CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

SERVICE TAX APPEAL NO: 86164 OF 2015

[Arising out of Order-in-Original No: KLH-EXCUS-000-COMMISSIONER - 011-14-15 dated passed by the Commissioner of Central Excise & Service Tax, Kolhapur.]

SM Fettling
A/p Vialivade, Tal: Karveer, Kolhapur – 416005 … ***Appellant***

versus

Commissioner of Central Excise & Service Tax
Vasant Plaza, Commerical Complex, 4th Floor,
1079/2 KH Rajaram Road, Bagal Chowk,
Kolhapur - 416001 ***…Respondent***

APPEARANCE:

Shri VB Gaikwad, Advocate for the appellant

Shri Dilip Shinde, Assistant Commissioner (AR) for the respondent

CORAM:

HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)
HON'BLE MR AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER NO: A / 86732 /2021

DATE OF HEARING:	14/07/2021
DATE OF DECISION:	07/09/2021

PER: C J MATHEW

This appeal of M/s SM Fettling assails levy of ₹61,61,870/-, demanded under section 73 of Finance Act, 1994 as liability for the period from April 2008 to March 2013 for providing of 'manpower recruitment or supply agency service', along with applicable interest under section 75 of Finance Act, 1994, and imposition of like amount as penalty under section 78 of Finance Act, 1994. The appellant is engaged in finishing of 'castings' manufactured by M/s Ghatge Patil Industries Ltd against work orders issued by the latter.

2. Learned Counsel, narrating the background of the demand, informs that appellant installed machinery for 'shot blasting' at the premises of the principal manufacturer and that three combinations of operations had been undertaken by them – by working these machines deploying labour on their rolls, by their employees working on machines installed by the principal manufacturer and by undertaking operations on premises for which they were charged by the principal manufacturer. It was also informed that they had initially taken registration as provider of 'business auxiliary service' which, however, was surrendered upon coverage by the exclusion in notification no. 8/2005-ST dated 1st March 2005.

3. It is contended by Learned Counsel that the remuneration offered in work-orders were on 'piece rate' which, in accordance with several decisions of the Tribunal, precluded coverage under the 'taxable service' sought to be fastened on them. Reliance was placed on the decision of the Tribunal in *Tiwari Services v. Commissioner of*

Central Excise, Aurangabad [2020 (37) GSTL 57 (Tri.-Mumbai)] which held that

> *'6. We find that M/s. Dhoot Compack Ltd. has entered into agreement with the appellant for manufacture of fabrics on job work basis. The appellant was paid for carrying out such activities on per meter basis. The workmen deployed by the appellant for carrying out such activities were under the supervision and control of the appellant. The ultimate manufacturer, who entrusted the job to the appellant was no way concerned with the workmen deployed by the appellant. It is also noticed that over and above paying the amount for manufacturing activities undertaken by the appellant on job work basis, the said service receiver had not paid any specific price to the workmen deployed by the appellant. Thus, under such circumstances, it cannot be said that the appellant had provided the Manpower Recruitment and Supply Agency Service. Hence, we are of the considered view that the adjudged demands confirmed on the appellant cannot be sustained.'*

and in *Aditya Enterprises v. Commissioner of Customs & Central Excise, Meerut – II [2020 (35) GSTL 406 (Tri.-Del.)]* which held that

> *'7. From the perusal of the copy of the agreement and copy of the bills on record, I find that the appellant has entered into an agreement for execution of various works for the principal - CPP. The payment for such work is based on the volume of the work executed and not according to the number of workmen deployed by the appellant.*
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> *8. We further find that such facts have been recorded in the impugned order-in-original wherein the Ld. Commissioner*

> *has taken notice of the agreement and the rates for various works e.g. lifting of wood from yard and supply to R.G.P. Chipper, is at the rate of Rs. 20/- per M.T. Similarly, for other work also like debarking of stacks of green wood, splitting of pulp wood, stacking of UPFC logs of all sizes and stacking of bamboo of all sizes, etc., have been provided P.M.T. basis. These facts are also confirmed from the bills raised by the appellant for the relevant period, which are on the basis of quantum of work executed and not based on the number of workmen deployed or allegedly supplied. The Adjudicating Authority has misconstrued the contract between the parties and has heavily relied on the payment of ESI and PF by the principal - CPP, in respect of workmen deployed by the appellant. Under the relevant Labour Laws being the Employees Provident Fund Act, 1952 read with the Scheme and the Employees State Insurance Act, 1948, the liability for workers employed in a factory towards payment of P.F. and ESI contribution is on the principal employer ultimately. The principal employer is the owner or occupier of the factory. Thus the principal - CPP has discharged their obligation under the provisions of ESI Act and EPF Act. The same does not lead to the inevitable conclusion that the appellant has supplied labourers but has entered into colourable contracts to avoid the liability of service tax. Accordingly, we hold that show cause notice is not maintainable as the same is based on the presumption, having no sanctity of law.'*

before concluding that

> *'9. Further, no liability can be fastened on an assessee for the same work, done in the past only for the reason that in the present or future point of time, the assessee under compulsion by the principal, started paying service tax. Under the facts and circumstances, we find that there is no case of any*

