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

REGIONAL BENCH COURT NO.1

Appeal(s) Involved:

ST/194/2007-DB; ST/744/2009

[Arising out of OIA No. 68/2007-CE dated 20/02/2007 & OIA No.286/2009 dt. 03/07/2009 passed by CCE(Appeals), Mangalore]

Ridhi Sidhi Transport
B-5 , Iind Floor Eureka Tkowers Traffic
Island Hubli-580029

Appellant(s)

Versus

C.C.,C.E.& S.T-Belgaum
NO. 71...CLUB ROAD,
CENTRAL EXCISE BUILDING,
BELGAUM,
KARNATAKA
590001

Respondent(s)

Appearance:

Shri N. Anand, Advocate
No. 152(18), Race Cource
Bangalore,
Karnataka
560001

For the Appellant

Shri Rama Holla, Superintendent(AR) — For the Respondent

CORAM:
HON'BLE MR. S.S GARG, JUDICIAL MEMBER
HON'BLE MR. P. ANJANI KUMAR, TECHNICAL MEMBER

Final Order No. 20853-20854 / 2019

Date of Hearing: 24/09/2019
Date of Decision: 30/09/2019

Per : S.S GARG

These two appeals have been filed by the appellant directing against the impugned orders dt. 20/02/2007 and dt.03/07/2009 whereby the service tax demand has been confirmed on Cargo handling service. Since the issue involved in both the appeals is identical, they are taken up for discussion and disposal. The details of the appeals are as under:-

Appeal No.	**Period**	**SCN dt.**	**Service tax demand**	**Penalty**
ST/194/2007	December 2002 to June 2004	07.04.2005	Rs.2,77,017/-	Rs.2,77,017/- u/s 76 Rs.2,77,017/- u/s 78 Rs.1000/- u/s 77
ST/744/2009	July 2004 to April 2006	21.02.2007	Rs.3,72,894/-	Rs.3,72,894/- u/s 78

For the sake of convenience, the facts of the appeal No.ST/194/2007 are taken.

2. Briefly the facts of the present case are that the appellant is a proprietory concern and was engaged by M/s. Grasim Industries Ltd. as handling agent at Hubli on various terms and conditions which are enclosed with the appeal paper book and the appellant was required to provide local transportation of goods and also loading and unloading. Appellant was paid Rake Handling (consists of loading, unloading expenses) of Rs.20/- pmt; local transportation charges of Rs.53/- pmt and service charges of Rs.4/- pmt as per the agreement between the parties and the said agreement was renewed from time to time. On 27/07/2004, the Preventive Wing of the Department visited the premises of the appellant and a statement of Mr.Jitendra Agarwal was recorded on the same day who deposed that they were unaware of the incidence of service tax under the category of cargo handling service. In the meantime in the Finance Act, 2004, the Parliament introduced Extraordinary Taxpayer Friedly Scheme for registration of those service providers who have not got themselves registered so far. The scheme aimed to register all service providers

on the basis of their declaration and who had earlier failed to register themselves with the Department due to ignorance or any other reason with full waiver of penalty. The Scheme required the service providers to file self-declaration to be filed with the Department on or before 31.10.2004. The appellant opted to file the declaration under the above Scheme and they filed the declaration with the Department on 27/10/2004 and also obtained service tax registration. In the declaration filed under the above scheme, the appellant paid service tax of Rs.53,929/- and also interest thereon of Rs.5,108/- on the value of service charges which they received from Grasim Industries Ltd. The appellant did not include the value of Rake Handling Charges (consists of loading and unloading expenses) towards payment of service in view of the Board / TRU Circular No.B/11/1/2002-TRU dt. 01/08/2002 and as they entertained a bona fide belief that expenses reimbursed towards loading and unloading was not liable for payment of service tax in terms of the above TRU circular. Thereafter the Department issued the show-cause notice dt. 07.04.2005 for the period from December 2002 to June 2004 and proposed to demand service tax of Rs.2,77,017/- on the total value of loading and unloading charges and service tax charges. After following the due process, the show-cause notice was adjudicated vide Order-in-Original dt. 21/08/2006 confirming the demand of service tax along with interest and also imposed equal penalty under Section 76 & 78 and Rs.1000/- under Section 77. Aggrieved by the said order, appellant filed appeal before the Commissioner(Appeals) who partly allowed the appeal by holding that loading and unloading charges cannot be excluded from the value of service and confirmed the entire demand of service tax of Rs.2,77,017/-. However, the appellate Commissioner modified the Order-in-Original by reducing the demand of interest to the extent of delayed payment of service tax leviable on loading / unloading expenses and also reduced penalty imposed under Sections 76 & 78 and also dropped penalty imposed under Section 77.

