CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

NEW DELHI

PRINCIPAL BENCH – COURT NO. – I

Service Tax Appeal No. 50960 of 2017 [DB]

[Arising out of Order-in-Appeal No. 16/COMMR/ST/JBP/2017 dated 22.02.2017 passed by the Commissioner Customs, Central Excise & Service Tax, Jabalpur]

M/s. Singh Construction & Co. **...Appellant**

VERSUS

Commissioner of Customs, Central Excise and Service Tax Jabalpur. **...Respondent**

APPEARANCE:

Shri A K Batra, Chartered Accountant for the Appellant
Shri Ravi Kapoor, Authorised Representative for the Respondent

CORAM:
HON'BLE MR.JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)

DATE OF HEARING: 03.03.2023
DATE OF DECISION: 03.04.2023

FINAL ORDER No. 50426/2023

HEMAMBIKA R. PRIYA

The present appeal is filed to assail the Order-in-Appeal No. 16/COMMR/ST/JBP/2017 dated 22.02.2017 vide which the services rendered by the appellant have been confirmed to be in nature of 'Cargo Handling Services' and resultantly the demand in question has also been confirmed.

2. The brief facts are as follows:

Based on intelligence and after scrutiny of work orders received from M/s. Northern Coalfields Ltd. (M/s. NCL), the department observed that the appellant is engaged in transporting coal in tipping trucks including loading of coal into said trucks and in some cases loading into Contractor's tipping trucks by the

contractor's pay loaders. The Department opined that the said activity is squarely covered under the ambit of definition of 'Cargo Handling Services', as defined under Section 65(23) of the Finance Act, 1994. Consequently vide the Show Cause Notice No. 72/Commr/ST/JBP/15-16 dated 21.10.2015, a demand of Rs.3,32,59,302/- for a period from October, 2013 to March, 2015 was issued to the appellant, along with penalty and interest. The demand was confirmed vide Order-in-Original No. 16/COMMR/ST/JBP/2017 dated 22.02.2017, and penalties were imposed, which is the order under challenge in the present proceedings.

3. Shri A K Batra, learned counsel for the appellant submitted that the service rendered by appellant is merely the transportation of coal in tipping trucks within the mining area after loading such coal on such trucks by pay loaders and as such it does not fall within the definition of 'Cargo Handling Services'. He further mentioned that M/s. NCL had awarded contracts to the appellant merely for the transportation of coal through tippers. The loading and unloading is merely an incidental activity to the said transportation. He also submitted that because of said incidental activity, the services as that of 'Goods Transport Agency' cannot be called as 'Cargo Handling Services'. He went on to submit that the 'Cargo Handling Service' is taxable only if such service has been provided by a 'Cargo Handling Agency'. Though the term has not been defined in the Act[1], but there have been the circulars specifically a Circular No. B11/1/2002-TRU dated 01.08.2002, explaining that specific agencies are liable to be taxed under 'Cargo Handling Services'. Those agencies have to be more than a transportation agency.

Learned counsel relied on, amongst others, the following decisions to buttress his arguments that the service provided by the appellant was not a 'Cargo Handling Services':

(i) Hira Industries vs Commissioner, Central Excise,

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1 The Finance Act, 1994

Raipur[2]

(ii) Gautham Khona vs CCE & Cus & Service Tax[3]

3.1 The learned counsel also submitted that the impugned show cause notice is bad in law as the service tax demand has been proposed and thereafter confirmed as per provisions applicable during the period prior to 01.07.2012. The learned counsel relied on the following decisions:

1. **M/s. Atma Steels Pvt. Ltd. and others vs. CCE, Chandigarh and others**[4]
2. **Mahakoshal Beverages Pvt. Ltd. vs. CCEx, Belgaum**[5]
3. **Viking Tours & Travels vs CST, Chennai**[6]
4. **Aneja Property Dealer vs CCE, Ludhiana**[7]

3.2 The learned Counsel also submitted that the service tax on 'Goods Transport Agency' has already been deposited by M/s. Northern Coalfield Limited under RCM in terms of Notification No. 30/2012-ST dated 20.06.2012 read with Notification No. 26/2012 and dated 20.06.2012 and Rule 2(1)D(IV) of the Service Tax Rules, 1994.

