IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH AT CHENNAI

Appeal No.: ST/00393/2010

(Arising out of Order-in-Appeal No. 104/2009 (M-ST) dated 26.02.2010 passed by the Commissioner of Central Excise (Appeals), Chennai)

M/s. Aspinwall & Co. Ltd. :Appellants

Vs.

The Joint Commissioner of Service Tax, Chennai :Respondent

Appearance:-
Shri. Harish Bindumadhavan, Advocate
for the Appellant

Shri. K. Veerabhadra Reddy, JC (AR)
for the Respondent

CORAM:
Hon'ble Ms. Sulekha Beevi C.S., Member (Judicial)
Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)

Date of Hearing/Decision:**26.07.2018**

Final Order No. 42177 / 2018

Per Bench,

Brief facts are that the appellants are engaged in providing services related to import and export of goods through Chennai Port and are registered with the Service Tax Department. Pursuant to receipt of intelligence and conduct of investigation by DGCEI, it was revealed that the appellants have not included value of all services provided/received for discharging their service tax under various categories like Port Services, Cargo Handling Services and Goods Transport Agency services for the period 2004-05 to 2005-06. Show Cause Notice was issued proposing to demand service tax along with interest and for imposing penalties. After due process of law, the Original Authority confirmed an amount of Rs. 18,33,371/- under various categories along with interest and penalties both under Section 76 and 78 of the Finance Act, 1994. In appeal, the Commissioner (Appeals) upheld the demand, but however set aside the penalty imposed under Section 76 of the Act. Aggrieved, the appellants are now before the Tribunal.

2. On behalf of the appellant, Ld. Counsel Shri. Harish Bindumadhavan made the following submissions :

I. <u>Demand made under Port Services (Demand of Rs. 14,38,395/-):</u>

(i) The appellant is engaged in provision of Custom House Agency Services (CHA) and has registered under this category for the purpose of service tax. While providing the service of CHA, appellant also arranges services for packing, unpacking, loading, unloading, bringing or removing the goods to or from the customs area or vessels to their customers.

(ii) The SCN was issued and alleged that the classification of the above service under the category of CHA services is incorrect and demanded the service tax by vivisecting the service of CHA into different category of service such as Port Services, stevedoring services, weighment services, etc.

(iii) The trade notices issued by the Commissionerate of Mumbai and New Delhi would squarely apply to the appellant as the services provided by the appellant is of the nature of CHA services.

(iv) The Port service is defined to mean any service rendered by port or any person authorized by port. A person said to be authorized by the port only if such person is authorized as per the provisions of Major Port Trust Act to perform such activities as a normally performed by the Ports. In the instant case, the appellant is not authorized under the Major Port Trust Act and hence the appellant cannot be said to be authorized by the port.

(v) Further, the contention of the respondent that, the stevedoring license granted to the appellant tantamount to authorization given by the port does not hold merit. The mere licence to perform stevedoring activities cannot be said to be an authorization issued by the port.

(vi) The term “authorized” differs from the term “licensed”. The term “license” means “a permission given for specific purpose wherein the service provider will be acting in his individual capacity" whereas "authorized" means "appointing a person to act on behalf of him". In the instant case, the applicant has been licensed by the Port to provide the services like stevedoring, loading and unloading, transportation, etc. The High Court of Karnataka has upheld the order of the Bangalore Bench CESTAT in the case of Konkan Marine Agencies Vs. C.C.E., Mangalore and held that loading and unloading of cargo in port under stevedoring license issued by the port is not "port service "and it cannot be held as authorization by the port under Section 42 of the Major Port Trust Act. The services rendered by the applicant are therefore not eligible to service tax under the head of "port services".

