IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi – 110 066.
Principal Bench, New Delhi

COURT NO. III

DATE OF HEARING : 30/03/2017.
DATE OF DECISION : 20/04/2017.

Service Tax Appeals No. 837 of 2011 and 50686 of 2014

[Arising out of the Order-in-Appeal No. 47/BPL/2011 dated 03/03/2011 passed by The Commissioner (Appeals), Customs & Central Excise, Bhopal and Order-in-Original No. 39/COMMR/ST/ADJ/BPL-I/2013 dated 22/11/2013 passed by Commissioner, Customs and Central Excise, Service Tax, Bhopal]

M/s M.P. State Seed Certification Agency — Appellant

Versus

CCE, Bhopal — Respondent

Appearance

Shri Z.U. Alvi, Advocate – for the appellant.

Shri Sanjay Jain, Authorized Representative (DR) – for the Respondent.

CORAM: **Hon'ble Shri S.K. Mohanty, Member (Judicial)**
Hon'ble Shri B. Ravichandran, Member (Technical)

Final Order No. 52935-52936/2017 Dated : 20/04/2017

Per. B. Ravichandran :-

These are two appeals covering issue of service tax liability of the appellant with reference to their activity of testing and certification of seeds. The appellants are a statutory Agency created by Government of Madhya Pradesh under Section 8 of the Seeds Act, 1966. They are entrusted with the function of ensuring maintenance of minimum standards of purity and germination of seeds as per the standards prescribed. The main point of dispute in these appeals is relating to the liability of the appellant to pay service tax on the fee collected for testing and certifying seeds at the request of the persons in terms of Section 9 of the said Act. The Revenue held a view that the appellants are liable to service tax in terms of Section 65 (108) of the Finance Act, 1994 under the category of Technical Inspection and Certifying Agency Service.

2. Appeal No. ST/837 of 2011 deals with the claim of the appellant for refund of service tax amounting to Rs. 2,88,60,509/-. The appellants filed refund claim for the said amount on 08/03/2010. The amount was paid on 10/03/2009. A show cause notice dated 05/05/2010 proposing rejection of the said claim was issued. The Jurisdictional Assistant Commissioner adjudicated the case and issued order dated 18/11/2010 rejecting the claim of the appellant. On appeal, vide impugned order dated 03/03/2011, the learned Commissioner (Appeals) upheld the rejection by the Original Authority. The appellant is in appeal before us against the said order.

3. Appeal No. ST/50686 of 2014 is against original order dated 22/11/2013 of Commissioner of Central Excise, Bhopal confirming the service tax demand of Rs. 93,14,970/- against the appellant for the period January 2009 to February 2010. The

Original Authority also imposed penalties under Section 76, 77 and 78 of the Finance Act, 1994. The second appeal is against this order.

4. The learned Counsel appearing for the appellant submitted that the appellant is a Statutory Public Authority constituted under Section 8 of the Seeds Act, 1966. They are discharging statutory functions in terms of Section 9 with reference to certifying of notified seeds. He referred to Board's Circular dated 18/12/2006 and reiterated vide Circular dated 23/08/2007, to submit that activities assigned to and performed by sovereign/ public authorities under provisions of any law or statutory duties are not liable to service tax. The fee or amount collected as per the provisions of relevant statute for performing such function is in the nature of compulsory levy and are deposited into Government account. These are not to be treated as service provided for consideration. The learned Counsel also submitted that the appellants are a law enforcing statutory authority and the officers of the appellant have quasi-judicial powers and also powers of seizure and issue of warrant. The learned Counsel also relied on certain decided cases to support his contention that activity performed by a State Agency, as per law, cannot be subjected to service tax.

5. Regarding the entitlement of the appellant for refund, the learned Counsel submitted that service tax of Rs. 2,88,60,509/- was paid by the appellant on 08/03/2010 under coercion and

pressure put by the officers of Central Excise. In fact, they have taken service tax registration only on 09/03/2009 and paid the said amount on 10/03/2009. Letter dated 04/05.03.2009 of the Joint Commissioner of Central Excise should be treated as a demand. The said demand is without a proper show cause notice and not legally sustainable.

6. The learned Counsel also contested the service tax liability of the appellant stating that their activities will neither fall under "Technical Testing and Analysis" as defined under Section 65 (106) nor under "Technical Inspection and Certification" as defined under Section 65 (108) of the Finance Act, 1994. The appellants are testing the seeds in accordance with International Rules for Seeds Testing, 1976. The basic objective and purpose of activity is certification of the seed, which is not covered under tax entry, technical testing and analysis. It is further contended that the process of technical inspection as defined under Section 65 (108) is confined to mere physical examination of the item and the said item continues to remain in the same physical form, after inspection also. Whereas, the testing of seeds by appellant involves process of natural germination, sprouting and growth of plant and thereby resulting in loss of seeds which are subjected to test. As such, it is contended that the certification undertaken by the appellant is not covered by tax category of technical inspection and certification service. The learned Counsel also submitted that Notification No. 10/2010-ST dated 27/02/2010 exempted activities of seed testing by Central/State Seed

Certification Agencies and indicated both the above services. It only shows that the Government itself was not sure about the correct classification of the service rendered by the appellant. It is claimed that the functions of the appellant are similar to the functions of police providing armed guards to banks, public sector units etc., on payment of cost for deployment. In that case, the Tribunal held the activities as not taxable relying on the basis of Circular dated 23/08/2007 of the Board. The appellants also relied on various case laws to support their contention.

7. Regarding the appeal against order dated 22/11/2013 confirming the service tax liability for the period January 2009 to February 2010, the learned Counsel for the appellant submitted that there is no tax liability on the activities carried out by the appellant. The submissions made in the appeal relating to refund claim will apply for this appeal also. It is further submitted that the show cause notice dated 22/10/2010 issued invoking extended period is not legally sustainable as the Department is well aware of the activities of the appellant and in fact issued direction in March 2009 to pay service tax covering the period July 2003 to December 2008. In fact, the Department issued show cause notice on 05/05/2010 to reject the refund claim filed by the appellant for the earlier period, as such, the show cause notice dated 22/10/2010 cannot invoke extended period. Even otherwise, it is clear that the appellant being an Agency of a State Government, performing statutory functions, cannot be charged with allegation of suppression, willful mis-statement with

an intend to evade payment of tax. There is also a case for bonafide belief regarding non-liability to service tax in view of contradictory stand taken by the officers of the Department. The Joint Commissioner of Service Tax, Ahmedabad in his letter dated 01/08/2006 addressed to the Director, Gujarat State Seeds Certification Agency, Ahmedabad, clarified that the activity of Seed testing and certification carried out by the Agency would not be covered under service tax. The said communication was forwarded to the appellant by the Ministry of Agriculture, Government of India, vide their letter dated 27/09/2006. In such a situation, no malafide intend to evade payment of service tax can be alleged against the appellant. As such, it is submitted that the demand for extended period as well as various penalties imposed on the appellants by the impugned order dated 22/11/2013, are not legally sustainable.

8. The learned AR submitted that the appellants are engaged in providing service of certification for seeds for persons who are approaching them. Seed testing is not compulsory or a mandatory requirement for all. It is further submitted that the activities of the appellant in connection with testing certification of seeds has been exempted by the Government from payment of service tax vide Notification No. 10/2010-ST dated 27/02/2010. As such, the appellants are eligible for exemption from that date. The said notification is only prospective and will not provide any exemption for the period prior to 27/02/2010.

9. We have heard both the sides and perused the appeal records. The central point of dispute is the appellant's liability to pay service tax for testing and certification of seeds. The appellants contended that they are a statutory authority, performing a statutory function and there is no service element to be taxed under the category of technical inspection and certification. The statutory definition of technical inspection and certification is as below :-

> **<u>Section 65 (108)</u>** : "technical inspection and certification" means inspection or examination of goods or [process or material or information technology software] or any immovable property to certify that such goods or process or material or immovable property qualifies or maintains the specified standards, including functionality or utility or quality or safety or any other characteristic or parameters, but does not include any service in relation to inspection and certification of pollution levels";
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> **<u>Section 65 (109)</u>** : "technical inspection and certification agency" means any agency or person engaged in providing service in relation to technical inspection and certification";

10. We note that the appellants are engaged in testing and certification of seeds. They have submitted a brief write up of the whole process. We have perused the same. The process of certification of seeds starts from application by a person, identification of area where the seed is sown, periodical inspection, caring of seeds after harvesting, sampling, preliminary testing and inspection to check the purity, absence of

disease, seed health and other parameters like moisture etc., germination test, sealing of certified seeds. Admittedly, the appellants undertake these activities on payment of application fees, inspection charges etc. The nature of activities as submitted by the appellant themselves in their write up and also elaborately dealt with in the Seed Certification Handbook makes it clear that the activities of the appellant will fall under the taxable category of technical inspection and certification. The claim of the appellant is that the tax entry covers only physical examination of the item, whereas in the process carried out by the appellant, the seeds loose their identity during the course of testing and, as such, the activity cannot be called as technical inspection. We are not in agreement with the said assertion of the appellant. The statutory definition talks about inspection or examination of goods vis-à-vis specified and pre-set standards, resulting in certification to the effect that the item under inspection conforms to pre-set standards as regards qualities, functions etc. In the present case, the appellants have taken the inspection or examination of seeds in various stages starting from cultivation, harvesting, grading and quality checking in order to arrive at the decision whether the seeds meet the pre-set standards. Thereafter, due certification is given. We find that the activities of the appellant are covered by technical inspection and certification service. The lower Authorities have correctly upheld the service tax liability of the appellant under this category.

