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

REGIONAL BENCH – COURT NO.1

Service Tax Appeal No.76101 of 2014
(On behalf of Appellant)

(Arising out of Order-in-Original No.03/Commr./ST/GHY/14-15 dated 03.06.2014 passed by Commissioner of Central Excise & Service Tax, Guwahati)

M/s Ganesh Trading Company
K.K.Colony, Morigaon Road, PO-Jagiroad,Dist.-Morigaon-782410

Appellant

VERSUS

Commissioner of Central Excise & Service Tax, Guwahati
Sethi Trust Building, G.S.Road, Bhangagarh, Guwahati-781005

Respondent

APPERANCE :

Shri J.K.Mittal, Advocate for the Appellant
Shri S.S.Chattopadhyay, Authorized Representative for the Respondent

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

FINAL ORDER NO.75162/2024

DATE OF HEARING : 06.02.2024
DATE OF DECISION : 06.02.2024

Per Ashok Jindal :

The appellant is in appeal against the impugned order demanding service tax under the category of Business Auxiliary Service and imposition of penalty under Section 78 of the Finance Act, 1994.

2. The facts of the case are that during the period 01.10.2008 to 30.09.2013, the appellant was engaged for providing the services to their clients, comprising of (a) Transportation, Bundling and Feeding of Bamboo, (b) Unloading of Bamboo from Railway Wagons and shifting from Railway Siding to Bamboo Yard and (c) Coal Ash Transportation, unloading/shifting of SSP/Ind.Salt from Railway Wagons to go-down.

2.1 The Revenue is of the view that the said activity undertaken by the appellant falls under the Business Auxiliary Service, therefore, they are required to pay service tax and the appellant did not pay the service tax. Accordingly, a show-cause notice dated 22.10.2013 was issued to the appellant by invoking extended period of limitation.

2.2 The appellant contested the matter before the adjudicating authority, but the adjudicating authority confirmed the demand of service tax under the category of Business Auxiliary Service under Section 65 (19) and Clause (iv) and Clause (vii) of the Finance Act, 1994.

2.3 Against the said order, the appellant is before us.

3. The ld.Counsel appearing on behalf of the appellant, submits that the similar service was also rendered by their sister unit, namely, M/s Subham Syndicates wherein for the same activity, a show-cause notice was issued to demand the service tax under the category of Cargo Handling Service. The said service was held not be a Cargo Handling Service. Therefore, as the Department was under confusion whether the activity undertaken by the appellant falls under Cargo Handling Service or Business Auxiliary Service. In that circumstances, the extended period limitation is not invokable.

3.1 For the period falling within limitation, it is his submission that on 01.07.2012, there was a change in the Statute and as per the amendment, the services fall under the negative list and are to be taxed, but the demand has been confirmed against the appellant under the category of Business Auxiliary Service. Therefore, the said demand is not sustainable against the appellant as held by this Tribunal in the case of Maharashtra Industrial Development Corporation Vs. Commissioner of Central Excise, Nasik reported in 2014 (36) STR 1291 (Tri-Mumbai). Therefore, the impugned order is to be set aside on this ground only.

3.2 It is further submitted that the no particular Clause of Business Auxiliary Service has been invoked to demand the service tax from the appellant. Therefore, the demand is not sustainable.

3.3 It is further submitted that the activity of the appellant was known to the Department much prior to issuance of show-cause notice and on 20.06.2010, when an enquiry was made for service tax liability under Business Auxiliary Service and no proceedings were initiated thereafter. In that circumstances also, the extended period of limitation is not invokable as the activity was known to the Department much prior to issuance of show-cause notice i.e. 20.06.2010.

3.4 He further submitted that without prejudice, the activity at the most can be said that the transportation of goods does not fall under the Business Auxiliary Service. He, therefore, prayed that the impugned order is to be set aside.

4. On the other hand, the ld.A.R. for the Revenue, supported the impugned order and submitted that merely not mentioning the appellant is liable to pay service tax post on 01.07.2012 at the negative list regime, the said mistake can be rectified as held by the Hon'ble

Apex Court in the case of Collector of Central Excise, Calcutta Vs. Pradyumna Steel Limited reported in 1996 (82) ELT 441 (SC).

