(2021) 01 CESTAT CK 0029

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Service Tax Appeal No. 37, 44 Of 2010

M/s Ferro Scrap Nigam Limited @Hash Commr. Of CGST And Excise, Bolpur

Date of Decision : 19-01-2021

Acts Referred:

Finance Act, 1994 — Section 65(19)(v), 76, 78, 93(1)
Central Excise Act, 1944 — Section 2, 2(f)

Citation : (2021) 01 CESTAT CK 0029

Hon'ble Judges : P. K. Choudhary, J;P. Anjani kumar, Technical Member

Bench : Division Bench

Advocate : Rahul Tangri, D.Halder

Final Decision : Allowed/Dismissed

Judgement

1. The appeals filed by the assessee and the Revenue are being taken up together for disposal by this common order. The Ld. Commissioner of

Central Excise, Bolpur vide impugned Order dated 24.09.2009 has confirmed demand of Service Tax of Rs.5,90,40,393/- under the category of

Business Auxiliary Services (BAS) and Cargo Handling Services (CHS) for the period from April 2003 to March 2008 alongwith penalty under

Section 76 and 78 of the Finance Act, 1994 (the Act) and applicable interest under Section 75 of the Act. Against the said demand, the assessee is in

appeal registered as ST/37/2010. Since the Ld. Commissioner has allowed the cum-tax benefit while quantifying the tax demand as aforesaid, the

Department has preferred the appeal registered as ST/44/2010.

2. The assessee, M/s. Ferro Scrap Nigam Ltd, is a PSU and is engaged in handling and processing of slag mixture generated by steel companies

(clients) during the manufacturing process undertaken by them. The said processing of slag scrap mixture is undertaken for the purpose of obtaining iron and steel scarp from the said mixture by way of magnetic separation and the iron and steel so obtained is handed over to the client for further use

in the manufacture of dutiable goods. The assessee has entered into similar agreements with Durgapur Steel Plant (DSP), Bokaro Steel Plant and

other steel plants of Steel Authority of India Limited. The scope of work that is being undertaken by the assessee is for recovery of scrap from steel

skull at melting shop by lancing, breaking, cleaning and screening through magnetic separator, loading, unloading and dispatching the slag and scrap at

different sites within the steel plant, handling of slag pit by breaking the slag mass mixed with scarp and feeding the metal free slag to the screening

plant. Since the rates have been separately mentioned, the department has classified the activity of recovery and processing of scrap and slag under

BAS and transportation and loading/ unloading of scrap and slag within the plant under CHS.

3. Sri Rahul Tangri, Ld.Advocate appeared for the assessee and Sri D. Halder, Ld.Departmental Representative (D.R.), appeared for the Revenue.

4. The Ld. Advocate for the assessee at the outset submitted that the issue stands decided in their own appeals by the Tribunal wherein it has been

held that demand under both the category of services, viz, BAS and CHS would not be sustainable in identical set of facts. With regard to the demand

under BAS for the period prior to 16.06.2005, the demand raised under the category of BAS has already been set aside by the Principal Bench at

New Delhi in their case reported as Ferro Scrap Nigam Ltd vs. CCE, Raipur 2014 (1) TMI 1049 CESTAT New Delhi as well as in the case of Auto

Coats vs. CCE, Coimbatore 2009 (15) STR 398 (Tri-Chennai). For the period after 16.06.2005, he submitted that the processing services are held to

be exempted in terms of Notification No.08/2005-ST as held by the Tribunal reported as Ferro Scrap Nigam Ltd vs. CCE, Ranchi 2019 (2) TMI 766

â?" CESTAT-Kolkata. With regard to the demand raised under CHS, he submitted that the activity of shifting, transportation, loading and unloading

within the plant is not taxable as has been held in their case, reported as Ferro Scrap Nigam Ltd vs. CCE, Raipur 2014 (1) TMI 1051 â?" CESTAT,

New Delhi as well as in the case of Modi Constructions Co. vs. CCE Ranchi 2008 (12) STR 34 (Tri-Kol) as affirmed by the Honâ??ble Jharkhand

High Court reported in 2011 (23) STR 6 (Jhar), as well as in other cases. He also contested the imposition of penalty in absence of any fraud or suppression and also the invocation of extended period of limitation.

