

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL**

NEW DELHI

PRINCIPAL BENCH

Service Tax Appeal No. 50794 of 2021 [SM]

[Arising out of Order-in-Appeal No.85 (CRM) ST/JDR/2021 dated 18.03.2021 passed by the Commissioner (Appeals), Central Goods and Service Tax, Jodhpur].

M/s. Sitaram India Ltd.

F-226-227 & G-228-229,
RIICO Industrial Area, 4th Phase,
Pur Road, Distt. Bhilwara
(Rajasthan)

...Appellant

VERSUS

Commissioner CE & CGST Division-E,
Bhilwara (Rajasthan)

...Respondent

APPEARANCE:

Mr. Rahul Lakhwani, Advocate & Shri Raghav Rathi, C.A. for the Appellant
Mr. Ishwaqr Charan, Authorized Representative for the Respondent

Coram: HON'BLE DR. RACHNA GUPTA, MEMBER (JUDICIAL)

DATE OF HEARING: 08.03.2022
PRONOUNCED ON: 05.04.2022

FINAL ORDER No. 50317/2022

DR. RACHNA GUPTA

The appellants are engaged in collection of toll amount (only at Narayanpura Toll Plaza, Rithala, Udaipur Section) on NH 76 in State of Rajasthan. After receiving an information from Central Excise and Central Goods and Service Tax and Service Commissionerate, Udaipur that the financial documents including TDS Certificate, Balance Sheets, P & L Account alongwith schedules, Income Tax Returns for the year 2014-15 were

demanded from the appellant. On examination of those documents, Department observed that appellant had received Rs.34,93,06,965/- on account of 'Toll charges' (hereinafter called as Toll) and had paid Rs.33,42,03,471/- of said amount to National Highway Authority of India (NHAI) thereby retaining an amount of Rs.1,51,03,494/-.

2. Department formed an opinion that the appellants are providing business auxiliary services as defined under Section 65 (19) of Finance Act, 1994 to the users of their client NHAI but were not depositing the Service Tax. Accordingly vide Show Cause Notice No.55 dated 22.05.2020 service tax amounting to Rs.23,37,772/- was proposed to be recovered alongwith the interest and the proportionate penalties. The said proposal was confirmed by the Original Adjudicating Authority, however, only for the amount of Rs.18,66,791/- with the proportionate interest and the penalty of the same amount. The demands of Rs.4,87,832/- was dropped being the amount incurred against legal and professional expenses pertaining to miscellaneous amounts paid to various Chartered Accountants / Consultants / Membership Fees / Stamp Duty for Loan which were not chargeable to Service Tax. The Appeal there of has been rejected upholding the said order. Being aggrieved, the appellant is before this Tribunal.

3. I have heard Mr. Rahul Lakhwani, Advocate & Shri Raghav Rathi, C.A. for the Appellant and Mr. Ishwaqr Charan, Authorized Representative for the Respondent.

4. It is submitted on behalf of the appellant that NHAI had invited the Bid for Central Government User Fee Collection Rights. Appellant being the successful bidder was awarded the contract on principal to principal basis acquiring the user fee collection rights on Narayanpur Toll Plaza at NH-76 of NHAI. Fixed weekly remittances as mentioned in the contract were to be paid by the appellant to NHAI irrespective of the amount of fee collected by the appellant. Since all risks and rewards relating to the contract were shifted by NHAI towards the appellant, the appellant is wrongly held to be the service provider for NHAI or for its users. No question of providing Business Auxiliary Services even to the users of highway at all arises. All the submissions based upon the contract falsifying the allegations of the Show Cause Notice were made before the Adjudicating Authorities but have miserably been ignored and the demand has wrongly been confirmed. The order is challenged on the following grounds: -

- i) The activity of collecting toll is covered under the negative list of services.
- ii) Activity of collecting toll is not covered under section 65(19) (vi) of the Finance Act, 1994.
- iii) Department has misinterpreted the language and intention of the Circular No.152/3/2012-ST dated 22.02.2012

- iv) Extended period of limitation cannot be invoked as the Appellant did not suppress any fact with intent to evade duty and issue involves interpretation of law.
- v) Demand computed by the department is incorrect. Amount is inclusive of tax.
- vi) Penalty cannot be imposed.

