

***In The Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench At Ahmedabad***

Appeal No.ST/109/2010-DB

[Arising out of OIA-346/2009/STC/HKJ/COMMR-A-/AHD dated 31.12.2009 passed by the CST(A)
Ahmedabad]

M/s Larson & Toubro Limited

Appellant

Vs

C.S.T. Service Tax - Ahmedabad

Respondent

Represented by:

For Appellant: Mr. Prasad Paranjape (Advocate)

For Respondent: Mr. Amit Kr. Mishra (AR)

CORAM:

HON'BLE MR. RAMESH NAIR, MEMBER (JUDICIAL)

HON'BLE MR. RAJU, MEMBER (TECHNICAL)

Date of Hearing: 10.08.2018
Date of decision: 14.11.2018

Final Order No. A/ 12586 /2018

Per: Raju

This appeal has been filed by M/s Larson & Toubro Ltd. in respect of demand of service tax for the period 01.07.2002 to 09.09.2004 for the activity of collection of toll under the category of BAS.

2. Ld. Counsel for the appellant pointed out that the Government of Gujarat and Infrastructure Leasing and Financial Service Ltd. (ILFS) jointly promoted a company then known as Ahmedabad Mehsana Toll Road Company Ltd. (AMTRCL), now known as Gujarat Toll Road Investment Company Pvt. Ltd. for the purpose of, inter alia, construction of Ahmedabad-Mehsana Toll Road on Build, Own, Operate and Transfer (BOOT) basis. The said AMTRCL selected the Appellant for the design, construction, operation and maintenance of the

Ahmedabad-Mehsana Road Project. The appellant was also awarded a contract for the purpose of operation and maintenance of the said road, inter alia with the following scope:

- I. Optimize as far as possible the safety, availability, expectancy and efficiency of the facility.
- II. To collect the correct Toll from each of the User and ensure as far as possible that the revenue collected by AMTRL through the collection of Tolls is maximized and remitted in accordance with the terms of the agreement to the designated account of AMTRL and ensure that AMTRL is in compliance of their obligations under the Financing Agreements;
- III. Minimize the incidence and duration of any period during which the Facility or any part thereof is inaccessible to Users;
- IV. Correct, by appropriating means in accordance throughout the agreement, any damage or deterioration to the facility;
- V. Enable the facility to continue in operation throughout the Operations period in good working order and condition and to ensure compliance with the Performance Standards, the Technical Requirements and the Concession Agreement and to ensure that the Facility free from hazards to Users, clean, compliance with Law and is generally well maintained.
- VI. Ensure that the work place for its personnel and any Sub-contractor and its personnel and any other authorized visitor is safe and free from hazards and in accordance with law;
- VII. Ensure that the facility is in the condition at all times required by the Concession Agreement including, without limitation, at the time of transfer to Government of Gujarat.

VIII. Ensure that all the services provided hereunder comply with the Prudent Utility Practices.

2.1 Ld. Counsel argued that the definition of BAS at the material time did not cover the activity undertaken by the appellant in respect of Toll collection. He argued that to be taxable as BAS, the activity should be specifically covered under clause i to iv of Section 65 (19) of the Act. He argued that the activity is not covered by the activity (i) to (iii) of the said definition. He further argued that (iv) of the definition applies only to the activities incidentally or auxiliary to the activities defined under (i) to (iii) of the said definition.

2.2 He further argued that collection of toll is covered in Article 246 of the Constitution read with Schedule VII list -2, entry 59. In view of above, the toll is a tax collected by the Government, and therefore, the users of the road paying Toll cannot be called as customers either of the Government or of the AMTRL. He argued that since users do not qualify as customers, the service rendered to them cannot be classified as customer care service provided on behalf of the client. He further argued that clause iv of the definition of BAS applies only to services incidental and auxiliary services provided in relation to the services defined in clause (i) to (iii) of the said definition. He relied on the decision of Tribunal in the case of Atlas Documentary Facilitators Company (P) Ltd. vs CST Mubai-I 2017 (50) STR 22.

2.3 He further argued that the appellant is not promoting or marketing any goods or services belonging to the client nor provided any customer care service. He argued that mere collection of toll and other incidental service will not merit classification under BAS. He argued that clause (iv) of definition prescribes only services in relation

to customer and since the users are not customers, the appellants service would not be covered under clause (iv) of the definition of BAS.

2.4 He argued that, at best the services provided may classify as taxable under Business Support Service (BSS) taxable w.e.f 01.05.2006, he pointed out that the appellant has been paying service w.e.f. 10.09.2004 though in his opinion there is no liability under BAS even after 10.09.2004. He relied on the decision of Tribunal in case of Intertoll India Consultants (P) Ltd. cs CCE Noida 2011 (24) STR 611 and on the decision in the case of Ideal Road builders P. Ltd. vs CST Mumbai 2015 (40) STR 480.