5. The Ld. D.R. for the Department reiterated the findings of the Ld. Commissioner in the impugned order and pleaded that the appeal filed by the

assessee be rejected being devoid of any merit. For appeal filed by the Revenue, he submitted that benefit of cum-tax should not be allowed and that

the demand as proposed in the Show Cause Notice be confirmed by allowing the Revenue Appeal.

6. Heard both sides through video conferencing and perused the appeal records.

7. We find that the issue already stands decided in favour of the assessee. For the period prior to 16.06.2005, the definition of BAS under Section

65(19)(v) of the Act, inter-alia, mean any service in relation to production of goods on behalf of the client. The Principal Bench in assesseeâ??s own

case, as relied by the assessee, has already observed in identical set of facts that there is no third person in the instant case, whereas the tax can be

levied under BAS only in case the service is provided on behalf of the client i.e. there would be involvement of three parties. The relevant portion of

the decision rendered by the Tribunal in their case is reproduced below:

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

â??(19) â??business auxiliary serviceâ?? means any service in relation to â?

(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 subclause (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 â?? manufactureâ? within the meaning of clause (f) of Section 2 of the

Central Excise Act, 1944â??.

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 â??on behalf of the

clientâ??...................

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 revolves around the said activity, but relates to as to whether the said activity can be called as â??production of goodsâ?

and further â??on behalf of the clientâ??.

As regards the expression â??production of goodsâ?, we note that the same was amended in June 2005 and was substituted by the

expression - â??processingâ? of goods. As such it is clear that prior to the amendment and in the absence of the words â??processingâ?

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

â??manufactureâ? would include production though every production may not include the manufacturing activity. Inasmuch as the

Commissioner in his order dated 21-9-2006 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 ld. Advocate that the first criteria of the

definition is not satisfied.

9. As regards second criteria that the said activity has to be â??on behalf of the clientâ??, we find that the matter is no longer res integra and

stand settled by various decisions of the Tribunal. Even the Boardâ??s Circular has clarified the same. For ready reference we may

reproduce the relevant portion:

Circular No. 137/111/2007-CX, dated 15-7-2007

â??03. The matter has been examined by the Board. The view of the Board is that the incineration/shredding of bio-medical where can, by

no stretch of imagination, be called as â??processing of goodsâ?, even if in certain cases the shredded materials may be used as filters etc.

Further, the activity also 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 â??business auxiliary serviceâ?? is that while the â??clientâ? 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 servicesâ??.

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

â??24.1 One of the taxable activities prior to amendment by Finance Act, 2005 under business auxiliary service was â??production of

goods on behalf of the clientâ?? 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 â??production or processing of goods for, or on behalf

of, the clientâ??. 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 â??production of goods on behalf of the clientâ?? 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 taxâ??.

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) S.T.R. 398 (Tri.-Chen.) it stands held that prior to 16-6-2005 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) S.T.R.

34 (Tri.) it was held as under :

â??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 allowedâ??.

Further, in the case of Rathour Engg. Works - 2012 (27) S.T.R. 37 (Tri.-Del.), the Tribunal held as under :-

â??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, it can only be called processing not amounting to manufacture, which was not taxable during

the period of dispute. We also agree with the appellantâ??s plea that as held by the Tribunal in cases of M/s. Auto Coats. v. CCE,

Coimbatore (supra), M/s. Gedee Weiler Pvt. Ltd. v. CCE, Coimbatore (supra) and M/s. Sonic Watches v. 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 of job work

basis which got covered by this clause, when the same was substituted by â??production or processing of goods for, or on behalf of, the

clients.â? In view of this, the impugned order is not sustainable. The same is set aside. The appeals as well as the stay applications are

allowedâ??.

11. In view of our foregoing discussions, we hold that the appellantâ??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 appellantâ??s plea of limitation. Appeal is disposed of in the above manner.â??

8. Further, for the period after 16.06.2005, the Tribunal in their own case as reported in 2019 (2) TMI 766 â?" CESTAT Kolkata, has held that the

assessee is entitled to exemption under Notification no. 8/2005 dated 01.03.2005. The relevant portion of the decision is reproduced below:

â??9. Next we consider the liability for the period w.e.f. 16-6-2005. When we consider the definition in sub-clause (v) of Section 65(19) for

the period prior to and subsequent to 16-6-2005, we note that for the later period, the definition has included processing of goods in

addition to production of goods. The claim of the appellant is that the liability of service tax would stand extinguished through the

Notification No. 8/2005-S.T., dated 1-3-2005. The lower appellate authority has denied the benefit of the said exemption to the appellant.

