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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/431 /2008 - CU[DB] Date **27/01/2012**

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

To :
M/S R.K.TRANSPORT COMPANY
NAVKAR PARISAR, PULGAON NAKA,DURG,
DISTT- DURG(CG) 491001

M/S R.K.TRANSPORT COMPANY Appellant

Vs

C.C.E. RAIPUR Respondent

I am directed to transmit herewith a certified copy of **Final order No.ST/A/84/ 2012 CU[DB]** dated 25.01.2012 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)

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

Date of Hearing : 4.8.2011
Date of Pronouncement :

Service Tax Appeal No. 431 of 2008

[Arising out of Order-in-Original No. COMMISSIONER/RPR/30/2008 dated 27.3.2008 passed by the Commissioner of Central Excise, Customs & Service Tax, Raipur]

Coram:
Hon'ble Ms. Archana Wadhwa, 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?	Yes
3.	Whether their Whether their Lordships wish to see the fair copy of the order?	Seen
4.	Whether order is to be circulated to the Department Authorities?	Yes

M/s R.K. Transport Company — Appellant

Vs.

CCE, Raipur — Respondent

Appearance:

Appeared for Appellant : Shri B.L. Narasimhan, Advocate
Appeared for Respondent : Shri Sunil Kumar, SDR

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

Final Order No. ST/A/84/12-Cus dated 25.1.2012.

Per **Mathew John:**

The Appellants are engaged in activities of mining for excavation of bauxite ore, loading of the same into trucks at the stock yards, transportation of the same by road and unloading of the same at specified area. They were engaged in providing such service to Bharat Aluminum Company Ltd. (BALCO), Korba and Hindalco Industries Ltd. (HINDALCO), Renukoot during the period Aug 2002 to March 2006.

2. Revenue was of the view that the service rendered by the Appellant to BALCO and HINDALCO was classifiable under "Cargo Handling Service" and they should have paid service tax. A Show Cause Notice dated 23-10-07, based on such proposition was issued and adjudicated resulting in confirmation of tax demand of Rs.11,54,31,297/- along with interest and penalty equal to the same amount imposed under section 78 of the Finance Act, 1994. Aggrieved by the order the Appellants have filed this appeal before the Tribunal.

3. Definition of Cargo Handling Service under section 65(23) of the Finance Act 1994, during the relevant period was as under:

> *"(23) "cargo handling service" means loading, unloading, packing or unpacking of cargo and includes cargo handling service provided for freight in special containers or non-containerized freight, services provided by a container freight terminal or 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"*

4. The appellants contest that the activity undertaken by them would not be covered by the above definition. Their contract is for

integrated activity of mining which is brought under service tax levy under "mining service" introduced with effect from 01-06-2007. The composite service rendered by them should be classified in terms of section 65A of the Act. Integrated mining activity cannot be vivisected and subjected to tax. Excavation of bauxite amounts to production and hence is an activity chargeable to excise duty and not service tax.

5. For the period from 01-01-05 service tax has been discharged on the entire consideration received for transportation of goods by the receiver of under the head of Goods Transport Agency Service and no demand can survive for this period. In the case of activities other than transportation they submit that they have paid tax from 16-06-05 under the head of Business Auxiliary Service because from that date production of goods for clients was covered in the definition of service tax. For the period prior to 01-01-2005/16-06-2005 no service tax is legally tenable as neither GTA nor Business Auxiliary Service was in force. A service which is covered under mining service from 01-06-2007 cannot be considered to be covered by any other service for the earlier period. At any rate the activity of the appellants cannot be considered as cargo handling service. If any part of the activity is considered to be cargo handling service for that reason service tax cannot be levied on the entire receipts under the contract.

6. The Counsel for the appellant argues that handling of cargo within a factory or mines cannot be considered as handling of cargo. He relies on the following decisions, among others, to buttress his argument:

(i) **S.B. Construction Co Vs. UOI**-2006 (4) STR 545 (Raj)

(ii) **Modi Construction Co. Vs. CCE**-2008 (12) STR 34 (Tri);

(iii) **Sainik Mining & Allied services Ltd. Vs. CCE**-2008 (9) STR 531 (Tri)

(iv) **CCE Vs. Vinshree Coal Carriers Pvt. Ltd**-2008 (10) STR 473;

7. The Appellants have also the argument that the demands are time barred. He submitted that the scope of "cargo handling service" was under confusion as can be seen from Board's Circular F. No. 232/2/2006-CX-4 dated 12-11-07. Further when they got registered for payment of tax under the category of Business Auxiliary Service in Dec 2006 they had disclosed the contract to the Department. Further if at all any tax was payable the receiver of the service viz BALCO/HINDALCO could have taken credit of the service tax paid and there could not have been any intention to evade tax. They contest that mere non-registration under a particular category cannot consider as suppression of information with intent to evade payment of duty especially in a situation involving interpretation of law.

