

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI**

PRINCIPAL BENCH-COURT NO. I

SERVICE TAX APPEAL NO. 51160 OF 2017

[Arising out of Order-in-Original No. UDZ-EXCUS-000-COM-0116-16-17 dated 24.03.2017 passed by the Commissioner, Central Excise, Udaipur]

M/S. SANGAM (INDIA) LIMITED

Village Atun, Chittorgarh Road
Bhilwara

APPELLANT

VS.

COMMISSIONER, CENTRAL EXCISE

142 B, Sector 11, Hiran Magri
Udaipur

RESPONDENT

APPEARANCE:

Ms Neha Choudhary, Advocate for the Appellant
Dr. Radhe Tallo, Authorized Representative for the Department

CORAM:

HON'BLE MR.JUSTICE DILIP GUPTA, PRESIDENT

HON'BLE MS. HEMAMBIKA R PRIYA, MEMBER (TECHNICAL)

DATE OF HEARING :02 February, 2023

DATE OF DECISION :21 February, 2023

FINAL ORDER No. 50167 /2023

PER HEMAMBIKA R PRIYA

Service Tax Appeal No. 51160 of 2017 has been filed by the appellant M/s. Sangam India Limited to assail the Order-In-Original No. UDZ-EXCUS-000-COM-0116-16-17 dated 24.03.2017 wherein the demand of Rs.2,78,47,743/- has been confirmed and certain penalties have also been imposed. The period of show cause notice is from 01.12.2010 to 31.03.2013. The subject appeal relates to the taxability of amount collected as toll (user fee) from user of toll roads under the category of Business Auxiliary Service under proviso to section 73(1) of the Finance Act, 1994.

2. The appellant entered into various agreements with National Highway Authority of India¹ under which it was granted rights of collection of toll tax (user fee) at designated sites. NHAI is authorised to impose and collect such user fee for use of highways under of National Highways Act, 1956 read with relevant Rules. The NHAI invited bids from contractors for collection of toll at specified locations for specified period by issuing tenders for the same. In response to one such tender, the appellant had submitted their proposal which was accepted by NHAI. The Appellant was thereafter given the right for collection of toll charges. Following the receipt of an intelligence that the appellant was engaged in providing taxable service and was not registered with the Service Tax department, he was asked to submit various documents to the jurisdictional Service Tax authority. On completion of the investigation, a show cause notice dated 17.12.2015 was issued to the Appellant alleging that the Appellant was rendering services to the user of highway on behalf of NHAI to collect the user fee; and that on account of these services, the Appellant was liable to pay the amount to the NHAI only to the extent of bid amount as per the contract and entitled to retain the amount over and above the bid amount towards its consideration for the activities undertaken on behalf of its client i.e. NHAI. In this context, reliance was placed on Circular No. 152/3/2012-ST dated February 22, 2012.

3. For the period from July 01,2012 onwards, it was alleged that the services provided by the appellant does not fall under section 66 D(h) of the Act as it covers the services by ways of access to the road or bridge on payment of toll charges. Therefore, service tax was leviable.

4. We have heard Ms Neha Choudhary, learned counsel for the appellant and Dr. Radhe Tallo, learned authorised representative appearing for the Department.

1 NHAI

5. The learned counsel for the appellant placed reliance on contract between the appellant and NHAI and submitted that the appellant is an independent contractor, having their own separate and independent establishment and was engaged in the business of providing various services on contract basis, which is as follows:

B) WHEREAS the Contractor is authorized by its Memorandum of Association Bye-laws to carry on the business of providing various services on contract basis through its employees employed regularly or otherwise.

(C) AND WHEREAS the Contractor has its own separate and independent establishment which

(a) has been registered under the provisions of the Shops & Establishments Act, 1954 of the (mention the name of concerned State);

(b) is licensed under the provisions of the Contract Labour (Regulations & Abolition) Act, 1970 and has obtained license No. dt.

AND WHEREAS the Contractor undertakes to get itself licensed and/or registered with the appropriate Authority under the relevant laws mentioned above. And shall furnish necessary proof in this regard within 7 days of signing of this contract.

