
(2024) 07 CESTAT CK 1525

In the Customs, Excise And Service Tax Appellate, New Delhi

Case No : Service Tax Appeal No. 50421 of 2017

**M/s. Vishwakarma Infrastructures @APPELLANT @Hash Commissioner of
Service Tax @RESPONDENT**

Date of Decision : 10-07-2024

Acts Referred:

Finance Act, 1994 — Section 65(105)(zzzzj) , 66
Constitution of India, 1950 — Article 366(29A)

Citation : (2024) 07 CESTAT CK 1525

Hon'ble Judges : Dr. Rachna Gupta, Member (J);Raju, Member (T)

Bench : Division Bench

Advocate : J. Kainaat, Harshvardhan

Final Decision : Dismissed

Judgement

Dr.Rachna Gupta, J

1. The appellant herein is engaged in business of giving cranes on hire basis to different parties builders for construction purposes. Department received an information regarding evasion of service tax by the appellants, despite rendering taxable service namely, supply of "tangible goods service". The Department found that the appellant is not even registered with the service tax Department. Response was sought from the appellant vide a letter dated 12.10.2012. But no reply was given by appellant. Appellant was required to submit copies of all agreements, invoices, balance sheets, ST-3 Returns for financial year 2008-09 to 2012-13. Vide letter dated 'Nil' requisite documents were provided by the appellant including the copies of agreement issued by different parties in connection with the hiring of cranes.

2. From the various clauses of the said agreement, department observed that the operators and helpers, on the cranes given on hire, were agreed to be made available by the appellant for 24 Hrs a day. The staff deployed on those cranes was to be directed to follow the instructions of project manager. The salaries and welfare funds of the staff deployed was agreed to be the responsibility of the appellant. Clause (No.2) of the agreement required that service tax registration

number be submitted. Based on these clauses of the agreement, department formed the opinion that the appellant has not transferred the possession and effective control of the cranes/vehicles to their clients hence their activity of giving cranes on hire cannot be treated as 'Deemed Sale' of goods. Department alleged that the activity of the appellant is a taxable service of 'Supply of Tangible Goods'. The income received by the appellant is therefore alleged to be taxable. Resultantly, vide Show Cause Notice No.377/2013-14 dated 24.10.2013 service tax amounting to Rs.6,12,996/- for the period 2008-09 to 2011-12 was proposed to be recovered from the appellant alongwith the interest and the proportionate penalties. The Show Cause Notice was issued invoking the extended period of limitation on the ground that the appellant has deliberately avoided discharging its due service tax liability on the income received from taxable service in contravention of section 66 of Finance Act by not getting themselves registered. This is alleged to be an act of suppression of facts and contravention of the provisions of the Act. The proposal of said Show Cause Notice has been confirmed vide Order-in-Original No.20/2015 dated 31.03.2015 dated 31.03.2015. Being aggrieved of this order the appellant is before this Tribunal.

3. We have heard Ms. J. Kainaat, Id. Counsel for the appellant and Mr. Harshvardhan, Authorised Representative for the Department.

4. Id. Counsel for the appellant has mentioned that the appellants were providing cranes to different clients on hire basis for different period like 3 months, 6 months etc. It is impressed upon that as per the agreements between appellant and their clients the appellants were paying VAT at the rate of 5% of the value involved. The invoices raised are also clearly showing payment of VAT at the rate of 5%. The requisite agreements, invoices alongwith other documents as that of balance sheet profit and loss account, auditor's report etc. for the impugned period were duly provided to the Department. The agreements are sufficient to show that the cranes were transferred with right of possession and effective control to their clients. Hence the transaction is to be treated as sale of goods (deemed sale) as contrary to allegations of it being a taxable service of 'Supply of Tangible Goods. Id. Counsel has relied upon the departments own CBEC Circular No.334/1/2008 TRU dated 29.02.2008 wherein it has been clearly stated that service tax is not payable in case VAT has been paid on deemed sales. Reiterating that the cranes were given with right of possession and effective control hence the activity of appellant amounts to deemed sale as contrary to being taxable service of Supply of Tangible Goods, the findings of the order under challenged are prayed to be set aside.