8. The Ld SDR on the other hand relies on Circular 232/2/2006-CX-4 dated 12-11-07 issued by CBEC when mining service was brought under tax net by Finance Act, 2007. Relevant portion of the circular reads as under:

> *"Subject : Applicability of Service tax on activities undertaken at mines prior to enactment of the Finance Bill, 2007 - Regarding*
>
> *It may be recalled that vide appropriate entry in the Finance Act, 2007, 'service provided by any person to any other person in relation to mining of minerals, oil or gas' has been comprehensively brought under the ambit of service tax with effect from 1-6-2007. However, for the prior period, certain disputes relating to chargeability of service tax on some of the services provided to mining sector were reported. In this regard, a draft circular dated 9-10-06 was put up on the official web-site, soliciting response from the stakeholders. The responses received have since been examined.*
>
> *2. The mining sector (such as the coal mines, mining of ores, etc.) mainly receive the following types of services, mostly on contract basis :-*
>
> *(i) Excavation/drilling and removal of the overburdens (i.e. stratum, layer of mud, boulders, etc, that needs to be removed during or prior to extraction of coal/minerals).*
>
> *(ii) Coal cutting or mineral extraction and lifting them up to the pithead.*
>
> *(iii) Handling and transportation of coal/mineral from pithead to a specified location within the mine/factory or for transportation outside the mines.*
>
> *3. **Excavation/drilling and removal of the overburdens:***
>
> *These activities are essentially in the nature of site formation, clearance, excavation and earth-moving. As clarified earlier vide circular B1/6/2005-TRU, dated 27-7-2005 (para 6.2) [2007 (1) S.T.R. C48], the definition of site formation and clearance, excavation and earth-moving and demolition service is an inclusive definition and activities specifically mentioned are indicative and not exhaustive. Prior to construction of buildings, factory or any civil structure, activity of mining or clearance, excavation and earth moving or levelling are normally undertaken for a consideration to make*

the land suitable for such activities. Such services include blasting and rock removal work, clearance of underground, drilling and boring, overburden removal and other development and preparation services of mineral properties and site, and other similar excavating and earth-moving services. Hence, these activities are taxable under the category of site formation and clearance, excavation and earth-moving and demolition service w.e.f. 16-6-2005.

4 Coal cutting or mineral extraction and lifting them up to the pithead :

These activities are essential integral processes and are part of mining operations. As stated earlier, mining activity has been made taxable by legislation under the Finance Act, 2007 (w.e.f. 1-6-2007). Prior to this date, such activities, being part of mining operations itself are not subjected to service tax. Therefore, no service tax is leviable on such activities prior to the said date.

5. Handling and transportation of coal/mineral from pithead to a specified location within the mine/factory or for transportation outside the mine :

These activities are post-mining activities and are chargeable to service tax under the relevant taxable services, i.e., "Cargo Handling service" and "Goods Transport by Road". However, in case, such transportation is undertaken by mechanical systems, such as conveyor belt system, ropeway system, merry-go-round systems etc., and the same is not transported by road, no service tax would be chargeable. Service tax is, however, chargeable under cargo handling service, even if the loading, unloading and similar activities are done using mechanical systems.

6. The above are the general guidelines for settlement of pending disputes. These should be applied to individual cases keeping in view the facts and circumstances of each case."

9. The Ld SDR points out clause 1.12 of the contract with BALCO and clause 1.29 of the contract with HINDALCO to argue that the work done by the appellants includes loading and unloading of cargo at places outside the mine also. The said clauses read as under:

"**1.12** Transportation by road of Bauxite from the Kesra/Kudardihi/any other area of Mines of company located at Mainpat, Distt. Sarguja (Chattisgarh), including loading of Bauxite into trucks from Stock yard at Mainpat. Weighment of truck (both tare and gross wherever facility of weighment is available), transportation up to Company Bauxite yard and Alumina Plant. Weighment of truck inside Plant (both gross and tare), unloading the Bauxite. Any other work not specifically indicated but required to complete the work is deemed to be included in the scope of Contractor".

