

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

Appeal No. ST/102 /2008 - CU[DB]

Date 12/10/2011

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

To :
M/S GAYTRI CONSTRUCTION CO.
GAYTRI BHAWAN, INDIRA GANDHI NAGAR, KOTA.
M/S GAYTRI CONSTRUCTION CO.

Appellant

Vs
Respondent

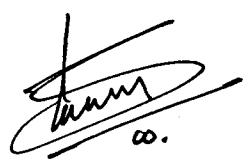
C.C.E. JAIPUR I

I am directed to transmit herewith a certified copy of **Final order No.ST/546/ 2011 CU[DB]** dated 27.09.2011
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. JAIPUR I
N.C.R.BUILDING, STATUE
CIRCLE, "C" SCHEME, JAIPUR
302005.
2. Adv. / Consult
MR.BIPIN GARG
B-1/1289,A-VASANT KUNJ, NEW DELHI
3. C.D.R
4. Bar association. CESTAT, New Delhi
5. Director Publications, Customs, Excise. I.P. Estate, New Delhi
6. M/s Centax Publications Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi -
7. Company Law Institute of India Pvt Ltd.,No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
8. Taxmann Allied Service Pvt Ltd., 59/32, New Rohtak Road, New Delhi - 110005
9. Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road,
Ahmedabad-15
10. LAWCRUX Advisors Pvt Ltd, LAW House.1-8.Sector - 10, Faridabad 121003 (Harvana)
11. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor,Vasant Arcade,Nelson Mandela Road,
Vasant Kunj, New Delhi - 110070
12. Office Copy
13. Guard file


Assistant Registrar
(Customs Appeal Branch)

**IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi – 110 066.**

Date of Hearing : 21.7.2011

Service Tax Appeal No. 102 of 2008

[Arising out of the Order-in-Appeal No. 215(RKS)/ST/JPR-I/2007 dated 12.12.2007 passed by the Commissioner (Appeals), Customs & Central Excise, Jaipur]

Coram:

Hon'ble Shri Ashok Jindal, Member (Judicial)

Hon'ble Shri Mathew John, Member (Technical)

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

M/s Gaytri Construction Co.

Appellants

Vs.

CCE, Jaipur

Respondent

Appearance:

Appeared for Appellant : Shri Mayank Garg, Advocate
Appeared for Respondent : Shri Sunil Kumar, DR

CORAM: Hon'ble Shri Ashok Jindal, Member (Judicial)
Hon'ble Shri Mathew John, Member (Technical)

Final Order No. ST/SH.6/11.....dated.....27.9.11

Per Mathew John:

During August 2002 to September 2005, the Appellants were engaged in providing certain services to M/s Shriram Cement

Works (SCW for short) for assisting in loading of cement bags from storage yard to wagon/truck using mechanized equipments. They were also engaged in shifting of coal from power plant to cement plant within the factory premises of SCW and also in shifting of the final product viz. cement from the factory to a proper storage place within the factory premises. The Appellants state its activities as under :-

“(a) Loading of cement bags into trucks and Railway Wagon

That M/s Shriram Cement Works has a mechanized plant for loading of cement bags at the company site. They required manpower for managing various points in the mechanized process. All the activities are done mechanically by machineries and conveyor belt owned by the cement manufacturer i.e. M/s SCW. The loading job is fully automated and the man power supplied by the appellant is related to only supplementing the mechanized process of loading of cement bags. The labourers provided by the appellant stand at different place in the mechanized process. The loading job are carried out through conveyor system which takes these bags to the exist point that goes right into / or wagon (sic. truck or wagon) At the exist point, the labourers simply give a helping push to the bags whenever necessary so that it falls in place and bags are properly stacked. Since labour supplied by the appellant are just supplementing the job of loading of cement bags into trucks/Railway Wagon, the services carried out by the appellant do not fall under the Cargo Handling Services. The case is squarely covered by the judgement passed in the case of M/s J.J. Enterprises Vs. CCE, Raipur reported in 186 ELT 189 (Tribunal-Delhi) and the Renu Singh & Co. Vs. Commissioner of Custom & Excise, Hyderabad 7-**STE**-397 (Tri.-Bang.). Under this head, appellant has received

the total payment of Rs.11,90,653/- during the disputed period.

(b) Internal Shifting of Goods.

