

Complete text of the judgment on the aforesaid issue argued by APRA & Associates LLP is reproduced below: -

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

NEW DELHI.

PRINCIPAL BENCH, COURT NO. I

SERVICE TAX APPEAL NO. 52076 OF 2014

[Arising out of the Order-in-Original No.09-11/ST/SRB/2014 dated 09/01/2014
passed by Commissioner Service Tax (Adjudication), New Delhi.]

M/s Power Machines India Ltd.,

B-21, Ground Floor, Sector – 58, Noida – 201 301.

...Appellant

Versus

Commissioner Service Tax (Adjudication)

Room No. 136, C.R. Building, I.P. Estate, New Delhi – 110 002 ...Respondent

APPEARANCE:

Shri Atul Gupta, Chartered Accountant, Shri Varun Gaba, Advocate for the appellant.

Shri Rajeev Kapoor, Authorized Representative for the Department

CORAM:

HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT

HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER NO. 51181/2023

DATE OF HEARING: 10.08.2023

DATE OF DECISION: 12.09.2023

PER P.V. SUBBA RAO :

M/s Power Machines India Ltd.1 filed this appeal to assail the order-in-original dated 09.01.2014 passed by the Commissioner (Adjudication), Service Tax, New Delhi, whereby he confirmed the demand of Rs. 1,18,63,098/- as service tax on Goods Transport Agency Service for the period 2007-2008 to 2011-2012 and also imposed penalties on the appellant.

2. The appellant is a subsidiary of M/s OJSO Power Machines, Russia and is engaged in providing services like Erection and Commissioning of turbine generators, Management Maintenance and Repair Services, Consulting Engineer Services, etc. in relation to power generation plants. It was registered with the service tax department for providing Erection, Commissioning and Installation Services, Management Maintenance and Repair Services with the service tax department. It was also registered as a service recipient under the category “Transport of Goods by Road” Service under section 65 (105) (zzp) of the Finance Act, 1994. It needs to be pointed out that as per Rule 2 (1) (d) (i) (B) of Service Tax Rules, 1994 in respect of some services; the person liable to pay service tax is the service recipient instead of the service provider. It reads as follows:-

“(d) “person liable for paying Service tax”

In respect of the taxable services ... means ...

(B) in relation to service provided or agreed to be provided by a goods transport agency in respect of transportation of goods by road, where the person liable to pay freight is
,-

- (I) Any factory registered under or governed by the Factories Act, 1948 (63 of 1948) ;
- (II) any society registered under the Societies Registration Act, 1860 (21 of 1860) or under any other law for the time being in force in any part of India ;
- (III) any co-operative society established by or under any law;
- (IV) any dealer of excisable goods, who is registered under the Central Excise Act, 1944 (1 of 1944) or the rules made thereunder ;
- (V) anybody corporate established, by or under any law; or

(VI) any partnership firm whether registered or not under any law including association of persons ;

any person who pays or is liable to pay freight either himself or through his agent for the transportation of such goods by road in a goods carriage :

Provided that when such person is located in a non-taxable territory, the provider of such service shall be liable to pay service tax.

.....”

3. The appellant had entered into contracts with National Thermal Power Corporation Limited for setting up Super Thermal Power Projects and each such contract was split into three sub- contracts as follows :-

- (i) Contract under which NPTC imported certain equipment from related parties of the appellant located in Russia ;
- (ii) Contract under which the appellant supplied indigenous plant and equipment and supplies to NTPC;
- (iii) Contract under which the appellant performed various services in relation to the equipment obtained under the first two contracts. Under this contract, the appellant received service charges on which it paid service tax. As per this contract, the appellant was also required to transport the equipment to the site for which it was entitled to invoice the NTPC @ 2% of the sale value of the goods supplied by the appellant regardless of the actual cost of transportation it incurred.

4. The appellant had supplied the goods and invoiced NTPC @ 2% of the value of the goods towards transportation charges. The appellant hired other transporters to transport the equipment and paid them for the transport. On these goods transport agency services availed by the appellant, it had discharged service tax as a recipient of the service and there is no dispute about it.

