CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL MUMBAI
WEST ZONAL BENCH

Service Tax Appeal No. 86265 of 2015

(Arising out of Order-in-Original No. 79/STC-I/SKS/14-15 dated 25.02.2015 passed by the Commissioner of Service Tax-I, Mumbai)

Traffic Manager, Mumbai Port Trust **…..Appellant**
Mumbai Port Trust,
Vijay Deep, 2nd Floor,
S.V. Marg, Mumbai GPO
Mumbai

Vs.

Commissioner of Service Tax-I, Mumbai **…..Respondent**
115, New Central Excise Bldg.,
M.K. Road, Churchgate,
Mumbai

APPEARANCE:
Shri Bharat Raichandani, Advocate for the appellant
Shri P.V. Sekhar, Addl. Comm(Authorised Representative) for the Respondent

CORAM:
HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)
HON'BLE DR. SUVENDU KUMAR PATI, MEMBER (JUDICIAL)

FINAL ORDER No: A/85644/2020

DATE OF HEARING : 27.08.2019
DATE OF DECISION : 23.07.2020

PER: C J MATHEW

Mumbai Port Trust, a body corporate established under the erstwhile Bombay Port Trust Act, 1879 and, since 1975, under the

aegis of the Major Port Trusts Act, 1963, is aggrieved by the crystallisation of liability of ₹21,19,68,032/- under section 73 of Finance Act, 1994, along with appropriate interest under section 75 of Finance Act, 1994, besides being imposed with penalty of like amount under section 78 of Finance Act, 1994 and as the demand was held to be liable for recovery from the Traffic Manager on whom penalty of ₹10,000/- under section 77 of Finance Act, 1994 was also imposed, that functionary is before us.

2. From the records, it is seen that Mumbai Port Trust, along with Central Excise authorities and Central Railway, was vested with the responsibility under Mumbai Municipal Corporation (Levy of Octroi) Rules, 1965 to collect octroi on entry of goods for consumption and use in the municipal area within their respective operational jurisdictions for which 3% of such collections was retained as recompense. The tax liability was computed on the retained amount of ₹186,11,14,303/- as the ostensible consideration for having rendered service, taxable under section 65(105)(zn) read with section 66 of Finance Act, 1994 until 30 June 2012 and under section 66B read with section 65B(44) of Finance Act, 1994 for the period thereafter, to Municipal Corporation of Greater Mumbai (MCGM) between 1st October 2007 and 31st January 2013. It is on record that though, in the pre-negative list regime, taxability could also have arisen under section 65(105)(zzb), taxing 'business auxiliary service', of Finance Act, 1994, liability was determined as provider of 'port service' by

recourse to section 65 A of Finance Act, 1994 for, so to speak, breaking the tie. It is also on record that, besides the transition to 'negative list' with effect from 1st July 2012, the definition of the taxable service also underwent changes though, from the confirmation of demand across these three distinct periods, it would appear to have been of no consequence insofar as the obligation of the appellant herein is concerned.

3. We consider it prudent to visit the statutory provisions relied upon by the adjudicating authority. In 2004, tax was imposed on service rendered by incorporating

> *'(zn) to any person, by a port or any other person authorised by the port, in relation to port service, in any manner;'*

in section 65(105) of Finance Act 1994 and with the scope of

> *'(82) "port service" means any service rendered by a port or other port or any person authorised by such port or other port, in any manner, in relation to a vessel or goods;*

and

> *(81) "port" has the meaning assigned to it in clause (q) of section 2 of the Major Port Trusts Act, 1963;'*

included in section 65 of Finance Act, 1994 and, by Finance Act, 2010, altered the levy to service rendered

'(zn) to any person, by any other person, in relation to port services in a port, any manner;'

and redefined

'(82) "port service" means any service rendered within a port or other port, in any manner;'

in section 65 of Finance Act, 1994 for eliminating reference to 'person authorised' as well as 'in relation to a vessel or goods' in the determining of taxability. Though these were not considered by the adjudicating authority to be significant impediments to subsequent fastening of tax liability, the rationale for these changes, amplified in circular no. 334/1/2010-TRU dated 26th February 2010 of Central Board of Excise & Customs (as it then was), may have to be referred to by us in the context of the submissions made on behalf of the appellant.

