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

S.No.	Appeal No.	Appellant	Respondent
1.	ST/579/2011	K.Kumar, Proprietor, Kumar Enterprises & Kumar Labour Contract	Commissioner of Central Excise & ST Puducherry
2.	ST/591/2011	Commissioner of Central Excise & ST Puducherry	K.Kumar, Proprietor, Kumar Enterprises & Kumar Labour Contract
Arising out of Order-in-Appeal No.132/2011 (P-ST) dt. 28.07.2011 passed by Commissioner of Central Excise (Appeals) Chennai			

Appearance :

Shri N. Viswanathan, Advocate
For the Assessee

Shri Arjun Ragvendra, DC (AR)
For the Revenue

CORAM :

Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)
Hon'ble Shri P. Dinesha, Member (Judicial)

Date of hearing / decision : 07.06.2018

FINAL ORDER No. 41763-41764 / 2018

Per Madhu Mohan Damodhar

The facts of the case are that Mr. K.Kumar, Proprietor of M/s. Kumar Enterprises & Kumar Labour Contract, (hereinafter referred to as assessee), was providing services of loading, unloading storage materials, filing of raw materials in bulk tanks / tankers, inventory ,warehousing, storage, transportation etc. to

Hindustan Unilever Ltd. (hereinafter referred to as HUL) in assessee's factory. Assessee were also providing similar services at the premises of a godown leaded by HUL and also at the premises of the godown leased by the assessee himself. Assessees were registered under Man Power Recruitment Agency service and paying service tax liability under that category. However, pursuant to an audit conducted by the departmental officers, it appeared that the services provided by the assessee would be more correctly classifiable under Cargo Handling Services. Accordingly, a show cause notice dt. 21.10.2008 was issued for the period 1.4.2003 to 31.3.2008, inter alia proposing demand of differential tax liability of Rs.49,06,835/- with interest thereon as also imposition of penalties under various provisions of law. In adjudication, the original authority vide an order dt.11.01.2010 confirmed the demand of an amount of Rs.42,93,171/- with interest thereon and also imposed equal penalty under Section 78 of the Finance Act, 1994. On appeal, the Commissioner (Appeals) vide the impugned order dt. 28.07.2011 upheld the finding of original authority that the services are required to be classified as Cargo handling Service, however held that the demand would survive only for one year prior to the issue of SCN and set aside the penalty imposed by original authority. Hence assessee has come in appeal (ST/571/2011) against the surviving demand as upheld by the lower appellate authority. The Department has also filed an Appeal No.ST/591/2011 being aggrieved by that portion of the impugned order restricting the demand to normal period of limitation.

2. Today when the matter came up for hearing, on behalf of the assessee, Ld. Advocate Shri N. Viswanathan made oral and written submissions which can be broadly summarized as under :

i) The activities carried out by the assessee are those which are done within the factory or at the warehouse. The assessee is doing a gamut of activities.

ii) Ld. Advocate draws our attention to para 8.3.8 of the adjudication order where the original authority himself has held that the services provided are classifiable under "Cargo Handling Services", "Business Auxiliary Services" and "Man Power Recruitment or Supply Agency Services" and hence Section 65A (2) has to be applied.

iii) Ld. Advocate submits that in a number of judgements of higher appellate forums including High Courts, it has been held that similar activities carried out within factory / mill /mine are not classifiable under Cargo Handling Service. He also submits that the amounts of which service tax has been demanded cannot survive as it relates to reimbursable expenses of which the judgement of the Hon'ble Apex court in *UOI Vs Intercontinental Consultants & Technocrats Pvt. Ltd.* 2018-TIOL-76-SC-ST would apply. He draws our attention to page 32 of the appeal book to submit that the said activities carried out at the godown are predominantly paid on man power basis.

iv) In respect of departmental appeal, ld. Advocate submits that the Commissioner (Appeals) has gone into the aspect of there being no suppression on the part of the assessee. It is also pointed out that they had been discharging duty liability under Man Power Recruitment and Supply Agency Service which had not been objected to by the department. Only pursuant to the audit the department otherwise had issued the SCN. In the circumstances, there cannot be any extension of extended period.

