CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

NEW DELHI

PRINCIPAL BENCH – COURT NO. – IV

Service Tax Appeal No. 52210 of 2019 [DB]

[Arising out of Order-in-Original No. UDZ-EXCUS-000-COM-0004-19-20 dated 11.06.2019 passed by the Commissioner of C.G.ST., Udaipur]

M/s. Manak Chand Agarwal **...Appellant**
82, Sarvaritu Vilas, Shastri Circle (HO),
Udaipur

VERSUS

Commissioner of Central Goods and
Service Tax, Excise and Customs, Udaipur **...Respondent**
142-B, Hiran Magri, Sector – 11,
Udaipur

APPEARANCE:
Ms. Jwaria Kainaat, Advocate for the Appellant
Shri Harshvardhan, Authorized Representative for the Respondent

CORAM:
HON'BLE DR. RACHNA GUPTA, MEMBER (JUDICIAL)
HON'BLE MRS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)

DATE OF HEARING: 16.02.2024
DATE OF DECISION: **07.06.2024**

FINAL ORDER No. 55908/2024

DR. RACHNA GUPTA

The appellant herein is registered under the category of Construction Services of the Residential/Commercial/Industrial complexes or other civil structures. From the third party data received from Directorate General of Service Tax for the Financial Year 2014-15, it was observed by the service tax commissionerate that the appellant has received such amounts during this financial year which has been booked as income under Section 194C of the Income Tax Act. Thus as an income which is related to payment made to contractors and sub-contractors. Based on these observations an investigation was initiated against the appellant by the officers of Anti Evasion Branch of CGST Hqrs., Udaipur

demanding financial documents as that of income tax returns, balance sheets, Form 26 AS, contract/agreements etc. for the period 2013-14 to 2017-18. Requisite documents were provided by the appellant vide their letter dated 05.10.2018. From the perusal of these documents department observed that the appellant, in addition to providing construction services as registered contractor in PWD Department, is also a partner in petrol pump namely, M/s. Hari Priya Filling station. The appellant had provided trucks to the said firm and to other firms/persons/organizations as well and have received payments for the same. The said payments are reflected as freight in their profit and loss account. The copy of agreement dated 26.12.2013, as submitted by the appellant, was the one entered between M/s. Bharat Petroleum Corporation Ltd. (BPCL) and M/s. Shreenath & Co. Similar was the agreement between M/s. Essar Oil Ltd. and M/s. Vishnu Priya Filling Station dated 01.10.2013 for transportation of branded fuels ex Udaipur depot into tank lorries . These companies have further awarded the work of transportation of BPCL/Essar for transportation of the said branded fuel of these companies as per freight charges mutually agreed. Department observed that neither M/s. Vishnu Priya Filling Station and M/s. Shreenath & Co., the contractors of BPCL for transportation of branded fuel, nor the appellants, the sub-contractor for the same purpose, were registered as GTA but the activity was opined to be taxable being an activity of giving tank lorries to M/s. Vishnu Priya Filling Station and M/s. Shreenath & Co. for transportation of fuel. Thus, the activity was as good as taxable service of "Supply of Tangible Goods Service" (STGS) being rendered by the appellant.

1.1 Since after the introduction of negative list regime w.e.f. 01.07.2012 all these services are to be taxed except those mentioned under Section 66D of the Finance Act and that the activity of STGS does not fall under the said Section but under Section 65B(44) of the Act which defines service. The appellant could not have produced any document to show that the said amount shown in their profit and loss account were received against provision of exempted services. However, the appellant was also observed to have provided Construction Services/Work Contract Services to M/s. Bhupal Nobels Sansthan Udaipur (Vidya Pracharini Sabha) but has not discharged the service tax despite the activity being taxable. Though service tax of Rs.12,22,760/- (Rs.9,90,000/- vide challan dated 10.10.2018 dated + Rs.2,17,310/-vide challan dated 11.10.2018) was paid but it was observed that payment is made after availing abatement of 60% on the value received of Rs.2,44,19,704/- Financial year 2013-14 to 2014-15.

1.2 Resultantly, vide Show Cause No. 9258 dated 23.10.2018 proposing the recovery of amount of Rs. 3,55,16,713/- as service tax on the income received by the appellant during the Financial Year 2013-14 to 2017-18 (upto June 2017) along with the interest. Penalty under Section 78 of the Finance Act was also proposed to be imposed. The said proposal has been confirmed to the extent of demand of service tax of Rs.1,63,12,805/-. The demand of service tax for amount of Rs.1,92,03,908/- has been dropped. Proportionate interest at applicable rates and proportionate penalties were also imposed vide the Order-in-Original No. 0004-

19-20 dated 11.06.2019. Being aggrieved the appellant is before this Tribunal.

