=CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI
PRINCIPAL BENCH, COURT NO. 3

SERVICE TAX APPEAL NO. 56768 OF 2013

[Arising out of Order-in-Original No. 02/SA/CCE/ST/2013 dated 22.01.2013 passed by the Commissioner of Central Excise, Delhi III]

NATIONAL CO-OPERATIVE CONSUMERS' FEDERATION OF INDIA LTD — **Appellant**

Deepali (5th Floor), 92 Nehru Place
New Delhi-110019

Vs.

COMMISSIONER OF CENTRAL EXCISE DELHI III COMMISSIONERATE, UDYOG — **Respondent**

Udyog Minar,
Vanijya Nikunj, Phase V, Gurgaon, Haryana
122 016

Appearance:
Present for the Appellant : Shri P. K. Sahu, Advocate
Present for the Respondent: Shri Manoj Kumar, Authorised Representative

CORAM:
HON'BLE MS. BINU TAMTA, MEMBER (JUDICIAL)
HON'BLE MS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)

FINAL ORDER NO._____/2024

Date of Hearing : 24/04/2024
Date of Decision: 10/05/2024

BINU TAMTA

1. The appellant is assailing the order in original no. 02/SA/CCE/ST/2013 dated 22.01.2013 whereby the Commissioner of

Central Excise confirmed the demand of service tax on the appellant under the category of "Business Auxiliary Service"[1].

2. The appellant is a cooperative society, registered under the Multi State Co-operative Societies Act, 2002, where approximately 80% share capital is held by the Government of India. The appellant has been allocated coal by Coal India Limited[2] for distribution among small tiny consumers in the country. An intelligence was received that the appellant had been allocated the coal for which it had been receiving the commission of 5% in lieu of services provided by them to CIL, but they are not discharging their service tax liability under the category of BAS as defined under section 65 (19) read with Section 65 (105)(zzb).

3. As per Coal Distribution Policy issued by the Ministry of Coal vide OM dated 18.10.2007, the relevant clauses are set out below:

> "4.1 "The earmarked Quantity would be distributed through agencies notified by the State Governments. These agencies could be State Govt. Agencies/ Central Govt Agencies (NCCF / National Small Scale Industries Corporation (NSIC) etc.) or industries associations, as the State Govt. may deem appropriate. The agency so notified will continue to distribute coal until the State Govt. chooses to de-notify it.
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> 4.2 The Agency/association so notified by the State Govt would be required to enter into Fuel Supply Agreement (FSA) with coal company to be designated by the Coal India Ltd The FSA will continue to remain in force till either the State Govt denotifies the agency/association or CIL shifts the obligation to some other coal company due to production, transportation, logistics etc. In the latter case, a fresh FSA would be signed with the new coal company. The FSA would be based on firm commitment and compensation for default in performance on either side. These State Govt/Central Govt. agencies would be free to device their own distribution

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1 BAS
2 CIL

mechanism. However, the said mechanism should inspire public confidence and should result in distribution of coal in a transparent manner."

4.3. **The price charged to such agencies would be same notified price as applicable to other consumers entering into FSA.** The agency would be entitled to charge actual freight and upto 5% margin as service charge over and above the basic price charged by the coal company from their consumers. The concerned state Governments and Central Govt. Deptt. having administrative control over the agencies would be responsible to ensure that coal allotted for targeted consumer is distributed in a fair and transparent manner and appropriate action taken to prevent its misuse."

4. For the purpose of distribution of sale of coal to the tiny consumers of the non-core sector, the appellant had appointed M/s Pavan Coal Company, Kanpur as their National Handling and Distribution Agent, for which an agreement dated 05.01.2005 was entered between both the parties. The Ministry of Coal had allotted 2 million MTs of Coal per annum to the appellant, which was made available through the subsidiaries of CIL. The coal was lifted from the collieries by their authorised coal agent and is further supplied to the small/tiny consumers in the small sector industry. In terms of the policy, the appellant is not permitted to collect over and above 5 % of the basic value and out of the 5% profit available to them, 1.5% is paid to the handling agent and the balance 3.5% is retained by them. The main role of the handling agent was to lift the coal from the collieries of a coal company for rake/road movement and deliver the same to small tiny consumers in the small sector industries sector and also collection of the payment thereof for depositing with the appellant from time to time.

5. A show cause notice dated 02.12.2004 was issued to the appellant as according to the revenue the appellant is engaged in promotion, marketing and sale of goods belonging to their clients CIL which is taxable under the category of BAS. Consequently, the demand of service tax of Rs. 1,07,30,726/- was made under the proviso to section 73 (i) along with interest and penalty under the Finance Act, 1994. On adjudication, the impugned order confirming the demand was passed. Being aggrieved the appellant has preferred the appeal before this Tribunal.