5. While rebutting these submissions, Id. D.R. has mentioned that Commissioner (Appeals) in para 6 of the Order under challenge has specifically mentioned that the appellants were providing services to the users of Narayanpur Section on NH 76 High Way on behalf of NHAI who is the client of the service provider, the appellant. Relying upon Section 66 B and 68 of Finance Act, 1994 Commissioner (Appeals) has rightly concluded that the services provided by the appellant are covered under the provisions of Business Auxiliary service as defined under section 65 (19) (iv) of Finance Act, 1994, on behalf of the client as has otherwise been clarified by Boards' Circular No.152/3/2012-ST dated 22.02.2012. The services of appellant have clearly been denied to be covered under negative list as prescribed under section 66 B of the Finance Act, 1994. Impressing upon the correctness of the said findings, the appeal in hand is hereby prayed to be dismissed.

6. After hearing the rival contentions, it is held as follows:-

The moot point of adjudication is :

“whether the collection of toll under a contract executed by NHAI in favour of the appellant amounts to providing Business Auxiliary Service by the appellant ?”

7. The demand against the appellant has been confirmed based on the findings that the appellants were not the owner of the land made available for construction of road nor they had constructed road. They were merely granted contract for collection of toll charges on behalf of NHAI. Hence they were merely an independent entity to collect toll from the users of the road on behalf of NHAI merely as the Commission Agent in terms of clause (a) (ii) (iv) of the explanation given under section 65/19 of the Finance Act, 1994.

8. To decide the controversy, foremost, the contract executed by NHAI in favour of appellant is perused. Following are observed as relevant clauses for the purpose: -

Clause – G AND WHEREAS the Authority is empowered under the provisions of the 1988 Act to enter into contracts with any person for the purpose of collection of USER Fee under the said User Fee Rules, 2008/ **the National Highways (Fees for the use of National Highways and permanent bridge - Public Funded Projects) Rules, 1997**. The Authority is desirous of **engaging the Contractor** to collect User Fees only at

Narayanpura Toll Plaza located at km 166.000 for the section from km 113.830 to km 213.000 (Rithala-Udaipur Section) on NH-76 in the State of Rajasthan.

1. Engagement of Contractor:

In consideration of the premises, the Authority hereby engages the party of the Second Part as the Contractor and the **Contractor do hereby agrees to act as the Contractor of the Authority for collection of USER Fee**, for the use of the said Section of National Highway/the said bridge.

Clause - 4 Collection Only At Prescribed Rate

The Contractor shall ensure that under no circumstances, USER Fee in excess of the prescribed rate or without issuance of receipt in the format including condition of such receipts being bilingual or trilingual, prescribed by the Authority is charged by the Contractor from the road users. **Printing of receipts shall be arranged by the Contractor at its own cost.**

Clause - 13 (f) The Authority shall not be liable for any misconduct or misdeeds of any act or incident involving the Contractor or any of its personnel in any criminal or civil case the Contractor shall be responsible for consequences and if any such incident takes place, the Contractor shall forthwith intimate the said incident to the Authority.

Clause - 14 (a) In all circumstances it is clearly understood by the parties that **the personnel deployed by the Contractor shall have no connection whatsoever with the Authority** and the relationship of master and servant or employer and employee shall be only between the Contractor and the personnel deployed by it.

9. Under clause 15 provision of infrastructure was absolutely appellants liability, even repair and maintenance thereof including the payment of electricity bill fuel other consumables were all at the appellants own cost. In addition, as per clause 17, appellant had furnished the performance security amounting to Rs.5,51,75,963/- in favour of NHAI alongwith the Bank Guarantee. The said amount of security is equal to one month agreed remittance valid for a period of 14 months from the date of the contract.

