

**CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH AT HYDERABAD
Division Bench-Court No – I**

Service Tax Appeal No. 3046 of 2011

(Arising out of **Order-in-Appeal** No.77/2011 (H-II) S.Tax dated 30.08.2011 passed by Commissioner of Customs, Central Excise & Service Tax, Hyderabad)

Sushee Infra Pvt Ltd.,

Plot No. 245/A/2,
MLA Colony, Road No. 12,
Banjara Hills, Hyderabad,
Telangana – 500 034.

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Appellant(s)

Vs

**Commissioner of Central Tax
Hyderabad - II**

L.B.Stadium Road,
Basheerbagh, Hyderabad,
Telangana – 500 004.

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Respondent(s)

Appearance

Shri Venkat Prasad, CA for the Appellant

Shri S. Hanuma Prasad, Authorised Representative for the Respondent.

**Coram: HON'BLE Mr. P.V. SUBBA RAO, MEMBER (TECHNICAL)
HON'BLE Dr. RACHNA GUPTA, MEMBER (JUDICIAL)**

FINAL ORDER No. A/30013/2023

Date of Hearing: 10.01.2023

Date of Decision: 10.01.2023

[Order per: Dr. RACHNA GUPTA]

The present appeal has been filed to assail Order-in-Appeal No. 77/2011 dated 30.08.2011 vide which the demand of Rs. 4,96,416/- (as a liability towards providing Business Auxiliary Services) was confirmed by Original Adjudicating Authority. The facts in brief relevant for the present adjudication are as follows:

The appellant is engaged in providing services of site formation and clearance and also for services of transport of goods by road, renting of immovable property and that of mining. During the audit of their records the Department observed that the appellant had received certain consideration towards commission on sub-contracts under the head "other income" during the period from October 2004 to November, 2006 for the

work executed on back to back basis through their sub-contractors. Department formed an opinion that the commission was liable to be paid as tax under 'Business Auxiliary Services'. Accordingly, vide Show Cause Notice No. 16/159/2010 dated 22.04.2010 the aforesaid amount of Rs. 4,96,416/- was proposed to be recovered as service tax along with proportionate interest and the appropriate penalties. The said proposal was confirmed initially by the Original Adjudicating Authority vide Order-in-Original No.49/2011 dated 27.05.2011. The appeal thereof has been rejected vide impugned order under challenge. Being aggrieved appellant is before this Tribunal.

2. We have heard Shri Venkat Prasad, CA Learned Counsel for the Appellant and Shri S. Hanuma Prasad, AR for the Respondent.

3. Learned Counsel for the appellant has submitted that the appellant being the civil contractor is dealing in site formation, mining and construction pursuant to tenders which get floated by various departments of various states and mining companies in the country and is being awarded back to back contract in appellant's favour. Subsequent thereto the appellant used to enter into a contract with others like Shri G. Venkat Reddy, Guntur, Shri G. Krishan Reddy, Guntur, Shri Jaya Laxmi Constructions, Hyderabad, Kolan Engineering Constructions, Hyderabad, Ganta Ramanaiah Naidu, Nellore, M/s GI Constructions, Guntur, etc., for getting contracts executed in their name but through said sub-contractor. For renting their name the appellants were getting a nominal percentage at the rate of 2% of the payment received as a commission and the same has been shown in the books under the head "commission received".

3.1 Learned Counsel has vehemently contended the appellant was not in any way rendering Business Auxiliary Services for promoting or marketing the services provided by the sub-contractor. The proposal of payment of service tax on the said ground and confirmation thereof is therefore prayed to be set aside. Learned Counsel for the appellant submits that the show cause notice otherwise has been issued invoking the extended period of limitation despite that there is no such circumstances nor any apparent intent with the appellant to evade the tax liability. The Department should

not have invoked the extended period of limitation. The demand in the show cause notice is for the period much beyond the normal period of issuing the show cause notice. The demand is therefore alleged to be hit by the bar of limitation. For this reason also the confirmation thereof is prayed to be set aside. The appeal is accordingly prayed to be allowed.

4. While rebutting these submissions, Learned Departmental Representative has relied upon the findings arrived at by Commissioner (Appeals) in the order under challenge. The findings in para 6 and 7 of the impugned order have been impressed upon. It is submitted that the findings have been arrived at after discussing the relevant case law on the subject. Hence, there is no infirmity in these findings. Learned DR has prayed for the appeal to be dismissed.

5. Having heard the parties, the rival contentions and after going through the records, the question for adjudication appears to be:

(i) Whether the amount received by the appellant in the name of commission while sub-contracting on back to back basis, is liable to service tax under the category "Business Auxiliary Service" and

(ii) Whether the extended period of limitation is invocable and penalties are imposable upon the appellant.

