

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

Appeal No. ST/66/2007

[Arising out of Order-in-Original No.20/COMMR/07 [ST] dt. 06.03.2007 passed by the Commissioner of Central Excise, Tirunelveli]

Diamond Shipping Agencies (P) Ltd.

Appellant

Versus

Commissioner of Central Excise,
Tirunelveli

Respondent

Appearance:

Shri N.Viswanathan, Advocate
For the Appellant

Shri A. Cletus, ADC (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 : 07.07.2017

FINAL ORDER No. 41223/2017

Per Bench

The appellants are registered under Custom House Agency Services. They were engaged by M/s.Resham Singh and Co. Pvt. Ltd., Mumbai to transport break-bulk cargo from Tuticorin port to Kudankulam Nuclear Power Project, Kudankulam. It appeared to the department that appellants are Cargo Handling Agents for Resham



Singh and Co. Pvt. Ltd. and that tax liability of Rs.12,02,004/- with interest thereon is required to be recovered from them for the period 2003-04. In adjudication proceedings, the said tax liability was confirmed along with interest and penalties imposed on appellant under Section 76 & 78 of the Finance Act, 1994. In confirming such liability, adjudicating authority held that appellant was providing cargo handling service, since they were involved in (a) Transportation of cargo from the Tuticorin harbour to the new yard (stock yard) which is 6 km away from the port (b) Storage, security, loading, unloading at yard (c) Arranging for escort and private labourers to clear the electric wire during the transportation of the cargo to Kudankulam project site and d) Transportation to the Kudankulam project site. Aggrieved, the appellants are before this forum.

2. On 07.07.2017, when the matter came up for hearing, on behalf of appellant, Ld. Advocate Shri N. Viswanathan submitted that the contract with Resham Singh and Co. Pvt. Ltd. was only for transportation of the break-bulk cargo from Tuticorin port to Kudankulam site which included freight, internal transportation to yard, unloading, loading, reloading, escorts and security at yard. In this regard, he submitted a copy of the communication dt. 05.12.2003 addressed to them by Reshamsingh & Co. Pvt. Ltd. setting out the terms and conditions of the said transportation. Ld. Advocate submits that transportation is the most important and essential character of

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the activity carried out by them and the other activities of loading, unloading etc. are only incidental to the same. He draws attention to Board's Circular No.104/7/2008-ST dt. 06.08.2008 where it has been clarified that in cargo handling service under Section 65 (105) (zr) transportation is not the essential character but only incidental. Ld. Advocate also submits that in their own case for subsequent period 01.04.2004 to 31.3.2007 wherein original authority had demanded an amount of Rs.28,34,712/- along with interest thereon and imposed penalties, the Commissioner (Appeals) vide an order dt. 24.03.2010 set aside the OIO and decided the matter in their favour. He submits that no appeal has been filed by the department against the said order. In the circumstances, Ld. Advocate prays that appeal may be allowed in their favour.

3. On the other hand, on behalf of the Department, Ld. A.R Shri A.Cletus (ADC) supports the adjudication. He submits that the activities carried out by appellants are in the nature of cargo handling agency, hence charges collected by them from M/s. Resham Singh and Co. Pvt. Ltd. will consist of (i) freight charges (ii) warehousing and storage charges and (iii) cargo handling charges. The essential character of the activity carried out by appellant is cargo handling only and hence there is no merit in the submissions of the appellant.

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

5.1 As per the provisions of sub-section (23) of section 65 of the



Finance Act, 1994, "Cargo Handling Service" means loading, unloading, packing or un-packing of cargo and includes Cargo Handling Services provided for freight in special containers or for non-containerized 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.

5.2 From the definition of "Cargo Handling Service", what emerges is that mere transportation of cargo is excluded from that definition. Every activity of service of transportation of goods will surely include some manner of loading and unloading of the goods. The question to be asked is whether such loading/unloading is the primary activity involved in the services carried out. From the facts of the matter at hand, we find that the answer is in the negative.

5.3 We further find that vide the circular dt. 01.08.2002, Board had issued clarifications regarding service tax on cargo handling services. The said circular, inter alia, clarified that liability to tax under that category would only be on those services provided by cargo handling agency undertaking activity of packing, unpacking, loading and unloading of goods meant to be transported by any means of transportation, namely, truck, rail, ship or aircraft. There is no doubt, then, that transportation is only incidental to the cargo handling service and not



the primary activity. On the other hand, the activities sought to be taxed in ~~that~~ cargo handling service is that those of packing, unpacking, loading and unloading of goods. The circular further clarifies that mere transportation of goods is not covered in the category of 'cargo handling' and is therefore not liable to service tax.

5.4 We further find that pursuant to representation to the Government regarding difficulties being faced by Goods Transport Agency, clarifications were issued by CBEC in circular dt. 06.08.2008 referred to by Id. advocate (supra). In para-3 thereof, with regard to GTA service, whether said service may include various intermediary and ancillary services such as loading, unloading, packing, unpacking, transshipment, temporary warehousing, the Board has clarified as follows :

"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 (para 3.2 and 3.3) [2006 (4) S.T.R. C30] and F. No. 334/1/2008-TRU, dated 29-2-2008 (para 3.2 and 3.3) [2008 (9) S.T.R. 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

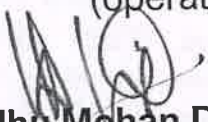


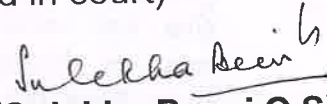
enumerated in section 65A. Thus, if any ancillary/ intermediate service is provided in relation to transportation of goods, and the charges, if any, for such services are included in the invoice issued by the GTA, and not by any other person, such service would form part of GTA service and, therefore, the abatement of 75% would be available on it."

In para-4, the Board further clarified that in cargo handling service "transportation" is not the essential character of cargo handling service but only incidental to the cargo handling service.

6. Viewed in this light, just because appellant carried out ancillary activities of loading, unloading etc., which is not the essential character of the activity contracted to him but only ancillary to the main work of transportation of break-bulk cargo, it would not be just and proper to bring such activity within the fold of "Cargo Handling Service". The essential character of the activity carried out is only transportation. In view of Board's clarification, we have no doubt that such activity cannot then fall under the ambit of cargo handling service. We also note that for subsequent period, in respect of the same appellant, the matter has been decided in their favour by Commissioner (Appeals), which decision has not been appealed against by the department. In view thereof, the appeal filed by the appellant has merit and is therefore allowed with consequential relief, if any, as per law.

(operative part of the order pronounced in court)


(Madhu Mohan Damodhar)
Member (Technical)


(Sulekha Beevi C.S)
Member (Judicial)

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