CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD

REGIONAL BENCH - COURT No.-I

Service Tax Appeal No.55237 of 2014

(Arising out of Order-in-Original No.(ST-23/2013) 12 of 2014 dated 16/07/2014 passed by Commissioner of Central Excise, Customs & Service Tax, Allahabad)

M/s Prakash Road Lines **.....Appellant**
(Champa Complex, Geeta Garden Road, Gorakhpur)

VERSUS

Commissioner of Central Excise, Customs & Service Tax, Allahabad ....Respondent
(38, M.G. Marg Civil Lines, Allahabad-211001)

APPEARANCE:

Shri Dharmendra Srivastava, Chartered Accountant for the Appellant
Shri B. K. Jain Authorised Representative for the Respondent

CORAM: HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. P. ANJANI KUMAR, MEMBER (TECHNICAL)

FINAL ORDER NO. - 70122 / 2022

DATE OF HEARING : 01 August, 2022
DATE OF DECISION : 08 August, 2022

P. ANJANI KUMAR:

This appeal is directed against Order-in-Original passed by Commissioner of Central Excise, Customs & Service Tax, Allahabad[1].

2. Brief facts of the case are that the appellants are engaged in transportation of goods from various siding to Nepal. On going through the records like Income Tax Returns, Income & Expenditure Account, Profit and Loss Account and Balance sheet of the appellant for the years 2007-08 to 2011-12, it appeared to the department that the appellant had rendered the taxable services under

[1] . (ST-23/2013) 12 of 2014 dated 16.07.2014.

the categories 'Goods Transport Agency Service'; 'Business Auxiliary Service'; 'Manpower Recruitment Service or Supply Service' etc and that the appellant had not discharged the applicable service tax. On completion of the enquiry, a show cause notice dated 31.03.2013 was issued to the appellant proposing to recover service tax of Rs.1,42,82,025/- alongwith penalty under section 77 and section 78 of Finance Act, 1994. The show cause notice was adjudicated, vide impugned order, confirming the duty and imposing penalties and hence, this appeal.

3. Shri Dharmendra Srivastava, Chartered Accountant, appearing for the appellant submits that the appellant acted as a facilitator of transportation of goods from Railway siding to Nepal by arranging either their own trucks or other truck operators/owners on commission basis of Rs.100/- per truck.

Learned Chartered Accountant submits that the demand under 'Goods Transport Agency Service' is not sustainable as the appellant is not a goods transport agency but was engaged in activity of arranging transportation of goods by arranging trucks; it had not issued any consignment note and had issued only truck delivery challans. He submits that the Nepal Parties authorize him, for transport of goods from Railway siding, on the back side of the Railway Receipt; they acknowledge also on the same as a token of receipt of the goods. He submits that Hon'ble Finance Minister, in his budget speech on 08.07.2004, categorically announced that it was not the intention of the legislature to tax individual truck owners or operators. He relies on the decision in the case of **C.C.E. & C., Guntur vs. Kanaka Durga Agro Oil Products Pvt Ltd**[2] and Order-in-Appeal passed in their own case by Commissioner (Appeals) for the subsequent period holding that the

[2] . 2019 (15) S.T.R. 399 (Tri.-Bangalore).

same falls under the negative list under Section 66D(p) of Finance Act, 1994.

4. Learned Chartered Accountant submits also that the appellant is not required to pay tax under 'Goods Transport Agency Service' as the consignor and consignee are persons specified under Rule 2(1) (d) the Service Tax Rules 1994 read with Notification No.30/2012-ST dated 20.06.2012. He submits that the demand on notional freight, of trucks arranged from outsider on commission of Rs.100/- per challan, confirmed under 'Business Auxiliary Service', is not sustainable; the freight in respect of these trucks was paid to the individual truck owners and not to appellant by various Nepal parties; It is not an income at the hands of the appellant.

