

**CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH AT HYDERABAD**

Bench – DB

Court – I

Appeal No. ST/11/2009

(Arising out of Order-in-Original No. 42/2008 (PVSR) dated
26.09.2008 passed by Commissioner of Customs & Central Excise,
Visakhapatnam -II)

A. Srinivasulu & Co

.....Appellant(s)

Vs.

**Commissioner of Customs, Central Excise
& Service Tax, Visakhapatnam -II**

.....Respondent(s)

Appearance

Shri V. Ravindranath, Advocate for the Appellant.

Shri Guna Ranjan, Superintendent (AR) for the Respondent.

Coram:

Hon'ble Mr. M. V. RAVINDRAN., MEMBER (JUDICIAL)

Hon'ble Mr. P.VENKATA SUBBA RAO, MEMEBER (TECHNICAL)

Date of hearing: 09/10/2018

Date of decision: 09/10/2018

FINAL ORDER No. A/31320/2018

[Order per: M. V. Ravindran.]

This appeal is directed against Order-in- Original No.
42/2008 (PVSR) dated 26.09.2008.

2. Heard both sides and perused the records.

3. On perusal of records, it transpires that the issue is
regarding demand of service tax for the period 01.07.2005 to
30.06.2006 from the appellant on the amounts collected by them as
toll fee and paid to National Highways Authority of India (NHAI). It is
the case of the Revenue that the appellant is engaged and conducting
as a commission agent of NHAI and collecting toll fee specifically as
commission agent of National Highway which is equivalent to
rendering of services under the category of Business Auxiliary

Services. The Adjudicating Authority has confirmed the demands so raised.

4. As correctly pointed by the Learned Counsel the issue is now squarely covered in their favour by the judgment of the Tribunal in the case of *Ideal Road Builders P. Ltd.*, [2015 (40) STR 480] wherein, identical issue came up before the Tribunal. We find it so. We reproduce the relevant paragraphs:

“8. On the background such a factual matrix, we have to consider whether any services are provided by the appellant to NHAI by collection of toll, and rendered on behalf of NHAI under the category of Business Auxiliary Service or otherwise”.

9. Before recording our finding on the issue it is necessary to reproduce the provisions of Section 65(19) of the Finance Act, 1994 prior to and post 9-9-2004, which is as under :

“Business Auxiliary Service” means any service in relation to, (w.e.f. 1-7-2003 to 9-9-2004) -

- (i) promotion or marketing or sale of goods produced or provided by or belonging to the client; or*
- (ii) promotion or marketing of service provided by the client; or*
- (iii) any customer care service provided on behalf of the client; or*
- (iv) any incidental or auxiliary support service such as billing, collection or recovery of cheques, accounts and remittance, evaluation of prospective customer and public relations services and includes services as a commission agent, but does not include any information technology services.*

“Business Auxiliary Service” means any service in relation to, (w.e.f. 10-9-2004) -

- (i) promotion or marketing or sale of goods produced or provided by or belonging to the client; or*
- (ii) promotion or marketing of service provided by the client; or*
- (iii) any customer care service provided on behalf of the client; or*
- (iv) procurement of goods or services, which are inputs for the client; or*
- (v) production or processing of goods for, or on behalf of the client; or*
- (vi) provision of service on behalf of the client; or*
- (vii) a service incidental or auxiliary to any activity specified in sub-clauses (i) to (vi), such as billing, issue or collection or recovery of cheques, payments, maintenance of accounts and remittance, inventory management, evaluation or development of prospective customer or vendor, public relation services, management or supervision, and includes services as a commission agent, but does*

not include any information technology service and any activity that amounts to “manufacture” within the meaning of clause (f) of Section 2 of the Central Excise Act, 1944 (1 of 1944).

Explanation. - For the removal of doubts, it is hereby declared that for the purposes of this clause, - (a) “commission agent” means any person who acts on behalf of another person and causes sale or purchase of goods, or provision or receipt of services, for a consideration, and includes any person who, while acting on behalf of another person -

(i) deals with goods or services or documents of title to such goods or services; or (ii) collects payment of sale price of such goods or services; or (iii) guarantees for collection or payment for such goods or services; or (iv) undertakes any activities relating to such sale or purchase of such goods or services;”

10. The above reproduced definition of Business Auxiliary Service talks about the services to be rendered to be covered under the specific head. It is to be noted that the appellant herein is not promoting or marketing or selling goods produced by a client nor is he promoting or marketing services provided by the client, inasmuch that undisputedly NHAI is a statutory body which has been constituted by the National Highway Authorities of India Act, 1988; has been in force from 1988 and it gives the NHAI a statutory position. On perusal of the said Act, we find that NHAI is a statutory body for development, maintenance and management of national highway and other highway power which were to be exercised by the Government of India. It is also seen that the said Act also authorises the NHAI to collect an amount as a fees from the users.

11. We find that the main argument of the Id. Departmental Representative and that the finding of the Adjudicating Authority for imposing service tax liability is on the ground that the appellant is appointed as an agent or a representative of NHAI and is providing services on behalf of NHAI. The said argument needs to be discarded inasmuch NHAI is not providing any services to any of the users of the National Highway but is doing a sovereign function of developing, maintaining of the highway. On perusal of the agreement with the appellant and NHAI, we find the said agreement does not indicate anywhere that the appellant is appointed as an agent/representative and the said agreement talks of collection of amount as “fee” to be known as “toll.” In view of this, we find that the appellant is not rendering any service which is incidental or auxiliary on behalf of NHAI. This view of ours is fortified by the decision of the Tribunal in CST v. Intertoll ICS CE Cons O & M P. Ltd. (supra) wherein the bench has held as under : -

“6. On merits of the matter, we find that National Highway Authority of India has availed services of the respondents. Fundamentally, the said National Highway Authority of India (NHAI) is not established by Revenue to be business concern nor a commercial concern not being engaged in any business activity. Therefore providing business auxiliary services by respondents to such NHAI is inconceivable. Therefore, for such reason, we dismiss the appeal of the Revenue without approving reasons given by the adjudicating authority.”

We also find in the case of PNC Construction Co. Ltd. v. CCE (supra), an identical view has been taken which is as under :-

“4. After hearing both the sides, we note that identical issues were the subject matter of the Tribunal’s decisions. In this case of Intertoll ICS CE Cons O&M P. Ltd. vide Final order no. ST/A/34/12-Cus., dated 23-12-11, the Tribunal observed that NHAI has availed the services of respondent and the said NHAI is not established by Revenue to be business concern or a commercial concern engaged in any business activities. Therefore, providing BAS to such NHAI is not conceivable. Accordingly appeal filed by the Revenue was dismissed.

Similarly in the case of Intertoll India Consultants P. Ltd. v. CCE, (2011) 32 STT 269/12 taxmann.com 296 (CESTAT-Delhi), the Tribunal held that toll tax and fee for use of bridge, by retaining the percentage of such collection, the activity cannot be held to be falling under BAS. In the case of Swarna Tollway P. Ltd. v. CC & CE

[2011] 32 STT 162/12 Taxmann.com 49 (Bang-CESTAT), again the same status was reiterated. As regards limitation, we find that the Tribunal in the case of Brij Motors P. Ltd. v. CCE [Final Order No. ST/601/2011 (PB), dated 22-11-2011] has held that when the issue is interpreted by judicial forums in different ways, the extended period cannot be invoked in such a situation.

5. By applying the ratio of all the above decisions to the present case, we find that the activities of the appellants in respect of toll fee collection cannot be held to be a service provided to NHAI falling under the category of BAS. As such we set aside the impugned order and allow the appeal with consequential relief to the appellants.

In the recent judgment in the case of Patel Infrastructure P. Ltd. v. CCE (supra) the issue as to whether the toll collection on highway would fall under the category of Business Auxiliary Service or otherwise was agitated and the bench took the following view : -

“10. As regards the Service Tax liability under the Business Auxiliary Service on collection of toll, we find that the order of the Tribunal in the case of Intertoll India Consultants (P) Ltd. (supra) (wherein one of us was the Member) and Swarna Tollway (P) Ltd. (supra) covers the issue in favour of the assessee. Accordingly, respectfully following the ratio laid down in these two decisions, we find that the Service Tax liability under the Business Auxiliary Service for toll collection is liable to be set aside and we do so.”

12. It can be seen from the above reproduced authoritative judicial pronouncements on the issue, the collection of tolls by the appellant is not considered as Business Auxiliary Service provided to NHAI.

13. Since we have discussed the matter on the merits of the case, also relying on various judicial pronouncements, we are not recording any finding or observation on various other submissions made before us both sides.

14. In view of the foregoing, in the facts and circumstances of this case, we set aside the impugned order and allow the appeal with consequential relief, if any.”

In view of the foregoing, the issue being identical and squarely covered in the favour of the appellant in the case of *Ideal Road Builders P. Ltd.* We find that the impugned order is unsustainable and liable to be set aside. The impugned order is set aside and the appeal is allowed.

(Order dictated and pronounced in open court)

P. VENKATA SUBBA RAO
MEMBER (TECHNICAL)

M. V. RAVINDRAN
MEMBER(JUDICIAL)

Lakshmi....