(H) AND WHEREAS the Authority invited bids from interested entrepreneurs for collection of USER Fee for the use of the said section of National Highway/ for a period of one years User Fee. The Contractor is one of those bidders who submitted bid and quoted in its offer that in lieu of transferring Central Government's User Fee collection rights for the said Section of the National Highway or the said bridge for aforementioned period, the Contractor shall remit the following amount to the Authority so as to be received by the Authority latest by TUESDAY of every week and if Tuesday happens to be a BANK Holiday, then the NEXT bank working day as indicated below by way of a demand draft / pay order for the said section of National Highway]

6. A plain reading of the contract makes it abundantly clear that the appellant is an independent Contractor, having their own separate and independent establishment and are engaged in providing service on contract basis. The amount payable by the appellant to NHAI was fixed as per the contract, and any loss or profit arising out of such collection, is to be borne by the appellant. Attention was drawn to the amount paid to NHAI in financial year 2013-2014 which was more than the amount

collected by the appellant as toll tax. This clearly indicates that the appellant was granted the right and collection of toll by NHAI for a fixed amount, which was regulated by the provisions of NHAI Act and user fees Rules. She relied on Recitals B and C of the contract to buttress her arguments. As regards the allegation of the appellant acting as Commission Agent, learned counsel argued that explanation (a) to section 65(1) of the Finance Act, 1994, presupposes existence of 3 parties. In the instant case, there are only 2- viz: NHAI and the appellant. Thus the appellant's activities cannot be that of 'Commission Agent'. She relied on the following judgements:

1. **Commissioner of Service Tax, Mumbai vs Ideal Road Builders P Ltd. and anr.** ²
2. **Souvenir Developers India Pvt Ltd. vs CCE C & ST-I**³,
3. **Ashoka Buildcon vs CST, Nashik** ⁴
4. **Bans Sands TTC vs CCE, New Delhi**⁵

As regards the demand for the period 01.07.2012 to 31.03.2013, she stated that the demand was not sustainable as the service is covered under section 66 D(h) of the Act.

7. The learned Authorised Representative appearing for the department submits that in the contract between the appellant and NHAI, the appellant/service provider has agreed to undertake the aforesaid activity and both the parties have signed the contract to abide by the terms & conditions for carrying out the activities of collection of toll fees from the users of the road. Thus, this activity of collection of toll fees for NHAI is covered by the phrase "on behalf of". He argued that without consent of NHAI, nobody can collect the toll fees from the user of the road. Hence, the appellant was acting as a representative of NHAI before the

2 [2017 (10) TMI 401 – CESTAT Mumbai];

3 [2022 (5) TMI 868-CESTAT, Mumbai];

4 [2017 (49) STR 404 (Tri-Mum)];

5 [2016 (9) TMI 374 CESTAT, New Delhi.

users of the road, and taking fees on behalf of NHAI. Therefore, the appellant was acting as contractor for NHAI only and collecting the toll charges from the users of the road and submitting the records to the authority. It is also a fact that by way of the contract, the NHAI has given the rights to collect only the determined toll fees from the user of the road for a specific period and the ownership of the road has not been given. Therefore, the appellant is not a Principal for taking any decision for running of the toll plaza. Thus, the appellant is an entity legally appointed by the NHAI to act on its behalf and does not have a conflict of interest in carrying out the said act of toll collection. As such, they are working as agent to principal basis and their consideration is the amount collected over and above the bid amount paid to NHAI. As per Section, 67 of Finance Act 1994, "consideration" includes any amount that is payable for the taxable services provided or to be provided. In this case, the consideration has been determined by way of collection of toll fees over and above the bid amount. Thus, the amount as retained by the appellant towards their services is a consideration in terms of Section 67 of the Act *ibid*.

