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

Date of Hearing: 4.7.2018
Date of Pronouncement: 05.12.2018

Appeal No. ST/197/2010-DB

CCE & ST, Ranchi — Appellant

Vs.

M/s Jagdamba Tyres Retreading Company — Respondent

Appeal No. ST/347/2011-DB

(Arising out of Order-in-Appeal No. 36/RAN/2010 dated 18.3.2010 passed by the Commissioner (Appeals), Central Excise & Service Tax, Ranchi)

M/s Jagdamba Tyres Retreading Company — Appellant

Vs.

CCE & ST, Ranchi — Respondent

Appearance

Shri Arnab Chakraborty, Advocate - for the Assessee

Shri A. Roy, AR - for the Revenue

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

Final Order No. FO/A/77029-77030/2018

Per Bijay Kumar :

Revenue is in appeal against the impugned order passed by the Commissioner (Appeals), Central Excise, Ranchi, wherein he has set aside the order passed by the lower adjudicating authority following the decision passed by him in Order-in-Appeal No. 20/JSR/2009 dated 30.1.2009. There is another appeal against this order in original passed by the lower adjudicating authority by the respondent assessee against the order of review passed by the Commissioner, Central Excise, Ranchi vide revision Order No. 5/ST/Commissioner/2011 dated 10.6.2011.

2. The issue involved in this case is that the manufacturer respondent/appellant is engaged in the service of retreading of tyre. The respondent assessee is ancillary of M/s Bharat Cooking Coal Ltd. and almost 98% of the transaction are with the Government companies. It was alleged in the show cause notice that the appellant is providing maintenance or repair service (up to 17.4.2006) and management, maintenance or repair service from 18.4.2006 by way of retreading of old and used tyre of various customers under contract but they did not pay proper service tax and also failed to file ST-3 returns to the Central Excise department. It is also alleged in the show cause notice that the appellant has obtained registration from the Department, but concealed the fact regarding provisions of the said service and the consideration raised against them. The show cause culminated into passing of the order by the lower appellate authority for the period from 16.6.2005 to 16.9.2006. Accordingly, the demand of duty of Rs. 12,09,627/-was

confirmed under Section 73 (2) of Finance Act (for short 'Act') along with interest under Section 75 of the Act. Equal penalty of Rs. 12,09,627/- was also imposed on the appellant under Section 78 of the Act. The adjudicating authority has refrained from penalty under Section 76 of the Act although mentioned in the show cause notice.

3. Revenue has filed the appeal against the order of Commissioner (Appeals) on the ground that retreading of tyre is covered under the 'maintenance and repair service' and under 'management or maintenance or repair service' and there is no sale material involvement. Therefore, the Revenue felt that the Commissioner (Appeals) not decided the appeal in accordance with law and relied upon the order passed by him. Another case (***M/s C.I.O. Tyre Vs. CCE, Jamshedpur***) on the similar issue against which the department has before the Hon'ble CESTAT and the issue is not decided till date and preferred appeal.

4. Further, it was stated by the Revenue that process of tyre retreading is well covered by the statutory definition. The process of retreading of tyre is done to bring it into sound condition and make it reusable. As the process of retreading does not leads to emergence of new product it is not the case of manufacture. Further, since the tyre has not loose its original identity it shall be called repair of tyre only. Therefore, retreading of tyre has rightly been categorised

under maintenance and repair service up to 17.4.2006 and under management and repair service since 18.4.2006. The services rendered by the noticee were covered under clause (b) of the definition of 'repair and maintenance service', and therefore, the service is taxable under the provision of Service Tax Rules. The Commissioner (Appeals) in his earlier order being Appeal No. 20/JSR/209 dated 30.1.2009 in case of M/s C.I.O Tyre Vs. CCE Jamshedpur (as quoted in Order-in-Appeal No. 36/RAN/2010 dated 18.10.2010). The CCE (Appeals) has not disputed the taxability of the process of retreading of tyres under "repair and maintenance service" or under "management, maintenance and repair service. Therefore, the taxability of tyre retreading under above category is well established. Further, regarding the value of taxable service, it was submitted by the Revenue that Notification No. 12/2003 dated 20.6.2003 *'exempts so much of value of all taxable service, as is equal to the value of goods and material sold by the service provider to the recipient of service, from the tax leviable thereon under Section 66 of the Act, subject to condition that there is a documentary proof specifically indicating the value of sale goods and material".* As the appellant did not indicate the breakup of material sold along with the value of material and service component of the transactions. Further at no point of time the assessee has come forward to prove that they had sufficient record indicating the quality and value of the raw material that has been consumed in the process of retreading.

