M/s. Sudhir Road Lines Vs Commissioner of Central Excise and CGST, Jaipur I

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

Date of Decision: Jan. 21, 2025

Acts Referred: Finance Act, 1994 â€" Section 65(105)(zzzzj), 66D, 73, 73(2), 75, 78
Constitution of India, 1950 â€" Articles 269(1), 286, 286(3), 366, 366(29A)
Constitution (Forty-sixth Amendment) Act, 1982 â€" Articles 366(29A)

Hon'ble Judges: Dr. Rachna Gupta, Member (J)

Bench: Single Bench

Advocate: Vijai Kumar, Abhishek Jaju, V.J. Saharan

Final Decision: Allowed

Judgement

Dr. Rachna Gupta, J

1. M/s Sudhir Road lines, the appellant, is registered for proving the taxable services under the category of Ã¢â‚¬Ëœ Supply of Tangible GoodsÃ¢â‚¬â„¢. During

the course of detailed scrutiny of records for the year 2013-14 and 2014-15, it was noticed that the appellants were engaged in supply of trailers

owned by them. They had provided the said trailers to their various clients who further supplied the said trailers to other clients or those clients of

appellants, being Goods Transport Agency(GTA) themselves, have used those trailers for transportation of goods by road. The appellant had not paid

service tax due to the reason that their clients had paid the service tax in respect of their further supply/ activity. It was also noticed that during the

period 2012-13 the appellant had paid service tax on full rate without claiming any abatement. The department was of the view that the appellant had

provided impugned services of supplying their trailers under the taxable category of Ã¢â‚¬Ëœ Supply of Tangible GoodsÃ¢â‚¬â„¢. Therefore, the Show Cause

Notice dated 14.09.2018 was issued to the appellant for demanding service tax amounting to Rs. 9,19,397/- under section 73 along with interest and

equal penalty under section 78 of the Act.

1.1 The adjudicating authority has confirmed the demand under section 73(2) along with interest under section 75 and imposed equal penalty vide

order in original bearing no. 28/2020-21 dated 17.12.2020. The appeal against the said order has been rejected vide order in appeal (O-I-A) no.

15/2021 dated 31.01.2022. Being aggrieved with the said (O-I-A) order, the appellant has filed this appeal with request to set aside the impunged order

(O-I-A).

2. We have heard Mr. Vijai Kumar and Mr. Abhishek Jaju, learned Advocate for the appellant and Mr. V.J. Saharan, learned Authorized

Representative (AR) for the department

3. Ld. Counsel for the appellant has submitted that the appellant had provided the said trailers to their various clients who further supplied the said

trailer to other clients. The appellant had not paid service tax due to the reason that their client had paid the service tax in respect of further supply of

the trailers. The department took a wrong view that the appellant had provided impugned services under the taxable category of Ã¢â‚¬Ëœ Supply of Tangible

GoodsÃ¢â‚¬â„¢.

3.1 It is submitted that the appellant neither had charged service tax from their clients/GTAs nor had issued any consignment note for any movement

of goods. The appellants are owner of the vehicles and provided the same to GTAs as per requirement. In the case of one of such GTAs namely M/s

Kataria Aditya Infra Services, appellants provided vehicle to them (M/s Kataria) for transportation of goods and the later issued a freight memo /

payment memo of monthly charges of vehicles. But the appellants did not charge service tax to them/GTA as they believed that as per service tax

notification no. 25/2012-ST dated 20.06.2012 (entry No. 22) providing vehicle on hire to GTA is exempted from service tax. The appellant was

therefore under the bona fide belief that their activity was not Ã¢â‚¬Ëœsupply of tangible goodsÃ¢â‚¬â„¢ but was of giving their trailers/ trucks to GTAs on Hire

to which no service tax liability arises. Hence the extended period of limitation has also been wrongly been invoked. Ld. Counselhas relied upon the

following decisions: -

1. Satish Kumar & Co. v. Commissioner of Central Excise, Nagpur [2019 (22) G.S.T.L. 269 (Tri. Ã¢â‚¬" Mumbai)]

2. Kartar Road Carriers v. Commissioner of Central Excise & ST [(2024) 14 Centax 289 (Tri. Ã¢â‚¬" Ahmd)]

3. Chartered Logistics Ltd. v. Commissioner of Central Excise [(2024) 16 Centax 473 (Tri. Ã¢â‚¬" Ahmd)]

4. While rebutting these submissions Ld. DR has mentioned that a sample invoice was examined, it was found that service recipient M/s Kataria

