CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI

REGIONAL BENCH - COURT NO. I

Service Tax Cross Objection No. 85523 of 2018
&
Service Tax Application No. 85287 of 2022
In
Service Tax Appeal No. 85415 of 2018

(Arising out of Order-in-Original No. 02/PR.COMMR.(KCG)/CGST & CEX/MC/2017 dated 26.09.2017 passed by the Principal Commissioner of CGST & CEX, Mumbai Central)

Commissioner of CGST and Central Excise, Mumbai .... **Appellant**
4th Floor, C.E.X. Building,
Churchgate, Mumbai- 400 020.

Versus

Agarwal Packers and Movers Limited .... **Respondent**
46, Eastern Chambers,
Poona Street, Mumbai- 400009.

Appearance:

Shri S.K. Mathur, Special Counsel for the Appellant

Shri V. Sridharan a/w Shri Jay Chedda & Ms. Shambhavi Devalkar, Advocates for the Respondent

CORAM:

HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)
HON'BLE MR. M.M. PARTHIBAN, MEMBER (TECHNICAL)

FINAL ORDER NO. A/85361/2024

Date of Hearing: 09.11.2023
Date of Decision: 08.03.2024

Per: S.K. MOHANTY

This appeal filed by Revenue is directed against the Order-in-Original No. 02/PR.COMMR.(KCG)/CGST & CEX/MC/2017 dated 26.09.2017 (for short, referred to as "the impugned order"), passed by the learned Principal Commissioner of CGST & Central Excise, Mumbai Central.

2. The respondents have filed the miscellaneous application, for consideration of additional grounds in respect of the cross objection filed by them, in response to the appeal filed by the Revenue. Considering the facts and circumstances of the case, the said application is allowed and the averments made therein are taken into records for consideration of the present appeal.

3. Brief facts of the case, leading to this appeal, are summarized as under:

3.1 The respondents herein, M/s. Agarwal Packers & Movers Limited are engaged *inter-alia*, in the business of transportation of commercial and household goods. In the business of transportation of commercial goods, they receive such goods in packed form from various companies for the purpose of transportation to different locations. In such cases, as the recipient of service, the corporate entities discharge the service tax liability under the Reverse Charge Mechanism, in terms of Notification No. 35/2004-ST dated 03.12.2004 (upto the period 30.06.2012) and thereafter, under Rule 2(1)(d) of the Service Tax Rules, 1994 read with Notification No. 30/2012-ST dated 20.06.2012 (from 01.07.2012 onwards). Classification/taxability of provision of such service is not under dispute in the present case.

3.2 The other area of transportation is that of the household goods, which is the subject matter of dispute involved in the case in hand. For carrying out the activity of transportation, the respondents are engaged either by the corporate houses for shifting of household goods of their employees or by individuals for transportation of their own household goods. For provision of such service, the appellants got themselves registered with the jurisdictional Service Tax department.

3.3 The Directorate General of Central Excise Intelligence (DGCEI), Ahmedabad Zonal Unit gathered intelligence that the appellants are mainly providing services of shifting of household goods, which is covered under the taxable category of 'Cargo Handling Services', defined under Section 65 (23) of the Finance Act, 1994 read with Section 65(105)(zr) ibid. Further, it was also contended that the respondents had mis-classified the services provided by them in relation to shifting of household goods under the taxable entry of 'Transport of Goods by Road' service and as such, wrongly availed the benefit of abatement and short paid service tax on the activities carried out by them.

3.4 On the basis of the investigation conducted by the officers of DGCEI, the department issued the Show Cause Notices (SCNs) dated 02.06.2014, 17.04.2015 and 05.04.2016, calling upon the appellants as to why service tax demand amounting to Rs.1,64,87,79,904/- shall not be confirmed against them under the taxable category of 'Cargo Handling service'. Further, in respect of the SCN dated 02.06.2014, it has been alleged by the department that the appellants had collected some amount as surplus charges/surcharges and service tax at full rate on the value of service, but did not deposit the same into the Government treasury.

