
(2014) 01 CESTAT CK 0001

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Service Tax Appeal No. 275 Of 2007

M/s Ferro Scrap Nigam Limited

APPELLANT

Vs

CCE, Raipur

RESPONDENT

Date of Decision : 01-01-2014

Acts Referred:

Finance Act, 1994 — Section 65(19), 76, 78
Central Excise Act, 1944 — Section 2(f)

Citation : (2014) 01 CESTAT CK 0001

Hon'ble Judges : Archana Wadhwa, J;Rakesh Kumar, Technical Member

Bench : Division Bench

Advocate : B. L. Narasimhan, Ranjana Jha

Final Decision : Allowed

Judgement

1. After hearing both the sides we find that the demand of duty of Rs.2,38,97,913/- stands confirmed against the appellant alongwith imposition of penalties under Sections 76 and 78 of the Finance Act, for the period 10.09.2004 to 28 02 2005, by way of raising a show cause notice dated 22 06 2006.

2. As per the facts on record appellant is a public sector undertaking and entered into contracts with various steel plants for recovery, processing the scrap out of slag which arises in the factory of the steel plants. They were also to move the said recovered scrap from their production floors located in the plant itself for further use of the same by the steel plants.

3. The appellant were required to undertake the following activities in the steel plants of their clients.

"3. The appellant is first required to collect scrap mixed with slag from different places in the plant like BF Slag pit, Cast House, Ladle Repair Shop, Pig Cast Machine area. From the slag pit, the appellant collects mixture of slag and scrap by digging hot slag with the help of excavator. At pig cast machine area, hot metal is poured at pig casting machine and in this process some part of hot

metal spills over and fall on ground. The appellant collects this spilled over scrap and takes it to scrap processing yard. Apart from collecting scrap from abovesaid areas, the appellant also undertakes cleaning activities in these areas so that the transportation of slag and scrap is not hindered

2. Such collected scrap mixed with either slag or impurities are further processed by the appellant employing different processes like balling, lancing, chisel cutting etc.

3. In the process of balling, the appellant with the help of magnet crane lifts an iron ball weighing 8-10 tons up to a height of 20 feet and drops it on the scrap mixed with slag. Through this process, scrap is separated from slag. At times the mixture of slag & scrap becomes so big and gets attached so tightly that it cannot be separated by balling. In such a case, the appellant separates the scrap from slag by applying process of lancing and chisel cutting".

Revenue by entering an agreement that the said activities of the appellant amounted to production of goods on behalf of its client and they are liable to service tax under Business Auxiliary service (BAS), raised the demand against the appellant, which stands culminated into the impugned order passed by the Commissioner, confirming the demand and imposing penalties

4. During the relevant period the definition of BAS was as under:

"(19) "business auxiliary service" means any service in relation to-

(i) promotion or marketing or sale of goods produced or provided by or belonging to the client, or

(ii) promotion or marketing of service provided by the client. or

(iii) any customer care service provided on behalf of the client, or

(iv) procurement of goods or services, which are inputs for the client, or

(v) production of goods on behalf of the client; or

(vi) provision of service on behalf of the client, or

(vii) a service incidental or auxiliary to any activity specified in sub-clause (i) to (vi) such as billing, issue of collection or recovery of cheques, payments, maintenance of accounts and remittance, inventory management, evaluation or development of prospective customer or vendor, public relation services, management or supervision, and includes services as a commission agent, but does not include any information technology service and any activity that amounts to "manufacture" within the meaning of clause (f) of section 2 of the Central Excise Act, 1944"

5. As such, as seen from the above reproduced definition of BAS, a service provider has to produce the goods on behalf of the client. As such two criterias are required to be satisfied before an activity can be brought under the service

tax net falling under the above category. The first criteria relates to the production of goods and the second relates to the fact that such production has to be "on behalf of the client".

6. Ld. Advocate assails the impugned order on both the above points. His contention is that the activity carried out by the appellant does not amount to production of goods. For the above proposition, he draws our attention to the fact that prior to the present proceedings, the Revenue initiated proceedings against the appellant alleging that they are engaged in the manufacture of the goods, which are liable to duty of excise. The said show cause notice stands decided by the Commissioner of Central Excise vide his order No. Commissioner/RPR/77/2006 dated 21.09.2006. It stands held by the adjudicating authority that the activity of the appellant does not result in the manufacture of another final product inasmuch as the same involves separation of iron material from the molten slag. The said order of the Commissioner stands accepted by the Revenue and no appeal has been filed. By relying upon the same, he submits that inasmuch as the Revenue itself has held that the activity undertaken by the appellant does not amount to manufacture, the Revenue in the present case cannot allege that the same amounts to production of goods. Admittedly, manufacture includes production, though production may not include manufacture. Once the Revenue has itself accepted the fact that there was no manufacture meaning thereby that there was no production, the first criteria of the definition of the BAS does not get satisfied.