Aditya Infrastructure Services charged service tax at the rate of 12.36% to Reliance Industries Limited, Gujarat, under the Head Ã¢â‚¬Å“supply of

tangible goods for use service.Ã¢â‚¬ This scrutiny indicates that the recipient/ M/s Kataria, cannot be classified as a Goods Transport Agency (GTA)

under relevant Rule 4A ibid. The evidence on record clearly demonstrates that the appellant provided services of Ã¢â‚¬Ëœsupply of tangible goods for use

serviceÃ¢â‚¬â„¢, which does not qualify for the exemption under entry number 22(b) of notification 25/2012. The appellant has not submitted any

documentary evidence for establishing their claim that they had provided vehicles on hire to GTA. In view of the foregoing, Ld. AR reiterated the

findings of Commissioner (Appeals) and therefore it appears that the subject Service Tax Appeal filed by the appellant is not proper and legal and the

same is liable to be rejected.

5. Having heard both the parties and perusing the entire records of the appeal memo, we observe that the appellant, the owner of the trucks, is

providing those trucks to various clients including Goods Transport Agencies for transportation of goods. The appellants are doing so against certain

remuneration from the said clients/ GTAs. The department formed the opinion that the said activity undertaken by the appellant merit classification

under the category of Ã¢â‚¬Ëœ Supply of Tangible Goods ServicesÃ¢â‚¬â„¢ and the appellant is held liable to pay service tax. However, we observe it to be an

admitted fact that the said clients/GTAs have paid service tax for transportation of goods by road. This fact is apparent from the letter by one of such

GTA namely M/s. Kataria Aditya Infra Services vide their letter dated 16.08.2017. The department has otherwise not disputed the said fact.

Accordingly following questions are to be adjudicated: -

(i) Whether M/s Sudhir Road Lines are liable to pay Service Tax under Ã¢â‚¬Ëœ Supply of Tangible GoodsÃ¢â‚¬â„¢ Service for supplying their trailers to others

for being used for Transportation of Goods and when Service Tax stands already paid by the transfree?

(ii) Whether Extended Period for issuing Demand applicable in this case?

(iii) Whether Penalty under Section 78 imposable upon the appellant in this case?

6. Question no. 1

6.1 To adjudicate this question foremost, we need to peruse the definition of Ã¢â‚¬Ëœ Supply of Tangible Goods ServiceÃ¢â‚¬â„¢, which was brought under

service tax net w.e.f. 16.05.2008 vide notification no. 18/2008-ST dated 10.05.2008. It is defined under section 65 (105) (zzzzj) of Finance Act 1994 to

mean any service provided or to be provided to any person, by any other person in relation to Ã¢â‚¬Ëœ Supply of Tangible GoodsÃ¢â‚¬â„¢ including machinery,

equipment and appliances for use, without transferring right of possession and effective control of such machinery, equipment and appliances.

From the said definition, it became clears that in order to attract levy of tax under Ã¢â‚¬Å“ Supply of Tangible Goods ServiceÃ¢â‚¬ following three ingredients

must be present: -

(a) The service essentially has to be in relation to supply of tangible goods to any person by any other person;

(b) There must not be any transfer of right of possession of the goods from the service provider to the service recipient;

(c) There must not be any transfer of effective control of the goods from the service provider to the service recipient.

Hence if all the above three conditions are fulfilled in a commercial transaction than only it would be liable to Service Tax.

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 trailers were being

supplied by the appellants. The transferre clients/GTAÃ¢â‚¬â„¢s had all legal rights to use the same exclusively during the period of agreement. There is

no evidence produced by the department to show that the appellant had control on the movement of the trailers supplied nor during the period of the

trailers remained with the transferees.