5. Learned Chartered Accountant submits further that demand, on the charges received for 'loading and unloading of goods' at the railway siding, under 'Goods Transport Agency Service' is not sustainable. The demand was initially proposed in the show cause notice under 'Manpower Recruitment Service or Supply Service' whereas the impugned order confirmed the same under 'Goods Transport Agency Service'. He relies on **Balaji Contractor vs. CCE**[3] and **Niranjan Lal Agarwal vs. CCE**[4]**, Raipur**. and submits that when the demand of service tax on account of 'Goods Transport Agency Service' is not sustainable for the reasons cited above, demand of service tax on 'loading and unloading' treating them as incidental services to 'Goods Transport Agency Service' before '30.06.2012' or after '01.07.2012' (as bundled services) is also not sustainable. He further submits that the charges for loading and unloading it received from the Nepali Traders

[3] . 2012 (26) S.T.R. 457 (Tri.-Del.). [4] .2017-TIOL-1071-CESTAT-Del.

were in fact the reimbursement of expenses it paid on behalf of such Nepali clients. He also submits that the demand of service tax on the commission it received from other truck owners is not sustainable. The said commission is not paid by the Nepali parties. Therefore, it cannot be said to be 'Business Auxiliary Service'. He submits that no tax liability arises as appellant is entitled to basic exemption under Notification No.6/2005-ST dated 01.03.2005 and Notification No.33/2012-ST dated 20.06.2012 as may be applicable during the period.

6. Learned Chartered Accountant submits lastly that there is unreasonable delay in issuing of show cause notice; the Department started enquiries vide letter dated 27.10.2009 which was replied; show cause notice was issued after nearly three and half years. There was no suppression of facts as issue involves interpretation of taxes. He relies on **C.C.E., Indore vs. Prashant Electrode**[4] and **Mohan Goldwater Breweries Ltd. vs. C.C.E. & S.T., Lucknow**[6]

7. Shri B. K. Jain, learned Authorised Representative, appearing for the Respondent department, reiterates the findings of the impugned Order-inOriginal and submits that the appellants have rendered the services on 'Goods Transport Agency Service' and have issued challans which incorporate all the particulars as mentioned under Rule 4B read with second proviso to rule 4A of the Service Tax Rules, 1994. The appellant's contention that the demand was confirmed on the basis of assumption and presumption is incorrect. On the challenge of the appellant that whereas a maximum 18 MT can be carried in a truck in a trip, the demand is calculated as rate of 51.67 MT per truck, he submits that he

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[4] . 2006 (196) E.L.T. 297 (Tri.-Del.). [6] .2017 (4) G.S.T.L. 170 (Tri.-All.). [7] .1983 (13) E.L.T. 586 (SC.).

demand was confirmed on the basis of records/ challans made available by the appellant only; it is possible that a single challan may have been used for more than one trip; if there is any ambiguity, it was open to the appellant to come forward with its own calculation with evidence the appellant failed to do so. He relies on **Commissioner of Customs vs. D. Bhurmal**[7] and submits that the department need not prove the case with mathematical precision.

8. Learned Authorised Representative further submits that 'Business Auxiliary Service' also includes service rendered as a commission agent; the appellant arranged truck on a commission of Rs.100/- per truck and therefore it had rendered 'Business Auxiliary Service' and hence the demand was correctly raised. He submits that the appellant have shown income under head of 'loading and unloading' in their books of accounts on the basis of which it was alleged in the show cause notice that the appellant had provided 'Manpower Recruitment Service'; 'loading and unloading' of goods are incidentally to 'Goods Transport Agency Services' provided by the appellant; in view of Board Circular No.104//2008-ST dated 06.08.2008, service tax payable under 'Goods Transport Agency Service' includes 'loading and unloading' charges. Replying to the appellant's contention that the show cause notice demanded service tax on 'Manpower Recruitment Service' whereas Order-in-Original confirmed the demand on 'Goods Transport Agency Service', he submits that it was held in **BSE Brokers Forum vs. SEBI**[5] that as long as the impugned power is traceable to concerned statute, mere omission or error in reciting the correct provision of law does not denude the power of authority. He also relies on **Roche Products Ltd.**

[5] .2001 AIR SCW 628 (SC.). [9] .1989 (44) E.L.T. 194 (SC.).

vs. C.C.[9] and submits that referring wrong provision of law does not vitiate the order.

9. Heard both the sides and perused the records of the case. Brief issues that require concerned in this case is are as to whether

(i). the activity undertaken by the appellant in providing trucks for transportation of goods from railway siding in Gorakhpur to different parts of Nepal are covered under category of transport of goods by road service in terms of Section 65 (105) of Finance Act, 1994?

(ii). the appellants have rendered ' Business Auxiliary Service under section 65(105) (zzb) of Finance Act, 1994 in respect of the commission earned from trucks they hired on behalf of the Nepal parties at a commission?

(iii). it was correct to allege rendering of 'Manpower Recruitment Services' in the show cause notice and confirm the same under 'Goods Transport Agency Service' in the Order-in-Original?

(iv). extended period is invokable in the facts and circumstances of the case and whether penalties imposed are justifiable.

10. We find that the appellant had provided its own trucks or trucks of some others on commission of Rs.100/- to the Nepal traders for carrying of goods i.e. clinker etc from Railway siding in Gorakhpur to different destinations in Nepal. Appellant issued challans for the work undertaken. It is the contention of the department that the said challan has all the ingredients of a consignment note and thus they are 'Goods Transport Agency'. The appellant contends that the Department erred in holding that these delivery challans are nothing but consignment notes. We find that no contract or agreements have been expected to show that the

appellant had undertaken any responsibility to transport the goods or it had just provided the trucks as owners of the trucks. We find that these challans, alleged to be consignment notes by the department, have not been issued against the receipt of goods and they have not undertaken safe delivery of the same from the consigner to the consignee. We have gone through the sample challans and find that the said challans do contain details like truck number, driver name and particulars of the goods. The said challans do not mention separately the consignor and the consignee. It is submitted that the Nepali Traders engaged these trucks from the appellant and others for transporting their own goods for transportation from Gorakhpur to different places in Nepal. Thus, in the facts of the case, it appears that the consignor and consignees are same. Appellant referred to the speech of Hon'ble Finance Minister on 08.07.2004 stating that there has been no intention of law makers to levy service tax on services provided by individual truck owner operators. We find that under the circumstances, department's holding that the challans are consignment notes, is incorrect.

11. Moreover, we find that the whole demand has been made on the basis of an approximate calculation. Such calculation shows, in some cases, that 58 Metric Tonnes of material was transported in a single truck. It is common knowledge that a truck cannot carry more than 18 to 20 Metric Tonnes at a time. Learned authorized representative for the Department has made an argument that the quantities have been taken from the records of the appellant and that if the appellant felt it was wrong, it was free to justify its own calculation with evidence, challan wise and that it was probable that the appellant could have used the same challan for a number of trips by a truck. This argument of the Department is not acceptable. As it is the Department that is alleging non-payment of

service tax, it is incumbent upon the Department to quantify the duty liability in a legally sustainable manner with evidence. Having failed to adduce evidence to substantiate the allegation, the department cannot hide behind the ratio of a judgment, delivered, in some other context, stating that Revenue is not required to prove with mathematical precision. The Department cannot cover up half baked enquiry and issuance of demand under any judicial pronouncement. Instead of proving the existence of distinct elements, to fasten tax liability, like service provider, classification of service rendered, service recipient and consideration received, the department cannot just rely on figures culled from Income Tax Returns, 26AS Statement, balance sheet, profit and loss account etc. The impugned order has seriously erred in confirming the duty liability simply on the basis of the figures obtained from documents like Income Tax Returns etc. without causing a bare minimum enquiry with all the concerned parties. Moreover, the taxability of the appellant when they receive consideration from the customers residing in Nepal, on reverse charge mechanism is not established.