3. On the other hand, Ld. A.R Shri Arjun Ragvendra submits that both the adjudicating authority as well as the Commissioner (Appeals) have analyzed the activities of the assessee and given a reasoned finding that they would very much fall within the ambit of 'Cargo Handling Service' as defined in Section 65 (23) of the Finance Act.

3.2 Ld. AR submits that in response to the contention made by Ld. Advocate concerning bundle of services, this aspect has already been analyzed and a finding has been given in para 8.3.11 of the adjudication order that the activities would definitely fall under Cargo Handling Service. Ld. AR took us to the discussion on the agreement in para 5.3 of the impugned order which clearly indicates that the agreement covers not only material handling but also bulk tanker operations to the factory, storage, transportation, material warehousing, finished goods handling etc. Hence these services would correctly fall within the scope of Cargo Handling Service.

4. Heard both sides and have gone through the facts.

5.1 What comes to the fore is that in the agreement entered into by the assessee with HUL both for the factory and also for the godown, the elements which are included within the scope of “Cargo Handling Service” are very much present. It is also seen that there is transportation involved in respect of cargo handled. Godown bulk tanker operations are also contracted to the assessee. Viewed in this light, we do not find any infirmity with the conclusions arrived at by both the original and the lower appellate authorities that the activities in of the nature of cargo handling service. However, going by the ratio of case laws, especially, that laid down by the High Court of Allahabad in *CCE Vs Manoj Kumar* – 2015 (40) STR 35 (All.), the Tribunal decision in *Modi Construction Co. Vs CCE Ranchi* - 2008 (12) STR 34 (Tri.- Kolkata) as approved by the Hon’ble High Court of Jharkhand as reported in 2011 (23) STR 6 (Jhar.) and Tribunal decision in *CCE Bhopal Vs Karanveer Singh & Brothers* - 2018 (9) GSTL 70 (Tri.) and *Gaytri Construction Co. Vs CCE Jaipur* - 2012 (25) STR 259 (Tri.-Del.), we find that it has been consistently held that shifting of goods within factory premises and activity of loading, unloading, packing, unpacking , recycling, and shifting of cargo within the factory premises will not fall under the purview of Cargo Handling Services. We respectfully follow the ratio laid down by the High Courts and hold that these services performed within the factory premises of HUL by the assessee will not come within the scope of “Cargo Handling Services”. So ordered.

5.2 However, the said case laws will not help the case of assessee in respect of similar services provided by them at the godown leased by HUL and that leased by assessee themselves. This being so, the services provided at those two places will surely fall within the ambit of Cargo Handling Service as defined in Section 65 (23) ibid. So ordered.

5.3 We also find merit in the ld. Advocate's contention that the surviving part of the demand is predominantly, if not fully, relating to reimbursable expenses and hence the law as laid down by the Apex court in *Intercontinental Consultants & Technocrats Pvt. Ltd.* (supra) will apply. Accordingly, for the purpose of ascertaining whether the amounts relating to the surviving demand would be in the nature of reimbursable expenses which would be exigible to service tax liability as laid down by the Hon'ble Apex court in this judgement, the matter is being remanded to the adjudicating authority for the limited purpose of ascertaining and reworking of the tax liability, if any, with interest as applicable on the basis of the aforesaid judgment of the Hon'ble Supreme Court.

5.4. Coming to the department appeal, it cannot be disputed that the assessees were discharging their tax liability under Man power Recruitment and Supply Agency Service, which was not objected to by the department till the point of audit. This being so, we do not find any infirmity with that portion of the impugned order which has set aside the demand for the period beyond normal period of limitation.

6. In the result, Assessee's Appeal ST/579/2011 is allowed by way of remand on above terms. Department Appeal ST/591/2011 is dismissed.

(dictated and pronounced in court)

(P. Dinesha)
Member (Judicial)

(Madhu Mohan Damodhar)
Member (Technical)

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