(2014) 05 CESTAT CK 0004

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Service Tax Appeal No. 698 Of 2012

?M/s Deepak & Co. APPELLANT

Vs

CCE, New Delhi RESPONDENT

Date of Decision : 09-05-2014

Acts Referred:
Finance Act, 1994 — Section 65(zzzq), 65(105)(zzzq), 65(104c), 65(105)(zzb), 65(19), 65(19)(vi), 75, 76, 77, 78

Citation : (2014) 05 CESTAT CK 0004

Hon'ble Judges : G. Raghuram, J;Rakesh Kumar, Technical Member

Bench : Division Bench

Advocate : Anand Mishra, Sanjay Jain

Final Decision : Allowed

Judgement

1. The facts leading to filing of this appeal are, in brief, as under.

1.1 The appellant specializes in supplying food to train passengers. Apart from this activity, they are also engaged in supplying of bed rolls to the

passengers and cleaning of the coaches and toilets of the trains. The period of dispute in this case is from May 2007 to 31/12/2008. Prior to 1999-

2000, the Indian Railway itself used to give contracts to various persons like the appellant for supply of food on board the trains, supply of bed rolls

etc. Subsequently Indian Railways Catering and Tourism Corporation Ltd. (IRCTC) was set up which is fully owned by the Ministry of Railways.

W.e.f. September 1999, it is IRCTC which was responsible for organizing the catering and hospitality services on board the trains. They act as a

licencing authority of Indian Railways to arrange for private entrepreneurs to undertake various onboard activities relating to the services to be

provided on board the trains. The appellant were awarded licence by IRCTC to supply food and bed rolls to passengers in certain trains and also for

cleaning of the coaches and toilets in those trains. For cleaning of coaches and toilets, the appellant receive an amount from IRCTC on per coach

basis which varies according to the duration of the journey from the starting station to the terminus. For supplying bed rolls to non ACs coaches, the

appellant were charging a specified amount from the passengers, 12% of which was being paid to IRCTC as licence fee and the balance was being

retained by them in respect of supply of bed rolls to passengers. In respect of AC coaches, the appellant were receiving a specified amount per bed

roll from IRCTC. The Department was of the view that the appellant are providing the â??support services of business or commerceâ? taxable under

Section 65(zzzq) readwith Section 65(104c) of the Finance Act, 1994 and accordingly they would be liable to pay service tax on the amount being

received by them from IRCTC. It is on this basis that a show cause notice dated 01/05/09 was issued to the appellant for demand of service tax

amounting to Rs.12,67,522/- from them in respect of business support service alleged to have been provided to IRCTC during period from May 2007

to 31/12/08 alongwith interest thereon Section 75 of the Finance Act, 1994 and also for imposition of penalty on them under Section 76, 77 and 78 ibid.

1.2 The show cause notice was adjudicated by the Additional Commissioner vide order-in-original dated 27/04/10 by which the service tax demand of

Rs.12,67,522/- was confirmed alongwith interest and beside this, penalty of equal amount was imposed on them under Section 78 and penalty of

Rs.1,000/- was imposed under Section 77. On appeal being filed to Commissioner (Appeals) against this order of the Additional Commissioner, the

Commissioner (Appeals) vide order-in-appeal dated 22/2/12 dismissed the appeal. Against this order of the Commissioner (Appeals), this appeal has

been filed.

2. Heard both the sides.

3. Shri Anand Mishra, Advocate, proxy Counsel appearing for the appellant, pleaded that the appellantâ??s activity is supply of bed rolls to

passengers on board the trains and cleaning of coaches and toilets for which they receive remuneration at specified rates from IRCTC, that this

activity of the appellant has been treated as business support service taxable under Section 65(105)(zzzq) readwith Section 65(104c) of the Finance

Act, 1994, that this activity of the appellant is not in the nature of support service of the business or commerce, that the Commissioner (Appeals)

himself in para 9 and 10 of the impugned order has given a finding that the services provided by the appellant are not support service of business or

commerce and has given a finding that the appellantâ??s activity is classifiable as business auxiliary service under Section 65(105)(zzb) readwith

Section 65(19) ibid and has confirmed the demand on this basis, that the Commissioner (Appeals) has gone beyond the allegation made in the show

cause notice, which is not permissible, as the appellant had never been put on notice about taxability of their services under Section 65(105)(zzb)

readwith Section 65(19) as â??business auxiliary serviceâ? and from the very beginning their stand was that their activity is not covered by the

definition of â??support service of business or commerceâ?? and, in fact, is not covered by any other clause of 65(105). He, therefore, pleaded that the

impugned order is not sustainable.

4. Shri Sanjay Jain, the learned DR, defended the impugned order by reiterating the findings of the Commissioner (Appeals) and pleaded that the

services provided by the appellant are business auxiliary service covered by clause (vi) of Section 65(19) in as much as they have provided the

services to passengers on behalf of IRCTC for which they have received remuneration from IRCTC. He, therefore, pleaded that there is no infirmity

in the impugned order.

5. We have considered the submissions from both the sides and perused the records.

6. The show cause notice had been issued on the basis that the activity of the appellant - cleaning of coaches and toilets of certain trains and supply of

bed rolls to the passengers of ACs coaches is the â??support service of business or commerceâ? covered by Section 65(105)(zzzq) readwith Section

65(104c) of the Finance Act, 1994. There is no allegation in the show cause notice that in the alternative the Appellantâ??s services may be taxable

as â??business auxiliary serviceâ? under Section 65(105)(zzb) readwith Section 65(19)(vi). The Commissioner (Appeals) in the impugned order after

giving a finding that the Appellantâ??s activity is not â??support service of business or commerceâ? has gone on to examine the taxability of their

activity as â??business auxiliary serviceâ? under Section 65(105)(zzb) readwith

Section 65(19) and in doing so, he has traveled beyond the scope of

show cause notice which is not permissible in view of the judgment of the Apex court in the cases of CCE, Nagpur vs. Ballaspur Industries Ltd.

reported in 2007 (215) E.L.T. 489 (S.C.) and CCE, Bangalore vs. Brindavan Beverages (P) Ltd. reported in 2007 (213) E.L.T. 487 (S.C.). In view of

this, the impugned order is not sustainable. The same is set aside. The appeal is allowed.

(Operative part of the order pronounced in the open court.)