IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,
EAST REGIONAL BENCH : KOLKATA

S.T.Appeal No.147/09

(Arising out of Order-in-Original No.18/Commissioner/CE/Haldia/Adjn/2009 dt.23.03.2009 passed by Commissioner of Central Excise, Haldia Commissionerate, Kolkata)

M/s Industrial Handling

Applicant (s)/Appellant (s)

Vs.

Commr. of Central Excise, Haldia

Respondent (s)

Appearance:

Shri A.C.Tikadar, Consultant for the Appellant (s)
Shri A. K. Das, Spl.Counsel for the Revenue (s)

CORAM:

HON'BLE SHRI P. K. CHOUDHARY, JUDICIAL MEMBER
HON'BLE SHRI C. L. MAHAR, TECHNICAL MEMBER

Date of Hearing : 19.06.2018
Date of Decision : 19.06.2018

ORDER NO.FO/76354/2018

Per Shri C.L.Mahar :

This is an appeal filed by the Appellant against the impugned Order-in-Original No. 18/Commissioner/CE/Haldia/Adjn/2009 dt.23.03.2009 passed by Commissioner of Central Excise, Haldia Commissionerate, Kolkata

2. Brief facts of the matter are that the appellant is a proprietary firm and is engaged in providing material handling services to various business concerns, such as, factories, mining, project sites, worksites etc. . The appellant has been providing Hydra/Cranes and other various material handling equipments on rent basis to various business

establishments. The Department was of the view that the appellants had evaded payment of service tax by not getting themselves registered under the service tax category of "Support Services of Business or Commerce" and they should have paid the service tax on the charges received by them on supply of material handling equipments etc. provided by them to various business establishments. The Department had issued show-cause notice to the appellant wherein the demand of service tax amounting to Rs.1,43,43,937/- was demanded for the period between 1st May, 2006 to 10th March, 2008 under Section 73 (1) of the Finance Act, 1994, provisions of interest and penalty under Sections 75,76 and 78, had also been invoked. The matter came to be adjudicated by the ld.Commissioner vide Order-in-Original dated 23.03.2009. The ld.Commissioner has confirmed service tax totaling to an amount of Rs.1,47,07,296/- and equal amount of the penalty has also been imposed under Section 78 of the Finance Act, 1994. Penalty under Section 76 of the Finance Act, has also been confirmed. The ld.Commissioner has also confirmed the interest on the above mentioned confirmed service tax amount under Section 75 of the Finance Act, 1994.

3. The appellants are before us against the above mentioned Order-in-Original dated 23.03.2009. The basic arguments of the ld.Counsel appearing on behalf of the appellants are as follows :

(i) That the service tax on "supply of tangible goods" has come under the service tax leviability w.e.f.16.05.2008 and before that there was no service tax leviable on supply of tangible goods including machineries, equipments, appliances etc. without transferring right of possession etc. ;

(ii) The ld.Counsel appearing for the appellants has also argued that since specific category under service tax under name of “supply of tangible goods” has come into effect from 16.05.2008. Being introduced as fresh service for levy of service tax under the Finance Act, 1994, proves that the “supply of tangible goods” was previously not leviable to service tax. In this regard, the ld.Counsel has relied upon the judgement of the Hon’ble Bombay High Court in the case of **Indian National Shipowners’ Association Vs. Union of India : 2009 (14) S.T.R. 289 (Bom.)**, wherein the Hon’ble High Court has held that the introduction of new entry under the provisions of Service Tax Act, denotes that such service was not previously covered under the service tax leviability ;

(iii) The ld.Counsel for the appellants has also contended that the Department has tried to cover the activity of the appellant under the category of “support Services of Business or Commerce” as provided under Section 65 (104c) of the Finance Act, 1994. It has been the argument of the Department that the services which have been provided by the appellant in the form of supply of cranes and other equipments are nothing, but providing logistic support to various business establishment and therefore, this activity falls under the category of “infrastructural support services”, which have specifically been included within the scope of support service on business and commerce. The ld.Counsel has contended that the supply of cranes, material handling equipments etc., cannot be considered as support service for business or commerce as the definition provided in the Finance Act, 1994 for "Support Service of Business or Commerce", does not cover the activity of renting of the equipments to the business establishment. He has also relied upon the judgement of the Tribunal in the case of **Paradise Investments Vs. Commr. of Central Excise, Jaipur : 2017 (4) G.S.T.L. 315 (Tri.-Del.).**

4. The ld.D.R. for the Revenue has reiterated the arguments, on which the Order-in-Original dated 23.03.2009, has proceeded to confirm the demand under the category of "Support Service of Business or Commerce".