2. We have heard Ms. Jwaria Kainaat, learned Advocate for the appellant and Shri Harshvardhan, learned Authorized Representative for the department.

3. Learned counsel for the appellant has mentioned that the income received by appellant during the Financial Year 2013-14 to 2016-17 is the income from transportation of goods (branded fuels) as was shown in their profit and loss account. The appellant was using its truck lorries/tankers for transportation of petroleum products instead of giving its tanker/trucks on hire to. M/s. Shreenath & Co. and M/s. Hari Priya Filling station. They were not even paying any rent for getting truck lorries/tankers from the appellant. Both these companies were contracted by BPCL/Essar for the purpose. They sub-contracted the activity with the appellant. The sub-contracting does not change the nature of the activity i.e. transportation of branded fuel. The contracts between appellant, sub-contractor and the said companies is absolutely silent about taking the trucks/tanks of the appellant on hire. Thus, the activity performed by appellant was of transportation of goods by road. The only flaw is that the consignment note though was issued by the appellant in favour of M/s. Vishnu Priya Filling Station but the same was not issued in the case of transporting fuel on behalf of M/s. Shreenath & Co. and on behalf of M/s. Hari Priya Filling station. The nature and intent of the contracts in case of three of these companies is otherwise same. The demand against M/s. Vishnu Priya Filling Station has already been dropped. Based on the same reason demand against appellant for transporting on

behalf of the M/s. Shreenath & Co. and M/s. Hari Priya Filling station is also liable to be dropped. The confirmation thereof by the adjudicating authority is therefore not sustainable.

3.1 Vide the additional submissions, appellant has brought to the notice that the certificate received from the contractor firms certifying that they provided transportation services to M/s. BPCL and Essar Oil Ltd. were also produced on record. However, the adjudicating authority has dropped the demand only in relation to supply through M/s. Vishnu Priya Filling Station to M/s. Essar Oil Ltd only because the consignment note was got issued in the said case, as already explained above. It is further submitted that the services provided by the appellant are that of transportation of goods by road which is covered under negative list as per Section 66D (p) of the Finance Act. The remaining demand with respect to transportation on behalf of the M/s. Shreenath & Co. and M/s. Hari Priya Filling station is also liable to be set aside on this ground itself. Appeal is accordingly prayed to allowed.

4. While rebutting these submissions, learned Departmental Representative has mentioned that the ledger accounts provided by the appellant have shown the amount in question to be received as transportation income. But in their reply to show cause notice the appellant has acknowledged the amount to be received as hire charges. Though, later the said mention is asserted to be a clerical mistake but the reply amounts to an admission on part of the appellant that the impugned contracts are for taking appellant's truck lorries/tanks on hire against the charges. Otherwise also, appellant had failed to provide invoices showing that the receipts were with respect to freight charges. Even vide letter date

27.06.2014 while informing about filing a declaration under service tax Voluntary Compliance Encouragement Scheme, 2013, the appellant has described the service provided by him as "tanker provided to transport agency/construction services". The companies for whom the appellant was providing tankers or trucks were also not registered as GTA The apparent fact on record is that neither the companies nor the appellant has issued consignment note which is mandatory to hold that the activity done is that 'Transportation of Goods'. Learned Departmental Representative has relied upon the decision in the case of **East India Minerals Ltd. Vs. Commissioner of Central Excise, Customs & Service Tax, Bhubanswar-II reported as 2021 (44) GSTL 90 (Tri.-Kolkata)** . It is impressed upon that the activity of the appellant has rightly denied to be the activity of transportation of goods.

4.1 The other contention of the appellant that they are eligible for exemption under Notification No. 25/2012 is also not sustainable for the same reason of absence of the consignment notes. In the case of contractor M/s. Vishnu Priya Filling Station, since consignment notes were issued the adjudicating authority has already dropped the demand extending the benefit of the said notification. But for remaining two contractors the demand therefore has rightly been confirmed.

4.2 While submitting on the ground of limitation and about imposition of penalty, it is submitted that the appellant had filed 'Nil' tax returns for the period 2013-14 to 2016-17. The correct taxable value was also not disclosed to the department. The appellant on being pointed out had rather made payment of certain amount of service tax. The said payment is nothing but the

admission of appellants own liability. Since the same was not fulfilled at the relevant time but rather was concealed from the department, the returns being 'Nil'. The department has rightly invoked the extended period of limitation. Penalty also has rightly been imposed. Impressing upon no infirmity in the order under challenge. Learned Departmental Representative has prayed for appeal to be dismissed.

