CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

REGIONAL BENCH

Service Tax Appeal No. 87709 of 2019

(On behalf of Appellant)

(Arising out of Order-in-Original No.61-62/ST-VII/CD/2016 dated 20.12.2016 passed by the Commissioner, Service Tax-VII, 1st Floor, Satra Plaza, Palm Beach Road, Sector 19D, Vashi, Navi Mumbai-400 705)

Konkan Railway Corporation Ltd. .....Appellant
Belapur Bhawn, Sector11, P.O.Box No.9, CBD Belapur Bhavan,
Navi Mumbai-400614.

VERSUS

Commissioner of Service Tax, Mumbai .....Respondent
1st Floor, Satra Plaza, Palm Beach Road, Sector 19D,
Vashi, Navi Mumbai-400705.

APPERANCE:

Shri Chirag Shetty, Advocate for the Appellant

Shri Nitin M.Tagade, Joint Commissioner (AR) for the Respondent

CORAM:

HON'BLE DR. SUVENDU KUMAR PATI, MEMBER (JUDICIAL)
HON'BLE MR. ANIL G. SHAKKARWAR, MEMBER (TECHNICAL)

FINAL ORDER NO. 85984/2023

Date of Hearing:11.05.2023
Date of Decision:22.06.2023

PER: DR. SUVENDU KUMAR PATI

Confirmation of duty demand alongwith interest and penalty for the extended period made through two show cause notices on the appellant company, an unit constituted by the Indian Railways and four of the State Governments, vide above referred order, on the ground that it was providing business support service taxable under the Finance Act, 1994, is assailed in this appeal.

2. Facts of the case that gives rise to the appeal is that on the basis of information gathered, the DGCEI, Chennai Zonal Unit summoned the appellant for production of certain documents. It was noticed that appellant M/s. Konkan Railway Corporation Ltd. (KRCL) entered into agreement on 15.7.2002 with the Ministry of Railways, Government of Maharashtra, Goa and Kerala for construction of a new Broad Gauge Railway Line between Mangalore and Roha and it was allowing Indian Railways to use the said Railways Lines including signals and systems for transportation of Goods and passengers between Roha and Mangalore. It was receiving consideration for use of assets in terms of apportionment of revenue for such usage of its infrastructure facilities including railways tracks in accordance with agreement. It was further noticed by the department that transportation of goods and passengers was provided by Indian Railways and not by the appellant and collection of revenue was done by Indian Railways only that was being apportioned by stake holders, namely, participating State Governments and Indian Railways and the same was nothing but charges paid for allowing Indian Railways to use infrastructure of the appellant that is classifiable under 'Business Support Service' taxable under Section 66B(44) of Finance Act for the period on or after 1.7.2012 and under Section 65(104c) read with Section 105 (zzzq) of the Finance Act, 1944 for the prior period. Two show cause notices were accordingly issued on dated 20.10.2014 for the period 2009 to 2014 and on dated 2.5.2016 for the period 2014 to 2015 demanding duty of Rs.3,05,63,55,594/- and Rs.84,86,10,952/- respectively with proposal for interest under Section 75 of the

Finance Act, 1994, penalty under Sections 76, 77 as well as equal penalty under Section 78 of the said Finance Act, 1994 for the extended period. The appellant, having registered office at Mumbai, had unsuccessfully contested the same and thereafter approached this Tribunal for necessary relief against the confirmation of demand etc. by the Commissioner.

3. During course of hearing of the appeal, it was noticed that an application was filed by the learned Counsel for the Appellant for out of turn hearing of the appeal on the ground that the issue has been settled by this Tribunal in view of consistent orders passed by this Tribunal including that of the judgements in *Mudra Ports & Special Economic Zone Ltd. Vs. CCE, Rajot* reported in *2011-TIOL-1321-CESTAT-AHM* and *Bharuch Dahej Railway Co. Ltd.* reported in *2019-TIOL-1175-CESTAT-DEL* for which the same application was allowed *vide* order dated 27.02.2020 accordingly appellant was heard on 11.5.2023. Learned DR for the respondent department expressed reservation of the respondent department for acceptance of the *ratio* of above these two judgments, for which maintainability of the appeal on judicial precedent alone is taken up at the first instance to analyse the ground of acceptance/ non acceptance of judicial precedent, apart from the issue of taxability on the income of State Government.