4. The learned Authorised Representative reiterated the findings of the Commissioner in the impugned Order-in-Original. The learned Authorised Representative impressed upon the correctness about the findings recorded in Para 23 of the order under challenge and submitted that there is no infirmity in the findings while holding the impugned services as 'Cargo Handling Services' and the levy of penalty.

5. Having heard the rival submissions of the parties, perusing the records, we hereby observe and hold as follows:

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2 [2012 (28) STR 23 (Tri-Del)]
3 [2014-TIOL-2435-CESTAT-BANG]
4 [1984 (17) ELT 331 (T)]
5 [2007 (6) STR 148 (Tri-Bang)]
6 [2011 (22) STR 69 (Tri-Chennai)]
7 [2009 (13) STR 266 (Tri-Del)]

To appreciate the contentions herein, foremost, it would be appropriate to first go through the definition of 'Cargo Handling Service' and 'Goods Transport Agency Services'. The former being defined under Section 65(23) of the Finance Act, 1994 and is taxable under Section 65(105)(zr) of the Act and the latter is defined under Section 65(50b) of the Act which is taxable under Section 65(105)(zzp) of the Act. Both are reproduced as follows:

> *"65(23)- 'cargo handling service' means loading, unloading, packing or unpacking of cargo and includes cargo handling services provided for freight in special containers or for non-containerised freight, services provided by a container freight terminal or any other freight terminal, for all modes of transport and cargo handling service incidental to freight, but does not include handling of export cargo or passenger baggage or mere transportation of goods."*
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> *"65(50b)- 'goods transport agency' means any person who provides service in relation to transport of goods by road and issues consignment note, by whatever name called."*

The perusal of definition of Section 65(23) of the Act makes it clear that the 'Cargo Handling Service' is an activity which requires:
(i) A cargo,

(ii) To be transported from freight terminal

(ii) The activity has to be taken up by an agency specifically involved in the activity of 'Cargo Handling Services'.

6. 'Cargo Handling Service' has not been defined in the Act but is defined in Circular No. B11/1/2002-TRU, dated 01-08-2002 as the services of transporting coupled with loading, unloading, packing, unpacking can be called as 'Cargo Handling Service' if those are done by the authorities as that of Container Corporation of India, Airport Authority of India, Inland Container Depot, Container Freight Stations etc. Apparently and admittedly the appellant herein is none of these kinds of companies. Hon'ble

Supreme Court also while discussing the case of **Sushil & Company**[8] has appreciated the said circular in the following words:

> *"Mr. Kavin Gulati, learned senior counsel appearing for the respondent-assessee, has drawn our attention to a judgment of the Delhi Bench of the Tribunal in "J. & J. Enterprises v. Commissioner of Central Excise, Raipur," reported in 2006 (3) S.T.R 655 = 2005 (186) E.L.T 189 (Tribunal). In this judgment, almost similar services provided by the assessee were held not to be 'Cargo Handling Services'. In arriving at such a conclusion, the Tribunal had referred to the clarificatory instructions, being F. No. B11/1/2002-TRU, dated 1-8-2002 and the relevant portion therein was extracted at Paragraphs 3 and 15. These paragraphs read as under:-*
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> > *"3. The services which are liable to tax under this category are the services provided by cargo handling agencies who undertake the activity of packing, unpacking, loading and unloading of goods meant to be transported by any means of transportation namely truck, rail, ship or aircraft. Well known examples of cargo handing service are services provided in relation to cargo handling by the Container Corporation of India, Airport Authority of India, Inland Container Depot, Container Freight Stations. This is only an illustrative list. There are several other firms that are engaged in the business of cargo handling services.*
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> > *xx xx xx*
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> > *15. Another doubt raised in relation to cargo handling services is that whether individuals undertaking the activity of loading or unloading of cargo would be leviable to service tax. For example, if someone hires labour/labourer for loading or unloading of goods in their individual capacity, whether he would be liable to service tax as a cargo handling agency. It is clarified that such activities will not come under the purview of service tax as a cargo handling agency."*

