CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, WEST ZONAL BENCH : AHMEDABAD

REGIONAL BENCH - COURT NO. 3

SERVICE TAX Appeal No. 12928 of 2014-DB

[Arising out of Order-in-Original/Appeal No AHM-EXCUS-003-APP-020-14-15 dated 12.05.2014 passed by Commissioner of Central Excise-AHMEDABAD]

Agriculture Produce Market Committee .... Appellant
Sardar Bhavan, Main Market Yard,
Palanpur High Way, DEESA, GUJARAT-385535

VERSUS

C.CGST & CEx- Gandhinagar .... Respondent
Commissioner,Central GST & Central Excise, Custom House, Navrangpura, AHMEDABAD, GUJARAT-380009

APPEARANCE :

Shri Jigar Shah, Advocate for the Appellant
Shri Himanshu P Shrimali, Superintendent (AR) for the Respondent

CORAM: HON'BLE MR. RAMESH NAIR, MEMBER (JUDICIAL)
HON'BLE MR. C.L. MAHAR, MEMBER (TECHNICAL)

DATE OF HEARING : 10.04.2023

DATE OF DECISION: 27.04.2023

FINAL ORDER NO. A/11031 / 2023

RAMESH NAIR :

The issue involved in the present case is that whether the appellant, Agriculture Produce Market Committee (APMC for short) is liable to pay service tax on the rent recovered towards renting of shops, godown, office etc. to the commission agents/ traders under the head of Renting of Immovable Property Service.

2. Shri Jigar Shah, learned Counsel at the outset submits that the issue has been decided against the appellant in the case of Krishi Upaj Mandi Samiti – 2017 (4) GSTL 346 (Tri. Del.) and the same was upheld by Hon'ble Supreme Court reported at 2022 (58) GSTL 129 (SC). However, he submits that the demand is hit by limitation. He takes support from the same decision of Krishi Upaj Mandi Samiti (supra) wherein the demand for

extended period has been set-aside on the ground that there is no malafide on the part of the assessee to evade service tax liability. He further submits that in respect of demand if any arise, the appellant may be extended the cum-tax value and the same may be re-quantified by giving the benefit of cum-tax value principle. It is his submission that in view of the above settled position, demand in the present case for the extended period may be set-aside.

2. Shri Himanshu P Shrimali, Superintendent (AR) appearing on behalf of the respondent reiterates the findings of the impugned order.

3. We have carefully considered the submissions made by both the sides and perused the record. We find that issue has been decided against the assessee in the case of Krishi Upaj Mandi Samiti - 2017 (4) GSTL 346 (Tri. Del.). The said decision is reproduced below:-

> **"6.** We have heard both the sides and perused the appeal records. First, we considered the preliminary objection regarding validity of some of the demand notices. The appellants claimed that demand notices issued after 1-7-2012 cannot invoke charging Section 65 or tax entry under Section 65(105)(zzzz) of the Finance Act, 1994. These provisions ceased to exist with effect from 1-7-2012. We note that Notification No. 20/2012-S.T., dated 5-6-2012 is very clear. It stated that Section 65 of the Act shall not apply with effect from 1-7-2012 except as respects things done or omitted to be done before the said Section 65 so ceases to apply. Accordingly, in view of this clear saving provision, we find no infirmity in the demands raised after 1-7-2012 for periods prior to that date. Regarding invoking old provisions of Act for periods post 1-7-2012, we note that it is well settled legal principle that mention of incorrect section/rule will not make the proceedings invalid. The scope of demand along with applicable facts are brought out in the notice. Not mentioning the changing Section by itself will not be fatal to the proceedings.
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> **7.** The appellants' status as an authority created under a State enactment is not in dispute. Their overall functions and the activities were regulated by the said enactment and the rules made thereunder is also an admitted fact. The appellant strongly pleaded that they are allotting land/shops to various traders in furtherance of their statutory functions for promoting welfare of agriculturists. Reliance was placed by the appellant on the clarification issued by the Board vide Circular dated 18-12-2006. The said circular is reproduced below :-
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> ***Circular No. 89/7/2006, dated 18-12-2006 :***

"A number of sovereign /public authorities (i.e., an agency constituted/set up by Government) perform certain functions/duties, which are statutory in nature. These functions are performed in terms of specific responsibility assigned to them under the law in force. For examples, the Regional Reference Standards Laboratories (RRSL) undertake verification, approval and calibration of weighing and measuring instruments; the Regional Transport Officer (RTO) issues fitness certificate to the vehicles; the Directorate of Boilers inspects and issues certificate for boilers; or Explosive Department inspects and issues certificate for petroleum storage tank, LPG/CNG tank in terms of provisions of the relevant laws. Fee as prescribed is charged and the same is ultimately deposited into the Government Treasury. A doubt has arisen whether such activities provided by a sovereign/public authority required to be provided under a statute can be considered as 'provision of service' for the purpose of levy of Service Tax.