Clause 23 prescribes various other obligations of the contractor/ the appellant. The contract even gives rights to appellant as well as NHAI (both the parties to contract) to terminate the contract in case of Force Majure event subject to notice for the same.

10. The above clauses of the contract make it clear that NHAI has not appointed appellant as its agent. The contract is absolutely on principal to principal basis. There is opined no circumstance to hold that appellant was providing Business Auxiliary Services.

11. Coming to the aspect of service, it is observed that Section 66 B of Finance Act defines service to mean any activity carried out by a person for another for consideration, and includes a declared service, but shall not include –

- (a) And activity which constitutes merely, -
 - (1) Its transfer of title in goods or immovable property, by way of sale, gift or in any other manner; or
 - (2) Such transfer, delivery or supply of any goods which is deemed to be a sale within the meaning of clause (29a) of Article 366 of the Constitution ; or
 - (3) a transaction in money or actionable claim:

The explanation to this section excludes sovereign functions from the scope of being called as service. Undisputedly the activity of NHAI is of developing, maintaining and managing the National State Highways which is a statutory function, as different from being called as a business activity. Thus, their activity is out of the scope of being called as service. Seen from that perspective also, collection of user fee/ Toll on National Highway

by the appellant cannot be categorized as an activity of providing business auxiliary services.

12. Vide the contract the user fee collection rights have been transferred by NHAI in favour of the appellants against a fixed weekly remittance irrespective of the amount of fee collected by the appellant, whether it may be less or may be more. Thus, all risks and rewards stands transferred by NHAI in favour of the appellant. Question of appellant being the agent of NHAI does not at all arise. The contract is apparently on principal to principal basis. In the similar circumstances, this Tribunal Mumbai Bench in the case of **Commissioner of Service Tax vs. Ideal Road Builders Pvt. Ltd. [2018(12)G.S.T.L. 192 (Tri.-Mumbai)]** held as follows: -

"4.2 We also find that the respondent's case is not even concerned with charging commission from NHAI or MSRDC unlike the judgments cited above. They stand on better footing than the cases cited by the Counsel for the respondents as in the present case they had secured the right to collect the toll from NHAI/MSRDC in a bid for lump-sum amount. This amount is to be paid to NHAI/MSRDC irrespective of any quantum of toll collection. The toll collection is not being done on commission basis or in lieu of any remuneration. All the proceeds of the toll collection belong to the respondents with no interference or right of NHAI/MSRDC. The income so generated is their own business income and NHAI/MSRDC has no right over such toll collection. The toll is not collected by the respondents as representative or agent of NHAI/MSRDC nor any commission in terms of quantum of amount or percentage is charged by the respondents from NHAI/MSRDC. They are liable only to pay the bid amount instalment to NHAI/MSRDC irrespective of any collection which can in no way be said to be commission income. They have purchased the right to collect the toll in auction which in no way can be termed as rendering of service to NHAI or MSRDC. Rather the respondents in terms of the agreement are liable to pay the amount fixed at auction to the NHAI/MSRDC irrespective of the fact that such collection of Toll is profitable to

them or not. This leaves no doubt that for the above reason also the Toll collection by the respondents is not arising from any "Business Auxiliary Service". We further find that even M/s. NHAI and MSRDC do not consider the toll collection by the respondents on their behalf as commission agent. They consider the respondents as in business of toll collection and even tax is collected at source u/s. 206C of the Income-tax Act from the instalments paid by the respondents. The said section is in respect of collection of tax of income tax at the time of receipt of amount."

13. The Principal Bench also earlier in the case of **Intertoll India Consultants (P) Ltd. v. Commissioner of Central Excise, Noida reported in 2011 (24) S.T.R. 611 (Tri.-Del.)**

has held as follows:-

10. As regards the collection of toll by the appellant on behalf of M/s. Banas Sands, it is undisputed that the said toll fees collected by the appellant is nothing but the toll which has been levied by the municipal corporation of Delhi. We find that Notification No. 13/2004 specifically exempts the service tax liability on such services of collection of duties and taxes levied by Government.