7. The Hon'ble Supreme Court has accepted Hon'ble High Court interpretation to the Entry viz. 'Cargo Handling Service' wherein it

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8 [2016 (42) STR 625 (SC)]

was observed that there must be a cargo i.e. a packed or unpacked commodity accepted by a transporter or carrier for carrying the same from one destination to another. It is only after the commodity becomes a cargo, its loading and unloading at the freight terminal for being transported by any mode becomes a cargo handling service, if it is provided by an independent agency and the service provider must independently be involved in loading-unloading or packing-unpacking of the cargo. Also from the various decisions as relied upon by the appellant, we observe that issue has several times been adjudicated by this Tribunal. The decision of the Hon'ble Supreme Court in the case of **Singh Transporters Vs. Commissioner of Central Excise, Raipur**[9] squarely covers this issue. The issue involved therein was whether the coal transported from pitheads of the mines to the railway sidings would fall within the taxable service as defined under Section 65(105)(zzzy). Though the service in question in the said case was whether it was a mining service but the outcome is relevant for the present adjudication wherein it was held that the aforementioned activity is an activity as that of transportation of goods. The Hon'ble Apex Court in the said decision has held as follows:

> *"3. The issue involved in the present appeal is whether the goods i.e. coal transported by the respondent - Singh Transporters from the pit-heads to the railway sidings would fall within taxable service as defined under Section 65(105) (zzzy) of the Service Tax Act of 1994 (for short "the Act") or as defined under Section 65(105)(zzp) of the Act.*
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> *xx xx xx*
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> *6. Be that as it may, even if the relied upon judgment in the case of Anjuna Carriers (supra) is of no consequence to the present case, we are of the view that the activity undertaken by the respondent i.e. transportation of coal from the pit-heads to the railway sidings within the mining areas is more appropriately classifiable under Section 65(105)(zzp) of the Act, namely, under the head "transport of goods by road service" and does not*

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9 [2012 (27) STR 488]

involve any service in relation to "mining of mineral, oil or gas" as provided by Section 65(105)(zzzy) of the Act.

7. The reliance placed on the definition of the term 'mines' under Section 2(j) of the Mines Act, 1952 does not assist the Revenue inasmuch as what would be indicated by the said definition is that a mine is not to be understood necessarily in respect of pit-heads of the mining area or the excavation or drilling underground, as may be, but also to the peripheral area on the surface. The said definition has no apparent nexus with the activity undertaken and the service rendered."

The Kolkata Bench of the Tribunal in the decision of **N.C. Paul & Company**[10] has held as follows :

" the dominant activities under the contract are movement of mineral within the mining area and loading to Railway Wagon, which includes loading and unloading, are merely incidental while the activities undertaken are principally transportation of coal within the mining area, hence, the gross amount received for the same cannot be taxed under the category of Cargo Handling Services. Therefore, we are of the view that the Service Tax demand of Rs.2,47,60,534/- on activities of transportation with incidental loading and unloading including wagon loading is principally and dominantly for transportation of coal within the mines and hence, cannot be taxed under the category of Cargo Handling Service and accordingly, set aside."

8. We note that the Department has, from time to time, issued several circulars clarifying this overlapping of two services with respect to one activity of transporting load through truck tippers. One such clarification dated 06.08.2008 reads as follows:

***"3. Issue** : GTA provides service to a person in relation to transportation of goods by road in a goods carriage. The service*

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10 [2020 (41) GSTL 494 (Tri-Kol)]

provided is a single composite service which may include various intermediary and ancillary services such as loading/unloading, packing/unpacking, transshipment, temporary warehousing. For the service provided, GTA issues a consignment note and the invoice issued by the GTA for providing the said service includes the value of intermediary and ancillary services. In such a case, whether the intermediary or ancillary activities is to be treated as part of GTA service and the abatement should be extended to the charges for such intermediary or ancillary service?