3.5 The Show cause proceedings were initiated against the appellants on the premise that the entire stress of service hinges on the quality of packing and safety of the articles. In this context, the department had referred to the advertisements, websites etc., published by the respondents, by projecting themselves as packers and movers and that they are the leading service providers in the field of shifting of household articles. On the said background facts, the department has referred to and relied upon the definition of 'Cargo Handling Services' and the Circular dated 29.02.2008 issued by the Central Board of Excise & Customs (CBEC). The department has contended that w.e.f. 16.05.2008, the ambit of cargo handling service has been widened to specifically include the services provided by packers and movers, wherein they undertake transportation of goods along with packing services.

3.6 The matter arising out of the above referred SCNs (three in numbers), was adjudicated by the Principal Commissioner of CGST & Central Excise vide the impugned Order dated 26.09.2017, wherein the proposals made in the SCNs were dropped. The Original Authority has held that the activities of transportation of household goods undertaken by respondents is correctly classifiable under 'Transportation of Goods by Road' service i.e., Goods Transport Agency (GTA) service and not under the taxable entry of 'Cargo Handling Services'. For arriving at such a conclusion, the learned Adjudicating authority has observed as under:

(a) The primary activity of the respondents is of transportation of goods and activities such as packing, un-packing, loading, unloading etc., are intermediate or ancillary to the main activity of transportation.

(b) Circulars dated 6.8.2008 and 5.10.2015 are squarely applicable to the present facts and the department cannot take contradictory stand to change the position of law, especially when clarified by the Apex body i.e., CBEC.

(c) The contention of the department that surcharge/surplus charges is nothing but service tax is incorrect as on perusal of few invoices it can be seen that there are different headings for recovery of surcharge / surplus charges and service tax; and that the amounts collected are also different in different cases.

(d) Hence, only where the amount collected as 'service tax' on face of invoice is not deposited with the government exchequer, then the demand to that extent amounting to Rs.3,82,569/- is only to be confirmed along with interest and penalty under Section 78 ibid is liable to be imposed.

3.7 Feeling aggrieved with the impugned order, the department has filed the present appeal before the Tribunal, *inter-alia*, contending as under:

(a) The amendment in 'Cargo Handling Services' w.e.f. 16.5.2008 has specifically included within its ambit the service of transportation of goods with services like packing, unpacking, loading, unloading and that exclusion has only been provided for mere transportation of goods.

(b) Reliance has been placed on Budget Circular dated 29.2.2008, wherein it has been clarified that Cargo Handling Services is amended to include service of packing together with transportation of goods.

(c) Reliance placed by the Ld. Principal Commissioner on Circular dated 6.8.2008 and 5.10.2015 is misplaced since these circulars have been issued clarifying the position with regard to loading, unloading, packing, unpacking when undertaken by a GTA. In those circulars, there is no mention about services provided by Packers and Movers. In the business model of Packers and Movers, activities like loading, unloading and packing are essential activities.

(d) The Ld. Principal Commissioner has confirmed the amount of Rs. 3,82,569/- as the quantum of service tax collected by the respondent in excess of what was required to be collected. The quantum 3,82,569/- has been arrived only based on list prepared by the respondent and the Certificate issued by the Statutory Auditor. There is no independent finding with regard to the correctness thereof.

4. Heard both sides and examined the case records, including the written submissions filed during the course of hearing of the appeal.

5. The period of dispute involved in this appeal is from April, 2009 to March, 2015. The statutory provisions, relevant for consideration of the present dispute with regard to classification of appropriate category of service are extracted herein below:

> *"65(105) "taxable service" means any service provided or to be provided,—*
>
> *….*
>
> *(zzp) to any person, **by a goods transport agency**, in relation to transport of goods by road in a goods carriage;"*
>
> *(zr)* to any person, by a **cargo handling agency** in relation to cargo handling services;
>
> *65(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;*
>
> *65(23) "**cargo handling service**" means* loading, unloading, packing or unpacking of cargo and includes,—
> (a) cargo handling services provided for freight in special containers or for non-containerised freight, services provided by a container freight terminal or any other freight terminal, for all modes of transport, and cargo handling service incidental to freight; and
> (b) service of packing together with transportation of cargo or goods, with or without one or more of other services like loading, unloading, unpacking,
> but does not include, handling of export cargo or passenger baggage or mere transportation of goods;*"*