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

appellant. The appellant was getting paid a fixed price per trailer from the respective client. Resultantly, we hold that the impunged activity was that of

giving trailers 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 service tax demand was proposed and has been confirmed based on the allegation that the trucks/trailers were not

supplied to GTA. From the above discussion, it is clear that for activity of transfer of vehicles, the nature of transferee is not relevant neither for the

activity to fall under Ã¢â‚¬ËœSupply of Tangible Goods ServiceÃ¢â‚¬â„¢ not for the activity to be called as Ã¢â‚¬ËœHireÃ¢â‚¬â„¢. The relevant criteria for the distinction

is whether the right to use is transferred with possession and effective control. In case it is so transferred, the activity will that be of hire else only it

shall fall under service of Ã¢â‚¬Ëœ Supply of Tangible GoodsÃ¢â‚¬â„¢.

11. 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.

12. 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 activity gets covered under the concept of Ã¢â‚¬Ëœdeemed saleÃ¢â‚¬â„¢ and gets out of the scope of service tax net.

13. 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.

14. Reverting to the facts of the present case, we observe that the department has alleged about appellant rendering the taxable service namely

Ã¢â‚¬ËœSupply of Tangible GoodsÃ¢â‚¬â„¢. The tax demand accordingly has been confirmed on the following grounds:

(i) Appellant is registered under the head Ã¢â‚¬ËœSupply of Tangible Goods for use serviceÃ¢â‚¬â„¢ which is the sufficient evidence to demonstrate that the

appellant do not qualify for exemption under Entry No. 22(b) of Notification 25/2012.

(ii) The appellant has not proved to be a Ã¢â‚¬ËœGoods Transport AgencyÃ¢â‚¬â„¢.

(iii) The appellant has not submitted any documentary evidence for establishing the claim that they had provided vehicles on higher to GTAS.

15. We observe that to establish an activity to fall under Ã¢â‚¬Ëœ Supply of Tangible Goods ServiceÃ¢â‚¬â„¢ is the right to use/exclusive possession of the goods

as to whether the same has been in the control of the transferee or not, (as already discussed above). In the present case, appellant has been

transferring the trailers/trucks owned by him to others who being GTA themselves or through other GTAs have been transporting goods by road. The

certificate produced by one of the client of the appellant shows that the said client has already discharged the service tax liability, the client himself

being the GTA. There is no denial of the department to the fact nor there is any other evidence produced by the department that during the period

when appellant had transferred the right of use, the effective control and the possession was still retained with the appellant. In the absence thereof,

the mere fact that the appellant was registered for rendering taxable service of Ã¢â‚¬Ëœ Supply on Tangible GoodsÃ¢â‚¬â„¢ is not sufficient to prove that the

impugned activity is taxable under category of supply of tangible goods. The registration otherwise cannot be the evidence to prove the same.

16. Further, we observe that appellant has placed on record several receipts issued by their clients. The perusal thereof reveals that the clients of

appellant have used the trucks for transportation of goods of their consignees. The receipts bear the name of the consigner as well as that of the

consignee, hence, the receipts are nothing but the consignment notes. As per the definition of Goods Transport Agency in Finance Act, 1994, the

issuance of consignment note is mandatory criteria for holding any act of transportation to be an act of GTA. Resultantly, we hold that the findings

arrived at by the adjudicating authorities below are erroneous on the face of the facts itself. The initial burden to prove the allegations was of the

department which has not been discharged.

17. We are also of the opinion that the issue of exemption under Entry No. 22(b) of the Notification No. 25/2012 has wrongly been raised that entry as

well as the sub-clause of Section 66D (Negative List of the Finance Act) exempts the transportation of goods by road except it is done by a courier

agency or a goods transport agency. The appellant admittedly is not a goods transport agency. His clients have been the GTAs who admittedly have

discharged the service tax liability. Resultantly and in view of the above discussion about Article 366 (29A), the activity rendered by the appellant is

held to be of transfer by way of hire/rent of his trucks to the others. Since same is out of scope of the service tax net, hence, we hold that the finding

arrived at by the authorities below are incorrect. Those are liable to be set aside. Consequent thereto, we hereby set aside the order under challenge

(O-I-O dated 17.12.2020). Consequently, the appeal stands allowed.

[Order pronounced in the open court on 21.01.2025]