4. The impugned order-in-original no. 79/STC-I/SKS/14-15 dated 25th February 2015 of Commissioner of Service Tax-I, Mumbai is at pains to record the contents of the several correspondence and discussions with the Mumbai Port Trust in attempting to persuade them of the error of their ways. Furthermore, justification has also been offered for proceeding with the adjudication despite the absence of the noticee during the personal hearing while attesting to having taken all the objections into consideration.

5. According to the adjudicating authority, the taxability, founded on two conditions specified in the original definition and having to rely only one of these after 1st July 2010, was inevitable as the amount withheld from the Municipal Corporation was for an activity undertaken, admittedly, by 'a port' and 'in relation to goods' that could be taken out only after discharge of octroi liability. For the confirmation relating to the period after 1st July 2012, the adjudicating authority, while taking note of the exclusion of services provided by government/local authority, held the noticee to be neither but, on the contrary, being by a trust, is a commercial organisation and that section 66F(1) of Finance Act, 1994, demarcating the rendering of main service from the provision of such services that enable such provider in rendering their output service, distanced them from any claim to sovereign function of tax collection.

6. To deny coverage of the clarification offered in circular no. 897/7/2006-ST dated 18 December 2006 and no. 96/07/2007-ST dated 23 August 2007 of Central Board of Excise & Customs (as it then was), the adjudicating authority derogated the collection of octroi from exclusion devolving on exercise of 'sovereign function' characterised by the entity being a public authority, providing service that is mandatory and statutory and the consideration thereof, as statutory fee or compulsory levy, deposited in the government account. By referring to the status of the noticee as 'trust', the scope of the powers of the Board of Trustees and the consequent kinship

with Life Insurance Corporation and Reserve Bank of India to hold that it is not a sovereign or public authority, the distinction between levy and collection, with diffusion of the latter task to other persons depriving it of mandatoriness implicit in sovereign function, and the retention of recompense without depositing in government account, excluded 'octroi' from being a statutory fee.

7. Discarding the decisions of the Tribunal in *UTI Technology Services Ltd v. Commissioner of Service Tax, Mumbai [2012 (26) STR 147 (Tri-Mumbai)]* and in *Intertoll India Consultants Pvt Ltd v. Commissioner of Central Excise, Noida [2011 (24) STR 611 (Tri-Del)]* on the ground of apparent infirmities in these decisions and, instead, amplifying the circular first of the two circulars *supra*, that had been referred to in the decision of the Hon'ble High Court of Karnataka in *Karnataka Government Insurance Department v. Asst Commissioner of Central Excise*, it was held as inapplicable to delegated collection of octroi. Quaintly, the adjudicating authority discarded the eligibility for exemption under notification no. 13/2004-ST dated 10 September 2004 as, admittedly, octroi was not a collection of the Government of India or Government of the state but, according to him,

> *'3.30….It appears that like the Municipal Councils, Zilla Parishads and Village Panchayats, MCGM is* ***merely*** *(emphasis supplied)* ***a local body*** *mandated with looking after certain pre-defined functions.*

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3.32. In so far as Octroi is concerned, I am of the strong view that it, is levied by the local bodies such as the Municipal Corporations to fund its operations. For instance, in Mumbai, Octroi is levied in terms of Section 192 (1) of the Mumbai Municipal Corporation Act, 1988, whereas in Pune, it is levied in terms of Mumbai Provincial Municipal Corporations Act, 1949, read with Pune Municipal Corporation Octroi Rules, 2008. The levy of Octroi, it appears, to not figure in the realm of the budget announced by the State Government of Maharashtra and thus, not to levy administered by the State Government.'

The decisions of the Tribunal, on the aspect of eligibility for this exemption, was denied applicability with the observation that

'3.31. I further find that reference to this notification by the Hon'ble Tribunal in the case of UTI Technology Service ltd. and Intertoll India Consultants (P) Ltd. cannot be taken as findings of the Tribunal as the Tribunal did not examine the exact wording of the notification to come to the conclusion. Therefore these judgements with reference to this notification should be treated as per incuriam.'

8. As we shall presently be taking up the issue of levy of octroi by municipalities, the views of the adjudicating authority will necessarily be subject to appropriate analysis then. Insofar as the declaration of the adjudicating authority on the decisions of the Tribunal are concerned, even disdainful silence in response to the revealed ignorance, demonstrated lack of grace and blatant want of discipline expected from a judicially subordinate authority is too dignified, and undeserving, a reaction. It is apparent that the reviewing authority established by the statute are equally complicit by not taking note of this aberration. We can only hope that other adjudicating authorities, present and future, remain mindful of their relative stations in the judicial hierarchy.

