IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL KOLKATA
EAST ZONAL BENCH, KOLKATA

Date of Hearing/Order: 5.7.2018

Appeal No. ST/148/2009-DB

(Arising out of Order-in-Original No. 17/Commissioner/CE/Haldia/Adjn/2009 dated 23.3.2009 passed by the Commissioner, Central Excise, Kolkata)

M/s Industrial Services (Gases) Appellant

Vs.

CCE, Haldia Respondent

Appearance

Shri A.C. Tikadar, Consultant - for the appellant

Shri S. Mukhopadhyay, AR - for the respondent

CORAM: **Hon'ble Mr. P.K. Choudhary, Member (Judicial)**
Hon'ble Mr. Bijay Kumar, Member (Technical)

ORDER NO.FO/76552/2018

Per Bijay Kumar :

The present appeal is filed against the impugned order passed by ld. Commissioner, Central Excise, wherein demand of service tax of Rs. 9,38,649/- along with education cess of Rs.18,774/- and SHE Rs. 3,977/- under Section 73(1) of the Finance Act along with equivalent amount of penalty under Section 78 of Finance Act, 1994 and Rs. 200/- per day or 2% of such tax under Section 76 ibid have been confirmed.

2. The issue involved in this case is regarding non-payment of service tax on the services rendered by the appellant. The appellant had provided hydra cranes on hire basis along with other material handling equipments as per the order received from their client. The Revenue tried to levy service tax on supply of crane, material handling equipment under "Support Services of Business or Commerce" as defined in Section 65(104c) of the Finance Act, 1994 on the pretext that the services rendered by the appellant is in the form of 'logistic service infrastructure support' service.

3. With the above background, we heard ld. Advocate on behalf of the appellant, who has stated that the appellant is providing only hydra crane and material handling equipment on a hire basis which not rendering in the business support service which is evident from the contract entered by the appellant. The arguments submitted by ld. Counsel is as follows:

(i) That they are not providing any 'business support service' as held in the impugned order are engaged in supply of tangible goods, which has come under the service tax liability with effect from 16.5.2008 and prior to that there was no service tax leviable on 'supply of tangible goods' including machineries, equipments, appliances etc. without transferring the right or possession thereof.

(ii) The ld. Counsel impressed upon that since specific category under service tax under the name of 'supply of tangible goods' has come into effect from 16.5.2008, there is no legal mandate to levy tax on such service prior to its introduction.

(iii) Being introduced as fresh service for levy of service tax under the Finance Act, 1994 it is evident that 'supply of tangible goods' was previously leviable not to service tax.

(iv) The ld. Advocate has relied upon the judgement of Hon'ble Bombay High Court in the case of ***Indian National Shipowners' Association Vs. Union of India*** – 2009 (14) STR 289 (Bom.), wherein it is held that the introduction of new entry under the provisions of Finance Act, 1994 shows that earlier such service was not within the purview of the service tax liability under the Act, ibid.

(v) Ld. Counsel also contended that the department has tried to cover the activity of appellant under the category of 'support service of business or commerce' as provided under Section 65(104c) of Finance Act, 1994. It has been argued by 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 hence this activity falls under the category of 'infrastructural support service', which have specifically been included within the scope of 'support service on business' and 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. In support of his argument, he has relied upon the judgement of This Tribunal in the case of ***Paradise Investments Vs. CC, Jaipur*** – 2017 (4) GSTL 315 (Tri.-Del.).

4. Per contra, the ld. AR for the Revenue has supported the impugned order under which the demand has been confirmed in the category of 'support service of business or commerce'.

5. We have heard ld. Advocate on behalf of the appellant and ld. AR on behalf of the Revenue and considered the Appeal records carefully.

It is a fact that supply of tangible goods as a service has been included in the taxable category with effect from 16.5.2008 by introducing necessary amendment to the Finance Act, 1994. This proves that this service was not within its ambit prior to its introduction the supply of crane and other material equipment handling equipment etc. on hire were not covered by any existing entry in the Finance act, prior to 16.5.2008, which necessitated the creation of new entry for such type of services rendered by the service provider. It was the background against which the legislature created a new category of services in the name of 'supply of tangible goods'. We are of the agreement with the arguments advanced by ld. Counsel appearing for the appellant that the introduction of new category of service itself proves that such activity was not under service tax net before 16.5.2005. We are of the view that supply of tangible goods cannot be considered as support service of business or commerce. In this regard, we find it appropriate to reproduce the definition of support service of business or commerce 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, panty and security."*

A bare perusal of the definition makes it clear that 'infrastructural Support Services" primarily relates to the logistic support system, such as the office premises and other office utilities pertaining to the smooth functioning of office and hence supply of cranes and material handling equipment can by no stretch of imagination can be brought within the scope of 'Support of Service of Business or Commerce'. We are considered as Logistic Support for smooth functioning of business. While taking the above view, we refer Tribunal's decision in the case of ***Paradise Investments*** (supra), wherein it has been held as under:

> **"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.'

> **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."

6. Our views are also fortified by the decision of Hon'ble Bombay High Court in the case of ***Indian National Shipowners' Association*** (supra), the relevant extract of which is reproduced as under:-

> "**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."

7. In view of above, we are of the considered view that the services provided by the appellant is not covered under the support service of business or commerce. The service provided by the appellant will fall under the category of 'support of tangible goods' with effect from 16.5.2008. In the case demand pertains to the period from 1.4.2006 to 10.3.2008 and hence non-taxable under the Finance Act. Accordingly, we set aside the impugned order with consequential benefit, if any, in accordance with law.

(Pronounced in Court)

Sd/

(P.K. Choudhary)
Member (Judicial)

Sd/

(Bijay Kumar)
Member (Technical)