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

Division Bench

Court – I

## Service Tax Appeal No. 730 of 2010

(Arising out of Order-in-Original No.15/2009 (RS) dt.20.11.2009 passed by CCCE, Visakhapatnam - I)

**Navayuga Engineering Company Ltd**
48-9-17, Dwarakanagar,
Visakhapatnam – 500 016 **......Appellant**

*VERSUS*

**Commissioner of Customs, Central Excise & Service Tax, Visakhapatnam - I**
Port Area, Visakhapatnam,
Andhra Pradesh – 530 035 **......Respondent**

**Appearance**

Shri Vipin Varma, Advocate for the Assessee.
Shri P.R.V. Ramanan, Authorized Representative for the Revenue.

**Coram:**

**HON'BLE Dr. D.M. MISRA, MEMBER (JUDICIAL)**
**HON'BLE MR. P. VENKATA SUBBA RAO, MEMBER (TECHNICAL)**

## FINAL ORDER No. A/30902/2020

**Date of Hearing: 21.01.2020**
**Date of Decision: 03.07.2020**

**[Order per: P. VENKATA SUBBA RAO.]**

1. This appeal has been filed against the Order-in-Original No. 15/2009 (RS) dt.20.11.2009.

2. Heard both sides and perused the records.

3. The appellant is a Multi-disciplinary Engineering & Construction firm engaged in civil, electrical and mechanical works, civil construction projects and infrastructural facilities. They entered into an agreement with the Government of Andhra Pradesh on 06.10.1999 according to which they had

to construct a bridge across Gowtami branch of river Godavari between Yanam & Yedurulanka (Y-Y Bridge) on Build-Operate-Transfer (BOT) basis. As per the agreement they were supposed to conduct survey, investigation, studies, planning, design and construct a bridge and maintain it. They were allowed to collect a fee till the recovery of investment is made after which they were supposed to hand it over to the Government of Andhra Pradesh. The estimated total cost of the project was Rs.110 crores, of which the Government of Andhra Pradesh gave them a subsidy of Rs.69 crores while the rest of the investment had to be made by the appellant. The appellant was entitled to collect a fee on the motor vehicles and users of the bridge during the concessionaire period of 15 years. The salient features of this agreement were as follows:

a. M/s NEC is permitted to levy fee (toll) for a concession period of 15 years during which period they are also liable for maintaining the facility.
b. The fee to be collected by M/s NEC is to be retained by them as a nominee of GOAP during the concession period.
c. M/s NEC should not attempt to assign the project to others.
d. M/s NEC is permitted to develop way-side facilities like advertisements, hoardings etc., to generate revenue during the BOT period.
e. The land along with the properties and fee booths etc., so developed by M/s NEC to be handed over to GOAP after the expiry of BOT period.
f. The ownership of the bridge continues to vest with the GOAP.
g. M/s NEC shall maintain the project/ facility during the period of operation.

4. Para 3.1.1 of the agreement specifically prohibited the appellant from assigning their rights under the agreement to any party other than the financial institutions financing this project.

5. Despite such explicit prohibition of assignment, the appellant formed a 100% subsidiary company by name of M/s Godavari Toll Bridge Pvt Ltd (GTBPL) and transferred the rights to collect toll and maintain the bridge for a consideration. The transferee, GTBPL had been issuing receipts in the name of the appellant themselves and collecting user fee from the users of

the bridge and motor vehicles. Revenue was of the opinion that the service being rendered by GTBPL by way of maintaining the toll bridge and allowing its use was being done in the name of the appellant. As per section 65(105)(zze) of Chapter 5 of the Finance Act, 1994, "taxable service" means any service provided or to be provided to franchisee by the franchisor in relation to franchise. The term "franchise" has been defined in section 65(47) as "franchise means an agreement by which the franchisee is granted representational right to sell or manufacture goods or to provide service or undertake any process identified with the franchisor, whether or not a trade mark, service mark, trade name or logo or any such symbol, as the case may be, is involved". The term "franchisor" is defined under section 65(48) as "franchisor means any person who enters into franchise with a franchisee and includes any associate of franchisor or a person designated by franchisor to enter into franchise on his behalf and the term "franchisee" shall be construed accordingly". As the appellant had allowed GTBPL to provide service in their name and the invoices were also being issued in the appellant's name, this falls under the definition of franchise service in terms of section 65(105)(zze) of the Finance Act, 1994. Accordingly, a show cause notice was issued on 03.06.2008 to the appellant calling upon them to explain as to why;