5. With respect to the invocation of extended period of limitation while issuing the show cause notice, it is submitted that there is no suppression on the part of the appellant. Appellant has duly co-operated during investigation. All requisite documents were provided sooner than those were asked for. The extended period in the given circumstances is not invocable. The allegations levelled against the

appellants are otherwise the subject matter of interpretation. Allegations of suppression are not sustainable in the said circumstance. Above all, burden to prove the suppression was on the Department. For which there is no iota of any evidence. Id. Counsel has prayed for setting aside of order under challenge while relied upon the following decisions:-

1. Arval India Pvt. Ltd. vs. Pr. Commissioner of Service Tax, Mumbai-IV [2020 (41) G.S.T.L. 528 (Tri. – Mumbai)]

2. MSPL Ltd. vs. CCE, Karnataka [2022 – TIOL – 223 – CESTAT – Bang].

3. Commissioner of Central Excise and Customs vs. MSPL Ltd. [2023 (69) G.S.T.L. 225/2 Centax 312 (S.C.)]

4. CCE vs. Chhattisgarh Earth Movers [2017 (6) GSTL 297 (Tri.)]

6. To rebut the submissions made on behalf of appellant, Id. D.R. while relying and reiterating the findings in the impugned order, has submitted that the impugned order has been passed after examining various clauses of the contract, as many as 829 in number. The order has meticulously referred to the respective clauses and the findings in respect thereof. Those clauses are sufficiently reflecting that the control and possession of the vehicles / cranes given on hire was retained with the owner /the appellant. The activity of appellant is therefore, rightly held to be a taxable service namely supply of tangible goods service. Impressing upon no infirmity in the said order, the appeal is prayed to be dismissed.

7. Having heard the rival contentions of both the parties we observe that the moot question to be adjudicated for the present appeal is :

Whether supply of crane on hire basis by the appellant is an activity of 'Deemed Sale' (Article 366 (29A) of Constitution of India) or it is a taxable service namely, Supply of Tangible Goods (herein referred as STGU).

8. To appreciate, whether service tax can be levied on the transaction, it would be necessary to analyze the relevant statutory provisions as they existed prior to 01.07.2012.

9. Section 65(105)(zzzzj) of the Finance Act, which would be relevant for the period prior to 01.07.2012 defines taxable STGU as follows:-

(105) "taxable service" means any service provided or to be provided, -

(zzzzj) to any person, by any other person in relation to supply of tangible goods including machinery, equipment and appliances for use, without transferring right of possession and effective control of such machinery, equipment and appliance."

10. Thus, what has to be seen for transaction of transfer of goods to be taxable as a service, is:

i. There must be a transfer or supply of goods;

- ii. The transfer must be by way of hire or lease or license for using the goods; and
- iii. The right of possession and effective control over such goods must not have passed on to the transferee.

11. The transaction transferring goods by way of hire or lease or license is also covered under the concept of 'Deemed Sale' as introduced by the forty-sixth amendment to the Constitution, which extended the meaning of "sale or purchase of goods" by giving an inclusive definition of the phrase "tax on the sale or purchase of goods" under article 366(29A) of the Constitution. The same is reproduced below:

"366(29A) "tax on the sale or purchase of goods" includes-

- (a) a tax on transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration;
- (b) a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of works contract;
- (c) a tax on the delivery of goods on hire purchase or any system of payment of installments;
- (d) a tax on the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;
- (e)
- (f)"

(emphasis supplied)

12. It would be seen from the aforesaid that the Constitution empowers the State to levy Sales Tax/VAT on transactions in the nature of transfer of right to use goods, which were earlier not exigible to sales tax as such transactions were not covered by the definition of "sale" as given in the Sales of Goods Act, 1930.

13. It needs to be remembered that the term "transfer of right to use goods" has neither been defined in the Constitution nor in any of the State VAT Acts or Central Sales Tax Act. The said phrase was interpreted by the Supreme Court in *Bharat Sanchar Nigam Ltd. vs. Union of India* reported as 2006 (2) STR 161 SC wherein the Supreme Court laid down five attributes for a transaction of "transfer of right to use goods" to constitute Sale/Deemed Sale. In this connection paragraph 91 of the judgment is reproduced below:

"91. To constitute a transaction for the transfer of the right to use the good, the transaction must have the following attributes:

- a. There must be goods available for delivery;
- b. There must be consensus ad idem as to the identity of the goods;

c. The transferee should have a legal right to use the goods consequently all legal consequences of such use including any permission or licenses required therefore should be available to the transferee;

d. For the period during which the transferee has such legal right, it has to be the exclusion of the transferor this is the necessary concomitant of the plain language of the statute- - viz. a 'transfer of the right to use' and not merely a license to use the goods;

e. Having transferred the right to use the goods during the period for which it is to be transferred, the owner cannot again transfer the same rights to others."

(emphasis supplied)

14. From the above discussed provision of Finance Act and of the Constitution of India, it can safely be said that transfer of use of goods is leviable to VAT under Sales Tax if goods to be used are transferred with possession and effective control in goods. If there is transfer of goods for use but the possession and effective control while transferring the goods is retained with the supplier of goods, the transaction is 'SUTG' taxable under service tax.

