FOR basis. The freight was agreed to be paid separately. Vide the agreement which was the purchase order only. Element of service cannot be impleaded into the said agreement/purchase order. Otherwise also, a conjoint reading of Section 68 and 65 of the Finance Act, 1994 reveals that there has to be a taxable service provided or to be provided to a client against certain consideration and that the said consideration is chargeable to service tax. As already observed above, there is no contract except the purchase order which is the contract of sale of goods issued by the buyers of the goods.

5.3 We observe that basic allegation against the appellant was that the appellant has collected an amount in excess of the actual freight incurred by them towards the transportation and delivery of goods to their customers/clients. Thus, the notice, in lieu of having arranged and facilitating the transportation and delivery of goods, have generated some income in the form of additional amount collected by them from their customers. Such an activity undertaken by the noticee falls within the ambit of "Business Auxiliary Service". But facilitating the delivery of goods by engaging transporters cannot be said to be any of the activities under clause (i) to clause (vii) of Section 65(19) of Finance Act which defines Business Auxiliary Service. The buyer of goods manufactured by appellant cannot be held to be the service recipient, he being the party to contract of sale/purchase order. There is no contract between appellant and the transporter. No question of later being the service recipient at all arises. Thus there is no activity of appellant which may be called as Business Auxiliary Service. No question arises of providing Business Auxiliary Service as is alleged in show cause notice by the appellant to the said buyer.

5.4 Coming to the plea taken by the Commissioner that the amount in question is nothing but a brokerage and commission, we hold that the mere activity of sale cannot be called as taxable service. Earning profit in the said arrangement therefore cannot come under the service tax net. Thus, the findings of Commissioner are otherwise not sustainable. The transaction in question is between principal manufacturer to principal buyer. The freight charges are in addition to the value of the goods. The surplus is earned by the appellant by not acting as a service provider to the transporter nor to the buyer. Above all the order of Commissioner (Appeals) is beyond the show cause notice, the findings under challenge are not sustainable on this count itself. We draw our support from the decision of Hon'ble Supreme Court in the case of Hindustan Polymers Co. Ltd. Vs. Collector of Central Excise, Guntur reported as 1999 (106) E.L.T. 12 (S.C.), where in paragraph 6 held as under:

> *"While we appreciate the Tribunal's desire to do complete justice and mould the relief in that direction, we think that, in the circumstances, the Tribunal should not, in this case, have passed an order which proceeded upon a basis that is altogether different from that of the demand made upon the appellants. That is not "moulding" relief. The demand that was made upon the appellants was under Tariff Item 68 and it proceeded upon the basis that there was a process of manufacture of coloured polystyrene from uncoloured polystyrene. Having come to a conclusion against the Revenue on these counts, the appropriate order for the Tribunal to have passed was to have set aside the demand and left it open to the Revenue to proceed against the appellants, as permissible under the law. The appellants would then have had the opportunity of meeting the precise case made out by the Revenue."*

5.5 This Tribunal also in the case of **Balaji Contractor (supra),** Para 7 thereof reads as follows:

> *"7. We have heard both the sides and perused the appeal records. Admittedly, the show cause notices issued to the appellant sought to demand/recover Service Tax under the taxable category under Cargo Handling Services. The proposal was made after due examination of the scope of services rendered by the appellant. The same was confirmed by the original authority. On appeal, the first appellate authority examined the same scope of services, reclassified it under new categories of manpower supply and Goods Transportation Agency services. We note that the tax entry of each type of service has got legal implications with reference to tax liability, classification, quantification, exemption, abatement, etc. It is for this reason, the assessee should be put to notice about the correct classification under which the demand was sought to be made, so that defence can be made to reply for such allegation. Admittedly, in the case involved in the present proceeding, no such proposal to demand Service Tax in GTA services or manpower supply service has been made by the department. As such, the impugned order which travelled beyond the scope of show cause notice is not sustainable on this legal ground alone. We rely on the decision of Hon'ble Karnataka High Court in the case of Mahakoshal Beverages Pvt. Ltd. (supra)."*

6. We have no reason to differ there from. In light of the entire above discussion, the order under challenge is hereby set aside. Consequent thereto, appeal stands allowed.

[Order pronounced in the open court on **<u>20.03.2024</u>**]

(DR. RACHNA GUPTA)
MEMBER (JUDICIAL)

(P.V. SUBBA RAO)
MEMBER (TECHNICAL)

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