The appellant has also shifted the packed cement bags from Packing Plant to Railway Platform, unloaded the cement bags from godown to storage yard at Railway Platform including stacking properly, Shifted the cement filled bags from Packing Plant to Silver Cement Godown using own truck where loading will be done by the company, shifted the packed cement bags within the platform and re-stacking, transporting/shifting the cement bags within the platform and shifting of cement bags from platform from one place to another. All these activities were carried out within the factory premises and therefore called as internal shifting of goods and being these goods are shifted within the factory premises, the goods can't be construed as goods meant for transportation. Company has signed a different agreement for loading of cement bags to truck and railway wagon with several contractors including appellant and it is not necessary that finally the appellant will carry out the job of loading of these cement bags into the trucks or railway wagon and therefore such services are distinguishable from the work of loading of cement bags of goods meant for transportation and therefore the job of internal shifting of goods are clearly outside the purview of Cargo Handling Services. Under this head, appellant has received the total payment of Rs.19,25,064/- during the disputed period.

(c) Shifting of Coal from Power Plant to Cement plant

The appellant has also carried out the job of shifting of coal from Power Plant to Cement Plant, breaking of big lumps of coal and cleaning of crusher jail etc. These activities are in the nature of handling of material within the factory premises and these materials are not meant for transportation. The coal were not transported out of the premises of SCW and

consequently no document of title is raised for any party. The appellant has carried out the entire job within the factory premises and only a meagre amount not exceeding Rs.10,000/- was charged for transporting of coal from power plant to Jagpura which is outside the factory premises. The coal was shifted using loader machine and dumper and such (sic as such) the appellant has performed the work of internal transportation only which was specifically excluded under the head of cargo handling services. Further under the agreement no relationship of bailor of bailee exists between the parties and being the goods are not transported outside the factory premises no documents of title is raised for any party. In this case also being the goods were shifted within the factory premises from Power Plant to cement plant and such goods are not meant for transportation outside the factory premises and, therefore, such goods are not comes in the definition of Cargo and, therefore, the services provided by the appellant are not covered under the CHS. Under this head, appellant has received the total payment of Rs.28,52,917/- during the disputed period.

The total payment received against each category of services as referred above during the period under appeal is given in Annexure-3 enclosed. The service recipient has also certified the nature of jobs carried out by the appellant and the copy of the certificate given by the service recipient is enclosed as Annexure-4."

2. The Revenue is of the view that the above activities are taxable under the entry for Cargo Handling Service as defined under clause (zv) of Section 65 (105) of Finance Act, 1994 and clause (23) of Section 65 of Finance Act, 1994. These are reproduced below :-

65(105)(zv) "Taxable service means any service provided or to be provided to any person, by a

cargo handling agency in relation to cargo handling services".

65(23) "Cargo handling services means loading, unloading, packing or unpacking of cargo and includes cargo handling service 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 any other services incidental to freight but does not include handling of export cargo or passenger baggage or mere transportation of cargo."

3. Show Cause Notice issued on 20.2.2006 proposing levy of tax on such services rendered during the period 16th August, 2002 to September 2005 was adjudicated by the Adjudicating Authority confirming a demand of Rs.4,39,346/- along with appropriate interest. Further, penalties under Section 75, 76, 77 and 78 for the Finance Act 1994 were also imposed. Aggrieved by the order of Commissioner (Appeals), the Appellants filed an Appeal before the Commissioner of Central Excise (Appeals) who rejected the Appeal. Aggrieved by the order of the first Appellate Authority, the Appellants have filed this Appeal before the Tribunal. The main contention of the Appellants is that when the goods are moved within the factory premises, such goods cannot be considered as "cargo" because "cargo" means something to be transported in different modes of transport like truck, rail, ship or aircraft, when goods are shifted from one location to another location inside factory premises such goods cannot be considered to be cargo.

They relied on the following decisions of the Tribunal in the matter:-

- (i) **Modi Construction Co. Vs. CCE, Ranchi** – 2008 (12) STR 34.
- (ii) **CCE Meerut-I Vs. Surinder Kumar** - 2010 (20) STR 678 (Tri.-Del.)

So the Appellants argue that there cannot be any dispute that the activity of shifting of coal from power plant to cement unit or shifting of final product viz. cement within the factory premises cannot fall within the definition of "Cargo Handling Services".

