(2021) 12 CAL CK 0022

In the Calcutta High Court

Case No : CEXA No. 110 Of 2018

Commissioner Of Central Excise & Service Tax, Haldia Commissionerate — APPELLANT

Vs

M/S. Industrial Handling — RESPONDENT

Date of Decision : 06-12-2021

Acts Referred:

Service Tax Rules, 1994 — Rule 4(1)
Central Excise Act, 1944 — Section 35G
Central Goods and Service Tax Act, 2017 — Section 174
Finance Act, 1994 — Section 65(19), 65(104)(c), 65(105)(zzzzj)

Citation : (2021) 12 CAL CK 0022

Hon'ble Judges : T. S. Sivagnanam, J;Hiranmay Bhattacharyya, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

T. S. Sivagananam, J

This appeal by the Revenue filed under Section 35G of the Central Excise Act, 1944 read with Section 174 of the Central Goods and Service Tax Act, 2017 is directed against the order dated 19th June, 2018 passed by the Customs, Excise and Service Tax Appellate Tribunal, East Zonal Bench, Kolkata in S.T. Appeal No. 147 of 2009.

The appeal was admitted on 9th September, 2019 on the following substantial questions of law :

i. Whether the notification No. 15/2006-ST dated 24th April, 2006 effective from 1st May, 2006 or the amendment to the Finance Act, 1994 with effect from 16th May, 2008 relating to supply of tangible goods applied to the services rendered by the respondent assessee?

ii. Whether the tribunal applied the law correctly in its impugned order dated 19th June, 2018?

We have heard Mr. Somnath Ganguli, learned standing counsel appearing for the appellant/Revenue and Mr. Sudhir Kr. Mehta, learned counsel appearing for the respondent/assessee.

The Commissioner of Central Excise, Haldia Commissionerate, Kolkata issued show cause notice dated 22nd July, 2008 alleging that the respondent/assessee had not just supplied material handling machine on hire to provide the service of material handling with the help of material handling equipment such as Hydra/ Cranes etc. and their operating/maintaining personnel, that is the services which is apparently covered within the meaning of "Support Services of Business or Commerce" as defined under Section 65 (104c) of the Finance Act which came into effect from 1st May, 2006 vide Notification No. 15/2006-ST dated 24th April, 2006. With this allegation, the respondent/assessee was called upon to show case as to why they should not be registered with the Service Tax Authority under Section 69 of the Act read with Rule 4(1) of the Service Tax Rules, 1994; why a sum of Rs.1,43,43,937/- should not be demanded as service tax payable by the assessee, why interest should not be charged and demanded and why penalty should not be imposed. The assessee submitted their reply contending that the term 'Business Support Services' as defined under Section 65 (104c) of the Act is in relation to business or commerce and in terms of the dictionary meaning of the word 'commerce' it is an activity of buying and selling and besides that service must be outsourced. Further the assessee contended that the client who had hired Cranes from the assessee are engineering firms who should undertake project operation involving a series of activities such as earth moving, material lifting, construction, installation etc. for completion of the project. The assessee did not handle any of the series of activities by giving its Cranes on hire, not to speak of handling details of operation involved which might have been done by their client. Further, the assessee contended that they did not handle materials and the same were done by their client with the help of Cranes which were taken on hire from the assessee. Therefore, the assessee contended that it was erroneous on the part of the Department to hold that the assessee had rendered the services in relation to the logistic to their client and thus the said services is classified under the category of "Support Services of Business or Commerce" as defined under section 65 (104c) of the Act. Further, it was contended that the services of providing material handling equipment on hire to any person as in the case of the assessee was not within the ambit of services tax during the period under consideration, which is clear from the fact that service tax has been imposed for the first time on such activity during the budget 2008-09 by which sub-clause (zzzzj) was inserted in clause 105 of section 65 of the Act effective from 16th May, 2008. Thus, it was contended that the Crane is an equipment/machinery which was let out on hire by the assessee for the use of their client for a certain period of time without transferring right of possession and effective control of such machinery/equipment and, therefore, it would fall within the said definition of the said services for rendering material handling equipment on hire for use of their client and it was never within the ambit of service tax before 16th May, 2008. Apart from the above legal contention, the assessee also substantiated their case on facts and relied on various decisions of the Hon'ble Supreme Court, the High Courts and that of the Tribunal. The Commissioner did not agree with the contention placed by the assessee and by an order dated 23rd March, 2009 confirmed the proposal in the show cause notice.

