

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

WEST ZONAL BENCH

Service Tax Appeal No. 87589 of 2016

(Arising out of Order-in-Appeal No. NGP/EXCUS/000/APPL/205-
206/16-17 dated 31.08.2016 passed by the Commissioner (Appeals),
Central Excise & Customs, Nagpur)

M/s. Dinshaw Diary Foods Ltd.
Plot no. K-41 & K-42,
Five Star Indl. Area, MIDC
Butibori, Nagpur

.....Appellant

Vs.

Commissioner of CGST, Nagpur
PO Box No.81, Civil Lines,
Telangkhadi Road, Nagpur

.....Respondent

With

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APPEARANCE:

Shri Durgesh Nadkarni, Advocate for the appellant
Shri Prabhakar Sharma, Superintendent (AR) for the respondent

CORAM: Hon'ble Mr C J Mathew, Member (Technical)
Hon'ble Mr Ajay Sharma, Member (Judicial)

FINAL ORDER No: A/85185-85186/2023

DATE OF HEARING : 03-02-2023

DATE OF DECISION : 03-02-2023

PER: C J MATHEW

These two appeals of M/s Dinshaw Diary Foods Ltd, preferred against recovery of ₹9,76,720/-, for January 2005 to November 2008, and of ₹3,68,103/-, for December 2008 to June 2009, respectively under section 73 of Finance Act, 1994, along with appropriate interest thereon under section 75 of Finance Act, 1994, besides imposing penalties under section 76, 77 and 78 of Finance Act, 1994, in ¹order of Commissioner of Central Excise & Customs (Appeals), Nagpur, are disposed off by a common order.

2. The issue in appeal is the taxability of the charges incurred for hiring of refrigerated vehicles, deployed for distribution of 'ice cream' at different places across the country, on 'reverse charge' under section 65(105)(zzp) of Finance Act, 1994. The lower authorities have held that liability devolved on the appellant, as recipient of 'goods transport agency' service, defined in section 65(50a) of Finance Act, 1994, for discharge of tax.

¹ [order-in-appeal no. NGP/EXCUS/000/APPL/205-206/16-17 dated 31st August 2016]

3. Learned Counsel for the appellant submits that the vehicles had been procured, and paid for, on kilometre basis and as neither destination nor quantity carried were of any relevance, the contractual engagement could not substitute for 'consignment note' on which alone taxability may arise. He further submitted that the dispute for the period from 1st July 2009 to 30th June 2012, had been disposed off by the Tribunal, in *Dinshaw Dairy Foods Ltd vs. Commissioner of Central Excise, Nagpur [2018 (13) GSTL 170 (Tri-Mumbai)]*, holding that

'5. We find that the Appellant has hired the vehicles on the kilometres basis and monthly bills are raised on the basis of Kilometres travelled by the Vans. In such case when the vehicles are hired on monthly basis and the charges are not based upon destination but on kms basis, it cannot be said that the services involved are of Goods Transport Agency. Therefore in such case no consignment note is issued as the vehicles run on the direction of Appellant. The charges are fixed not on the basis of destination or quantity of goods or any other basis but solely on kms the vehicles have run in a month. Obviously no consignment note is issued as the services is not of consignment to be taken to any particular destination and therefore the services would not fall under the category of Goods Transport Agency. We agree to the submission made by the Learned Counsel that the issue is now squarely covered by the judgment of the Tribunal in the case of South Eastern Coalfields Ltd. v. CCE, Raipur - 2017 (47) S.T.R. 93 (Tri. - Del.). We respectfully reproduce the relevant paragraphs :

5. We have heard both sides and examined the appeal records. As noted earlier, the Tribunal vide Final Order dated 13-8-2014 held that issuance of a consignment note is non-derogable ingredient to fulfil the definition of Goods Transport Agency. The matter has again come up

for passing a detailed order as directed by the Hon'ble Chhattisgarh High Court.