9. In a similar vein must be viewed the failure of the adjudicating authority to perceive his own contradictory approach while dealing with the decision of the Hon'ble High Court of Madhya Pradesh in *Sindhi Sahiti Multi Purpose [1995 (0) MPLJ 176]*, cited by the noticee, by referring to the ruling of the Hon'ble Supreme Court in *S Mohanlal v. R Kondiah [AIR 1979 SC 1132]* on interpreting an expression in one statute with reference to its use in another but, unhesitatingly, placing reliance on the decision of the Hon'ble High Court of Rajasthan in *Municipal Board v. Industrial Tribunal and Labour [LAWS (RAJ) 1985-11-30]* to which also we may need to advert presently.

10. Though Learned Counsel submitted that the adjudication proceedings were, in effect, *ex parte* in the absence of representation of the noticee at the personal hearing, the grievance was not urged as having caused irreparable harm and proceeded to lay the foundation for the two pillars upon which his claim of exclusion from coverage under Finance Act, 1994 rested. According to him, it was plain that the levy and collection of any tax was beyond the pale of another tax and that the clarifications issued by Central Board of Excise & Customs in 2006 and 2007 makes this abundantly clear by not referring to any provision of Finance Act, 1994 while asserting the exclusion therein. He submits that the collection of taxes by local bodies is no less of a sovereign function than that of either the Government of India or the government of a state. Furthermore, he contends that the appellant merely acts as a pass through for the Municipal Corporation of Greater Mumbai and that the administrative expenses towards collection, that otherwise would have been borne by the municipal authority, is permitted to be retained by the appellant; it is not a consideration, arising from offer and acceptance, for rendering of 'port service' but mere transfer arrangements between two governments. According to him, the issue stands settled by the decision of the Tribunal in *Homa Engineering Works v. Commissioner of Central Excise, Mumbai [2007 (7) STR 546 (Tri-Mumbai)]* insofar as the scope of the levy is concerned and that exclusion of sovereign functions has been upheld by the Tribunal in *UTI Technology Services Ltd v. Commissioner of Service Tax, Mumbai [2012-TIOL-73-*

CESTAT-MUM]. The applicability of notification no. 13/2004-ST, he argues, has also been confirmed by the decision of the Tribunal in *Intertoll India Consultants (P) Ltd v. Commissioner of Central Excise, Noida [2011 (24) STR 611 (Tri-Del)]*. We take note that the latter two decisions were also before the adjudicating authority in that proceeding.

11. Learned Authorised Representative drew our attention to the several opportunities afforded to the appellant in adjudication proceedings and the lack thereof in participation which, according to her, warranted discarding of the plea that principles of natural justice had not been complied with. Since that aspect has not been seriously pressed on behalf the appellants, we are in agreement. On behalf the respondent, it is submitted that the decision of the Tribunal in *re Homa Engineering Works* does not advance the case of the appellant because it was concerned with the chargeability to tax prior to 2010 and in relation to repairs effected by a private party and not by the port. It is a further contention that the decision of the Tribunal in *Kandla Port Trust v. Commissioner of Central Excise & Service Tax, Rajkot [2019 (24) GSTL 422 (Tri-Ahmd)]* has clearly held that any fees charged in relation to, *inter alia*, goods are chargeable to tax for being within the definition of 'port services.' It was also submitted that the Tribunal in *Larsen & Toubro Ltd v. Commissioner of Service Tax, Ahemedabad [2019-TIOL-205-CESTAT-AHM]* has rendered the decision in *re Intertoll India Consultants (P) Ltd* to be *per incuriam.*

It was also argued that the decision of the Hon'ble High Court of Gujarat, in *Commissioner v. Adani Enterprise Ltd [2014 (35) STR 741 (Guj)]* holding that the amendment effected in section 65(105)(zn) of Finance Act, 1994 with effect from 1st July 2010, being clarificatory, enabled application of the expanded scope even retrospectively, should accord closure to the controversy.

12. Referring to the relevant provisions of Finance Act, 1994 and the contents of the impugned order, Learned Authorised Representative urged us to adjudge the nature of the activity undertaken by the appellant within the legislative intent in section 65 (105) (zn) of Finance Act, 1994, the inapplicability of the several exemptions and clarifications cited on behalf of the appellant and the exclusion from the 'negative list' regime for the period after 1st July 2012.