i. The service provided by them to GTBPL in relation to transfer of rights over Y-Y bridge, to collect toll etc., should not be classified as taxable services relating to franchise service under section 65(105)(zze) of the Finance Act, 1994;
ii. An amount of Rs.12,50,00,000/- being the service tax payable on the franchise service rendered to GTBPL should not be demanded from them under section 73(1) of the Finance Act, 1994 read with the proviso contained therein;
iii. An amount of Rs.25,00,000/- being the Education Cess payable franchise service rendered to GTBPL should not be demanded from them under section 73(1) of the Finance Act, 1994 read with the proviso contained therein;
iv. Interest should not be demanded from them under section 75 of the Finance Act, 1994; and
v. Penalty should not be imposed on them under section 76, 77 & 78 of the Finance Act, 1994.

6. The appellant contested the demand on merits as well as on limitation. After following due process, the learned Commissioner by the impugned order held that service provided by the appellant to GTBPL is a franchise service in terms of section 65(105)(zze) of the Finance Act, 1994. Accordingly, she confirmed the demand of service tax amounting to Rs.12,50,00,000/- under the proviso to section 73(1) of the Finance Act, 1994. She also confirmed the demand of Education Cess of Rs.25 lakhs along with interest under section 75 of the Finance Act, 1994. Further she imposed a penalty of Rs.12,75,00,000/- upon the appellant under section 78 of the Finance Act, 1994.

7. Aggrieved, the present appeal is filed by the appellant on the following grounds:

a) The OIO has been passed by the learned Commissioner without appreciating the factual position and legal provisions in proper perspective and therefore, needs to be set aside.
b) The arrangements between the appellant and the GTBPL are not covered under the taxable category of franchise service as there is no franchisor, franchisee relation between the appellants and GTBPL. M/s GTBPL being 100% subsidiary of the company is their associate and not a franchisee. The term "franchisor" means any person, enters into franchise with franchisee and includes any associate of franchisor. Therefore, GTBPL is their associate and hence is covered by the definition of franchisor and therefore, they cannot be a franchisee also at the same time.
c) No service has been provided or is to be provided by the appellant to GTBPL. They only have assigned the right to collect toll and maintain the bridge to GTBPL which is a special purpose vehicle floated by them only for this purpose. They have sold their right to collect toll to GTBPL for a consideration for the remaining concession period of 11 ½ years through a Board Resolution by their Board of Directors and it has been accepted by a Board Resolution of the GTBPL.
d) The franchisee service necessarily requires a representational right to be given to the franchisee. The right indicates an entitlement to do or an authority to take action which is legally enforceable i.e., a party

must be able to go to court and assert that a right exists in his favour. In the instant case the appellants had sold their right to GTBPL and hence there is no relationship that of a principal and an agent. GTBPL is collecting toll pursuant to the purchase of the right from the appellants. If GTBPL is collecting toll on behalf of the appellant as an agent then toll proceeds must flow back to the appellant and GTBPL should only get a commission from the toll. In this case, the entire toll proceeds are retained by GTBPL.

e) Maintenance of roads and bridges is the sovereign function of the state and the same is identified with the state.
f) The right to collect toll is not representational right. In the instant case no rights were granted by the appellant to GTBPL for rendering any service which is identified by them.
g) The consideration received for construction of bridges is exempted from the service tax under the taxable category of works contract and the same cannot be taxed under a different head.
h) The value of the taxable service received otherwise than by way of money is not taxable prior to 18.04.2006.
i) Without prejudice to contest the case on merits, the value of service should be taken as cum-tax value.
j) The demand is time barred and there is no evidence of fraud, collusion, wilful misstatement or suppression of facts or contravention of the Act or Rules with intent to evade payment of service tax.
k) There was a bonafide belief that no service tax is payable under franchise service. It involves interpretation of the law and therefore, extended period of limitation cannot be invoked.
l) No interest is payable as demand itself is not sustainable.
m) No penalties are imposable as it is question of bonafide belief in interpretation of law.

