CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL,

West Block No.2, R.K.Puram, New Delhi

COURT-I

Date of hearing: 19.07.2017
Date of Pronouncement: 31.10.2017

Appeal No. ST/1693 & 1701/2011-CU[DB]

[Arising out of the Order-in-Original No. 13-2011-ST-JPR-II dated 29/07/2011, passed by the Commissioner of Central Excise, New Delhi]

M/s. Shree Logistics Pvt. Ltd. … Appellant
C.C.E. Udaipur

Vs.

C.C.E. Udaipur
M/s. Shree Logistics Pvt. Ltd. ... Respondent

Appearance:

Present Shri Bipin Garg, Advocate for the appellant
Present Shri Amresh Jain, DR for the respondent

Coram: Hon'ble Mr. Justice (Dr.) Satish Chandra, President
Hon'ble Mr. V. Padmanabhan, Technical Member

FINAL ORDER No. 57485 - 57486 /2017

Per V. Padmanabhan:

These appeals have been filed by M/s Shree Logistics (Assessee) as well as revenue against the Order-in-Original number 13/2011 dated 29.7.2011. For the sake of convenience, all the appeals are disposed of by this common order.

2. The assessee is engaged in providing the service of supply of tangible goods and earth moving equipments such as excavators, dumpers, rippers etc. During the period under dispute (April 2005 to March 2009), the assessee supplied such

equipments to M/s Ambuja Cement Limited (ACL) for use in the mining work and M/s Mistri Construction (MCPL) for use in the construction works at M/s Bhushan Steel. Separate contracts were entered into by the assessee with their respective service receivers for different periods of time. As per the terms of these contracts, the diesel for use in the equipments supplied by the assessee was supplied free by the customers. The department issued show cause notice dated 30.4.2010 proposing to charge service tax for the disputed period under the categories of site formation, clearance, excavation and demolition service as well as cargo handling service. It was further proposed to include the value of diesel supplied free of charge by the recipients of service. After the due process of adjudication, the impugned order came to be passed in which the adjudicating authority ordered as follows:

i) Demanded service tax amounting to Rs. 56,49,969/- under the category of supply of tangible goods and Rs. 1,81,55,448/- under the category of site formation and clearance service.

ii) He dropped the demand of service tax of the balance amount of Rs. 4,63,75,471/-.

iii) Imposed penalties under various sections of the Finance Act, 1994.

3. Aggrieved by the impugned order, appeals have been filed by the assessee, in respect of the service tax demands

confirmed against them and by the revenue in respect of the service tax demand dropped by the adjudicating authority.

4. With the above background we have heard Shree Bipin Garg, Ld. Adv appearing for the assessee as well as Sh. Amresh Jain, representing revenue.

5. Shree Bipin Garg, arguing the grounds of the assessee appeal highlighted the following arguments:

i) The adjudicating authority has confirmed part of the demand of service tax under the category of supply of tangible goods with effect from 16.5.2008. However the SCN had proposed demand of service tax under the category of site formation and excavation service. Hence, the impugned order has travelled beyond the scope of the SCN and to this extent the demand is not sustainable.

ii) On behalf of the assessee, he submitted that the service tax demand amounting to Rs. 1.27 crore which has been confirmed in the impugned order is not being challenged by them.

iii) The service tax demand which is confirmed w.e.f. 16.5.2008 has also included the value of free supply of diesel. It is fairly well settled through various decisions of the Tribunal as well as courts that there is no basis in law for including the value of material supplied free of charge. Hence he submitted that such demands may be set-aside.

iv) He also raised the ground of time bar.

