CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH
BANGALORE

Appeal(s) Involved:

ST/409/2009-DB

[Arising out of Order-in-Appeal No. 07/2009 Service Tax dated 21/1/2009 passed by Commissioner Of Central Excise and Customs , COCHIN (Appeal).]

Paul Abrao and Sons
Paul Abrao Buildings
Subramanian Road,
Willingdon Island Cochin
COHIN – 682 018.
KERALA

Appellant(s)

Versus

Commissioner of Central Excise and Service Tax
C R BUILDING,
I S PRESS ROAD, ERNAKULAM,
COCHIN – 682 018.
KERALA

Respondent(s)

Appearance:

Mr. G. Shivadass, Sr. Advocate
SHIVADASS AND SHIVADASS LAW CHAMBERS
NO. 501 LEVEL 5 PRESTIGE CENTRE POINT
NO. 7 CUNNING HAM ROAD
BANGALORE -560 052.
KARNATAKA

For the Appellant

Mr. Madhup Sharan,
Asst. Commissioner (AR)

For the Respondent

Date of Hearing: 24/09/2019
Date of Decision: 27/09/2019

CORAM:

HON'BLE SHRI S.S GARG, JUDICIAL MEMBER
HON'BLE SHRI P. ANJANI KUMAR, TECHNICAL MEMBER

Final Order No. 20852 /2019

Per : P. ANJANI KUMAR,

The appellant, M/s. Paul Abrao and Sons, are providing Custom House Agent and Cargo Handling Services and have obtained registration, accordingly. The department based on CBEC Circular F. No. B11/1/2002-TRU dated 1.8.2002 opined that the appellants are undertaking 'Port Services' and accordingly, have issued a show-cause notice 11.10.2006. Addl. Commissioner vide Order-in-Original dated 30.1.2007 has confirmed the demand of Rs.23,10,838/- under Section 65(82) of Finance Act, 1994 along with interest. He also levied penalties under Sections 76, 77 and 78 of the Finance Act, 1994. Commissioner (A) vide Order dated 21.1.2009 upheld the Order-in-Original. Hence, this appeal.

2. Learned counsel for the appellant submits that they are engaged in providing Stevedoring Services which include the work of unlashing / lashing of containers in vessels for discharge of import and export containers; for this purpose they have entered into contracts with vessel operators; they do not undertaken any other services to the Port; the appellants have obtained a license from the Cochin Port for stevedoring activity; they have discharged applicable service tax under Cargo Handling Service towards imported goods and as Cargo Handling Service towards export is exempt, they need not discharge duty. He submits that the license given by the Port to undertake Cargo Handling Services within the Port does not equate to an authorization given by the Port to operate Port Services. He relied upon the following decisions:

- ***Homa Engineering Works vs. CCE, Mumbai: 2007 (7) STR 546 (Tri.-Mumbai)***
- ***Velji P. & Sons (Agencies) P. Ltd. vs. CCE, Cochin: 2008 (10) STR 331 (Tri.-Bang.)***
- ***VBC Exports Ltd. vs. CCE, Visakhapatnam: 2008 (10) STR 613 (Tri.-Bang.)***
- ***Konkan Marine Agencies vs. CCE, Mangalore: 2007 (8) STR 472 (Tri.-Bang.)*** affirmed by Karnataka High Court in ***CCE, Mangalore vs. Konkan Marine Agencies: 2009 (13) STR 7 (Kar.)***

- ***South India Corporation (Agencies) Ltd. vs. CCE, Visakhapatnam-I: 2010 (17) STR 170 (Tri.-Bang.)***
- ***Aspinwall & Co. Ltd. vs. CCE, Mangalore: 2011 (21) STR 257 (Tri.-Bang.)***
- ***HML Agencies (P) Ltd. vs. CCE, Mangalore: 2018 (12) GSTL 46 (Tri.-Bang.)***
- ***Aspinwall & Co. Ltd. vs. CCE, Cochin: 2017 (4) GSTL 48 (Tri.-Bang.)***

2.1 He also submitted that the present issue involves interpretation of law and as held in the following cases, no extended period can be invoked in such cases. Demand within the normal period is about Rs.1,71,367/- which is payable by them, if at all, the services are held to be 'Port Services'.

- ***Commissioner vs. Singh Transporters: 2018 (13) GSTL J40 (SC)***
- ***Principal Commissioner vs. Gandhar Oil Refinery (I) Ltd.: 2018 (360) ELT A177 (SC)***

3. The learned AR for the Department submitted that the Larger Bench in the case of ***Western Agencies Pvt. Ltd. vs. CCE, Chennai: 2011 (22) STR 305 (Tri.-LB)*** has held that such services come under the purview of 'Port Services' . This Bench in the case of ***M/s. West End Minerals and Exports Pvt. Ltd. vide Final Order No. 20710/2019*** has held that such services fall under 'Port Services'. He further submits that a specific authorization is not required and the license itself is as good as authorization.

4. Heard both sides and perused the records of the case. Brief issue for consideration in the instant case is as to whether the services rendered by the appellants can be considered as 'Port Services'. For this purpose, we have a look at the definition of 'Port Services' in terms of Section 2(82) of Finance Act, 1994. Section 2(82) defines 'Port Services' to mean any service rendered within a Port or other Port, in any manner. CBEC vide Circular F. No. B11/1/2002-TRU dated 1.8.2002 clarifies that:

> *"5. Cargo handling services are provided in the port also. Whether such service will be covered in the category of port services or cargo*

handling service. In this context it may be mentioned that port services cover any service provided in relation to goods or vessels by a port or a person authorized by the port. This includes the cargo handling service provided within the port premises. Therefore to this extent there may be an overlap in cargo handling service and the port service. However, since port services covers all the service in relation to goods and vessels and therefore more specific to port, the service provided in a port in relation to handling of goods would be appropriately covered under port service and no separate levy will be attracted under the category of cargo handling agency service. Similar would be the case in respect of service provided for storage of goods in the port premises."

Relying on this clarification, the Department has issued the impugned show-cause notice. We find that the definition of 'Port Service' as well as explanation given in the Board Circular give wider scope to the 'Port Service'. Cargo Handling Service is also subsumed in the 'Port Services'.

5.1 Learned counsel for the appellant relied upon ratio of many cases and states that the license issued by the Port does not qualify as authorization. We find that Larger Bench in the case of Western Agencies Pvt. Ltd. (supra) has held in para 10.3 as under:

"10.3 *The term "port service" defined by the 1994 Act bringing any service provided by a "port" or "other port" "in relation to vessels or goods" to the service tax net does not make any difference if such service is also provided through any person authorised by the port or such port. If stevedoring service is accepted to be a service not provided by "port" or "other port", the term "port service" defined by 1994 Act shall defeat the purpose of the service tax law. The facilities provided by a port to render the stevedoring service performable brings such service to the scope of service tax. The statutory definition suggesting the service provided "in any manner" serves the purpose of serving the clients of stevedore in relation to goods or services indirectly through stevedores. Therefore, the service provided by stevedores fall under the class of port service and taxable following para 7 of Konkan Marine case decided by Hon'ble High Court of Karnataka. Thus, answer to question (b) shall also be in favour of Revenue and against assessee."*

In view of the above decision of the Larger Bench and the jurisdictional High Court, we conclude that the services rendered by the appellant fall under 'Port Services'.

5.2 Learned counsel for the appellant submits that a portion of the demand is barred by limitation. We find that the period involved is 16/07/2001 to 31/12/2005 whereas show-cause notice was issued on 11.10.2006. On going through the show-cause notice, it is seen that reasons for invocation of extended period have not been brought out except for stating that they have suppressed the value of taxable services. It is not denied that the appellants were already registered under Cargo Handling Services and have been paying service tax and filing returns. Only as per the clarification given by CBEC as cited above, show-cause notice seeking to classify the services under 'Port Services' has been issued. It is evident that there was a confusion in the interpretation of the taxable service so that it necessitated the CBEC to issue a clarification. Under these circumstances, it cannot be alleged that there was suppression of facts with an intent to evade payment of duty on the part of the appellant. Therefore, we find that as contended by the appellant and as held in the case laws cited, we find that a major portion of the demand in the show-cause notice is time barred. We find that the demand is to be restricted to the normal period. As per the discussion above, as *mens rea* is not established, penalties are liable to be set aside. The matter requires to be remanded to the Original Authority for computing the duty demand for normal period.

6. In the result, the appeal is allowed partly and remanded to the original authority for computation of duty demand for normal period. Penalties imposed are, however, set aside.

(Order was pronounced in Open Court on **27/09/2019.)**

S.S GARG
JUDICIAL MEMBER

P. ANJANI KUMAR
TECHNICAL MEMBER

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