8. Learned counsel for the appellant reiterated the above submissions and vehemently argued that they have transferred their right to collection of toll to their own subsidiary. It is true that the subsidiary was collecting toll and issuing receipts in their own name until the investigations began. Thereafter, they started issuing toll receipts in their own name. He would assert that by no stretch of imagination can this be called a franchisee

agreement as in the first place, no service was provided or service charge is collected. GTBPL has only collected toll fee from the users of the bridge. They have received an amount towards transfer of such right for collection of toll fee. Therefore, it cannot be called a franchisee service at all.

9. He would also argue that the consideration in this case was paid in the form of allotment of equity shares which, prior to 18.04.2006, cannot be considered as a consideration paid for the service. He also argued that if the case is decided against them on merits, they must be given the cum-tax benefit. He, further, argued that the demand was time barred and no penalties must be imposed.

10. Learned Special Counsel for the revenue would submit that the appellant was permitted to collect toll fee as a nominee of the Government of Andhra Pradesh for a period of 15 years and retain the amount so collected. They were required to maintain the project or facility during the period of operation. They were not entitled to assign the project to anybody else. Both the bridge and the booths were to be handed over to the Government of Andhra Pradesh after a period of 15 years. The appellant collected fees and maintained the bridge up to 31.03.2006 and thereafter for the remaining 11 ½ years of the concession agreement they transferred this right to GTBPL. Along with the right to collect the toll, they have also transferred the responsibility of maintenance and use of the property in such manner as may be beneficial to the interest of the appellant.

11. For this transfer of right, the appellant was paid an amount of Rs.125 crores. A statement of Shri K.R. Kishore, DGM of the appellant was recorded on 18.06.2008 in which he averred that the right to collect toll has been assigned to GTBPL and the concerned authorities of the Government of Andhra Pradesh were informed about it. He admitted that the toll fee receipts were issued in the name of the appellant but the amounts were accounted for in the name of GTBPL. Learned special counsel also takes the bench through copies of receipts issued from June, 2008 onwards by GTBPL in the name of the appellant until the investigations were initiated and thereafter, in their own name.

12. He would submit that the department's case is that appellant has given representational right to GTBPL in respect of Y-Y bridged concessionaire agreement which amounts to franchise service. The extended period of limitation has been correctly invoked as the fact that the rights have been transferred to GTBPL was not disclosed to the department at any stage. In fact, these were internal Board resolutions of the two companies i.e., the appellant and the GTBPL. The appellant are registrants of Service Tax and have been filing returns. At no point of time, have they disclosed these facts to the department, hence, they cannot plead bonafide belief.

13. As per clause (3) of agreement between the appellant and the Government of Andhra Pradesh, the appellant was permitted to assign its rights only to banks or financial institutions for financing the project and not to any other person or entity. Hence, any assignment of representational rights would require fresh agreement and no such agreement was produced. It is evident that appellant had done this assignment without taking the approval of the Government of Andhra Pradesh. As confirmed by Shri K.R. Kishore, as on June 2008 their activity was not ratified by the Government of Andhra Pradesh. They did not produce any letter from the Government of Andhra Pradesh in this respect.

14. The appellant has stated that in their offer dated May, 1999, they had intimated to the Government of Andhra Pradesh about the confirmation of a separate company. However, the agreement finally executed in October, 1999, specifically bars assigning the project to anybody else.

15. The assignment was, in real terms, an internal and private arrangement between the appellant and the GTBPL. M/s GTBPL was discharging the obligations cast on the appellant under the main contract for a consideration. One of the significant obligations was maintenance of the bridge for a period of 15 years.

16. The toll receipts were issued in the name of the appellant until the investigation began. Therefore, for 20 months, any toll payer dealing with GTBPL was given the impression that they were dealing with the appellant.

17. The appellant's argument that the receipts were taken on the books of GTBPL and not transferred to them is immaterial because consideration for franchise was already paid to them in one go and the GTBPL was allowed to retain the proceeds and had to carry out the maintenance work for the next 11 ½ years.

18. In view of the above, appellant has been rightly regarded as franchisor and GTBPL as franchisee in terms of section 65(105)(zze).

19. The argument that the consideration received for construction of bridge is exempted from service tax under works contract is irrelevant because there is no demand at all on any amount received for construction of the bridge.