14. It is further observed that activity of collecting toll is covered under the negative list of services. The Appellant has been provided with the Fee Collection Rights i.e., the right to collect toll tax and not to provide any service on behalf of NHAI. Further, the Appellant was not paid any definite collection charges or service charges for collecting the toll, therefore, the service provided by the Appellant by way of granting access to road on payment of toll charges is covered under negative list clause (h) to section 66D of the Finance Act, 1994. No tax is leviable in the

scenario. Expounding the same and as per facts of the present case, the Appellant is not carrying out any activity for NHAI, in fact, NHAI is supplying rights to collect fees to the Appellant which falls within the ambit of 'goods'. Further, on receiving the right to collect toll, the amount that the Appellant is collecting from the users of the road squarely falls in the ambit of toll and thus, is not chargeable to service tax as per clause (h) of Section 66D of Finance Act, 1994 and accordingly, there is no liability of tax on the Appellant.

15. Further, it is observed that Department has misinterpreted the language and intention of Circular No.152/3/2012 dated 22.02.2012. As per the adjudicating Authority the Appellant has retained some amount out of total collected amount as their margin/ consideration for providing services to the users on behalf of NHAI. The understanding of Id. Adjudicating Authority, which has been further confirmed by Id. CCE(A) is grossly incorrect. As per the facts of the case, there is no retention by the Appellant rather he has to pay a fixed amount on weekly basis to NHAI irrespective of any collection. Hence, the very basis on which Id. Adjudicating Authority has alleged that the Appellant has earned commission is held incorrect.

16. Further, the said circular is applicable when the collection of toll is made on behalf of NHAI and a part of toll collection is retained by the collection agency. However, in the current case,

the Appellant was carrying out the said activity as an independent principal. No fixed amount has been retained by the Appellant, on the contrary, he is required to pay a fixed amount on weekly basis to NHAI. Thus, consideration is flowing from the Appellant to NHAI and not vice-versa. Therefore, the said circular is not applicable in the scenario and the department has erred in applying the circular in the present case. With reference to the same, in case of **Commissioner of Service Tax v. Ideal Road Builders Pvt. Ltd. [2018 (12) G.S.T.L. 192 (Tri.- Mumbai)**, it was held: -

"The reliance placed by the Revenue upon Board Circular No. 152/3/2012-S.T., dated 22-2-2012 is not correct for the reason that the respondents has not collected such toll charges on commission or charges on behalf of NHAI/MSRDC. The toll collection is their own income and is not parted with NHAI/MSRDC as they are concerned only with the bid amount finalized in auction and therefore cannot be termed as activity of Business Auxiliary Service"

17. Finally it is observed that demand in question has been raised by invoking the extended period of limitation but it is observed. Extended period of limitation cannot be invoked as the Appellant did not suppress any fact with intent to evade duty and issue involves interpretation of law. No corroborative evidence has been put forward by the department to support that there was a deliberate attempt on the part of the Appellant to suppress the material facts with an intent to evade payment of tax. Appellant

had a service tax registration and all the transactions which aroused the eyes of the department were recorded in the books of accounts of the Appellant. Everything was disclosed to the department at the time of scrutiny, therefore in any case, extended period of limitation is not invocable in the scenario. Further as the Appellant was always in bona fide belief about the exemption on the services provided by him, it is well settled law that extended period of limitation is not applicable case of bona fide belief about the taxability or applicability of exemption on the basis of reasonable grounds. For the same reason no question arises for imposition of penalty.

18. In view entire above discussion, the findings of Commissioner (Appeals) are held to be based on wrong assumptions and interpretations. The order under challenge is accordingly set aside. Appeal stands allowed.

[Order pronounced in the open Court on 05.04.2022]

(DR. RACHNA GUPTA)
MEMBER (JUDICIAL)

Anita