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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066
CUSTOMS APPEAL BRANCH

Appeal No. ST/411 /2007 - CU[DB] Date 14/01/2009

Assistant Registrar
C.E.S.T.A.T, New Delhi

To :
SINGH BROTHERS
HIG-821, HOUSING BOARD COLONY, MORENA, M.P.
476001

SINGH BROTHERS Appellant

Vs

C.C.E. INDORE Respondent

I am directed to transmit herewith a certified copy of **Final order No.** ST/19/09 CU[DB] dated 07.01.09 passed by the Tribunal under Section 129, (B) of the Customs Act,1962 & Financial Act 1994 relating to Service Tax

Assistant Registrar
(Customs Appeal Branch)

Copy to :

1. Respondent
   C.C.E. INDORE
   MANIK BAGH PALACE, POST BOX NO. 10, INDORE 452001 (M.P.)
2. Adv. / Consult
   MR.S. K. PAHWA
   MARWAH & PAHWA, 45, ARADHANA SECTOR 13, R. K. PURAM, NEW DELHI-110066.
3. S.D.R
4. J.C.D.R.
5. Bar association, CESTAT, New Delhi
6. M/s. Deeparchi Publications, M-93, Marg. 46, Saket, New Delhi 110017
7. M/s Centax Publictions (P) Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New - 3
8. Excise & Customs cases, B-37, Sector -1, NOIDA - 201301 Gautam Budh Nagar, (U.P.)
9. Raghuraman's 44-B, Regal Flat,Shipra Suncity, Indirapuram - 201010,Ghaziabad, DT, U.P.
10. Nidheshak publications, I.P.Estate, new Delhi
11. Taxmann Allied Service Pvt Ltd., 21/35, West Punjabi Bagh, New Delhi - 110026
12. Commercial Laws of India Pvt Ltd Post Bag No. 1033, No.70(Old No. 88), Thyagaraya Road, T. Nagar,Chennai
13. Taxindiaonline.com Pvt.Ltd, B-XI/8183,Vasant Kunj, New Delhi - 110070
14. Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road,Ahmedabad-15
15. Office Copy
16. Guard file

Assistant Registrar
(Customs Appeal Branch)

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
WEST BLOCK NO. 2, R.K. PURAM, NEW DELHI

COURT – III

SERVICE TAX APPEAL NO. 411 OF 2007-ST

[Arising out of Order-in-Original No. 04/Commr./ST/IND/2007 dated 27.04.2007 passed by the Commissioner, Customs & Central Excise, Indore]

For approval and signature:

Hon'ble Mr. M. Veeraiyan, Member (Technical)
Hon'ble Mr. P.K. Das, Member (Judicial)

1.	Whether Press Reporters may be allowed to see the order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	No
2.	Whether it would be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	Yes
3.	Whether their Lordships wish to see the fair copy of the order?	Seen
4.	Whether order is to be circulated to the Departmental authorities?	Yes

M/s. Singh Brothers — Appellant

Vs.

Commissioner,
Customs & Central Excise, Indore — Respondent

Appearance:

Shri S.K. Pahwa, Advocate for the appellant,
Shri Sunil Kumar, Departmental Representative, for the Revenue,

Coram:

Hon'ble Mr. M. Veeraiyan, Member (Technical);
Hon'ble Mr. P.K. Das, Member (Judicial),

Date of Hearing: 7th January, 2009

FINAL ORDER NO. 57/19/09 **dated** ________

Per M. VEERAIYAN:

This appeal is against the order of the Commissioner No. 04/Commr/ST/IND/2007 dated 27.04.2007.

2. Heard both sides.

3. Relevant facts, in brief, are as follows:-

(a) The appellants had entered into a contract with Sanjay Gandhi Thermal Power Station, Birsinghpur for handling work relating to unloading of coal from rail wagons and discharging them to the conveyor belt through the track Hopper. The work also includes breaking and pushing of coal lumps of bigger size into track Hopper. This work was being handled within the premises of the power house. The contract envisages that the appellants engage sufficient labourers for timely completion of the work of unloading.