12. Moreover, we find that it is also not established that the appellant's activity falls under 'Goods Transport Agency Services'; no agreement contract etc. whatsoever has been placed on record to arrive at the conclusion that the appellant had rendered 'Goods Transport Agency Services'. The impugned order mainly relies on the part of the definition of 'Goods Transport Agency'. The stress was on the challan alleging that it had all the particulars of a consignment note. It cannot be ascertained who is a consignor and who the consignee is. Such conclusion is erroneous; it is required to be established that the service provider is a 'Goods Transport Agency Services' and only then one can proceed to examine the second part of the definition that the challan constitute the

consignment note referred to therein. The appellant further contended that both the consigner and consignee are in Nepal. They are persons specified under Rule 2(1) (d) of the Service Tax Rules, 1994 read with Notification No.30/2012-ST dated 20.06.2012; the fact that the freight is paid by the foreign entity is not disputed by the Department; even it is assumed that the appellant is required to pay service tax, it can come under the exempted limit over the period of time if the calculations are correctly done and duty liability is fastened correctly. We find that these contentions of the appellants have not been answered.

13. Moreover, we find that the Department was confused where issuing show cause notice. In so far as the 'loading, unloading charges' are concerned, the show cause notice considered them receipts for services rendered as 'Manpower Supply Agency'. The impugned order treats them to be for the 'Goods Transport Agency Services'. We find that to this extent the impugned order has travelled beyond the show cause notice. The Department is trying to shield itself under the ratio of the judgment in the case of **Roche Product Ltd.** (supra) that referring to wrong provision of law would not vitiate the proceedings. Such an assumption would lead to absurd conclusions. We, therefore find that this argument is not acceptable. Correct interpretation of the cited decision of the Apex Court would be to the effect that in case the show cause notice discusses the taxability under a particular classification of service, mere wrong mention of any particular section under which it falls will not have vitiated the proceedings. However, wrong classification itself cannot be covered up by the judgment. Therefore, we are of the considered opinion that the impugned order has travelled beyond scope of the show cause notice as far as loading unloading charges are concerned.

14. Coming to the demand of service tax on 'Business Auxiliary Service' the appellant submits that he has taken only a commission of Rs.100/- per truck when he arranged trucks from other owners. The Department argues that this is 'Business Auxiliary Service'. The consideration for such hiring was not paid by the Nepali Traders. It cannot be said that the appellant had rendered 'Business Auxiliary Service'' to the individual transporters/truck owners. No explanation to that effect was given in the Show Cause Notice or the impugned order. Further, we find that the appellant submits that the the appellant is not liable to pay service tax as 'Goods Transport Agency', and under such circumstances, the commission received by him is within the taxable limits over the years in terms of the Notifications issued from time to time. We find that there is force in the argument of the appellant. As we have held above, the department has simply confirmed the service tax liability against the appellant without going into the details of arrangements between the appellant and his clients relying only on the documents like income tax returns, profit and loss account and balance sheet etc. The appellant's contention on the receipts being within exemption limits, over the years, is acceptable. Under the circumstances, we are of the considered opinion that the demand confirmed is not sustainable. Accordingly, the penalties imposed are not sustainable. As we have held the issue in favour of the appellants, the issue of limitation becomes redundant.

15. We find that learned Chartered Accountant for the appellant has also submitted that for the subsequent period the show cause notice was issued to the appellants covering the period 2012-13 which was confirmed by the Assistant Commissioner of Central Excise and Service Tax Division Gorakhpur. On an appeal filed by the appellant learned Commissioner (Appeals) vide Order-in-Appeal No.119-

120/ST/APPL/LKO/2017 dated 11.04.2017 has allowed the appeal and set aside the impugned order. He further submits that the order has not been appealed and, therefore, attained finality. Learned authorized representative of the department however, submits that the order has been accepted on monitoring account and not on merits. We find that learned Commissioner (Appeals) has gone into the various aspects involved in the case and has come to the conclusion as below.