8. Learned authorised representative further submits that the service provider was appointed as contractor under the contract to run the toll plaza on behalf of the NHAI and were given rights to collect the toll user fees from the users of the highway or bridge on behalf of the NHAI. Therefore, they were collecting toll fees from the users of the toll road on behalf of NHAI and also providing service of access to toll road on behalf of the client. Therefore, their services were definitely covered under the provisions of service as commission agent in terms of clause (a) (ii) and (iv) of the Explanation given under Section 65(19) of the Finance Act, 1994 and are taxable under the provisions of Section 65(105)(zzb) of the Act *ibid* upto 30.06.2012. With effect from 01.07.2012, as per Section 65B(44) all services became taxable except the services specified in negative list under Section 66D of

the Act. As per the clause (h) of Section 66D of the Act, only service by way of access to a road or a bridge on payment of toll charges is covered in the negative list. This clause grants exemption from levy of service tax to the services availed by the person to get access to a road or bridge on payment of toll charges. The department has demanded the service tax on the amount retained by the service provider as consideration during the course of providing the services of toll collection from the users of the toll road to the NHAI. Thus, the services provided by the service provider are not covered under the negative list and was liable to service tax. This contention also gets support from Circular No. 152/3/2012-ST dated 22.02.2012 wherein it was clarified that if Special Purpose Vehicle engages an independent entity to collect toll from users on its behalf and a part of toll collection is retained by that independent entity as commission or is compensated in any other manner, service tax liability arises on such commission or charges, under the Business Auxiliary Service under Section 65(105) (zzb) read with Section 65(19) of the Finance Act, 1994 upto 30.06.2012. Therefore, the services as rendered by the service provider are liable to service tax under the category of Business Auxiliary Service under Section 65(105) (zzb) read with Section 65(19) of the Finance Act, 1994 upto 30.06.2012. With effect from 01.07.2012, 'as per Section 65B(44) of Finance Act 1994, "service" includes any activity carried out by a person for another for consideration. These services are not covered under any exemption granted vide Notification No. 25/2012 or any other notification.

9. We have heard the arguments carefully. The core issue to be decided is whether the collection of toll /user fee by the appellant on behalf of NHAI tantamounts to a service and whether such amount is chargeable to service tax?

10. We note that the appellant responded to a tender floated by NHAI for collection of toll charges on specified sections of the

highways. The appellant was successful in this bid and offered the highest assured payment at specified intervals and emerged as the designated operator. The expenditure for maintenance of the assigned section was to be met from the toll collected at rates determined by the Government from time to time with the balance, if any, after the setting off the lumpsum payments, being the returns to the operator. The non-payment of tax on this consideration led to issue of show cause notice culminating in the impugned order.

11. We find that the allegation that the appellant worked as an 'Commission Agent' on whose behalf he collects the toll, appears to have overlooked the underlying scheme of the tender which brought the appellant into this transaction. The contractual arrangement between the appellant and NHAI was for undertaking the collection of toll or user fee. The terms of the contract is very clear: possession of the 'Kanwalias Toll Plaza' asset is transferred to the appellant for the stream of lumpsum payment guaranteed by the appellant. Any deficit returns owing to decreased vehicular traffic or any other reason affects the revenue stream of the appellant. A 'Commission Agent' is akin to a channel partner in delivery of goods/service, wherein the Principal bears all the risks. In the instant case, the tax liability does not arise by way of being Commission Agent as per section 65(19) of the Finance Act, 1994 for the period prior to introduction of negative list regime.

12. We note that this issue under consideration is squarely covered by the order of this Tribunal in the case of **Souvenir Developers India Pvt. Ltd vs Commissioner of Central Excise, Customs & Service Tax I** (Supra). The relevant extract is as follows:

"10. The submission that the agencies of the State Government are 'clients' of the appellant on whose behalf maintenance of roads is undertaken appears to have overlooked the underlying scheme of the tender which brought the appellant in to the transaction. The

contractual arrangement between the appellant and the agencies of the State was for undertaking collection of 'toll' or 'user fee', as the case may be, while also ensuring maintenance of roads in the condition in which these were handed over. These may, at best, be perceived as rendering service to these agencies of the State, and with 'user' of the road as nothing but statistical probability when their bid was made and accepted, having no other intended recipient. Even this restricted depiction is founded solely on the fitment of the statutory definitions of the taxable service on to the commercial definitions employed in the contract without delving into the scheme. It is moot if, in the determination of tax liability, the commercial expressions deployed in a contract should be so construed, as the adjudicating authority has, without scrutinizing the context of the entirety of the contract for fitment within the charging provision of the statute.

