Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench At Ahmedabad

REGIONAL BENCH-COURT NO. 3

Service Tax Appeal No. 10811 of 2015- DB

(Arising out of OIA-VAD-EXCUS-001-APP-05-2015-16 dated 07/04/2015passed by Commissioner of Central Excise, Customs and Service Tax-VADODARA-I)

Aims Industries Ltd **.....Appellant**
Beside Geb Sub Station, At & Post : Gavasad,
Taluka : Padra,
Vadodara, Gujarat

VERSUS

C.C.E. & S.T.-Vadodara-i **.....Respondent**
1st Floor...Central Excise Building,
Race Course Circle,
Vadodara,Gujarat-390007

APPEARANCE:
Shri Surabh Dixit, Advocate for the Appellant
Shri Rajesh R Kurup, Superintendent (AR) for the Respondent

CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
HON'BLE MEMBER (TECHNICAL), MR. RAJU

Final Order No. 12101/2023

DATE OF HEARING: 01.09.2023
DATE OF DECISION: 22.09.2023

RAMESH NAIR

The issue involved in the present case is that whether the Appellant is liable to pay Service Tax on amount of freight paid by them to tractor trolley owners, who did not issue any LR and transported the goods in such tractor trolley for the appellant.

1.1 The brief facts of the case are that the appellant is engaged in production and clearance of the excisable goods, namely industrial Gases falling under Chapter 28 of the First Schedule to the Central Excise Tariff Act, 1985. For the transportation of their finished goods, the appellant had availed GTA service and have been paying Service Tax on that service under Reverse Charge Mechanism. The appellant had also availed services for transportation of their finished goods or capital goods in local nearby area,

from the private tractor owners, who used their tractors mainly for the agriculture purpose, but casually undertake transportation of gas cylinders in tractor trolley for the appellant. The case of the department is that since the appellant have availed the GTA service, they are liable to pay Service Tax under reverse charge mechanism on the freight paid by them to the tractor trolley owners who provided their transportation to the appellant.

2. Shri Shaurabh Dixit, Learned Counsel appearing on behalf of the appellant submits that in this case the service of the transportation availed is not from the organized transport agency but directly from the tractor trolley owners, who otherwise carry out the transportation of agricultural produce but at time they provide the transportation service and for that they do not issue any LRs/Consignment notes. Therefore, the service does not fall under the 'goods transport agency service'. Hence, not liable to service tax in the hands of the appellant as a service recipient. He placed reliance on the CBIC Circular and judgments as follows:

- CBIC Circular No. 95/6/2007-ST dated. 11.06.07
- Lakshminarayana Mining Co. 2009 (16) STR (69)
- Lakshminarayana Mining Co. 2012 (26) STR 517 (Kar.)
- SANT ROADLINES2020 (43) G.S.T.L. 206 (Tri. - Chan.)
- Bharat Swabhiman (Nyas) 2022(62) GSTL 470 (Tri-Del)
- Mahanadi Coalfields Ltd. 2022 (57) G.S.T.L. 242 (Tri. - Kolkata)
- East India Minerals Ltd. 2021 (44) G.S.T.L. 90 (Tri. - Kolkata)
- Ultra Tech Cement Ltd 2018(10) GSTL 80 (Tri- Mumbai)
- Salem Co-operative sugar mills 2010(19) STR 435 (Tri- Chennai)
- Chattisgarh State Co-Operative Mkg. Federation Ltd. 2019 (22)G.S.T.L. 265 (Tri. - Del.)

3. On the other hand Shri Rajesh R Kurup, Learned Superintendent (AR) appearing on behalf of the revenue reiterates the findings of the impugned order.

4. On careful consideration of the submission made by both the sides and perusal of record, we find that the facts are not under dispute that the service of transportation was provided by tractor trolley owners themselves and no transport agency is involved. Freight of the transportation was paid by the appellant to such tractor trolley owner for the transportation of goods i.e. Gas cylinder, no LR/consignment note was issued. In this case even though the transportation activity is involved but the criteria for classifying a transport service under GTA are not fulfilled. Such as no consignment note/LR was issued and the transportation was provided by not the goods transport agency but individual tractor trolley owners Therefore, the service does not fall under the definition of GTA service. Accordingly, in our considered view the same is not taxable in the hands of the appellant. This issue has been considered time and again in the following judgments:

a) In the case of Lakshminarayana Mining Co. 2009 (16) STR (69) Bangalore Tribunal has passed the following decisions:

> *"4. We have heard both sides. We find that the appellants paid service tax under the head "GTA" as recipient of GTA services in terms of Rule 2(1)(d)(v) of Service Tax Rules, 1994 during the material period. LMC received service of transportation of goods i.e. iron ore by the transporters. The Commissioner rejected the plea of the appellants that they had received service of transportation of goods either from owners of trucks or goods transport operators relying on the following statutory provisions :*
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> > *"Section 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 Section 65(105) (zzp) to a customer, by a goods transport agency, in relation to transport of goods by road in a goods carriage"*

4.1 He held that by virtue of the above provisions, the service received by LMC was exigible under the category of "GTA". He found that the providers of service involved were commercial concerns engaged in the business of transportation of goods in a goods carriage by road. These facts were not in dispute. A couple of bills seen by him indicated that the tax liability was abated from the mutually agreed amount for transport of consignments. He held that goods transport agency themselves could be the owner of the trucks/operators.

5. The appellants had mis-declared the actual taxable value in the ST-3 returns. This warranted invocation of proviso to Section 73(1) of the Act. The plea that penalty was not justified since the appellants had discharged tax liability before issue of show cause notice, was rejected relying on the following judgments of the High Court :

(a) CCE & C Aurangabad v. Padmashri V.V. Patil S.S.K. Ltd. - 2007 (215) E.L.T. 23 (Bom-H.C.)

(b) M/s. Sai Machine Tools Pvt. Ltd. - 2006 (203) E.L.T. 15 (M.P.-H.C)

5.1 From the impugned order it is not obvious that the appellants had short paid Service tax by not paying tax due in certain cases during the material period or paid less tax in respect of all consignments for which it had incurred freight. In any case, we find that the Commissioner has not effectively countered the plea of the appellants that they had not received services from a GTA. The Commissioner has attempted to classify services received from goods transport owners/goods transport operators as GTA service defined under Section 65 (50b) of the Act. We find that the claim of the appellants that the impugned services were not exigible to service tax is amply supported by the following extract of the Budget Speech of the Finance Minister, made while introducing the Finance Bill, 2004.

> *"149. 58 services have been brought under the net so far. I propose to add some more this year. These are business exhibition services; airport services; services provided by transport booking agents, transport of goods by air; survey and exploration services; opinion poll services; intellectual property services other than copyright; brokers of forward contracts; pandal and shamiana contractors; outdoor caterers; independent TV/radio programme producers; construction services in respect of commercial or industrial constructions; and life insurance services to the extent of risk premium. I may clarify that there is no intention to levy service tax on truck owners or truck operators....."*

5.2 From the above pronouncement by the Finance Minister, the legislative intent not to tax truck owners or truck operators is beyond doubt. In the absence of a finding that the appellants had received the service of transport of goods from any GTA, the impugned demand of Service tax and penalties are liable to be set aside. We also find that this Bench had observed in Final Order Nos. 527 & 528/2009 dated 12-3-2009 [2009 (15) S.T.R. 399 (T)] that "from the definition of the GTA and also the clarification given by the Finance Minister in the Budget Speech, we are of the view that the tax has been paid wrongly and the respondents are not liable to pay any Service tax". This was in a case where differential Service tax had been demanded in respect of services received from individual truck owners.

6. In the circumstances, we set aside the impugned order and hold the appellants not liable to Service tax under the category of GTA during the material period and allow this appeal."

b) The above decision of the Tribunal was upheld by the Hon'ble Karnataka High Court reported at *Lakshminarayana Mining Company 2012 (26) STR 517 (Karnataka)*, whereby, an appeal against the aforesaid Tribunal order was dismissed by the Hon'ble Karnataka High Court:

"4. This appeal was admitted to consider the following substantial questions of law :

(i) Whether the order of the CESTAT, based solely on the speech of the Hon'ble Finance Minister made while introducing the Finance Bill, 2004 and not as per the statutory provisions of law was right in holding that the Respondents were not liable to pay Service Tax under the category of "GTA" ?

(ii) Whether the order of the CESTAT was right in holding that the Respondents were not liable to Service Tax under the category of "Goods Transport Agency", contrary to the statutory provisions of law i.e., Section 65(105)(zzp), Section 65(50b), Rule 2(1)(d)(v) of the Service Tax Rules, 1994 & Notification No. 35/2004-S.T. dated 3-12-2004 w.e.f. 1-1-2005 and thereby setting aside the Order-in-Original dated 21-8-2008?"

Therefore the question that arises for consideration in this appeal is as to whether the assessees are liable to pay service tax or not under the category of Goods Transport Agency?

