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

ST/604/2009

(Arising out of Order-in-Appeal No. 137/2009 dated 11.09.2009 passed by the Commissioner of Central Excise (Appeals), Salem)

M/s. Manju Contractor : Appellant

Vs.

CCE & ST, Salem : Respondent

Appearance

Ms. Sridevi, Advocate,
for the appellants

Shri R. Subramaniyam, AC (AR)
for the Respondent.

CORAM :

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

Date of Hearing/Decision: **14.08.2017**

FINAL ORDER No. 41682 **/2017**

Per Bench

Brief fact are that on the basis of intelligence and scrutiny of records that appellants are providing "Cargo Handling Service" and is not discharging service tax for such services. A Show Cause Notice was issued for the period 01.10.2002 to 31.08.2005. After due process of law, the original authority confirmed the demand of

Rs. 1,87,435/- along with interest and also imposed penalties under Section 76, 77 and 78 of the Finance Act, 1994. In appeal, Commissioner (Appeals) upheld the same. Hence this appeal.

2. On behalf of the appellant, the Ld. Counsel, Ms. Sridevi, submitted that the appellant is not providing any Cargo Handling services. The appellants are engaged in carrying out loading of AC sheets and its accessories at M/s. Visaka Industries as per the agreement entered with M/s. Visaka Industries. A copy of the agreement was produced before the adjudicating authority. The appellant was providing man power for loading articles of M/s. Visaka and thus the services would fall under the Man Power Recruitment & Supply Agency Services. The appellant got registered themselves under the said category when such services became taxable with effect from 16.06.2005. They have been discharging service tax thereafter under this category and no SCN has been issued after this period. She explained that the department classified these services under "Cargo Handling Services" merely because the payments were fixed as per piece rate of cargo. But after loading the appellant has no responsibility with the cargo and therefore the activity would not fall under cargo handling services. She relied upon the Board's Circular F.No. B11/1/2002-TRU dated 01.08.2002 and the following judgments:-

1. *CCE Vs. Sushil & Company*
   2016 (42) STR 625 (S.C.)

2. *CCE Vs. Manoj Kumar*
   2015 (40) STR 35 (All.)

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3. *Renu Singh & Co. Vs. CCE, Hyderabad*
2007 (7) STR 397 (Tri.-Bang.)

3. The Ld. AR Shri R. Subramaniyam, AC reiterated the findings in the impugned order. The appellants have to engage workers required by the company for loading AC sheets. The obligation of the appellant did not end with the man power supply and were responsible for loading AC sheets and its accessories as per timings given by the specific authority.

4. Heard both sides. The department alleges that the activity carried out by appellants would fall under 'Cargo Handling Services' The definition of 'Cargo Handling Services' is as under:-

> "Cargo Handling Service means loading, unloading, packing or unpacking of cargo and includes cargo handing service provided for freight in special container or for non-containerized freight, services provided by a container freight terminal or any other freight terminal, for all modes of transport, and any other service incidental to freight, but does not include handing of export cargo or passenger baggage or mere transportation of cargo".

The relevant conditions in the contract are as under:-

The rates of loading AC sheets and its accessories shall be as follows:-

- AC sheet loading - Rs. 10.50/- per M.T.
- Moulding gods loading - Rs. 00.60/- per piece
- The workers required for loading of AC sheets and its accessories shall be engaged by M/s. Manju Contractor subject to a maximum of 20 on any day.
- The payment of workers shall be made by M/s. Manju Contractor as follows and Provident Fund and other statutory deduction to be deducted against their payment periodically, M/s. Manju Contractor shall be responsible

Customs, Excise & Service Tax Appellate Tribunal for maintaining all registers and other things as per the Contract Labour (Regulation and Abolition) Act, 1970.

- M/s. Manju Contractor's representatives shall always be available while loading and gardening to take care of the activities and work permit to be obtained before starting their activities.
- M/s. Manju Contractor and the persons engaged by them would abide by all the instructions given by specified authority and for any violation of the terms of the contract, the losses to the company would be made good by M/s. Manju Contractor.
- Payment of workers shall be made on or before 7th of next month during office hours in presence of management representative.
- M/s. Manju Contractor shall be responsible for loading of AC sheets and its accessories as per timings given by the specific authority.
- The company shall have the rights to terminate the contract for any valid reasons by fiving one month's notice.
- In case of M/s. Manju Contractor wants to withdrawn their services, they shall do so by giving one month's notice.
- In the even it is felt that M/s. Manju Contractor's presence and/or that of the persons engaged by them under the contract is detrimental to the interests of the company or its smooth working, the contract would be liable to termination with immediate effect.
- The contract is valid for a period of two years from 01.01.2005.

The main reason for the department to hold that the activity would not be mere man power recruitment and supply agency services but cargo handling services is that there is a condition that the appellant's representatives should be present while loading. That there is supervisory control and therefore would be cargo handling services. In *Sushil & Company* (supra) the Hon'ble Apex Court had considered whether the activity of supplying workers for loading/unloading cement as per the agreement would amount to Cargo Handling Service. The Hon'ble Apex Court observed as under:-

"**5.** Coming to the issue as to whether the contract in question, whereby labour is supplied by the respondent to M/s. Birla Corporation Ltd., could be treated as 'Cargo Handling Service' within the meaning of Entry 23 of Section 65 of the Act. This Entry reads as under :-

" 'Cargo Handling Service' means loading, unloading, packing or unpacking of cargo and includes cargo handling services provided for freight in special containers or for no containerized freight, services provided by a contrainers freight terminal, for all mode of transport and cargo handling service incident to freight, but does not include handling of export cargo or passenger baggage or mere transportation of goods."

6. The High Court, on the interpretation of the aforesaid Entry, has observed that two conditions for considering any service to be 'Cargo Handling Service' need to be satisfied, namely; (1) there must be a cargo i.e. a packed or unpacked commodity accepted by a transporter or carrier for carrying the same from one destination to another. It is only after the commodity becomes a cargo, its loading and unloading at the freight terminal for being transported by any mode becomes a cargo handling service, if it is provided by an independent agency and; (2) the service provider must independently be involved in loading-unloading or packing-unpacking of the cargo.

7. The aforesaid meaning given by the High Court while interpretating Entry 23 of Section 65 is perfectly in order and justified. On that basis, we have to see whether the twin conditions mentioned therein are satisfied in the present case or not.

8. We find from the record that in the instant case, as per the contract entered into between the respondent and the customer, namely, M/s. Birla Corporation Ltd., the respondent was to supply manpower for working at the packing plant as per the customer's requirement. The contractor-respondent was to ensure that manpower deployed on the work given by customer's officers is executed properly, diligently, uninterruptedly and to the satisfaction of the customer in the factory premises of its works.

9. It is significant to note that no part of loading or unloading was assigned to the workers of the respondent-assessee upto transportation of the cement bags out of the factory. This work was, in fact, been performed by the automatic machines. It is through these automatic machines, the cement bags were loaded, unloaded, packed or unpacked and this included 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.

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10. On the reading of the aforesaid contract, coupled with the statement of Mr. Kailash Sharma, an officer of the respondent-Company, the High Court has rightly concluded that the aforesaid services would not fall within the definition of 'Cargo Handling Services'."

Following the same, we are of the view that the subject services would not fall under Cargo Handling Services. The impugned order is set aside. The appeal is allowed with consequential reliefs, if any.

(Operative part of the Order pronounced in the open Court)

Sulekha Beevi

(MADHU MOHAN DAMODHAR)
MEMBER (TECHNICAL)

(SULEKHA BEEVI C.S.)
MEMBER (JUDICIAL)

BB

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