

**IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL
NEW DELHI**

Principal Bench, COURT NO. IV

Service Tax Appeal No. 50876 of 2014

[Arising out of the Order-in-Appeal No. 312/OPD/CE/JPR-II/2013 dated 08/11/2013 passed by The Commissioner of Central Excise - II, Jaipur (Rajasthan).]

WITH

Service Tax Appeal No. 52108 of 2015

[Arising out of the Order-in-Appeal No. 78 (SLM)/ST/JPR/2015 dated 13/03/2015 passed by The Commissioner of Central Excise - II, Jaipur (Rajasthan).]

WITH

Service Tax Appeal No. 52553 of 2015

[Arising out of the Order-in-Appeal No. 77 (SLM)/ST/JPR/2015 dated 13/03/2015 passed by The Commissioner of Central Excise - II, Jaipur (Rajasthan).]

M/s Pathan Carriers & Suppliers

Opposite RSEB Sub Station,
Ratanada Circle,
Jodhpur (Rajasthan).

Appellant

Versus

**Commissioner of Central Excise
and Service Tax**

NCR Building, Statue Circle,
C Scheme,
Jaipur - 302 005 (Rajasthan).

Respondent

Appearance

Shri Firoz Khan, Prop. - for the appellant.

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

CORAM: **Hon'ble Mrs. Archana Wadhwa, Member (Judicial)**
Hon'ble Shri C.L. Mahar, Member (Technical)

Final Order No. 53609/2018 Dated : 26/12/2018

DATE OF HEARING/DECISION : 26/12/2018.

C.L. MAHAR :-

The brief facts of the matter are that the appellant are registered with the service tax department for providing transport of goods by road service as well as for supply of the tangible goods service. After undertaking the audit of financial records of the appellant, three show cause notices have been issued the details of which alongwith the concerned appeal as well as impugned order-in-original and order-in-appeal are given in the table here below :-

Appeal No.	SCN No. and date	Period covered	Amount (Rs.)	Order-in-original No. and date	Order-in-appeal No. and date	Issue
ST/50876 of 2014	V (ST)SCN/74/JDR/2012 dated 09/10/2012	2007-2008 to 2011-2012 upto September 2011	59,217/-	181/ST/2013 dated 23/04/2013	312/OPD/ST/JPR-II/2013 dated 30/10/2013	Goods Transport Agency
ST/52553 of 2015	V (ST)SCN/33/JDR/2013 dated 18/04/2013	October 2011 to March 2013	72,965/-	203/ST/2013 dated 19/08/2013	77 (SLM)/ST/JPR/2015 dated 13/03/2015	Goods Transport Agency
ST/52108 of 2015	V (ST)SCN/46/JDR/2012 dated 04/03/2013	16/05/2008 to 30/09/2011	2,79,818/- an amount of Rs. 1,22,185/- + interest of Rs. 41,415/- deposited by appellant	201/ST/2013 dated 01/08/2013	78 (SLM)/ST/JPR/2015 dated 13/03/2015	Tangible goods supply.

So far as the show cause notice dated 09/10/2012 and show cause notice dated 18/04/2013 as mentioned on the Sl. No. (i) and (ii) in the table above, it has been alleged that the assessee has provided goods transport agency service to air force station at Jodhpur, however, they have not discharged their service tax liability on the same. The show cause notice as mentioned at Sl. No. (i) covers the period 2007-2008 to 2011-2012 (upto September 2011) the total demand of service tax under this show cause notice is of Rs. 59,217/-. The matter has been adjudicated and has reached upto the level of Commissioner (Appeals) who has not given any benefit to the assessee. The basic contention of the appellant have been that they have supplied only heavy vehicles and cars for use by the