11. 'Toll' is a constitutionally authorized levy assigned to Governments of Constituent States of the Union and, unarguably, to be collected under the authority of the State Government. It is not the case of the service tax officers that the mechanism erected for such collection compromises the characteristic of the levy into two - 'toll' and other - but that denomination of the latter as 'commission' in the contract constitutes two activities of which only one was taxable. Concatenating the deprivation of authority to determine the charges leviable from users and the monitorial oversight by the agencies of the State Government, the adjudicating authority concluded that 'principal and agent' relationship existed.

12. The megatrends in infrastructure development of the country in recent decades have increasingly incorporated private sector participation, to a lesser or larger degree, in big projects requiring massive investment for transfer of risk to the private entity - whose core competency it is - and, in return for assured lumpsum payment, also the potential earnings through models such as 'Build Operate Transfer' (BOT) and 'Build Own Operate Transfer' (BOOT). The terms of engagement is thus clear : possession of the upgraded/constructed asset is transferred to the appellant for the stream of lumpsum payment guaranteed by the appellant while alienating risk of sub-optimal use and risk of asset deterioration. Any deficit in returns from lower traffic or owing to maintenance costs dents only the purse of the appellant. A 'commission agent' is a channel partner in delivery of goods/service in which the risk of market rejection continues to be borne by the principal and bears no resemblance similarity to the contractual obligation in the impugned transaction of the appellant which is all about risk assumption. Oversight by agencies of the State is intended to assure proper maintenance of the asset and fixation of rates is retained by the Government to prevent exploitative exaction both of which are mandated by public interest and not as a facet of principal-agent equation. Thus, tax liability does not arise by way of being 'commission agent' in Section 65(19) of Finance Act, 1994 for the period prior to introduction of 'negative list' regime.

13. Insofar as the period after 1st July, 2012 is concerned, the adjudicating authority has determined that the activity conforms to the definition of 'service' in Section 65B(44) of Finance Act, 1994 but devoid

of the privilege of exclusion afforded by Section 66D(h) of Finance Act, 1994 that is available only to agencies of State Government and not to the appellant rendering service to the said agency. Reliance was placed on Circular [No. 152/3/2012-S.T., dated 22nd February, 2012] of Central Board of Excise & Customs (CBE&C) distinguished the collection of 'toll' by a Special Purpose Vehicle (SPV) established for a project and collection of 'toll' by independent entity engaged for collection on commission, or other basis, for excluding the appellant from immunity to tax.

14. The narration in the said circular suggesting the dichotomous treatment does not even begin to appreciate the complexity of infrastructural creation. It was probably not intended to clarify anything beyond a model for collection simpliciter and the construing of such bland arrangement as intendment of tax liability in all models of road infrastructure partnership designs appears to be overreach on the part of the adjudicating authority. The circular, not having considered the degrees of private participation in infrastructure projects, is not a reliable guide to tax liability except in instances that was so intended therein.

15. We fail to perceive the authority under which the impugned order has concluded that, with effect from 1st July, 2012, the activity enumerated in the 'negative list' in Section 66D of Finance Act, 1994 is restricted to the State and to agencies of the State. The exclusion of service by way of access to road or a

'(h) bridge on payment of toll charges;'

in Section 66D of Finance Act, 1994 does not bespeak any such restriction on the provider of service. Therefore, there can be no controversy on the immunity from tax for the period after 1st July, 2012 merely from transfer of responsibility for collection to the appellant."

13. We also find that the Tribunal has consistently held the same view in several of its decisions:

- 1) **Ideal Road Builders P Ltd. vs Commissioner of Service Tax, Mumbai [2015 (40) STR 480 (Tri-Mum)];**
- 2) **Patel Infrastructure Pvt. Ltd. vs Commissioner of Central Excise, Rajkot [2014 (33) STR 701 (Tri-Ahmd)]; and**
- 3) **Ashoka Buildcon Ltd. vs Commissioner of Service Tax, Nashik [2017 (49) STR 404 (Tri-Mum)].**

14. In view of the above, we set aside the Order-in-Original dated 24.03.2017 and allow the appeal.

(Pronounced in the open court on 21 February, 2023)

(JUSTICE DILIP GUPTA)
PRESIDENT

(HEMAMBIKA R PRIYA)
MEMBER (TECHNICAL)

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