5. We have heard both sides and also perused the record of the appeal. We are of the opinion that the supply of tangible goods as a service has been included in the taxable category of services w.e.f. 16.05.2008 by introducing necessary amendment to the Finance Act, 1994. This very fact proves that the activity, such as supply of cranes and other material handling equipments etc., were not covered in any of the taxable services previous to 16.05.2008 which were leviable to service tax and therefore, the legislature in their prudence had brought in a new category of service under the name of "supply of tangible goods" service for leviability of service tax under the Finance Act, 1994. We are of the opinion that primarily, we agree with the arguments advanced by the ld.Counsel appearing on behalf of the appellants that the introduction of new category of service itself proves that such activity was not under the service tax net before

16.05.2008. We are also of the view that the supply of "tangible goods" cannot be considered as "Support Service of Business or Commerce". The "Support Service of Business or Commerce" has been defined under Section 65(104c) of the Finance Act, 1994, which reads as follows :

> *" 'Support Service of Business or Commerce' means services provided in relation to business or commerce and includes evaluation of prospective customs, telemarketing, processing of purchase, information and trading of delivery schedules, managing distribution and logistics, customer relationship management services, accounting and processing of transactions, operational assistance for marketing, formulation of customer services and pricing policies, infrastructural support services and other transaction processing.*
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> *Explanation – For the purposes of this clause, the expression "infrastructural support services" includes providing office along with office utilities, lounge, reception with competent personnel to handle message, secretarial services, internet and telecom facilities, pantry and security."*

A quick glance at the above definition makes it clear that "Infrastructural Support Services" as provided in the above definition primarily pertains to the logistic support system, such as the Office premises and other Office utilities pertaining to the smooth Office functioning and therefore, supply of material handling equipments, such as, cranes etc. can by no stretch of imagination be considered as logistic support for smooth functioning of business office. While taking the above view, we also take shelter of this Tribunal's decision in the case of **Paradise Investments (supra).** The relevant extracts are reproduced here below :

> " ***5.****Heard both sides and perused the records. "Support service of business of commerce" is defined in Section 65(104c) of the Finance Act, 1994 is extracted herein below :-*
>
> *' "Support services of business or commerce" means services provided in relation to business or commerce and includes evaluation of prospective customers, telemarketing, processing of purchase orders and fulfilment services, information and tracking of delivery schedules, managing distribution and logistics, customer relationship management services, accounting and processing of transactions, operational assistance for marketing, formulation of customer service and pricing policies, infrastructural support services and other transaction processing.'*
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> ***6.****On perusal of the above statutory definition, it is clear that providing of equipment on rent is not categorized in any of the activities itemized therein. With regard to the infrastructural services and other transaction processes, the explanation appended to the definition clause has provided that infrastructural support service should include the office utilities and other facilities provided for smooth running of the office establishment.*
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> ***7.****We find that the appellant is no way connected to the business establishment for running the business of the client and is only supplying the equipment on rental basis. Providing of equipment on rent, per se cannot be called infrastructure support service. The scope of BSS as defined cannot cover simple renting of equipments. We are of the view that service tax demand under such category of service in the case of*

appellant cannot be sustained. Accordingly, we do not find any merits in the impugned order and after setting aside the same, we allow the appeal in favour of the appellant".

We also take shelter of the judgement of the Hon'ble High Court of Bombay in the case of **Indian National Shipowners' Association (supra).** The relevant extract is reproduced here below :

> "***38.*** *If the Department's contention is accepted that would mean that the activities of the members of the 1st petitioner are covered by entry (zzzy) and entry (zzzzj). Such a result is difficult to comprehend because entry (zzzzj) is not a specie of what is covered by entry (zzzy). Introduction of new entry and inclusion of certain services in that entry would presuppose that there was no earlier entry covering the said services. Therefore, prior to introduction of entry (zzzzj), the services rendered by the members of the 1st petitioner were not taxable. Creation of new entry is not by way of amending the earlier entry. It is not a carve out of the earlier entry. Therefore, the services rendered by the members of the 1st petitioner cannot be brought to tax under that entry".*

6. In view of the above, we are of the opinion that the activity of supply of material handling equipment, such as, cranes etc., is not leviable under the category of "Support Service of Business or Commerce" and this activity has come under the scope of service tax under a category of "supply of tangible goods" w.e.f.16.05.2008. Accordingly, we do not find any merit in the Order-in-Original dated 23.03.2009 of the ld.Commissioner of Central Excise, Haldia Commissionerate, Kolkata and the same is set aside.

7. As a result, the appeal is allowed with consequential benefit, if any, to the appellant, in accordance with law.

(Operative part of the Order was pronounced in the open Court.)

Sd/	Sd/
(P.K.CHOUDHARY)	**(C.L.MAHAR)**
MEMBER (JUDICIAL)	**MEMBER (TECHNICAL)**

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