4. In the matter of loading of cement bags into trucks and railway wagon using mechanical appliances the Appellant relies on the decision of Hon'ble Rajasthan High court in the matter of **S.B. Construction Company Vs. Union of India** reported in 2006 (4) STR 545 (Raj.). He relies on paragraph 7, 8, 9 & 10 of the order which are re-produced below :-

"7. We have heard learned Counsel for the parties and perused the pleadings. In order to appreciate the controversy involved it will be necessary to look into the actual nature of job assigned to the petitioner Firm, which has been placed on record as Annexure-3. It clearly appears that the 4th respondent gave contract to the petitioner Firm for unloading the coal from railway wagon to boiler bunkers of the Thermal Power Station. The contract has been awarded for unloading of coal through WT system, stacking/reclaiming of coal to S/R system and feeding of coal to boiler bunkers through conveyor system. For the convenience it can be divided into two parts as follows :-

“(i) Unloading of coal from railway wagons through wagon tipping system and feeding to boiler bunkers of all the units through conveyor system, as required,

(ii) Transportation of picked up coal/stones, Manual unloading and stacking thereof.”

8. The scope of the said work has been summarized by the petitioner as under :-

- Unloading of coal from railway wagons through tipping system/manual unloading system.
- Feeding of Coal into the bunkers of all the units either from wagon tipplers or from Coal stacked at the stockpile area.
- Feeding of Coal to stockpile area from wagon tipplers through Stacker/Reclaimer.
- Collecting spilled coal from various conveyors, galleries, buildings, bunker floors, rail track area and putting on the near by conveyors for feeding to bunkers or stacking in stock-pile area.
- Collecting spilled Coal from various buildings/below the conveyor galleries/bunker floor etc. and transporting and stacking the same to stock-pile area at the location to be decided by the Engineer Incharge.
- Segregating coal from the refuse dump house and transporting and stacking to the stock-pile area at the location to be decided by the engineer-Incharge.
- Transportation and stacking of stones from refuse dump house/ground floor of bunkers/bunker floor/conveyors/TP's/ buildings or any other-location to the specified area in the Thermal Plant.

9. At this stage, it will be relevant to refer to definition clause which defines Taxable Services and particularly “Cargo Handling Services” as under :-

Clause 90

“.....taxable services means any service provided (zr) to any person by a Cargo Handling Agency in relation to Cargo Handling Services.”

The Dictionary meaning of word “Cargo” defined in various Dictionaries are as under :-

Webster's Dictionary :

'Cargo' - Goods and Merchandise taken on abroad, vessel, aircraft etc.

Webster's IX New Collegiate Dictionary :

'Cargo' - Goods or Merchandise conveyed in ship, aeroplane or vehicle.

Thus, it is evident that word 'Cargo' means carriage of luggage in ship, vessel or aircraft.

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 tipping system to be fed in the boiler bunkers through conveyor system. It is evident that handling of the coal is done through wagon tipping 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."

5. The Appellants point out that in the case of **S.B. Construction Company**, the cargo which came by railway wagon was being unloaded using a mechanised system to a factory and the High Court decided that such services will not come within the ambit of "Cargo Handling Services". The Appellant points out that they were doing exactly the same type of activity but while despatching the goods from the factory premises to the consumers of cement. Therefore, it is argued that the decision of

Rajasthan High Court in the above said case will apply with equal force to the facts and circumstances of the case of the Appellants.

6. The Appellants have a further case in the matter of time bar. They contest that they did not suppress any information from the department with intent to evade payment of tax. They argue that unless there is a positive act on the part of assessee to suppress information, extended period cannot be invoked. They rely on the decision of Tribunal in the case of **Associated Pigments Ltd. Vs. Supdt. of Central Excise**- 1993 (68) ELT 514 (Cal.) and the decision of Supreme Court in the case of **Pahwa Chemicals Pvt. Ltd. Vs. CCE Delhi** in 2005 (189) ELT 257 (SC) to support their argument. The Appellants also point out that in the case of **Gajanand Agarwal Vs. CCE** reported in 2009 (13) STR 138 (Tri.-Kolkata), such view was held in para 17 of the order and therefore, there cannot be any allegation of suppression against the Appellant and on this count alone they will succeed.

7. Ld. DR, on the other hand, relies on the description of activity as stated by M/s Shriram Cement Works which is reproduced below:-

"This is to certify that we have given the job/work order for loading cement bags into truck and railway wagon, shifting of bags within the factory premises, shifting of tarpaulin and ropes from plant store for lying stack, Shifting of coal from Power Plant to Cement Plant etc. to M/s Gayatri Construction Co., Gayatri Bhawan, Indra Gandhi

Nagar, Kota vide various orders during the period from 16.8.2002 to 30.9.2005.

