

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL,
WEST BLOCK NO.2, R.K. PURAM, NEW DELHI-110066

BENCH-DB

COURT -IV

Service Tax Appeal No.ST/1298 & 1329/2011-CU [DB]

[Arising out of Order-in-Appeal No.236 (DKV) ST/JPR-I/ 2011 dated 25.05.2011 passed by the Commissioner, Central Excise, Jaipur]

(1) **R.K. Gupta**
C/o. M/s. Mangalam Cement Ltd.

(2) **C.C.E., Raipur** **...Appellants**

Vs.

(1) **C.C.E., Raipur**

(2) **R.K. Gupta**
C/o. M/s. Mangalam Cement Ltd.... Respondent

Present for the Appellant : Ms. Rinki Arora, Advocate

Present for the Respondent: Mr.Amresh Jain, D.R.

Coram: HON'BLE MR. V.PADMANABHAN, MEMBER (TECHNICAL)
HON'BLE MRS. RACHNA GUPTA, MEMBER (JUDICIAL)

Date of Hearing: 04.06.2018
Pronounced on : 26/06/2018

FINAL ORDER NO. 52318-52319/2018

PER: RACHNA GUPTA

Both the appeals are against the common order dated 25.05.2011 passed by the Commissioner, Central Excise, Jaipur.

2. Facts relevant for the purpose are that the appellants are engaged in providing various services as classifiable under Section 65(105) of the Finance Act, 1994 and were accordingly, the holder of Service Tax Registration. During the course of audit of records of the appellant for the period w.e.f. 1st April, 2004 to 30th June, 2009, the appellant was observed to have not paid/short paid Service Tax on different services. Accordingly, a show cause notice dated 14th October, 2009 was issued calling upon them to pay a specific amount of tax for rendering following services:

2.1 Goods Transport Service (GTA), Cleaning Service, Manpower Supply Service, Cargo Handling Service, Packing Service, Construction of Complex Service and Commercial and Industrial Construction Service, Maintenance and Repair Service of Immovable property and accordingly, they were called upon to explain as to why the amount of Rs.34,77,344/- shall not be recoverable from them as Service Tax alongwith the interest and the imposition of penalty upon them.

3. While adjudicating the said show cause notice, the original Adjudicating Authority vide order dated 22nd November, 2010 has confirmed the demand of Rs.15,92,170/- alongwith the interest for rendering the services as that of GTA, the service for cleaning SILO, MCL was held to be the cleaning service, for manpower supply, partly upholding the service of cargo handling, packaging. The services of commercial and Industrial Construction and that of

maintenance and repair services were also confirmed holding them to be admitted by the appellant. Same amount of penalty was also imposed thereby dropping the demand of Rs.18,85,174/-. Aggrieved of this order, the same was challenged. The adjudicating authority below that is the Commissioner (Appeals) vide order dated 29th May, 2011 has confirmed the demand for Rs.3,68,503/- for rendering the services as that of Goods Transport Agency, Cleaning and Supply of Manpower. However, without any interest but with the imposition of penalty to the said amount. Aggrieved of the said order, both the parties have filed the above appeals. Appellant is aggrieved of the amount of demand as has been confirmed on the plea that appellant is not providing any services as are confirmed by the Commissioner (Appeals). The Department is also aggrieved of the amount of demand for rendering Cargo Services and for rendering Packages Service as has been dropped by Commissioner (Appeals).

4. We have heard both the parties at length.

5. After hearing both the parties, our considered opinion is as follows:-

To dispose of both the appeals simultaneously, we still have to check as to whether the services provided by the appellant fall under the following categories, Goods Transport Agency, Cleaning Service, Supply of Manpower Service, Cargo Handling Service and Packaging Service. We proceed service-wise as follows:-

(1) GTA SERVICE:

5.1 It is submitted by the Counsel for the appellant that appellant company is not an agency to provide transportation service, hence, cannot be held liable for the same. This argument is rebutted by Id. D.R. submitting that admittedly the freight is being for the transportation. It is as good as consignment Note, which is just a procedure. In support of their claim, Id. Advocate relied upon the decision in the case of **Commr. of C.EX. & S.T., Aurangabad vs. Jaikumar Fulchand Ajmera – 2017 (48) STR 52 (Tri.-Mumbai) & Bhima Sahakari Sakhar Karkhana Ltd. vs. CCE, Pune-III – 2016 (41) STR 438 (Tri.-Mumbai).**

