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

REGIONAL BENCH - COURT NO.2

Service Tax Appeal No.25 of 2012

(Arising out of Order-in-Original No.07/ST/ADJ/COMMR/DIB/11 dated 30.09.2011 passed by Commissioner of Central Excise & Service Tax, Dibrugarh.)

M/s. D.C. Jain
(Station Char-Ali, Sivasagar-785640, P.O. & Dist:- Sivasagar, Assam.)

...Appellant

VERSUS

Commissioner of Central Excise & Service Tax, Dibrugarh

.....Respondent

(Milan Nagar, Lane 'F', P.O. C.R.Building, Dibrugarh-786003.)

APPEARANCE

Shri Devraj Sahu & Shri R.S. Mishra, both Advocates for the Appellant (s)
Shri S.Mukhopadhyay, Authorized Representative for the Revenue

CORAM: HON'BLE SHRI R. MURALIDHAR, MEMBER(JUDICIAL)
HON'BLE SHRI K. ANPAZHAKAN, MEMBER(TECHNICAL)

FINAL ORDER NO. 77534/2023

DATE OF HEARING : 20 November 2023
DATE OF DECISION : 20 November 2023

Per : R. MURALIDHAR :

The Appellant is a provider of hiring out service of cranes to various corporates. Show Cause Notice was issued for the period 01.04.2005 to 31.03.2008 alleging that the appellant has provided 'Business Auxiliary Service' falling under section 65(19). After due process, the demand was confirmed. Being aggrieved, the Appellant is before us.

2. The Ld.Advocate submits that the 'Supply of Tangible Goods Service' came into effect only from 16.05.2008. Therefore, the same service could not have been classified under 'Business Auxiliary Service' for the earlier period, in order to make the assessee to pay the Service

Tax on the same. In their case during the period under consideration they have neither charged Service Tax, nor collected the same, nor paid to the Department since they had a bona fide belief that the service provided does not get covered under 'Business Auxiliary Service. He cites case law of Dr. Lal Path Lab Pvt.Ltd. Vs. Commissioner [2006 (4) STR 527 (Tri.-Del.]. Further he submits that the issue is no more res integra. The same identical issue has come up before this Bench in the case of Devanchand Ramsaran Vs. Commissioner of C.Ex., Dibrugarh [2019 (24) GSTL 646 (Tri.-Kolkata)], wherein this Bench has allowed the appeal by holding as under:-

> ***"7.*** *The definition of Business Auxiliary Service under Section 65(19) is clearly applicable only when the service is rendered on behalf of someone else. Perusal of the contract reveals that the activity can at best fall under Section 65(105)(zzzz) w.e.f. 16-5-2008. Since the entire demand in the present proceedings is for the prior period, we find no justification for the levy of the service tax under the category of Business Auxiliary Service."* *[Emphasis supplied]*

3. This matter was also taken up by the Revenue before the Hon'ble Calcutta High Court in the case of Commissioner of C.Ex. & S.T., Haldia vs. Industrial Handling [2022 (59) GSTL 132 (Cal.)], wherein the Hon'ble High Court has held as under:-

> **"7...***......................... The Tribunal accepted the fact position, noted the contract between the parties and also that the assessee had placed the cranes at disposal of ONGC along with operators and consideration will be paid by ONGC on monthly operation charges as well as empty run charges and, therefore, the Tribunal held that the contract cannot be considered to be that of procurement of services which are inputs for the client for the simple reason that there is no third party in the contract. Further, it was held that the definition of Business Auxiliary Service under Section 65(19) is clearly applicable only when the service is rendered on behalf of somebody else. Thus, the assessee succeeded before the Tribunal. The decision of the said case will apply with full force to the case in hand. Furthermore, we find that the*

Tribunal which is the last fact finding authority in the hierarchy of authorities under the provisions of the Act had examined the facts and concluded that the nature of activity cannot be construed within the ambit of service tax. Thus, we find that there is no error in the order passed by the Tribunal. Accordingly, the appeal filed by the Revenue is dismissed and the substantial questions of law are answered against the Revenue." *[Emphasis supplied]*

4. The Ld.AR reiterates the findings of the lower authority.

5. After going through the factual details and the cited case law, we find that the present issue is covered by the Tribunal and High Court.

6. Accordingly, we set aside the impugned order and allow the appeal with consequential relief, if any, as per law.

(Dictated and pronounced in the open Court.)

Sd/
(R. MURALIDHAR)
MEMBER (JUDICIAL)

Sd/
(K. ANPAZHAKAN)
MEMBER (TECHNICAL)

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