20. As far as the argument of value of taxable services received otherwise than by way of money was not taxable prior to 18.04.2006 is concerned, he argued that section 67 was substituted by the Finance Act, 2006 and it merely clarifies the methods of valuation of services under different situations. The expression "gross amount charged" is a comprehensive term. Besides, non-money transactions were not excluded from section 67 as it existed prior to 18.04.2006.

21. On the question of limitation, learned special counsel argued that appellants were not new to service tax regulations and they had registration of service tax. They were fully aware of the obligations under self assessment scheme. The agreement which they entered with GTBPL was a private arrangement which was not disclosed to the department. There was no precedent decision which could have lead them to believe that no service tax was payable in their case. There is nothing on record to show that the appellant had obtained any legal opinion or sought any clarifications from the department which could have lead them to believe that they are exempted from service tax. The argument that they sold their rights to GTBPL is not correct because it could not have done so under the contract with the Government of Andhra Pradesh. The purported change in the toll fee receipts after investigations have commenced is also indicative of their effort to suppress the fact of their intent to evade payment of tax. In view of

the above, the appellant's appeal has no merits and the demand needs to be confirmed along with interest and penalties imposed also need to be upheld.

22. We have considered the arguments on both sides and perused the records. Construction of roads and bridges is done by the Government either directly or sometimes it is done on Build-Operate-Transfer basis. In the latter case, the Government, instead of investing either the whole or part of the money itself, gives the responsibility to build the bridge to a private party and gives them the right to collect a user fee or toll fee, by whatever name called, from the users of the bridge. The user fee is allowed to be collected over a specified number of years after which the bridge is turned over to the Government. This scheme is known as Build-Operate-Transfer scheme. Evidently, a private company has no interest in building roads for public good. They do it as a profitable business venture. Where a bridge or road is required and it is not there, it is profitable for the public to have such a bridge or road built and maintained. In return for the use of such road or bridge, they pay a consideration in the form of toll fee. However, like in the case of any licenses, there is an element of monopoly in this and therefore, the amounts which can be collected are regulated by the Government. Nevertheless, the fact remains that the user of the bridge is a consumer of the service and for the enjoyment of the facility he pays a consideration to the company which builds and maintains the bridge.

23. In this case, the Government of Andhra Pradesh has assigned the construction of this bridge to the appellants. They allowed them to collect user fee as per the schedule in the agreement. In addition, the Government of Andhra Pradesh also gave them a subsidy of Rs.69 crores towards construction of the bridge. The total estimated cost of the bridge was Rs.110 crores. The appellant was expected to get the remaining investment and recovered the same and profits through toll fee collected over a period of 15 years.

24. It is very clear from the agreement that the Government of Andhra Pradesh allowed the appellant to assign their rights and responsibilities under the agreement only to the financial institutions which finance their project and not to anybody else. There is no whisper of separate subsidiary

company being formed and taking over this particular project in the agreement. Thus, we have no doubt that the agreement had prohibited assigning the rights and responsibilities to the appellant on to any other company. However, the appellant formed a separate legal entity in the form of 100% subsidiary and assigned their rights and responsibilities under the agreement to them in exchange for an amount received in the form of taking over debt and assigning some shares. The value of both these debt and the shares has been quantified and is specifically included in the arrangement between appellant and their subsidiary, M/s GTBPL. Thus, the amount received as consideration for assigning these rights and responsibilities is evident.

25. There is nothing on record to show that the Government of Andhra Pradesh has modified any of the terms of the agreement so as to permit such assignment to third party. Evidently, this has been done behind the back of the Government of Andhra Pradesh. The DGM of the appellant firm had, in a statement, indicated that they have informed the Government of Andhra Pradesh but there is nothing on record to show that this assignment has been approved by the Government of Andhra Pradesh or the agreement has been modified. Thus, the arrangement between the appellant and GTBPL was not disclosed to the Government of Andhra Pradesh. It was also not disclosed to the Revenue in this case to enable them to examine the arrangement from the service tax point of view. In fact, it was done through a Board resolution by the appellant company and accepted by another Board resolution by GTBPL. We, therefore, find that it was never an open arrangement and it had not come to light until intelligence was gathered and investigations were initiated by the Revenue.