air force station at Jodhpur and has not provided any goods transport agency service and, therefore, the service provided by them is covered under the supply of the tangible goods service and since the supply of tangible goods service has come to levy of the service tax only since 16/05/2008 and, therefore, the demand prior to 16/05/2008 is legally not enforceable as the service itself has been enacted since 16/05/2008. It has also been mentioned that the appellants are entitled for the small scale industries SSI benefit. The learned Advocate appearing on behalf of the appellants has contended that earlier also the department has raised a demand of service tax under the GTA category on the supply of heavy transport vehicles and cars to Oil India Ltd. It has further been mentioned that on the same issue, earlier also demand had been raised against them under GTA category vide SCN C. No. V (ST) SCN/759/JDR/07/3071 dated 29/03/2007 and the demand was confirmed by department vide order-in-original No. 583/ST/2009-10 dated 12/07/2010 and penalty was also imposed against them. Later on the Commissioner (Appeals) has dropped the demand under the GTA as the same was not falling under the category of GTA service. After dropping of demand by the appellate authority, the department had made out a case against them on the same ground again. It has further been contended that the appellants have entertained a bonafide belief about non-taxability of the activity undertaken by them since the Commissioner (Appeals) had held that their activity is not classifiable under GTA service and, therefore, the extended period is not available in their case. It has further been submitted that the department itself has classified their service under the category of other than GTA service and, therefore, they cannot go back and again demand service tax on the similar circumstances under goods transport agency service. It has further been mentioned that the department has been aware about the activity undertaken by the appellants since very beginning and also a show cause notice, as mentioned above, has already been adjudicated vide order-in-original No.

583/ST/2009-10 dated 12/07/2010 and, therefore, the provisions of extended time limit for demanding service tax under Section 73 (1) of the Finance Act, 1994 cannot legally be invoked in their case and, therefore, the entire demand is barred by limitation so far as the show cause notice at Sl. No. (i) is concerned. So far as show cause notice and appeal mentioned at Sl. No. (iii) is concerned, it covers the period from 16/05/2008 to 30 September 2011 it has been the contention of the department that the appellant have provided certain vehicles to M/s Indian Oil Company, Jodhpur, in which the appellant have charged an amount of Rs. 54,000/- per month per vehicle as fixed charges + Rs. 12.50 per k.m. as the operating charges for supply of such vehicles. The department has entertained the view that the assessee has not discharged their service tax liability on the gross amount received by them from Indian Oil Company because the operating charges have not included by the appellant in the taxable value for determination of the service tax. Accordingly, a demand of Rs. 2,79,818/- has been made on them which has been got confirmed up to the level Commissioner (Appeals). So far as the show cause notice at Sl. No. (iii) above-mentioned is concerned, it has vehemently been argument on the part of the appellant that the show cause notice as mentioned at Sl. No. (i), which have covered the period 2007-2008 to 2011-2012 (upto September 2011) and thereafter the show cause notice dated 04/03/2013 again covering the extended time period which is also covered by the show cause notice dated 09/10/2012 is in blatant violation of the provisions of Section 73 (1) of the Finance Act, 1994 and, therefore, barred by period of limitation and need to be set aside on this ground itself. The appellant have also made a contention that the levy under the supply of tangible goods as per the provisions of Section 65 (105) (zzzzj) is purely on the charges received by the appellant for supply of the tangible goods and not on the operating part of the tangible goods at the end of service recipient. The appellant have relied on the clarification issued by the CBEC vide Circular

No. 334/1/2008-TRU dated 29 February 2008 wherein it has been clarified that only transactions of allowing another person to use the goods without giving legal right of possession and effective control is covered under the scope of tangible goods supply service.

2. We have also heard the Departmental Representative who has generally supported the findings as given in the impugned order-in-appeals.

