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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/334 /2007 - CU[DB]   Date **24/01/2012**

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

To : M/S SINGH TRANSPORTERS,
78, SHANTI NAGAR, AMERI ROAD,
NEAR MPEB POWER STATION,
P.O. MANGLA, BILASPUR 495001.

M/S SINGH TRANSPORTERS Appellant

Vs

C.C.E. RAIPUR Respondent

I am directed to transmit herewith a certified copy of **Final order No.ST/A/82/ 2012 CU[DB]** dated 23.01.2012 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. RAIPUR
CENTRAL EXCISE BUILDING,
DHAMTARI ROAD, TIKRAPARA,
RAIPUR 492001.

2. Adv. / Consult
MR.V. LAXMIKUMARAN
B-6/10, SAFDARJUNG ENCLAVE,
NEW DELHI-110029

3. C.D.R
4. Bar association, CESTAT, New Delhi
5. Director Publications, Customs, Excise. I.P. Estate, New Delhi
6. M/s Centax Publictions Pvt Ltd.,1512-B, Bhishm Pitamah marg,Opp. ICICI Bank of Defence Colony, New Delhi-3
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 (Haryana)
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)

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
WEST BLOCK NO.II, R.K. PURAM, NEW DELHI-110066.

DIVISION BENCH
Court No.3
Service Tax Appeal No.ST/334/2007-Cus
(Arising out of Order-in-Appeal No.RPR/19/2002 dt.23.3.07 passed by the CCE(A), Raipur)

Date of Hearing: 18.8.2011
Date of decision:

For approval and signature:
Hon'ble Mrs.Archana Wadhwa, Member (Judicial)
Hon'ble Mr.Mathew John, Member (Technical)

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 should 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 Transporters — Appellant
Vs
CCE, Raipur — Respondent

Present for the Appellant: Shri B.L.Narsimhan,Advocate
Present for the Respondent: Shri Sonal Bajaj, SDR

Coram: Hon'ble Mrs.Archana Wadhwa, Member (Judicial)
Hon'ble Mr.Mathew John, Member (Technical)

Final **ORDER NO.** 87/A/82/12-Cus

PER: ARCHANA WADHWA

Vide his impugned order, the Commissioner has confirmed the service tax of Rs.56,36,761/- against the appellant for the period from 16.8.02 to 30.5.04 on the finding that they have provided services under the category of "cargo handling service" to M/s. Steel Authority of India, Bhilai Steel Plant. In addition a penalty of identical amount stands imposed under section 78 of Finance Act, 1994 alongwith imposition of penalty under sections 75A, 76 and 77 of Finance Act, 1994.

2. As per facts on records, the appellant entered into a contract with SAIL for breaking of over size dolomite boulders, crushing/screening of ROM dolomite, loading and transportation relating to breaking of dolomite rocks, separation of waste/reject, crushing/screening of rock and loading of dolomite by mechanical means etc.

3. Dolomite is used in steel making chiefly for refractory purposes. SAIL uses the dolomite for the production of pre-fluxed sinter. In the sinter plant it is used in the form of chips and as refractory material in the open hearth furnaces for fettling and steel making.

4. After due investigation, show cause notice dated 22.9.04 was issued by the Revenue alleging that the activities rendered by the appellant fall under the category of "cargo handling service" and as such are liable to service tax. The said show cause notice was contended by the appellant on merits as also on limitation. However, the adjudicating authority, by rejecting the appellant's plea held that the services provided by them are "cargo handling service" and accordingly confirmed the tax alongwith imposition of penalties. The present impugned order passed by the Commissioner stands assailed by the appellant on merits as well as on limitation.

5. After hearing both sides, duly represented by Shri Ravi Raghvan, learned Advocate appearing for the appellant and Shri

Sheo Narayan Singh, learned JCDR appearing for the Revenue, we find that the tender invited by SAIL and schedule of work under the contract and entered into by the appellant with SAIL specified the nature of the work required to be done by the appellant is as under:

(1) Breaking of Oversize (+500 mm) dolomite boulders available in the stockpile spreading to distance 1 Km of crusher site by means of mechanical rock breaker machine, which is mounted on excavator to obtain (-) 500 mm feed size. Loading of dolomite (0-500 mm) size from stockpile by means of mechanical Excavator/loader, into tippers, transporting to a maximum Lead up to 1 km and unloading into hopper over a grizzly Feeder of crushing unit, crushing and screening to obtain following sizes. Stack the same into piles of sufficient height separately by means of conveyor as crushing site.

(a) Separation of 0-6 mm/0-10 mm waste/reject material through vibrating grizzly. Loading by shovel/pay loaders into contractors own tippers from above stack and transporting the same to waste dump located up to distance up to 0.952 m.