6. Findings with respect to the first point of adjudication:

To adjudicate foremost the definition of Business Auxiliary Services is to be seen. Section 65(19) of Finance Act defines Business Auxiliary Service as follows:

"Business Auxiliary Service" means any service in relation to, -

(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

[Explanation - For the removal of doubts, it is hereby declared that for the purposes of this sub-clause, "service in relation to promotion or marketing of service provided by the client" includes any service provided in relation to promotion or marketing of games of chance, organised, conducted or promoted by the client, in whatever form or by whatever name called, whether or not conducted online, including lottery, lotto, bingo;]

(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

[Explanation - For the removal of doubts, it is hereby declared that for the purposes of this sub-clause, "inputs" means all goods or services intended for use by the client;]

(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 activity that amounts to "manufacture" of excisable goods.

Explanation - For the removal of doubts, it is hereby declared that for the purposes of this clause, -

6.1 Reverting to the facts of the present case, we observe that the arrangement herein is that the appellant being a service provider for services as that of site formation, mining etc. were being awarded the tenders floated by various Government departments for receiving the aforesaid activities. Apparently and admittedly in such scenario the said different departments were the service recipients and the appellant has been the service provider as far as the service of site formation, mining etc., are concerned.

6.2 Further, admitted facts are that for execution of the work of awarded tenders, the appellant was appointing sub-contractors to act on his behalf. Hence the tender awarding departments/companies remain the service recipients and the sub-contractor is the service provider but on behalf of the appellant. We also observe that sub-contractor was stepping into the shoes of the appellant by virtue of a duly executed agreement by and between the appellant and the concerned sub-contractor purely for undertaking by the sub-contractor for the execution of the entire work under the respective tender, adhering to all such terms and conditions as were imposed upon the appellant by virtue of his agreement with the said employer. The perusal of few such agreements, as found on record, reveals that the sub-contractor was also made liable to compensate the appellant for any loss or damage to which the appellant might be held liable to the employer/tender agency

on account of failure or improper execution of the work by the sub-contractor and on account of not abiding by any terms and conditions of the agreement with the employer.

6.3 These perusals make it clear for us to hold that the sub-contractor was not the service recipient of the appellant as such cannot be called as his client. He rather was been engaged by the appellant as his agent pursuant to the duly executed agreement where all profits and even all losses accruing to the appellant on any account pursuant to his agreement with the employer/tender agency were to be inculcated by the sub-contractor. In such circumstances, the arrangements between the appellant and the appointed sub-contractor cannot be called as an activity of the appellant meant to promote or market the service provided by the sub-contractor. Hence engagement of sub-contractor in the given circumstances cannot be called as the 'Business Auxiliary Service' being provided to the sub-contractor by the appellant. Arrangement is rather the outsourcing, some of the appellant's work to some other person under an agreement. No doubt the appellant was getting 2% of the value involved in the contract as their commission. However, the appellant only was deducing said amount of commission for himself and was making payment to the subcontractor in whose favour the execution of work was outsourced by the appellant. Hence, we hold that no service tax can be charged from the appellant under the head 'Business Auxiliary Services'. We rely on our earlier decision of the Bench in the case of **M/s Dwaraka Constructions Vs Commr. Of Customs & Central Excise reported as 2021 (3) TMI 209 (CESTAT – Hederabad)**.

7. Findings with respect to second point of adjudication:

The period of demand in the present case is from October, 2004 to November, 2006 and show cause notice of 22.04.2010 i.e. which beyond the normal period prescribed for issuing the show cause notice under Section 73 Finance Act. The proviso thereof enhances the normal period of 30 months to that of five years. However, only in the cases where the service tax has not been levied or paid or has been short levied or short paid or erroneously refunded by the reason either of fraud or collusion or wilful mis-statement or suppression of facts or contravention of any of the provisions of the Act or the rules made there-under that too with the intent to evade the payment of

service tax by the person charging service tax. From the findings on the first point of adjudication it has already been held that the appellant was not providing 'Business Auxiliary Services' to their subcontractors and thus has been held not chargeable to service tax under 'Business Auxiliary Services'. In such circumstances, there arises no case for the appellant to discharge any liability. The question of having any intent to evade the tax liability does not at all arise. There is nothing produced by the Department on record to show a positive act of the appellant which may constitute an act of committing any fraud, misrepresentation or suppression on appellant's part. Nor there remains any question of contravention of the applicable act and rules. We therefore hold that the proviso to Section 73 of Finance Act has wrongly been invoked by the Department. Though Commissioner (Appeals) has relied upon several case laws including the decision of **CCE Visakhapatnam Vs M/s. M and Company reported as to 2011 TIOL 17 SC dated 10.02.2011** to hold suppression on part of the appellant. But we hold that once there was no circumstance for appellant to be the service provider of 'Business Auxiliary Services' to his sub-contractor, the question of suppression is held to have wrongly been indicated. The appellant had otherwise provided all relevant documents including Tenders, agreements etc. to the investigating team. We accordingly, hold that extended period has wrongly been invoked by the Department.

8. In view of entire discussion, both the points of adjudication stands decided in favour of the appellant and against the Department. The findings of Commissioner (Appeals) in the impugned order under challenge are therefore hereby set aside. Consequent thereto, the appeal stands allowed.

(Operative part of this order was pronounced in the open Court
on conclusion of the hearing)

(P.VENKATA SUBBA RAO)
MEMBER (TECHNICAL)

(Dr. RACHNA GUPTA)
MEMBER (JUDICIAL)