Clarification: *GTA provides a service in relation to transportation of goods by road which is a single composite service. GTA also issues consignment note. The composite service may include various intermediate and ancillary services provided in relation to the principal service of the road transport of goods. Such intermediate and ancillary services may include services like loading/unloading packing/unpacking, transshipment, temporary warehousing, etc., which are provided in the course of transportation by road. These services are not provided as independent activities but are the means for successful provision of the principal service, namely, the transportation of goods by road. The contention that a single composite service should not be broken into its components and classified as separate services is a well accepted principle of classification. As clarified earlier vide F.No. 334/4/2006-TRU, dated 28-2-2006 (Paras 3.2 and 3.3) [2006 (4) S.T.R. C30] and F.No. 334/1/2008-TRU, dated 29-2-2008 (Paras 3.2 and 3.3) (2008 (9) S.TR. C61], a composite service, even if it consists of more than one service, should be treated as a single service based on the main or principal service and accordingly classified. While taking a view, both the form and substance of the transaction are to be taken into account. The guiding principle is to identify the essential features of the transaction. The method of invoicing does not alter the single composite nature of the service and classification in such cases are based on essential character by applying the principle of classification enumerated in Section 65A. Thus, if any ancillary/intermediate service is provided in relation to transportation of goods, and the charges, if any, for such services are included in the invoice issued by the GTA, and not by any*

other person, such service would form part of GTA service and, therefore, the abatement of 75% would be available on it."

9. We observe that with effect from 01.07.2012, major changes were carried out in the Service tax provisions. Vide Finance Act, 2012 the concept of the Negative List was introduced. In pursuance to these changes classification of services was rendered immaterial. However, we note that in the present show cause notice dated 21.10.2015, the Department has relied upon the provisions applicable prior to 01.07.2012.

9.1 Further, while confirming the Service Tax liability on the Appellant, no reference has been made to the new Charging Section i.e. Section 66B of the Act applicable from 01.07.2012 in the impugned Order.

9.2 We note that in the Larger Bench decision of the Tribunal rendered in the case of **M/s Atma Steels Pvt. Ltd. & Others v. CCE, Chandigarh & Others**[11] it was held that once the provisions has been changed, then the existing provisions at the time of issue of show cause notice should be applicable and not the earlier provisions.

9.3 In the case of **M/s Mahakoshal Beverages Pvt. Ltd. Vs Commissioner of Cz. Ex., Belgaum**[12] the Tribunal held that demand cannot be confirmed in accordance with deleted provisions.

"4. On a careful consideration, we are not agreeable with the contentions raised by the Commissioner in the written submissions and the learned JDR. The proviso to Section 73 of the Act was promulgated by Finance Act 2004 but adding proviso to Section 73 of the Central Excise Act, which is parimateria to Section 11A of Central Excise Act. The ingredients of the said proviso have not been invoked in the show cause notice to demand duty for larger period. The contention of the Revenue that the demands pertaining to period earlier to promulgation of the new Section 73 should be confirmed in terms of the deleted provisions of Section 73, is not sustainable. The Larger Bench judgment rendered in the case of **Atma steel (**supra) has clearly held that once a new provisions has been

11 [1984 (17) E.L.T. 331 (T)]
12 [2007 (6) STR 148 (Tri-Bang)]

brought into existence, then at the time of issue of show cause notice the new provisions as is in existence should be complied. The show cause notice has been issued in the present case on 28-7-2005, therefore, the amended provisions in terms of Section 73 of the Finance Act 2004 ought to have been invoked. The ingredients of proviso to Section 73 have not been invoked, therefore, the demands are barred by time. Furthermore, as held in the **Atma Steel** case (supra), the demands for the period earlier to promulgation cannot be confirmed "

9.4 In addition, we find that in a catena of decisions it has been held the demand can be confirmed only as per the provisions that exist at that time.

9.5 Hence, the show cause notice issued and adjudicated on the basis of the provisions existing during the period prior to the disputed period, cannot be upheld. Consequently, we do not find it relevant to discuss other arguments.

10. As a consequence of above discussions, the Order under challenge is hereby set aside and the appeal stands allowed.

(Pronounced in the open court on 03.04.202)

(JUSTICE DILIP GUPTA)
PRESIDENT

(HEMAMBIKA R PRIYA)
MEMBER (TECHNICAL)

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