6. Sh. Amresh Jain, Ld. DR summarised the grounds of the Revenue's appeal as follows:

i) The adjudicating authority has dropped the demand for the period prior to 16.5.2008 on the ground that the service of supply of tangible goods was introduced only from that date. However, revenue is of the view that for the period prior to this date, the services rendered by the assessee would be liable to service tax under the category of site formation and excavation service.

ii) In respect of the contract executed at for M/s MCPL, the adjudicating authority has recorded that the nature of service rendered was correctly classifiable under the site formation service. However he has dropped the demand for the period prior to 1.4.2008. Since the service rendered for the earlier period also remained the same, the demand is sustainable for the prior period as well

iii) Revenue is of the view that the value of free supply diesel also is required to be included for purposes of charging service tax. In this regard he reiterated the findings of the adjudicating authority in para 20 of the impugned order.

iv) Revenue is also of the view that the assessee cannot be granted the benefit of non-payment of service tax on the ground that they were contractors and the main contractor has discharged service tax liability. The service tax is required to be paid by the subcontractor and the same will be available as cenvat credit to the main contractor.

7. We have heard both sides and perused the appeal record. One of the contentious issues in the present appeal is the question whether the value of diesel supplied free by the customer is required to be included for purposes of levy of service tax. We note that this issue is no longer res integra and stands settled in favour of the assessee. In the case of ***CCE vs Gandhar Rock vide Final order no. ST/A/50807/2017-CU(DB) dated 08.02.2017*** observed as follows:

5. After hearing both the parties and on perusal of record, it appears that the issue is squarely covered in favour of the appellant as per the ratio laid down in the case of CCE Vs. M/s S.B. Construction Pvt. Ltd.–2014-TIOL-1654-CESTAT-DEL, where it was observed as under:

"5. The issue of includibility of the value of free supplies in the gross amount charged has been decided by the Larger Bench of CESTAT in the case of Bhyana Builders (P) Ltd. Vs. Commissioner of Service Tax, Delhi –2013 (32)STR 49 (Tri.-LB) = 2013-TIOL-1331-CESTAT-DEL-LB, wherein it has been unambiguously held that the value of free supplies by the service receiver to the service provider is not includible in the 'gross amount charged' by the service provider from the service receiver. In view of this, any further discussion on the issue involved is unnecessary and unwarranted. It is accordingly held that the demand confirmed on the basis that the value of diesel supplied free of cost by the service receiver is includible in the gross amount charged is unsustainable. When the demand itself is not

sustainable, the question of any penalty simply does not arise."

Similar views were expressed in the following cases:

(i) Bhayana Builders (P) Ltd. Vs. CCE, Raipur–2013 (32) STR 49 (Tri.-Delhi.)

(ii)Karamjeet Singh & Co. Ltd. Vs. CCE, Raipur–2013 (32) STR 40 (Tri.-Delhi)

(iii) CCE, Pune-II Vs. V.B. Patil Kanwade Associates – 2014-TIOL-26-CESTAT-MUM

(iv) Baliram Gopal Mahajan Vs. CCE Nashik –2014-TIOL-90-CESTAT-MUM

(v)S.V. Engineering Constructions Vs. CCE, Guntur–Final Order No. 27220/2013 dated 31.12.2013 –2016 (46) STR 589 (Tri.-Hyd.)

(vi) ATR Constructions Pvt. Ltd. Vs. CCE, Ghaziabad–2014-VIL-48-CESTAT-DEL-ST = 2014 (35) STR 92 (Tri.-Del.).

6. In the light of the well settled legal position above, we find no reason to interfere with the impugned order. The same is hereby sustained along with reasons mentioned therein."

8. By following the earlier decision, we are of the view that there is no justification for adding the value of free supply diesel for purposes of levy of service tax.

9. Next we consider the service tax demand arising out of the assessee's contract with M/s ACL for supply and deployment of earth moving equipments such as excavators, bulldozers etc for use in mining work. The show cause notice had proposed levy of service tax on the consideration received by the assessee under the category of site formation and excavation service. The

adjudicating authority, after considering the terms of the contract with M/s ACL came to the conclusion that the contract was a composite one but the essential character of the contract is hiring of equipments and accordingly the same is classifiable under supply of tangible goods service and not under site formation and excavation service. She restricted the demand only w.e.f.16.5.2008 since the supply of tangible goods service was introduced only from that date and dropped the demand for the period prior to this date.

