

(2012) 11 AP CK 0015

Andhra Pradesh High Court

Case No: CEA No"s. 3 to 5 and 26 of 2012

Commissioner of Customs and
Central Excise, Guntur

APPELLANT

Vs

Swarna Tollway (P.) Ltd.

RESPONDENT

Date of Decision: Nov. 27, 2012

Acts Referred:

- Central Excises and Salt Act, 1944 - Section 35G
- Finance Act, 1994 - Section 65(19), 73(1), 75, 76, 77
- National Highways Act, 1956 - Section 8A

Citation: (2013) 31 STR 419 : (2013) 38 STT 189

Hon'ble Judges: Ramachandra Rao, J; Goda Raghuram, J

Bench: Division Bench

Advocate: Gopalakrishna Gokhale, for the Appellant; Gandra Mohan Rao, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

Ramachandra Rao, J.

These appeals are filed u/s 35G of the Central Excise Act, 1944 by the Commissioner of Customs and Central Excise, Guntur Commissionerate, Guntur challenging the final order Nos. 368-371 of 2011 of the Customs, Excise and Service Tax Appellate Tribunal, South Zone Bench, Bangalore in Appeal Nos. ST/33/2009, ST/938/2009, ST/1227/2010 and ST/63/2009. M/S. Swarna Tollway (Pvt.) Ltd., Nellore is the respondent in all these appeals.

2. The brief facts leading to the filing of these appeals is as under:

3. The Central Government (Ministry of Road Transport and Highways) had authorized the National Highways Authority of India (for short "NHAI") to:

(i) improve and upgrade a section (52.8 km to 163.6 km) of the National Highway No. 5 (NH. 5) and

(ii) a section (217 km to 252 km) of the National Highway No. 9 (NH. 9) in Andhra Pradesh, the former referred to as "TADA-Nellore Section of NH. 5" and the latter referred to as "Nandigama-Ibrahimpatnam Section of NH. 9". The work included construction, strengthening and widening of the two lane highways into four lane highways and the operation and maintenance and toll collection of the above sections through a "Concession" on "Build, Operate and Transfer" (BOT) basis.

4. Accordingly, NHAH entered into an agreement dated 19.12.2000 with a Malaysian Company i.e. CIDBI In ventures SDN BHD (for short "CIDBI"). This agreement was concluded after NHAH invited proposals from CIDBI for the above purposes and after the detailed project proposal submitted by CIDBI was accepted by NHAH.

5. Clause 5 of this agreement authorized CIDBI to transfer all rights, benefits, interests, duties and obligations under this Agreement to a "Special Purpose Vehicle" (SPV) to be constituted by CIDBI either solely or jointly with other parties for the purpose of implementing the project and the concession. The said clause further provided that in such an event, NHAH shall enter into a Concession Agreement with the SPV.

6. On 27.3.2001, a Concession Agreement was entered into between NHAH and CIDBI whereunder NHAH granted to CIDBI (Concessionaire), the Concession for a period of 30 years, including the exclusive right, licence and authority to implement the project and the concession in respect of the project highways.

7. Subsequently the CIDBI had, jointly with other parties, promoted and incorporated the respondent company on 11.5.2001 to act as the Special Purpose Vehicle (SPV) to undertake the design, engineer, finance, procure, construct, operate and maintain the project actually on BOT basis in accordance with provisions of the concession agreement.

8. On 29.6.2001, an assignment agreement was entered into between NHAH, CIDBI and the respondent pursuant to clause 5 of the Agreement dated 19.12.2000. As per this agreement, CIDBI assigned and transferred the concession agreement in favour of the respondent and the respondent unconditionally agreed to accept the said assignment/transfer of the concession agreement and undertook to execute/perform the concession agreement as if the said agreement was entered into between NHAH and the respondent.

9. By a Notification dated 28.4.2004, issued u/s 8-A of the National Highways Act, 1956, the Central Government (Ministry of Road Transport and Highways) prescribed the rates at which fees should be levied and collected from vehicles for the use of the project highways and also authorized the concessionaire CIDBI to collect and retain such fee from the date of commercial operation till the date of

termination of the concession agreement. Subsequently the Central Government issued an amendment dated 13-05-2009 to the preamble of the Notification dated 28-04-2004 mentioning that after NHAI had entered into an agreement with CIDBI, an assignment agreement was entered into by NHAI with CIDBI and the respondent for the development of the sections of the above National Highways and that the respondent would be the concessionaire. As the respondent stepped into the shoes of CIDBI through the assignment agreement, they were collecting the fee prescribed by NHAI from the users of the project highways.