13. In our opinion, the submission of Learned Authorised Representative on the applicability of the decision of the Tribunal in *re Intertoll India Consultants (P) Ltd* does not find much favour. Without going into the proprieties of a coordinate bench so derogating an earlier decision cited before it, we are inclined to proceed with caution as it is legally well-settled that such declarations do not erase the judgement out of existence. It also appears to us that the declaration itself was pursuant upon a distinguishment of the lexicon to be deployed for ascertainment of the meaning of 'customer' which is not relevant to the present proceedings disputing an entirely

different head of taxable service. On the contrary, the decision places emphasis on 'common parlance' which, according to us, is of relevance. We are also inclined to note that the decision of the Hon'ble High Court of Gujarat in *re Adani Enterprise Ltd*, having made it abundantly clear that

> *'10. Considering the above facts and circumstances of the case, in our view, no question of law arises..'*

and, thus, ruling out maintainability under section, has not rendered a decision on the nature and scope of the impugned taxable service. Learned Authorised Representative also placed before us the decision of the Hon'ble High Court of Rajasthan in *Municipal Board v. Industrial Tribunal and Labour* referred to supra in our summary of the findings of the adjudicating authority to which we shall presently address ourselves.

14. Learned Counsel countered the reliance on the decision *in re Kandla Port Trust* by pointing out that the decision in *re Homa Engineering Works* was not argued in the proceedings before the Tribunal.

15. From a perusal of the impugned order, it is apparent that the adjudicating authority has proceeded on the assumption that the collection of octroi was the service rendered by the appellant and the sole aspect that remained in dispute was the fitment within the proposed taxable service. In doing so, the plea of having discharged

sovereign function that was beyond the ambit of tax laws was taken up to sustain the finding that taxable service had been rendered.

There can be no cavil that sovereign functions are not intended to be taxed; sovereignty of a State has its genesis in either divine right or upon entrustment by the governed and the subjecting of the exercise of that sovereignty to levy is, generally speaking, anathema. Practically too, the absence of tangibility as well as specified recipients, renders the scope for such a levy to be well nigh impossible. It can be seen from the laws enacted for commodity taxation that there is a reiteration of the taxability of government transaction; such a mandate to tax is conspicuously absent in Finance Act, 1994. Normally, there would be no cause for such eventuality as the discharge of sovereign responsibility is not characterised with corresponding consideration. In taxation of intangibles, it is the manifest consideration, coupled with frailty - a casualty of brevity in drafting and imprecision inherent in broadening applicability of expression, that excites the interest of the tax collector and it was precisely to settle controversies arising therefrom that the clarifications, referred to *supra*, were required to be issued. It was not intended to exempt sovereign functions but to enable the field formations to comprehend the distinction among aspects of governance for enforcing the tax liability on such that, perceptibly, were not relatable to sovereign function. Logically, therefore, the adjudicating authority should have examined the liability within the

enumerated taxable services only after elimination of the possibility of the impugned activity being the discharge of a sovereign function.

16. The negation of the claim flows from certain responses of the adjudicating authority to the claims of the appellant. We are constrained to take note of the solecism evident in those findings. Tax officials are creations of taxing statutes and not only required to be diligent in enforcing levies contemplated in those statutes but also be soldiers in defence of rule of law. Incorrect sequencing of the hierarchy of findings underlines disregard for other taxing statutes and even of the Constitution itself which may be attributable either to ignorance or to egregious disrespect. In the interests of rule of law, we do hope that it is not the latter and in the interest of revenue administration, we do hope that it was not the former. We do, however, believe that our apprehensions will be comprehended.

17. The adjudicating authority has, in casual manner, discarded the appellant from the scheme of governance by characterising them as a trust. Perhaps, he was unaware that the appellant, entrusted with the conservation and operation of the harbour in Bombay (as it then was) as a successor of the several departments of the pre-independence provincial administration, including the Customs, was constituted under the Bombay Port Trust Act, 1879 almost contemporaneously with the administration of Calcutta (as it then was) Port and that the Indian Trusts Act, 1882, enacted subsequently, was intended to

regulate the functioning of only private trusts. The scope of entrustment with the appellant, from inception and even after coverage under the Major Port Trusts Act, 1963 until much later, did not appear to have been appropriately appreciated in the impugned order. These were properties belonging to, and facilities offered by, the State, entrusted for administrative convenience with the Board of Trustees designated as the 'conservator', as required under the Indian Ports Act, 1908.