2.5 He further argued that extended period of limitation has been invoked in the instant case. He pointed out that for the period 01.07.2003 to 09.09.2004 demand notice has been issued in August 2007. He argued that they had started paying tax w.e.f. 10.09.2004 and it was in knowledge of Revenue and there was no suppression on the part of the appellant. He further argued that even in circumstances the demand is held to be sustainable the benefit of cum tax needs to be extended to the appellant in the current circumstances.

3. Ld. AR argued that work done by them consist of bundle of services. He pointed out that the appellant were responsible to all maintenance services for traffic. They were also responsible to take action during accidents and to clear obstructions, wreckage and broken down vehicles. They were required to ensure road availability of ambulance and toll vehicles at all times. The appellants were also required to arrange and liaison with road transport facilities and local police for the traffic arrangements. He argued that the aforesaid

service were rendered by L&T on behalf of AMTRL to Customers of AMTRL.

3.1 He further pointed out that toll may be tax but the service provided by the appellant and the Revenue recovered as a consideration for service is not a tax. He argued that there is no exemption to services provided in relation to collection of tax at the material period.

4. We have gone through the rival submissions. The definition of BAS at the material time read as follows:

“Business Auxiliary Service” means any service in relation to :-

- (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) Any incidental or auxiliary support service such as billing, collection or recovery of cheques, accounts and remittance, evaluation of prospective customer and public relation services, and includes service as a commission agent, but does not include any information technology service.

Explanation.- For the removal of doubts, it is hereby declared that for the purposes of this clause ‘information technology service’ means any service in relation to designing, developing or maintaining of computer software, or computerized data processing or system networking, or any other service primarily in relation to operation of computer systems.”

It can be seen that the definition has four limbs. The clause (i) relates to promotion or marketing or sale of goods and therefore, is not relevant in the instant case. The clause (ii) reads as “promotion or marketing of service provided by the client”. Ld. Counsel has relied on the decision of Tribunal in case of Intertoll India Consultants (P) Ltd. (supra) and Ideal Road Builders P. Ltd. (supra). It is seen that none of these decisions consider clause (iii) of the definition to ascertain the liability to tax under BAS. There is no doubt that in the transaction for collection of toll the AMTRL are providing the service to the road users

and the road users pay to the AMTRL the toll for using the road. Ld. Counsel has used two arguments. The first argument being that the toll collected is a tax, and therefore, there cannot be any service tax liability on the toll collection. The second argument being that the provision of good roads is responsibility of Government and the same cannot be treated as a service provided by the Government. Therefore, no service is provided by AMRTL to road users and clause (ii) of the definition of BAS cannot be invoked to levy service tax on the appellant.

4.1 The service tax in the instant case has been demanded, not on the amount of toll collected, but on the compensation received by the appellant with respect to collection of such toll. While the toll may be a tax, the compensation received by the appellant is not a tax. The compensation received by the appellant is for the service provided by the appellant to AMTRL in respect of collection of toll and other assorted services. There is no exemption to any service provided in respect of collection of tax, and therefore, first argument of the Ld. Counsel cannot be sustained.

4.2 In this regard the agreement between AMTRL and the appellant is relevant. The following clauses of the agreement are relevant in this regard:

- (A) The State of Gujarat (the "State") is one of the highly industrialized states in India. The Government of the State ("GoG"), in order to meet the growing demand for a developed, efficient, goods quality and expensive system of road transportation, has formulated a policy enabling private participation in the development, construction, reconstruction, repair, upgrading, management, operation

and maintenance of roads within the State. In order to enable to due implementation of this policy, The Bombay Motor Vehicles Tax Act, 1958, which had earlier prohibited the levy of the tolls on motor vehicles utilizing roads within the territory of the State, has been amended, by the Bombay Motor Vehicles Tax (Gujarat Amendment) Act, 1994, to enable GoG to levy tolls on motor vehicles utilizing roads that have been either constructed, reconstructed, upgraded or repaired by private enterprises which have been specifically authorized by GoG to do so. The amended Act upgrading or repaired of the road to collect the toll in relation to such road on the terms and conditions and in such manner as may be prescribed.

- (B) Infrastructure Leasing & Financial Services Limited ("IL&FS") is a company providing financial services one of the main objectives of which is to promote, establish, develop, finance and implement projects establishing infrastructure facilities, including roadways, bridges, transportation systems, power, telecommunications and integrated area development programmes.
- (C) GoG, pursuant to the aforementioned policy of involving private participation in the development of roads in the State, entered into a Memorandum of Agreement with IL&FS (the "MOA"), on 31 October 1995, wherein GoG and IL&FS agreed to the implementation of projects relating to the development, upgrading, repair, operation and maintenance of roads in the State on a commercial basis, through private participation and utilizing private financial resources.
- (D) ...

