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

COURT NO. IV

DATE OF HEARING : 08/11/2017.
DATE OF DECISION : 08/11/2017.

Service Tax Appeal No. 78 of 2012

CCE, Raipur — Appellant

Versus

Shri Gyan Singh — Respondent

Service Tax Appeal No. 654 of 2012

Shri Gyan Singh — Appellant

Versus

CCE, Raipur — Respondent

[Arising out of the Order-in-Appeal No. 33 (ST)/RPR-I/2011 dated 17/10/2011 passed by The Commissioner (Appeals), Central Excise & Customs, Raipur, Chhattisgarh.]

Appearance

Shri Sanjay Jain, Authorized Representative (DR) – for the appellant/respondent.

Shri Manish Saharan, Advocate – for the respondent/appellant.

CORAM: **Hon'ble Shri S.K. Mohanty, Member (Judicial)**
Hon'ble Shri B. Ravichandran, Member (Technical)

Final Order No. 57807-57808/2017 Dated : 08/11/2017

Per. B. Ravichandran :-

Both Revenue and assessee are in appeal against common impugned order dated 17/10/2011 of Commissioner (Appeals), Central Excise & Customs, Raipur. The assessee/appellant are engaged in unloading, loading and transportation of iron ore from Bilaspur Railway siding to various factories of manufacture of sponge iron. They are registered with the Revenue under the category of Cargo Handling Service and GTA service. Certain verification of records were conducted by the Revenue in the premises of the appellant. On completion of enquiry, the Revenue entertained a view that the assessee/appellant is not discharging service tax properly on their activities to be classified under Cargo Handling Service. Proceedings were initiated against the assessee/ appellant by issue of show cause notice dated 30/09/2009. The same was adjudicated by the Original Authority vide order dated 10/12/2010. A service tax liability of Rs. 20,80,306/- was confirmed against the assessee/appellant alongwith penalty of equivalent amount under Section 78 and further penalties under Section 76 and 77 of Finance Act, 1994. On appeal, vide the impugned order, the Commissioner (Appeals) upheld the original order except setting aside the penalty under Section 76 on the ground that the legal provisions do not provide for imposition of simultaneous penalties under both Section 78 and 76.

2. The learned Counsel for the assessee/appellant submitted that they are basically transport contractors and are not to be

taxed under Cargo Handling Service. The essence of the service rendered by the appellants to various manufacturing units is for transportation of iron ore from Railway siding at Bilaspur to the factory premises. Incidental to the such activity they are engaged in unloading from Railway racks loading in the truck and unloading in the factory premises. These activities are only incidental to their main activity of transportation. As such, he contested finding by the lower authorities on their tax liability. He also contested the demand on limitation stating that there were interpretation issues regarding the tax entry and accordingly no malafide for suppression can be attributed to the assessee/appellant. Accordingly, the extended period of demand as well as various penalties are not sustainable. He relied on various decided cases in support of his contention.

3. The learned AR supported the findings of the lower authorities with reference to tax liability. He submitted that the Revenue has proceeded based on total consideration received by the assessee/appellant and referring to the total quantum of iron ore handled by them. It is seen that the per metric tonne consideration works out to around to Rs. 30 only. Out of it Rs. 15/- per M.T. has to be paid to the labour contractor engaged to unload the iron ore at Railway siding at Bilaspur. The remaining amount is attributable for various activities like loading of ore in the truck, transportation and unloading of ore at the factory premises. Since, the assessee/appellant could not produce any

written contract, the lower authorities proceeded with the documents submitted by the assessee/appellant alongwith deposition of the responsible person of the assessee/appellant. There is no error in the finding by the lower authorities regarding tax liability. However, the impugned order erred in setting aside the penalty under Section 76 by an erroneous finding that simultaneous penalties are not sustainable as per the legal provisions. The law as it was prevalent during the period of dispute is clear to the effect that penalties under Section 76 and 78 can be imposed simultaneously. The legal position has been clarified specifically by the Hon'ble Delhi High Court in **Bajaj Travels Ltd. vs. CST – 2012 (25) S.T.R. 417 (Del.)** as well as by Tribunal in **Ramawat Construction Co. vs. CCE, Jaipur – II** vide final order No. 53206 – 53207 of 2017 dated 12/05/2017.

4. We have heard both the sides and perused the appeal record. On the first issue being contested by the assessee/ appellant is regarding the taxability of the services rendered under the category of cargo handling service. We have perused the impugned order as well as the show cause notice and original order. It is clear that the assessee/appellant are engaged in unloading iron ore from railway racks at Bilaspur siding, loading of such iron ore into the trucks, transportation upto the factory and thereafter unloading the said iron ore in the premises of the client's factories. The dispute is with reference to the essential nature of the composite work carried out by the assessee/

appellant. We note we are not having the assistance of written contract to guide us. In the absence of such written contract, clear stipulation and quantification attributable to each activity we have to rely on the taxable consideration and the quantum of iron ore dealt with by the assessee/appellant. The lower authorities arrived at per metric tonne rate of Rs. 30/- for the whole gamat of activities. Admittedly, Rs. 15/- per M.T. is to be paid to the labour contractor engaged to unloading the iron ore from railway racks. That leaves an amount of Rs. 15/- per M.T. for remaining activities of loading of said ore into the trucks, transportation and unloading in the factory premises. Considering the quantification of consideration received alongwith the quantum of cargo handled, we are of the view that the assessee/appellant are essentially involved in cargo handling service and the transport being incidental to said activities. It is also noted that the assessee/ appellant did collect service tax from various clients under cargo handling service and upon enquiry by the Revenue, deposited an amount of Rs. 9.98 lakhs under the said category. It would appear that the assessee/appellant treated the said services as cargo handling services and are contesting the tax liability only after the proceedings have been initiated by the Revenue.

5. Regarding the reliance placed by the assessee/appellant on the decision of the Tribunal in **CCE, Indore vs. Vikas Road Lines – 2017 (49) S.T.R. 461 (Tri. – Del.)**, we note that the Tribunal was examining the dispute between the claim of the

Revenue and the assessee for classification of service under C&F Agency service. After examining the facts of the case, the Tribunal held that the principal activities engaged in by the assessee/ appellant is one of transportation. The factual basis of such finding is not available in the order. However, in the present case, we are having the facts as per the records of the assessee/appellant which were discussed hereinabove.

6. Regarding the contention of the assessee/appellant on limitation, we note, admittedly, that they have collected service tax under Cargo Handling Service from various clients and deposited the same upon initiation of enquiry by the Revenue. In such situation, it is not open to the assessee/appellant to contest the demand for extended period on the ground of their bonafideness.

7. Regarding the appeal by the Revenue, we note that the impugned order fell in error in stating that simultaneous penalties cannot be imposed on the assessee/appellant for the same case. We are dealing with the period prior to the amendment of provision of Section 78. The decision of Hon’ble Delhi High Court in **Bajaj Travels Ltd.** (supra) and the Tribunal in **Ramawat Construction Co.** (supra) cited by the learned AR is squarely applicable to the facts of the present case and as such we hold that the impugned order is legally not sustainable with reference

to non-imposition of penalty under Section 76. To that extent, the impugned order is set aside.

8. In view of the above discussion and analysis, the appeal by the assessee/appellant is dismissed. The appeal by the Revenue is allowed.

(Order dictated and pronounced in open court.)

(S.K. Mohanty)
Member (Judicial)

(B. Ravichandran)
Member (Technical)

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