5. Heard both the parties and considered the submissions.

6. We find that the facts are not in dispute that for the period 1st October, 2008 to 30th September, 2013, the demand has been raised against the appellant under the category of Business Auxiliary Service by invoking extended period of limitation through show-cause notice dated 22.10.2013. It is also a fact on record that for the similar activity, another show-cause notice was issued to the sister concern of the appellant, namely, M/s Subham Syndicate to demand service tax under the category of Cargo Handling Service, which shows that the respondent was under confusion whether the activity undertaken by the appellant falls under the category of Cargo Handling Service or Business Auxiliary Service. In that circumstances, when the Revenue itself is not definite under which category the activity undertaken falls, the extended period of limitation is not invokable. Moreover, the activity undertaken by the appellant was known to the Department much prior to issuance of show-cause notice i.e. 20.06.2010, when Revenue issued a letter to the appellant, which is as under :

GOVERNMENT OF INDIA
OFFICE OF THE COMMISSIONER
CENTRAL EXCISE AND SERVICE TAX : GUWAHATI
HEADQUARTERS ANTI EVASION UNIT
SETHI TRUST BUILDING, 4TH FLOOR
G.S. ROAD, BHANGAGARH GUWAHATI – 781 005
☎ 0361-2527775, Fax: 0361-2461131

C.No. V (30) 12/HQRS AE/ST/GHY/2005/1235

Date: - 26.07.2010

To
Shree Ganesh Trading Co
K K Colony
Jagiroad

Sir,
Subject: - Service Tax liability

It has been reported by the Survey Unit under the Guwahati Service Tax Division that Shree Ganesh Trading Co K K Colony Jagiroad is providing various services to M/s Hindustan Paper Corporation Limited Nagaon Paper Mill Jagiroad under work contract and these activities have been reported to fall under Business Auxiliary Service. In order to ascertain service tax liability, it is requested to submit following particulars with in seven days receipt of this letter.

1. Is your company registered with Service Tax Department? If yes, copy of complete ST-2 (with the copy of ST-I) may be provided along with details of Centralized Registration taken, if any or multiple localized ST Registrations.
2. Are you paying Service Tax? If yes, quantum of Service Tax paid category-wise & month wise during the last five years i.e. April 2005 to July 2010
3. Copy of last two complete ST-3 returns filed with the department;
4. Copy of bank statement for the last five years.
5. Copies of Annual Reports/Balance Sheets along with Income Tax returns for the last 5 years.
6. Copies of Work Orders of works executed during the last five years.

Yours faithfully,

26.7.10

(J M BORA)
SUPERINTENDENT
HQRS ANTI EVASION
Superintendent
CENTRAL EXCISE
H.Q. ANTI EVASION
GUWAHATI-5

True Copy

For Shree Ganesh Trading Co.

Proprietor

But no proceedings were initiated against the appellant.

7. In that circumstances also, we hold that the extended period of limitation is not invokable.

8. Further, we find that in this case, the demand of service tax has been raised against the appellant under the category of Business Auxiliary Service and no particular clause of Business Auxiliary Service

has been charged against the appellant. Therefore, the show-cause notice is defective.

9. Further, post 01.07.2012, the negative list regime came into force and all the negative regime, the appellant is liable to pay service tax on the activity undertaken by them, but no demand has been made from the appellant under the negative list regime.

10. In that circumstances, the demand against the appellant is not sustainable as held by this Tribunal in the case of Maharashtra Industrial Development Corporation (supra), wherein this Tribunal has observed as under :

> *"**7.4** With regard to the show cause notice in Appeal No. ST/85267/14 we find that the period involved is 1-10-2011 to 30-9-2012. In the said case, the demand is for two periods - one from 1-10-2011 to 30-6-2012 and the second is from 1-7-2012 to 30-9-2012 when the negative list came into effect but the show cause notice has been issued on the basis of definition of Management, Maintenance and Repair service has stood prior to 1-7-2012. Therefore, as post-1-7-2012 the provisions are not existing therefore, the demands for the period post-1-7-2012 are not maintainable."*

11. Therefore, we hold that for the period post 01.07.2012, the demand is not sustainable.

12. The ld.A.R. relied upon the decision of the Hon'ble Apex Court in the case of Pradyumna Steel Limited (supra) to hold that mere mentioning wrongly of law does not vitiate a show-cause notice. We find that the said decision is not applicable to the facts of this case as the said case deals with an application for rectification of mistake for

rectification of its order. Therefore, the case relied on the ld.A.R. for the Revenue is not applicable in the facts and circumstances of the case as in this case no demand has been raised under the negative list regime post 01.07.2012.

13. In view of the above observations, we hold that the demand prior to 01.07.2012 is barred by limitation and post 01.07.2012 is not maintainable as no demand has been made under negative list regime.

14. Therefore, the impugned order is set aside and the appeal is allowed with consequential relief, if any.

(Operative part of the order was pronounced in the open court)

(Ashok Jindal)
Member (Judicial)

(K.Anpazhakan)
Member (Technical)

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