10. By a show-cause notice dated 20.11.2007, the Department of Customs, Central Excise and Service Tax demanded from the respondent service tax of over Rs. 10,48,76,577/- with education cess on the toll charges collected by them at Venkatachalam Toll Plaza, Budanam Toll Plaza and Sullurpet Toll Plaza on NH. 5 from 21.5.2004 to 31.12.2006. By another show-cause notice dated 16.4.2008, the Department demanded from the respondent, service tax of over Rs. 6,25,44,784/- with education cess on the toll collection for the period from 1.1.2007 to 31.12.2007. These demands were under the head "Business Auxiliary Service" as defined in Section 65(19) of the Finance Act, 1994 (for short "the Act"). The show-cause notices also demanded interest on tax and cess u/s 75 of the Act and proposed penalties u/s 76 and 77 of the said Act. The appellant i.e. the Commissioner passed a common order dated 17.10.2008 in relation to both the show cause notices confirming the demand of service tax and cess against the respondent u/s 73(1) of the Act and also held that the respondent is liable to pay interest thereon u/s 76 apart from penalty of Rs. 2,000/- u/s 77 and Rs. 17,00,00,000/- u/s 78 in respect of the first show-cause notice.

11. Aggrieved thereby, the respondent filed Appeal No. ST/33/09 and the Revenue filed Appeal No. ST/63/09 before the CESTAT, South Zonal Bench, Bangalore.

12. In respect of toll collections of the respondent on NH. 5 for the period from 1.1.2008 to 30.11.2008, a show cause notice dated 16.3.2009 was issued for recovery of service tax of Rs. 6,70,61,975 with education cess and interest thereon and for imposition of penalties. The Commissioner after considering the explanation of the respondent by order dated 12.8.2009 confirmed the demand of service tax and education cess, directed the respondent to pay interest u/s 75 and also imposed penalty of Rs. 5000/- u/s. 77 and Rs. 8,00,00,000 u/s. 78 of the Act. The respondent filed Appeal No. ST/938/2009 against the said order before the CESTAT, South Zonal Bench, Bangalore.

13. The Commissioner had also issued a show-cause notice dated 6.10.2009 to the respondent for recovery of service tax of Rs. 9,95,48,639/- on the toll charges collected at Nandigama-Ibrahimpatnam Section of NH. 9 during the period 11.9.2004 to 31.3.2009 imposition of penalties etc. After hearing the explanation of the respondent, the Commissioner by order dated 1.3.2010 confirmed the demand of service tax, education cess and directed the respondent to pay interest u/s 75 and

imposed penalty of Rs. 1000/- u/s. 77 and Rs. 12,00,00,000/- u/s. 78 of the Act. The respondent filed Appeal No. ST/1227/10 before the CESTAT, South Zonal Bench, Bangalore.

14. Four appeals were heard together by the CESTAT and by a common Final Order Nos. 368-371/2011 dated 12.5.2011 in Appeal Nos. ST/33/2009, ST/938/2009, ST/1227/2010 and ST/63/2009, it allowed the appeals of the respondent. The Tribunal held that the substitution made by the Notification dated 13-05-2009 in the part of the preamble of the Notification dated 28-04-2004 would have retrospective effect and even the NHAI had issued a letter dated 19-05-2008 wherein it had clarified that CIDBI had ceased to be the Concessionaire and in its place the respondent has become the Concessionaire and that the Commissioner of Service Tax should not have entertained any doubt in his mind about the status of the assessee in relation to the concession agreement. It therefore held that under the concession agreement, the respondent was collecting toll charges on sections of NH-5 and NH-9 in its capacity as the Concessionaire and not as an agent of CIDBI. It therefore set aside the orders of assessment and allowed the appeals of the assessee.

15. Aggrieved thereby, the Revenue has filed the present appeals u/s 35G of the Central Excise Act, 1944.

16. Heard Sri Gopalakrishna Gokhale, learned Counsel for the Revenue/appellant herein and Sri G. Mohan Rao, learned counsel for the respondent in all these appeals.

17. Sri Gokhale, learned counsel for the Revenue contends that the orders of the Tribunal are contrary to law; that only CIDBI was legally authorized for collection of toll fee as per the concession agreement dated 27.3.2001; that there was no assignment of the right to collect toll by CIDBI to the respondent under the assignment agreement dated 29.6.2001; that the Notification dated 28.4.2004 issued by the Government permitted only CIDBI to collect the fees on the project highways as a concessionaire; and that the said Notification was amended by SO. No. 1212 (E) dated 13.5.2009 substituting the words:

And whereas, the Authority has entered into an agreement with CIDB In ventures SDN BHD, Suite 15-3, 15 Floor, Wisma UOA II, No., 21, Jalan Pinang 50450 Kuala Lumpur, Malaysia;

and whereas, subsequently executed an assignment agreement with CIDBI In ventures SDNBHD and M/S. Swarna Tollway Pvt. Ltd. (hereinafter referred to as the "Concessionaire") for the development of the said section of the said National High Ways,

for the words "And whereas, the Authority has entered into an agreement with CIDB In ventures SDNBHD Suite 15-3, 15 Floor, Wisma UOA II, No. 21, Jalan Pinang 50450

Kuala Lumpur, Malaysia (hereinafter referred to as the "Concessionaire")

18. According to the Revenue, the substitution has no retrospective operation. He therefore, contended that the respondent was providing the service of toll collection which comes within the definition of "business auxiliary service" as defined u/s 65(19) of the Ac., that the respondent should have obtained service tax registration and disclosed that it was providing service to CIDBI apart from filing returns, and therefore, the Commissioner was justified in holding that the respondent is liable to pay service tax and educational cess with interest apart from penalties under the statute.