6. The sequence of events taken place in the statutory definition of Cargo Handling and Goods Transport Agency services are furnished herein below, in the form of a date chart:

Sr. No.	Date	Event
1	16.8.2002	Entry for taxation of Cargo Handling Services was introduced.
2	01.01.2005	Entry for taxation of services provided by Goods Transport Agency was introduced and the services of GTA became chargeable to service tax.
3	16.5.2008	Definition of 'Cargo Handling Services' was amended, to include services of '*packing together with transportation of cargo or goods*' within its ambit.
4	29.2.2008	Budget Circular No. 334/1/2008-TRU dated 29.2.2008 clarified that service providers commonly known as 'packers and movers' provide services of packing together with transportation of goods and such services of packing with transportation are included under Cargo handling services through 2008 budget amendment.
5	6.8.2008	Subsequent to the amendment in definition of Cargo Handling Services read with circular dated 29.2.2008, the All India Motor Transport Congress made representations to the Government regarding confusion between scope of GTA services and Cargo Handling Services. Accordingly, Circular No. 104/2008-ST dated 6.8.2008 was issued which clarified that transportation is not the essential character of cargo handling services but only incidental to cargo handling services.
6	1.7.2012	The Negative list regime was introduced after which all services except services specified in the negative list were chargeable to service tax.
7	5.10.2015	Circular No. 186/5/2015-S.T. dated 5.10.2015 was issued, which clarified that GTA service is a composite service, which may include ancillary services like packing which is provided in the course of transportation of goods. It was clarified that if ancillary services are provided in the course of transportation of goods by road and the charges for such services are included in the invoice issued by the GTA, such services would form part of the GTA services only. This circular issued as a consequence of the introduction of the negative list of services.

7. On perusal of the case records, we find that the services provided by the respondents are confined to transportation of household goods. For accomplishing the purpose of such business, the respondents are essentially engaged by the individuals or by corporates (for their employees) for transportation of household goods from one location to another. The essential characteristics of the contracts entered into between the respondents and the recipients of such service are that the customers of the respondents are interested in getting their goods transported from one location to the other and to ensure that the goods are being properly handled, they availed the other facilities such as packing etc. On careful reading of various documents/records, we find

that the principal objective in provision of the service in question is that of transportation of household goods and the other services are incidental and ancillary to such main object. It is also a fact, not under dispute that the respondents had issued the 'consignment note' for transportation of the goods and are also registered with the Service Tax department under the taxable category of GTA service. The activities undertaken by the respondents clearly demonstrate that they provide the business of transportation of household goods and for such purpose, issue the consignment note and as such, qualify for consideration as 'Goods Transport Agency', defined under Section 65(50b) ibid.

8. Considering the true scope and ambit of such definition clause, the CBEC in the Circular No.104/07/ 2008-S.T. dated 06.08.2008 had clarified certain issues raised by the trade.

> *"3. **Issue**: GTA provides service to a person in relation to transportation of goods by road in a goods carriage. The service provided is a single composite service which may include various intermediary and ancillary services such as loading/unloading, packing/unpacking, transshipment, temporary warehousing. For the service provided, GTA issues a consignment note and the invoice issued by the GTA for providing the said service includes the value of intermediary and ancillary services. In such a case, whether the intermediary or ancillary activities is to be treated as part of GTA service and the abatement should be extended to the charges for such intermediary or ancillary service?*
>
> ***Clarification**: GTA provides a service in relation to transportation of goods by road which is a single composite service. GTA also issues consignment note. The composite service may include various intermediate and ancillary services provided in relation to the principal service of the road transport of goods. Such intermediate and ancillary services may include services like loading/unloading, packing/unpacking, transshipment, temporary warehousing etc., which are provided in the course of transportation by road. **These services are not provided as independent activities but are the means for successful provision of the principal service, namely, the transportation of goods by road.** The contention that a single composite service should not be broken into its components and classified as separate services is a well-accepted principle of classification. As clarified earlier vide F.No. 334/4/2006-TRU dated 28.2.2006 (para 3.2 and 3.3) and F. No. 334.1/2008-TRU dated 29.2.2008 (para 3.2 and 3.3), a composite service, even if it consists of more than one service, should be treated as a single service based on the main or principal service and accordingly classified. While taking a view, both the form and substance of the transaction are to be taken into account. The guiding principle is to identify the essential features of the transaction. **The method of invoicing does not alter the single composite nature of the service and classification in such cases are based on essential character by applying the principle of classification enumerated in section 65 A. Thus, if any ancillary/intermediate***