5. Having heard the rival contentions and perusing the records, we observe that the moot point of adjudication in the given circumstances is:

"Whether the services provided by the appellant to M/s. Shreenath & Co., M/s. Hari Priya Filling station and M/s. Vishnu Priya Filling Station amounts to be called as the activity of 'Transportation of Goods by Road' to which the exemption from payment duties is available under Notification No. 12/2015 or the activity was of merely supplying the truck/lorries/tankers for transportation of the branded fuel of companies like M/s. BPCL and Essar Oil Ltd. to companies' customers."

6. Since there have been the contracts executed between the parties for the impugned activity. Foremost those agreements are perused. One such contract is executed between M/s. BPCL and M/s. Shreenath & Co., dated 05.12.2013. The said agreement is with respect of awarding contract for two tankers /lorries as mentioned therein for transportation of branded fuel ex Udaipur depot for a period of two years from 06.12.2013 to 05.12.2015 with a provision of further extension on such terms and conditions as for the sole discretion of BPCL. Vide the said agreement M/s.

Shreenath & Co. is understood to have those two tanker/lorries as are mentioned in the said contract on. It is further perused from the said agreement itself that M/s. Shreenath & Co. only was held responsible for security lock arrangement in the said tank lorries. The painting of tank lorry was also agreed to be done as directed by BPCL but at the contractors (M/s. Shreenath & Co.) cost. The statutory regulations including the Motor Vehicle Act was also required to be observed by the contractor. The security deposit was also asked on per tanker/lorry basis. The character and antecedents of tanker/lorry crew from the competent concerned authorities for issuing the identity card were also called for from the contractor on the date of agreement itself. The tanker or lorry offered was required to comply with valid terms, at all, times of the permits issued and those permits were also to be submitted at the time of agreement itself. The tanker or lorries were required not to be black listed by any of the oil industries nor to be under the contract with other oil companies.

7. We further observe that the said M/s. Shreenath & Co., subsequent to the above discussed agreement with BPCL awarded the work of transportation of BPCL goods (branded fuel) on their behalf to the appellant vide a letter dated 20.06.2014. It has been specifically mentioned in the said letter that M/s. Shreenath & Co. had been awarded with the work of transportation of BPCL goods (branded fuel) and as per the appellants consent the truck/tanker/lorries of appellants also got approved by BPCL in the said work order itself. The work of transportation of BPCL goods was awarded by M/s. Shreenath & Co. to the appellant as per freight charges mutually agreed based on per kilometre/per kilolitre

basis depending upon the charges agreed by BPCL. The perusal of both these documents pursuant to these contracts clarifies that the appellant had transported branded fuel of BPCL for M/s. Shreenath & Co. against the payment received as freight charges. Similar is the set of document with the similar terms and conditions with respect to M/s. Hari Priya Filling station and M/s. Vishnu Priya Filling Station.

8. Perusal of these documents reveal that none of them is talking about taking truck/tanker, on hire, for transporting branded fuel of the oil companies. The amount in question received by the appellant is specifically mentioned as the freight charges. There is no hire/rent agreement for taking truck lorries from the appellant for the purpose. The documents rather reveal that the appellant has stepped into the shoes of the main contractors who had agreed to transport fuel in truck/tankers for the oil companies.

9. We further observe that contending the activity as transportation of fuel the appellant has sought the benefit of Section 66D (p) of Finance Act. We observe that while dealing with the said contention the adjudicating authority has given following findings:

> *44. I observe that during the said period in respect of M/s Vishnupriya Filling Station, M/s Shreenath and Company and M/s Haripriya Filling Station the receipts of the nature of services provided by the assessee to these parties are actually of providing Tankers/Lorries on hire and received the hire charges against it, however, in their ledgers they have mentioned it as Transportation Receivable. Further, in respect of the receipts from other parties also the assessee did not submit any documentary evidence except the copies of their ledger accounts in which they have shown the receipts as transportation income. Thus, merely on the basis of the head shown in their ledger accounts which has been found different*

from the actual nature of receipts in respect of M/s Vishnupriya Filling Station, M/s Shreenath and Company and M/s Haripriya Filling Station as mentioned above and in absence of any substantial evidence like contracts/Invoices/work orders it cannot be ascertained whether the receipts from the other parties are freight/transportation income or else. Therefore, it is held that these receipts are on account of the taxable services provided by the assessee as the ***same are neither covered under negative list of the services as per Section 66D of the Finance Act, 1994 nor exempted vide any Service Tax Notification including Mega Exemption Notification No. 25/2012-ST dated 20.06.2012 and hence attract the levy of service tax under Section 66B of the Finance Act, 1994 during the period in dispute.***