Therefore, it was impressed upon by the Revenue that order passed by the Commissioner (Appeals) setting aside the order of the lower adjudicating authority is incorrect and needs to be reviewed in appeal.

5. It is also on record that the same adjudication order passed by the lower adjudicating authority was also reviewed under Section 84 of the Act vide order in revision No. 5/ST/Commissioner/2011 dated 10.6.2011. The revision order was passed on the ground that the lower adjudicating authority has failed to impose penalty under Section 76 of the Act which was there in the show cause notice and, therefore, the order of the lower adjudicating authority is not correct and legal. While passing the revision order, the Commissioner has reiterated the order of the lower adjudicating authority and in addition imposed penalty under Section 76 of the said Act, @ Rs. 100/- per day till 17.4.2006 and from 18.4.2006 @ Rs. 200 per day or 2% per month of the amount of service tax whichever is higher.

6. It is against this order of revision passed by the Commissioner, the assessee appellant has filed the Appeal No. ST/347/2011 on the following grounds :

6.1 It was submitted by ld. Advocate on behalf of the appellant assessee that the order of revision under Section 84 of the Act has been passed by the Commissioner after the statutory period of limitation and, therefore, liable to be set aside on this ground also. The revisionary authority has passed the impugned order beyond the prescribed period and hence is liable to set aside on this ground alone. Further, it was argued that the revisionary authority has not granted any opportunity of personal hearing to the appellant assessee as contained in Section 84 of the Act.

6.2 It was also submitted that on passing the impugned revision order, the ld. Commissioner has failed to notice that the order passed by the lower adjudicating authority has been appealed against to Commissioner (Appeals) and accordingly, in view of provisions as contained in Section 84(4), the revision order is clearly contrary to the provisions of Rule 84(4) of the Act as it was dealt.

6.3 Regarding the appeal filed by the department, it was submitted by the ld. Advocate that the Commissioner (Appeals) has followed his earlier order being Order-in-Appeal No. 20/JSR/ 2009 dated 31.1.2009. He has stated that now the Hon'ble Tribunal has decided the appeal in this case and the order passed by the Hon'ble Tribunal has upheld the order of Commissioner (Appeals).

6.4 He further stated that at the nature of tyre retreading during period 16.6.2005 to 16.9.2006 (i.e. impugned period) were classifiable as those pertaining to repair and maintenance/management, maintenance and repair under Section 65(64) and 65 (105)(zzg) of the Finance Act, 1994 and therefore, taxable thereunder. The ld. Commissioner (Appeals) has set aside the order of lower adjudicating authority which sought to recovery the service tax along with penalty. It was further submitted that considering the nature of the service rendered by the appellant, it is covered more appropriately under Section 65(105) (zzg) of the Act as they are paying the VAT on the said contract involving tyre retreading with the VAT department of State Government. Article 366 (29A) of the Constitution introduced 46 amendment, 1982 empowering the State Government to enact law to artificial segregation individual contract pertaining to work, covering and higher project. In exercise of such power the concerned State Government has enacted the stated provisions for collecting Sales Tax/ VAT on the tyre retreading contract treating that as "work contract" for the purpose of levy, allowing deduction from the assessable turn over to the extent of labour charge, which is not specifically provided by the assesee was arrived notionally. In this regard, he relied on the decision of Hon'ble Apex Court in the case of ***Bharat Sanchar Nigam Ltd. Vs. Union of India*** – 2006 (2) STR 161 (SC). In view of above such tyre retreading contract are classified in any other work contract, the levy of Service Tax/VAT could be rendered outside the scope of Article 366 (29A) and therefore illegal.

It is the contention of the department however, that subject tyre retreading contract must be classified as being in relation to repair and maintenance service in entirety, and thus being subject of levy of service tax on total turn over value of the said contract. It was further contended that the assessee would be entitled to claim abetment to the extent of value of material consumed in providing retreading of tyre as Notification No. 12/2003-ST dated 20.6.2003.

7. The ld. Advocate further relied upon the decision of Hon'ble Supreme Court in the case of ***Commissioner of Central Excise & Customs, Kerala Vs. Larsen & Toubro Ltd.*** – 2015 (39) STR 913 (SC), wherein it was held that work contract is "separate price" of contract in comparison with other taxable service classified in the Act prior to introduction and accordingly it is not possible to classify the tyre retreading partly as work contract and partly as a repair and maintenance contract. It has been held by Hon'ble Court that the service tax is leviable on the works contract of service only with effect from 1.7.2007 are not before that.