18. According to the adjudicating authority, octroi is not a collection envisaged in the budget of the Government of Maharashtra and, hence, excluded from the privileges that are appurtenant. At the same time, the impugned order makes reference to the Mumbai Municipal Corporation Act, 1888 and the Mumbai Municipal Corporation (Levy of Octroi) Rules, 1965; every levy does not have to necessarily pass through the annual budgetary exercise of a government. Had the adjudicating authority paused for a moment to peruse the Mumbai Municipal Corporation (Levy of Octroi) Rules, 1965 incorporating a role for public servants not under the control of either the Government of Maharashtra or of Municipal Corporation of Greater Mumbai but of Central Excise authorities, Mumbai Port Trust functionaries and officials of Central Railway-and not by executive command the finding of collection as delegated function may not have been arrived at. Such a specific assignment can only flow from appropriate legislative arrangement. In his attempt to disengage the collection of

octroi from exercise of taxing powers, a distinction was sought to be propagated between levy and collection. A perusal of Part XII of the Constitution of India would have been sufficient to appreciate that levy, collection and appropriation are all employed in the design of distribution of taxing powers and relegation of collection outside the aspect of sovereignty is not acceptable. Indeed, Article 265 is explicit in denying legality to tax is 'levied or collected' without authority of law. The finding of the appellant having exercised delegated powers is without basis.

19. The adjudicating authority has placed reliance on the decision of the Hon'ble High Court of Rajasthan in *re Municipal Board* to cast the municipal authority as an industry and, hence, not deserving of any consideration as discharging sovereign functions. Not only is this contrary to the clarification issued by the Central Board of Excise & Customs vide circular no. 89/7/2006-ST dated 18 December 2006 which acknowledges, without identifying a descending hierarchy, that organisations could be discharging statutory obligations but failed to take cognizance of a far-reaching change brought about by Constitution (Seventy third Amendment) Act, 1992 and by Constitution (Seventy fourth Amendment) Act, 1992 incorporating Part IX and Part IXA widely known as the Panchayati Raj Institutions. These reforms provided for three tier third level institutions for governance in the country with independent State Election Commissions and State Finance Commissions-the one for constitution

of these bodies and the other for appropriate financial devolution. Thus, the Constitution itself permitted the states to assign some of its taxing powers to these third level institutions. The adjudicating authority has erred in ignoring that the circumstances in which municipalities may have been perceived as industry had long since ceased to exist.

20. Considering these flaws of inferences in the impugned order leading to the conclusion that collection of octroi by the appellant, we, on examination of the legal framework, finding it useful to restate the foundations. That levy and collection of tax is a sovereign privilege and must have authority of law enacted by the Union Parliament or the legislatures of constituent states is not in dispute. It is also not in doubt that List II of the Seventh Schedule in the Constitution of India empowers the legislatures of the constituent states to levy and collect tax on 'entry of goods' which is, essentially, what octroi is. The collection of octroi for the entry and consumption of specified goods in Greater Mumbai has been legislated under the Mumbai Municipal Corporation Act, 1888 and, in terms of the Mumbai Municipal Corporation (Levy of Octroi) Rules, 1965, Mumbai Port Trust, a statutory authority established under law and subsequently incorporated within the ambit of Major Port Trusts Act, 1963, was one of the three agencies of the Central Government empowered-and not by contract-to enforce collection. In this scheme, we fail to see the lack of any deviation from this charge of sovereign functions and in

any way distinct from the empowerment of the officers of central excise to collect service tax. Retention of a portion of such collection, as mere procedure of transfer, is not distinguishable from the allocation of estimates to the field formations of the Central Board of Excise & Customs for meeting administrative expenses. The conclusion, inevitably, is that the collection of octroi by the appellant is in pursuance of discharge of sovereign privilege.

21. In view of the above, which rules out the invoking of Finance Act, 1994 against the amount retained by the appellant, we do not find it necessary to ascertain if the activity is taxable service under the scheme of enumerations or the negative list regime. Accordingly, we set aside the impugned order and allow the appeal.

(Order pronounced in open court on 23.07.2020)

(C J Mathew)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

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