(vii) The above submissions are also supported by the judgement in the appellant's own case with respect to its operations in Mangalore and Cochin – ***Aspinwall & Co. Ltd. Vs. Commissioner of C.E. Mangalore: 2011 (21) S.T.R. 257 (Tri. Bang), Aspinwall & Co. Ltd. Vs. Commissioner of Central Excise, Cochin 2017 (4) G.S.T.L. 48 (Tri. – Bang.)*** and a recently judgement in the case of ***HML Agencies (P) Ltd. Vs. Commissioner of Central Excise, Customs and Service Tax***

Mangalore and 2017 (4) G.S.T.L. 48 (Tri. – Bang.). Further, appellant is also relying on the below judgments:

a. *C.C.E., Bhavnagar Vs. Gujarat Maritime Board Jafrabad – 2015 (39) S.T.R. 529 (S.C.)*
b. *Shreeji Shipping Vs. C.C.E. & S.T., Rajkot – 2014 (36) S.T.R. 569 (Tri. – Ahmd.)*
c. *Western Agencies Pvt. Ltd. Vs. Commissioner of Central Excise, Chennai – 2011 (22) S.T.R. 305 (Tri. – LB)*
d. *Commissioner of Central Excise, Mangalore Vs. Konkan Marine Agencies – 2009 (13) S.T.R. 7 (Kar.)*

(viii) In the light of the above submission it is amply clear that, the service rendered by the appellant is of the nature of custom house agency services and hence, the contention of the respondent to classify such service under Port Services is not just and proper.

II. <u>Demand for Cargo Handling Service (Activity related to Raw Sugar – Demand of Rs. 1,85,590/-):</u>

(i) The appellant was rendering cargo handling services on raw sugar cargos including shifting of cargo from one godown to another inside the port and also outside the port. In this regard, the appellant has availed the exemption benefit extended to cargo handling services for agricultural produce vide Notification No. 13/2003 dt. 20.06.2003 as amended vide Notification No. 08/2004 dt. 09.07.2004

(ii) The respondent has concluded that the raw sugar does not amount to agricultural produce as the raw sugar is a manufactured product which has been excluded from the benefit extended vide captioned exemption notification. In this regard, appellant wish to point out that the raw sugar handled by them is the unprocessed/unrefined sugar. Raw sugar cannot be consumed as such without being processed and hence it cannot be said to be manufactured product.

III. Demand for Goods Transport Agency Service (Transportation of Raw Sugar – Demand of Rs. 2,09,387/-):

(i) Appellant would like to submit that with regard to Goods Transport Agency, they have paid tax on the actual amount as Freight. However, appellant also collected some excess amounts from the customers over and above the freight incurred and demand is in respect of such amount.

(ii) That the appellant is not contesting the demand on this issue.

IV. Invocation of extended period of limitation and imposition of penalty is not applicable if the demand is due to interpretation of exemption notification :

(i) Appellant would like to submit that in the present case, they are under the *bona fide* belief that raw sugar is eligible for exemption since it is an agricultural produce. Further, mentioning of Jaggery in the definition of Agricultural definition which is akin to raw sugar substantiated them the availability of exemption for their activity. The appellants have claimed exemption on the activity related to raw sugar under exemption Notification No. 13/2003 ST dt. 20.06.2003 as amended by Notification No. 08/2004 dt. 09.07.2004. Accordingly, the demand of Service Tax of Rs. 3,94,977/- is not liable for service based on limitation.

(ii) Assuming but not admitting the appellants are not eligible to avail the exemption of raw sugar, then the demand is only due to interpretation of exemption notification. It is settled provision of law that invocation of extended period of limitation and imposition of penalty is not applicable where the demand is due to interpretation of exemption notification. In this regard, appellant is relying on the following judgments :

a. *Hindustan Petroleum Corporation Ltd. Vs. Commissioner of Central Excise, Mumbai-II – 2014 (301) E.L.T. 554 (Tri. – Mumbai)*
b. *Kejriwal Casting Pvt. Ltd. Vs. Commissioner of Central Excise, Kolkata-II – 2017 (345) E.L.T. 649 (Tri. – Kolkata)*

3.1 The Ld. AR Shri. K. Veerabhadra Reddy appearing on behalf of the Department supported the findings in the impugned order.

3.2 With regard to the **Port Services**, he referred to the definition contained in Section 65(82)(zn) of the Finance Act, 1994 wherein it is stated that Port Services means any service rendered by a port or other port or any person authorized by such port or other port, in any manner, in relation to a vessel or goods. The taxable service under Section 65 (105) states that any service provided or to be provided to any person by a port or any person authorized by the port in relation to Port Services in any manner would be subject to levy of service tax. In the present case, the appellants are licensed by the Madras Port Trust to undertake Stevedoring Activities within the port area during the disputed period. These activities are required to be performed only by a person authorized by the port trust within the port area. Thus, the appellants are authorized under the above licence for activities such as handling services, storage of goods, weighment charges, water sprinkling charges, supervision charges, etc., rendered by them under the Stevedoring Licences. These being rendered within the port area, attracts the levy of service tax under the category Port Services. Thus, the demand of service tax under Port Services is fully legal and proper.