6. We have heard learned counsel for the appellant and the learned authorised representative appearing for the department and perused the records.

7. Learned counsel for the appellant submitted that the arrangement between the appellant and the coal companies was for purchase of coal and resale to the coal consumers. The appellant is not acting as an agent of the coal companies and is not providing the service of promotion or marketing of sale of goods purchased by the coal companies. The relationship between the appellant and the CIL was on principal-to-principal basis, as they are paying the entire coal price to the coal companies on its own account before the supply. Learned counsel further submitted that invoices annexed with the memorandum of appeal clearly show that the appellant had paid sales tax/VAT on the amounts on which service tax is being levied. Learned counsel for the appellant has relied on the decision, enunciating the

principle that service tax was not payable on the transactions on which the sales tax/VAT has been paid.

8. Learned authorised representative appearing for the department reiterated the findings of the adjudicating authority and submitted that the relationship between the appellant and CIL is not on principal-to-principal basis as they are engaged in sale and distribution of coal on behalf of CIL to the final consumers. The appellant is engaged in promotion, marketing and sale of goods belonging to CIL and such services are taxable under the category of BAS and are liable to pay service tax.

9. The issue which arises for our consideration is whether the appellant is engaged in promotion, marketing and sale of goods belonging to CIL and is, therefore, liable to pay service tax under the category of BAS or whether the transaction between the appellant and CIL is one of sale/purchase.

10. As per the coal distribution policy (para 4.3), for allocation of coal to the agencies price is charged from them as per the notified price. The appellant on its own account is paying entire price to the coal companies before procuring the coal. The appellant has placed on record the letter received from the North Eastern Coalfields and from Bharat Coking Coal Ltd, which shows that the excess amount paid to these companies have been refunded to the appellant and not on behalf of any particular coal consumer. The transaction is therefore, one of

sale/purchase which is further substantiated by the sample invoices placed on record by the appellant issued by Western Coalfield Ltd, a subsidiary of CIL in their favour showing payment of sales tax/VAT. Similarly, on resale to the small consumers, the sale invoices issued by the appellant shows the payment of VAT by them. Once the coal companies have charged sales tax/VAT at the appropriate rate on the sale of coal to the appellant and the appellant in turn has charged sales tax/VAT to the consumers of coal , the transaction is one of sale/purchase and not of rendering service.

11. In **Bharat Petroleum Corporation Limited vs. CST, Mumbai-I**[3], the Tribunal considered the issue in identical situation where the BPCL and HPCL being public sector undertaking were engaged in marketing of petroleum products. They purchased the compressed natural gas (CNG) from Mahanagar Gas Limited and sold the same to their dealers. The revenue took the view that services rendered by the appellant to MGL are in relation to marketing of the goods of MGL and, therefore, constitutes service under BAS. Considering whether the transaction is one of sale or would constitutes service, the Tribunal observed as under:

> "11. As per the said provisions, the service provider provides service to his client for märketing or promotion of the goods to third party. **In these cases, appellants themselves are buying goods from M/s. MGL. Therefore, the question of rendering the service to the client for marketing of the goods does not arise. We further find that MGL is discharging VAT/ST liability while selling the CNG to appellants. Although the RSP is fixed but it does not mean that the profit margin shall be constituted as commission for rendering the service. On examination, it is found that all the transactions shown by the appellants are done on principal to**

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3 2014 (36) STR 433 (Tri.-Mumbai)

> **principal basis. Moreover, the appellants are selling these CNG on payment of VAT/ST to the buyers. There is no commission component that have been received by the appellants from M/s. MGL.** FOR e.g., if the appellant is receiving goods from MGL at 100/- per kg. including VAT but these goods are sold by the appellant to customers on RSP fixed at 102/- per kg., that does not mean that the appellants are receiving commission of 2/- from MGL. In fact the appellants are also paying VAT on 2/- also. It is also a fact that the appellants are not receiving any commission from M/s. MGL. Therefore, it cannot be presumed that appellants are rendering any service to MGL. Moreover, the case law relied upon by the counsel in the case of Bhagyanagar Gas Ltd. (supra) also supports the cases in hand, wherein this Tribunal held that mere mention in the agreement the trade margin as commission on which VAT/ST has been paid would not evidence the fact of rendering service."