(b) Obtaining of SP Grade 0-60 mm/6-60 mm/10-60 mm size fractions after crushing & screening. Loading by shovel/pay loaders into contractors own tippers by above stack and transporting to Dadhapara Railway Siding at a distance of 6.422 km.

(c) Obtaining of SP Grade 8-20 mm/10-25 size fractions after crushing & screening. Loading by shovel/pay loaders into contractors own tippers by above stack and transporting to Dadhapara Railway Siding at a distance of 6.422 km.

(2) Loading of Dolomite of various sizes i.e. (a) 8-20/10-25 mm sizes, (b) 0-60 mm/6-60 mm size, fractions into Railway Siding Wagons at Dadhapara Siding by mechanical means."

6. The tender also requires the appellant to have following technical requirements:-

(i) *Rocker Breaker*
(ii) *Hydraulic Excavator*
(iii) *Pay Loader*
(iv) *Tippers*
(v) *Crushing and Screening Plant*
(vi) *Skilled, Unskilled and Supervisory Manpower.*

7. It is seen that mining and excavating of dolomite is done by the employees of the SAIL, who transport the dolomite boulders which is known as "Run of Mine" (ROM) from the mine to stockpile which is about 1-2 km from the area of excavating but is within mine, the appellant starts their work of stockpile and load the dolomite boulders into tippers using excavator, transport them and unloads them into the hopper of the crusher, which is about 05. to 1 km away from the stockpile. The crusher is located within the mine area.

8. The crusher is owned and operated by the appellant. The crushed dolomite is screened by a "Vibrating Screen" into various sizes of 0-10 mm, 10-60 mm, 0-60 mm, 10-25/10-30 mm and is carried by Belt conveyors and dropped at designated stacking places. The stacking place is also located within the mine. 06 mm and below size material is treated as waste. The appellant loads the waste into tippers by using Pay Loader, transports it from the stacking place to about 1 km away and unloads the waste into waste dump. The waste dump is also located within the mine.

9. The aforesaid different sizes of dolomite (0-10 mm, 10-60 mm, 0-60 mm, 10-25/10-30 mm) are loaded into Tippers by Pay Loaders from the stack and they carry them to and unload them at Dadhpara Railway Siding, which is about 6.422 kms from the mine. SAIL officials issue Gate pass/Transit pass showing the quantity being transported by each Tipper from the mine to Dadhpara Railway Siding.

10. At the Railway Siding, which is private siding of SAIL within the mining lease area, the dolomite is loaded into open Railway Wagons. This loading operation is done by the Pay Loaders (mechanised means). Pay loaders come under the category of Heavy Earth Moving Machineries (HEMM). The work of the Appellant ends on loading the dolomites in the Railway wagons.

11. The dolomite so transported by Railway wagons is unloaded in the premises of Bhilai Steel Plant and is used by them for manufacturing steel.

12. In the above background of the work being done by the appellant, now definition of "cargo handling service" as provided under section 65 of Finance Act, 1994 can be looked into for the purpose of concluding as to whether the appellant have provided such service or not. For ready reference, we reproduce the definition as appearing in section 65 (21) of Finance Act, 1994:-

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

13. The Commissioner, while examining the issue before him, has observed that the activities undertaken under the contract includes loading, unloading, packing or unpacking of cargo, which stands specifically covered under the definition without stipulating any condition about the manner in which the cargo is subsequently handled. Inasmuch as the appellant is engaged for executing the work of loading of 0-6 mm dolomite to waste dump and rest of the dolomite to Dadhapara Railway Siding and for loading it to Railway wagons, the definition of cargo handling service stands satisfied. He has detailed the work executed by the appellant as under:-

(i) *Loading of dolomite (0-500 mm) size from stockpile by means of mechanical excavator/loader into tripper.*

(ii) *Unloading the above into hopper over grizzly feeder of crushing unit, which is situated at a distance of 1 km from the Mechanical Excavator.*

(iii) *Loading of 0-6 mm/0-10 mm Waste/Reject material by shovel/pay loader into contractors own tripper after separation through vibrating grizzly.*

(iv) *Loading of 0-6 mm/6-10 mm/10-60 mm size fractions of dolomite by shovel/pay loaders into contractors own trippers before transporting to Dadhapara railway siding.*

(v) *Loading of 8-20 mm/10-25 mm size fractions of dolomite by shovel/pay loaders into contractors own trippers before transporting to Dadhapara railway siding.*

(vi) *Loading of dolomite of various sizes into railway wagons at Dadhapara Railway siding by mechanized means.*

14. He has concluded that the appellants have rendered the services cargo handling as defined under the Act. As such, by taking into account the entire consideration received by the appellant for various items of work, including crushing, sorting, transportation within the mine as also loading it into Railway wagons, he has confirmed the service tax liability against the appellants.