2. The issue has been examined. The Board is of the view that the activities performed by the sovereign/public authorities under the provision of law are in the nature of statutory obligations which are to be fulfilled in accordance with law. The fee collected by them for performing such activities is in the nature of compulsory levy as per the provision of the relevant statute, and it is deposited into the Government treasury. Such activity is purely in public interest and it is undertaken as mandatory and statutory function. These are not in the nature of service to any particular individual for any consideration. Therefore, such an activity performed by a sovereign/public authority under the provisions of law does not constitute provision of taxable service to a person and, therefore, no Service Tax is leviable on such activities.

3. However, if such authority performs a service, which is not in the nature of statutory activity and the same is undertaken for consideration not in the nature of statutory fee/levy, then in such cases, Service Tax would be levaible, if the activity undertaken falls within the ambit of a taxable service."

8. We note that the claim of the appellant for exclusion from the Service Tax liability in terms of the above Circular was examined by the lower authorities. In one of the impugned orders, it is recorded as below :-

(i) Services provided by them with a view to regulate agriculture produce market wherein they charge market fee (mandi shulk) for issuing licence to wholesale trader cum-commission agent, any other buyer of agriculture produce, etc. As statutory body the appellant provide basic facility in the market area out of the market fee collected from licensee, mainly to facilitate the farmers, purchasers and others. This activity of the appellant is not taxable as clarified under C.B.E. & C. Circular No. 89/7/2006-S.T., dated 18-12-2006 read with C.B.E. & C. Circular No. 157/8/2012-S.T., dated 27-4-2012.

(ii) The appellant have been providing another kind of service, which is not in the nature of Statutory activity and the same is undertaken for a consideration like renting of shops, canteen, dharamkanta in the krishi upaj mandi samiti market area. I find that this is liable to Service Tax as amply clarified in Para 3 of C.B.E. & C. Circular No. 89/7/2006-S.T., dated 18-12-2006 and reiterated under para 6 of C.B.E. & C. Circular No. 157/8/2012-S.T., dated 27-4-2012.

9. It is relevant to note that here that the allotment of land/shops to the traders is not in terms of the Rajasthan Agricultural Produce Markets Act, 1961 or the rules made thereunder. In fact, in the written submissions, made by the ld. Counsel for the appellants in Appeal No. ST/50069 of 2017 and ST/51936/2016, it is specifically mentioned that the allotments of land and shops were made by the appellants in terms of the Immovable Property Allotment Rules, 2005 and the fees are received for such allotments. We have examined sample copies of allotment letters and agreements, entered into by the appellants with the traders. The appellants allotted

shops/godown/platforms towards a monthly consideration called as allotment fee. The allottee shall pay three months advance of allotment fee, which shall be kept as a security by the Market Committee. The allottee shall pay the monthly allotment fee on or before 5th of every month. We have perused the allotment letter as well as agreements. The agreement clearly mentions that the allotment is made for a consideration of allotment fee/lease amount. The terms of the agreement/allotment letter clearly indicated the arrangement for renting of immovable property for a consideration. The fact that the allottee uses the shop/premises for commercial purpose is not in dispute. As such, we find the claim of the appellant that the allotment of shop or land to the traders cannot be considered as "renting of immovable property" is not tenable. We also do not agree with the submission of the appellant that such renting out of shop/land is a mandatory/sovereign function carried out by the appellant. There is no support for such assertion. As such, we find that the appellant are liable to Service Tax on the considerations received by them for renting out the shop/land to traders and others for activities of furtherance of commerce.

