(2015) 04 CESTAT CK 0011

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Appeal No. 603 Of 2009

M/s. Hans Travels APPELLANT

Vs

C.C.E., Indore RESPONDENT

Date of Decision : 30-04-2015

Acts Referred:

Finance Act, 1994 — Section 65(104c), 65(105)(n), 65(113), 65(115), 76, 77, 78
Finance Act, 2011 — Section 75
Motor Vehicles Act, 1988 — Section 2(43), 65(114), 214

Citation : (2015) 04 CESTAT CK 0011

Hon'ble Judges : G. Raghuram, J;R. K. Singh, Technical Member

Bench : Division Bench

Advocate : Manish Saharah, Amresh Jain

Final Decision : Disposed Of

Judgement

1. Appeal has been filed against the Order-in-Original No.16/COMMR./ST/IND/2009, dated 06.05.2009 in terms of which service tax demand of

Rs.1,21,99,408/- was confirmed for the period 2004-05 to 2007-08 along with interest and penalties (under Sections 76, 77 and 78 of the Finance Act,

1994). Out of the total demand, a demand of Rs.1,12,81,122/- was confirmed under the category of ""Travel Agent and Tour Operator"" service in

tourist vehicles; demand of Rs.9,18,286/- was confirmed under the category of Business Support Service (BSS) on charges recovered for the goods

transported by the appellant on the ground that the goods transported belonged to businessmen and thus related to commercial activity of these

businessmen and therefore service rendered was BSS [Section 65(104c) ibid] and not GTA service. The impugned demand was confirmed invoking

the extended period holding that the appellant indulged in suppression of facts.

2. The appellant has contended that (i) out of the total demand under Travel Agent and Tour Operator service, an amount of Rs 98,424/- pertains to

the service tax on the amount received as commission by it in respect of booking of passengers for others The appellant has not contested this liability

and indeed has paid the same. Thus, this amount is not a subject matter of dispute. (ii) As regards the remaining impugned demand under tour operator

service, the appellant stated that it was operating buses as stage carriage, although the permit was for contract carriage and therefore it was not

providing tour operator service. It also stated that such service has since been exempted under Notification No.20/2009-ST, dated 07.07.2009, which

was given retrospective effect from 01.04.2000 vide Section 75 of the Finance Act, 2011. It relied upon the judgement of CESTAT in the case of

M/s. Eagle Corporation Pvt. Ltd. Vs. CCE, Rajkot [2011- TIOL-876- CESTAT-AHMJ which remanded the case to the lower authority in the wake

of the said Notification. (iii) There was a confusion with regard to leviability of the service tax on such service as is evident from the fact that the said

Notification was given retrospective effect about two years after its issuance and therefore the extended period is not invocable. (iv) As regards the

impugned demand under BSS, the appellant contended that it was booking luggage on buses and was charging transport charges for that and such

service cannot fall under the category of BSS. Such service would fall under GTA service on which liability to pay tax is on the consignor or

consignee paying the transport charges. Also, as the freight per consignment was less than Rs.750/-, it was exempted from service tax.

3. We have considered the facts of the case and contentions of the appellant. As stated earlier, the demand of Rs.98,424/- in respect of the

commission received by the appellant as ticket booking agent for various travel agencies, is not contested. As regards demand of Rs.9,18,286/-

confirmed under BSS, it is seen that this service tax is confirmed on freight charges (luggage booking charges) recovered by the appellant for

transportation of goods on its buses. The adjudicating authority has held that such goods which were carried on such buses belonged to businessmen

and hence the service related to commercial activity of the businessmen and therefore covered under BSS. Goods carriage has been defined under

Section 214 of the Motor Vehicles Act, 1988, ""Goods carriage means any motor vehicle constructed or adapted for use solely for the carriage of goods, or any motor vehicle not so constructed or adapted when used for the carriage of goods"" and therefore transportation of goods on the

appellant's buses would amount to transportation of goods in a goods carriage. BSS (more precisely support services of business or commerce) is

defied under Section 65(104c) of the Finance Act, 1994 as under:-

Support Services of Business or Commerce"" means services provided in relation to business or commerce and includes evaluation of

prospective customers, telemarketing, processmg of purchase orders and fulfilment services, information and tracking of delivery schedules,

managmg distribution and logistics, customer relationship management services, accounting and processing of transactions, operational

assistance for marketing, formulation of customer service and pricing policies, infrastructural support services and other transaction

processing.