(b) In this connection, a detailed work order has been given and the relevant portion reads as follows:-

S.No.	PARTICULARS	QTY (MT)	RATE (Rs./MT	VALUE OF CONTRACT (RUPEES)
(A)	Unloading of coal at Track Hopper by opening gate of "N" type Box wagons, or any Other type Box wagons, or any Other	45,00,000 (Forty five Lakhs MT)	5.98 (Rs. Fiv & Ninty Eight Paise)	2,69,10,000/- (Rs. Two crores Sixty Nine Lakhs Ten Thousand)

	type of equivalent Wagon by opening both/one side gate, breaking and Pushing of coal in to track Hopper			
(B).	Unloading of coal at track hopper, by opening gate of BOBRN wagons and pushing the coal in to track hopper.	As & when received	5.60 (Rs. Five & sixty Paise)	-
(C)	Stacking, weighment transportation and disposal of shales & stones to the designated low lying area within 2 Kms. Lead.	30,000 (Thirty Thousand MT)	21.40 (Rs. Twenty One & Forty Paise)	6,42,000/- (Rs. Six Lakhs Forty Two Thousand only)

Total contract value Rs. 2,75,52,000-00
Rs. Two crores Seventy Five Lakhs & Fifty Two Thousand only

(c) The Commissioner has held that the work handled by them falls under the category of "Cargo Handling Services" and demanded service tax amounting to Rs. 63,77,374/- relating to the period 21.8.2002 to 2.5.2006 in pursuance of show cause notice date 18.10.2006. He also imposed penalties under various sections of the Finance Act.

3.1 Learned Advocate took us through various clauses of the agreement. He also produced copies of photographs, taken during unloading of coal from rail wagons to hopper by the workers, for our perusal. He submitted that on opening of doors of wagon and gates at the bottom of wagon, substantial quantity of coal automatically moves to the hoppers and discharged to the conveyor belt. The labour is involved in opening the gates and doors, breaking lumps of coal and shoveling the quantities of coal which do not automatically fall into the hopper for further being carried automatically by conveyor system. No handling by any labour is involved for further movement after discharge into the conveyor system. He submits that no motor vehicle is used for the purpose of transportation of coal by the appellants.

3.2 He relies on the decision of the Hon'ble High Court of Rajasthan in the case of S.B. Construction Company vs. Union of India, reported in 2006 (4) STR 545 (Raj.) wherein the activities of the handling of coal done through wagon tippling system or conveyor system was held to be outside the purview of service tax.

3.3 Learned Advocate submitted that the service tax is not attracted in every case of cargo handling but only when cargo handling was under taken by "cargo handling agents". He submitted that appellants are only a contractor and they cannot be treated as cargo handling agency. He drew our attention to the clarification of the Board in F. No. B11/1/2002-TRU dated 1.8.2002 wherein the scope of cargo handling services has been explained with examples.

4. Learned D.R. reiterates the findings of the Commissioner. He drew our attention to the provisions of contract and submitted that the activities undertaken by the appellants come under cargo handling services. The decision in the case of S.B. Construction Co. relates to a situation where there is only mechanical handling of the cargo and hence not applicable to the facts of the present case. Learned D.R. relied on

the decision of the Tribunal in the case of Gajanand Agarwal & Ors. Vs. Commissioner of Central Excise & Customs, BBSR, reported in 2008-TIOL-2076-CESTAT-KOL wherein in similar situation relating to loading of coal, the activities have been considered as cargo handling services.

5.1 We have carefully considered the submissions from both sides. The definition of "Cargo Handling Services" given under Section 65 (23) is reproduced below:-

"**Section 65 (23) of the Finance Act, 1994** – "cargo handling service" means loading, unloading, packing or unpacking of cargo and includes, -

(a) 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; and

(b) service of packing together with transportation of cargo or goods, with or without one or more of other services like loading, unloading, unpacking, but does not include, handling of export cargo or passenger baggage or mere transportation of goods.

The definition of taxable service under Section 65 (105) (zr) is reproduced below:-

Section 65 (105) (zr) of the Finance Act, 1994 – "taxable service" means any service provided or to be provided to any person, by a cargo handling agency in relation to cargo handling services.

