

IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL,
WEST BLOCK NO.2, R.K. PURAM, NEW DELHI-110066

BENCH-DB

COURT –IV

Service Tax Appeal No. ST/215/2012-Cus. [DB]

[Arising out of Order-in-Appeal No.325 (DKV) ST/JPR-1/2011 dated 29.07.2011/09.08.2011 passed by Commissioner (Appeals-I) Jaipur]

M/s.Khandelwal Construction Co. ...Appellant

Vs.

C.C.E., Jaipur-I

... Respondent

Present for the Appellant : Ms. Rinki Arora, Advocate

Present for the Respondent: Mr.G.R. Singh, D.R.

Coram: HON'BLE MR. C.L. MAHAR, MEMBER (TECHNICAL)
HON'BLE MRS. RACHNA GUPTA, MEMBER (JUDICIAL)

Date of Hearing:08.02.2019

Pronounced on : 30.04.2019

FINAL ORDER NO. 50603 /2019

PER: RACHNA GUPTA

Appellant herein is providing services as that of cargo handling, management, maintenance or repair, commercial or industrial construction, rent-a-cab operators and site formation clearance, excavation and earth moving / demolition services. Department noticed that appellant has short-paid an amount of Rs.24,92,399/- during the period from 01.07.2003 to 31.03.2006 for providing the aforesaid services. Accordingly, a

show cause notice No.3635 dated 22.10.2008 was served upon them proposing the aforesaid recovery with the interest and the penalties. The original adjudicating authority vide Order No.52/2010 dated 20 September, 2010 has confirmed the demand of Rs.21,79,497/- and of Rs.3,80,058/- alongwith the interest and the penalties of equal amount. However, the demand of Service Tax for an around of Rs.3,12,902/- was dropped. The said order was challenged before the Commissioner (Appeals). However, vide Order-in-Appeal No.325 dated 09.08.2011, the appeal was rejected. Hence the appellant is before this Tribunal.

2. Heard Ms. Rinki Arora, Id. Advocate for the appellant and Mr. G.R. Singh, Id. D.R. for the Revenue.

3. It is submitted on behalf of the appellant that the adjudicating authorities have wrongly held the services of the appellant while holding it to be the cargo handling services. Despite that the activity is only of loading of urea and charcoal and unloading the collection of loose urea that too through a conveyer belt of the factory. The issue is no more res integra. The demand of Rs.5,36,325/- is prayed to be set aside for the said services.

4. With respect to commercial and industrial services, the appellant has submitted that liability has already been discharged while availing the benefit of Notification No.15/2004 dated 10.09.2004. This demand of Rs.13,54,295/- has been wrongly confirmed. The decision of Larger Bench in the case of **Bhayana Builders (P) Ltd. vs. CCE reported in 2013 (32) STR 49** is impressed upon.

5. With respect to maintenance and repair services, it is submitted that the services fall under the completion and finishing services and as such cannot be categorized as repair and maintenance services. Otherwise also the repair and maintenance also not taxable prior to 16.06.2005 and the liability post the said date has already been discharged, that the demand of Rs.33,660/- for painting work is not sustainable.

6. With respect to the demand under the service for maintenance of railway track similar ground has been taken. In addition, it is submitted that the service tax of Rs.12,027/- was discharged on 30 March, 2006 alongwith the liability of Rs.12,422/- on 5 July, 2006. Both these amounts were included in the total demand for maintenance and repair services. The payment bills for the same have not been considered by the adjudicating authority. As far as canal

closure job is concerned, it is submitted that the canal site was owned by Government of Rajasthan as such the activity was not for commercial purposes and thus the demand of Rs.34,379/- on this account also liable to be dismissed.

7. With respect to Excavation services, it is submitted that the nature of work performed was the extension of Godowns, which cannot be called as excavation. Otherwise also this service came into tax net w.e.f. 16.07.2005 and the work thereof got completed before the said date. The Service Tax of Rs.1,42,978/- cannot be demanded.

8. With respect to rent-a-cab services, it is mentioned by the appellant that the service was provided to their sister concern M/s. Ghiya Services who have already discharged the tax liability and had produced a certificate in support of their contention. As such, the appellant is not liable to pay any more service tax. The demand of Rs.5,554/- also therefore, liable to be set aside.

9. Finally submitting upon limitation, it is mentioned that since the appellants were under the bonafide belief for most of their services being provided were not taxable, the Department was not entitled to invoke the extended period. Hence the show cause notice herein is barred by time. The order under

challenge is therefore, prayed to be set aside and Appeal is prayed to be allowed.

