CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHANDIGARH

REGIONAL BENCH - COURT NO. I

Service Tax Appeal No. 2745 of 2012

[Arising out of Order-in-Appeal No. 119/ST/Appeal/CHD-II/2012 dated 29.03.2012 passed by the Commissioner (Appeals), Chandigarh]

M/s Shemco India Transport **……Appellant**
Near Bank of Baroda, Railway Road, Moga (PB)

VERSUS

Commissioner of Central Excise, Ludhiana **……Respondent**
F Block Rishi Nagar, Ludhiana, 141001

APPEARANCE:

Present for the Appellant: Shri Alok Arora, Advocate

Present for the Respondent:Shri Shivam Syal, Authorized Representative

CORAM: HON'BLE MR. S. S. GARG, MEMBER (JUDICIAL)
HON'BLE MR. P. ANJANI KUMAR, MEMBER (TECHNICAL)

FINAL ORDER NO. 60580/2023

DATE OF HEARING:12.09.2023
DATE OF DECISION: 01.11.2023

PER S. S. GARG

The present appeal is directed against the impugned order dated 26.03.2012 passed by the Commissioner (Appeals) whereby the Commissioner has dismissed the appeal of the appellant and upheld the Order-in-Original.

2. Briefly stating the facts of the present case are that a show cause notice has been issued to the appellant on 29.09.2008 alleging therein that M/s Shemeo India Transport are providing services under 'Cargo handling Services', 'BAS', 'Manpower Recruitment & Supply Agency Service' & 'Erection Commissioning & Installation Services' to M/s Nestle India Ltd, Moga without obtaining Service Tax Registration. It is alleged, Nestle vide their letter dated 17.2.2005, 27.5.2005, 5.6.2006 revealed that M/s Shemco India Transport has provided services in relation to material handling, loading, unloading, providing trailers, low bed trollies, tractor trollies, tractor cranes, erection commissioning & installation of plant & machinery with requisite manpower to Nestle since April 2003 to Dec. 2005 under written contracts from time to time. The appellant received an amount of Rs.34,22,047/- from M/s Nestle involving service tax of Rs.3,09,800/- which has been demanded in the notice. The Adjudicating Authority vide O-in-O No.02/ST/DC/SNG/2011 dated 11.3.2011 confirmed the demand of service tax Rs. 3,09,800/-, interest & equal penalty under Section 78 & Rs.1000/- under Section 77 of the Act. Aggrieved by the said order, the appellant filed appeal before the Commissioner who rejected the appeal of the appellant. Hence, the present appeal.

3. Heard both the parties and perused the record.

4. Ld. Counsel appearing for the appellant submits that the impugned order is not sustainable in law as the same has been

passed without properly appreciating the facts and binding judicial precedents on the same issue. He further submits that the appellant has provided Low bed trollies, tractor trollies, tractor cranes to M/s Nestle to carry-out various activities within the factory, as well as Maruti Van & Tata 407 to M's Nestle to carry purchases from outside the factory for which written agreements/contracts were provided from Aug 1999 onwards. He further submits that the first Show Cause Notice was issued on 22 11:2001 for the period April, 2000 to March, 2001 demanding service tax under Rent-a-cab service. On confirmation of demand of service tax & penalty, the first appeal was decided against the appellant. On second appeal, the Hon'ble Tribunal vide Final Order No.ST/208/2011 dated 24.5.2011 allowed the appeal of the appellant by setting aside the impugned order.

5. Ld. Counsel further submits that for the period 1.1.2006 to 30.9.2006, another show cause notice was issued on 29.03.2007 demanding service tax under Rent-a-cab service, manpower Recruitment or Supply Agency service and the said show cause notice was also issued by invoking the extended period of limitation. He further submits that the present show cause notice was issued on 29.09.2008 for the period April, 2003 to December, 2005 demanding service tax on various activities carried-out at the factory premises of Nestle and Maruti Van and Tata 407 for carrying out the activities of purchase.

6. Ld. Counsel for further submits that all the activities carried out by the appellant for M's Nestle India Ltd were within the knowledge of the department for which the above stated two show cause notices were issued, the present show cause notice invoking the extended period of limitation issued on 29.09.2008 for the period April, 2003 to December, 2005 is barred by limitation as in similar circumstances earlier show cause notice has been issued. In support of this submission, he relied upon the judgment of the Hon'ble Apex Court in the case of *Nizam Sugar Factory Vs. CCE , A.P. reported in 2006 (197) E.L.T. 465 (S.C.)* wherein it has been held by the Apex Court that when all relevant facts are in the knowledge of the authorities when the show cause notice was issued then issuing second and third show cause notices alleging suppression of facts on the part of assessee will not sustain.

7. He also relied upon the judgment of CESTAT in the case of *J.K. Enterprises Vs. Principal Commissioner, CE, Alwar reported in 2023 (70) GSTL 297 (Tri.-Del.)* wherein it has also been held by the Tribunal that when the facts are in the knowledge of the department while issuing the first show cause notice, second show cause notice could not have been issued invoking the extended period of limitation on same facts as facts were already in the knowledge of the authorities. As far as, the merits are concerned, the Ld. Counsel submits that the issue involved in the present case stands decided in favour of the appellant. He further submits that as per the various

agreements copies of which are on record of the appeal paper book, low bed trollies with tractors provided with drivers to run within the factory, tractor crane with driver run within the factory of M/s Nestle do not fall under the category of 'Business Auxiliary Service' rather it falls under supply of tangible goods service which was made taxable with effect from 16.05.2008.

