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

Date of Hearing/Decision: 8.2.2017

Appeal No. ST/3862/2012-DB

(Arising out of Order-in-Appeal No. 116(RDN)ST/JPR-II/2012 dated 5.10.2012 passed by the Commissioner (Appeals), Central Excise, Jaipur)

CCE, Jaipur-II — Appellant

Vs.

M/s Gandhar Rock — Respondent

Appearance

Ms. Neha Garg, D.R. - for the appellant

Ms. Rinky Arora, Advocate - for the respondent

CORAM: **Hon'ble Mr. Justice (Dr.) Satish Chandra, President**
Hon'ble Mr. Ashok K. Arya, Member (Technical)

Final Order No. 50807/2017

Per Justice Dr. Satish Chandra:

The present appeal is filed by the Department against the Order-in-Appeal No. 116/2012 dated 5.10.2012 .

2. The brief facts of the case are that during the relevant period (8.10.2005 to 31.8.2009), the appellant was engaged in providing services under the category of cargo handling services. The department was of the view that the same is subject to service tax. After issuing the show cause notice, the demand of service tax was made along with penalty and interest. But by impugned order in appeal, the said demand was set aside. Being aggrieved, the department has filed the present appeal.

3. With this background, we have heard Dr. Neha Garg, ld. Counsel for the department who submits that the sole dispute in the present appeal is pertaining to diesel which was supplied free of cost to the respondent/assessee. She relied on the order in original.

4. On the other hand, ld. Counsel Ms. Rinky Arora relied on the impugned order. She submits that in the instant case, the diesel was provided for specified job. The respondent neither takes out the diesel or used it for any other purpose nor allowed to take equipment outside the factory premises till the work is over. Hence, the principal activity of the respondent i.e. providing the service does not fall within the ambit of the definition of Cargo Handling Service.

5. After hearing both the parties and on perusal of record, it appears that the issue is squarely covered in favour of the appellant as per the ratio laid down in the case of ***CCE Vs. M/s S.B. Construction Pvt. Ltd.*** – 2014-TIOL-1654-CESTAT-DEL, where it was observed as under :

> "5. The issue of includibility of the value of free supplies in the gross amount charged has been decided by the Larger Bench of CESTAT in the case of Bhyana Builders (P) Ltd. Vs. Commissioner of Service Tax, Delhi – 2013 (32) STR 49 (Tri.-LB) = 2013-TIOL-1331-CESTAT-DEL-LB, wherein it has been unambiguously held that the value of free supplies by the service receiver to the service provider is not includible in the 'gross amount charged' by the service provider from the service receiver. In view of this, any further discussion on the issue involved is unnecessary and unwarranted. It is accordingly held that the demand confirmed on the

basis that the value of diesel supplied free of cost by the service receiver is includible in the gross amount charged is unsustainable. When the demand itself is not sustainable, the question of any penalty simply does not arise."

Similar views were expressed in the following cases :

(i) ***Bhayana Builders (P) Ltd. Vs. CCE, Raipur*** – 2013 (32) STR 49 (Tri.-Delhi.)

(ii) ***Karamjeet Singh & Co. Ltd. Vs. CCE, Raipur*** – 2013 (32) STR 740 (Tri.-Delhi)

(iii) ***CCE, Pune-II Vs. V.B. Patil Kanwade Associates*** – 2014-TIOL-26-CESTAT-MUM

(iv) ***Baliram Gopal Mahajan Vs. CCE Nashik*** – 2014-TIOL-90-CESTAT-MUM

(v) ***S.V. Engineering Constructions Vs. CCE, Guntur*** – Final Order No. 27220/2013 dated 31.12.2013 – 2016 (46) STR 589 (Tri.-Hyd.)

(vi) ***ATR Constructions Pvt. Ltd. Vs. CCE, Ghaziabad***– 2014-VIL-48-CESTAT-DEL-ST = 2014 (35) STR 92 (Tri.-Del.).

6. In the light of the well settled legal position above, we find no reason to interfere with the impugned order. The same is hereby sustained along with reasons mentioned therein.

7. In the result, the appeal filed by the department is dismissed.

(Dictated & pronounced in open Court)

(Ashok K. Arya)
Member (Technical)

(Justice Dr. Satish Chandra)
President

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