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

REGIONAL BENCH – COURT NO.2

Service Tax Appeal No.75501 of 2015

(Arising out of Order-in-Appeal No.16/DIB/CE(A)/GHY/15 dated 11.2.2015 passed by Commissioner, customs & Central Excise (Appeals), Guwahati.)

M/s. Oil India Ltd.
(P. O. Duliajan, Dist. –Dibrugarh, Assam-786602)

Appellant

VERSUS

Commr. of CGST & Central Excise, Guwahati
(Customs House, Nilamoni Phukan Path, Christian Basti, Guwahati-781005)

Respondent

APPEARANCE :
Mr. Deepak Thackur, Advocate for the Appellant
Mr. P. Das, Authorized Representative for the Respondent

CORAM:
HON'BLE MR. R. MURALIDHAR, MEMBER (JUDICIAL)
HON'BLE MR. RAJEEV TANDON, MEMBER (TECHNICAL)

FINAL ORDER NO.77519/2024

Date of Hearing : 23 October 2024
Date of Decision: 23 October 2024

PER R. MURALIDHAR:

The appellant Oil India Limited is a Government of India Enterprises holding Service Tax registration number AAACO2352CST007. In the course of their business, they were hiring out 72 feet height production Derrick and their equipments on which rental charges were received from the persons who were taking these equipments on hire. The Revenue took the view that for various equipments thus hired out by the appellant, the receiver of such service was paying them the consideration. On the ground that this service will amount to "supply of tangible goods service", a show cause notice was issued for the period July 08 to Mar 2009 by invoking the extended period provisions. The appellant submitted copies of the Agreements entered into with the hirers of the equipment to show that the effective control of the equipments was with the hirers and not with the appellant. Therefore, the appellant argued that the service did not qualify to be charged under service tax in terms of "supply of tangible goods services". They also submitted that in terms of Assam Sales Tax Act, they were discharging the VAT on such hiring out activity, since it was "deemed sale" under the Assam Sales Tax Act. They relied on the Board Circular No. 334/1/2008 TRU dated 29.2.2008 wherein it has been clarified that if the VAT is paid on any transaction, the same should be taken as excluded from the purview of Service Tax. After due process, the adjudicating authority confirmed demand. Being aggrieved, the appellant has filed their appeal before the Commissioner (Appeals) along with their Stay Petition. The Stay Petition was taken up for hearing on 18/11/2014. The Commissioner (Appeals) directed the appellant to pre-deposit Rs. 19,84,415/- along with interest. The appellants filed Miscellaneous/modification application on the ground that the Section 35F provisions have been amended with effect from 06/08/2014 wherein the 7.5% of the litigated amount is required to be pre-deposited for pursuing the appeal. Accordingly, they prayed that the pre-deposit amount may be modified. However, the Adjudicating Authority has not considered their prayer and passed the impugned OIA on the sole ground that pre-deposit condition has not been fulfilled. Being aggrieved, the appellant is before the Tribunal.

2. The Learned Advocate appearing on behalf of the appellant submits that the issue is no more *res-integra* and is squarely covered by the decision of this Bench in their own case. He submits that vide Final Order No. 77166/2024 dated 11/09/2024, this Bench in their own case on account of identical issue for the period July 2008 to March 2009 has held that since VAT has been paid, no Service Tax is required to be paid. He submits that the period involved in the present case is for the period April 2009 to September 2012 on account of the periodical notice issued by the Revenue. Therefore, he prays that the present appeal may be allowed.

3. The Learned AR submits that the Commissioner has not decided the issue on merits but has dismissed the appellant's appeal on the ground of non-fulfillment of pre-deposit condition. Therefore, he submits that the matter may be remanded to the Commissioner (Appeals).

4. In the re-joinder, the Learned Advocate submits that the issue pertains to the year 2009-2012 and adjudication process was taken up on 30/01/2019 i.e. about 10 years back and presently the issue is squarely covered because of the decision of this Bench. Therefore, he submits that in the interest of justice, this Bench may take up the appeal for disposal and pass the final order without remanding the matter to the commissioner (Appeals) so as to avoid further delay in getting the justice.