Aggrieved by the said order, appellant filed appeal before this Tribunal and the Tribunal vide its Final Order No.1016/2018 reported in 2008(12) STR 555 (Tri. Bang) wherein the demand of service tax under the category of 'cargo handling service' insofar as loading / unloading expenses received by the appellant was confirmed. However this Tribunal was pleased to set aside all the penalties confirmed in the impugned order. As regards the plea of limitation urged by the appellant, the Tribunal did not choose to examine the same. Thereafter appellant filed ROM application seeking the modification of the Final Order on the ground that there was no discussion on the plea of non-applicability of extended period and demands being barred by limitation. The Tribunal allowed the ROM application and recalled the Final Order. Thereafter the Department filed appeal against the Miscellaneous Order allowing the ROM application and recalling the Final order before the Hon'ble High Court of Karnataka and Hon'ble High Court dismissed the appeal of the Department and held that there was no reason to interfere with the Misc. Order dt. 05.05.2009. Further the subsequent appeal ST/744/2009 is for the subsequent period from July 2004 to April 2006 and during this period the appellant was registered as service provider and has been paying service tax on the service charges received from Grasim Industries Ltd. and the appellant did not pay service tax in respect of loading / unloading expenses reimbursed in view of the circular dt. 01/08/2002 and also the appeal pertaining to previous period was pending before the Tribunal. The Department issue the show-cause notice dt. 21/02/2007 demanding the differential service tax of Rs.3,72,894/- by invoking the extended period of limitation and the original authority confirmed the demand along with penalty and Commissioner(Appeals) partly allowed the appeal and upheld the demand but the penalty under Section 76 was dropped taking recourse to Section 80 of the Act.

3. Heard both sides and perused the records.

4.1. Learned counsel for the appellant submitted that the impugned orders are not sustainable as the same have been passed without properly appreciating the facts and the law. He further submitted that the appellants are disputing the classification of service under the category of 'Cargo Handling Service' because as per the Agency Agreement entered with the Grasim Industries Ltd., the contract was essentially for transportation of goods and loading / unloading being incidental to main activity of transportation of goods. He further submitted that it is clear from the rates agreed between the parties as the rates agreed are divided into three parts: Rs.20 pmt towards loading / unloading; Rs.53/- pmt towards transportation charges and Rs.4/- pmt towards services charge. He submitted that the essential character or the main activity is towards transportation charges. Learned counsel then referred to Section 65A of the Finance Act, 1994 which provides the classification of service and in terms of Section 65A(2)(b)when for any reason a taxable service is prima facie classifiable under two or more sub-clauses, due to composite services consisting of a combination of different services, then the composite service shall be classified as if they consisted of a service which gives them their essential character. As per the learned counsel by virtue of Section 65A(2)(b), appellants are providing composite service comprising of transportation of goods and also loading/unloading of goods and the essential character of their service is transportation of goods. He further submitted that the Department has wrongly confirmed the demand under 'cargo handling service' by severing the composite services which is not tenable in law. In support of his submission, he relied upon the following decisions:-

i. Tycoons Industries Pvt. Ltd. Vs. CCE [2009-TIOL-1509-CESTAT-KOL]
ii. DRS Dilip Road Lines Pvt. Ltd. Vs. CCE [2019-TIOL-1505-

CESTAT-HYD]

iii. CCE Vs. Arvind Singh Lal Singh [2017(48) STR 63 (Tri. Del.)]

iv. CCE Vs. Drolia Electrosteels (P) Ltd. [2016(43) STR 261 (Tri. Del.)]

v. Pioneer Builders Ltd. Vs. CCE [2018(15) GSTL 335 (Tri. Hyd.)]

4.2. He further submitted that in the first appeal ST/194/2007, the entire demand is barred by limitation because the period of dispute is from December 2002 to June 2004 and the show-cause notice was issued on 07/05/2005 and during the said period show-cause notice was required to be issued within 6 months from the relevant date. The learned counsel further submitted that during the relevant period, the Government come up with 'Extraordinary Taxpayer Friendly Scheme and the appellant paid the service tax on the service charges received from the Grasim Industries Ltd. but they did not pay the service tax on loading and unloading charges received from the Grasim Industries Ltd. under the bona fide belief that the same are not taxable. In view of the TRU circular dt. 01.08.2002 wherein the said clarification was provided by CBEC as under:-

> *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.*

4.3. He further submitted that during the relevant time, the service tax was new and due to the circular issued by the CBEC, appellant entertained a belief that proprietor / individuals providing the activity of loading / unloading of cargo was not liable for payment of service tax and that is why they did not get themselves registered and paid the service tax on loading and unloading service charges reimbursed. He further submitted that it is a settled law that when the Board clarified the scope of levy of service tax and when there is doubt/confusion in the minds of the assessee, then the invocation of extended period of limitation is not permitted as there cannot be any question of intent to evade payment of service tax. In support of this submission, he relied upon the following decisions:-

i. Vishal Traders Vs. CCE [2010(19) STR 509 (Tri. Del.)]
ii. Singh Brothers Vs. CCE [2009(14) STR 552 (Tri.)]
iii. Narayan Builders Vs. CCE [2013(31) STR 174 (Tri. Del.)]
iv. Ankleshwar Taluka Ongc Land Loosers Travellers Coop Vs. CCE [2003(29) STR 352 (Guj.)]