10. However, we note that with the introduction of Negative List Regime of Taxation w.e.f. 1-7-2012, the appellants' services were excluded from the tax liability. The provisions of Section 66D are as below :-

66D. *The negative list shall comprise of the following services, namely :-*

(a) services by Government or a local authority excluding the following services to the extent they are not covered elsewhere -

(i) services by the Department of Posts by way of speed post, express parcel post, life insurance and agency services provided to a person other than Government;

(ii) services in relation to an aircraft or a vessel, inside or outside the precincts of a port or an airport;

(iii) transport of goods or passengers; or

(iv) any service other than services covered under clauses (i) to (iii) above, provided to business entities;

(b) services by the Reserve Bank of India;

(c) services by a foreign diplomatic mission located in India;

(d) services relating to agriculture or agricultural produce by way of -

(i) agricultural operations directly related to production of any agricultural produce including cultivation, harvesting, threshing, plant protection or testing;

(ii) supply of farm labour;

(iii) processes carried out at an agricultural farm including tending, pruning, cutting, harvesting, drying, cleaning, trimming, sun drying, fumigating, curing, sorting, grading, cooling or bulk packaging and such like operations which do not alter the essential characteristics of agricultural produce but make it only marketable for the primary market;

(iv) renting or leasing of agro machinery or vacant land with or without a structure incidental to its use;

(v) loading, unloading, packing, storage or warehousing of agricultural produce;

(vi) agricultural extension services;

(vii) services by any Agricultural Produce Marketing Committee or Board or services provided by a commission agent for sale or purchase of agricultural produce.

11. It is clear that the appellants, being an Agricultural Produce Marketing Committee, is excluded from the tax liability in terms of the above provisions. Services relating to agricultural produce by way of storage or warehousing are in the negative list. The scope of negative list has been examined by the Board in the Education Guide dated 20-6-2012. Para 4.4.9 of the said Guide states as below :-

4.4.9 Would leasing of vacant land with green house or a storage shed meant for agricultural produce be covered in the negative list?

Yes. In terms of the specified services relating to agriculture 'leasing' of vacant services land with or without structure incidental to its use' is covered in the negative list. Therefore, if vacant land has a structure like storage shed or a green house built on it, which is incidental to its use for agriculture then its lease would be covered under negative list entry.

Further, on APMCs, the guide clarified as below :-

4.4.11 What are the services referred to in the negative list entry pertaining to Agricultural Produce Marketing Committee or Board?

Agricultural Produce Marketing Committees or Boards are set up under a State Law for purpose of regulating the marketing of agricultural produce. Such marketing committees or boards have been set up in most of the States and provide a variety of support services for facilitating the marketing of agricultural produce by provision of facilities and amenities like, sheds, water, light, electricity, grading facilities, etc. They also take measures for prevention of sale or purchase of agricultural produce below the minimum support price. APMCs collect market fees, licence fees, rents, etc. Services provided by such Agricultural Produce Marketing Committee or Board are covered in the negative list. However any service provided by such bodies which is not directly related to agriculture or agricultural produce will be liable to tax e.g. renting of shops or other property.

12. Accordingly, we hold that the appellants are not liable to Service Tax on renting of immovable property used for storage of agricultural produce in the market area. In this connection, we refer to Paras 161 and 162 of the Budget Speech of the Hon'ble Finance Minister while introducing Budget 2012-2013. The same is extracted as below :-

161. The important inclusions in the negative list comprise all services provided by the Government or local authorities, except a few specified services where they compete with private sector. The list also includes pre-school and school education, recognized education at higher levels and approved vocational education, renting of residential dwellings, entertainment and amusement services and a large part of public transportation including inland waterways, urban railways and metered cabs.

162. Agriculture and animal husbandry enjoy a very important place in our lives. Practically all services required for cultivation, breeding, production, processing or marketing up to the stage the produce is sold in the primary markets are covered by the list.

13. It is mentioned that practically all services required for cultivation, breeding product, processing or marketing up to the stage the produce is sold in the primary markets are covered by the list. In the present case, we note that we are dealing with the shops and land given out on rent, which are in the primary market areas, where agricultural produce are brought for sale. The allotment stipulates that the shops/godown shall be used for business of notified commodities and licence is issued by the Market Committee. As such, the premises in the primary market areas are let out with reference to agricultural produce, their storage/warehousing, etc. During the

course of arguments, the ld. Counsel for the appellants submitted that they are not disputing their Service Tax liability with reference to renting of shops, etc., given to commercial establishments like banks, general shops, etc. In fact, they are discharging Service Tax on the same.