15. We, after examining the contract, find that the same was entered into between the appellants and SAIL for the main job of breaking and crushing of dolomite boulders. The said contract was entered into in response to the tender floated by SAIL, which required the person having technical requisites and having possession of various technical equipments. The primary job of the appellant was breaking the dolomite boulders, separating the various sizes including the separation of waste and reject through vibrating grizzly. Amended section 65 (23) of Finance Act, 2003 defines "cargo handling service" means loading, unloading, packing and unpacking of cargo. Further, section 65 (105) (zr) of Finance Act, 1994 defines "taxable service" means any service provided or to be provided to any person, by a cargo handling agency in relation to cargo handling services. The word 'cargo' is not defined in the Act. The dictionary meaning of the word 'cargo' reads as follow:-

Random House Compact Unabridged Dictionary	Cargo 1.the lading or freight of a ship, airplane, etc. 2.load
The New Lexicon Webster's Dictionary	Cargo the freight of goods or luggage carried by a ship, aircraft, etc.
Chambers English Dictionary	Cargo

	the goods carried by a ship or aeroplane; any load to be carried.
The Penguin English Dictionary	Cargo the goods conveyed in a ship, aircraft, or vehicle, freight.
Collins Cobuild English Dictionary for Advanced Learners	Cargo Cargo of a ship or place is the goods that it is carrying
The Compact edition of the oxford English dictionary	Cargo 1.freight or lading of a ship, a ship-load

16. As can be seen from the above word 'cargo' relates normally to goods carried by ship but definition could be extended to carriage of goods by other forms of transporting the goods i.e. rail, air or road. The Board vide its Circular F.No.B11/1/2002-TRU dt.1.8.2002 has clarified that services liable to tax under the said category are services provided by cargo handling agency who undertakes the activities of packing, unpacking, loading and unloading of goods to be transported by any means of transport, namely, truck, rail, ship or aircraft.

17. The appellants have contended that on completion of breaking oversize dolomites, movement of the same is upto maximum 1 km within mine and that the activities of loading and unloading are within 1-2 km from the end point of one activity to initial point of another activity. The entire loading and transportation is within mines itself and there is no lorry receipt, goods receipt etc. issued for such transportation of the goods. No bailment and no document of title are issued in respect of dolomite loaded and transported within mines. It is only after completion of aforesaid activities in the mine area, dolomites of various sizes are loaded by mechanical means and transported to Dadhapara Railway sidings from where it is loaded in

wagons by mechanical means and sent to Bhilai. A separate consideration for the said activity is specified in the contract.

18. At this stage, we refer to some the precedent decisions of the Tribunal. In the case of N.Rajashekhar & Co. vs. CCE-2008-TIOL-1531-CESTAT-BAN, the activity of breaking and crushing of limestone into jelly and transportation of the same was held as not covered under the definition of "cargo handling service". In the case of CCE, Bhubaneswar-II vs. B.K.Thakkar-2008 (9) STR 542 (Tri.-Kolkata), it was held that contract entered into by the appellant with SAIL for excavation, transportation and feeding of iron ore to the hill top crusher plant for further processing of iron ore were held to be mining service which has been brought under service tax net only with effect from 1.6.2007. The contract was held as not for loading or unloading or handling of cargo so as to fall under "cargo handling service". In the case of Sanik Mining & Allied Services Ltd. vs. CCE & C, Bhubaneswar-2008 (9) ELT STR 531 (Tri.-Kolkata), it was held that transportation of coal within mining area from the coal face to tippers cannot be held to be covered under "cargo handling service". In the case of CCE, Jaipur-I vs. Girraj Brothers-2008 (10) STR 549 (Tri-Del.), it was held that a series of activities starting from mine to delivery of the lime stone to the designated place of client cannot be held to be falling under the category of "cargo handling service". Inasmuch as the assessee cannot be held to be an agent in the context of rendering of services of the cargo handling. It was further observed that the cargo handling service, even if taken as separate service rendered, the same is rendered to the respondent himself in completing the entire work assigned to the respondent by the

contract. Further, in the case of Modi Construction Co. vs. CCE, Ranchi-2008-TIOL-1627-CESTAT-KOL, it was held that transportation of raw materials, waste material and finished product from one place to another within the factory will not fall under the cargo handling service, which requires the service provided to be integrally or inseparably connected with handling of cargo or attributable thereto without being a mere activity of transportation of such cargo. The Tribunal accordingly observed that it can be safely concluded that loading and unloading, packing or unpacking of the cargo and handling of cargo for freight in special container or non-containerized freight and service provided by container freight terminal or other freight terminal for all the modes of transport only are subject matter of taxation under the class of cargo handling service. To the similar effect are the other decisions of the Tribunal that movement of the products within mining area is not covered under the cargo handling service.