- (E) ...
- (F) ...
- (G) IL&FS, pursuant to the decision of GoG to implement the Project under the MOA, initiated negotiations with the International Bank for Reconstruction and Development (the "World Bank") in order to make the Project eligible for the line of credit available to IL&FS from the World Bank. IL&FS also appointed through competitive bidding process Scott Wilson Kirkpatrick India Pvt. Ltd. ("SW") to undertake a detailed feasibility study of the Project in order to prepare the technical and financial details of the implementation of the Project.
- (H) In view of the feasibility report submitted by SW, GoG has decided that the Project should be implemented on a Build, Own, Operate and Transfer basis ("BOOT") by a corporate entity incorporated in the State and promoted by GoG and IL&FS, specifically for the purpose of developing and implementing the Project on a BOOT basis.
- (I) ...
- (J) GoG granted the Owner, the Concession Agreement, the concession to implement, on strictly commercial principles, the Project and to that end design, construct, manage, operate and maintain the Facility in accordance with the terms of the Concession Agreement.
- (K) ...
- (L) After due evaluation of the various bids submitted in response to the RFP, the Owner has awarded the tender for the design and construction of the Project to Larsen & Toubro Limited the Contractor.

From the above it is apparent that IL&FS has agreed to take up development, upgrading, repair, operation and maintenance of roads in the street on a 'commercial basis'. The construction and operation and maintenance has been sub-contracted to the appellant by IL&FS through a corporate entity incorporated in the state and promoted by Govt. of Gujarat and IL&FS specifically for this purpose. From the above terms of the contract, it is apparent that the construction of road, and its operation and management have been undertaken strictly on commercial basis and the toll tax collected is being used for recovery of investment and operating cost on Build Own Operate Transfer (BOOT) basis. In these circumstances merely because a project is funded by toll tax, it cannot be said no service has been provided. Especially on the ground that during the phase when the toll tax is collected, the property owned by a corporate, promoted by Govt. of Gujarat and IL&FS. In view of above, it is apparent that the toll collected is a compensation given to a private operator for providing the services of road used to the public on BOOT basis. Thus, the facility and usage of road against payment of toll is a service provided by the AMTRL.

4.3 Perusal of the contract shows that the appellant are, inter alia, required to maximize the collection of toll. The appellants are also required to minimize the incidents and duration of any period during which the facility or any part thereof is accessible to use. The appellants are also required to maintain the facility against damage or deterioration. They are also required to ensure that all the services provided under the contract comply with prudent utility practices. In these circumstances, it can be said that appellants are engaged in

promotion or marketing of service provided by AMTRL. The term "Marketing" is defined in Oxford dictionary is as under:

"The action or business of promoting and selling products or services, including market research and advertising."

The term "Marketing" is defined in Cambridge dictionary is as under:

"a job that involves encouraging people to buy a product or service."

The term "Marketing" is defined in Merriam Webster dictionary is as under:

1. **a** : The act or process of selling or purchasing in a [market](#) did most of her *marketing* in local stores.
b: The process or technique of promoting, selling, and distributing a product or service
2. An aggregate (see [³AGGREGATE](#) 1) of functions involved in moving goods from producer to consumer

From the above definitions it is apparent that marketing of service is a very wide term. The activities of the appellant which are clearly intended to maximize the Revenue of the Principal comes under the ambit of promotion and/ or marketing of service.

4.4 Ld. Counsel for the appellant has argued that the road user is not a customer, and therefore, they would not be cover under clause (iii) of the said definition. Clause (iii) of the definition of BAS reads as "Any Customer Case service provided on behalf of the client". The Ld. Counsel has relied on the decision of Tribunal in the case of Intertoll India Consultants (P) Ltd. (supra) wherein it has been held that road user is not a customer. Para 8 of the said decision reads as under:

"8. At the outset, we find that NTBCL was declared as owner of the DND bridge by the Noida Authority under the Govt. of U.P. The owner had given rights of collection of toll tax to the appellant and to retain a percentage of it and remit the balance. It can be seen that the appellant

herein is collecting an amount as toll from the users of the DND bridge. To our mind, the users of toll fee paid bridge cannot be considered as customers. The persons who are using the DND bridge cannot be called as customers of either the appellant or NTBCL for a simple reason, because the expression 'customer' as defined in Advanced Law Lexicon read as under :-

“Customer is a person with whom a business house or a business man, has regular or repeated dealings; a purchaser of goods; one who frequents any place of sale for the sake of purchasing or ordering goods. A business customer is one who has the use and habit of resorting to the same person or place to do business; therefore, a stranger who goes into bank to get a cheque collected, is not a customer of the bank.”