4.4. He also submitted that it is well settled that mere inaction or mere non-disclosure is not suppression of facts to warrant invocation of extended period of limitation. As regards appeal ST/744/3009, he submitted that the period involved in this appeal is subsequent period and in this appeal also, demand is partly barred by limitation inasmuch as the period from July 2004 to September 2005 is barred by limitation and the extended period of limitation cannot be invoked since there is no wilfull suppression of facts and the Department was having the full knowledge since they have issued a show-cause notice for the previous period. He also submitted that it is well settled law that when the Revenue has issued a show-cause notice for earlier period, then for the subsequent period, the Revenue cannot claim willful suppression of facts on the part of the appellant. in this regard, he relied upon the following decisions:-

i. Nizam Sugar Factory Vs. CCE [2006(197) ELT 465 (SC)]
ii. Hyderabad Polymers Pvt. Ltd. Vs. CCE [2004(166) ELT 151 (SC)]

iii. ECE Industries Ltd. Vs. CCE [2004(164) ELT 236 (SC)]

5. On the other hand, the learned AR defended the impugned order and submitted that in the first round of litigation, the appellant themselves have admitted that they are rendering 'cargo handling service' and the Tribunal in the first round of appeal has confirmed the demand for the cargo handling service. He further submitted that the extended period has rightly been invoked because th appellant did not inform the Department regarding the activities and it was detected by the Department during the audit. Revenue has also relied upon the following decisions:-

i. Maruthi Plastics Vs. CCE, Chennai-I [2019(367) ELT 43 (Mad)]
ii. Avtar Sodhi Vs. CCE, Ludhiana [2016(46) STR 547 (Tri. Del.)]
iii. NTPC Ltd. Vs. CCE, Raipur [2017(5) GSTL 412 (Tri. Del.)]

6.1. After considering the submissions of both the parties and perusal of the material on record, we find that though in the first round of litigation, the demand was confirmed under the cargo handling service, the said order of the Tribunal was recalled in ROM application and appeal was listed for fresh hearing. Though the Department challenged the recalling of the order before the High Court but High court has dismissed the petition of the Revenue. Since the final order passed by the Tribunal is recalled, the appellant is at liberty to raise all the legal issues. Further we find that in fact going by the principles laid in Section 65A of the Finance Act, 1994, the demand should not have been confirmed under 'cargo handling service' because the essential character of the main activity in the present case is towards transportation charges which is Rs.53/-pmt whereas loading and unloading, it is only Rs.20/- pmt. Further we find that any composite service, the classification of the service should be made. Keeping in view the essential character as held in various decisions relied upon by the learned counsel cited supra, the ratio of the said decisions is applicable in the present case and applying the ratio of the said decisions, we are of the considered view that demand of service tax under 'cargo handling service' in the present case is not tenable under law and therefore we set aside the demand of service tax under Cargo Handling Service.

6.2. As far as limitation is concerned, we find that in the first round, the period of dispute is December 2002 to June 2004 and the show-cause notice was issued on 07.05.2005 and during the said period, six months was provided for issuing the show-cause notice from the relevant date. Though the Department has invoked the extended period, Department has not brought any material on record to show that there was an intention to evade service tax on the part of the appellant because during the relevant time, this cargo handling service was introduced and a circular was also issued by the Department which clarified the position and the appellant entertained a bona fide belief that they are not liable to pay service tax under loading and unloading of cargo. Further we find that in view of the decision of the Tribunal in the case of Vishal Traders and Singh Brothers, when there is doubts/confusion in the minds of the assessee and that too on account of the circular issued by the Department, then invocation of extended period of limitation is not tenable because there cannot be any intention to evade payment of service tax. Therefore we hold that extended period has been wrongly invoked and entire demand is barred by limitation. However in the subsequent appeal ST/744/2009, partly the demand is barred by limitation because extended period cannot be invoked in subsequently show-cause notice when the Department had the knowledge of all facts since they had issued the show-cause notice for the previous period. In view of the Apex Court decisions in the case of Nizam

Sugar Factory cited supra willful suppression cannot be alleged for the subsequent period.

7. In view of our discussion above, we set aside the demands in both the cases on merits as well as on limitation. Both the appeals are accordingly allowed.

(Order was pronounced
in Open Court on **30/09/2019**)

S.S GARG
JUDICIAL MEMBER

P. ANJANI KUMAR
TECHNICAL MEMBER

Raja…