> ***service is provided in relation to transportation of goods, and the charges, if any, for such services are included in the invoice issued by the GTA, and not by any other person, such service would form part of GTA service and, therefore, the abatement of 75% would be available on it.***
>
> *4.* ***Issue 2****: GTA providing service in relation to transportation of goods by road in a goods carriage also undertakes packing as an integral part of the service provided. It may be clarified whether in such cases service provided is to be classified under GTA service.*
>
> ***Clarification****: Cargo handling service [Section 65 (105) (zr)] means loading, unloading, packing or unpacking of cargo and includes the service of packing together with transportation of cargo with or without loading, unloading and unpacking. Transportation is not the essential character of cargo handling service but only incidental to the cargo handling service.* ***Where service is provided by a person who is registered as GTA service provider and issues consignment note for transportation of goods by road in a goods carriage and the amount charged for the service provided is inclusive of packing, then the service shall be treated as GTA service and not cargo handling service****."*
>
> *…(Emphasis supplied)*

9.1 Reading of the above circular issued by CBEC, makes the position amply clear that merely because the Goods Transport Agent is engaged in packing, unpacking, loading and unloading along with transportation, it would not *ipso facto* imply that the service is classifiable under Section 65(105)(zr). On the other words, it can be said that once the service is provided by road in a goods carriage and the service provider issues consignment note and the amount charged is inclusive of packing charges, then the service would be covered within the ambit and scope of the taxable entry of 'Goods Transport Agency' and not of 'Cargo Handling Service'.

9.2 We find that in another circular issued by the Tax Research Unit (TRU), in the Ministry of Finance vide Circular No.186/5/2015-S.T., dated 05.10.2015, the CBEC has also clarified the position with regard to classification of service as a GTA. The said circular once again clarified the position that if ancillary services are provided in the course of transportation of goods by road and the charges for such services are included in the invoice issued by the GTA, and not by any other person, then such services would form part of GTA service.

9.3 Further, we find that both the above circulars issued by the CBEC have addressed the issue involved in the present case to amplify that the services in question should be considered as 'Goods Transport Agency' service and not otherwise. Revenue in this case has not adduced any documentary evidences to strengthen the case that the service in question should be classified as 'Cargo Handling service'. Thus, without proper substantiation, the department is not permitted to take a contrary view, than those decided by the Apex body, monitoring and controlling the affairs of the whole of the department. In this context, the law is well settled that the departmental authorities are bound by the circular or clarification issued by the Apex body and cannot argue contrary to the clarification furnished by the superior authorities. In the case of *Collector of C. Ex., Vadodara v. Dhiren Chemical Industries* - 2002 (139) E.L.T.3 (S.C.), the Hon'ble Supreme Court have held as under:

> *"9. We need to made it clear that, regardless of the interpretation that we have placed on the said phrase, if there are circulars which have been issued by the Central Board of Excise and Customs which place a different interpretation upon the said phrase, that interpretation will be binding upon the Revenue."*

In view of the settled position of law, since the learned Adjudication authority has dropped the show cause proceedings initiated against the respondents by relying upon the circulars issued by CBEC, it cannot be said that such order passed by him is not legal and proper.