12. In similar situation in **Mahanagar Gas Limited[4],** the controversy related to was that CNG purchased by oil marketing companies (OMCs) from MGL is a transaction of sale/purchase and not for providing of any service by OMS to MGL. Considering the various clauses of the agreement, it was held that those are not agency agreements but are for sale purchase of CNG on principal-to-principal basis for which MGL paid VAT on sale of CNG and OMCs also paid VAT on re-sale of CNG. It was, accordingly, observed as under:

> "5.2…..We have perused the copies of Central Excise invoices issued by MGL to OMCs on daily basis for dispensing CNG from 6.00 am to 6.00 am showing the quantity supplied, assessable value, duty paid/payable, etc. We also find that there are joint tickets prepared outlet-cum-party-wise showing the sale period starting at 0600 hrs. on preceding day and ending at 0600 hrs. on the succeeding day and also show the quantity of CNG dispensed with opening reading, closing reading, total reading and total quantity supplied. Such joint-tickets are also signed by both parties, i.e. appellants and OMCs. Thereafter, the appellants are raising tax invoices upon OMCs on monthly basis with specific business days within which payment has to be made by OMCs and for any delay in payment, interest is also payable by OMCs. The appellants have paid VAT/sales tax on their sale of CNG to OMCs, as evidenced from the invoices. Further, sales invoices of OMCs for resale of CNG to ultimate buyers, VAT/sales Tax is paid by them on their sales price.

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4 2018 (360) ELT A 133 (SC)

> **In nutshell, the appellants are paying VAT on its sales price to OMCs and OMCs are also paying VAT on their sales price to their customers. This clearly evidences that the AR's arguments that sale is not taking place between appellants and OMCs and also it is a paper transaction is incorrect and not supported by any evidence on record."**

13. Merely because the nomenclature in the coal policy refers to 'Agency' does not mean that the appellant is selling coal to the coal consumers on behalf of the coal companies as agent and the transaction is one of principal and agent. In this context, the Apex Court in **Bhopal Sugar Industry Limited vs. STO**[5] has observed as under:

> " 6. It is well settled that while interpreting the terms of the agreement, the court has to look to the substance rather than the form of it. The mere fact that the word ' agent' or 'agency' is used or the words 'buyer' and 'seller' are used to describe the status of the parties concerned is not sufficient to lead to the irresistible reference that the parties did in fact intend that the said status would be conferred. Thus, the mere formal description of a person as an agent of buyer is not conclusive, unless the context shows that the parties clearly intended to treat a buyer as a buyer and not as an agent."

14. The Fact that the appellant is required to charge specified price and sell the coal to specified category of consumers which are identified as per the policy of the State Government is not in the nature of restrictions and does not alter the nature of the transaction. In **Bhopal Sugar Industry**, the Apex Court categorically observed that the concept of sale having undergone a revolutionary change, the seller by virtue of an agreement impose various conditions on the buyer, however, that would not change the contract of sale to one of agency. The fact that appellant is under no obligation to report back to the coal

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5 (1977) 3 SCC 147

companies about its sale proceeds implies that the appellant has not been appointed by the coal companies as their agent for distribution of coal. Further, applying the principle as laid down in Bhopal Sugar Industry, for determining the concept of agency, there has to be an element of indemnifying the agent in the event of any loss, by the Principal, however, there is no such provision in the Coal Policy. Therefore, the appellant cannot be treated as agent of the coal companies. We are, therefore of the considered opinion that the arrangement between the appellant and the coal companies was one for purchase of coal for resale to coal consumers.

15. Learned counsel for the appellant has relied on the decision of the Apex Court in **Union Territory of Chandigarh vs. Amrit Roller Floor Mills[6],** where the issue for consideration was whether the sale of wheat products against permit issued by the District Food and Supplies Officer under the Control Order is liable to be taxed under the General Sales Tax Act. The Court taking note of its earlier decision in **Vishnu Agencies (Pvt) Ltd. vs. CTO,[7]** held that the transaction effected by the appellant therein must be regarded as sales. The Court noticed that the appellant in **Vishnu Agency** had carried on business as agent and distributors of cement in the State of West Bengal and on the basis of licence he was permitted to stock cement in his godown and to supply the persons in whose favour allotment orders were issued and at the price stipulated and in accordance with the conditions for

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6 1985(Supp)SCC 213
7 (1978) 1 SCC 520

the permit issue by the authorities. The conclusion arrived at was that notwithstanding the conditions imposed by the statutory framework within which the dealer operated the transactions effected by it must clearly be regarded as sales. Also the decision of Supreme Court in case of **Bhopal Sugar Industry Limited** where the principle for determining the agent/ principal relationship, it was observed:

> "….the essence of the matter is that in a contract of sale, title to the property passes on to the buyer on delivery of the goods for a price paid or promised. Once this happens, the buyer becomes the owner of the property and the seller has no vestige of title left in the property. The concept of a sale has, however, undergone a revolutionary change, having regard to the complexities of the modern times and the expanding needs of the society, which has made a departure from the doctrine of laissez faire including a transaction within the fold by virtue of an agreement, impose a folo of a sale even though the seller may by virtue of an agreement impose a number of restrictions on the buyer, e.g., fixation of price submission of accounts, selling in a particular area or territory and so on. **These restrictions per se would not convert a contract of sale into one of agency, because in spite of these restrictions the transaction would still be a sale and subject to all the incident of a sale. A contract of agency, however, differs essentially from a contract of sale inasmuch as an agent after taking delivery of the property does not sell it as his own property but sells the same as the property of the principal and under his instructions and directions. Furthermore, since the agent is not the owner of the goods, if any loss is suffered by the agent he is to be indemnified by the principal. This is yet another dominant factor which distinguishes an agent from a buyer pure and simple**. In Halsbury's Laws of England, Vol. 1, 4th Edn. in para 807 at p. 485, the following observations are made:
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> "The relation of principal and agent raises by implication a contact on the part of the principal to reimburse the agent in respect of all expenses, and to indemnify him against all liabilities, incurred in the reasonable performance of the agency, provided that such implication is not excluded by the express terms of the contract between them, and provided that such expenses and liabilities are in fact occasioned by his employment'."

16. Learned counsel has also referred to the decision of **Ahmedabad Stamp Vendors Association vs. UOI**[8], which was noted by this Tribunal while considering the stay petition. The controversy in the said case was whether the cement vendors are agents of the State Government who are being paid commission or brokerage or whether the sale of stamp papers by the Government to the licenced vendors is on principal-to-principal basis involving the contract of sale. Referring to the decision of the Apex Court in **Bhopal Sugar Industries,** the Gujarat High Court observed that although the Government has imposed price restrictions on the licenced stamp vendors regarding the manner to carry on the business, the stamp vendors are required to purchase the stamp papers on payment of price less discount on principal-to-principal basis and there is no contract of agency. It was, accordingly, concluded that few stamp vendors took delivery of stamp papers on payment of full price less discount and they sell such stamp papers to retail consumers but neither of the two activities (buying from the Government and selling to the consumers) can be termed as the service in the course of buying or selling of goods.

> **" 13.....It is not that the stamp vendor collects the stamp papers from the Government, sells them to the retail customers and then deposits the sale proceeds with the Government less the discount. The liability of the stamp vendor to pay the price less the discount is not dependent upon or contingent upon sale or the stamp papers by the licensed vendor. The licensed vendor would not be entitled to get any compensation or refund of the price if these tamp papers were to be lost or destroyed."**

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8 (2002) 124 Taxman 628 (Guj)

17. To appreciate whether the appellant is providing the service of promotion or marketing or sale of goods produced by the coal companies, the provisions of section 65(19) of the Finance Act, 1994, defining "Business Auxiliary Service" is set out below:

> **"Business Auxiliary Service"** means any service in relation to,
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> (i) promotion or marketing or sale of goods produced or provided by or belonging to the client; or
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> (ii) promotion or marketing of service provided by the client; or"

18. Under sub clause (i) of section 65(19) promotion, marketing or selling the goods of the client is taxable as business auxiliary service, only if the service provider is acting as an agent of the client, however as noted above the appellant is not acting as an agent of the coal companies but is purchasing coal from the coal companies for reselling further to the coal consumers. Here we find that the relationship of the appellant with the coal companies was on principle to principal basis and there was no element of service which could be taxed under the category of business auxiliary service.

19. We may now consider the allegation raised by the revenue regarding fixed remuneration of 5% on the base price of coal charged by the appellant from the coal companies as service charge and the limitation that the appellant cannot charge any price higher than 105% of the base coal price. As can be seen from the Coal Policy the appellant is selling coal at such price whereby he is getting a profit margin of 5% on the base price. The resale price has been fixed by an agreement

between the parties. Whatever is charged by the coal companies for coal, the appellant is adding 5% margin money and collecting the sale price from the consumers and is paying the sales tax on the entire amount received from the end consumers, therefore the revenue cannot charge any service tax.

20. Having decided the issue that the transaction is one of sale/purchase on principal-to-principal basis and the coal companies as well as the appellant is discharging the liability of sales tax/VAT, there is no element of service involved, the appellant cannot be saddled with the liabltity of service tax, it is not necessary to go into the other issues as they do not survive.

21. The impugned order, therefore, deserves to be set aside. The appeal is, accordingly, allowed.

[Order pronounced on **10.05.2024**]

(BINU TAMTA)
MEMBER (JUDICIAL)

(HEMAMBIKA R. PRIYA)
MEMBER (TECHNICAL)

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