26. In this case, the appellant was to provide services to the consumers in the form of maintaining the bridge and allowing its use for which they were entitled to collect renumeration in the form of toll fee. The toll fee, evidently was to be collected in the name of the appellant because they were entitled to collect it as per the agreement with the Government of Andhra Pradesh. This was the business model of the appellant as far as this project is concerned. The appellant had given this right to GTBPL who was rendering all the services which the appellant was required to render and was

collecting fees which the appellant was entitled to collect. The receipts were also issued in the name of the appellant themselves. This changed only when the investigations had begun. Until these investigations had begun, every user of that bridge was given the impression that the appellant was rendering service and he was paying a fee for it. Similarly, the Government of Andhra Pradesh was also under the impression that the appellant was rendering service and was collecting fees as we understand from the agreement to which no changes have been produced before us. No document has been produced before us that the Government of Andhra Pradesh has either agreed to the arrangement between the GTBPL and the appellant or has concurred to it.

27. Thus, we find that, as far as both the Government of Andhra Pradesh and the users are concerned, the service which GTBPL was rendering was being rendered by the appellant and the fee which they were collecting was being collected by the appellant. This is akin to McDonald's restaurant being run in a town by a franchisee. The consumer sees it as McDonald's restaurant although it is actually being operated by the franchisee. In view of the above, we find that the appellant has provided franchisee service to GTBPL and had collected an amount towards it.

28. Learned counsel for the appellant argued that if they were rendering service the amounts collected as toll fee should have been transferred to them, whereas, GTBPL has actually taken these amounts in their accounts. We do not find much force in this argument. In a franchise agreement, the franchisor and franchisee can have any convenient method of financial arrangement. What is important is the service must be provided and the franchisor must allow franchisee to provide that service and collect the amounts. The franchisor and franchisee can have an arrangement where a portion of amount is paid to the franchisor on every transaction or they could have an arrangement of lump sum payment or any combination of two or any other suitable arrangement. In this case, the entire amount has been paid upfront in one go by the franchisee, GTBPL, to the appellant. Therefore, the entire toll fee is being retained by the franchisee, GTBPL.

29. It has also been argued by the learned counsel for the appellant that the amount was not paid in money. We do not find much force in this argument as the amount was indeed paid in terms of money. It is not necessary for the amount to be paid in cash whether prior to 2006 or thereafter. The money could be paid in the form of cash, cheques, drafts or any other acceptable form. What is important is that the amount must be paid and that amount must be a consideration for the service rendered. In this case both the franchisee taking over the liability of debt of the franchisor and paying an amount by way of shares has been quantified in terms of money and that is how the SCN has computed the demand. There is no doubt that the entire amount has been paid only for consideration of this service. There is no other arrangement in this case. Therefore, we find that the case is against the appellant on merits.

30. As far as the question of limitation is concerned, it can be invoked if there is fraud or collusion or wilful misstatement or suppression of facts or violation of Act or Rules with intent to evade payment of service tax. In this case, nothing was disclosed to the Revenue by the appellant either in their ST3 returns or by way of letters or intimation to the department. In fact, the agreement was entered into privately between the appellant and the franchisee GTBPL through Board resolutions. One reason for such an arrangement could be the express prohibition of assignment of contracts in the agreement entered into with the Government of Andhra Pradesh. It is not for us to examine whether there was a violation of the agreement with the Government of Andhra Pradesh and its implications. We are merely concerned with the arrangement between the appellant and GTBPL which we have already held to be in the nature of franchise service. Evidently, nothing was disclosed to the department at any stage until the investigations revealed these facts. Therefore, we find sufficient grounds to invoke extended period of limitation in this case. For the same reasons, we find that the imposition of penalty under section 78 is also sustainable. As far as the question of valuation is concerned, we do find in favour of the assessee and any consideration which was received by the appellant must be considered as cum-tax value and accordingly, the service tax must be recomputed. For this limited reason, we remand the matter back to the original authority.

31. In view of the above, the appeal is disposed of as below:

a) The demand of service tax invoking extended period of limitation along with interest is upheld.
b) The service tax, however, must be computed taking the amounts received as cum-tax value.
c) The imposition of penalty under section 78 is upheld.
d) The appeal is remanded to the original authority for the limited purpose of computation of the service tax taking the amounts received as cum-tax values and corresponding changes in the interest and amount of penalty.

(Pronounced in the open court on 03.07.2020)

**(Dr. D.M. MISRA)**
**MEMBER (JUDICIAL)**

**(P. VENKATA SUBBA RAO)**
**MEMBER (TECHNICAL)**

**Veda**