Aggrieved by the said order, the assessee filed the appeal before the Tribunal. The short question, which falls for consideration before the Tribunal was whether supply of tangible goods by the respondent/assessee could be brought within the definition of "Support Services of Business or Commerce" as defined under section 65(104c) of the Finance Act, 1994. The Tribunal after taking note of the definition which was being inserted by sub-clause (zzzzj) in clause 105 of Section 65 of the Act held that the activity of supply of material handling equipment such as Cranes, etc. is not leviable under the category of "Support Services of Business or Commerce" and this activity has come to the scope of service tax category only with effect from 16th May, 2008 and, therefore, set aside the order passed by the Commissioner. Aggrieved by the same, the Revenue before us by way of this appeal.

The learned counsel for the respondent raised a preliminary objection with regard to the maintainability of this appeal before this court on the ground that the issue involved relates to classification dispute and the appeal, if any, can be maintained only before the Hon'ble Supreme Court.

We have heard the learned standing counsel on the above submission. At the first blush, it appears that the matter is purely a classification dispute. However, on close scrutiny of the fact we find that the core issue is involved whether the adjudicating authority was right in trying to import the fact of the definition which was inserted with effect from 2008 - 09 in sub-clause (zzzzj) in clause 105 of section 65 of the Act which, admittedly, came into effect only from 16th May, 2008. The said sub-clause has newly been inserted in the statute. The settled legal interpretation which has been given by the Hon'ble Supreme Court in several decisions when amendment brought about to a statute by insertion of a new definition or a clause, such insertion will always be prospective in nature. In this regard, we are guided by the decision of the Hon'ble Supreme Court in Balaji Enterprises vs. Collector of Central Excise, Madras, 1997[92] E.L.T. 3 [S.C.]. In the said decision the Court noted that 'waste and scrap' could not be brought to tax as aluminium in crude form as 'waste and scrap' was already included in item no.27(A) of the Tariff and if that is so there would not have been any need for making the entry (aa) and the amendment left sub-item (A) of item 27 untouched. Thus, it was held that the sub-item (aa) was not clarificatory of sub-item (A) of item 27 and, therefore, it cannot be held to be retrospective. Thus, this aspect was rightly noted by the Tribunal. Apart from that the Tribunal has also taken note of the decision of the Calcutta Tribunal in the case of Devanchand Ramsaran vs. Commissioner of C.Ex., Dibrugarh, 2019 (24) G.S.T.L. 646 (Tri.-

Kolkata). In the said case the assessee had challenged the demand for service tax under the category of Business Auxiliary Service. It was contended that the activities carried out by ONGC will not fall within the category of Business Auxiliary Service as the contract clearly indicated that it was a case of pure hire of cranes which was placed at the disposal of ONGC for their operation along with necessary operators. At best such activities are falling under the category of section 65(105)(zzzz), i.e., under the category of 'Supply of Tangible Goods Service' and such service was introduced in the statute only with effect from 16th May, 2008. Therefore, it was argued that the entire demand for service tax under the category of Business Auxiliary Service needs to be set aside. The Tribunal accepted the fact position, noted the contract between the parties and also that the assessee had placed the cranes at disposal of ONGC along with operators and consideration will be paid by ONGC on monthly operation charges as well as empty run charges and, therefore, the Tribunal held that the contract cannot be considered to be that of procurement of services which are inputs for the client for the simple reason that there is no third party in the contract. Further, it was held that the definition of Business Auxiliary Service under section 65(19) is clearly applicable only when the service is rendered on behalf of somebody else. Thus, the assessee succeeded before the Tribunal. The decision of the said case will apply with full force to the case in hand. Furthermore, we find that the Tribunal which is the last fact finding authority in the hierarchy of authorities under the provisions of the Act had examined the facts and concluded that the nature of activity cannot be construed within the ambit of service tax. Thus, we find that there is no error in the order passed by the Tribunal. Accordingly, the appeal filed by the Revenue is dismissed and the substantial questions of law are answered against the Revenue.