5.1.1 After hearing we are of the view:

5.1.2 Section 65 (50b) explains Goods Transport Agency to mean any person who provides service in relation to transport of goods by road and issues consignment note by whatever name called. No doubt the words, person was “commercial concern” prior to 1st May, 2006 but this amendment is not meant to include any individual “person” who is transporting some goods for another individual. We draw our support from the definition itself where the word “agency” still continues. It clarifies that a person to render goods transport service should be an agency meant exclusively for providing goods transport service by whatever means and

for the purpose, he should be issuing a consignment note. None of the criteria is met by the appellant in the present case. We are of the firm opinion that the order under challenge qua confirming GTA Service Tax liability is not sustainable. The argument of Id. DR that the charges of rate are shown separately in the invoice are of no relevance for the purpose in view of the apparent fact that the amount of money paid by the appellant was the price for the Gitti purchased by them, that too on FOR basis, for the said Gitti to be delivered from the site of purchase to the site of the appellant. Irrespective freight is shown separately in the invoice, the same cannot be considered as equivalent to the consignment note, which is the mandatory requirement of Section 65 (50b).

5.1.3 Applying the ratio of the case **Nandganj Sihori Sugar Co. Ltd. vs. CCE, Lucknow – 2014 (34) STR 850 (Tri. Del.)**, we hold that the appellant M/s.R.K.Gupta was not rendering Goods Transport Agency Services and we hereby drop the impugned demand qua GTA services.

(2) **CLEANING SERVICES:**

5.2 The appellant has relied upon the work contract dated 3rd December, 2005 as was executed by Mangalam Cement Ltd. in favour of the appellant with respect to cleaning, submitting that the activity actually amounts to collection of cement and as such is not a cleaning service.

5.2.1 Ld. DR on the other-hand has submitted that cleaning through air slide is an activity, which is very much covered under Section 65 (24b) of 1944 Act.

5.2.2 After hearing both the sides, we are of the considered opinion that the authorities below have already reduced the demand for cleaning. At this stage, the demand is only confined to cleaning of SELO MCL i.e cleaning of loose cement either through air slide or by transportation by means to gentry and lump etc. The same is very much included in the definition of cleaning activity under Section 65 (24b). Hence, the confirmation of demand under this head to that effect, we find no infirmity. The same is accordingly, upheld.

(3) MANPOWER SERVICE:

5.3 The appellant has submitted that the work undertaken by them was for weighment of cement filled bags and the labour was deployed by them for the said purpose. Hence, by no stretch of imagination same can be called as manpower supply. In support of their claim, Id. Advocate relied upon the decision in the case of **Satara Sahakari Shetu Audyogik OOS Todani Vahtook Society vs. CCE, Kohlapur – 2014(36) STR 123 (Tri. – Mumbai) and Bhogavati Janseva Trust vs. CCE, Kohlapur – 2014 (34) STR 410 (Tri.-Mumbai).**

5.3.1 On the other hand, it is submitted by the Department that both the authorities below have confirmed the said demand relying upon that service of supply of manpower temporarily or otherwise to a client is very much covered under the category of manpower supply service.

5.3.2 After hearing both of them, we are of the considered view that Section 65 (68) of Act of 1944 describes manpower recruitment or supply agency to mean any person engaged in providing any service directly or indirectly in any manner for recruitment or supply of manpower temporarily or otherwise to any other person. No doubt the earlier word of "commercial concern" is substituted by word "person" vide an amendment dated 18th April, 2006, but still we are of the firm opinion that it does not extend to an individual person discharging any other service for which he need the manpower, because the word agency still continues in the definition and for the explanation as above under GTA service, the Services provided by the appellant herein cannot be categorized as supply of manpower by a manpower supply agency. Also there is no evidence that the consideration was paid separately for manpower but it is apparent that it was required for the job as was agreed to be rendered by the appellant. There can be the levy of supplying manpower services. We draw our support from the case of Ritesh Enterprises vs. CCE, Bangalore – 2010 (18) STR) Tri.-Bang.) Hence, the demand on this ground cannot be confirmed.

(4) CARGO HANDLING SERVICE:

5.4 The Id. Counsel for the appellant has submitted that the facts of the case make it apparently clear that the appellant was simply shifting/ transporting the cement bags from shop floor to packing machine only i.e. within the factory during the course of packing of cement and as such same cannot be called as the cargo handling. In support of their claim, Id. Advocate relied upon the decisions in the case of **Gaytri Construction Co. vs. CCE, Jaipur- 2012 (25) STR 259 (Tri.-Del.), Purshottam Lal vs. CCE, Jalandhar –**

2015 (38) STR 161 (Tri.-Del.) and CCE & ST, Meerut-I vs. Jaspal Darshan Lal -2016 (45) STR 156 (Tri.-All.).

