





1: ORDER-IN-APPEAL 1:

Mrs K.K.Baralya Cargo Movers, Taluka Jalrapad, District Amroli (hereinafter referred to as "Appellant") holding Service Tax registration No. 411PB2351FST001 filed appeal No. Y2/139/BVR/2018-19 against Order in Original No. 01/AC/CGST/BVR-3/DIV/2018-19 dated 27-04-2018 (hereinafter referred to as "impugned order") passed by the Assistant Commissioner Central Goods & Service Tax Division, Bhavnagar-3 (hereinafter referred to as "lower adjudicating authority").

2. The brief facts of the case are that the Appellant was engaged in providing 'Supply of Tangible Goods Service' and 'Transport of Goods by Road Service'. During audit of the records of the Appellant, it was found that the Appellant provided trailers to M/s Logix Park, Rajula on rental basis and classified the said services under the category of "Goods Transport Agency Service" during the period 2010-11 to 2014-15. It appeared to the Audit that said service is classifiable under the category of "Supply of Tangible Goods Service" and the Appellant had sham paid service tax by wrongly classifying the services under the category of "Goods Transport Agency Service".

2.1 Show Cause Notice No. Y/15-191/Dem-ST/HQ/2015-16 dated 08.03.2016 was issued to the Appellant concerning service tax of Rs.19,52,625/- and an amount to be quantified for the F.Y. 2014-15 under Section 73(b) of the Finance Act, 1991 (hereinafter referred to as "Act"), interest under Section 75 of the Act, imposition of penalty under Section 77, Section 77(1)(c) and Section 76 of the Act with late fee of Rs. 20,000/- per return for late filing of returns.

2.2 The lower adjudicating authority vide the impugned order confirmed demand of service tax of Rs.48,31,861/- under Section 73(1) of the Act along with interest under Section 75 of the act and imposed penalty of Rs.12,000/- under Section-77(2) for failure to file correct ST-3 Returns, penalty of Rs.12,000/- under Section 77(1)(c) for failure to furnish information and documents as were called for by the Central Excise Officer and late fee of Rs.20,000 per ST-3 Return for late filing of returns and penalty of Rs. 48,31,861/- under Section 76 of the Act.

3. Being aggrieved with the impugned order, the appellant preferred appeal, inter alia, on following grounds:-

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(i) The impugned order is not legal, proper and correct. The adjudicating authority did not consider their plea that they did not receive any fixed charges from M/s. Logix Park for deployment of trailers as mentioned in Show Cause Notice but they were under agreement with M/s. Logix Park for transportation of goods per their fact that they had not provided any 'Supply of Tangible Goods Service' and therefore, they were not liable to pay Service Tax under the Category of 'Supply of Tangible Goods Service'.

(ii) As per condition no 6 & 7 of the work order dated 16.10.2013 awarded by M/s Logix Park, Rajula to the Appellant, it is clear that there is transfer of right of possession and effective control of goods i.e. deployed trailers for the time being during the agreed period of transportation of containers from CFS to Pipavav Port and back to CFS as per the Work Order / Convey Note Terms; that Condition No.6 and 7 below are reproduced as under for further consideration-

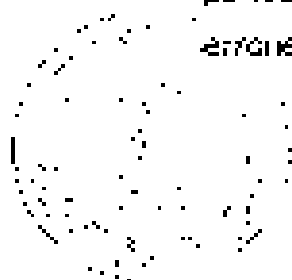
"Condition No.6 : All your trailers should be at the disposal of the Transport division in-Charge stationed at CFS.

Condition No.7 : All the trailers should be available for round the clock movement of the containers. 2 days period per month will be provided for maintenance. Any break down period other than the allowed maintenance period will be deducted from the fixed charges "

Thus from above two conditions of the contracts, it is self-explanatory that in the instant case right of possession or effective control of the vehicles (trailers) was transferred as per the aforesaid conditions of the Contract and therefore, there is no question to pay any Service Tax under the category of 'Supply of Tangible Goods Service' since, the Appellant provided the container transportation Service at their cost to M/s. Logix Park, Tal: Rajula, Dist. Amreli and relied upon the case law of M/s Satish Kumar & Co. Vs Commissioner of Central Excise (CESTAT Mumbai).

(iii) The Adjudicating Authority misinterpreted the Service category of CTA Service as 'Supply of Tangible Goods Service'; that the Appellant rightly classified their services as 'Goods Transportation Agency service and did not contravene any provisions of Act with any willful suppression of facts to evade Service Tax liability and therefore, invocation of proviso to Section 73(n) of the Act to demand service tax from the Appellant for the extended period of five year and interest leviable under Section 75 of the Act is erroneous; that for year 2014-15 Service Tax amounting to Rs.28,89,236/- has

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been arrived based on assumption, which is not fair and acceptable as well as permissible in law; that the said service tax has been calculated on assumed income of Rs.2,33,75,695/- with an 20% increase.

(iv) The adjudicating authority calculated service tax liability for the year 2014-15 on assumption basis which is not acceptable and also not permissible in law. The adjudicating authority wrongly assumed 20% increase in income to Rs.2,33,75,695/- and calculated service tax of Rs. 78,89,136/-, which is not viable and as well as against natural justice.

3.1 In writer submission, the Appellant has contended that,

(i) The Appellant provided GTA Service to M/s. Legix Park, Rajula, as per their terms and conditions of Work Order / Convey Notes and as per circular no. 79/9/2004-ST dated 17-12-2004, these Convey notes should be treated as one kind of a Consignment Note, since all requirements of consignment note is fulfilled, that invoices and work orders / convey notes are nothing but consignment notes.