An identical issue came up for consideration before the Division Bench of this Court in CEA No. 121/2009 and connected matters. This court by the order dated 23-3-2011 [2011 (23) S.T.R. 97 (Kar.)] came to the conclusion that service tax is paid on

transportation charges fell within the phrase "clearance of final products from the place of removal" and therefore, the assessee was entitled to Cenvat credit."

4. The question of law that arises for consideration in this appeal having since been answered by the Division Bench in the above referred appeal, the substantial question of law are answered in favour of the assessee and against the revenue."

c) Similarly in the case of Bharat Swabhiman, this Tribunal has passed the following order:

"18.'Goods transport agency' service has been defined in Section 65(26) of the Finance Act to mean any person who provides service in relation to transport of goods by road and issues consignment notes, by whatever name called. In the present case, consignment notes have not been issued and so the activities cannot be said to be covered under 'goods transport agency' services.

19. In this connection it would be useful to refer to the decision of the Tribunal in Bhoramdeo Sahakari Shakhar Utpadam Karkhana v. Commissioner of Customs, Central Excise & Service Tax, Raipur [2019 (10) TMI 1416-CESTAT, New Delhi], wherein it has been held that service tax can be levied only if consignment notes are issued.

20. Thus, service tax liability could not have been fastened on the appellant under the reserve charge mechanism."

d) Similar issue has also been considered by this Tribunal in Mahanadi Coalfields Ltd. (Supra) case, wherein the following view was expressed by the Tribunal:

"9.In the instant case, the issue before us is whether the appellant, who is a recipient of goods transportation services in the mines, is liable to pay service tax under RCM. We find that the service tax liability will arise only if the definition of 'taxable service' as contained in Section 65(105)(zzb) of the Act, which was in force during the material period, is fulfilled. As per the said provision, during the period in dispute, the taxable service, in relation to transport of goods in a goods carriage, means any service provided or to be provided to a customer by a goods transport agency service. We note that the term 'goods transport agency' has been specifically defined in Section 65(50b) to mean any commercial concern which provides service in

relation to transport of goods by road and issues consignment note, by whatever name called.

10.On perusal of the above statutory provisions, it is clearly evident that in order to constitute 'Goods Transport Agency', the provider of transportation service must issue the consignment notes or any other document by whatever name called. We find that the issue has already been examined in detail by the Tribunal, in Final Order dated 13-8-2014, in South Eastern Coalfields Ltd. v. CCE, Raipur 2016 (41) S.T.R. 636 (Tri. - Del.), the relevant portion is reproduced below :-

> *"...5. If the transaction/service provided by the 24 transporters tothe appellant fall within ambit of Goods Transport Agency service within the meaning of the aforesaid provisions, the appellant would be liable to tax though being recipient of the service is not contested by the appellant and it is conceded that under this taxable service, recipient of the service is liable to tax. The only issue canvassed is the one presented to the adjudication authority which did not commend acceptance namely, that since no consignment notes were issued by transporters, the services provided to the appellant fall outside the ambit of GTA.*
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> *6.The issue is no longer res integra. Learned Division Benches of this Tribunal in Birla Ready Mix v. C.C.E., Noida - 2013 (30) S.T.R. 99 (Tri. - Del.) and in Final Order Nos. ST/A/50679-50681/2014-CU(DB), dated 13-1-2014 [2014 (34) S.T.R. 850 (Tribunal) and in NandganjSihori Sugar Co. Ltd. and others v. C.C.E., Lucknow unambiguously enunciated the principle that qua the definition of "Goods Transport Agency" enacted in Section 65(50b) of the Act, to fall within the ambit of the defined expression issuance of a consignment note is non-derogable ingredient.*
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> *7.In view of the law declared and the factual matrix of this appeal since where admittedly no consignment notes were issued by the 24 transporters for transportation of the appellant's coal, the Goods Transport Agency service cannot be held to have been rendered. That being the position the appellant is not liable to tax."*

11.We note that the pursuant to directions of the Hon'ble Chhattisgarh High Court [2016 (41) S.T.R. 608 (Chhattisgarh)], in the remand proceedings, the Tribunal in its Final Order dated 28-7-2016 has re-affirmed the aforesaid legal position to hold that the assessee has not received any GTA service, so as to make them amenable to service tax in absence of consignment notes. The issue of consignment note, is a non-

derogable ingredient to make the "goods transporter" as "Goods Transport Agency" as defined in the statute.

12.We also find that the same view has been consistently followed by the co-ordinate Benches of the Tribunal, the decisions which have been admitted for consideration before the Hon'ble Supreme Court in Revenue Appeals. We note that though the matter is pending before the Apex Court, the aforesaid Tribunal decisions have not been stayed and therefore, we do not find any reason to take a contrary view. In so far as the decision in Singh Transporter's case (Supra) is concerned, we agree with the arguments canvassed by the Ld. CA for the appellant that the mandatory requirement of issue of consignment note, in order to constitute "Goods Transport Agency" as has been specifically defined in the Act, was not the subject matter of examination so as to decide the taxability in the hands of assessee receiving goods transportation services and therefore, the aforesaid Apex Court's decision has no application in the instant case.

13.We find it worth taking note of the observation made by the Tribunal in JWC Logistics Pvt. Ltd. (supra) as below :

> *"8. It is not the transportation of goods byroad that is subject to tax but the services rendered by a goods transport agency in relation to the transportation of goods by road and road transport agency tasked with responsibilities that others connected with road transport are not, with consignment note being the point of difference. There is also no doubt that Rule 4B of the Service Tax Rules, 1994 lays down the contents of a consignment note."*

14.In view of the above discussions andthe decisions cited (supra) and taking into consideration the essential requirement of issuance of 'consignment note', in order to attract the definition of "Goods Transport Agency", we hold that the transport contractors rendering the coal transportation services in mines cannot be said to be "Goods Transport Agency" and therefore, their services cannot be made amendable to levy of service tax in the category of "transportation of goods by road services". Hence, the impugned demand of service tax, interest and penalty cannot sustain and therefore, the same is set aside.

15. The appeal is allowed with consequential relief as per law."

e) Similar view was taken by this Tribunal in the case of East India Minerals Ltd as per the following order:

"13.We havecarefully gone through the submissions made by the Learned Advocate for the appellant for allowing the misc. applications, seeking incorporation of additional ground. The misc. applications have been filed by the appellant in terms of Rule 10 of CESTAT (Procedure) Rules, 1982 which, for the sake of convenience, is reproduced below :

> ***Grounds which may be taken in Rule 10. appeal. -*** *The appellant shall not, except by leave of the Tribunal, urge or be heard in support of any grounds not set forth in the memorandum of appeal or those taken by leave of the Tribunal under these rules :*
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> *Provided that the Tribunal shall not rest its decision on any other grounds unless the party who may be affected thereby has had a sufficient opportunity of being heard on that ground.*

In this connection, we take note of the decision of the Hon'ble Supreme Court (Three Member Bench), in the case of National Thermal Power Co. Ltd. v. Commissioner of Income Tax, reported in 1998 (99) E.L.T. 200 (S.C.), which is to the effect that the Tribunal has jurisdiction to examine the question of law which arises on facts, as found by the authorities below, and having bearing on tax liability of assessee, even though said question was neither raised before the lower authorities nor in appeal memorandum before the Tribunal, but sought to be added later as an additional ground by a separate letter.

14. In view of the specific provision under Rule 10 of the CESTAT (Procedure) Rules and the law laid down by the Hon'ble Supreme Court in the aforesaid case, we are inclined to entertain the misc. applications, seeking incorporation of additional grounds. The misc. applications are allowed, which have substantial bearing on the main appeals.

15. We have carefully gone through the relevant documents, such as, the contract between the appellant and the raising contractors, the monthly bills raised by them on the appellant, the transit pass in 'Form-G', issued by the mining authority for the purpose of payment of mining royalty, and transportation of iron ore from the mines site. The raising contractors have not issued any other document in the name of the appellant, for the purpose of transportation of iron ore, which can be termed as a consignment note, as stipulated under Rule 4B of the Service Tax Rules, 1994, as amended. As per the legal principles decided by different Benches of Tribunal and relied upon by the appellant, the activities of transportation of iron ore in the present

case, do not fall under the GTA service in terms of Section 65(105)(zzp) of the Finance Act, 1994, nor the raising contractors fall under the definition of 'GTA' as defined under Sec. 65(50b) of the said Finance Act.

16. In view of the above discussions, the impugned orders are set aside. The appeals filed by the appellant are allowed with consequential relief, as per law."

In view of the above judgments, it is categorically held that in case transportation made by vehicle operator (in the present case tractor trolley owners) and no consignment note was issued, the service cannot be held as goods transport agency service liable to Service Tax. Therefore, the impugned order is not sustainable.

5. Hence, the impugned order is set aside. Appeal is allowed.

(Pronounced in the open court on 22.09.2023)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

Raksha