It can be seen from the above definition, a person is considered as customer of a business house when he has repeated dealings with the business house. To our mind, by any stretch of imagination, individual using the DND bridge and pays toll to the authority cannot be considered as a customer. The definition of the BAS either prior to 10-9-2004 or post-10-9-2004 has to be considered from the point of view of whether the appellant has provided any customer care services on behalf of the client. First and foremost, it is to be noted that NTBCL is not a client of the appellant as the appellant is not promoting any customer care service of NTBCL. There is no visible activity done to please the user of the DND bridge to take care of their needs or something which is done which induces to come again and again to the said DND bridge. It may be noted that the users of DND bridge may be paying the toll fees reluctantly as that is the only means to connect the two banks of the rivers.”

We respectfully disagree with conclusion reached in the said paragraph. The said paragraph relies on the definition of customer as it appears in Advanced Law Lexicon. According to the said definition only a person who has regular or repeated dealing can be a customer. Customer has been defined as follows in dictionaries:

The term “Customer” is defined in Oxford dictionary is as under:

- “A person who buys goods or services from a shop or business.”
- “A person of a specified kind with whom one has to deal.”

The term “Customer” is defined in Cambridge dictionary is as under:

“A person who buys goods or a service.”

The term “Customer” is defined in Merriam Webster dictionary as under:

- “one that purchases a commodity or service.”
- “an individual usually having some specified distinctive trait.”

From the above definitions it is apparent that even a single time buyer of service or goods also qualifies as customer. Moreover, the conclusion in para 8 of the decision of Intertoll India Consultant P. Ltd. (supra) is based on the presumption that all the road users of the said road are one time users. There is no basis for the said presumption as it is possible that a lot of road users would be using the said product on daily, weekly, or monthly basis and thus qualifying as customer even by definition relied upon in the case of Intertoll (supra). It is seen that the appellants were responsible to all maintenance services for traffic. They were also responsible to take action during accidents and to clear obstructions, wreckage and broken down vehicles. They were required to ensure road availability of ambulance and toll vehicles at all times. The appellants were also required to arrange and liaison with road transport facilities and local police for the traffic arrangements. In these circumstances, we find that every user is a customer of AMTRL and the appellants are providing services to the customers (the users) on behalf of AMTRL and thus the activity would also be covered under clause (iii) of the definition of BAS.

From the above it is apparent that the appellants are providing a bouquet of services to the customers on behalf of the principal AMTRL and thus the appellants are also covered by the clause (iii) of the definition of BAS.

4.5 It is also seen that appellants are engaged in the following activities:

- Supply of toll tickets to users and collect toll from users;
- Maintain books and records about toll collected, traffic volumes, vehicles classification, exempted vehicles, etc.;
- Establish toll procedures, minimize time taken in collection of toll, ensure that exempted vehicles use only service roads and maintain toll plaza;
- Deposit each business day collection in to the toll account and ensure security of the amount;
- The toll shall be collected by single tickets using Toll Ticket Machines which shall store all the data for further electronic processing;
- Establish enforcement procedures to ensure that all the vehicles pass only after payment of toll tax and in case of failure shall compensate for loss;
- Shall augment the toll collection on the basis of traffic forecast;

Ld. Counsel has argued that the issue of toll tickets is not the same as billing. We, however, do not agree with the said contention. Issue of toll ticket is nothing but billing. The activity of billing is identifying the service availed and charging for the same. The appellants in the instant case would be identifying the size of vehicle and the destination to ascertain toll charges. Thereafter toll ticket is issued and money is collected. In view of above activities undertaken by the appellant, they would also be covered under clause (iv) of the definition of BAS.

4.6 In view of the above we are of the opinion that the decision in case of Intertoll India Consultants (P) Ltd. (supra) is per incurium as it ignores the common parlance definition of the term 'Customer'. As described above the activity of the appellant

would be squarely covered by definition of BAS and would be chargeable to service tax during period prior to 10.09.2004 also.

4.7 The appellants have sought benefit of limitation. We find that the appellants are providing the BAS and there is no doubt regarding the same. Merely, because they are collecting the said amount on behalf of the corporate entity backed by Government it does not constitute a bonafide belief for exemption. The definition of BAS is very clear. Thus, they cannot be given any benefit on account of limitation.

5. The appeal is consequently dismissed.

(Pronounced in the open court on 14.11.2018)

(Raju)
Member (Technical)

(Ramesh Nair)
Member (Judicial)

Neha