6. *The admitted facts are that the appellants engaged various transporters/contractors for moving coal from pithead to railway sidings. These contractors do not issue 'consignment note' to the appellant. The appellant had issued, slips with a view to keep the track of the goods for onwards transportation. We have perused one such slip which is issued at the loading point. The serial numbered form contained certain details like weight, date, etc. The admitted fact is that the consignor and consignee are one and the same and transporter of goods is not issuing any consignment note. In such a situation, the original authority quoting "letter and spirit of the statute" observed that by not issuing consignment note the transporter had violated the provision of Rule 4B of the Service Tax Rules, 1994. We find that the reasoning followed by Id. Commissioner is devoid of merits. It is relevant to examine the concerned legal provisions :*

Section 65(105)(zzp) of the Act defines the taxable service as under :

(zzp) to any person, by a goods transport agency, in relation to transport of goods by road in a goods carriage;

Section 65(50b) of the Act defines 'goods transport agency' as under :

(50b) "goods transport agency" means any person who provides service in relation to transport of goods by road and issues consignment note, by whatever name called;

It is clear that to be called "goods transport agency" a person should fulfill two conditions, namely, he should provide service in relation to transport of goods by road and issue consignment note, by whatever name called. In the present case, admittedly, no consignment note was issued by the goods transporter. The original authority held that the slip/challans issued for monitoring purposes by the appellant (receiver of service) will satisfy such conditions and tax liability can be upheld. We are unable to understand or appreciate such reasoning. The original authority is creating an amalgamation of service provider and recipient to fit in the definition of Goods Transport Agency. In other words, the transport of coal is done by

the transport contractor which satisfied the first condition but no consignment note being issued. The slip issued by the appellant as recipient of service is taken with such activity of transport to bring in tax liability. We find that such attempt is beyond the scope of law and without merit.

7. The matter has come up for decisions on earlier occasions by the Tribunal in Nandganj Sihori Sugar Co. Ltd. and Others v. C.C.E, Lucknow - 2014 (34) S.T.R. 850 (Tri.-Del.), it was held that the Goods Transport Agency in terms of its definition under Section 65(50b) provides services in relation to transportation of goods and issues consignment note which should have particulars as prescribed in Explanation to Rule 4B.

8. In cases where admittedly no consignment notes have been issued, the said transporter cannot be called Goods Transport Agency. In Birla Ready-mix - 2013 (30) S.T.R. 99 (Tri.-Del.), it was held that the provisions of the Act has to prevail and the definition at Section 65(50b) has to be understood independent of Rule 4B of the Service Tax Rules, 1994 to decide whether the person concerned is a goods transport agency.

9. In Northern Coalfields Limited v. C.C.E., Bhopal vide Final Order No. 53313/2015, dated 29-10-2015, an identical situation was examined by the Tribunal. There also, the payment slips were generated by the service recipient containing relevant particulars like truck number, weight, etc., for monitoring and paying contractors for their service. No consignment notes were issued by the transporter. The Tribunal held that as no consignment note as generally understood or delineated in Rule 4B was issued by the transporter to the appellant in the transaction the tax liability under GTA does not arise.

10. Ld. Counsel for the appellant also contested the demand on the question of time-bar. He submitted that the Board issued a draft Circular on 9-10-2006 regarding service tax liability on various activities in open cast mines. One issue in draft circular in transportation of coal from pithead to railway sides and its tax liability under GTA. The Board opined that such movement of goods within the premises of mines may not be covered under taxable service as there is no consignment note for such

transportation. However, later when Final Circular was issued on 12-11-2007 there was no clarification on this issue by the Board. Ld. Counsel submitted this fact to emphasis that this was a clear case of interpretation regarding tax liability during relevant time. Hence, there can be no allegation of suppression of fact, etc., to invoke the extended period of limitation against the appellant. He submitted that on this ground alone substantial demand will be hit by time-bar.

10. On careful examination of the issue as discussed above, we find that tax liability under Goods Transport Agency service cannot be sustained against the appellant. The ratio laid down by the Tribunal in various decisions discussed above are to be followed as there is no reason to differ with the same. We also note that appellant is correct regarding their contention on the issue of interpretation with reference to time-bar of the demand also.

11. In view of the above, we find that the impugned order is not sustainable and accordingly set aside the same. The appeal is allowed.

Thus following the ratio of above decision wherein the Tribunal has held that in absence of consignment note services cannot be considered as GTA Service and from the facts emanating from the present case, we hold that the demand of service tax under the category of “Goods Transport Agency” does not sustain. We thus set aside the impugned order and allow all the appeals with consequential reliefs, if any.’

4. Furthermore, he submitted that this was consistent with earlier decisions of the Tribunal in *South Eastern Coalfields Ltd. vs. Commissioner of Central Excise, Raipur* [2017 (47) STR 93 (Tri-Del.)) and in *Nandganj Sihori Sugar Co. Ltd. vs. Commissioner of Central Excise, Lucknow* [2014 (34) STR 850 (Tri-Del.)].