> *contumacious conduct, suppression or falsification of records on the part of the appellant. Further, whatever service tax the appellant would have paid was available to the principal - CPP as the Cenvat credit, as they have discharged central excise liability for their manufactured goods - paper/paper pulp. Thus, we hold that extended period is not invocable.'*

in the context of the submission that mere discharge of tax liability under 'reverse charge mechanism', stipulated for 'manpower recruitment and supply agency service' for the period after 1st July 2012, would not serve to advance the case of the service tax authorities. It is also submitted that the adjudicating authority had erred in proceeding on the assumption that all the 'work orders' furnished by the appellant, and available on record, had contracted for compensation on the basis of 'man-day' computation. Likewise, it was also pointed out that invoking of the provisions of Contract Labour (Regulation and Abolition) Act, 1970 was inappropriate considering that the statutory imposition, under section 65(105) of Finance Act, 1994, and judicial precedent, interpreting the scope of taxability, sufficed for a legally correct decision. It was further contended that though the demand for the period after 2013 had been dropped by the competent authorities, no appeal had been preferred by Revenue.

4. Learned Authorised Representative submits that the compensation in the 'work-orders', being the subject of an agreement

between the provider and recipient with appropriately convenient couching of the terms and conditions therein, offered no guarantee that there was no intent to obfuscate the reality that ‘manpower supply’ – the taxable service – had been provided. He places reliance on the findings of the adjudicating authority that the registration under Contract Labour (Regulation and Abolition) Act, 1970, acknowledged by the appellant, sufficed to establish that they are in the business of supplying manpower to the principal manufacturer. It was further contended that several of the work-orders are not based on ‘piece-rate’ as claimed by the appellant. It is also a submission that, notwithstanding the terms of the ‘work orders’, performance contracted by mutual agreement was comprehended by the recipient as ‘supply of manpower service’, as evidenced by discharge of tax liability on a service which, while continuing after 1st July 2013, was, as one of the exceptions to the negative list regime, enumerated specifically to bifurcate obligation of tax payment. As far as the acceptance of the orders dropping the proceedings on demand for period after 2013, he submits that, in the absence of relevant information, the possibility of the National Litigation Policy barring further appeals precludes acceptance of the submission that the principle enshrined in those orders was not disputed by Revenue.

5. The arguments on both sides have covered a wide range, but, in our opinion, we are not required to delve into all of them. Two aspects

are starkly prominent insofar as the present dispute is concerned: the recipient of the service had been discharging a portion of the tax liability that devolved on them in accordance with the specific prescription for ‘manpower recruitment or supply agency service’ after 1st July 2012 and it has been held by the Tribunal in several decisions, among which are those cited by Learned Counsel, that coverage under ‘manpower recruitment or supply agency service’ for tax may be determined by the manner in which consideration is packaged.

6. The Contract Labour (Regulation and Abolition) Act, 1970, intended for the specific purpose of ensuring proper working conditions of those not in regular employment, does not, in the light of the specific definitions in Finance Act, 1994, provide adequate support to fasten tax liability. That is not relevant to the dispute and may be ignored.

7. It is seen from the findings of the adjudicating authority that the claim of the appellant of having engaged in contract on ‘piece rate basis’, though undeniable in some of the ‘work orders’, has been disregarded in the impugned order. Having identified some of the ‘work orders’ to contain compensation on ‘man day’ basis, it was incumbent upon the adjudicating authority, in the light of such finding, to segregate those to which, in accordance with the precedent

arising from decisions of the Tribunal, coverage under that taxable service would not extend. This, the adjudicating authority has failed to do. The tax liability of the appellant for the period after 1st July 2012 also needs ascertainment by segregation of the work-orders on which tax liability may arise and re-examining those in the light of statutory provision and judicial precedent.

8. To enable this, we set aside the impugned order and remand the dispute back to the original authority for a fresh decision, including that on the scope for invoking the extended period, after evaluating the contentions raised by the appellant.

(Order pronounced in the open court on 07/09/2021)

(Ajay Sharma)
Member (Judicial)

(C J Mathew)
Member (Technical)

**/as*