8. The assessee appellant also distinguished decision of Hon'ble Supreme Court in the case of ***Safety Retreading Co. (P) Ltd. Vs. CCE, Salem*** – 2012 (26) STR 225 (T), with the issue at hand as the appellant in this case has deposited entirely the amount as per the

requirement of the Act. The appellant assessee has not retained any amount of service tax collected by them.

9. The assessee after the introduction of negative list regime .has been classified impugned transaction as 'works contract' and claiming the same in its ST-3 returns. The appellant assessee was also filing the VAT return with the concerned State Government on a regular basis showing the consumption of raw material to the extent from 60% to 70% of the total charge of tyre retreading. No facts contradictory to this were presented by the department during the investigation. The dominant intention of the parties and substance of the subject contract is therefore clearly characteristic of sale as opposed to service. In such an event there can be no possibility of such transaction as being in relation to service let alone those relation to repair and maintenance as against by the department. Evidently in making such allegation the department has omitted the application of 'domain nature test' as proportionate by Hon'ble Supreme Court in the case of ***BSNL Vs. Union of India –*** 2006 (2) STR 161 (SC). Therefore, it was prayed that the Commissioner (Appeals) has rightly set aside the order-in-original of lower adjudicating authority being order-in-original No. 13/ST/JC/2009.

10. The ld. AR, on the other hand, has relied upon the impugned order. He has also submitted that in case of ***Safety Retreading***

(supra), the Hon'ble Tribunal has held that assessee was not liable to pay service tax on total amount of retreading including the value of materials. However, the appellant assessee has failed to provide the documentary evidence regarding consumption of material as required under Notification No. 12/2003-ST dated 20.6.2003. Regarding the appellant assessee appeal against the review order, the ld. A.R. relied on the impugned order and stated that the lower adjudicating authority has failed to impose the penalty under Section 76 of the Act which has been rectified by the ld. Adjudicating authority. He further submitted that the review was on a different ground that is regarding escape of imposition of penalty under Section 76 of the Act and the matter before Commissioner (Appeals) against the confirmation of demand and imposition of penalty under various other provisions viz. Section 78 and 77 of the Act so there is no contradiction in the order passed by the Revisionary Authority under Section 84 of the Act.

11. Heard the parties and perused the appeal record.

12. The issue involved in this case is regarding service tax payable on the retreading of the tyre undertaken by the appellant assessee. The Commissioner (Appeals) has relied on the earlier orders being Order No. 20/JSR/2009 dated 31.1.2009 & 27/RAN/2010 dated 26.2.2010, which was subject matter of appeal before this Hon'ble

Tribunal. The issue now stands decided wherein the order of Commissioner has been upheld. The relevant portion of the order is reproduced as under:

> "4. "After perusal of record, it appears that respondent was maintaining sales tax assessment order, purchase orders, stock registers, sellers' invoices etc. for retreading and the said material costs normally worked out to 70% of the total retreading charges on which the respondent has paid VAT/CST under the said law. It is undisputed fact that the materials consumed were treated as sale/deemed sale in terms of the local sales tax/Central Sales Tax Act, 1956 which is reflected in the sales tax returns. For the remaining 30% the appellant already paid the service tax. Similar views were expressed in notification No. 12/2003-ST dated 20.6.2003 by the Board. Similar views were expressed by the Hon'ble Supreme Court in the case of Safety Retreading Co. (P) Ltd. Vs. Commissioner of C.Ex., Salem [2017 (48) STR 97 (SC)], where it was observed as under:
>
> > **10.** The exigibility of the component of the gross turnover of the assessee to service tax in respect of which the assessee had paid taxes under the local Act whereunder it was registered as a Works Contractor, would no longer be in doubt in view of the clear provisions of Section 67 of the Finance Act, 1994, as amended, which deals with the valuation of taxable services for charging service tax and specifically excludes the costs of parts or other material, if any, sold (deemed sale) to the customer while providing maintenance or repair service. This, in fact, is what is provided by the Notification dated 20th June, 2003 and CBEC Circular dated 7th April, 2004, extracted above, subject, however, to the condition that adequate and satisfactory proof in this regard is forthcoming from the assessee. On the very face of the language used in Section 67 of the Finance Act, 1994 we cannot subscribe to the view held by the Majority in the Appellate Tribunal that in a contract of the kind under consideration there is no sale or deemed sale of the parts or other materials used in the execution of the contract of repairs and maintenance. The finding of the Appellate Tribunal that it is the entire of the gross value of the service rendered that is liable to service

tax, in our considered view, does not lay down the correct proposition of law which, according to us, is that an assessee is liable to pay tax only on the service component which under the State Act has been quantified at 30%.

