CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

SERVICE TAX APPEAL NO: 86358 OF 2015

[Arising out of Order-in-Original No: 06/ST/2015 dated 31st March 2015 passed by the Commissioner of Central Excise, Customs & Service Tax, Nashik-I]

Souvenir Developers India Pvt Ltd **...Appellant**
1, Animesh Market, Janki Nagar
WB Road, Deopur, Dhule-424002

versus

Commissioner of Central Excise, Customs & Service Tax– I **...Respondent**
Kendriya Rajaswa Bhavan, 2nd Floor, Annex Building RG Gadkari Chowk, Old Agra Road, Nashik - 422002

APPEARANCE:

Shri Bharat K Raichandani, Advocate for the appellant

Shri Nitin M Tagde, Joint Commissioner (AR) for the respondent

CORAM:

HON'BLE MR JUSTICE DILIP GUPTA, PRESIDENT
HON'BLEMR C J MATHEW, MEMBER (TECHNICAL)

DATE OF HEARING: 14/03/2022
DATE OF DECISION: 17/05/2022

FINAL ORDER NO: A / 85461 /2022

PER: C J MATHEW

This appeal challenges the fastening of tax liability of Rs. 2,97,28,305 under section 73 of Finance Act, 1994, along with interest applicable under section 75 of Finance Act, 1994, for having provided 'business auxiliary service' for the period from October 2008 to June 2012 and for having provided 'service' between July 2012 and March 2013 in the course of undertaking 'toll collection' as also the attendant imposition of penalties

under section 77 and section 78 of Finance Act, 1994.

2. M/s Souvenir Developers India Pvt Ltd had, in response to tender floated by M/s Gujarat Road and Infrastructure Company Ltd (GRICL), M/s West Gujarat Express Ltd (WGEL) and M/s Maharashtra State Road Development Corporation Ltd (MSRDCL) for 'toll collections' on specified sections of the highways in the two states entrusted to them for construction or upgradation by the respective state governments, offered the highest assured payment at specified intervals to emerge as the designated operator. The expenditure for maintenance of the assigned section was to be met from the 'toll collected' at rates determined by the government from time to time with the balance, if any, after the setting off the lumpsum payments being the returns to the operator. The non-payment of tax on this 'consideration' led to issue of show cause notice culminating in the impugned order.

3. The appellant herein contends that, in their 'principal to principal' transaction with risk of loss assumed by them, the amount retained is not 'commission', as alleged by service tax authorities, but profit which is beyond the reach of Finance Act, 1994. It is further contended that the issue stands decided in their favour by decisions of the Tribunal in **Intertoll India Consultants (P) Ltd v. Commissioner of Central Excise, Noida**[1], in **Ideal Road Builders P Ltd v. Commissioner of**

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1. 2011 (24) STR 611 (Tri-Del)

Service Tax, Mumbai[2] in **Patel Infrastructure Pvt Ltd v. Commissioner of Central Excise, Rajkot**[3] and in **Ashoka Buildcon Ltd v. Commissioner of Service Tax, Nashik**[4] as well as the decision of the Hon'ble High Court of Andhra Pradesh in **Commissioner of Customs & Central Excise, Guntur v. Swarna Tollway (P) Ltd**[5] and the justification offered in the impugned order to distinguish the facts therein from the present dispute does not stand test of judicial scrutiny. It was also argued by Learned Counsel for the appellant that the impugned transaction does not find fitment within any of the activities enumerated in section 65(19) of Finance Act, 1994 as 'business auxiliary service' taxable as enumerated in section 65(105)(zzb) of Finance Act, 1994 for the period prior to 1st July 2012 and that the exercise of sovereign function by the other parties to the contracts transposes the operation model beyond 'client servicing' which is the essence of taxability. It was also submitted that the responsibility for maintenance, repair and upkeep of the assigned sections, which is exempt from tax in terms of notification[6] having effect from 16th June 2005 as well as by specific enumeration in the 'negative list' also excludes the applicability of 'taxable service' for the entire period of dispute.

4. Learned Authorized Representative placed particular emphasis on the agreement that the appellant had entered into with M/s Gujarat Road and Infrastructure Company Ltd (GRICL)

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2 . 2015 (40) STR 480 (Tri-Mumbai)
3. 2014 (33) STR 701 (Tri-Ahmd)
4. 2017 (49) STR 404 (Tri-Mumbai)
5. 2013 (31) STR 419 (AP)
6. No. 24/2009-ST dated 27th July 2009

to demonstrate that reference to 'agency' and 'commission' therein sufficed to establish that the appellant was a 'commission agency' within the scope of taxability as provider of 'business auxiliary service' in the scheme of section 65 (19) of Finance Act, 1994. The decisions of the Tribunal in **Larsen and Toubro Ltd v. Commissioner of Service Tax**[7] and in **Kandla Port Trust v. Commissioner of Central Excise & Service Tax, Rajkot**[8] were cited in support of the case of Revenue.

5. In determining that the amounts retained by the appellant out of the 'toll' and 'user fee', being descriptions assigned to the collections from motor vehicles and trailers in the agreements of M/s Maharashtra State Road Development Corporation Ltd (MSRDCL) and M/s Gujarat Road and Infrastructure Company Ltd (GRICL) respectively, after remitting the lump-sum amount assured in their successful bid were liable to tax under section 65(105)(zzb) of Finance Act, 1994 as 'consideration' for rendering of 'business auxiliary service', the adjudicating authority has been influenced by the deployment of 'commission' to describe such amounts therein and the seeming appearance of being an agent with no control over the determination of user charges as leading to the inevitable conclusion of 'commission agency' being the contractual intent of both sides.

6. Strangely, it was also posited in the very same order that this transaction also fits within 'provision of service on behalf of the client' which is yet another enumeration in the definition. As

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7. 2019 (21) GSTL 428 (Tri-Ahmd)
8. 2019 (24) GSTL 422 (Tri-Ahmd)

'commission agent' was considered deserving of separate inclusion among the activities enumerated in the definition, the two are mutually exclusive and the hesitancy in narrowing the nature of the activity to one or the other is at odds with certainty that should guide taxation. It appears to us from

> '8. The activities performed by M/s SDIPL i.e. collection of user fee/toll, from ultimate users and the activities of M/s MSRDCL and M/s GRICL, i.e. providing access to use the road on charging of user fee/toll are intangible in nature and therefore, they qualify to be called as service. From the terms of contract agreements it appears that M/s SDIPL had merely been appointed as 'Agent' of M/s MSRDCL and M/s GRICL [M/s GRICL also used this term for M/s SDIPL in their agreements] to collect the toll or user fee, which is actually to be levied and collected by M/s MSRDC or M/s GRICL, as the case may be, on the behalf of later. It is not the case that if some excess collection is made, on the rates being revised, the same can be retained by M/s SDIPL, but, the same has to be given to M/s MSRDCL or M/s GRICL, as the case may be, as per their directions/instructions. Even the right to revise or modify the rates lies with M/s MSRDCL or M/s GRICL, including the right to terminate the agreement or contract in certain specified circumstances. These facts also imply that M/s MSRDCL or M/s GRICL, who are awarding the contracts, are the 'Principals' and M/s SDIPL are the 'Agent'.
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> 8.3 Thus, it appears that M/s SDIPL are engaged in managing various facilities for promoting, providing various services on behalf of their clients, viz. M/s MSRDCL or M/s GRICL. Further, M/s SDIPL also appear to act on behalf of their principals for collecting the user fee/toll charges and regulating the access to the road and during performance of such act, they appear to perform various services, incidental or auxiliary, to collect of payment of user charges/toll on behalf of the principal, guarantee them collection of user charges/toll in the form of security deposits/upfront fee. The above said activities of M/s SDIPL will approximately fall under the definition of "Business Auxiliary Services" as defined at Section 65(19) of Chapter V of the Finance Act, 1994. ….'

in the show cause notice, that the framework establishing the bounds of adjudication has not ventured beyond the 'agency' service. The determination of tax in the impugned order on the foundation of section 65(19)(vi) of Finance Act, 1994 is beyond the scope of proceedings and does not merit our attention except thus, and in passing too.

7. While Learned Counsel places reliance on the decision of the Tribunal in **Intertoll India Consultants (P) Ltd** holding that

> '8. At the outset, we find that NTBCL was declared as owner of the DND bridge by the Noida Authority under the Govt. of U.P. The owner had given rights of collection of toll tax to the appellant and to retain a percentage of it and remit the balance. It can be seen that the appellant herein is collecting an amount as toll from the users of the DND bridge. To our mind, the users of toll fee paid bridge cannot be considered as customers. The persons who are using the DND bridge cannot be called as customers of either the appellant or NTBCL for a simple reason, because the expression 'customer' as defined in Advanced Law Lexicon read as under:-
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> > "Customer is a person with whom a business house or a business man, has regular or repeated dealings; a purchaser of goods; one who frequents any place of sale for the sake of purchasing or ordering goods. A business customer is one who has the use and habit of resorting to the same person or place to do business; therefore, a stranger who goes into bank to get a cheque collected, is not a customer of the bank."
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> It can be seen from the above definition, a person is considered as customer of a business house when he has repeated dealings with the business house. To our mind, by any stretch of imagination, individual using the DND bridge and pays toll to the authority cannot be considered as a customer. The definition of the BAS either prior to 10-9-2004 or post-10-9-2044 has to be considered from

> the point of view of whether the appellant has provided any customer care services on behalf of the client. First and foremost, it is to be noted that NTBCL is not a client of the appellant as the appellant is not promoting any customer care service of NTBCL. There is no visible activity done to please the user of the DND bridge to take care of their needs or something which is done which induces to come again and again to the said DND bridge. It may be noted that the users of DND bridge may be paying the toll fees reluctantly as that is the only means to connect the two banks of the rivers.'

while discarding the liability fastened by the order impugned therein for rendering of 'any customer care service provided on behalf....', Learned Authorized Representative sought to deny it as a binding precedent in view of the decision of the Tribunal in **Larsen & Toubro Limited** which, after noting the plea therein that

> '4.4……..the road user is not a customer, and therefore, they would not be cover under clause (iii) of the said definition. Clause (iii) of the definition of BAS reads as "Any Customer Case service provided on behalf of the client". The Ld. Counsel has relied on the decision of Tribunal in the case of Intertoll India Consultants (P) Ltd. (supra) wherein it has been held that road user is not a customer. Para 8 of the said decision reads as under :
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went on to opine that

> 'We respectfully disagree with conclusion reached in the said paragraph. The said paragraph relies on the definition of customer as it appears in Advanced Law Laxicon. According to the said definition only a person who has regular or repeated dealing can be a customer. Customer has been defined as …….

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> From the above definitions it is apparent that even a single time buyer of service or goods also qualifies as customer. Moreover, the conclusion in para 8 of the decision of Intertoll India Consultant P. Ltd. (supra) is based on the presumption that all the road users of the said road are one time users. There is no basis for the said presumption as it is possible that a lot of road users would be using the said product on daily, weekly, or monthly basis and thus qualifying as customer even by definition relied upon in the case of Intertoll (supra). It is seen that the appellants were responsible to all maintenance services for traffic. They were also responsible to take action during accidents and to clear obstructions, wreckage and broken down vehicles. They were required to ensure road availability of ambulance and toll vehicles at all times. The appellants were also required to arrange and liaison with road transport facilities and local police for the traffic arrangements. In these circumstances, we find that every user is a customer of AMTRL and the appellants are providing services to the customers (the users) on behalf of AMTRL and thus the activity would also be covered under clause (iii) of the definition of BAS.
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> From the above it is apparent that the appellants are providing a bouquet of services to the customers on behalf of the principal AMTRL and thus the appellants are also covered by the clause (iii) of the definition of BAS.'

8. Learned Counsel appears to have relied upon **Intertoll India Consultants (P) Ltd** to draw attention to non-taxability of receipts under the authority of section 65(105)(zzb) of Finance Act, 1994 in a somewhat similar outsourcing of activity. However, tax authorities had sought to classify the transaction therein under another of the enumerations in the definition of 'business auxiliary service' in section 65(19) of Finance Act,

1994 that required elucidation of 'customer' while examining the applicability of 'client' to describe the equation between the owner of the infrastructure and the appellant therein. The contrary decision in **Larsen and Toubro Ltd** was also founded on a different approach to the meaning of 'customer' which was then built upon to conclude that the service impugned therein had been rendered to users on behalf of client - the owner of the infrastructure facility.

9. That controversy need not detain us as the adjudicating authority has determined coverage thus

> '18. From the terms and conditions mentioned in the agreements/work orders, as appearing in the foregoing paras, it is very clear that infrastructure such as, road/toll plazas were built/constructed by M/s GRICL/M/s MSRDCL and not by M/s SDIPL and instead of collecting the toll/user fee themselves, they appointed M/s SDIPL as agent/contractor for collection of toll/user fee, as per rates prescribed, from the specified vehicles at the specified Toll Plaza. M/s SDIPL (i.e agent) were liable to remit the specified instalments from time to time to M/s GRICL/M/s MSRDCL. In consideration of M/s SDIPL (i.e agent) having agreed to collect user fee/toll on the specified Toll Plazas during the subsistence of the agreement, they were entitled to retain with them the amount out of the user fee/toll collected by them which exceeded the amount quoted by them in the bid. Thus, the amount retained by M/s SDIPL is nothing but a consideration for collecting the user fee/toll on behalf of M/s GRICL/M/s MSRDCL which can be termed as 'commission'. Entire function of M/s SDIPL was supervised/controlled/regulated by M/s MSRDCL or M/s GRICL and these authorities had got right even to direct M/s SDIPL to terminate their employees if they did not

behave in an ethical manner. Even the right to revise or modify the rates rested with M/s MSRDCL or M/s GRICL, including the right to terminate the agreement or contract in certain specified circumstances. All these imply that M/s MSRDCL or M/s GRICL are the 'principal' and M/s SDIPL are the 'agent'. Hence, in this case, M/s SDIPL acted as 'commission gent' for providing the services of collection of user fee/toll to M/s GRICL/M/s MSRDCL. M/s SDIPL were also performing various services, incidental or auxiliary, to the said activity such as, regulating the access to the road, standing guarantee for collection of user charges/ toll in the form of security deposits/ upfront fee, etc. The activity of M/s SDIPL is definitely provision of service on behalf of the client i.e M/s GRICL/M/s MSRDCL. Thus, the activity of M/s SDIPL will approximately fall under the service category of "Business Auxiliary Services" as defined under Section 65(19) of Chapter V of the Finance Act, 1994 and is taxable service in terms of section 65(105)(zzb) of the Finance Act, 1994. It is specifically covered at sr.no. (vi) read with (vii) of the definition of "Business Auxiliary Services". For the ease of reference, the same is reproduced below-

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The Board, vide its Circular No.152/3/2012-ST dated 22.02.2012 has also clarified the matter. The said circular is reproduced as under for ease of reference:-

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Therefore, I hold that the services provided by M/s SDIPL to M/s MSRDCL or M/s GRICL are levaible to service tax section 6 of Chapter V of the Finance Act, 1994 and hence, they are liable to pay the Service tax in accordance with Section 68 of the Act, ibid.'

in the impugned order which is entirely distinct from, and separate of,

> '(iii) any customer care service provided on behalf of the client'

in section 65(19) of Finance Act, 1994.

10. The submission that the agencies of the state government are 'clients' of the appellant on whose behalf maintenance of roads is undertaken appears to have overlooked the underlying scheme of the tender which brought the appellant in to the transaction. The contractual arrangement between the appellant and the agencies of the state was for undertaking collection of 'toll' or 'user fee', as the case may be, while also ensuring maintenance of roads in the condition in which these were handed over. These may, at best, be perceived as rendering service to these agencies of the state, and with 'user' of the road as nothing but statistical probability when their bid was made and accepted, having no other intended recipient. Even this restricted depiction is founded solely on the fitment of the statutory definitions of the taxable service on to the commercial definitions employed in the contract without delving into the scheme. It is moot if, in the determination of tax liability, the commercial expressions deployed in a contract should be so construed, as the adjudicating authority has, without scrutinizing the context of the entirety of the contract for fitment within the charging provision of the statute.

11. 'Toll' is a constitutionally authorized levy assigned to governments of constituent states of the Union and, unarguably, to be collected under the authority of the state government. It is

not the case of the service tax officers that the mechanism erected for such collection compromises the characteristic of the levy into two – 'toll' and other – but that denomination of the latter as 'commission' in the contract constitutes two activities of which only one was taxable. Concatenating the deprivation of authority to determine the charges leviable from users and the monitorial oversight by the agencies of the state government, the adjudicating authority concluded that 'principal and agent' relationship existed.

12. The megatrends in infrastructure development of the country in recent decades have increasingly incorporated private sector participation, to a lesser or larger degree, in big projects requiring massive investment for transfer of risk to the private entity – whose core competency it is – and, in return for assured lumpsum payment, also the potential earnings through models such as 'build operate transfer' (BOT) and 'build own operate transfer' (BOOT). The terms of engagement is thus clear: possession of the upgraded/constructed asset is transferred to the appellant for the stream of lumpsum payment guaranteed by the appellant while alienating risk of sub-optimal use and risk of asset deterioration. Any deficit in returns from lower traffic or owing to maintenance costs dents only the purse of the appellant. A 'commission agent' is a channel partner in delivery of goods/service in which the risk of market rejection continues to be borne by the principal and bears no resemblance similarity to the contractual obligation in the impugned transaction of the appellant which is all about risk assumption. Oversight by

agencies of the state is intended to assure proper maintenance of the asset and fixation of rates is retained by the government to prevent exploitative exaction both of which are mandated by public interest and not as a facet of principal-agent equation. Thus, tax liability does not arise by way of being 'commission agent' in section 65(19) of Finance Act, 1994 for the period prior to introduction of 'negative list' regime.

13. Insofar as the period after 1st July 2012 is concerned, the adjudicating authority has determined that the activity conforms to the definition of 'service' in section 65B (44) of Finance Act, 1994 but devoid of the privilege of exclusion afforded by section 66D(h) of Finance Act, 1994 that is available only to agencies of state government and not to the appellant rendering service to the said agency. Reliance was placed on circular[9] of Central Board of Excise & Customs (CBEC) distinguished the collection of 'toll' by a special purpose vehicle (SPV) established for a project and collection of 'toll' by independent entity engaged for collection on commission, or other basis, for excluding the appellant from immunity to tax.

14. The narration in the said circular suggesting the dichotomous treatment does not even begin to appreciate the complexity of infrastructural creation. It was probably not intended to clarify anything beyond a model for collection simpliciter and the construing of such bland arrangement as intendment of tax liability in all models of road infrastructure

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9. No. 152/3/2012-ST dated 22nd February 2012

partnership designs appears to be overreach on the part of the adjudicating authority. The circular, not having considered the degrees of private participation in infrastructure projects, is not a reliable guide to tax liability except in instances that was so intended therein.

15. We fail to perceive the authority under which the impugned order has concluded that, with effect from 1st July 2012, the activity enumerated in the 'negative list' in section 66D of Finance Act, 1994 is restricted to the state and to agencies of the state. The exclusion of

> '(h) service by way of access to road or a bridge on payment of toll charges;'

in section 66D of Finance Act, 1994 does not bespeak any such restriction on the provider of service. Therefore, there can be no controversy on the immunity from tax for the period after 1st July 2012 merely from transfer of responsibility for collection to the appellant.

16. Adjudication should have been limited to taxability arising from rendering 'commission agent' service without venturing also to emplace the activity of the appellant under other enumerations that fall within the definition of the said service. The impugned proceedings has not appreciated the nature of the contract and, having limited itself to superficial determination with reference to random phrases, has overlooked the substantive difference in risk assumption that is the key to

'principal-principal' transaction. The circular of Central Board of Excise & Customs has been assigned undeserved emphasis and the exclusion by way of 'negative list' has been improperly construed by the adjudicating authority. For these reasons, the impugned order is set aside and the appeal allowed.

(Order pronounced in the open court on **17/05/2022**)

(JUSTICE DILIP GUPTA)
President

(C J MATHEW)
Member (Technical)

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