CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI

REGIONAL BENCH

Service Tax Miscellaneous Application No. 86613 of 2019

in

Service Tax Appeal No. 85454 of 2015

(Arising out of Order-in-Appeal No. NGP/EXCUS/000/APP/177/14-15 dated 14.11.2014 passed by the Commissioner (Appeal) Customs, Central Excise & Service Tax, Nagpur)

M/s Akash Machineries **Appellant**
EL-32, MIDC Area
Hingna Road, Nagpur 440016

Versus

Commissioner Central Excise Nagpur-I **Respondent**
P.O. Box 81, Telangkhedi Road,
Civil Lines, Nagpur 440 001.

Appearance:

Shri Aparajit Ninawae, Advocate for the Appellant

Shri Onil Shivadikar, Authorized Representative for the Respondent

CORAM:

HON'BLE SHRI SANJIV SRIVASTAVA, MEMBER (TECHNICAL)
HON'BLE SHRI AJAY SHARMA MEMBER (JUDICIAL)

FINAL ORDER NO. A/85710/2020

Date of Hearing: 29.01.2020

Date of Decision: 29.01.2020

Per: Sanjiv Srivastava

This appeal is directed against Order in Appeal No NGP/ EXCUS/000/APP/177/14-15 dated 14.11.2014 of the Commissioner (Appeal) Customs, Central Excise & Service Tax, Nagpur. The impugned order has been by passed by the Commissioner (Appeals) in remand proceedings, in matter remanded back by the Tribunal vide its Final Order

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No A/227/14/CSTB/C-1 dated 03.03.2014. By the impugned order Commissioner (Appeal) has held as follow:

"The Order in Original No 43/VW/JC/ST/2012 dtd 24.12.2012 passed by Joint Commissioner Customs and Central Excise Hqrs Nagpur is upheld and the appeal filed by the appellants is dismissed"

1.2 Joint Commissioner has by his order dated 24.12.2012 held as follows:

"i. I hereby confirm the demand of Service Tax (including Education cess and Higher education cess) of Rs 15,40,818 (Rupees Fifteen Lakhs Forty Thousand Eight Hundred and Eighteen only) under proviso to Section 73(1) of the Finance Act, 1994, and order for its recovery.

ii. I hereby impose a penalty on the Noticee of Rs 200/- per day during which such failure continues OR at the rate of two percent of such tax per month, whichever is higher. This penalty is applicable in respect of non payment of service tax paid under the category of "Infrastructure Support Service" under Business Support Services for the period upto 10/05/2008 starting from the first day of due date till the date of actual payment of outstanding amount of service tax under Section 76 of the Finance Act, 1994 read with Rule 6 of the Service Tax Rules, 1994, as the Noticee failed to pay Service Tax in accordance with the provisions of Section 68 of the Finance Act, 1994. Provided that the total amount of the payable under this section shall not exceed the Service Tax payable.

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iii. I hereby order to recover an interest under Section 75 of the Finance Act, 1994 at appropriate rate on the aforesaid amount of service tax recoverable from the Noticee."

iv. I impose a penalty of Rs 5000/- (Rupees Five Thousand only), on the noticee, under Section 77 of the Finance Act, 1994 for the contravening the provisions of Finance Act. 1994/ Service Tax Rules, 1994.

v. Late fee of Rs 200 Per Return is imposed on the Noticee, under Rule 7(c) of the Service Tax Rules for delay in filing ST-3 Return.

iv. I impose a penalty of Rs 15,40,818 (Rupees Fifteen Lakhs Forty Thousand Eight Hundred and Eighteen only), on the noticee, under Section 78 of the Finance Act, 1994 for suppressing the value of taxable services with malafide and pre-meditate intent to evade payment of service tax which has resulted into short payment of Service Tax. However, the Noticee is given an option to pay only 25% of this penalty amount subject to the condition that the entire amount of Service Tax along with interest and 25% penalty under Section 78 are paid within 30 days of communication of this order .

2.1 Appellant is a proprietorship concern registered with the department as provider of the services under the category of "Business Support Services".

2.2 During the course of audit of the records, it was noticed that they have entered into agreement for renting

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of premises and machineries with M/s Agro Fab Machineries India (P) Ltd (M/s Agro Fab). On further scrutiny of records of M/s Agro Fab, it was noticed that apart from rent they were paying charges towards water and electricity, job charges, salary and wages to the employees, insurance and auditing charges on behalf of appellant. Thus Appellant have provided all the infrastructure support facilities along with manpower to appellants against an agreed consideration. Thus revenue entertained the view that the services provided by the Appellant were *"infrastructure support services",* classifiable under the taxable category "Business Support Services" defined by Section 65 (104c) of the Finance Act, 1994.

2.3 Investigations were undertaken and statement of Shri Suresh Jaiswal recorded, wherein he stated that they were under the genuine belief that the services of renting the premises were not covered under the scheme of Service Tax, so he has not obtained registration and paid any Service Tax in respect of these services. On completion of investigation a Show Cause Notice dated 27.06.2011 was issued asking them to show cause why Service Tax amounting to Rs 15,40,818/- short paid by them should not be recovered from them by invoking proviso to Section 73(1) of the Finance Act, 1994 along with the interest under Section 75. Penalties under Section 76, 77 & 78 of the Finance Act, 1994 was also proposed.