Assailing on the second criteria, he submits that in any case such activity was being undertaken by the appellant for various steel plants and was not being undertaken by them on behalf of steel plants. By referring to various decisions wherein the said expression "on behalf of client" has been the subject matter of interpretation, he submits that it stands held that there has to be three parties and service provider has to act on behalf of the one party. It is only in such a situation that the service provider can be said to have acted on behalf of the client. Inasmuch as the appellant, in the present case, is working directly for the steel plant and not on their behalf for any third party, the said second criteria of the definition does not stand satisfied. For the above proposition he relies upon the decisions of the Tribunal in the case of Auto Coats vs. CCE (ST), Coimbatore - 2009 (15) STR 398 (Tri. Chennai), Sonic Watches Ltd. vs. CCE, Vadodara - 2011 (21) STR 34 (Tri. Ahmd.) and Rathore Engg. Works vs. CCE, Chandigarh - 2012 (27) STR 37 (Tri.- Del.) He also draws our attention to the Board Circular dated 15.07.2007 and another Circular dated 27.07.2005 clarifying that inasmuch as the expression "processing and for" were introduced in the definition w.e.f. June 2005, the service provider working as a job worker for his client cannot be held to be working "on behalf of the client" prior to the amendment.

Apart from contesting the demand on merits he also submits that the same is barred by limitation having been raised beyond the normal period. He submits

that the Commissioner was aware of the activities being undertaken by the appellant inasmuch as prior to the present show cause notice, regular show cause notices were being issued to the appellant alleging the said activity to be a "cargo handling activity". Not only that, the Revenue had also issued them excise show cause notice alleging that the appellant is engaged in the manufacture of excisable goods. As such the entire activities were in the knowledge of the Revenue, in which case, no suppression can be attributed to them, justifying invocation of longer period.

7. Countering the arguments Id. DR draws our attention to the detailed process undertaken by the appellant vide which molten metal are separated from the slag and subsequently broken into smaller pieces so as to make them fit for use in the steel plant. As such she submits that the process undertaken by the appellant may not amount to manufacture of excisable goods but the same admittedly amounts to production of goods. As such she submits that the detailed process, as taken note of by the Commissioner in his order, clearly reveals that the appellant is engaged in the production of the goods, thus satisfying the first part of the definition.

As regards the second part of the definition i.e - "on behalf of the client", she submits that during the relevant period the expression - "for" was not introduced in the said definition and as such the

expression - "on behalf of the client" has to be interpreted in a manner which gives wider scope to the same and includes both the situations i.e. for the client and on behalf of the client Merely because the expression "for" was introduced w.e.f. June 2005, does not mean that the earlier definition has to be given restricted meaning.

As regards the appellant's reliance on the order of the Commissioner dated 21.09 2006 holding that the activity does not amount to manufacture, she submits that in fact the said adjudication order supports the Revenue case. The activity may not amount to manufacture but the same definitely amounts to production Inasmuch as the goods involved in the activity undertaken by the appellant have been physically changed and has been converted into the final shape, in which the steel plants can use the same. As regards reliance on the Board's circular, she submits that the same having been issued in the year 2007 relates to the period subsequent to the period involved in the present appeal and in fact deals with entirely different product which is shredding of bio-medical waste, which is not being used further. As regards the decisions of the Tribunal, she submits that during the relevant period though the expression "for the client" was not there but the expression "on behalf of the client" would cover both the situations and as such her arguments on the said point should be taken into consideration.

8. Having appreciated the submissions made by both the sides, we first of all note that there is no dispute on the detailed activity undertaken by the appellant vide which they separate the iron metal from the molten slag. As such we do not

feel the need of referring the same, as the dispute does not revolve around the said activity, but relates to as to whether the said activity can be called as "production of goods" and further "on behalf of the client".