14. We have examined the scope of entry in the negative list along with various clarifications issued by the Government. On harmonious construction of all material facts on record, we find that the appellants are not liable to Service Tax on shops/sheds/platforms/land leased out in the notified market area for traders for temporary storage of agricultural produce traded in the market. In respect of shops, premises, buildings, etc., rented/leased out for any other commercial purpose other than with reference to agricultural produce (like bank, general shop, etc.), the same shall not be covered by the negative list and the appellants shall be liable to Service Tax.

15. In view of the above position, we find that the appellants are not liable to Service Tax for the period after 1-7-2012.

16. The appellants also contested the demand wherever issued invoking extended period of time. Proviso to Section 73(1) can be invoked only, where the Service Tax has not been paid or levied or short-paid or short levied, by reason of fraud; or collusion; or wilful misstatement; or suppression of facts; or contravention of any of the provisions of Chapter V of Finance Act, 1994 or rules made thereunder with intent to evade payment of Service Tax by the person chargeable with Service Tax. If any one of the ingredients are present, then the demand for not paid or short paid Service Tax can be made invoking extended period of limitation of 5 years, from the relevant date. Admittedly, the appellants are a Government Organisation; their functions are regulated by the said enactment and the rules. In such situation, it is clear that there will be a rebuttable presumption regarding non-existence of any of these ingredients on the part of the appellant. We have perused the reasons recorded by the lower authorities to sustain the demand for longer period. We are not convinced with the findings as there is no evidence of the appellants' *mala fide* act to evade Service Tax liability by resorting to conduct, which will attract any of the serious allegation listed in the proviso to Section 73(1) of the Act.

17. We also note that the tax entry "renting of immovable property service" itself was subject matter of serious litigation in various judicial forum. In fact, the Hon'ble Delhi High Court in the case of *Home Solutions Retail Ltd*. v. *Union of India* - 2011 (21) S.T.R. 109 (Delhi) held that the activity of the rent *per se* cannot be subjected to Service Tax levy, whereas the activities in relation to renting are liable to Service Tax. The decision of the Delhi High Court led to legislative changes including retrospective amendment of the concerned legal provisions in the Finance Act, 1994. In fact, for non-payment of Service Tax under this tax entry, special provision was made under Section 80(2) to waive the penalties. Considering these backgrounds and the status of the appellant as a Government Organisation, we find that the ingredients for invoking demand for extended period are not present in the present case. Accordingly, the demands raised shall be restricted to normal period only. On the same reasons, we hold that penalties imposed on the appellants are also liable to be set aside.

18. In view of the above discussions and analysis, the appeals are disposed of in the following terms :-

(I) The appellants are liable to pay Service Tax under the category of "renting of immovable property service" for the period up to 30-6-2012.

(II) For the period from 1-7-2012 (Negative List Regime), the appellants are not liable to pay Service Tax under the said tax entry in respect of shed/shop/premises leased out

to the traders/others for storage of agricultural produce in the marketing area. The Negative List will not cover the activities of renting of immovable property for other than agricultural produce.

(III) The demands, wherever raised invoking extended period, shall be restricted to the normal period. Penalties imposed on the appellants are set aside.

(IV) The threshold exemption available to the small scale service provider in terms of the applicable notifications during the relevant years, shall be extended to the appellant on verification of their turnover.

4. In view of the above decision which was upheld by the Hon'ble Supreme Court reported as 2022 (58) GSTL 129 (SC), the issue on merit has been decided against the assessee. Accordingly, the demand on merit is sustainable. However, since the same facts and legal issue of the appellant's case involved in the above decision, in Para 16 and 17, this Tribunal held that the demand for the extended period is not sustainable on the ground that there is no malafide act to evade service tax. Considering the said findings of the Tribunal, in the present case the issue involve the same law as well as the facts, the demand for extended period shall not sustain. Accordingly, we set-aside the demand of service tax for the extended period. As per settled legal position on the issue of cum-tax value, the appellant is eligible for such benefit. Revenue is at liberty to work-out the demand for the normal period by extending the cum-tax benefit and recover/ adjust from the deposit made by the appellant, if any.

5. The appeal is allowed in the above terms.

(Pronounced in the open court on 27.04.2023*)*

(Ramesh Nair)
Member (Judicial)

(C L Mahar)
Member (Technical)

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