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2.4 After considering the submissions made Joint Commissioner, has vide his order in original referred in para 1.2, supra adjudicated the show cause notice. Aggrieved by the order of Joint Commissioner, Appellants preferred an appeal before the Commissioner (Appeal). The appeal was dismissed by the Commissioner (Appeal) and Appellants preferred the appeal before CESTAT.

2.5 CESTAT has vide its Final Order No A/227/14/CSTB/C-1 dated 03.03.2014, remanded the matter back to Commissioner (Appeal) because as per CESTAT, the order in appeal was passed in gross violation of principles of natural justice.

2.6 After hearing the party, in remand proceedings, Commissioner (Appeal) has vide the impugned order adjudicated the matter again dismissing the appeal of the Appellant. Hence this appeal before us.

3.1 We have heard Shri Aparajit Ninawe, Advocate for the Appellant and Shri Onil Shivadikar, Assistant Commissioner, Authorized Representative for the Respondent.

4.1 We have considered the impugned order along with the submissions made in appeal and during the course of arguments in appeal.

4.2 The order in appeal is a classic case wherein Commissioner (Appeal) has rejected the submissions made by the Appellants before him saying that the appellants have

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not made the submissions which he expected them to make. Relevant paragraphs from the order are reproduced below:

10.4 The appellant has time and again repeated that the nature of services being rendered by him are of renting and has cited various case laws which support his version and interpretation of the entire case. But the appellant is only placing a distorted and twisted version of the entire story on record and is not coming up with the actual facts of the case. He ought to have put forth on record the copies of contract and the terms and conditions of contract entered into by him with M/s Agro Fab from which the exact and accurate details and the facts of case will emerge. But he has simply avoided doing this and repeatedly drumming his version of the story which he has not corroborated by placing any evidences on record which would have appropriately been the copy of the contract/ agreement with the relevant terms and conditions.

10.5 On the other hand, the facts which are obvious in the case is that the appellant, even after renting the premises and plant to (and) machineries to M/s Agro Fab is still continuing to work in the factory and running the factory. There are various questions to be answered. What is the appellant doing in the factory after renting it out? On what terms and conditions is he allowed to continue operating from the factory, when the entire factory now belongs to M/s Agro Fab? Why is M/s Agro Fab incurring various expenditures in the factory and why are they being debited to the appellant account? Why is the Appellant receiving the

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job charges from M/s Agro Fab and also selling goods to him and receiving the sale value for the same? There are many grey areas in the contentions put by the appellant. And unless and until appellant gives a clear picture of the commercial arrangement between him and M/s Agro Fab, I find no reason why I should be accepting the contentions of the appellant that he is only doing the activity of "Renting".

10.6 On the other hand, Revenue has made a more clear cut case. Revenue has alleged that the nature of contract entered into by the Appellant with M/s Agro Fab is composite in nature and they are rendering infrastructural support which includes renting, and also broadly stated includes managing the business on behalf of M/s Agro Fab, which cannot be done without rendering infrastructural support. And such services are rightly covered under "Business Support Services" as alleged by the revenue. As both the Appellant and M/s Agro Fab are related and family members, they may have their internal financial arrangements. But this has nothing to do with the nature of services rendered by the appellant to M/s Agro Fab which is to be independently decided. Further the appellants contention regarding deductions to be allowed from gross value can only be accepted when there is clarity and acceptance on the part of appellant regarding classification of service and he comes up with the entire facts of the case correctly. Only then can it be decided whether any deductions from the gross value can be allowed or not and which of such heads are to be allowed as deductions.

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10.7 As the revenues case is more clear cut and precise and the appellant has not come up with any plausible and justifiable grounds and evidences to prove revenue's case otherwise, I find no reason to interfere with the impugned order passed by the lower authority and hence I conclude that as the appellant is rendering complete infrastructure support, management services, services of processing the raw material, selling and marketing services, along with renting of premises and plant and machinery, the service rendered by him are correctly classifiable under Business Support Services and all the considerations received by the appellant on account of renting, electricity, wages, salaries, auditing, water charges, job charges, processing and sale of goods etc pertain to single composite service rendered by the appellant and thus are includible in the gross value. If there is any loan repayment by M/s Agro Fab to the Appellants, the amount of such loan repayment during the said period along with the supporting documents has not been brought before me by the appellant and hence I am unable to allow any deductions on this account.

10.8 All the cases quoted and relied upon by the Appellant are not relevant to the circumstances under which the appellant is working. The appellant cannot simply pick up one thread of the story and cite cases which are similar to it. He has to come with the entire facts of the case." 4.3 We find that issue in respect of the renting of factory premises etc., has been subject matter of the decision of tribunal in following cases:

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- Narsinha SSK [2015 (38) S.T.R. 165 (Tri.-Mumbai)]
- Air Liquide North India [2012 (27) STR 296 (T-Del)]
- Fine Switchgears [2012 (25) STR 443 (T-Del)]

Commissioner (Appeal) has found that these decisions are not applicable in case of the Appellant without assigning any plausible reason.

