IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA

REGIONAL BENCH – COURT NO.2

Service Tax Appeal No.77413 of 2018

(Arising out of Order-in-Appeal No.155/KA-1/2018 dated 17.04.2018 passed by Commissioner of Central Excise Audit I, CGST & Excise, Kolkata)

M/s Ballavpur Paper Mfg.Ltd.
Ballavpur, Raniganj, Dist.-Burdwan, West Bengal, Pin-713323

Appellant

VERSUS

Commr. of CGST & Excise, Bolpur
Chandidas Road, SIAN, Dist.-Birbhum, Pin-731204

Respondent

APPERANCE :

Dr.Samir Chakraborty, Sr.Advocate & Shri Abhijit Biswas, Advocate for the Appellant
Shri A.K.Biswas, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. P.K.CHOUDHARY, MEMBER (JUDICIAL)

FINAL ORDER NO. 75246/2021

DATE OF HEARING : 03.03.2021
DATE OF PRONOUNCEMENT : 12 May 2021

PER P.K.CHOUDHARY :

This appeal is against an order dated 17.04.2018 passed by the Commissioner (Appeals), CGST & CEX Commissionerate, Kolkata, upholding confirmation of demand of service tax of Rs. 22,14,741/- (including cesses) against the appellant under Section 73 of the Finance Act, 1994 (hereinafter referred to as "the Act") read with Rule 6 of the Service Tax Rules, 1994 (in short, "the Rules"), along with interest in terms of Section 75 of the Act and penalty of an equivalent amount under Section 78 of the Act by the adjudicating order dated 09.12.2014 passed by the Additional Commissioner of Central Excise & Service Tax, Bolpur.

2. The facts in brief are:

(i) The appellant, who is engaged in the manufacture of Kraft Paper in its paper manufacturing unit, effects delivery of the kraft papers manufactured to its distributors/dealers by engagement of local transporters who lift the said goods from the factory of the appellant on the basis of challans issued by the appellant, duly acknowledged by the said transporters.

(ii) The transporters, after delivery of the goods, raised bills/invoices periodically, covering a specified period(s). The said bills/invoices contained, amongst others, the date of loading, truck numbers, challan numbers issued by the appellant, date of unloading, demurrage if any and charges for delivery at extra points, etc. Along with the bills the transporters also submitted acknowledgement copies of the challans as proof of delivery. None of them issued any consignment note.

(iii) Pursuant to an audit by CERA, audit objections were raised on 01.03.2012, demanding payment of service tax on transport charges (outward freight) for the period 2009-10 to 2011-12 from the appellant on reverse charge basis on the ground that there was providing of GTA services by the transporters. Reply dated 09.05.2012 was filed by the appellant denying any providing of GTA services and hence liability to make payment of service tax.

(iv) Thereafter on 08.08.2013 a show cause notice was issued by the Additional Commissioner, on the basis of the same allegations as in the audit objection, requiring the appellant to show cause as to why service tax of Rs. 22,14,741/- (including cesses) should not be demanded and recovered from it in terms of Section 73(1) of the Act read with Rule 6 of the Rules, along with interest thereon in terms of Section 75 of the Act and as to why penalties under Sections 77 and 78 of the Act should not be imposed.

(v) The said show cause notice was replied to by the appellant on 22.10.2013, whereafter the adjudication order dated 09.12.2014 confirming the demand of service tax and interest and imposing penalties of Rs. 22,14,741/- under Section 78 of the Act, Rs. 5,000/- under Section 77(b) of the Act, Rs. 5,000/- under Section 77(b) of the Act and Rs. 5,000/- under Section 77(e) of the Act upon the appellant was passed by the Additional Commissioner.

(vi) Being aggrieved by the said adjudication order, the appellant preferred an appeal against the same before the Commissioner (Appeals), which was disposed of by the impugned order. The Commissioner (Appeals), while upholding the demand of service tax and interest and imposition of penalty under Section 78 of the Act, set aside the penalties imposed under the various clauses of Section 77 of the Act. Being aggrieved, the instant appeal has been preferred by the appellant.

3. I have heard Dr. Samir Chakraborty, Senior Advocate on behalf of the appellant and Mr.A.K.Biswas, learned AR on behalf of the Department and have perused carefully the records of the proceedings.