4. Learned DR for the respondent department Shri Nitin M. Tagade submitted with reference to the case law of Mudra Ports & Special Economic Zone Ltd. and Bharuch Dahej Railway Co. Ltd.,

cited supra that in both the cases appeals of the Revenue were admitted for hearing by the Hon'ble Supreme Court for which judgements of CESTAT, as referred above are under jeopardy and in view of the decision of Hon'ble Supreme Court given in the case of Union of India and others vs. West Coast Paper Mills Ltd. and another reported in 2004 (2) TMI 344 SC, the issue cannot be considered to have attained finality that could be taken as binding precedent. He further submitted that the Hon'ble Bombay High Court, in the writ petition filed by the present appellant, had also observed that shares are being distributed between Centre and State Governments does not warrant differential treatment to the Appellant under the Act for the reason that in actuality the petitioner is a limited company.

5. In response to such submissions, learned Counsel for the appellant Shri Chirag Shetty submitted that the issue is no more *res integra* in view of the decision Mudra Ports & Special Economic Zone Ltd. and Bharuch Dahej Railway Co.Ltd. as well as *M/s. Krishnapatnam Railway Company Ltd.* reported in *2019-TIOL-1175-CESTAT-DEL* and the fact that the respondent department has filed appeal before the Hon'ble Supreme Court that has been admitted for hearing would not make any difference since the *ratio* decided therein are binding precedents as has been held by the Hon'ble Supreme Court in Kunhayammed vs. State of Kerala, AIR 2000 SC 2587 and Eknath Shankarrao Mukkaar vs.State of Maharashtra, AIR 1977 SC 1177.

6. We find that it was held in Kunhayammed and Eknath Shankarrao Mukkaar decisions that though the decree or order under challenge continues to be effective and binding, nevertheless its finality is put in jeopardy. As could be seen from Kunhayammed case, which is the leading decision in this field, it has become settled principle of law that the decision of a court cannot be ignored for the reason that the same is under challenge before the Supreme Court, for the reason that apart from being a judicial precedent prevailing at relevant point of time, decision delivered acts as *Res Judicata* if parties litigating in the subsequent proceedings are same.

7. However, in the instant appeal, acceptance of precedent value of order passed by this Tribunal on the issue is being questioned! In this connection, we are persuaded by the judgement of Hon'ble Allahabad High Court in *Natraj Chhabigrih, Sigra vs State Of U.P. and Another* reported in *AIR 1996 1996 All 375.* Para 17 of the judgement reads as under:

> *"17. The principle of binding judicial precedent is well sealed. Not only decision of higher Courts are binding on the Courts lower in hierarchy, even in the same Court it binds Bench of lower number of Judges even to equal number of Judges of coordinate jurisdiction. Thus judgment of a Division Bench is binding on subsequently consumed Division Bench of co-ordinate jurisdiction (equal number of Judges). It cannot decide contrary but has an option with judicial sanction to refer it to a larger Bench".*

We, therefore, accept he precedent value of both the decisions.

8. At this juncture, on the issue of taxability though not sufficient argument is led by both parties, we consider it proper to place on record our opinion and observation on fastening of tax liability on the State Governments concern by the Union in view of the fact that the same appears to be contrary to the provisions of Constitution of India and every authority under the Constitution is duty bound to respect the constitutional provisions as well as protect the same.

9. Part XII of Constitution of India deals with property, contract and suits concerning Union and its federating units namely, the States. Article 274 clearly stipulates that no Bill or amendment which imposes or varies any tax or duty, in which states are interested, shall be introduced or moved in either House of Parliament except on the recommendation of the President of India. Article 289 exempts both 'property' and 'income' of a State from Union taxation. The provision that can at best pressed into services to justify imposition of service tax on the States is clause 2 of Article 289 of the Constitution that reads as hereunder:

> *"(2) Nothing in clause (1) shall prevent the Union from imposing, or authorizing the imposition of, any tax to such extent, if any, as Parliament may by law provide in respect of a trade or business of any kind carried on by, or on behalf of, the government of a State or any operations connected therewith, or any property used or occupied for the purposes of such trade or business, or any income accruing or arising in connection therewith."*
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> *(Underlined to emphasise)*

10. A conjoined reading of the provisions would clearly indicate that imposition of tax by the Union on the State is not prohibited but

the same is not permitted even on the subjects in which States are interested or States are having any interest, unless President of India makes a prior recommendation and Parliament by law provide for such imposition of tax on any specific trade or business being carried on behalf of Government of a State or any operation connected with it. This would imply that general taxation law would not be applicable to the State or to its government or agencies in which States are interested unless Parliament makes a special law in respect of trade or business **of any kind** and such law making requires prior recommendation of President of India. To put it differently, it can be said that taxation laws applicable to the subjects of the country would not *suo moto apply* to the States unless the same satisfies the provisions contained in Article 274 and 289 of the Constitution of India. This being the constitutional mandate applicability of service tax in general, on the income of State in respect of trade or business, is not permissible and on this score alone duty demand against the appellant, constituted by four States and Indian Railway, would not survive.