10. While rebutting these arguments, it is submitted on behalf of the Department that the order under challenge has dealt with all the contentions of the appellant as raised before this Tribunal. There has been a specific reasoning given in the order, which has been passed relying upon the various decisions of the Tribunal and the higher Courts as well as on the Board's clarifications and directions. Hence, there is no infirmity in the order. Appeal is prayed to be dismissed.

11. After hearing both the parties, the activity-wise findings are as follows:-

CARGO HANDLING SERVICE:

11.1 The definition is important for the purpose, which defines Taxable Services and particularly "Cargo Handling Services" as under :-

Clause 90

".....taxable services means any service provided

(zr) to any person by a Cargo Handling Agency in relation to Cargo Handling Services."

The Dictionary meaning of word "Cargo" defined in various Dictionaries are as under :-

Webster's Dictionary :

'Cargo' - Goods and Merchandise taken on abroad, vessel, aircraft etc.

Webster's IX New Collegiate Dictionary :

'Cargo' - Goods or Merchandise conveyed in ship, aeroplane or vehicle.

Thus, it is evident that word 'Cargo' means carriage of luggage in ship, vessel or aircraft.

11.1.1 In the present case, the appellants have provided manual labour for loading of urea and charcoal and thereafter for unloading the collection of loose urea for the internal shifting in the premises of M/s. DCM Shriram Consolidated Ltd. The entire shifting is otherwise done from the conveyer belt of the factory and the goods are actually used for being transported within the factory. It becomes clear that merely a fact of urea being loaded, the entire said activity does not qualify the aforesaid definition. In Gajanand Aggarwal vs. Commissioner reported in 2009 (13) STR 138, the High Court of Hon'ble Punjab & Haryana has held that in the case of handling of goods using conveyor system that too in the factory, the activity will not fall within the definition of cargo handling. This Tribunal also in the case of Gaytri Construction Co. vs. Commissioner of Central Excise, Jaipur reported in 2012 (25) STR 259 has held:

"Cargo Handling services - Scope of -Shifting of goods within factory premises, supply of manpower for manual assistance

at various points of loading using conveyer system, and small part of service of manual loading of cargo into railway wagons or trucks. HELD : It is not within the scope of "Cargo Handling Services" under Sections 65(23) and 65(105)(zr) of Finance Act, 1994."

11.1.2 Drawing support from these decisions and observing that the facts of the present appeal are squarely covered by these decisions, we hold that the appellant has not provided any such service which can be classified as cargo handling service. The demand of Rs.53,6325/- is, therefore, held to have been wrongly confirmed vide the order under challenge.

COMMERCIAL AND INDUSTRIAL CONSTRUCTION SERVICES:

11.2 It is apparent as an undisputed fact from the show cause notice as well as the order under challenge that the appellant have paid service tax with respect to this activity. However, after availing the benefit of Notification No.15/2004 dated 10.09.2004 amended by Notification No.1/2006 dated 01.03.2006 under which the value of free supply of material by the service recipient need not to be included. The view has already been affirmed by the Hon'ble Apex Court in the case of **CCE vs. Bhayana Builders Pvt. Ltd. reported in 2018 (10)**

GSTL 118 (S.C.). We observe that following submission was made by the appellant before Commissioner (Appeals):

"Further, without prejudice to above, as clarified by the board, in the cases where some material were provided by the service recipient, the taxable value can be computed by including the value of such material but denial of abatement on this ground that some material were provided by the service recipient is clearly against the law and is against the principle of natural justice too. The appellant has already deposited the full amount of tax by computing the value as prescribed under notification. The adjudicating authority has illegally denied the benefit of abatement available to the appellant and, therefore, the order so passed should be set aside."

11.2.1 The Commissioner (Appeals) has mentioned that while availing the benefit of Notification No.15/2004, the appellant was required to include the value of free supply. We perused both these Notifications in the light of the Board Circular No.80/102004/ST dated 17.09.2004 wherein it is recorded as follows:-

13.5 The gross value charged by the building contractors include the material cost, namely, the cost of cement, steel, fittings and fixtures, tiles etc. Under the Cenvat Credit Rules, 2004, the service provider can take credit of excise duty paid

on such inputs. However, it has been pointed out that these materials are normally procured from the market and are not covered under the duty paying documents. Further, a general exemption is available to goods sold during the course of providing service (Notification No. 12/2003-ST) but the exemption is subject to the condition of availability of documentary proof specially indicating the value of the goods sold. In case of a composite contract, bifurcation of value of goods sold is often difficult. Considering these facts, an abatement of 67% has been provided in case of composite contracts where the gross amount charged includes the value of material cost. (refer notification No.15/04-ST, dated 10.09.2004) This would, however, be optional subject to the condition that no credit of input goods, capital goods and no benefit (under notification no. 12/2003-ST) of exemption towards cost of goods are availed.