3. After hearing both the sides and on perusal of the record of the appeals, we feel that the show cause notice mentioned at Sl. No. (i) and one mentioned at Sl. No. (iii) are both hit by period of limitation because previously also the appellant has been issued a show cause notice No. V (ST)/SCN/759/JDR/07/307 dated 29 March 2007 which was adjudicated by the order-in-original No. 583/ST/2009-10 dated 12 July 2010 wherein a demand under the goods transport agency service was confirmed against the appellant and same was dropped by the Commissioner (Appeals) holding that the activity undertaken by the appellant does not qualify to be classifiable under the goods transport agency service. These facts were undoubtedly in the knowledge of the department and the department still chose to issue a show cause notice dated 09/10/2012 covering a period from 2007-2008 to 2011-2012 by invoking the extended time proviso under Section 73 of the Finance Act, 1994 and again classifying the activity undertaken by the appellant under the Goods Transport Agency Service. We feel that the department has been aware about the activity of the appellant since very beginning and, therefore, we do not find any justification in invoking the extended time proviso under Section 73 of the Finance Act, 1994. Secondly, since the issue of the classification of the activity undertaken by the appellant have already been decided by the Commissioner (Appeals) as we have been told there is not appeal against the said order, we feel that the subordinate officers should have shown some sense of discipline and would have respected the

findings of the Commissioner (Appeals) while deciding the matter. However, we want to add here that the Advocate appearing for the appellant have not produced the said order of the Commissioner (Appeals) before us. So far as the appeal mentioned at Sl. No. 3, the basic issue of valuation of the supply of the tangible goods service has been made by invoking the extended time proviso, however, here also we feel that the period of demand is already covered by the previous show cause notice dated 09/10/2012, as mentioned at the Sl. No. 1 in the table. So far as the appeal at Sl. No. 2 is concerned, we feel that the Commissioner (Appeals) while deciding the issue has not appreciated the facts which has been mentioned before him by the appellant has confirmed the demand against the appellant without giving any concrete findings on the submissions made by the appellant during the course of hearing. The appellant had mentioned that a demand was raised earlier confirmed on the amount received by them from the Indian Oil Company, Jodhpur under GTA service and same has been set aside by the Commissioner (Appeals) vide order-in-appeal No. 259-260 dated 28/06/2011 and thereafter the department has changed their stand and demand was raised under category of supply of the tangible goods. The Commissioner (Appeals) has not given any concrete finding on this submission of the appellant. We also feel that the certificates and the invoices submitted by the appellant before the Commissioner (Appeals) claiming that they have only provided the vehicles included trucks of the capacity of 9 M.T. and 20 M.T. and Indica cars to air force station, Jodhpur same has not been appreciated by the Commissioner (Appeals) and same has been rejected only saying that the vehicles have been given for transportation and, therefore, the same is covered under the category of goods transport agency service. It will be worthy to mention here that the Commissioner (Appeals) has rejected the appellant claim of the SSI exemption only by saying the following:-

"7. As regards the eligibility for SSI exemption, the appellants have not put forth any corroborative evidence to substantiate their contention and as such the same is not tenable. Therefore, I hold that the appellant were liable to pay service tax on GTA service as air force who paid freight were not covered in any of the seven categories specified under Notification No. 34/2004".

4. In view of above findings, we feel that Commissioner (Appeals) need to take all the three show cause notices for consideration at a time and issue is pertaining to the classification of the service on the basis of the documents available in the adjudication file of the department as well as with the appellant need to be scrutinized to reach at a conclusion as to whether the appellant is providing supply of the tangible goods service or goods transport agency service ; (ii) since the issue have been before the department since 2007 when the first show cause notice No. V (ST) SCN/759/JDR/07/3071 dated 29 March 2007 which was adjudicated vide the order-in-original No. 583/ST/2009-10 dated 12 July 2010 which has also been decided by the Commissioner (Appeals) subsequently, the legal maintainability of the show cause notices need to be examined in view of above fact whether same are barred by period of limitation as per the provisions of Section 73 of the Finance Act, 1994 or not.

5. In view of above, we remand back the matters to Commissioner (Appeals) for re-adjudication of all the three matters, as mentioned at in the table at para 1 above. Accordingly, the appeals are allowed by way of remand.

(Operative part of order pronounced in open court.)

(Archana Wadhwa)
Member (Judicial)

(C.L. Mahar)
Member (Technical)