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

Service Tax Appeal No. 75604 of 2022

(Arising out of Order-in-Appeal No. 87/RAN/2022 dated 30.06.2022 passed by Commissioner of CGST & Central Excise, Bokaro-I.)

M/s Tushar Transport,
HA-I, City Centre, Sector-4, Bokaro Steel City, Bokaro-827004.

...Appellant (s)

VERSUS

Commissioner of CGST & Central Excise, Bokaro-I.
2nd & 3rd Floor Grand Emerland Building,
Between Road, 1&2, Ashok Nagar, Ranchi-834002.

. ..**Respondent(s)**

APPERANCE :
Shri Akshat Agarwal & Shri Anand Kr. Pasari, both Advocates for the Appellant
Shri P. K. Ghosh, Authorized Representative for the Respondent

CORAM:
HON'BLE MR. ASHOK JINDAL, MEMBER (JUDICIAL)
HON'BLE MR. K. ANPAZHAKAN MEMBER (TECHNICAL)

FINAL ORDER No. 76661/2023

DATE OF HEARING : 12.09.2023

DATE OF PRONOUNCEMENT: 15.09.2023

PER K. ANPAZHAKAN :

M/s Tushar Transport (The Appellant), are engaged in providing taxable services as defined under Section 65B(44) of the Finance Act, 1994. The data received from the Income Tax Department revealed that the Appellant has received total amount of Rs.1,59,36,103/- from various parties, during the Financial Year 2015-16. The Appellant has neither taken Service Tax Registration nor paid any service tax for the Financial Year 2015-16. The department alleged that the Appellant has suppressed the gross amount received by them in respect of services rendered and they have not paid Service Tax to the tune of Rs.23,10,735/- on the taxable value of Rs.1,59,36,103/- during the financial year Financial Year 2015-16.

2. A Show Cause Notice dated 09.12.2020 was issued to the Appellant demanding Service Tax of Rs.23,10,735/- along with interest and penalty. The Notice was adjudicated vide Order-in-Original dated 08.07.2021, wherein the demand of service tax of Rs.23,10,735/- made in the Notice was confirmed along with interest and equal amount of duty as penalty was also imposed. On appeal, the Commissioner (Appeals) upheld the demands vide Order-in-Appeal dated 30.06.2022. Aggrieved against the impugned order, the Appellant has filed the present appeal.

3. In their submission, the Appellant stated that the Ld. Adjudicating Authority has passed the order only on the basis of entries contained in Form 26AS information received from the Income Tax Department. The demand of Service Tax has been confirmed on the basis of assumption and presumption by declaring that they have provided the taxable services of "Supply of Tangible Goods Services" and "Goods Transport Agency Services". The demand of service tax has been confirmed along with interest and penalty by invoking the provisions of willful mis-statement/ collusion/ suppression of facts etc., on the part of the Appellant. They contended that the demand in the instant case is barred by limitation, as the ingredients required for invoking the extended period, as envisaged in proviso to Section 73(1) of the Finance Act, 1994, are not available in this case.

4. The Appellant contended that the entire proceedings has been carried out on the basis of the information available in Form 26AS statement forwarded by the Income Tax Department. They submitted that the department has not adduced any evidence to substantiate the claim that these amounts were received towards rendering of 'taxable services'. No verification was conducted at their end to ascertain the nature of activities carried out by them and whether they are liable to pay service tax on these amounts. Further, these figures are included in their profit/Loss Account in the Balance Sheet, which is a Public document and so there can be no suppression. Moreover, the Department has not adduced any positive evidence to show any malafide intention or mensrea for evasion of Service Tax.

5. The Appellant relied on the judgment rendered by the Hon'ble Apex Court in the case of **Caprihans India Ltd., Vs. Commissioner of Central Excise, Surat,** reported in **2015 (324) E.L.T. 8** wherein it was held that when the facts were already in the knowledge of the department, notice invoking extended period cannot be issued and no demand can be confirmed. Therefore, the Appellant contended that the demand, if any, sustainable should have been proposed only within the normal period of limitation.