4. It has been contended on behalf of the appellant by Dr. Chakraborty as under:

(i) On application of the correct proposition of law as laid down in decisions, including that of the jurisdictional Bench of the Tribunal, to the undisputed facts and materials on record of the instant case, it is conclusively evident that there was no liability on the part of the appellant to make payment of service tax on the freight charges involved in the instant case during the period involved and that the demand of service tax and interest confirmed and the penalty imposed upon the appellant are illegal, invalid, untenable and unsustainable.

(ii) From the materials on record, including the impugned order and the adjudication order, the following undisputed facts are on record:

(a) The concerned transporters operate either individually or through a sole proprietorship firm. They raised periodical bills or invoices, along with copies of challans issued by the appellant with acknowledgements of the recipient of the said goods, as proof of delivery of the goods;

(b) None of the bills/invoices raised by the transporters contained in them details, such as name of consignor and consignee, place of origin and destination, person liable to pay service tax and in many cases registration number or details of the carrier vehicles and also not serially numbered.

(c) No consignment note was issued by any of the transporters;

(d) No amount towards service tax liability is also referred to in any of the said invoices or bills.

(e) None of the transporters own any regular fleet of vehicles. They lift the goods from the appellant's factory according to the availability of vehicular space in a particular vehicle engaged by them at the given point of time.

(iii) In such circumstances it cannot be said that the transporters had raised any document in the name of the appellant for the purposes of transportation of the said goods which can be termed as a "consignment note" as stipulated under Rule 4B of the Rules, as was in force during the said period. The requirements laid down in the "*Explanation*" to Rule 4B of the said Rules have not been satisfied.

(iv) In support, reliance has been placed on the following decisions:

(a) *East India Minerals Ltd. Vs. Commr. of C.EX., Cus & ST, 2021 (44) GSTL 90 (Tri-Kol)*

(b) *Lakshminarayana Mining Company Vs. Commr. of Central Tax, 2019 (27) GSTL 745 (T)*

(c) *Chhattisgarh State Co-Operative Mfg. Federation Ltd. Vs. Commr. of S.T., 2019 (22) GSTL 265 (T)*

(d) *Commr. of C.Ex. & ST Vs. Jaikumar Fulchand Ajmera, 2017 (48) STR 52 (T)*

(e) *Ultra Tech Cement Ltd. Vs. Commissioner of C.Ex., 2018 (10) GSTL 80 (T)*

(f) U.P. State Bridge Corporation Ltd. Vs. Commr. of C.Ex & ST, 2017 (6) GSTL 523 (T)

(g) *Commr. of Cus, C.Ex & Service Tax Vs. JWC Logistics Pvt. Ltd., 2019 (22) GSTL 237 (T)*.

(v) It is further submitted that in any event the demand for the period April 2009 to September 2011 is barred by limitation, the show cause notice having been issued beyond the prescribed normal period. Contrary to the erroneous reasonings contained in the impugned order and the adjudication order, on the facts and circumstances on record of the instant case, there can be no invocation of the extended period of limitation contained in the Proviso to Section 73(1) of the Act. Reliance in this regard has been placed upon the following decisions:

(i) Uniworth Textiles Ltd. Vs. CCE, 2013 (288) ELT 161 (SC)

(ii) *Continental Foundation Jt. Venture Vs. CCE, 2007 (216) ELT 177 (SC)*

(iii) *Jaiprakash Industries Ltd. Vs. CCE, 2002 (146) ELT 481 (SC)*.

The impugned order is therefore liable to be and should be set aside.

5. Mr.A.K.Biswas, learned AR appearing on behalf of Department reiterates the findings of the lower appellate authority and the adjudicating authority and prays for upholding of the impugned order.

6. The relevant legal provisions governing the applicability of service tax in the case of GTA services are as follows:

"(i) Section 65(50b) of Finance Act, 1994 defines 'Goods Transport Agency' to mean 'any person who provides service in relation to transport of goods by road and issues consignment note, by whatever name called'.

(ii) 'Taxable Service' in relation to 'Goods Transport Agency' means 'any service provided or to be provided to any person, by a goods transport agency, in relation to transport of goods by road in a goods carriage'. (Section 65(105)(zzp) of Finance Act, 1994 as amended).