19. When we examine the activity undertaken by the appellant as reflected in the agreement, in the light of the above decision of the Tribunal, we note that prime work for which the contract was awarded to the appellant for crushing, screening and sieving of the dolomite in the mining area. The movement of the end product from site of one activity to the site of second activity for further work upon the same is within the mining area. As such, it can be safely concluded that the said activity, being within mining area cannot be held to be covered by the definition of cargo handling service. That brings us to the last as to whether the loading of final product i.e. dolomite of various sizes from the mining area and transportation of

the same to the Dadhapara Railway sidings from where it is being loaded in wagons by mechanical means for further transportation of the same to Bhilai would get covered by the definition of "cargo handling service" or not. As is seen from the definition of cargo handling service extracted above, in the preceding paragraph, we find the same would include loading and unloading of cargo for all modes of transportation. As such, it appears to us that the activity of loading of finally processed dolomites at Dadhapara Railway sidings for transportation of the same to Bhilai would get covered by the definition of "cargo handling service". Learned Advocate had drawn our attention to the Hon'ble Rajasthan High Court in the case of S.B. Construction Company vs. Union of India-2004 (4) STR 545 (Raj.). Para 10 of the said judgement reads as under:-

"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."

20. As is clear from the above, the activity involved in that case was transportation of coal from wagon to thermal power station by conveyor belt and not by means of transportation. It was in the circumstances of the case, Hon'ble High Court held that the activity is not covered under the cargo handling service. Contrary to the above, we find in the present case that a part of the service being provided by the appellant includes loading of dolomites in wagons for further transportation of the same to Bhilai. As such, it is not the case of unloading from where transportation has already been completed but a case of loading, for further transportation of the same. As such, that part of the activity which involved loading of dolomite in the railway wagons for further transportation of the goods, to Bhilai Steel plant would get covered under the definition of the cargo handling service. It is seen from the work order dt.3.12.01 placed by SAIL on the appellant the consideration for the said activity stands separately specified as amounting to Rs.1,26,32,183.49. The said consideration alone would be liable to service tax under the category of "cargo handling service".

21. The appellant has stressed on the fact that such activity is carried out using mechanical appliances like pay loaders and tippers and therefore the activity is not cargo handling service. There is a clarification from the Board that handling of cargo using mechanical means is not covered by cargo handling service. But the clarification is in the context of mechanized means like conveyor system. This cannot be interpreted to mean that of any equipment like pay loader, tipper or shovel are used the activity will fall outside the scope of the

entry. "Cargo handling service" does not have to be done necessarily by ~~land~~ hand.

22. For arriving at the above finding, we may refer to the decision of the Tribunal in the case of M/s.Gajanand Agarwal vs. CCE, Bhubaneswar-2008-TIOL-2076-CESTAT-KOL wherein loading of coal on railway wagons for further transportation were held to be covered under the category of "cargo handling service". For better appreciation, we reproduce a part of para 17 of the said judgement:-

"It was noticed from the agreement of the parties that time was essence of the contract. The nature of activity that was carried by the appellants was to load the cargo i.e. coal in the Railway wagons. Such an activity squarely falls under the definition of cargo handling service provided by section 65 (23) read with Section 65 (105) of the Finance Act, 1994 and brings the appellants to the fold of law for such service provided. Accordingly, we decline to intervene to the orders passed by the Ld. First Appellate Authority."

23. In view of the above, we hold except above activity of loading of the dolomite in the wagons at Dadhapara Railway sidings for further movement of the same to Bhilai, the demand for the rest of the activity is not sustainable. In respect of the above, activity of transportation, which has been held to be falling under the category of "cargo handling service", we find that the demand issued and confirmed by invoking longer period limitation. Inasmuch as the issue involved is of legal interpretation of the definition of the various services and being a complicated issue, the assessee cannot be

saddled with any suppression or mis-statement or malafide intention so as to invoke longer period of limitation. We take note of the fact that there have been many disputes of this nature coming up before the Tribunal and this shows the contentious nature of the dispute. Even in the relied upon judgement in the case M/s.Gajanand Agarwal vs. CCE, Bhubaneswar, the Tribunal set aside the penalty by observing that there cannot be any wilful suppression justifying the invocation of penal provisions. We direct the lower authorities to re-quantity the demand of the service tax only on consideration received for movement for loading of dolomite at Dadhapara Railway sidings for further movement of the same to Bhilai. The said re-quantification is required to be done within normal period of limitation.

24. As we have observed that there is no malafide on the part of the appellant, imposition of penalty upon them is not justified. The appeal is disposed of in the above manners.

(Pronounced in the open court on 23/1/12)

(ARCHANA WADHWA)
MEMBER (JUDICIAL)

(MATHEW JOHN)
MEMBER (TECHNICAL)

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