A mere perusal of the said definition makes it quite clear that transport of goods on the buses would not come under the category of BSS merely

because the goods transported belonged to businessmen, indeed the inclusive part of the above definition leaves no scope for doubt in this regard.

Accordingly, the demand of Rs.9,18,286/- confirmed under BSS is not sustainable.

4. As regards remaining demand under tour operator service, it is a fact that the appellant was granted licence to operate buses as contract carriages

and not as stage carriages. The contention of the appellant that it operated its buses as stage carriages does not alter the category of its buses from

contract carriages to stage carriages Tour is defined under Section 65(113) ibid as under:-

Tour means a journey from one place to another irrespective of the distance between such places.

Tour Operator is defined under Section 65(115) ibid as under:-

Tour Operator means any person engaged in the business of operating tours in a tourist vehicle covered by a permit granted under the

Motor Vehicles Act, 1988 (59 of 1988) or the rules made thereunder;

With effect from 10.09.2014, the said definition reads as under:-

Tour Operator' means any person engaged in the business of planning, scheduling, organizing or arranging tours (which may include arrangements for accommodation, sight seeing or other similar services) by any mode of transport and includes any person engaged in

business of operating tours in a tourist vehicle covered by a permit under the Motor Vehicles Act, 1988 or the rules made there under;

A tourist vehicle is defined under Section 65(114) read with Section 2(43) of Motor Vehicles Act, 1988 as under:-

Tourist vehicle"" means a contract carriage constructed or adapted and equipped and maintained in accordance with such specifications

as may be prescribed in this behalf,

Thus, it would appear that the impugned service rendered by the appellant using a contract carriage would fall under the category of tour operator

service. Indeed in the case of M/s. Ideal Travels & Others Vs. CCE, Mangalore [2011-T/OL-1850-CESTAT-BANGJ, CESTAT rejected a similar

contention (that the service provided did not fall under the ambit of tour operator service). However, CESTAT in that case remanded the matter with

the following words:-

10. However, their alternative plea for the benefit of Notification No.2012009-ST dt. 07/07/2009 read with corrigendum dt. 31/08/2009

merits consideration. The said Notification granted full exemption from payment of service tax on the taxable service referred to in Section

65(105)(n) of the Finance Act, 1994, provided by a tour operator having contract carriage permit or tourist vehicle permit for inter-State or

intra-State transportation of passengers, excluding tourism, conducted tours, charger or hire services. Parliament extended the exemption

retrospectively upto 01/04/2000 vide Section 75 of the Finance Act, 2011. Prima facie, all the assessees before us are entitled to the benefit

inasmuch as the impugned demands are for the period from April, 2000. The adjudicating authorities will have to examine their claim for

exemption on merits, untrammelled by our prima facie view.

It is to be noted that in the above (Ideal Travels) case, CESTAT categorically stated that the adjudicating authority was to examine the applicability of

Notification No.20/2009-ST, dated 07.07.2009 on merits and should not be influenced by prima facie views expressed by it (i.e., the Tribunal).

5. As regards the invokability of extended period and mandatory penalty, the appellant has referred to the retrospective applicability (with effect from

01.04.2000) of Notification No.20/2009-ST to plead that there was confusion about the issue during the relevant time. This pleading was not made (as

it could not have been made) before the adjudicating authority because the said Notification was not in existence at the time of issuance of the

impugned order. This aspect has been kept in mind while remanding this case for de nova adjudication without expressing any opinion thereon.

6. In the light of the foregoing, we pass the following Order:-

(i) The demand of Rs 98,424/- is upheld as uncontested.

(ii) Demand of Rs.9,18,286/- under Business Support Service is set aside.

(iii) As regards the demand under tour operator service, the case is remanded to the adjudicating authority for de novo adjudication on the limited

aspect of eligibility of the appellant for the benefit of exemptionâ?¢ under Notification No.20/2009-ST, dated 07.07.2009 as made applicable with

effect from 01.04.2000, invokability of the extended period and imposability of mandatory penalty under Section 78 ibid. We make it clear that the

adjudicating authority shall determine the eligibility of the appellant for the benefit of the said Notification keeping in view the fact that the vehicles

involved were tourist vehicles and not stage carriages.

The demand and penalties will be re-computed based on the adjudicating authority's finding regarding eligibility (or otherwise) of the appellant for the

benefit of Notification No.20/2009-ST, and invokability of the extended period and the provisions of Section 78 ibid