11.2.2 We, therefore, find no error in the order vide which the tax liability for commercial and industrial construction services for Rs.13,54,295/- has been confirmed. In fact either the decision of Hon'ble Apex Court in **Bhayana builders** (supra) has to be followed else the benefit of Notification has to be availed. These are the two alternate options available. Both cannot be availed simultaneously.

MAINTENANACE AND REPAIR SERVICES.

11.3 It is clear that maintenance and repair services were made taxable w.e.f. 16.06.2005 only. It is an undisputed fact

that appellants are discharging their liability qua the services post 16.06.2005. The Adjudicating authority has failed to consider the said aspect. Hence, the confirmation of demand for painting work of Rs.33,660/- is liable to be set aside. As far as of maintenance of railway track is concerned, In addition to the above reason the adjudicating authority has also failed to observe that part payment of the service tax against Bill No.1599 dated 31.03.2006 has not been considered. Resultantly, the differential demand in respect of maintenance of railway track is hereby set aside.

CANAL CLOSURE

11.4 The adjudicating authority has failed to consider that this activity was not for commercial purposes despite acknowledging that the canal site was owned by the Government of Rajasthan. The order confirming the demand of Rs.34,379/- is, therefore, liable to be set aside.

EXCAVATION SERVICES

11.5 Undisputedly, the demand has been raised based on Bill No.1383 dated 21.03.2006 apparently the same pertains to the work of extension of godown, which from no stretch of imagination can be called as excavation. Mere mention in the said bill of excavation of godown is mere way of nomenclating

by the service provider or the recipient. The same cannot be a ground for denying that the service provided was merely of extension of the godown. There is otherwise no dispute to the said fact. Confirmation of the demand merely on the nomenclature of the service is liable to be set aside. Therefore, the demand of Rs.1,42,978/- is also hereby set aside.

RENT-A-CAB SERVICE

11.6 The appellants have relied upon the certificate given by Ghiya services, the sister concern of the appellant declaring that they have duly paid service tax on the taxing higher income received from DCM Shriram Consolidated Ltd. to whom the taxis taken on rent from Khandelwal Construction Co. during the year 2004-05 and 2005-06 were supplied also that no service tax credit has been taken by them. The document is very much on record. But the adjudicating authority has failed to consider the same. Once the service tax liability stands already discharged, any confirmation of the demand for the same amount and the same period shall amount to double taxation, which is not permissible under statute. Hence, this demand of Rs.5,554/- is also hereby set aside.

11.7 Finally coming to the aspect of the limitation, it is observed that most of the demands have been found to have been confirmed beyond the scope of the statutory provisions and are therefore set aside. It is the plea of the appellant that they were under bonafide belief for most of their services provided by them are not taxable, in view of various judicial pronouncement. With respect to the service tax about commercial and industrial construction service, appellants have placed reliance upon the decision of Hon'ble Apex Court in **Bhayana Builders** though the said demand has been confirmed. In the above discussion, but in the light of the said submission, we are of the opinion that appellant was under the bonafide belief otherwise also there is no evidence of the Department to prove any positive act on part of the appellant, which may amount to suppression or mis-representation of the facts that too, with an intent to evade payment of tax. We draw our support from the following case laws:-

1. Anand Nishikawa Co. Ltd. vs. CCE, Meerut reported in 2005 (188) ELT 149 (S.C.)
2. Hindustan Steels Ltd. vs. State of Orissa reported in 1978 ELT 154.

12. Resultantly, we are of the opinion that the show cause notice dated 22.10.2008 proposing the demand for the period

01.07.2003 to 31.03.2006 has gone beyond the normal period of one year without the entitlement of the Department to invoke the extended period. Hence, the show cause notice as such, is held to be barred by time. As a result of entire above discussion, it is held that irrespective the liability of the appellant towards commercial and industrial construction services is apparent. However, the demand as a whole is set aside for the show cause notice being barred by time. Resultantly, the order under challenge is hereby set aside and appeal is allowed.

[Pronounced in the open Court on 30/04/2019]

(C.L. MAHAR)
MEMBER (TECHNICAL)

(RACHNA GUPTA)
MEMBER (JUDICIAL)

Anita