15. Now reverting to the facts of the present case, we observe that the original adjudicating authority has examined following agreements and the respective clauses:-

Sl.No.

Service Receiver

Clause Number

1

Navayuga Engineering Co. Ltd.

4

2.

ARSS Projects Ltd.

1-10

3.

Sidharath Associates

1-17

4.

Johnson Matthey

Entire contract

5.

Ambey Construction

1-13

6.

Perfect Enterprises

1-10

7.

RB & Company

1-8

8.

Valecha Engineering Ltd.

1

9.

PNC Infratech Ltd.

1-6

16. The authority has formed the following opinion:-

"20.1.10 The terms of the above mentioned contracts, which have been supplied by the noticee himself through their written submissions clearly imply that the during the period for which the cranes were given on hire basis, the cranes were to be operated by the operators and helpers duly employed by the noticee and all the repairs and supply of lubricants including hydraulic fluids to the said crane were to be looked after by the noticee. Thus it is clearly evident that the party's "crane" is covered under the definition of 'tangible goods' as explained earlier at para 20.1.6 above. I also find that it fulfills the parameters for the said services to be covered under section 65(105)(zzzzj) of the Finance Act, 1994 as it remains in possession of the service provider and the said effective control and legal right of possession has not been transferred from the service provider to the service recipient. Therefore the argument of the party that their activity was covered under "deemed sales" by virtue of the other agreements signed by them with their clients and that they were not supplying any tangible goods to their clients, is not tenable."

17. After perusing the clauses relied upon by the adjudicating authority specifically clause 3, 4, 8 & 13 of the agreement pursuant where to the cranes were given on hire we hold that the effective control and possession of cranes was retained with the appellant while giving those on hire to various other parties. In view thereof and in view of the above discussion about various

statutory provisions and the case law, we find no reason to differ from the findings arrived at by the original adjudicating authority.

18. Mere presence of another clause agreeing for VAT to be paid at the rate of 5% is held highly insufficient to call the impugned transaction as a transaction of deemed sale in terms of article 366 (29 A) of the Constitution of India.

19. Though the appellant has relied upon para 4.4.3 of Circular No.334/1/2008 TRU dated 29.02.2008. The Circular and the said para reads as follows:-

"4.4 Supply of Tangible Goods Services:

4.4.1 Transfer of the right to use any goods is leviable to sales tax/VAT as deemed sale of goods [Article 366(29A) (d) of the Constitution of India). Transfer of right to use involves transfer of both possession and control of the goods to the user of the goods.

4.4.2 Excavators, wheel loaders, dump trucks, crawler carriers, compaction equipment, cranes, etc., offshore construction vessels & barges, geo-technical vessels, tug and barge flotillas, rigs and high value machineries are supplied for use, with no legal right of possession and effective control. Transaction of allowing another person to use the goods, without giving legal right of possession and effective control, not being treated as sale of goods, is treated as service.

"4.4.3 Proposal is to levy service tax on such services provided in relation to supply of tangible goods, including machinery, equipment and appliances, for use, with no legal right of possession or effective control. Supply of tangible goods for use and leviable to VAT/sales tax as deemed sale of goods, is not covered under the scope of the proposed service. Whether a transaction involves transfer of possession and control is a question of facts and is to be decided based on the terms of the contract and other material facts. This could be ascertainable from the fact whether or not VAT is payable or paid."

20. The perusal clarifies that this para itself has created a distinction as to when the supply of tangible goods can be called as the taxable service and when it can be called as deemed sale. Both the situations have been discussed in this paragraph. Hence, we are not convinced that the circular extends any benefit to the appellant. We rather hold that the appellant has picked up 4.4.3 of the Circular to just misrepresent which otherwise has to be read in context of remaining paras of the said circular.

21. To our opinion the said clause in the agreement of agreeing for payment of VAT rather reflects an intent to wrongly give an impression that the activity of appellant is an act which amount to 'Sale' so as to avoid the service tax liability. From the above observation it is otherwise clear that the activity in question is a taxable service namely "Supply of Tangible Goods". Payment of VAT is insufficient to alter said status when apparently complete possessions and the effective control of cranes was not transferred by the appellants. Hence we hold that this act of appellant is rightly been held as an act of misrepresentation getting

themselves not registered with the service tax department. Despite rendering a taxable service is rightly held as an act of suppression. Hence, we do not find any fault when the extended period of limitation has been invoked while issuing the show cause notice.

22. In the light of entire above discussion, we do not find any infirmity in the order under challenge/Order-in-Original. Same is therefore upheld. Consequent thereto, the appeal is hereby dismissed.

[Pronounced in the open Court on 10/07/2024]