11. An argument has been advanced by Ms. Pinky Anand, learned Additional Solicitor General that there is no evidence forthcoming from the side of the assessee that the value of the goods or the parts used in the contract and sold to the customer amounts to seventy per cent (70%) of the value of the service rendered which is the taxable component under the State Act. The aforesaid argument overlooks certain basic features of the case, namely, the undisputed assessment of the assessee under the local Act; the case projected by the Department itself in the show cause notice; and thirdly the affidavit filed before this Court by one S. Subramanian, Commissioner of Central Excise, Salem.

12. No dispute has been raised with regard to the assessment of the appellant on its turnover under the local/State Act, insofar as payment of Value Added Tax on that component (70%) is concerned. A reading of the show cause notice dated 24th January, 2008 would go to show that the entire thrust of the Department's case is the alleged liability of the appellant-assessee to pay service tax on the gross value. In the aforesaid show cause notice, the details of the value of the goods, raw materials, parts, etc. and the value of the services rendered have been mentioned and service tax has been sought to be levied at the prescribed rate of ten per cent (10%) on the differential amount. It is now stated before us that the aforesaid figures have been furnished by the assessee himself and, therefore, must be understood not to be authentic. This, indeed, is strange. No dispute has been raised with regard to the correctness of the said figures furnished by the assessee in the show cause notice issued to justify the stand now taken before this Court; at no point of time such a plea had been advanced."

> 5. By following the ratio laid down by the Hon'ble Supreme Court, we find no reason to interfere with the impugned order and the same is hereby sustained."

13. In view of Supreme Court's order and binding order of this Tribunal the issue is no longer res integra and accordingly, we set aside the Revenue's appeal.

14. Regarding Appeal No. ST/197/2010 and ST/347/2011 against the order of Commissioner has clarified that the Commissioner has reviewed the order after being aware of the order of Commissioner (Appeals) which was in favour of the appellant assessee. This is in contradiction of the legal provisions as contained in Section 84 of the Finance Act which reads as under:

> "**84.** (4) No order under this section shall be passed by the Commissioner of Central Excise in respect of any issue if an appeal against such issue is pending before the Commissioner of Central Excise (Appeals).

From the perusal the appeal record, it is seen that the Commissioner (Appeals) has passed the Order-in-Original No. 36/RAN/2010 on 18.3.2010. However the review order has been passed on 10.6.2011, which is after the passing of the appellate order from the Commissioner (Appeals). The Section 84 restricts the Commissioner to exercise the revisionary power under Section 84 when the matter is pending before Commissioner (Appeals). In this case the Commissioner (Appeals) order was available with the revisionary authority and has been acknowledged by him in his order at para 11, which indicates that so far as the noticee contention is concerned the Commissioner (A) has set aside the said order in original, we find that the department has preferred the appeal against order in appeal No. 36/RAN/2010 dated 18.3.2010 before CEATAT, Kolkata which is pending for decision. Further the noticee No. 1 has also contended that as per Section 84(2) of the said Act every order has to be appealed before Commissioner (Appeals) within three months from the date of communication of order if he has not satisfied with the order, therefore, revision of the instant case cannot be passed. We find that the Commissioner has not given any reason for passing this order knowing fully well that the order of the lower appellant authority has been set aside by the Commissioner (Appeals). This is purely a non- application of mind and abuse of the revisionary power and hence colourable exercise on his part. In any case the main ground for review of this order was pendency of appeal before the Hon'ble CESTAT in Order-in-Original No. 36/RAN/2010 dated 18.3.2010, which now stands affirmed by Hon'ble CESTAT and therefore the revision order is required to be dismissed on this ground alone. The ld. Advocate has relied upon the various other judgement which we do not feel necessary to discuss in view of our above finding.

15. In view of above, Appeal No. ST/197/2010 stands dismissed and Appeal No. ST/347/2011 stands allowed.

16. Accordingly, both these appeals are decided by this common order in above terms.

(Pronounced in Court on. 05.12.2018)

Sd/	Sd/
(P.K. Choudhary)	(Bijay Kumar)
Member (Judicial)	Member (Technical)

RM