5.2 From the above definitions, it is clear that the main part of the definition relating to cargo handling services refers to loading, unloading, packing or unpacking of cargo. It is not disputed that the appellants are unloading the cargo and they are also using labourers under their employment for the said purpose.

5.3 In the case of Gajanand Agarwal & Others (supra) cited by the learned D.R. the appellants therein were loading coal to the wagon by providing pay loaders. The Tribunal has, in the said case, held as under:-

"Combined reading of provisions of section 65(105)(zr) and 65(23) of the Act throw light that cargo handling agencies are taxable entities. Cargo handling service provided by such entities attract the levy service tax. Section 65(23) has a wide amplitude and has brought all like nature activities of its fold expressly and by inclusion of such like nature activities under the class 'cargo handling services'. However classification of service under this category is subject to two exceptions/exclusions: viz.,: (1) handling of export cargo or passenger baggage and (2) mere transportation of goods. These two activities are beyond the scope of such class from taxation for rationale behind them. Accordingly, cargo handling services provided in respect of domestic cargo, only are liable to tax. Event of levy arises when service relating to or in relation to handling of cargo is provided by a cargo handling agency irrespective of mode of transport used for movement of such cargo. Precisely, following activities which are contemplated to be taxed as cargo handling service are:

(1) By express terms:

(A) Loading, unloading, packing or unpacking of cargo;

(2) By inclusion terms;

(B) Handling service relating to cargo;

(i) Provided for freight in special containers or for non-containerised freight;

(ii) Provided by a container freight terminal or, by any other freight terminal; and

(3) Cargo handling service provided which is incidental to freight.

5.4 However, the case of S.B. Construction Co. Hon'ble High Court of Rajasthan dealt with a case of handling of coal through mechanical means. In this regard we reproduce below the relevant portion of the order:_

"10. In the instant case, the coal is handled/moved from railway wagons to the site of Thermal Power Station with the aid of wagon tippling system to be fed in the boiler bunkers through conveyor system. It is evident that handling of the coal is done through wagon tippling system or conveyor system, they are mechanical devices and no motor vehicle is involved in the said handling. The clarification made by the

CBEC also supports the petitioner's contention. It clearly appears that the Service tax has been levied under the 'Cargo Handling', on such services which undertakes the activities of packing, unpacking, loading, unloading of goods to be transported by any means of transportation namely truck, rail, ship or aircraft. In the instant case the service provided by the petitioner Firm under the contract is distinct i.e. transporting coal from wagons to Thermal Power Station by conveyor belt and not by any means of transportation. Thus we are of the view that the service rendered by the petitioner under the subject contract does not fall under the ambit of Cargo Handling Services and as such it is not liable to pay the service tax."

6. In the light of above, we hold the facts of the present case is substantially the same as dealt with in the case of Gajanand Agarwal & Others (supra) and that the decision of the Commissioner treating the activities of the appellants as falling under the category of cargo handling services cannot be faulted.

7. It was submitted that there is no question of any mis-declaration or suppression with intent to evade service tax by the appellant. Service tax was introduced on 16.7.2002. They entertained bona fide belief that the activities undertaken by them are not covered under the purview of service tax during the relevant period. It was submitted that the show cause notice having been issued on 18.10.2006 relating to the period of 21.8.2002 to 2.5.2006, the demand is substantially time barred. This

submission of the Advocate deserves to be accepted as it is a question of interpretation of law and there can be no question of suppression on the part of the appellants. As a result, demand requires to be restricted for the period within the normal period of limitation and accordingly to be re-quantified. While recalculating the demand of service tax the benefit of cum-tax should also be extended. We direct the original authority to do so.

8. We have held that the issue involved interpretation of law and that there is no justification for invoking extended period of limitation and therefore, no penalties are warranted. We, accordingly, set aside the penalties imposed on the appellants.

9. Appeal is disposed of in above terms.

(Dictated & pronounced in the Open Court.)

(M. VEERAIYAN)
MEMBER (TECHNICAL)

(P.K. DAS)
MEMBER (JUDICIAL)

RK