10. To adjudicate the correctness we look into the Section 66D of the Act and observed that clause (p) of this section reads as follows:

Section 66D: Negative list of services – The negative list shall comprise of the following services, namely:

(a) xxxxxxxxxxxxxxxx

(b) xxxxxxxxxxxxxxxx

(C) xxxxxxxxxxxxxxxxx

Xxxxxxxxxxxxxxxxxxxxx

(p) Services by way of transportation of goods-

(i) by road except the service of –

(A) a goods transport agency (GTA); or

(B) a courier agency

11. The bare perusal makes it clear that if any person is providing services of transport of goods by road, and his is neither covered under the statutory definition of GTA, nor under courier agency, then he is not liable to pay any service tax on such transportation. The definition of GTA is given under Section 65B(26) of the Finance

Act. Accordingly to which, a person can be said to be Goods Transport Agency, it the person provides services in relation to transportation of goods by road and issues the consignment note. The transportation services provided by GTA against consignment note are taxable but not the transportation of goods by any other person. This Tribunal has held that a person even if provides Goods Transport Service but if he does not issue consignment note, he cannot be brought under ambit of GTA and his receipt cannot be taxed. We rely upon the decisions given in :

(i) Narendra Road Lines Pvt Ltd Vs. Commissioner of Customs, CGST, Agra, reported as 2022 (64) GSTL 354 (Tri.-All.)

(ii) Mahanadi Coal Fields Ltd. Vs. Commissioner of Central Excise & Service Tax, reported as BBSR-I reported as 2022 (57) GSTL 242 (Tri. Kolka.)

12. We also observed that in the present matter appellant also claimed alternative exemption related to their activity as per the Sr. No. 22(b) of Notification No. 25/2012-ST dated 20.06.2012. For ease of reference the Sr. No. 22 of the Notification No. 25/2012-ST dated 20.06.2012 is reproduced as below.

> *Services by way of giving on hire –*
>
> *(a) ————————–,*
>
> *(b) to a goods transport agency, a means of transportation of goods;*

From the above provision we find that the services of providing vehicles on hire basis to GTA is covered under above Entry and this entry exempts the services by way of giving on hire a means of transportation of goods to a goods transport agency.

Even if the contention of the revenue is accepted that the Appellant are not providing the transport of goods services to M/s FCPL and providing the vehicles on hire basis, the demand of service tax still not sustainable in the present matter. The Ld. Commissioner denied the benefit of above notification on assumption that the recipient of the services i.e M/s FCPL is not a Goods Transport Agency. However we have already discussed in above paragraph that in the present matter FCPL has issued consignment notes/ LRs for transportation of goods, hence M/s FCPL is clearly covered under the definition of Goods Transport Agency Service and if at all there is any Service Tax liability it is on the service recipient of FCPL i.e. M/s Reliance Industries Ltd. In view of this we also do not see any reason for denying the benefit of the exemption under this entry to the appellant. CESTAT Ahmedabad in the case of **Chartered Logistics Limited Vs C.C.E, CESTAT Ahmedabad** held that services of transportation of goods by a person other than GTA are clearly exempt under Section 66D (P)(i)(A) of the Finance Act, 1994.

13. Since the activity is held purely to be a service of transportation of goods (branded fuels) by road, not by GTA, it is covered under the negative list/list of exempted services in terms of Section 66D(p)(i)(A) of Finance Act. In view of this discussion the findings in Order-in-Original under challenge are held erroneous. Therefore the tax liability confirmed upon the appellant vis-à-vis transporting fuel without issuing consignment notes is held liable to be set aside. However, the demand against the amount received from M/s. Vishnu Priya Filling Station is held to have been wrongly dropped. However, department has not filed any appeal against

the said part of the order, we refrain ourselves to reverse the same, it being have attained finality.

14. We observe from the order that the demand as was proposed with respect to incentives received by the appellant from the oil companies, on miscellaneous receipts including bad debpts, written off, balances return off, miscellaneous income and other income totalling to an amount of Rs.1,92,03,908/- has already been dropped by the appellant holding all those income to have been received by the appellant towards the trading activities which does not invite service tax. Department is not in appeal against the said part of the order. We also find no reason to differ from the findings arrived while dropping the said demand. However, the demand of service tax of Rs.1,63,12,805/- is hereby set aside. In the light of entire above discussion, we set aside the impugned Order-in-Original. Consequent thereto appeal stands allowed.

[Pronounced in the open court on **07.06.2024**]

(DR. RACHNA GUPTA)
MEMBER (JUDICIAL)

(HEMAMBIKA R. PRIYA)
MEMBER (TECHNICAL)

HK