10. The assessee's grievance is that the SCN has proposed service tax levy under site formation service and hence it is their contention that the impugned order has travelled beyond the SCN. On the other hand the grievance of the revenue is that for the period prior to16.5.2008, the demand is liable to be confirmed under the category of site formation service.

11. On perusal of record, we find that the SCN has referred to the various contracts executed by the assessee with M/s ACL. The adjudicating authority has also recorded the nature of activities required to be carried out and concluded that the contract was composite but the essential character of the contract is that of supply of tangible goods service and not site formation service. The detailed discussions are found in para 23 of the impugned order. In view of the above, we uphold the findings of the adjudicating authority that the service rendered to M/s ACL will be liable for service tax under the category of

supply of tangible goods, that too only w.e.f. 16.5.2008. Consequently the appeal of revenue on this ground is dismissed.

12. The SCN has also referred to the fact that the assessee did not provide the complete detail of all the contracts entered with the service receiver as well as exact nature of services provided by them. The adjudicating authority could get further details only at the time of adjudication and after due consideration of the reply furnished, he concluded that the service rendered by the appellant to M/s ACL will be rightly classifiable under supply of tangible goods service. In any case we note that the rate of service tax is one and the same for both services. Hence it cannot be said that the impugned order has travelled beyond the SCN. Consequently we dismiss the appeal of the assessee on this ground.

13. The SCN has also proposed demand of service tax under the category of cargo handling service for a part of the work executed by the assessee for M/s ACL. In the impugned order such demands were dropped. Revenue has appealed against this. The adjudicating authority has recorded in para 25 of the impugned order that the nature of activity carried out in the mining area of ACL was transportation of limestone and rejects with the help of dippers and dumpers. He has taken the view that the nature of activity is nothing but transportation of goods within the mine and cannot be covered under cargo handling service. We note that this issue is no more res integra and stands settled in favour of the assessee. The Tribunal in the case

of ***Sainik Mining and Allied Services Vs. CCE 2008 (9) STR 531 (Tri)*** has observed as follows:

> *"8. We find that the activity undertaken by both the appellants for mechanical transfer of coal from the coal face to tippers and subsequent transportation of the coal within the mining area, does not come under the purview of cargo handing service. The dominant activities undertaken by the appellants under the contract in question are primarily the movement of coal within mining area and transfer of coal from the coal face to the tippers, if at all, includes loading and unloading which are merely incidental. Cargo in commercial parlance has a definite connotation which is carried as freight in a ship, plane, rail or truck and the activities undertaken by the appellants in terms of the contracts on behalf of M/s. MCL to move coal within mining area do not fall in the category of cargo handling service. Moreover, the activities undertaken are principally the transportation of coal within mining area and hence, the gross amounts received for the same cannot be taxed under the category of cargo handling service. We have, therefore, no hesitation in our mind to hold that the definition of cargo handling service under the Finance Act, 1994, does not include the kind of activities undertaken by the appellants and hence the same are not chargeable to service tax. We also find that there was no suppression or mis-statement by the appellants regarding the nature of activities undertaken by the appellants and hence the imposition of penalty on them is not at all justified. Accordingly, we set aside the impugned order and allow both the appeals with consequential benefit to the appellants."*

14. By following the decision of the coordinate bench of the Tribunal, we find no reason to interfere with the findings of the impugned order in this regard. This ground of Revenue's appeal is dismissed.

15. In view of the above discussions, impugned order is set aside, the appeal filed by the appellant is allowed and the appeal filed by the Revenue is dismissed.

[Order Pronounced in the open court on **31.10.2017**]

(Justice Dr. Satish Chandra)
President

(V. Padmanabhan)
Technical Member

Bhanu