IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI
COURT No. I

APPEAL No. ST/88593/2014

(Arising out of Order-in-Original No. KLH-EXCUS-000-COM-004-14-15 dated 9.6.2014 passed by Commissioner of Central Excise, Kolhapur)

Krishna Shetkari & Shetmajur Sarva Seva Sangh **Appellant**

Vs.

Commissioner of Central Excise, Kolhapur **Respondent**

Appearance:

Shri Anshul Jain, Advocate, for appellant
Shri M.K. Sarangi, Joint Commissioner (AR), for respondent

CORAM:

Hon'ble Mr. Ramesh Nair, Member (Judicial)
Hon'ble Mr. Raju, Member (Technical)

Date of Hearing: 15.1.2018
Date of Decision: 11.5.2018

ORDER NO. **A/86358/2018**

Per: Ramesh Nair

The brief facts of the case are that the Appellant are engaged in providing manpower supply service. They were issued show cause notice alleging that they have delayed in making service tax payment during the period July 2008 to March 2011 and also did not pay interest on same. That in terms of point of taxation rules they did not issue bills within 14 days of rendering of service or on receipt of advance did not pay service tax. The show cause notice proposed demand of service tax and to appropriate the same against the amount already deposited. It was also proposed to impose penalty u/s 76, 77 and 78 of the Finance Act. The adjudicating authority under the impugned order confirmed the demand alongwith interest and ordered that the amount deposited by the Appellant be appropriated against the same. He also ordered for imposition of penalty of Rs. 10,000/- u/s 77 (2) and of penalty equivalent to demand amount under section 78. Hence the present appeal by the Appellant.

2. We have heard the ld. Counsel Shri Anshul Jain appearing for the Appellant who submitted that the services offered by them were in respect of cutting/ harvesting of the crop of sugar cane and transporting of the same to the Sugar factory by Bullock Cart or truck and the service does not fall under the category of Manpower supply service. That the impugned order has been passed ex-parte and therefore bad in law. That earlier the Tribunal in their own case has held that the services rendered by them does not fall under the category of 'Manpower Supply Service" and hence not sustainable. He accordingly submits that the demand is not sustainable.

3. Shri M.K. Sarangi, ld. JC, AR appearing for the revenue who supported the impugned order.

4. We find that the show cause notice was issued to the Appellant on the ground that they have not made timely payment of service tax in terms of Point of taxation rules; that they did not raise bills on completion of services and did not pay tax on advances received. We however find that the impugned order was passed ex-parte. The Appellant has pleaded that their activity does not fall under the category of "Manpower Supply Service' and hence not taxable. They have relied upon Tribunal's judgment in their own case as reported in 2014 (34) STR 410 wherein the demands were set aside. The Tribunal's findings are as under :

> ***5.*** *We have carefully considered the submissions made by both the sides.*
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> ***5.1*** *As per Section 65(68) of Finance Act, 1994 "manpower recruitment or supply agency means any person engaged in providing any service, directly or indirectly, in any manner for recruitment or supply of manpower, temporarily or otherwise to any other person" and the taxable service is defined under Section 65(105)(k) as "service rendered to any person by a manpower recruitment or supply agency in relation to the recruitment or supply of manpower, temporarily or otherwise, in any manner". The appellants are not manpower recruitment agencies as they do not recruit any persons; they also do not supply manpower to the sugar factory. What they have undertaken is harvesting of sugarcane and transportation of the same to the sugar factory. To undertake that work, they have entered into an agreement with the contractors who have provided the manpower for harvesting of the sugarcane and*

transportation of the same. In any service activity, manpower is required. That does not make the service as supply of manpower. Otherwise, all services would have to be classified as "manpower supply service". Further in the instant case, the consideration is paid not on the supply of manpower but on the sugarcane supplied on tonnage basis. If an efficient contractor engages less manpower, he will make more profits while an inefficient contractor engaging more manpower would make less profits. In other words, since the consideration is received on the quantity of sugarcane delivered, the essential nature of service is the harvesting and supply of sugarcane. How the service is rendered is not relevant for classification of the service. From the statutory definitions given above and the contracts entered into by the appellants, it is clear that there is no element of manpower supply or recruitment by the appellants to the sugar factory and therefore, the services rendered by the appellants cannot be classified under manpower recruitment or supply agency services, by any stretch of imagination. Therefore, the impugned demands by classifying the activity under manpower supply service have to be set aside.

5.2 *It is further seen that the activity undertaken by the appellant merits classification under BAS which is defined under Section 65(19) as follows :-*

"business auxiliary service" means any service in relation to, -

(i) promotion or marketing or sale of goods produced or provided by or belonging to the client; or

(ii) promotion or marketing of service provided by the client; or

(iii) any customer care service provided on behalf of the client; or

(iv) procurement of goods or services, which are inputs for the client; or

(v) production or processing of goods for, or on behalf of, the client;

(vi) provision of service on behalf of the client; or

(vii) a service incidental or auxiliary to any activity specified in sub-clauses (i) to (vi), such as billing, issue or collection or recovery of cheques, payments, maintenance of accounts and remittance, inventory management, evaluation or development of prospective customer or vendor, public relation services, management or supervision.

Sub-clause (iv) deals with procurement of goods or services, which are inputs for the client. Sugarcane is an input for the client, the sugar factory and the sugarcane are goods. Though the appellants do not procure these goods, they are rendering a service incidental or ancillary to such procurement and therefore, the activity undertaken by the appellants in harvesting and transporting the goods comes under sub-clause (vii) of Section 65(19). Since the impugned demands have been raised under the category of manpower supply or recruitment agency services, such demands cannot be sustained at all.

6. *In view of the above and also in view of the decisions of this Tribunal in the case of Amrit Sanjivni Sugarcane Transport Co. Pvt. Ltd. and Samarth Sevabhavi Trust (cited supra), we hold that the impugned demands are not sustainable in law. Accordingly we set aside the demands and allow these appeals. Since the appeals are allowed on merits, we are not going into the other issues raised by the appellants. We are informed that in some cases, the appellants have made payments. If the appellants have made any payments towards these demands, refund of the same shall be considered by the department in accordance with the law.*

5. The Ld. AR has submitted that the revenue's appeal before the aforesaid Tribunal order is pending before the Hon'ble High Court. We find that the revenue's appeal has only been admitted and there are no further order. In such case we deem it appropriate to remand the case back to the adjudicating authority to consider the facts of the case afresh and pass orders in the light of Tribunal's earlier above order. The impugned order is thus set aside and the appeal is allowed by way of remand.

(Pronounced in court on 11.5.2018)

(Raju)
Member (Technical)

(Ramesh Nair)
Member (Judicial)

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