5. Three show cause notices dated 27.06.2011, 21.10.2011 and 19.12.2012 were issued to the appellant for different periods demanding service tax on the 2% transportation charges which it received from NTPC towards the transportation of the goods. These demands were confirmed by the impugned order. Hence, this appeal on the following grounds:-

- (a) The appellant is not a Goods Transport Agency as defined under section 65 (105) (zzp) inasmuch as it had not issued any consignment note by any name to M/s NTPC. It got the goods transported to the site and charged 2% of the value of the goods from NTPC towards the transportation regardless of the actual charges incurred by it ;

Even if the service of the appellant is held to fall under “Goods Transport Agency”, the appellant is not liable to pay service tax because as per Rule 2 (1) (d) (i) (B) where the service is provided by Goods Transport Agency to anybody corporate established by or under law, the recipient of service is liable to pay service tax and not the service provider and NTPC was created under the law ;

- (b) After the introduction of the Negative List regime in 2012, Goods Transport Agency Services were brought under negative list under section 66D (p) and, therefore, no service tax was chargeable at any rate after 2012 ;
- (c) There are no grounds for invoking extended period of limitation ;
- (d) Since the demand itself is not sustainable, the confirmation of interest cannot be sustained ;
- (e) Penalty is not imposable even if the case is decided against the appellant as per section 80 of the Act which reads as follows :-
“Notwithstanding anything contained in the provisions of section 76, section 77 or section 78, no penalty shall be imposable on the assessee for any failure referred to in the said provisions, if the assessee proves that there was reasonable cause for the said failure”.

6. In view of the above, learned Chartered Accountant for the appellant prays that the appeal may be allowed and the impugned order may be set aside.

7. Learned authorized representative for the Revenue reiterates the impugned order.

8. We have considered the submissions on both sides and perused the records.

9. The short question to be decided is if the appellant is liable to pay service tax under the head Goods Transport Agency Service on the 2% amount, which it had collected towards transportation from M/s NTPC. It is evident from the records that

the appellant's contracts were for supply of the goods, and for provision for Erection, Commissioning and Installation and Management Maintenance and Repair Services. In order to erect and install the equipment, they need to be transported to the site by the appellant. As per the agreement, the appellant could charge 2% of the sale value of the equipment for this transportation. It did not matter what was the actual cost of transportation incurred by the appellant. If it was more, the appellant would have to suffer the loss and if it was less, the appellant could gain. According to the Revenue, this collection of 2% towards transportation amounts to providing Goods Transport Agency Service. According to the appellant, it was not providing any Goods Transport Agency Service and in fact it had not issued any consignment note, as required under section 65 (50b) according to which Goods Transport Agency means "any person who provides service in relation to transportation of goods by road and issues consignment note, by whatever name called". Nothing in the records before us show that the appellant was providing Goods Transport Agency Service to M/s NTPC. The person liable to pay service tax in case of Goods Transport Agency Service is the one who is liable to pay the freight for the transportation of such goods. In other words, it is the NTPC which would have been liable to pay service tax and not the appellant. It also needs to be pointed out that the appellant had hired the services of Goods Transport Agencies for transporting the goods and as the service recipient; it had discharged service tax on the amounts which it paid towards goods transportation.

10. To sum up, given the nature of contract, there is nothing to establish that the appellant was providing Goods Transport Agency Service to the NTPC. It was only charging 2% towards the cost of transportation of goods. Even if the appellant had provided the Goods Transport Agency Service, it is the NTPC which would have been liable to pay service tax on such services and not the appellant.

11. In view of the above, the impugned order is not sustainable and is liable to be set aside.

12. The appeal is allowed and the impugned order is set aside with consequential relief to the appellant.

(Order pronounced in open court on 12/09/2023.)

(JUSTICE DILIP GUPTA) PRESIDENT

(P.V. SUBBA RAO) MEMBER (TECHNICAL)