8. He further submits that for various works carried out for M/s Nestle India Ltd. value wise certificate for the period in question has been provided by M/s Nestle which is on record. Ld. Counsel further submits that this issue is squarely covered by the judgment of the Hon'ble High Court of Calcutta in the case of *CCE & S.T., Haldia Vs. Industrial Handling reported in 2022 (59) GSTL 132 (Cal.).* He also cited the judgment of CESTAT in the case of *Devanchand Ramsaran Vs. CCE, Dibrugarh reported in 2019 (24) GSTL 646 (Tri.-Kol.)* wherein it has been held that the activity of providing cranes with operators on hire basis to Oil and Natural Gas Corporation Ltd. on payment of consideration in form of monthly operational charges as well as empty run charges, covered under Supply of Tangible goods services introduced w.e.f. 16.05.2008 and not under Business Auxiliary Service.

9. Ld. Counsel also submits that pickup van Tata 407 and Maruti Van were provided to M/s Nestle India for carrying of purchased goods and during hiring of vehicle, possession & control was with the appellant and repair & maintenance was also with the appellant and

therefore in such a situation the activity do not fall under Rent-a-cab service. For this submission he relied upon the judgment of CESTAT in the case of *Rahul Travels Vs. CCE, Nagpur/Pune-III reported in 2017 (47) S.T.R. 332 (Tri.-Mumbai).*

10. On the other hand, Ld. DR. reiterated the findings of the impugned order.

11. After considering the submissions of both the parties and perusal of the material on record, we find that in the present case show cause notice was issued on 29.09.2008 for the period April, 2003 to December, 2005 demanding service tax on various activities carried out at the premises of M/s Nestle India Ltd. and Maruti Van & tata 407 for carrying out activities of purchase. The said activity carried by the appellant for Nestle India Ltd were very much within the knowledge of the department for which earlier show cause notice was issued on 22.11.2001 for the period April, 2000 to March, 2001 and the second show cause notice was issued on 19.03.2007 for the period 01.01.2006 to 30.09.2006. We also find that the said show cause notice was set aside by the Tribunal vide its order dated 24.05.2011, therefore, the present show cause notice invoking the extended period of limitation is completely barred by limitation as held in the case of Nizam Sugar Factory cited (Supra) by the Hon'ble Apex Court. Similarly, the Tribunal in the case of J.K. Enterprises cited (Supra) also held that when the facts are in the knowledge of the department subsequent show cause notice alleging suppression

cannot be issued and the entire demand was found beyond normal period of limitation and was set aside. As far as the merits of the case are concerned, we find that as per the various agreements which are produced on record, low bed trollies with tractors proved with drivers to run within the factory, tractor crane with driver run within the factory of M/s Nestle do not fall in the category of 'Business Auxiliary service' rather it falls under supply of tangible goods service which was made taxable w.e.f. 16.05.2008. We also find that various works carried out for M/s Nestle India Ltd. value wise certificate for the period in question has been provided by Nestle India Ltd. which is at page 41 of appeal memo. But the said certificate was not considered by both authorities below.

12. The said certificate clearly gives the nature of the work carried out by the appellant and the amount paid by the Nestle to the appellant. Further, we find that this issue is clearly held in favour of the appellant in the case of CCE & ST, Haldia Vs. Industrial Handling cited (Supra) wherein it has been held that when the tangible goods are supplied along with operators on monthly hire basis without transferring right of possession and effective control then the same was covered under supply of tangible goods services as introduces as introduced vide amendment to Finance Act w.e.f. 16.05.2008 and not under business auxiliary service. Similarly, the Tribunal in the case of Devanchand Ramsaran cited (Supra) has held in para 6 and 7 as under:

"6. We have perused a copy of the contract executed by the assessee with ONGC. The contract specifically is for hiring the service of Type-ll Cranes. The contract agreement clearly specified that the cranes are to be placed at the disposal of ONGC along with operators and consideration will be paid by ONGC on the basis of monthly operation charges as well as empty run charges. It is required to be noted that the contract is only between two parties Le the assessee as well as ONGC By any stretch of imagination, the contract cannot be considered to be one of procurement of service which are inputs for the client, for the simple reason that there is no third party in the contract. Evidently the activity has not been carried out on behalf of ONGC

7. The definition of Business Auxiliary Service under Section 65(19) is clearly applicable only when the service is rendered on behalf of someone else. Perusal of the contract reveals that the activity can at best fall under Section 65(105) [zzzz) w.ef. 16-5-2008. Since the entire demand in the present proceedings is for the prior period, we find no justification for the levy of the service tax under the category of Business Auxiliary Service.

13. As regards the Pickup Van Tata 407 and Maruti Van we find that the same were provided to M/s Nestle India for purchase of goods and during hiring of vehicle, possession & control was with the appellant and repair & maintenances were also with the appellant, hence, the activity do not fall under Rent-a-cab service. Identical issue was considered by the Tribunal in the case of Rahul Travels cited (Supra) wherein the Tribunal held that when the cars and Buses are given in hiring as contract carriage on payment basis on their

usage as per kilometer basis though possession with repair and maintenance remained with the owner, the same is not taxable prior to 01.01.2007 either under Rent-a-Cab service or under Tour Operator service.

14. In view of our discussion above and by following the ratio of the above said decisions, we hold that the impugned order is bad on merits as well as on limitation and we set aside the same by allowing the appeal of the appellant with consequential relief, if any, as per law.

(Order pronounced in the open court on 01.11.2023)

(S. S. GARG)
MEMBER (JUDICIAL)

(P. ANJANI KUMAR)
MEMBER (TECHNICAL)

Kailash