M/s. Bhopal Crane Trading Co. Vs Commissioner of Customs, Central Excise and Service Tax ï¿½ Bhopal

Court: Customs, Excise And Service Tax Appellate, New Delhi

Date of Decision: Jan. 17, 2025

Acts Referred: Finance Act, 1994 â€" Section 65(105)(zzzzj), 67(2), 70, 73, 73(1), 75, 76, 77(1)(a), 77(1), 77(2), 78
Central Excise Act, 1944 â€" Section 14
Andhra Pradesh Goods and Services Tax Act, 2017 â€" Section 5E
Constitution of India, 1950 â€" Articles 269(1), 286, 286(3), 366, 366(29A), 366(29A)(d)

Hon'ble Judges: Dr. Rachna Gupta, Member (J); Hemambika R. Priya, Member (T)

Bench: Division Bench

Advocate: Sandeep Mukherjee, Harshvardhan

Final Decision: Allowed

Judgement

Dr. Rachna Gupta, J

1. M/s Bhopal Crane Trading Company, the appellant, is a partnership firm engaged in the business of supplying cranes to Bhopal Municipal

Corporation, Bhopal since the year 2005. Based on intelligence with the departmental officers, it got revealed that the appellant is neither registered

nor is paying any service tax for the services being provided by them. On perusal of the contract dated 08.10.2009 made between Bhopal Municipal

Corporation (as 1st party) and the appellant (as 2nd party), the department observed that the appellant is supplying cranes to the Bhopal Municipal

Corporation on a fixed monthly charge of Rs. 54,999/-per crane but has neither applied for service tax registration nor paid service tax on its taxable

receipts. The appellant provided the copy of partnership deed and the copy of bank statement of its account to the department instead of copies of P

& L A/c, ITR and contract wise details of amount received by them against such activity during the period 2007-08 to 2010-11 as asked by the

department. A statement of Shri Inam Ahmed Usmani, partner and authorized representative of the appellant was recorded on 24.10.2011 under

Section 14 of the Central Excise Act, 1944 in which he has accepted that the appellant is engaged in the activity of supply of cranes to Bhopal

Municipal Corporation against which it has collected amount as shown in bank statements. The department observed that the services provided by the

appellant would fall under the category of Ã¢â‚¬ËœSupply of Tangible Goods ServiceÃ¢â‚¬â„¢ which has been made taxable w.e.f. 16.05.2008.

1.1 From the records produced by the appellant, it was noticed that they have received an amount of Rs.85,70,664/- against the taxable service

provided or to be provided by them during the disputed period, for which they have not charged any service tax from Bhopal Municipal Corporation.

The gross amount charged by them has been considered as inclusive of service tax in terms of provisions of Section 67(2) of the Act. Accordingly, a

Show Cause Notice No. 139/ADC/ST/BPL-I/2012 dated 04.12.2012 was issued to the appellant demanding service tax amount of Rs. 8,21,142/-under

the provisions of Section 73 of the Finance Act, 1994 along with interest under Section 75 and penalties under Section 76, 77(1)&(2) & 78 of the said

Act. The Adjudicating Authority has confirmed the demand of service tax amount of Rs. 8,21,142/- vide the impunged order under the provisions of

Section 73(1) of the Finance Act, 1994 along with applicable interest and penalties were imposed under Section 76, 77(1)(a) & 78 of the said Act. A

late fee of Rs. 20,000/- per half yearly return for non-filing / delayed filing of ST-3 return for the period April, 2007 to March, 2012 was also imposed

under Section 70 of the said Act. Being aggrieved with the impunged order, the appellant has preferred this appeal.

2. We have heard Shri Sandeep Mukherjee, learned Chartered Accountant for the appellant and Shri Harshvardhan, Authorized Representative for

the department.

3. Learned Chartered Accountant for the appellant mentioned that Municipal Corporation, Bhopal (MCB) was engaged for impounding of vehicles

inappropriately parked as directed by the Traffic Police in the area falling under the Jurisdiction of Municipal Corporation, Bhopal. During the course

of the impounding, the two wheelers were to be loaded onto the vehicles and four wheelers were to be towed from the place where those were found

improperly parked and were taken to the Jurisdictional Police Station. MCB had entered into an agreement with the appellants for providing cranes for

said loading/ towing. As per the said agreement the remuneration for this work was agreed to be a fixed sum of money per month, to be paid for, from

the collections made from issue of the challans to the vehicles impounded. However, expenditure on fuel, driver and cleaner and also the maintenance

was to be borne by appellants along with damages, if any, to the vehicle were to be made good by appellants.