3.3 With regard to the **demand of service tax on Cargo Handling Services** in respect of raw sugar, he submitted that the appellants are claiming the benefit of Notification No. 13/2003 dt. 20.06.2003 as amended by Notification No. 08/2004-ST dt. 09.07.2004. Agricultural produce has been defined in the said Notification and it excludes manufactured products such as sugar, edible oils, etc. Therefore, it is very much clear that raw sugar, being a manufactured product, cannot be equated with agricultural produce to claim exemption. Thus, the appellants are liable to pay service tax under Cargo Handling Services in respect of handling of cargo of raw sugar.

3.4 With regard to the argument made by the Ld. Counsel on **limitation** , he submitted that the appellants have wrongly availed the benefit of exemption under the above stated Notifications. When they were not eligible for the exemption under the Notification, they cannot merely put forward a contention that they were under the *bona fide* belief that raw sugar was included within the definition of "agricultural produce". The Notification is very much clear that manufactured product are excluded from the exemption. That, therefore, the contention that the demand is hit by limitation cannot be accepted as the issue is an interpretational one.

3.5 It is also submitted him that they have not disclosed to the Department that they were handling cargo of raw sugar and were not discharging service tax. Therefore, the demands raised invoking the extended period are legal and proper.

4. Heard both sides.

5.1 For better appreciation, the details of the demand are stated as under as tabulated by the Ld. Counsel for the appellant :

Period	**Category of Service**	**Service Tax (in Rs.)**	**Education Cess (in Rs.)**	**Total (in Rs.)**
22.07.2004 to 31.03.2006	Port Services	14,10,135/-	28,259/-	14,38,394/-
23.11.2004 to 31.03.2006	Cargo Handling Services *(Raw Sugar)*	1,81,951/-	3,639/-	1,85,590/-
01.01.2005 to 31.03.2006	Goods Transport Agency (*Raw Sugar*)	2,05,281/-	4,106/-	2,09,387/-
Grand Total				**18,33,371/-**

The period involved is from July, 2004 to March, 2006 and the Show Cause Notice is dated 12.04.2007.

5.2 With respect to the **first issue**, the Ld. Counsel has pointed out that the issue whether the services would fall under Port Services has been decided in their favour in their own case by the Tribunal in Bangalore as reported in ***2017 (4) G.S.T.L. 48 (Tri. – Bang.)*** and ***2011***

(21) S.T.R. 257 (Tri. – Bang.). The appellants have contended that these services fall under the category of Customs House Agent (CHA) and does not fall under Port Services. The Tribunal has analyzed the very same issue in their case as decided and reported in ***2011 (21) S.T.R. 257 (Tri. – Bang.)***, the relevant portion of which is reproduced as under :

> ***"11.*** *The issue involved in all these cases mainly centres around the classification of the services rendered by the appellants herein. The appellants herein are claiming the classification of their services under the category of 'Custom House Agents' and other services while Revenue seeks to classify these services under 'Port services'.*
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> ***17.*** *It can be seen from the above reproduced ratio of the judgment of the Tribunal in the case of Velji P. & Sons (Agencies) P. Ltd. that the facts, of that case and the facts in these cases before us are identical wherein various services were rendered by the appellants herein within the port area. Since the ratio of the judgment of the Velji P. & Sons is squarely applicable in this case, the judgment had also having been upheld by the Hon'ble Apex Court, the ratio is binding on us. It is also to be noted that the judgment of the Hon'ble Supreme Court in the case of Velji P.& Sons seems to have been accepted by the Government of India, which can be ascertained from the fact that the Government of India in Finance Act, 2010 expanded the scope of many existing services and one of them being 'Port services'. The expansion of definition of 'Port services', which has been brought into play by the Finance Act, 2010, would seeks to include all services provided entirely within airport/port premises would fall under these services i.e. 'Port services' and there is no pre-condition of any authorisation from the port authority for taxing the services. It is also seen from the Circulars issued by the Government of India, more specifically, Circular dated 26th February, 2010, the scope of modifications or expansion of definition of 'Port services' would come into effect from notified date i.e. after the enactment of the Finance Bill, 2010. The said Finance Bill was passed by the Parliament and the President gave assent to it on 8-5-2010. It would imply that the modified/altered or expanded definition of 'Port services' would definitely encompass the services rendered by the appellants herein, but from 8-5-2010. It is an admitted fact that the relevant period in all these cases is prior to 8-5-2010. Hence, the contentions*