"**1.29** Loading of trucks at the mines stack yard and unloading at Meralgram Railway Siding shall be the sole responsibility of the contractor at its own cost. The loading/unloading time will be from 6 AM to 6 PM."

10. The Ld. SDR relies on para 10 of the impugned order to point out that the appellants already accept that their contract can be vivisected. It is pointed out that they have already paid service under the category of Business Auxiliary Service, Site Formation and Clearing Service and Mining Service based on such composite contract and the receiver of the service has already paid service tax on the services in the nature of Goods Transportation by Road. But the Appellants are not paying tax on cargo handling service based on the argument that the contract cannot be vivisected.

11. The Ld. SDR points out clause 2.1 of the agreement with HINDALCO according to which the payment for mining is Rs. 192 per ton and Rs. 588 per ton for transportation. So he argues that the argument that mining is the predominant activity is not correct at all.

12. The Ld. SDR also relies on the decision of the Tribunal in the case of **Gajanand Agarwal Vs. CCE**-2009 (13) STR 138 to support his argument.

13. The Ld SDR also points out that despite repeated requests from the department the appellants did not disclose the details of the contract and they did not file returns. He says there is deliberate attempt on the part of the appellants and their principal to classify the service under that of Goods Transport Agency with intention to avail the abatement of 75% and hence extended period can be justifiably invoked in this case.

14. We have considered arguments on both sides and perused the relevant contracts. The question whether a bundle of services can be vivisected into different services has been considered by the Larger Bench of the Tribunal in the case of **CCE Vs. BSBK Pvt. Ltd** - 2010 (253) E.L.T. 522 (Tri. - LB). The Tribunal held that turnkey contracts can be vivisected and discernible service elements involved therein can be segregated and classifiable as well as valued for levy service tax under Finance Act, 1994 provided such services are taxable services as defined by that Act and depending on the facts and circumstance of each case. So we are not able to agree with the contention of the Appellants that a bundle of services cannot be vivisected. However this issue is to be examined with reference to facts of each case.

15. Nothing in the two contracts indicates that these contracts had any significant component of cargo handling other than transportation. In the activities carried out by the appellants there appears to be a small component of loading and unloading of cargo. The contract with BALCO has an integrated rate of Rs. 485 per ton for mining, transportation, loading and unloading. In the case of HINDALCO there are two components in the compensation rate, one for mining and another for transportation. No separate activity of cargo handling is mentioned or rate specified. Obviously the component for transportation will depend on the distance of transportation. But the main activities are that of mining and transportation. By now it is well settled that handling or transportation of goods within a factory or mining area does not amount to cargo handling because at that stage the goods are not cargo within the common meaning of the word. As per records of the case, on the entire component of transportation the receiver of the service has already paid service tax under the category of services of Transportation of Goods by Road. No separate component of compensation for loading and unloading is seen from the contract. In this respect the contract under consideration is different from the contract considered in the case of **Gajanand Agarwal** where there was a rate for loading of railway wagons based on the number of wagons loaded. In the contracts under consideration there is a predominant activity of transportation. The cargo handling activity is incidental to transportation. Revenue's attempt to convert such services into cargo handling service to

deny the abatement available to value of services of Transportation of Goods by Road is too far fetched to find any legal support. It can be seen from clause 4.00 of the contract with HINDALCO that the base transportation charge was fixed at Rs. 588 per ton for a distance of 460 KM. There is no attempt to show that this is an unreasonable rate for transportation, jacked up on account of value of cargo handling included in it. The definition of cargo handling service includes cargo handling incidental to freight. The definition does not specifically include transportation. It specifically excludes "mere transportation". So the definition cannot be interpreted to mean that if a transporter who transports goods for 460 KM does loading and unloading also, the service rendered by the transporter will no longer be transportation but "cargo handling service". So we see merit in the contention of the Appellants that they were providing services of transportation of goods and not cargo handling service.

16. So the Appeal is allowed with consequential relief.

(Pronounced on 25-01-12)

(Archana Wadhwa)
Member (Judicial)

(Mathew John)
Member (Technical)