3.1 Learned Chartered Accountatn further submitted appellants had been engaged in this activity since the year 2005 and had not paid any service tax

on the said service being rendered to the Municipal Corporation, Bhopal, and under the bona fide belief that the service was not chargeable to tax. It is

impressed upon that even after the introduction of the category, Ã¢â‚¬Å“supply of tangible goods serviceÃ¢â‚¬, since the control and possession of the vehicle

was not with appellants, they were still under the belief that there was no liability to pay service tax.

3.2 The adjudicating authority below is alleged to have not considered the submissions of the appellants and has wrongly confirmed the demand on the

basis of presumptions. Hence the impunged order is alleged to be illegal also for the reason that it has been passed in ignorance of threshold

exemption. Order is also objected for the reason that it has been passed in incorrect interpretation of the provision of Supply of Tangible Goods

Service. Accordingly it is prayed top be set aside and appeal is prayed to be allowed.

4. While rebutting these submissions, learned Departmental Representative (DR), at the outset, reiterated the findings arrived at by Commissioner

appeals. It is submitted that all the grounds raised by the appellant have properly been dealt with in the impugned order. The additional grounds cannot

be raised, for the first time before this tribunal. Not even legal ground as that of limitation can be raised at this stage for the fact that pleading

ignorance of law is not a permissible defence. The appellant thus has acted against statute which is an act of suppression / misrepresentation. Hence

the issue of limitation as raised at this stage for the first time, is not sustainable. With these submission learned Departmental Representative has

prayed for dismissal of the appeal. Following decisions have been relied upon: -

1. Dempo Engineering Works Ltd. 2015 (319) E.L.T. 359 (S.C.)

2. Gujchem Distillers 2011 (270) E.L.T. 338 (Bom.)

3. Afsar Tours & Travels 2019 (28) G.S.T.L. 153 (Tri. Ã¢â‚¬" Hyd.)

4. Gannon Dunkerley& Co. Ltd. 2020(43) G.S.T.L. 183 (Tri. Ã¢â‚¬" Del.)

5. Having heard both the parties and perusing the record of the present appeal, we observe following to be admitted facts:

1. Appellants were providing cranes to Municipal Corporation Bhopal on a fixed monthly charge of Rs. 54,999/- per crane.

2. The cranes were being used by the traffic police Bhopal for impounding the vehicles i.e. for discharging a sovereign function.

3. Service tax is not charged from Municipal Corporation Bhopal, a governmental authority.

4. The cranes used to remain parked in the concerned police station during the period of the agreement.

5. MCB used to pay the crane charges from the amount of penal charges recovered from the owners of impounded vehicles.

6. The maintenance of crane and the cost the driver of the crane, however, was to be borne by the appellants.

6. We now need to look into the definition of Ã¢â‚¬ËœSupply of Tangible GoodsÃ¢â‚¬â„¢ which activity has been made taxable w.e.f. 16.5.2008. As per Section

65(105)(zzzzj) this activity means any service provided or to be provided to any person, by any other person in relation to supply of tangible goods

including machinery, equipment and appliances for use, without transferring the right to possession and effective control of such machinery, equipment

and appliances.

7. Now we need to know the concept of Ã¢â‚¬Ëœright to possession and effective control Ã¢â‚¬â„¢. This has been explained by honÃ¢â‚¬â„¢ble Supreme Court in

the case of Bharat Sanchar Nigam Limited vs. Union of India reported as 2006 (2) STR 161 SC has held as follows: -

To constitute a transaction for the transfer of the right to use the goods , the transaction must have the following attributes: -

(a) There must be goods available for delivery;

(b) There must be a consensus ad idemas to the identity of the goods;

(c) The transferee should have a legal right to use the goods consequently all legal consequences of such use including any permissions or

licenses required therefor should be available to the transferee;

(d) For the period during which the transferee has such legal right, it has to be the exclusion to the transferee this is the necessary

concomitant of the plain language of the statute Ã¢â‚¬" viz. a Ã¢â‚¬Å“transfer of the right to useÃ¢â‚¬â€‹ and not merely a licence to use the goods;

(e) Having transferred the right to use the goods during the period for which it is to be transferred, the owner cannot again transfer the

same rights to others.

8. In the present case, all these conditions seems complied with. The above observed admitted facts clearly reveal that identified cranes were being

supplied by the appellants. MCB had all legal rights to use the same exclusively during the period of agreement. Since the cranes were taken at

instance of Traffic Police, those used to be parked in the premises of the jurisdictional police stations. The appellant had no control on the movement

of the crane nor upon the driver thereof, except, that the cost of driver and cost of maintenance of the crane was being paid by the appellant. During

the period of contract, the appellant was not supposed to give that crane to anybody else.

9. In the light of these observations, we hold that the effective control and possession with respect to cranes given to MCB was not with the appellant.

The appellant getting paid a fixed price per crane from MCB. Resultantly, we hold that the impunged activity was that of giving cranes on

Ã¢â‚¬ËœHireÃ¢â‚¬â„¢ instead of it being wrongly classified as Ã¢â‚¬ËœSupply of Tangible GoodsÃ¢â‚¬â„¢.