11. Now coming to the legality of the order that is being assailed, we consider it proper to take up the points of arguments led by both the sides on the issues and give our findings accordingly.

12. Learned Counsel for the appellant Mr. Chirag Shetty submitted that with reference to the Budget speech of Hon'ble Railway Minister made on 14.3.1990, making proposal for formation of a Railway company in terms of Companies Act 1956 for the purpose of

construction and operation of railway lines that had received the Cabinet approval Government of India through Hon'ble President of India and Governments of Maharashtra, Goa, Karnataka and Kerala through their respective Hon'ble Governors entered into a joint venture company agreement on 19.6.1990 to be operated under the control of Ministry of Railway. In the said agreement, it has been clearly stipulated that company will be 'deemed to be Railway Company' under the provision of Indian Railways Act, 1890 and the main objective of the company was to construct Konkan Railway lines, operate the same for a period upto which the company discharges its liabilities arising out of such project and such cost of service shall be met by equity and by collecting loan and debenture/bond etc., with equity participation of Indian Railways of more than 50% share. He further submitted that another "Working Agreement", for the purpose of making arrangement for train operations and working of traffic for the said purpose, was executed to the effect that among Appellant and others zonal railway units would apportion a part of revenue generated from fare and freight charges and the same distribution would be done keeping the Appellant at par with other zonal railways and therefore, no service can be said to have been rendered by the Appellant to Railway since both are not two separate entities. He strengthens his argument by referring to the clauses of the agreement concerning transfer of assets to the Railways soon after cost is recovered by the respective participating Governments, through apportionment of revenue that is solely collected by Indian Railways and therefore, the allegation itself in the show cause notice that 'working agreement' is nothing

but arrangements for payment of consideration for allowing utilization of infrastructure facilities itself is unsustainable in law and facts.

13. Per contra, in response to the submissions on this aspect, Learned AR for the revenue department Shri Nitin M. Tagade submitted that both Appellant KRCL and India Railways are two different persons not only from the point of view of charging of service tax but also they are distinct units having separate independent logo, staff and infrastructure having separate annual financial reports and Managing Director of KRCL having entered into working agreement with Secretary Indian Railway cannot be considered as one unit and therefore, the methodology adopted for apportionment of collection, at par with other zonal railways cannot make the appellant KRCL an integral part of Indian Railway since for all practical purposes, the Appellant is separate entity in the status of an Public Sector Undertaking though, under the control of the Ministry of Railway. He further argued that even both Indian Railway and KRCL have two training institutes and audit staff of different status. Further, management of the zonal units are headed by General Managers while the Appellant company is headed by the Chairman/Directors and therefore, merely being a Public Sector Undertaking under the Ministry of Railway of the Government of India would not make it entitled for exemption available to Government of India. Since PSU, namely, Government companies are subjected to taxing Statute.

14. We have heard submissions on the standing of the Appellant company and gone through written submissions as well as relied upon case laws in order to give our finding on the issue as to if both Indian Railway and the Appellant are two separate units functioning under the main unit namely Indian Railway's administrative control. Going by the agreement executed among government of India and four federal units, the company that is formed would be "deemed to be Railway Company" under the provisions of Indian Railway Act, 1890, as amended from time to time. Moreover, validity of agreement was for 15 years or for further period to be extended for the purpose of complete discharge of the liability of the company after which property acquired or created by the company by whatsoever services in their entirety would vest in the company and the same shall be transferred to the Indian Railways including respective shares of other State Governments. Working Agreement also contains some additional features including obligation to follow the freights and tariff rates as decided by the Parliament from time to time and apportionment between KRCL and Indian Railway shall be done at par with other zonal railways.

15. From the above narration, coupled with purpose of bringing the appellant into existence that was being disclosed in the Budget Speech of the Finance Minister, it can only be stated that respective states have entered into an agreement with the Railway company owned by Government of India so as to facilitate early completion of railway line with financial, infrastructural and managerial support so that project would be executed in a better ways and railway services

passing through those participating states would not suffer due to administrative, finances and other constraints. Apart from this moto, creation of the Appellant company for any other purpose is not apparently visible from the work agreement or relied upon documents on which duty demand is based. There is not a whisper of word in the text of both the agreements regarding any profit sharing or payment to the participating units of the company, apart from certain recoveries of expenditure incurred by four States and the railway company and that ultimately assets would go to the railway company upon meeting of expenditure incurred in the project. This being facts on record, we are of the considered view that there is no flow of 'consideration' to the appellant company and to the Indian Railway even as a separate unit so as to subject it to an independent entity under the category of service. Moreover, Indian Railways is not a separate unit that of the appellant company since it is 'deemed owner' and a part of it having larger share during the relevant period for which show cause notice was issued. Therefore, the demand of service tax on this score on the appellant company is also not sustainable.