11. We also considered the appellant's plea against tax liability on the ground that they are a statutory authority discharging a statutory function and the charges collected for such function cannot be taxed. We have perused the provisions of Seed Act, 1966.The appellants were constituted in terms of Section 8 of the Seeds Act, 1966. The said section states that the State Government or Central Government in consultation with the State Government may, by notification establish a certification Agency to carry out the function entrusted to the certification Agency by or under this Act. Section 9 states that any person selling, keeping for sale, offering to sale any notified kind or variety of seed may have the same certified by the certification Agency. On payment of fee for such certification, an application can be made. On perusal of the provisions of the Act, we note certification of notified type of seed is an optional requirement. The appellants contended that they are entrusted with enforcement of various provisions of the Act and, as such, they are performing a statutory function. We note that the fees and charges collected by the appellant are with reference to the optional activity of a person approaching the appellant for certification. The appellants do have various other statutory functions with reference to declared seeds in terms of Section 5 of the Act. The Government can fix quality standards for such declared seeds. To enforce such standards, the appellants were vested with statutory powers. However, we are dealing with fees and charges paid by the person who desires to have seeds to be

certified for his commercial purposes. In such situation, we can discern two different types of roles for the appellant – (a) as a certifying agency which is performed on collection of fees and charges from the persons who approach them and (b) enforce the provisions of Seed Act, 1966 in respect of declared seeds to maintain the quality and standards of such seeds. The fee collected, is for performing activity of certification of seeds and not connected with any coercive enforcement of legal authority. As such, we find that the fees and charges collected by the appellant for providing certification service of seeds are rightly taxable.

12. It is relevant to note that the Government has issued Notification No. 10/2010-ST dated 27/02/2010 exempting the activities of seed testing by Central/State Seed Certification Agencies under the category of technical inspection and certification and technical testing and analysis. We find the said notification is applicable only prospectively. We are not able to accept the plea of the appellant that the exemption should be treated as only clarificatory. We find no legal support for such claim.

13. As the service tax liability of the appellant is upheld in our finding, as recorded above, now we examine the appellant's eligibility for refund of service tax paid gathered in appeal No. ST/837 of 2011. The appellants paid the service tax after enquiry was initiated by the Department and there were many

correspondence between the Jurisdictional officer and the appellants. The Joint Commissioner of Central Excise vide his letter dated 05/03/2009 directed the appellant to deposit the service tax liability, not paid for the period July 2003 to December 2008, alongwith applicable interest. The appellants have paid the said amount (without any interest) on 10/03/2009. There were no demand proceedings resulting in adjudication of any demand by the competent officer. The appellants paid the service tax liability towards the past dues in one lump-sum payment and filed a claim later for the refund of the same. As the service tax liability of the appellant has been upheld, we find no reason to interfere with the orders of the lower authorities rejecting the refund claim of the appellant.

14. Regarding the adjudication proceedings initiated by issue of show cause notice dated 22/10/2010. We note that the said notice invoked extended period of limitation and the adjudication order also confirmed demand for extended period alongwith penalties under Section 76, 77 and 78 of the Finance Act. We find that while the appellant’s liability to service tax is upheld, there can be no allegation of fraud, suppression, willful misstatement etc. against the appellant. It is very clear that investigation by officers of DGCEI, Indore started way back in May 2006. After the applicant furnished relevant information, the enquiry was dropped in November 2006. Thereafter, in December 2008 again the local Jurisdictional Central Excise officers commenced an enquiry and after due examination of the records addressed

letters to the appellant to pay service tax due for the past period from July 2003 to December 2008. The appellants discharged the service tax on 10/03/2009. Thereafter they filed a claim for refund also. In such situation, show cause notice dated 22/10/2010 was issued invoking extended period. We find there is no legal justification to invoke demand for extended period when the earlier enquiries were conducted twice which later resulted in realization of service tax dues and closure of matter without any adjudication proceedings. We have perused the justification recorded by the lower Authority for such demand. It is recorded that the appellants are aware of the law and paid service tax earlier but stopped paying from January 2009, without any reason. It was further noted that the appellants failed to provide details even after repeated request and, hence, they have suppressed the facts to the Department. We are not able to appreciate such assertion. The scope and nature of activities of the appellants were examined in detail on two earlier occasions by two sets of officers and service tax was paid by the appellant after such enquiry. Admittedly, as noted earlier in this order based on a clarification issued by Joint Commissioner of Service Tax, Ahmedabad, the Ministry of Agriculture, Government of India, communicated to the appellant regarding non-applicability of service tax for their services. Considering these facts in view, we find no justification for invoking demand for extended period against the appellant in the proceedings pursuant to show cause notice dated 22/10/2010. The service tax liability should be restricted to normal period only. Accordingly, for the same reason, we hold the penalties imposed on the appellants under Section 76 and 78 are liable to be set aside.

15. In view of the above discussion and analysis we conclude that the appellant's liability to service tax is to be upheld. The demand confirmed pursuant to show cause notice dated 22/10/2010 shall be restricted to the normal period and the penalties imposed under Section 76 and 78 are set aside. The appeals are disposed of in the above terms.

(Order pronounced in open court on 20/04/2017.)

(S.K. Mohanty)
Member (Judicial)

(B. Ravichandran)
Member (Technical)

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