raised by the counsels for all the appellants that the Finance Act, 2010, has removed the lacuna in the earlier port services, is correct.

18. *Hence, in view of the foregoing reasonings, on the merits of the case whether all the services rendered by the appellants would fall under the category of 'Port services' or not, we hold that the services rendered by the appellants would not fall under the category of 'Port services'. As the impugned orders are set aside on merits, there can be no case of penalty or interest in respect of this issue."*

5.3 The **<u>next issue</u>** is with regard to the demand on Cargo Handling Services in respect of raw sugar. The Ld. Counsel has strongly argued that raw sugar would fall within agricultural produce. The definition of agricultural produce as stated in the Notification is as under :

> ***"agricultural produce" means any produce resulting from cultivation or plantation, on which either no further processing is done or such processing is done by the cultivator like tending, pruning, cutting, harvesting, drying which does not alter its essential characteristics but makes it only marketable and includes all cereals, pulses, fruits, nuts and vegetables, spices, copra, sugar cane, jaggery, raw vegetable fibres such as cotton, flax, jute, indigo, unmanufactured tobacco, betel leaves, tendu leaves, rice, coffee and tea but does not include manufactured products such as sugar, edible oils, processed food and processed tobacco"***

5.4 It is very much clear from the above that the manufactured products are excluded from the definition of "agricultural produce". The Notification is available only to such produce which fall within the definition given in the Notification. Since, in our opinion, raw sugar is a product which has undergone processing, we are of the opinion that the benefit of exemption is not extendable to raw sugar. Thus, the Cargo Handling Services in respect of handling of cargo of raw sugar would attract the levy of service tax.

5.5 The appellant has contended that they were under the *bona fide* belief that raw sugar would fall within the definition of "agricultural produce". We do not find this argument tenable for the simple reason that the definition is amply clear wherein the manufactured products and processed products are excluded from the definition of "agricultural produce". Further, it states that the agricultural produce does not include manufactured products such as sugar. When it is stated with such clarity that sugar would not fall within the definition of agricultural produce, the appellant cannot contend that raw sugar was eligible for exemption.

5.6 With regard to the **next issue** relating to the demand on GTA Services in respect of raw sugar, the Ld. Counsel on 26.07.2018, when the matter came up for hearing, stated that the appellant is not contesting this issue. However, he has made an alternate plea to set aside the penalties in respect of both the issues relating to raw sugar. The Commissioner (Appeals) has set aside the penalty imposed under Section 76, but however has upheld the penalty imposed under Section 78. The penalty under Section 78 is imposed alleging that the appellants have suppressed facts with an intention to evade payment of service tax. However, no positive act of suppression has been established by the Department with cogent evidence to conclude that there is suppression of fact on the part of the appellant. Apart from merely stating that the appellants did not disclose the fact of rendering of Port Services, Cargo Handling Services and Goods Transport Agency Services, there is no deliberate act with an intention to evade payment of service tax established by the Department to conclude that there is suppression of facts. On this ground, we are of the view that the penalty imposed under Section 78 with respect to both issues (Cargo Handling and GTA Services in respect of raw sugar) cannot sustain and requires to be set aside, which we hereby do.

6. To sum up, the impugned order is modified to the extent of setting aside the demand in respect of Port Services and upholding the demand in respect of Cargo Handling Services and Goods Transport Agency Services in respect of raw sugar. However, the penalties imposed in respect of Cargo Handling Services and GTA Services are set aside.

7. The appeal is partly allowed in above terms with consequential benefits, if any.

(Dictated and pronounced in open Court)

(Madhu Mohan Damodhar)
Member (Technical)

(Sulekha Beevi C.S.)
Member (Judicial)

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