10.1 We find that the issue arising out of the present appeal is no more *res integra* in view of the Order dated 21.08.2017 of this Tribunal in the case of *DRS Logistics Pvt. Limited Vs. Commissioner of Service Tax, Delhi-I – 2017 (7) G.S.T.L. 352 (Tri. – Del.),* affirmed by the Hon'ble Supreme Court, reported in *2018 (18) G.S.T.L. J172 (S.C.).* The relevant paragraphs recorded in the order dated 21.08.2017 of the Tribunal are quoted below:

> *"8. The fact is not under dispute that the appellant is registered with the Service Tax Department under the taxable category of `Goods Transport Agency service' and issues consignment notes for transportation of goods from one place to another for its customers. Issuance of consignment note by the goods transporter is a mandatory requirement under the Carriage by Road Act, 2007. The contractual relationship between the appellant and its customers are primarily confined to transportation of household and other goods from one place to the other. It is a matter of fact that the customers never approach the appellant only for loading, unloading, packing or unpacking of goods. Rather, the request comes only when they want to shift the goods from one place to other. Considering the sensitive nature of the goods being transported, the appellant also undertakes other activities of packing etc., if so desired by its customers, which are optional. Thus, the modus operandi adopted by the appellant transpires that the principal aim and objective is for transportation of goods*

and providing of other services are incidental and ancillary to the main purpose of transportation.

…

10. Further, under the negative list regime, effective from 1-7-2012, the C.B.E. & C. vide Circular No. 186/5/2015-S.T., dated 5-10-2015 has clarified the subject issue, pursuant to the query raised by the All India Transport Welfare Association (AITWA), by reiterating the clarification furnished earlier vide circular dated 6-8-2008. However, the ld. Adjudicating authority has simply brushed aside the above circulars by placing reliance on the circular dated 20-2-2008 issued by C.B.E. & C., which is contextually different than the case in hand. On careful examination of the contents of circular dated 6-8-2008 and 5-10-2015, it transpires that the clarifications furnished thereunder by the C.B.E. & C., the apex body, are in conformity with the provisions of Section 65A ibid. In this context, the law is well settled that the circular issued by the Board, either in its administrative or executive jurisdiction, are binding on the officers working under it, unless and until it is proved that the clarifications furnished are contrary to the statutory provisions or the law pronounced by the higher judicial forums. We find that the decision in the case of Drolia Electrosteels Pvt. Ltd. (supra) cited by the ld. Advocate is squarely applicable to the facts of the present case, wherein by relying on the circular dated 6-8-2008 (supra), the Tribunal has held that the service provided by M/s. Hira Industries (appellant therein) merits classification under the GTA service and not under Cargo Handling Service."

10.2 In another case of *DRS Dilip Roadlines Pvt. Ltd. and Others Vs. CC & CE, Hyderabad – 2019-TIOL-1505-CESTAT-HYD*, on the identical set of facts, the Co-ordinate Bench of the Tribunal, by placing reliance on the above order of the Tribunal and the judgement of the Hon'ble Supreme Court (supra) has allowed the appeal, holding that the services rendered by the appellant should be classifiable under Goods Transport Agency service and not Cargo Handling service.

11. With regard to the issue relating to collection of surplus charges/surcharges and collection of service tax at full rate, without abatement on value of service, the learned Adjudicating authority has considered various evidences, including the submissions made by the respondents that the surplus charges etc., were charged for various expenses incurred on road, such as toll tax, accident expenses claimed for damages etc. The figure of actual liability for payment of service tax of Rs.3,82,569/- was considered by him based on the certificate dated 14.09.2017 issued by M/s Manjeet Dewan & Associates, Chartered Accountants. Since, the evidence of actual liability for payment of service tax was appreciated by the original authority, it cannot be said that he has not examined the records properly. Further, on examination of the documents available in the case file, we also find that the actual liability towards payment of service tax as claimed by the respondents, duly certified by the professional accounting firm are proper and the same cannot be questioned by the Reviewing authority,

who had only examined the adjudication order, to conclude that the findings are perverse or erroneous. Thus, we are not in agreement with the grounds urged by Revenue that the correctness of the disputed amount has not been examined at the original stage by the Adjudicating authority.

12. In view of the foregoing discussions and analysis, we do not find any infirmity in the impugned order dated 26.09.2017, insofar as it has dropped the proposals made in the Show Cause Notices for confirmation of the demands on the respondents. Therefore, the appeal filed by Revenue is dismissed.

13. Cross objection filed by the respondents is disposed of.

(Order pronounced in open court on 08.03.2024)

(S.K. Mohanty)
Member (Judicial)

(M.M. Parthiban)
Member (Technical)

SM