That we have the mechanised plant/conveyor belt system of loading of cement bags at the company site. We require man power for managing various points in the mechanised process. The loading of cement bags are done mechanically by machineries and conveyors owned by us. The loading job is fully automated and the manpower supplied by M/s Gayatri Construction Co. is related to only supplementing the mechanised job of loading. The labours provided by M/s Gayatri Construction stand at different places in the mechanised loading process. The loading jobs are carried out through conveyor system which takes these bags to the exit point that goes right into the truck and loading into truck from exit point, the labours simply give a helping push to the bag whenever necessary, so that it falls in place and bags are properly staked. In a very few instances where the loader machines or conveyor belts are not reaching to the trucks, the work is carried out manually. We further certify that M/s Gayatri Construction is neither the owner of the machine nor they have taken it on rent. He is completely outsider to the mechanized process of cargo handling activity. The firm has no control on the mechanised process, in fact M/s Gayatri Construction Co. deploy only the manpower under the contract given for handling at plant site.

Under the contract, M/s Gayatri Construction Co. is also doing the job for internal shifting of goods within the factory premises. These goods are not meant for transportation and were just shifted from one place to another within the factory premises. M/s Gayatri Construction is also doing the job of shifting the cement bags from plant site to Railway platform but in such cases it is not necessary that finally they will carry out the job of loading of cement bags into the truck or railway wagon. In case of loading from platform to wagon we are paying tax since beginning.

M/s Gayatri Construction has also carried out other jobs of shifting of coal from power plant to cement plant, breaking of big lumps of coal and cleaning of crusher and these materials are not transported outside the factory. Being the goods are not transported outside the factory, no document i.e. bilty or other document of title was raised. We further certify that coal was shifted using loader machine and dumper and as such no labour was involved for loading and unloading of material."

8. The Ld. DR argues that the contract is not just for moving of goods within the factory but also for despatch of cement bags to different destinations. During such process these goods are indeed "cargo". He also points out that there is considerable activity done at Railway platform. There cannot be a case that such work at railway platform is done by an automatic mechanised system like conveyor system. Therefore, he argues that the service is squarely covered by the definition of "Cargo Handling Service" in Finance Act, 1994. He relies on the decision of **Gajanand Agarwal** (supra) wherein it has been held that such activity of loading goods on railway wagons is covered by the definition of "Cargo Handling Service". In the matter of time bar, the Ld. DR argues that the Appellant was suppressing information regarding the service being rendered by him inasmuch as the Appellant on his own did not disclose such information to the department and did not take registration and did not file ST-3 returns showing rendering of such service and the matter has been brought to light during

investigation process. It is argued by him that the department can take adequate time to gather material necessary for issuing of Show Cause Notice and the time limit prescribed in the matter under Section 73 of the Finance Act 1994 is five years from the relevant date, in such cases.

9. Considered arguments on both sides, we find that it is now well settled by the decisions of the Courts and Tribunal discussed above that shifting of goods within the factory premises will not come within the scope of "Cargo Handling Services" as decided in the case of **S.B. Construction** (supra). There is no need for much discussion on the issue. In the case of handling of goods using conveyor system also decision of Hon'ble Punjab & Haryana High Court in the said decision has held that such activity will not fall within the definition of "Cargo Handling Service". There is no information that such orders has been challenged by the Revenue or stayed by the Apex Court. The facts of the case at hand is different for that in Gajanand Agarwal where the whole payment was based on per metric tonne of cargo loaded in railway wagons.

10. In this case an issue arises at what stage the goods handled by the Appellants were in the nature of "cargo". M/s Shriram Cement Works state that in the case of loading from platform to wagon they were paying service tax from the beginning.

Therefore, essentially the present demand is for services used for transporting goods within the factory and also for manpower supplied for manual assistance at various points of loading system using conveyer system though there may be a small part of the service which may be in the nature of manual loading of cargo into railway wagons or trucks which may come within the meaning of "Cargo Handling Service." In the facts of the case the service rendered by Appellants cannot be considered as "Cargo Handling Services", in view of the decisions in the case of **S.B. Constructon Co.** – 2006 (4) STR 545 (Raj.). and **Modi Construction Company** – 2008 (12) STR 34. Therefore, the Appellant succeeds on merits. The appellant has a strong case also on time bar because essentially the contract was for shifting of cargo within factory premises and the Appellant had a bonafide belief that it was not "Cargo Handling Service" as defined in Finance Act, 1994. Accordingly, the Appeal is therefore, allowed with consequential relief, if any.

(Pronounced in open Court)

(Ashok Jindal)
Member (Judicial)

(~~Mathew~~ John)
Member (Technical)

RM