5. Learned Authorised Representative conceded that the decision in *re Dinshaw Diary Foods Ltd.* did exclude tax liability but argued that it cannot be concluded as having been accepted by Revenue as the constraint of the New Litigation Policy (NLP) of Government of India in Department of Revenue prevented appeal therefrom. He also submitted that the decision of the Tribunal in *re South Eastern Coalfields Ltd.*, being under challenge, does not offer itself as precedent.

6. We find that the *catena* of decisions cited by Learned Counsel relate to tax liability not arising in circumstances that are similar to that of appellant; mere hiring of vehicles does not suffice for transaction to be taxed under Finance Act, 1994 unless the elements of section 65 (105) (zzp) of Finance Act, 1994, in which the definition of ‘goods transport agency’ is vital, is conformed to. In *re Nandganj Sihori Sugar Co. Ltd.*, it has been held that

6. In terms of Section 65(105)(zzp), the taxable service means “any service provided to a customer, by a Goods Transport Agency, in relation to transport of goods by road in a goods carriage. “In terms of Section 65(50a) *ibid* ‘Goods Carriage’ has the meaning assigned to it in clause 14 of Section 2 of the Motor Vehicle Act, 1988. In terms of Section 65(50b), ‘Goods Transport Agency’ means any commercial concern which provides service in relation to transport of goods by road and issues consignment note, by whatever name called. The Service Tax has been demanded from the Appellants as service recipient under Rule 2(l)(d)(v) of the Service Tax Act, 1994 read with Notification No. 35/2004-S.T., dated 3-12-2004, on the payments made

by them to transporters against the fortnightly bills being presented by them. While admittedly no consignment notes or GRs have been issued by the transports, according to the Department the Transporter's bills are in the nature of the consignment notes. Under Rule 4B of the Service Tax Rules, 1994, "any Goods Transport Agency which provide service in relation to transport of goods by road in a goods carriage shall issue a consignment note to the customer. In term of Explanation to Rule 4B, 'Consignment Note' means - a document issued by Goods Transport Agency against the receipt of goods for the purpose of its transport by road in a goods carriage, which is serially numbered and contains the name of consignor and consignee, registration number of the goods carriage in which goods are transported, details of goods transported, details of the place of origin and destination, person liable for paying Service Tax whether consignor, consignee or Goods Transport Agency. Thus mere transportation of the goods in a Motor Vehicle is not the service provided by a Goods Transport Agency. A Goods Transport Agency in terms of its definition under Section 65(50b) provides service in relation to transportation of goods under a consignment note which should have the particulars as prescribed in explanation to Rule 4B. In the present case admittedly no consignment notes have been issued. The fortnightly bills cannot be treated as consignment notes, as a consignment note issued by Goods Transport Agency represent its liability to transport the consignment handed over to it to the destination and deliver the same to the consignee and merely a bill issued for transportation of goods cannot be treated as Consignment Note. The fact of non-issue of consignment to M/s. Nandganj is admitted in the show cause notice itself. In case of M/s. Bajpur though it is not mentioned in the show cause notice, this plea has been made by the Appellant and the same has not been refuted. The transportation of goods by individual truck owners without issue of consignment note, GR's & billties, etc. as prescribed in Rule 4B of the Service Tax Rules, would be simple transportation and not the service of Goods Transport Agency which involves not only undertaking the transportation of the goods handed over to it but also undertaking delivery of the goods to the

consignee and also temporary storage of the goods till delivery. When the transports did not issue consignment notes or GRs or Challans or any documents containing the particular as prescribed in Explanation to Rule 4B of the Service Tax Rules, 1994, the Transporters cannot be called 'Goods Transport Agency' and, hence, in these cases, the service of transportation of sugarcane provided by the transporters would not be covered by Section 65(105)(zzp). In view of this we hold that there will be no Service Tax liability on the appellant sugarcane mills, as they have not received the service from a Goods Transport Agency. In view of this the impugned orders are not sustainable and the same are set aside. The appeals filed by M/s. Nandganj and M/s. Bajpur are allowed. As regards the Revenue's appeal, since it has been held that there is no Service Tax liability of the Appellants, there would be no merit in it and the same is dismissed.'

The appeal of Revenue against the decision in *re South Eastern Coalfields Ltd* does not, in the absence of stay, alter the validity of the decision of the Tribunal on non-taxability of the very same transaction of the appellant herein for the subsequent period. Consequently, we set aside the impugned order and allow the appeals.

(Operative part pronounced in Court)

(Ajay Sharma)
Member (Judicial)

(C J Mathew)
Member (Technical)