(ii) To cover service under "Supply of Tangible Goods Service", three ingredients are essential - (a) The service has to be in relation to supply of tangible goods to any person by any other person (b) There must not be any transfer of right of possession of the goods from the service provider to the service recipient (c) There must not be any transfer of effective control of the goods from the service provider to the service recipient; that as per the Condition No. 6 and 7 of the Work Order / Convey notes, it is clear that in the instant case there is a transfer of right of possession and effective control of employed trailers for the time being during the agreed period of transportation of containers from CFS to Piravay Port and back to CFS as per the Work Order/Convey Note terms; that aforesaid ingredients as mentioned above vide points (a) and (c) which are the very important conditions framed as per rules, under "Supply of Tangible Goods Service" are not fulfilled and hence, their service can not be classified as 'Supply of Tangible Goods Service'.

4. A Person(s) bearing Shri Nitul Kansariya, Advocate appeared on behalf of the Appellant and reiterated grounds of appeal and submitted written submission dated 21.05.2019 to say that service tax payable by them is Rs. 29,02,926/- and they have paid Rs. 29,02,926/-. That SCM has wrongly calculated demand of S.Tax for 2010-11 to 2013-14 at Rs. 19,42,625/- whereas as per their calculation it is Rs. 27,10,972/-; that S. tax liability on actual basis

for 2014-15 as per their return filed with Income Tax authorities. Whereas 50% has arrived at Rs. 28.31 256/- which is less than 50% of the returns for the year 2010-11 to 2014-15 have been submitted by them in 2014-15 (i.e. 2018) that due to non-filing of returns and non-submission of returns made by them in 2014-15, SCN has assessed under section 78 of the Act, 1944 (best judgement method) total value of services provided to them as Rs. 2,02,35,411/- as taxable value whereas actual total taxable value of services provided by them in 2014-15 is Rs. 15,53,618/- and the 5% tax confirmed by the impugned order is also incorrect as it has arrived at Rs. 19,45,675/- paid by them as Service Tax while approximately 10% tax paid by them that since they have paid all 5% tax payable on a monthly basis, no penalty under Section 78 is imposed on them; and for the above reasons, no interest is payable by them; that they are liable to pay Rs. 20,000/- per return as late fee.

**FINDINGS:**

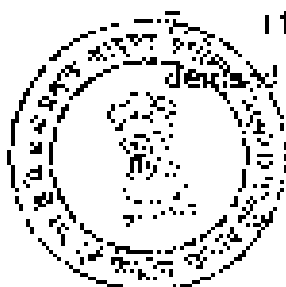
5. I have carefully gone through the facts of the case, the impugned order, the grounds of appeal memoranda and oral & written submissions made by the Appellant. The issue to be decided in this appeal is whether the impugned order, in the facts of the case, is correct, legal and proper or otherwise.

6. I find that the Appellant has required to pre-deposit 7.5% of demand of Service Tax confirmed to make Commissioner (Appeals) to entertain this appeal as per the provisions of Section 35F of the Central Excise Act, 1944, which is applicable to Service Tax by virtue of Section 83 of the Act. The relevant provisions are reproduced as below:

SECTION 35F. Deposit of certain percentage of duty demanded as penalty imposed by this Act, appeal—The Tribunal or the Commissioner (Appeals), as the case may be, shall not entertain any appeal

(i) under sub-section (1) of section 35, unless the appellant has deposited seven and a half per cent. of the duty, in case where duty or duty and penalty are in dispute, or ten per cent. where such penalty is in dispute, in pursuance of a decision or an order passed by an officer of Central Excise lower in rank than the Principal Commissioner of Central Excise or Commissioner of Central Excise;

I further find that the appellant has not made pre-deposit of 7.5% of the demand confirmed, which is mandatory to be pre-deposited as per Section 35F



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of the Central Excise Act, 1944. The appellant was required to deposit 7.5% of Service Tax amount confirmed with the impugned order and since they have not paid the same, the appeal is not maintainable and is required to be dismissed for non-compliance of the provisions of Section 35F of the Central Excise Act, 1944.

8. In view of above, the appeal filed by the Appellant is dismissed.

9. उचितकालीनद्वारा हज़र की गई अनिल का बिपदात उपरोक्त तरीके से किया जाता है।

9. The appeal filed by the Appellant stands disposed off in above terms.

पंजीकृत आरू दुगार  
सेवासे.

आयुक्त  
जि. ३४  
महाराष्ट्र (ए. ए. सी.)

(कुमार राजीव)  
आयुक्त आयुक्त (अपील)

M/s K.R. Baranya Cargo Movers  
No. Narmada Cement Co.,  
Tanuka Jafnabad,  
District Ahmedn.

गणेश के के परिया काशी मुम्बई  
तर्निका पी. डी. ए. सी. के. ए. सी.,  
साधुका माहाराष्ट्र, जिला- अहमदन

पत्रे,

1. प्रधान मुख्य आयुक्त, केन्द्रीय वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, नूतनराज सिंह, अहमदाबाद को जानकारी हेतु।
2. आयुक्त, केन्द्रीय वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, केन्द्रीय आयुक्तालय, नोवारा को अवगत कार्यवाही हेतु।
3. सहायक आयुक्त, केन्द्रीय वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, मण्डल डि. के. अहमदा, को तुरत आवश्यक कार्यवाही हेतु।

वर्क फाइल:

