

CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
SCO 147-148, SECTOR 17-C, CHANDIGARH - 160 017
COURT NO. I

Appeal No. ST/52893/2015-DB

Date of Hearing : 24.05.2018

Date of Decision :16.08.2018

[Arising out of Order-in-Original No. OIO-16-ST-CHD-II-2015 dated 05.05.2015
passed by the Commissioner (Appeals) Central Excise & ST, Chandigarh]

M/s. Nabha Power Limited : Appellant

vs.

Commissioner of Central Excise & ST, Chandigarh : Respondent

Appearance:

Shri Sujeet Ghosh and Ms. Mannat Waraich, Advocates for the Appellant(s)

Shri Vijay Gupta, A.R. for the Respondent(s)

CORAM:

Hon'ble Mr. Ashok Jindal, Member (Judicial)

Hon'ble Mr. Devender Singh, Member (Technical)

Final Order No. 62617 / 2018

Per : Ashok Jindal

The appellant is in appeal against the impugned order wherein the demand of service tax of Rs. 4,26,28,936/- has been confirmed along with interest and equivalent amount of penalty has been imposed under Section 78 of Finance Act, 1994 and Rs. 10,000/- under Section 77 of the said Act, under the category of Business Support Service.

2. The facts of the case are that appellant is a wholly owned subsidiary of Larsen and Toubro Limited has set up a Thermal Power Plant in Rajpura and the power generated in the plant is to be sold to the Punjab State Power Corporation Limited. To generate power, the main input required by the appellant is coal and the same being transported through network of railways. So the appellant entered into an agreement for procurement of coal from South East Central Coalfields Limited, Chhattisgarh. The coal was to be transported through railway upto the plant of the appellant. However, as the last station was Sarai Banjara railway station in Punjab, which is located at considerable distance from the Power Plant and there was no direct linkage up to the power plant, the appellant was required to construct siding for transportation of coal from Sarai Banjara railway station to Thermal Power Plant. As the construction of siding involved various alterations and modification to the existing Sarai Banjara railway station and such construction could not have been undertaken without the mandatory approvals, permits and supervision of the Railways. Therefore, the appellant constructed the siding under the mandatory supervision of Railways. For that activity, the appellant is required to make payment to the Railways in relation to approval and supervision provided by the railways. An enquiry was conducted by the Revenue with regard to various payments made

to Indian Railways in relation to mandatory supervision of the Railways during the period 01.07.2012 to 14.10.2013. On the basis of the details provided by the appellant, the Revenue was of the view that appellant was required to pay service tax on the services received from the Railways for construction of siding from Sarai Banjara railway station to Thermal Power Plant. Hence, the appellant was liable to pay service tax under the category of Support services under reverse charge mechanism. In these set of facts, the show cause notice was issued to the appellant and on mandatory amount paid by the appellant to Railways for various approvals and supervisions, the demand of service tax was confirmed as mentioned hereinabove in Para-1, along with interest and various penalties under the Finance Act, 1994 were also imposed. Against the said order, the appellant is before us.

3. The Id. Counsel for the appellant submits that the construction of siding was done mandatorily by the railways and for that appellant was required to make certain payments for approvals and supervision. The said activity do not qualify as Business Support Service. It is his contention that the payment made by the appellant for the activity performed by railways do not qualify as consideration towards any support service provided by Railways in as much as the same in relation to mandatory statutory payment and are not substitutable. He also relied on the CBEC Education guidelines 2012, TRU Circular dated 20.06.2012 to say that the services which are provided by the government in terms of their sovereign rights to business entities and which are not substitutable in any manner by any private entity, are not support service as such services cannot be performed by the business entity themselves. He further submitted that supervision provided by the Railways is an activity in discharge of sovereign statutory function inasmuch as the payment thereof are deposited in the consolidated fund of Government of India and not retained by Railways. He also submitted that even otherwise the services received from the Railways are in relation to construction of railway siding and accordingly are exempt from levy of service tax under entry No. 14A of the Notification No. 25/2012-ST dated 20.06.2012. He also submitted that Id. Commissioner has erroneously confirmed the demand of service tax of Rs. 34,48,94,304/-, in complete ignorance of factual submission of the appellant that the total amount paid by the appellant to Railways was Rs. 29,92,50,000/- and out of which Rs. 17,35,14,200/- has been made during the impugned period. Therefore, he prayed that the impugned order is to be set-aside.

4. On the other hand, Id. AR opposed the contention of the Id. Counsel on the ground that construction or supervision of private railway sidings like the subject one is not a statutory function of the Indian Railways. The Departmental/ Codal charges are collected on the basis of their being provided for in the Engineering Code. Code 1137 specifies that when a work is undertaken by the engineering department of the Railways for outside parties, departmental charges should be levied to cover the cost of tools and plant and of establishment supervision and

prescribe the rates thereof which are as mentioned in the Freight Marketing Circular No. 1 of 2012. Therefore, the charges are not as per any statute but are based on letters issued by the Railway Board and empower an officer of the Railways to remit them in certain circumstances. He also relied on the decision of Hon'ble High Court of Delhi in Writ Petition (Civil) 993/2012 and CM No. 2178-79/2012 in the matter 5 Appeal No. ST/52893/2015-DB of UOI vs. Competition Commission of India to say that the activity undertaken by Indian Railways to the appellant is only 'Business Support Service' being an enterprise.

5. Heard the parties and considered the submissions.

6. On careful consideration of the submissions made by both sides, it would be relevant to discuss that for what the charges have been paid to the Railways by the appellant and what service has been provided by Railways.

7. To know the details thereof, we have to see various provisions of the Railways Act and the same are reproduced below:-

“2. Definition. – In this Act, unless the context otherwise requires, -

(1) to (30)

(31) **“railways”** means a railway, or any portion of a railway, for the public carriage of passengers or goods, and includes -

(a)

(b) all lines of rails, sidings, or yards, or branches used for the purposes of, or in connection with, a railway; “

CHAPTER V - OPENING OF RAILWAYS

“21. Sanction of the Central Government to the opening of railway - No railway shall be opened for the public carriage of passengers until the Central Government has, by order, sanctioned the opening thereof for that purpose.

22. Formalities to be complied with before giving sanction to the opening of a railway, - (1) The Central Government shall, before giving its sanction to the opening of a railway under Section 21, obtain a report from the Commissioner that -

(a) he has made a careful inspection of the railway and the rolling stock that may be used thereon;

(b) the moving and fixed dimensions as laid down by the Central Government have not been infringed;

(c) the structure of lines of rails, strength of bridges, general structural character of the works and the size of, and maximum gross load upon

the axels of any rolling stock, comply with the requirements laid down by the Central Government; and

(d) in his opinion, the railway can be opened for the public carriage of passengers without any danger to the public using it.

(2) If the commissioner is of the opinion that the railway cannot be opened without any danger to the public using it, he shall, in his report, state the grounds therefore, as also the requirements which, in his opinion, are to be complied with before sanction is given by the Central Government.

(3) The Central Government, after considering the report of the Commissioner, may sanction the opening of a railway under Section 21 as such or subject to such conditions as may be considered necessary by it for the safety of the public.

23. Sections 21 and 22 to apply to the opening of certain works. – The provisions of Section 21 and 22 shall apply to the opening of the following works if they form part of, or are directly connected with, a railway used for the public carriage of passengers and have been constructed subsequent to the giving of a report by the Commissioner under Section 22, namely:-

- (a) opening of additional lines of railway and deviation lines;
- (b) opening of stations, junctions and level crossings;
- (c) re-modelling of yards and re-building of bridges;
- (d) introduction of electric traction; and
- (e) any alteration or reconstruction materially affecting the structural character of any work to which the provisions of sections 21 and 22 apply or are extended by this Section. “

On going through the above provisions, we find that Railways includes siding also for transportation of public carriage of passengers or goods. Admittedly, in the case in hand, the siding has been required to be constructed for transportation of coal upto the plant of the appellant. Therefore, the siding in question is covered under the definition of Railways. As per Section 21 of the Railways Act, certain sanctions are required for construction of that siding and Section 22 and 23 provide various formalities to be complied with. Therefore, the Railway is required to construct the siding and have to supervise the same and the said properties of railways cannot be interfered by anybody else. In this regard, the Railway issued a policy Circular dated 30.01.2012 and issued Freight Marketing Circular No. 1/2012. The said Circular is incorporated hereunder:-

1. **Nodal Agency** : In order to provide a ‘Single Window Service’ to the customers, Board have decided that for all siding matters during pre-construction stage and for signing of the agreement, Chief Traffic, Planning Manager (CTPM) at the Zonal Railway shall be the Nodal Officer. However,

throughout the construction stage including activities for approval of plants and sanctioning of Estimates, Chief General Engineer (CGE) shall be the Nodal Officer. Further, as soon as the siding is notified for commissioning, CCM (FM) shall take over as the Nodal Officer. In Railway Board's office, EDCE(G) shall be the Nodal Officer during construction stage. Executive Director (Freight Marketing) shall be the Nodal Officer both prior to construction and also after the siding is notified for commercial operation.

2. Time Frame : To avoid complaints from users regarding delay in whole process of survey, approval of plan, final inspection etc., Railways shall observe a time frame as under:

- (i) Six months to one year depending on the size of the project, where survey is done by the Railway and work is executed under Railway's supervision.
- (ii) When survey is done by empanelled consultants and work is supervised by them, the preliminary plan shall be approved within two months and the final approval within four months of submissions of the detailed project report.

3. Overhead Charges : The overhead charges, in terms of provisions of Engineering Code, shall be payable by the party, desirous to set up a siding. These charges shall have respective applicability for the Deposit Works, as to be executed by Railways, by the Party under Railway's supervision or by the party through Railway's Approved Consultants respectively as per following table:

SL	Purpose	Execution by	Charges	
1	Departmental charges: (inclusive of cost of tools & plant ad establishment supervision)	Railway	12 ½%	% of cost of project excluding cost of OHE and S&T Works
		Party	6 ¼%	
		Approve Consultant	4%	
2	Departmental charges for CHE and S&T Works (Inclusive of cost of tools & plant and establishment supervision)	Railway	12 ½%	% of cost of OHE and S&T works for Railway's mandatory supervision
		Party	6 ¼%	
		Approve Consultant	6 ¼%	
3	D&G charges: (For work charged establishment and other than establishment supervision)	Railway	As per actual, if any (Ref: para-1829E)	
		Party		
		Approve Consultant		

As per the said Circular, for construction of railway siding, mandatory deposits have to be made by the appellant as per the chart extracted in Para 3 of the above policy Circular.

8. In the case in hand, the appellant themselves have constructed the siding under the supervision of the Railways. Therefore, they are required to make payment of mandatory departmental charges, cost of OHE work and D&G charges. It is not disputed that all these charges have been paid by the appellant for various approvals and supervisions by the Railways for construction of siding by the appellant. The said execution of such work cannot be done without mandatory approvals and supervisions by the railways. In that circumstances, in terms of CBEC Education guide 2012, TRU Circular dated 20.06.2012, the services in question cannot be termed as Support Services under Section 65B of the Finance Act, 1994, which provides as under :-

“thus the services which are provided by the Government in terms of sovereign right to business entity and which are not substituted in any manner by any private entity, are not support services, e.g. grant of mining or licensing rights or audit of government entities established by a special law, which are required to be audited by CAG under Section 18 of the Comptroller and Auditor General Act, 1971 (such services are performed by CAG under the statute and cannot be performed by the business entity themselves and thus do not constitute Support Service.”

Admittedly, the supervision services and various approvals given by the Railways cannot be done by the appellant. Moreover, on a specific query made to the Id. AR that, whether the various approvals taken by the railways and supervision done by the railways can be done by the appellant or any other agency. The Id. AR answered in negative. In that circumstance, it is to be seen that whether said activities are under Support service or not. As per Section 66D of the Finance Act, 1994, Support Services describe the services provided by the Government which are taxable and states as under:-

“66D. Negative list of services: The negative list shall comprise of the following services, namely:-

(a) services by Government or a local authority excluding the following services to the extent they are not covered elsewhere -

(i) services by the Department of Posts by way of speed post, express parcel post, life insurance and agency services provided to a person other than Government;

(ii) services in relation to an aircraft or a vessel, inside or outside the precincts of a port or an airport;

(iii) transport of goods or passengers; or

(iv) support services, other than services covered under clauses (i) to (iii) above, provided to business entities;

..... “

The “support services” are defined in Section 65B of the Act, which states as under:-

“ 65B. Interpretations : In this Chapter, unless the context otherwise requires, -
(1) “actionable claim” shall have the meaning assigned to it in Section 3 of the Transfer of Property Act, 1882;

.....

(49) “ support services” means infrastructural, operational, administrative, logistic, marketing or any other support of any kind comprising functions that entities carry out in ordinary course of operations themselves but may obtain as services by outsourcing from others for any reason whatsoever and shall include advertisement and promotion, construction or works contract, renting of immovable property, security, testing and analysis;”

Admittedly, as per Section 65B (49) of Finance Act, 1994, the approvals and supervision done by the Railways cannot be done by any other party or the appellant. We further take note of the fact that in the case of Commissioner of Cus. & CE, Bhopal vs. State of Madhya Pradesh, the Hon'ble High Court has observed as under :-

“7. From the aforesaid, it is clear that ‘service tax’ is a value added tax and the service provided for which the duty is payable is nothing but an activity undertaken by a person based on his performance and skill and is certain service provided by the service provider to his client. According to the aforesaid principle laid down by the Supreme Court, ‘service tax’ is imposed every time when service is rendered to a customer or a client by the assessee. If the act of the State Government in appointing a person for supervision and for discharging the statutory function under Section 28A of the MP Excise Act, 1950 is taken note of, it would be seen that the supervisory staff appointed by the State Government or the Excise Department does not provide any service on behalf of the Government to the Liquor Contractor or the person who is storing the liquor in the warehouse or the storage. On the contrary, the supervisor only keeps a watch, on the material stored in the warehouse and ensures that the person manufacturing, exporting, importing or storing the material in the warehouse carries out the activities strictly in accordance to the MP Excise Act, 1950; all the requirements with regard to preparation of inventory, transportation, movement, storage and even insurance of the property is undertaken as per the statutory provision and the excise policy. What is done by the supervisor/supervisory staff so appointed by the State Government is not to provide any service on behalf of the State Government to the Liquor Contractor, but to ensure that all the activities in the warehouse where the liquor is stored is carried out in a proper manner without there being any contravention to the rules or regulation governing distribution, manufacturing of liquor, no evasion of duty etc.”

Therefore, the said service is out of the ambit of 'Business Support Service', in that circumstance, we hold that the appellant is not required to pay service tax on their activity.

9. We further take note of the fact that in the impugned order, the adjudicating authority has held that the fees collected cannot be considered as statutory fee. Only in case where the fee is collected towards sovereign functions and directly deposited with the Government Revenue qualify to be outside the levy of service tax. Admittedly, at the time of adjudication, the appellant could not produce any certificate to say that the amount paid by the appellant is paid to the Railways has gone to consolidated fund of India but during the course of arguments, the appellant produced letter dated 27.09.2016 which is reproduced as under:-

The above letter clearly shows that the said amount has been credited in the consolidated fund of Government of India and therefore, we hold that activity undertaken by the Railways for granting various approvals and supervision for siding constructed by the appellant are of statutory in nature and is sovereign function of the Railways. Therefore, on that account, the appellant is not liable to pay service tax.

10. We further take note of the fact that as per Notification No. 25/2012-ST dated 20.06.2012, Serial No. 14A, the services by way of construction, erection, commissioning or installation of original works pertaining to railways are exempt from payment of service tax. The term railway includes siding and yard. Therefore, on that account also, the granting of approvals and supervision are in relation to the Railways which is exempted from payment of service tax under Notification No. 25/2012-ST dated 20.06.2012 at Serial No. 14A. Therefore, we hold that appellant are not liable to pay service tax.

11. As, on merits we have decided the case in favour of the appellant, therefore, we are not going into the issue of quantification of the demand against the appellant. In view of the above analysis, we set-aside the impugned order and allow the appeal with consequential relief, if any.

(Order pronounced in the court 16.08.2018)

Devender Singh
Member (Technical)
Ashok Jindal
Member (Judicial)