6. The Appellant submits that the levy of Service Tax cannot be solely based on the amounts on which the TDS has been deducted and reflected in Form 26AS. This is for the reasons that the provisions determining the nature of the transaction whether it is a service or not, nature of service involved, the applicable rate of tax, the value of services and the person who is required to pay the tax whether forward

or reverse charge etc. are different from the provisions under Income Tax Act providing for deduction of TDS. It is trite law that figures of Form 26AS are not to be used for determining Service Tax Liability, unless there is proof to show that it was on account of any taxable service. The Appellant relied on the decision of the Tribunal in the matter of **Kush Constructions Vs. CGST NACIN reported in 2019 (24) G.S.T.L. 606 (Tri.-All.)** and in the matter of **M/s Luit Developers Private Limited Vs. Commissioner of CGST & Central Excise, Dibrugarh,** wherein this Tribunal has taken a similar view that the liability of service tax cannot be determined merely on the basis of Income Tax Returns / Form 26AS.

8. The Appellant stated that the nature of transactions carried out by them with the contractor M/s O.K Movers and Minerals Pvt. Ltd, was of hiring of JCB and Trucks and Service Tax on the same is not attracted/s O.K. Movers & Minerals Pvt. Ltd used the JCB/ Trucks hired from them for rendering .Goods Transportation' service to M/s Electro Steels Ltd, Bokaro, who paid service tax for the GTA service under reverse charge. They have never carried out any transaction of "Supply of Tangible Goods Service" or of "Goods Transport Agency Service" but on the contrary they have given the JCB and Trucks to the contractor and collected only hire charges viz., rent on the same on monthly basis. They did not provide any facility such as driver, repair and maintenance, fuel etc. Once the JCB & Trucks rented out, the entire possession and control was with the Contractor and during the period of renting, there was no interference by them. Hence, the service rendered by them is not taxable under the said head. In this regard the

appellant places reliance in the case of Praveen Engineering Works Vs. Commissioner of Service Tax, Raigad reported in 2014 (33) STR 719 (Tri.-Mumbai).

9. In order to attract levy of tax under "Supply of Tangible Goods Service" following three ingredients must be present:-

a) the service essentially has to be in relation to supply of tangible goods to any person by any other person;

b) There must not be any transfer of right of possession of the goods from the service provider to the service recipient;

c) There must not be any transfer of effective control of the goods from the service provider to the service recipient.

If all the above 3 conditions are fulfilled in a commercial transaction then only it would be liable to Service Tax. However, in the instant matter, the right of possession of the goods and effective control has been transferred from the service provider to service recipient and therefore ingredient mentioned at b & C above has not been satisfied and accordingly, the test for classifying the service under "Supply of Tangible Goods Service" fails. Thus, the Appellant stated that the observation made by the Adjudication Authority as well as the Appellate Authority is bad in law and hence the demand confirmed in the impugned order is not sustainable.

10. The Ld.A.R. Stated that after the introduction of the 'Negative List' regime, it is not required to classify the service under any particular category of service. The bills submitted by the Appellant indicate that they have raised monthly bills for 'Hire Charges for Trucks'. These Bills indicate that the Appellant have charged rent on the tangible goods

namely, JCB and Trucks, on the basis of number of days of Hire. Prior to 01.07.2012, such supplies were liable to service tax under the category of 'Supply of tangible goods' as defined under Section 65(105)(zzzzj) of the Finance Act, 1994. With effect from 01.07.2012, the transfer of goods by way of hiring, leasing, licensing or any such manner without transfer of right to use such goods has been declared as 'deemed service'. Accordingly, the impugned order has rightly demanded service tax and hence he prayed for upholding the impugned order.

11. Heard both sides and perused the appeal records.

12. We observe that the demand notice was issued based on the data received from the Income Tax Department. The data received revealed that the Appellant has received total amount of Rs.1,59,36,103/- from various parties, during the Financial Year 2015-16.The Appellant has not taken Service Tax Registration and not paid any service tax for the Financial Year 2015-16. Accordingly, the department alleged that the Appellant has suppressed the gross amount received by them in respect of services rendered and they have not paid Service Tax to the tune of Rs.23,10,735/- on the taxable value of Rs.1,59,36,103/- during the financial year Financial Year 2015-16. The Appellant contented that the demand of Service Tax has been confirmed on the basis of assumption and presumption by declaring that they have provided the taxable services of "Supply of Tangible Goods Services" and "Goods Transport Agency Services. No verification was conducted by the department to ascertain the nature of activities carried out by them and whether they are liable to pay service tax on these amounts.