16. On the issue of taxability, Learned Counsel for the appellant further submitted that Section 99 of the Amended Finance Act, 1994 has given retrospective exemption to the Indian Railways from payment of service tax upto 1.7.2012 and thereafter, service tax has been paid against purchase of tickets, collection of freight charges by the respective passengers at the stations where such purchases were made for which demand of service tax from the appellant

company for permitting Indian Railways to use the infrastructure to provide transportation of passengers and transportation of goods would amount to double taxation, apart from the fact that in the show cause notice the same is categorised as business support service for allowing Indian Railways to use infrastructure of the appellant company. In this connection, he had also referred to the definition of support service on Business and Commerce explained under Section 65 (104c) of the Finance Act, 1994 and more importantly to its explanation that categorised services that could be considered as "infrastructural support service", which are distinctly different from the nature of the service allegedly provided by the appellant. He further added that Board's Circular No. 109/3/2009-S.T., dated 23.2.2009 stipulates that when contract/agreement is carried on principle to principle basis, they cannot be considered as service by one authority to another and accordingly service tax is to be demanded. He relied upon the decision of Commissioner vs. Rattan Melting and Wire Industries reported in 2008 (12) STR 416 (SC) to support his stand.

17. On the other hand, with reference to judgement of M/s. Hyderabad Race Club vs. Commissioner of Customs and Central Excise, Hyderabad-II reported in 2019-TIOL-2629-CESTAT-HYD and Indo Hong Kong Industries Pvt.Ltd. vs. Commissioner of Central Excise and Service Tax, Delhi reported in 2017-TIOL-1829-CESTAT-DEL, Learned AR had argued that any service which is rendered in relation to Business and Commerce Service would amount to business support service since dictionary meaning of it is that the services which are necessary for an organization to run smoothly are

all business support services, for which no interference is required in the order passed by the Commissioner. However, he has not countered to the Circular No. 109/3/2009-S.T., dated 23.2.2009 issued by the Board, that has been referred by the appellant.

18. Having regard to the submissions on these issues, we would like to restrict our discussions to the point that both judgements cited by the respondent department were on infrastructural support service being provided by the assessee which were covered under explanation to Section 65(104c) of the Finance Act, 1994 that has undergone change with effect from 1.7.2012 and made taxable under Section 65B(44) of the Finance Act, 1994 that reads as hereunder:-

> *"Support Services of Business or Commerce" means services provided in relation to business or commerce and includes evaluation of prospective customers, telemarketing, processing of purchase orders and fulfilment services, information and tracking of delivery schedules, managing distribution and logistics, customer relationship management services, accounting and processing of transactions, operational assistance for marketing, formulation of customer service and pricing policies, infrastructural support services and other transaction processing.*
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> *Explanation.—For the purposes of this clause, the expression "infrastructural support services" includes providing office along with office utilities, lounge, reception with competent personnel to handle messages, secretarial services, internet and telecom facilities, pantry and security."*

19. No such activity of the appellant could be apparently equated with services described above for which the appellant is required to declare itself as service provider of support service of Business and Commerce and specifically extending 'infrastructural support

service'. We are therefore, of the considered view that Section 65(105)(zzzq) of Finance Act defined taxable service to mean any service provided or to be provided to any person, by any other person, in relation to support services of Business or Commerce and our finding as referred above would go to say that both the appellant and Indian Railways are not separate entities, we have no hesitation to hold that the Appellant's case is also covered by Board's Circular No.109/3/2009-S.T., dated 23.2.2009.

20. This being facts on record and law on the subject that appears to be completely different from the demand raised in the show cause notice and confirmed by the Commissioner, it would be out of context to discuss about the extended period, computed since 2009 apart from the fact that Indian Railways is given exemption from payment of service tax for the prior period up to 1.10.2012. Therefore, we conclude this discussion by holding that confirmation of demand by the Commissioner is unsustainable, for which the order passed by the Commissioner is required to be set aside.

21. Hence, we allow the appeal with consequential relief, if any.

(Order pronounced in the open court on 22.06.2023)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

(Anil G. Shakkarwar)
Member (Technical)

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