As regards the expression "production of goods", we note that the same was amended in June 2005 and was substituted by the expression - "processing" of goods. As such it is clear that prior to the amendment and in the absence of the words "processing" the same has to be interpreted in a manner that the activity results in production of goods. We may here observe that every production may not amount to manufacture but admittedly every manufacturing activity involves production of goods, inasmuch as the term "manufacture" would include production though every production may not include the manufacturing activity. Inasmuch as the Commissioner in his order dated 21.09.2006 has held that the said activity does not amount to manufacture and such order stands accepted by the Revenue, it has to be held that there was no production of goods. As such we agree with the Id. Advocate that the first criteria of the definition is not satisfied.

9. As regards second criteria that the said activity has to be "on behalf of the client, we find that the matter is no longer res-integra and stand settled by various decisions of the Tribunal. Even the Board's circular has clarified the same. For ready reference we may reproduce the relevant portion:

Circular No. 137/111 /2007-CX dated 15.07.2007

"03. The matter has been examined by the Board. The view of the Board is that the incineration shredding of bio-medical waste can, by no stretch of imagination, be called as "processing of goods", even if in certain cases the shredded materials may be used as filters etc. Further, the activity a/so does not qualify to be called as provision of service on behalf of the client. This is because the taxable activity envisaged under this category of 'business auxiliary service' is that while the "client" is obliged to provide some service to a 3rd person but instead of the client providing such service, the service provider provides the such service to the 3rd person, on behalf of the client i.e. acting as an agent of the client. Admittedly, in the instant case, there is no 3rd person. Thus, the activity as undertaken does not fall under business auxiliary service or any other existing taxable services."

Circular No. B1/6/2005-TRU dated 27 Jul. 2005

"24 1 One of the taxable activities prior to amendment by Finance Act, 2005 under business auxiliary service was 'production of goods on behalf of the client'. The activities that amount to manufacture within the Central Excise Act were not covered within the scope of the taxable service. Amendments have been made to define this taxable activity as 'production or processing of goods for, or on behalf of the client'. The condition that only such activities would be liable to service tax which do not amount to manufacture under Central Excise Law would, however, continue

24.2 A point was raised whether 'production of goods on behalf of the client' covers situations where the service provider undertakes Job work for the client. In view of the amendment, production or processing (not amounting to manufacture) done either for the client or on behalf of the client would be liable to service tax"

10. Apart from the above circulars of the Board there are decisions of the Tribunal settling the issue at rest In the case of Auto Coats - 2009 (15) STR 398 (Tri. Chen.) it stands held that prior to 16 06 2005 unless a person was engaged by another for processing the goods entrusted by a third person such activity would not be exigible to service tax. Similarly in the case of Sonic Watches Ltd.- 2011 (21) STR 34 (Tri.) it was held as under

"5. We find that activity undertaken by the appellants in this case was similar to the one as existed in the case of Auto Coats. Therefore, in the light of above two decisions discussed above, it cannot be said that appellants have undertaken Job work on behalf of the clients, in view of the fact that there were only two parties to the transaction in this case, whereas where the production is on behalf of the clients, there would be three parties. Since, services undertaken by the appellants is not covered by the definition, no service tax is attracted Accordingly, impugned order is set-aside and appeal is allowed"

Further, in the case of Rathore Engg. Works - 2012 (27) STR 37 (Tri. Del.), the Tribunal held as under -

"6. The appellants carry out the process of grinding and smoothening the edges, called fettling of the rough castings received from principal manufacturers who clear the goods after carrying out further processes Since there is no dispute that this activity of the appellants does not amount to manufacture, ii can only be called processing not amounting to manufacture, which was not taxable during the period of dispute. We also agree with the appellant's plea that as held by the Tribunal in cases of M/s Auto Coats. Vs. CCE, Coimbatore (supra), M/s Gedee Weiler Pvt. Ltd. vs. CCE. Coimb atore (supra) and M/s Sonic Watches vs. CCE. Vadodara (supra) during the period of dispute, the wordings of Clause (v) of Section 65(19) of the Finance Act, 1994 did not cover processing of goods ob job work basis which got covered by this clause, when the same was substituted by "production or processing of goods for, or on behalf of, the clients." In view of this the impugned order is not sustainable The same is set aside. The appeals as well as the stay applications are allowed"

11. In view of our foregoing discussions, we hold that the appellant's activity prior to June 2005 cannot be held to be exigible to service tax under the category of BAS. Accordingly, we set aside the impugned order and allow the appeal with consequential relief to the appellant. Inasmuch as we have held in favour of the appellant on merits, we do not think it necessary to deal with the appellant's plea of limitation Appeal is disposed of in the above manner.