19. Sri G. Mohan Rao, counsel for the respondent on the other hand submits that the order of the Tribunal's correct in law, that the respondent had stepped into the shoes of CIDBI after the assignment agreement dated 29.6.2001 was executed between NHAI, CIDBI and the respondent, that the respondent under the terms of the said agreement was assigned the duty of toll collection also which had been earlier entrusted to CIDBI under the concession agreement dated 27.3.2001. He contended that therefore, CIDBI was no longer and the respondent was, the concessionaire. He also submitted that the amendment vide notification dated 13.5.2009 to the earlier Notification dated 28.4.2004 is only to reflect the correct position of the respondent being the concessionaire and this has no bearing on the issue of levy of service tax.

20. We have considered the submissions of both the parties.

21. CIDBI was awarded the work of widening the existing two lane highway to four lane highway on both sections of NH. 5 and NH 9 mentioned above including construction, strengthening and widening thereof and the operation, maintenance of the same through a concession on BOT basis. Thereafter, a memorandum of agreement dated 19.12.2000 was entered into between NHAI and CIDBI and clause 5 of the said agreement permitted CIDBI to transfer all rights, benefits, interests, duties and obligations of CIDBI under the said agreement to a SPV to be constituted by CIDBI. A concessionaire agreement dated 27.3.2001 was subsequently entered into appointing CIDBI as the Concessionaire inter alia to collect toll also apart from designing, engineering, financing, procurement, construction, completion, operation and maintenance. Later, CIDBI had promoted and incorporated the respondent on 11.5.2001 as a SPV and assigned all its rights to the respondent under the assignment agreement dated 29-06-2001 to which NHAI is also a party. Probably, by mistake in the Notification dated 28.4.2004, the Government of India authorized CIDBI to collect toll fee on the above project highways overlooking the fact that by that date, there was an assignment by CIDBI to the respondent and the respondent was actually collecting the toll fee. Later, on realizing this mistake, the later Notification dated 13.5.2009 was issued by the Central Government amending the preamble to the earlier notification dated 28.4.2004 as mentioned above so as to reflect the fact that the respondent was the concessionaire. By virtue of the said

amendment, which can be said to be clarificatory, the correct factual position was declared and the collection of toll fee by the respondent and not CIDBI was ratified.

22. In our view, neither the earlier Notification dated 28.4.2004 nor the subsequent Notification dated 13.5.2009 are of any assistance in deciding the issue as to whether the toll collection was being done by CIDBI or by the respondent. This issue can only be decided by interpreting the language of the assignment agreement dated 29.6.2001.

23. Under Clause 2.1 of the assignment agreement dt. 29.6.2001, CIDBI assigned and transferred the concession agreement in favour of the respondent and the respondent unconditionally agreed to accept the said assignment/transfer of the concession agreement and undertook to execute/perform the concession agreement as if the said agreement was entered into between NHAI and the respondent. Clause 2.2 of the agreement states that NHAI agreed to the aforesaid assignment of the concession agreement by CIDBI in favour of the respondent and with the execution of the assignment agreement, the respondent shall be deemed to be the concessionaire under the concession agreement. Clause 2.3 of the agreement provided that with the execution of the assignment agreement, NHAI and CIDBI released each other from their respective rights, duties and obligations under the concession agreement. Clause 2.4 of the agreement states that this assignment agreement shall be annexed to the concession agreement dated 27.3.2001 and shall form an integral part of the concession agreement. We are of the view that a conjoint reading of the above clauses of the assignment agreement dated 29.6.2001 lead to the irrefutable conclusion that the respondent alone was the concessionaire entitled to collect toll as all the rights of CIDBI under the concession agreement dated 27.3.2001 including toll collection, were assigned to the respondent with the consent of NHAI.

24. Counsel for the Revenue pointed out from clause G of the preamble to the assignment agreement dated 29.6.2001 that the words "toll collection" was not mentioned therein and therefore CIDBI continued to be the agency for collection of toll and not the respondent. We are of the view that the preamble to the agreement or clause G would not be relevant and one has to see the operative clauses of the agreement dated 29.6.2001 i.e. clauses 1.1, 2.1, 2.2, 2.3 and 2.4 mentioned above. Therefore, we reject this contention of the counsel for the Revenue.

25. We therefore, uphold the final order Nos. 368-371/2011 dated 12.5.2011 in Appeal Nos. ST/33/2009, ST/938/2009, ST/1227/2010 and ST/63/2009 of the CESTAT, South Zonal Bench, Bangalore although for reasons different from those given by the CESTAT. Therefore, the appeals filed by the Revenue are dismissed as they are without any merit. No costs.