10. We further observe that the Government of India proposed to amend the Constitution to include in Article 366, a definition of Ã¢â‚¬Ëœtax on the sale or

purchase of goodsÃ¢â‚¬â„¢ by inserting a new Clause (29A) and to insert a new Entry 92-A in the Union List in the Seventh Schedule and to amend

Articles 269(1) and 286(3) of the Constitution of India to be in consonance with the other proposed amendments. As a result, the Constitution (Forty-

sixth Amendment) Act, 1982 was enacted. The new definition in Article 366 (29A), which reads as under.

366. Definitions

(29A) Ã¢â‚¬Å“tax on the sale or purchase of goodsÃ¢â‚¬â€¹ includes Ã¢â‚¬

(a) a tax on the transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable

consideration;

(b) a tax on the transfer of property in goods whether as goods or in some other form involved in the execution of a works contract;

(c) a tax on the delivery of goods on hire purchase or any system of payment by instalments;

(d) a tax on the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or

other valuable consideration;

(e) a tax on the supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or

other valuable consideration;

(f) a tax on the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for

human consumption or any drink whether or not intoxicating), where such supply or service, is for cash, deferred payment or other

valuable consideration,

and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery

or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made.

11. The expression Ã¢â‚¬Ëœtax on sale or purchase of goodsÃ¢â‚¬â„¢ is an inclusive definition. It must receive a wide and expansive meaning. The latter part

of clause (29A) contemplates that Ã¢â‚¬Ëœsuch transfer, delivery or supply of any goods shall be deemed to be a sale of those goodsÃ¢â‚¬â„¢. The sub-clauses

(a) and (b) use Ã¢â‚¬Å“transferÃ¢â‚¬; sub-clause (c) uses Ã¢â‚¬Å“deliveryÃ¢â‚¬; sub-clause (d) uses Ã¢â‚¬Å“transfer of the right to use goodsÃ¢â‚¬, and sub-clauses (e)

and (f) use Ã¢â‚¬Å“supplyÃ¢â‚¬ of goods while defining deemed sale. Thus under the sub-clause (d) there would be deemed sale if the right to use goods is

transferred even though delivery is not an essential part of such transfer of the right to use goods. In other words, the moment the right to use goods is

transferred, the taxable event happens. When would such transfer of the right to use goods de facto comes within the gravitational field of the species

of deemed sale? A score of High Court decisions and half a dozen Supreme Court decisions, notwithstanding, this question remains an unavoidable

vexed question. We may, therefore give a brief analysis of the judicial decisions on Article 366(29A)(d) of the Constitution which is the basis for

Section 5E of the APGST Act as well as similar provisions in other StatesÃ¢â‚¬â„¢ laws.

12. In Builders Association of India v. Union of India - (1989) 73 STC 370 : (1989) 2 SCC 645, the validity of the Constitution (Forty-sixth

Amendment) Act was upheld. But the Apex Court ruled that the StatesÃ¢â‚¬â„¢ power to levy tax on the goods involved in a works contract is subject to

the restrictions in Article 286. Article 366(29A) was elucidated by the Constitution Bench as below:

It refers to a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works

contract. The emphasis is on the transfer of property in goods (whether as goods or in some other form). The latter part of clause (29A) of

Article 366 of the Constitution makes the position very clear. While referring to the transfer, delivery or supply of any goods that takes

place as per sub-clauses (a) to (f) of clause (29A), the latter part of clause (29A) says that Ã¢â‚¬Å“such transfer, delivery or supply of any

goodsÃ¢â‚¬ shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods

by the person to whom such transfer, delivery or supply is made Ã¢â‚¬Â¦Ã¢â‚¬Â¦. The object of the new definition introduced in clause (29A) of

Article 366 of the Constitution is, therefore, to enlarge the scope of Ã¢â‚¬Ëœtax on sale or purchase of goodsÃ¢â‚¬â„¢ wherever it occurs in the

Constitution so that it may include within its scope the transfer, delivery or supply of goods that may take place under any of the

transactions referred to in sub-clauses (a) to (f) thereof wherever such transfer, delivery or supply becomes subject to levy of sales tax.

13. We also observe that Commissioner (Appeals) has not given any reason on which basis the effective control and possession was held to be with

the appellant. Apparently and admittedly, appellant has not collected any tax from Municipal Corporation Bhopal on the invoices raised to MCB. We

do not see any reason to consider the invoice amount to be inclusive of service tax. Seen from any angle as discussed above, the appellant is held not

liable to pay service tax. The demand is held to have been wrongly confirmed. Order is therefore hereby set aside. Consequent thereto, the appeal is

allowed.

[Order pronounced in the open court on 17.01.2025]