13. We find merit in the contention of the Appellant. The bills submitted by the Appellant indicate that they have raised monthly bills for 'Hire Charges for Trucks'. The impugned order concluded that in these Bills the Appellant has charged rent on the tangible goods namely, JCB and Trucks, on the basis of number of days of hire. Prior to 01.07.2012, such supplies were liable to service tax under the category of 'Supply of tangible goods' as defined under Section 65(105)(zzzzj) of the Finance Act, 1994. With effect from 01.07.2012, the transfer of goods by way of hiring, leasing, licensing or any such manner without transfer of right to use such goods has been declared as 'deemed service'. Accordingly, the impugned order has justified the demand of service tax by treating the entire amount shown in the AS26 statements as amount received towards rendering of taxable service.

14. We observe that prior to 01.07.2012, in order to classify a service under the category of 'supply of tangible goods service' there must not be any transfer of right of possession of the goods from the service provider to the service recipient. Also, there must not be any transfer of effective control of the goods from the service provider to the service recipient. With effect from 01.07.2012, the transfer of goods by way of hiring, leasing, licensing or any such manner without transfer of right to use such goods has been declared as 'deemed service'. From the records we observe that no effort has been made by the department to ascertain whether the right to use the JCBs and Trucks have been transferred to the customers or retained by the Appellant. Without such ascertainment, it would not be possible to conclude whether the service would fall within the ambit of 'deemed service' or not.

15. The Appellant stated that the nature of transactions carried out by them with the contractor M/s O.K Movers and Minerals Pvt. Ltd, was of hiring of JCB and Trucks and Service Tax on the same is not attracted. M/s O.K. Movers & Minerals Pvt. Ltd has received the order from M/s Electro Steels for transportation of goods and they used the JCB/ Trucks hired from them for rendering Goods Transportation' service to M/s Electro Steels Ltd, Bokaro, who paid service tax for the GTA service under reverse charge.

16. The Appellant relied on the decision of the Tribunal in the matter of **Kush Constructions Vs. CGST NACIN reported in 2019 (24) G.S.T.L. 606 (Tri.-All.)** and contended that the liability of service tax cannot be determined merely on the basis of Income Tax Returns / Form 26AS. The Appellant also relied on the decision of the Tribunal in the case of **M/s Luit Developers Private Limited Vs. Commissioner of CGST & Central Excise, Dibrugarh,** wherein this Tribunal has held similar view that the demand cannot be based on AS26 statement received from Income Tax department, without any corroborative evidence.

17. From the decisions cited above, we observe that the demands confirmed merely on the basis of the data available in the Income Tax Returns/AS26 Statements is not sustainable. It must be established that the amount shown in the AS26 statements are actually received in connection with taxable service rendered by the Appellant. As the department has not brought in any positive evidence to substantiate the allegation that the amounts received are towards rendering of taxable service liable for service tax, we hold that the demand confirmed in the impugned order is not sustainable.

18. Regarding imposition of penalty under section 78 of the Finance Act, 1994, the Appellant stated the penalty is imposable only on a person, who with an intent to evade tax, by reason of fraud or collusion or willful mis-statement or

suppression of facts with an intention to evade the tax. However, in the instant case we observe that no evidence has been brought on record to establish that the appellant has rendered any taxable service liable for service tax. As the liability of service tax on the Appellant was not established, the question of evasion of tax or having an intention to evade tax does not arise. Accordingly, we hold that no penalty is imposable under Section 78 of the Finance Act, 1994 and hence we set aside the same.

19. In view of the above discussion, we set aside the impugned order and allow the appeal filed by the appellant.

(Pronounced in the open court on…15.09.2023…)

Sd/-
(Ashok Jindal)
Member (Judicial)

Sd/-
(K. Anpazhakan)
Member (Technical)

Tushar