For ready reference, we reproduce below the Notification No. 8/2005-S.T. ibid :

â??In exercise of the powers conferred by sub-section (1) of Section 93 of the Finance Act, 1994 (32 of 1994) (hereinafter referred to as

the Finance Act), the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby exempts the taxable

service of [production or processing of goods for, or on behalf of, the client] referred in sub-clause (v) of clause (19) of Section 65 of the

said Finance Act, from the whole of service tax leviable thereon under Section 66 of the said Finance Act :

Provided that the said exemption shall apply only in cases where such goods are produced [or processed] using raw materials or

semifinished goods supplied by the client and goods so produced [or processed] are returned back to the said client for use in or in

relation to manufacture of any other goods falling under the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986), as amended

by the Central Excise Tariff (Amendment) Act, 2004 (5 of 2005), on which appropriate duty of excise is payable.

Explanation. - For the purpose of this notification, -

(i) the expression â??production [processing] of goodsâ? means working upon raw materials or semi-finished goods so as to complete part

or whole of production [or processing], subject to the condition that such production [or processing] does not amount to â??manufactureâ?? within the meaning of Clause (f) of Section 2 of the Central Excise Act, 1944 (1 of 1944).

(ii) â??appropriate duty of exciseâ?? shall not include â??Nilâ?? rate of duty or duty of excise wholly exempt.â??

10. The activities carried out by the appellant for BSP is in the nature of processing. It is evident from the record that the appellant was

required to recover of iron steel scrap from various stages of manufacture and the collected scrap was to be returned to BSP, but the

benefit was denied to the appellant by taking the view that such scrap cannot be covered by expression of â??raw materialsâ? or

â??semifinished goodsâ?. But such a view is not called for. The scrap is nothing, but a raw material for use in melting and further

manufacture within the iron and steel plant.

11. On behalf of Revenue, the Ld. DR has further raised a doubt about the satisfaction of the condition of the second limb of the

notification i.e. to the effect that the processed goods have been returned back to the client and the same has been further used in the

manufacture of other goods, on which appropriate duty of excise is payable. In this connection, we note that the Ld. Advocate on behalf of

the appellant, has submitted a certificate, dated 4th September, 2009, issued by M/s. SAIL, Bokaro Steel Plant, wherein the Deputy General

Manager (F & A) has certified that the scrap, after processing and recovery, has been returned back and the same has been used for the

manufacture of dutiable steel products. Giving due consideration to such end-use certificate submitted by the Public Sector Undertaking, we

are of the view that the appellant will be entitled to the benefit of Notification No. 8/2005, dated 1-3-2005. Consequently, we set aside the

demand for service tax made in the impugned order and allow the appeal.

9. With regard to the demand raised on shifting, transportation, loading and unloading from one place to another inside the steel plant of the client itself,

the Tribunal in their own case as reported in 2014 (1) TMI 1051- CESTAT-New Delhi has observed that :-

â??7. In any case, we have seen the decision of the Tribunal as upheld by Honâ??ble High Court in the case of Modi Construction Co. vs.

CCE, Ranchi (supra), it stands clearly held by the Tribunal that service of shifting, transportation or raw materials, waste materials, and

finished products from one place to another, inside the plant itself, does not fall under the taxing category of Cargo Handling Services. The

activities undertaken by the appellant are admittedly within the plant itself. As such, we find that the ratio of the law declared by he Tribunal

in the above referred matter, which also stands upheld by the Honâ??ble Jharkhand High Court, is fully applicable to the facts of this

case.â??

10. In view of the aforesaid, the issue is no longer res-integra, since decided in favour of the assessee. We do not find any reason to take contrary

view and therefore, the demand raised vide the impugned adjudication order cannot be sustained and hence, the same is set aside. Consequently, the

appeal filed by Revenue to dispute the cum tax benefit is liable to be rejected since there cannot be demand of service tax as held above.

11. The appeal filed by assessee is thus allowed with consequential relief as per law. The appeal filed by Revenue is rejected.

(Pronounced in the open court on 19.01.2021)