(iii) As per 'Explanation' to Rule 4B of the Service Tax Rules, 1994, 'Consignment Note is a document, issued by a goods transport agency against the receipt of goods for the purpose of transport of goods by road in a goods carriage, which is serially numbered, and

contains the name of the consignor and consignee, registration number of the goods carriage in which the goods are transported, details of the goods transported, details of the place of origin and destination, person liable for paying service tax whether consignor, consignee or the goods transport agency'.

(iv) As per Rule 2(1)(d)(v)(a) of the Service Tax Rules, 1994, 'person liable for paying service tax', in respect of the taxable services notified under sub-section (2) of Section 68 of the Finance Act, 1994 means 'any factory registered under or governed by the Factories Act, 1948'."

6.1 In the instant case, from the records it is seen that except for bills or invoices and acknowledgments of receipt of the goods by the customers by endorsing the challans issued by the appellant, no other document was submitted by the transporters. There is nothing to evidence submission of a consignment note as envisaged in the "Explanation" to Rule 4B of the Rules by any of the transporters. It is also found on perusal of the adjudication order, the appellate order and the documents on record that there is no evidence to dispute the correctness of the contentions of the appellant abovestated in this regard. The learned AR has also not contested the correctness thereof.

6.2 On the contrary, the fact that no consignment note has been issued as required under Rule 4B of the Rules stands confirmed from the findings of the lower appellate authority in the impugned order. Therein the Commissioner has sought to make the challans issued by the appellant, which were returned back along with the endorsements of recipients proving delivery of the goods by the transporters, taken together with the bills/invoices raised by them, as "consignment note" under Rule 4B. This is impermissible, there being no mandate in the Act or the Rules, including in the "*Explanation*" of Rule 4B of challans forming part of the bills/invoices to form a "consignment note" as envisaged under Rule 4B of the Rules. The inference of Commissioner (Appeals) is therefore beyond the scope of Rule 4B, contrary to settled principle of interpretation of a taxing statute's provisions and hence untenable.

6.3 The acknowledgement by the lower appellate authority in the impugned order as regards the contents of the bills/invoices raised by the transporters, on the other hand, establishes that the bills/invoices raised by the transporters are not consignment notes as per Rule 4B of the Rules.

6.4 In the premises, as per legal principles decided by different Benches of the Tribunal, delivery of the goods by the transporters in the instant case does not fall under GTA services in terms of Section 65(105)(zzp) of the Act. Consequently, the said transporters cannot be said to be "Goods Transport Agency" within the meaning of Section 65(50b) of the Act.

6.4.1 In the case of *East India Minerals Ltd. Vs. Commr. of C.Ex., Cus & ST (supra)*, this Bench (DB) of the Tribunal, in a similar case as the instant case, has held as follows:

> *"15. We have carefully gone through the relevant documents, such as, the contract between the appellant and the raising contractors, the monthly bills raised by them on the appellant, the transit pass in 'Form-G', issued by the mining authority for the purpose of payment of mining royalty, and transportation of iron ore from the mines site. The raising contractors have not issued any other document in the name of the appellant, for the purpose of transportation of iron ore, which can be termed as a consignment note, as stipulated under Rule 4B of the Service Tax Rules, 1994, as amended. As per the legal principles decided by different Benches of Tribunal and relied upon by the appellant, the activities of transportation of iron ore in the present case, do not fall under the GTA service in terms of Section 65(105)(zzp) of the Finance Act, 1994, nor the raising contractors fall under the definition of 'GTA' as defined under Section 65(50b) of the said Finance Act."*

6.4.2 In *Commr. of Cus., C.Ex. & Service Tax Vs. JWC Logistics Pvt. Ltd. (supra)*, also a case involving similar facts, a coordinate division bench of the Tribunal has held as under:

> "*5. It is not in dispute that the respondent had availed services of M/s V.A. Enterprises and others, but, admittedly, did not discharge service tax liability on the consideration paid over to these transporters. It is the contention of the respondent that they are not liable to tax on such consideration for the various reasons adverted to by the Learned Counsel.*
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> *6. That goods had been transported and, that too, by road is not in doubt. The question that arises for consideration is whether the respondent had availed the service of 'goods transport agency' within the meaning of Finance Act, 1994. There is no doubt that the respondent is a 'cargo handler'. Operation of container freight station undertake loading and unloading, packing or unpacking of cargo, which conforms to the main limb of the definition in Section 65(23) of the Finance Act, 1994. There is an exclusion limit in the said definition extending to handling of export cargo, passenger baggage and mere transportation of goods. That respondent is a provider of 'cargo handling services' does not preclude the utilisation 'goods transport agency services' for rendering such output service. In the normal course, a service provider discharging tax liability on its output services would not have to concern itself with input service. Nevertheless, in situations of liability to tax on reverse charge, such an escapement from obligation is not possible. It is up to the recipient of the service to discharge tax liability and, in the event of failure to do so, to explain or justify the tax liability having not been discharged. According to respondent, they had not utilised 'goods transport agency service'.*
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> *7. The case of Revenue is that a transporter has been used and monthly bills containing essential ingredients of the consignment note, as laid down in Rule 4B of Service Tax Rules, 1994 were issued. According to Learned Authorised*

Representative, with Rule 4B prescribing the contents of a consignment note, decision in re Bharathi Soap Works on non-issue of consignment note which is normative, tax liability of the recipient does not get erased.

8. It is not the transportation of goods by road that is subject to tax but the services rendered by a goods transport agency in relation to the transportation of goods by road and road transport agency tasked with responsibilities that others connected with road transport are not, with consignment note being the point of difference. There is also no doubt that Rule 4B of the Service Tax Rules, 1994 lays down the contents of a consignment note.

9. Revenue relies upon the invoices or monthly bills raised by M/s. Enterprises. An invoice, notwithstanding adequacy of details thereon is no substitute for a consignment note. An invoice creates liability of debt on the part of the recipient of the service. A consignment note, on the other hand, carries with it a certain legal burden, the issuing of a consignment note is a contractual undertaking made to the entity that handed over the goods to the agency of responsibility for safe delivery at the stipulated destination. A consignment note also creates binding responsibility for each consignment. In the absence of any evidence of such responsibility having devolved on M/s. V.A. Enterprises and the issue of monthly bills does not, ipso facto, creates such liability and the impugned order is not at fault for having held that tax liability does not arise."

6.4.3 The same view has also been taken by two other coordinate Division Benches of the Tribunal in the cases of *Lakshminarayana Mining Company Vs. Commr. of Central Tax (supra)* and *Ultra Tech Cement Ltd. Vs. Commissioner of C.Ex.(supra)*.

6.5 The decisions of the Tribunal and the Hon'ble Madras High Court relied upon by the Commissioner (Appeals) are clearly distinguishable. They have no manner of application to the instant case.

(i) The issues involved in *CCE Vs. Suibramania Siva Co-Op Sugar Mills Ltd., 2014 (35) STR 500 (Mad) and CCE Vs. KMB Granites Pvt. Ltd., 2014 (35) STR 63 (Mad)* were whether the expression “any person” in definition of GTA includes any commercial or proprietary concern or individual operator and availability of benefit of Notification No. 34/2004-ST. It is in this context that the Hon’ble Madras High Court held that individual truck owners fell under GTA category. None of these issues are involved herein. These decisions were not involved with issue as to what amounts to “consignment note”. Similar is the case with the decision of the Tribunal in *Sree Balaji Transport Vs. Commr. of Cus., C.Ex. & ST, 2015 (38) STR 651 (T)*.

(ii) The decisions of the Tribunal in *Annam Traders Vs. CCE, 2010 (20) STR 226 (T) and Bharathi Soap Works Vs. CCE, 2008 (9) STR 80 (T)* are Single Bench decisions delivered in March 2010 and September 2007 respectively. In the light of the abovestated subsequent decisions of the Division Bench of the Tribunal, both these orders can be of no applicability. In fact the decision in *Bharati Soap Works (supra)* has been duly considered and not agreed with by the Division Bench of the Tribunal in *JWC Logistics Pvt. Ltd. (supra)*.

6.6 In view of the above, respectfully following the abovestated decisions of the Division Benches of the Tribunal, the facts and issues involved wherein fully covers the instant case, I hold that the impugned order of the lower appellate authority is unsustainable. Hence the demand of service tax of Rs. 22,14,741/- and interest and penalty imposed confirmed by the impugned order are erroneous and unsustainable.

7. In the above premises, I set aside the impugned order and allow the appeal with consequential relief, if any.

(Pronounced in the open court on **12 May 2021.**)

SD/

(P. K. Choudhary)
Member (Judicial)

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