5.4.1 The arguments were vehemently rebutted by the Id. D.R. submitting that any kind of shifting or transportation of goods by any means of Rail, Road or Ship or Air is an activity which can be called as cargo handling activity.

5.4.2. After hearing both the Id. Counsels on this issue, we are of the firm opinion that for any service to be called as cargo handling service the loading, unloading, packing or unpacking should be meant only and only for transport, as it is very much evident from the definition under Section 65 (23) of the Act. Not only this, such services should be provided for freight. The definitions specifically mention that mere transportation of goods will not be cargo handling. Thus, we find that the Adjudicating Authority below has rightly dropped the demand and the arguments of the Department have no contention in that regard.

(5) PACKING:

5.5 Ld. Counsel for the appellant qua this activity has submitted that what appellant was doing in the existing facts was an activity which is very much ancillary to manufacture, hence, it expressly excluded from the definition of packaging services. In support of their claim, Id. Advocate relied upon the decision in the case of **MAA Sharda Wine Traders vs. Union of India – 2009 (15) STR 3 (MP) and Kedia Castle**

Delleon Industries Ltd. vs. CCE, Raipur – 2011 (22) STR 15 (Tr.-Del.).

6. While rebutting the Department has submitted that the appellant were just printing the HDPE bags without any details of date, month and year and prior, this article (cement herein) is filled in the said bags. Hence the facts are sufficient to take away this activity from the ambit of activity of manufacture. Hence, the appellants were liable to be charged for rendering packaging services. The demand has wrongly been dropped by the Commissioner (Appeals). While adjudicating upon this particular service, it is observed as per the definition under Section 65 (76 b) any activity of packaging including pouch filling bottling, labeling or imprinting of packages is packaging activity till it does not amount manufacture under Section 2 (f) of the Central Excise Act. Since for manufacture, the goods has to qualify two criteria, the manufacture of a new product and the marketability. The appellant was imprinting the HTPE bags, no doubt for those to be filled with cement being manufactured by the principal of the appellant but the fact remains is that HDPE bags is still pay good having its own marketable value, it will be the part of manufacture of cement only after it gets filled with the cement. Prior that activity it is a distinct goods in itself, then from a bag of cement. The admitted fact in the present case is that the appellants were imprinting the HDPE bags, the same is sufficient to categorize the activity as packaging activity. In as

such, we hold that Commissioner (Appeals) has committed an error while dropping this liability.

7. Chapter Note 6 of Chapter 4 of First Schedule of Central Excise Tariff Act, 1985 is very much relevant for the same qua it reads as follows:-

"Chapter 4, Note 6. In relation to products of this Chapter, [labelling or relabeling of containers or repacking] from bulk packs to retail packs or the adoption of any other treatment to render the product marketable to the consumer, shall amount to "manufacture"."

8. Also Section 66D (f) decides that in process amounting to manufacture or production same not be leviable to Service Tax. Since the loose cement is not a marketable commodity unless and until it is packed in a bag, the activity of the appellant was incidental to manufacture and as such was not a packaging service. We draw our support from the decision of Hon'ble Supreme Court in the case of **Collector of Central Excise, Bombay vs. S.D. Fine Chemicals - 1995 (77) E.L.T. 49 (S.C.)** wherein it was held that word manufacture is not confined to the natural meaning but it is an extensive definition which include the incidental or ancillary procedures meant to the completion of manufactured product We hold that the Department has raised a wrong levy upon the appellant. We hereby drop away the said levy.

9. Now coming to the imposition of interest on the confirmed amount and the imposition of penalty thereof. We are of the opinion that the Commissioner (Appeals) has held that the Provision of Section 73 (3) of Finance Act are *parimateria* with the provisions of Section 11 A (2B) of Central Excise Act, 1944. He has rightly relied upon the adjudication of Hon'ble Apex Court in the case of **Union of India vs. Rajasthan Spinning and Weaving Mills - 2009 (238) E.L.T. 003 (SC)**

and has rightly held that the payment of Service Tax before issue of Show Cause Notice will not provide any immunity from penal provisions in a case where escape of Service Tax is intentional and by reason of dissection, appellant in the case had not declared the receipt of the amount claimed to the Department in their periodical ST 3 returns, the depositing was made only after the same was detected by the audit party. Hence, the benefit of making payment before show cause notice has rightly been declined to the appellant. The findings as far as imposition of interest and penalty relying upon the above observations are therefore, held to have no infirmity and thus are accordingly upheld.

10. As a result of entire above discussion, both the appeals in hand stands partly allowed.

[Pronounced in the open Court on 26.06.2018]

(RACHNA GUPTA)
MEMBER (JUDICIAL)

(V.PADMANABHAN)
MEMBER (TECHNICAL)

Anita