5. Heard both sides and perused the appeal papers.

6. We find that the Commissioner (Appeals) has taken up the stay proceedings on 18/11/2014 with effect from 06/08/2014. Section 35F was amended to the effect that litigating party would pre-deposit 7.5% of the litigated amount for pursing the appeal before the Commissioner (Appeals). Having taken up Stay Petition on 18/11/2014, the Commissioner (Appeals) was required to go through the relevant provisions applicable at the relevant period. Even after modification request was submitted, the Commissioner (Appeals) was failed to consider the same.

7. Now coming to the present issue, we find that for the period July 2008 to March 2009, this Bench vide Final Order No. 77166/2024 dated 11/09/2024 has held as under:-

> *10. The clarification issued by TRU of the DOR while letter dated 29.2.2008 in respect of supply of tangible goods services at para 4.4 is reproduced below.*
>
> > ***"4.4 SUPPLY OF TANGIBLE GOODS FOR USE:***
> >
> > *4.4.1 Transfer of the night to use any goods is leviable to sales tax/VAT as deemed sale of goods (Article 366(29A)(d) of the Constitution of India).*

> *Transfer of right to use involves transfer of both possession and control of the goods to the user of the goods.*
>
> *4.4.2 Excavators, wheel loaders, dump trucks, crawler carriers, compaction equipment, cranes, etc., offshore construction vessels & barges, geo-technical vessels, tug and barge flotillas, rigs and high value machineries are supplied for use, with no legal right of possession and effective control. Transaction of allowing another person to use the goods, without giving legal right of possession and effective control, not being treated as sale of goods, is treated as service.*
>
> *4.4.3 Proposal is to levy service tax on such services provided in relation to supply of tangible goods, including machinery, equipment and appliances, for use, with no legal right of possession or effective control. Supply of tangible goods for use and leviable to VAT/sales tax as deemed sale of goods, is not covered under the scope of the proposed service. Whether a transaction involves transfer of possession and control is a question of facts and is to be decided based on the terms of the contract and other material facts. This could be ascertainable from the fact whether or not VAT is payable or paid."*

11. From the Offer Letter dated 25-3-2006, issued by Oil India Ltd to Geo Enpro Petroleum Ltd, on going through the terms and conditions it is seen that the effective control for all purposes is given to the client. The appellant is not retaining any rights whatsoever including that of supplying manpower to operate such equipments. Under clause (iv) and (viii) it has been made very clear to the hirer that loss or damage would be to the account of the hirer only. Therefore from this Agreement there is nothing to suggest that the effective control was still remaining with the appellant. On this count itself we hold that the present confirmed demand legally does not sustain.

12. Coming to para 4.4.3 of the Circular No. 334/1/2008 TRU dated 2902.2008, it is clarified that the fact as to whether the transaction will call for Service Tax payment or not can be ascertained from the fact "as to whether or not the VAT is payable or paid". It is noted that the word used therein is whether VAT is payable or paid. This means that even if it is payable but not paid by the appellants still the exemption from Service Tax would apply.

14. Coming to the case law of Gimmco Ltd cited by the appellant, it we observed that the issue therein was identical. The Tribunal has held as under:

"5.2 Revenue"s contention is based on the clauses in the agreement relating to restrictions of use by the lessee, provision of skilled operator by the lessor and maintenance and repairs of the equipment by the lessor. Merely because restrictions are placed on the lessee, it can not be said that there is no right to use by the lessee. Such a view of the revenue does not appear to be tenable when we read carefully the provisions of the agreement. Cl. 13 of the agreement provides for Hirer"s Covenants. As per Cl. 13.1, the hirer will use the equipment only for the purpose it is hired and shall not misuse or abuse the equipment. Similarly in Cl. 13.3, it is provided that the hirer will ensure the safe custody of the equipment by providing necessary security, parking bay, etc., and will be responsible for any loss or damage or destruction. Cl. 13.5 provides that the hirer shall be solely responsible and liable to handle any dispute entered with any third party in relation to the use and operation of the equipment. Further Cl. 14 dealing with title and ownership specifically provides that "equipment is offered by GIMMCO Ltd. only on „rights to use" basis". Cl. 15 relating to damages provides for compensation to be paid by the hirer to the assessee in case of damage to the equipment during the period of use. These responsibilities cast on the hirer clearly show that the right of possession and effective control of the equipment rest withthe hirer; otherwise the hirer cannot be held responsible for misuse/abuse, safe custody/security, liability to settle disputes with third parties in relation to use etc. Further Cl. 4.3 of the agreement provides for charging of VAT at 12.5% on the monthly invoice value which shall be payable by the hirer. These terms and conditions stipulated in the agreement, lead to the conclusion that the transaction envisaged in the agreement is one of "transfer of right to use" which is a deemed sale under Section 2(24) of the Maharashtra Value Added Tax Act, 2002. The Finance Minister"s speech and the budget instructions issued by the C.B.E. & C. also clarify that if VAT is payable on the transaction, then service tax levy is not attracted.

5.3 A similar issue arose for consideration before the Hon"ble High Court of Andhra Pradesh in the G.S. Lamba case cited supra. The petitioners therein entered into a contract with M/s. Grasim, manufacturer of ready mix concrete (RMC) for providing transportation service for shipping RMC by hiring specially designed Transit Mixers. Under the contracts, the transit mixers are never transferred and effective control over running and using of these vehicles, as well as disciplinary control over the drivers, always remained with petitioners. It was petitioner"s responsibility to obtain route permits, to take the risk or loss of transportation, to decide *the shifts for the drivers and vehicles, to maintain and upkeep the vehicles in good condition. The petitioners contention was that the contract was for transport service and not the transfer of the right to use the goods.*

5.4 The Hon‟ble High Court observed that the essential requirement of a transaction for transfer of the right to use goods are :

(1) it is not the transfer of the property in goods, but it is right to use property in goods;

(2) Article 366(29A)(d) read with the latter part of the Clause (29A) which uses the words, "and such transfer, delivery or supply" would show that the tax is not on the delivery of the goods used, but on the transfer of the right to use goods regardless of when or whether the goods are delivered for use subject to the condition that the goods should be in existence for use;

(3) in the transaction for the transfer of the right to use goods, delivery of goods is not condition precedent, but the delivery may be one of the elements of the transaction;

(4) the effective or general control does not mean always physical control and even if the manner, method, modalities and the time of the use of goods is decided by the lessee or the customer, it would be under the effective or general control over the goods;

(5) the approvals, concessions, licences and permits in relation to goods would also be available to user of the goods, even if such licences or permits are in the name of transferor of the goods; and

(6) during the period of contract exclusive right to use goods along with permits, licences, etc., vests with the lessee.

Applying these principles and examining the terms of the contract, the Hon‟ble High Court held that the transaction involved was a transfer of right to use Transit Mixers and not transport service and the petitioners had transferred the „right to use goods‟ to Grasim. If we apply the ratio of the above decision to the facts of the present case, the transaction involved herein is "transfer of right to use which is a deemed sale and not "supply of tangible goods for use" service.

> *6. In view of the foregoing, we are of the considered view that the assessee"s activity of giving various equipments on hire does not fall under the category of "Supply of tangible goods for use", hence the same is not liable to service tax w.e.f. 16-5-2008.".*

8. In the present case, it is not disputed that the present proceedings have been initiated on account of periodical Show Cause Notice issued for the period April 2009 to September 2012. The facts are identical and appellant has provided documentary evidence to the effect that VAT has been paid by them. Therefore, we hold that the impugned order is legally not sustainable. Accordingly, we set aside the same.

9. In view of the fact that issue stands fairly decided by this Bench in the appellant's own case, we have decided the issue by taking up the appeal on merits. The appeal stands allowed with consequential relief, if any, as per law.

(Dictated and pronounced in the open court.)

Sd/-
(R. Muralidhar)
Member (Judicial)

Sd/-
(Rajeev Tandon)
Member (Technical)

Pooja