I observe that taxability as a goods transport agency arises when the person provides services in 'relation to' transport of goods by road and issues consignment note. In the instant case, appellant is not an agent who books for transportation of goods by road by a goods carriage. It is the one who arranges for the transportation of goods through own trucks/trucks taken from the market. Therefore, the appellant is not a Goods transport agent but a Goods transport operator. That further the appellant has not issued any consignment note as it has not entered into any agreement either with the Seller or the purchaser (the Nepal party) for providing any service in relation to transport of goods by road. Truck delivery challans issued by the appellant are not consignment notes as has been contended by the department. That on perusal of copies of delivery challans it can be seen that they contain the signature of the receiver on behalf of the customer, which implies that the Nepal parties receive 'the goods in good condition' and then these goods are transported vide the Truck carrying the Number as quoted in the Challan. Department has failed to establish that these 'Truck delivery challans' are consignment note which are issued by the appellant as Goods t

Transport Agent. That Service tax is on goods transport agencies and not on individual transport vehicle/ truck owners/operator who provides transportation of goods by road through owned trucks/outside trucks, as their services is in the negative list.

Relevant extract of the Section 66D, Negative list of services is reproduced as under:-

The negative list shall comprise of the following services, namely:--

(p) Services by way of transportation of goods-

(i) By road except the services of

(A) A goods transportation agency;

Thus, the impugned activity of the appellant not being in the nature of transportation of goods by road by a GTA is in the negative list and hence, not subject to service tax for the period after 01.07.2012. That when the services of the appellant are not subject to service tax, demand of tax on freight is dropped, therefore, there is no requirement to discuss the issue of taxability on so called 'notional freight' (in respect of trucks arranged from outsiders on commission of Rs.100/- per challan).

(ii)I now take up the issue whether the appellant is liable to pay service tax on commission received in respect of trucks arranged from outside truck operators. Adjudicating Authority has contended that the appellant is engaged in providing 'Business Auxiliary Service' and is liable to pay service tax. Whereas the appellant has contested that the said amount of Rs.100/- per truck is received from the transporter who transported the goods to Nepal. It is not separately paid by the Nepal party. The appellant has contested that since the appellant is not liable to pay service tax as a 'Goods Transport Agency' u/s section 66B of the Finance Act, 1994, the appellant is not liable to pay service tax on commission income for the period 01.12.2012 to 31.12.2013, the gross receipts/billing being below the threshold exemption limit as provided under Notification No.33/2012ST dated 20.06.2012 in each of the disputed years as is evident from the chart provided in the appeal submissions. I agree with the contention of the appellant that having held that appellant is not liable to pay service tax as a goods transport agency, it is entitled to benefit of basic exemption provided vide Notification No.33/2012-ST dated 20.06.2012 on its commission income, gross billing being below Rs.10 lakhs in each of the disputed years hence, it is not liable to pay service tax on it for the said period.

16. On going through the aforesaid orders, we find that learned Commissioner (Appeals) has analyzed the issues correctly and has recorded correct findings. Even though, he decided the issue in the negative list regime, post 1.7.2012, the argument is valid for earlier period also and the impugned demand covers partly the period after 1.7.2012. Learned Commissioner has correctly evaluated the services rendered by the appellants. The Department has accepted the order. It

cannot be said that the order has been accepted on monitory grounds, when an appeal against the earlier order passed is pending before this Bench. Therefore, we are of the opinion that the order has attained finality. For this reason also the earlier order, impugned in the present appeal, confirming the demand cannot be sustained and needs to be set aside.

17. In the result the impugned order dated 16.07.2014 is set aside and the appeal is allowed, with consequential relief, if any.

(Pronounced in open court on 08.08.2022)

(JUSTICE DILIP GUPTA)
PRESIDENT

(P. ANJANI KUMAR)
Member (Technical)

LKS