4.4 The definitions of the Business Support Services as per Finance Act, 1994 is as follows:

"Support Services of Business or Commerce" means services provided in relation to business or commerce and includes evaluation of prospective customers, telemarketing, processing of purchase orders and fulfilment services, information and tracking of delivery schedules, managing distribution and logistics, customer relationship management services, accounting and processing of transactions, operational assistance for marketing, formulation of customer service and pricing policies, infrastructural support services and other transaction processing.

Explanation -For the purposes of this clause, the expression "infrastructural support services" includes providing office along with office utilities, lounge, reception with competent personnel to handle messages, secretarial services, internet and telecom facilities, pantry and security;

(Section 65(104c) of the Finance Act, 1994)

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"Taxable Service" means any service provided or to be provided to any person, by any other person, in relation to support services of business or commerce, in any manner;

(Section 65 (105) (zzzq) of the Finance Act, 1994)

The Board Circular dated 28.02.2006 explained the scope of the above said tax entry. It is clarified as under:-

"Business entities outsource a number of services for use in business or commerce. These services include transaction processing routine administration processing, routine administration or accountancy, customer relationship management and tele-marketing. There are also business entities which provide infrastructural support such as providing instant offices along with secretarial assistance known as 'Business Centre Services'. It is proposed to tax all such outsourced services."

4.4 The above definitions and clarification clearly show that for the service to be classified under this category, the service provided by one person should be in the nature of supporting the business of another. The job work done on principal to principal to basis or the value of goods sold cannot be part of Business support services as these are in no way supporting the business undertaken by the other person. If the conclusion as arrived by the Commissioner (Appeal) were to be accepted then it would imply that the manufacturer by selling the goods manufactured by him to the independent trader will not be a case of sale of goods but a case of "Business Support Services". Hence we are not

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in position to agree to the logic of the Commissioner (Appeal) in not allowing the deductions claimed by the Appellant towards, Sale of Good, Job Charges, Loan repayment, Excise Duty and Education Cess paid As per the explanation appended to Notification No 6/2005-ST dated 01.03.2005 as amended by Notification No 8/2008-ST dated 01.03.2008, *"aggregate value not exceeding* ****ten lakh rupees*** *means the sum total of first consecutive payments received during a financial year towards the gross amount, as prescribed under section 67 of the said Finance Act, charged by the service provider towards taxable services till the aggregate amount of such payments is equal to ten lakh rupees but does not include payments received towards such gross amount which are exempt from whole of service tax leviable thereon under section 66 of the said Finance Act under any other notification."*

4.5 We find that appellant had made specific claim before the adjudicating authority and the Commissioner (Appeal) giving the break up of amounts received by them during the period of demand as indicated in table below: (Refer para 11 of the Order in Original of the Joint Commissioner)

Breakup of Amounts Received			**Amount in Rs**		
Financial Year	**2006-07**	**2007-08**	**2008-09**	**2009-10**	**2010-11**
Total Received	2623996	2461804	2060795	2220000	4190000
Rent	914760	1004040	779490	900000	900000
Loan Repayment	0	300000	0	790000	3290000
Job Work Charges	391650	787390	538656	530000	0

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Sale of Goods	1317586	370374	0	0	0
Excise Duty	0	0	721018	0	0
Education Cess	0	0	21631	0	0

On the basis of above they had claimed the benefit of small scale exemption and had themselves determined the value of taxable service and the tax payable for each year as indicated below: (Refer para 12.1 of the Order in Original of the Joint Commissioner)

Financial Year	Taxable Value	Tax Payable
2006-07	914760	111966
2007-08	1004040	124099
2008-09	721018	89117
2009-10	0	0
2010-11	0	0
Total Tax		325182

4.6 Thus after allowing the deduction as claimed by the Appellants towards Loan Repayment received, Sale of Goods, Job Charges received, excise duty and education cess the aggregate value of taxable services provided should be taken for computing the taxable value in the respective years and service tax liabilities determined accordingly after allowing the benefit of Small Scale Exemption under notification No 6/2005-ST dated 01.03.2005 as amended from time to time, subject to appellant fulfilling conditions as prescribed.

4.7 We do not find much force in the submissions made by the appellants on the issue of limitation because the facts

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which led to short payment of Service Tax were only in the knowledge of appellant and they had failed to determine and pay the Service Tax due from them.

5.1 In view of discussions as above we allow the appeal filed by the appellants to the extent of allowing

- the deduction claimed by the appellant on account of loan repayment, sale value of goods, job charges, excise duty and education cess, for determining the aggregate value of taxable service during each year for which the demand has been made; and
- benefit of exemption under notification No 6/2005-ST as amended from time to time will be available subject to fulfilment of other conditions as prescribed.

5.2 Thus the appeal is partly allowed, the impugned order is set aside and the matter remanded back for recomputation of service tax payable in above terms.

5.3 Miscellaneous application is disposed off.

(Order pronounced in open court)

Sanjiv Srivastava
Member (Technical)

Ajay Sharma
Member (Judicial)

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