CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL PRINCIPAL BENCH, NEW DELHI

Date of Hearing: 23.05.2018
Date of Decision: 16.11.2018

S. T. Appeal No. 2930/2012(DB)

[Arising out of Order-in-Appeal No.115/BPL/2012 dated 18.06.2012 passed by the Commissioner (Appeals), Customs, Central Excise & Service Tax, Bhopal (M.P.)]

M/s Maharaja Group and Associates Appellants

Vs.

CCE, Bhopal Respondent

Appearance:

Rep. by Shri Inderjeet Yadav, Advocate for the appellant.
Rep. by Shri G.R. Singh, DR for the respondent.

Coram:

Hon'ble Shri Anil Choudhary, Member (Judicial)
Hon'ble Shri C. L. Mahar, Member (Technical)

Final Order No. 53293/2018

Per Anil Choudhary:

The issue in this appeal is whether the appellant is providing services under the category 'cargo handling service' as defined under Section 65(23) read with Section 65 (105)(zr) of the Finance Act, 1994.

2. The appellant is a partnership firm and is engaged in providing services of packing and loading/unloading of cement into wagons and trucks for the clients. It appeared to Revenue, that during the period prior to 16/06/2005 (March 2003 to 15/06/2005),

appellant had provided services to various cement plants for loading/unloading of cement (cargo) at the sites and had received payments for services which were appropriately covered under the category ‘cargo handling services’, made taxable with effect from 16/08/2002. The appellant had not been paying service tax on the same.

3. On scrutiny of the documents of the appellant, it was noticed that they have entered into agreement dated 15/01/2003 with various cement plants. One of them is **Prism Cements Ltd.,** located within the jurisdiction of the range office of the Department. The said Agreement has been extended from time to time. On examination of the terms and conditions of the Agreement, it appeared that – the bag is filled with cement automatically, sealed automatically and put on the conveyor by the machine itself, for loading at the destination, say lorry or as the case may be. As soon as the bag of cement is automatically dropped in carrier, the manpower supplied by assessee takes care of the final activity to see the proper stacking of the bags in the carrier. Here, the work involved is of the manpower supplied by the appellant. The appellant was providing similar service to ‘Rajeshwari cement’ Gulbarga, wherein under the similar facts and circumstances, the issue is decided in favour of the appellant by the learned Commissioner (Appeals),Central Excise, Mangalore, vide order-in-appeal dated 21/01/2011.

4. As per the show cause notice dated 09/01/2008 issued by Directorate General of Central Excise Intelligence, Indore. Shri Devinder Singh, Partner of the appellant appeared before the authority during investigation wherein his statement was recorded under Section 14 of the Act, wherein he had inter alia stated that they are registered with the Service Tax Department at four places under the category of "Manpower Recruitment Agency". In the Rewa Range, registration was taken on 6th July 2005 and they have been paying the tax under the category of "Manpower Recruitment Agency" since June 2005. He also stated that they have not undertaken cargo handling service as the services rendered by them fall under the category of "Manpower Recruitment Agency". They are not providing any machinery, tools, truck, pay loader etc. to the cement plant. They are providing only manpower to the service receiver company, hence they are not liable to pay service tax under the category of "Cargo Handling Services". Although, the workers are under their control and not in the muster roll of the service receiver company. That they are paying wages to their workers.

5. On enquiry with the Central Excise office at Raipur, the DGCEI learnt that a show cause notice had been issued to the appellant for the services provided by them at the premises of 'Grasim cement', Raipur being SCN dated 29/06/2006, wherein the dispute was whether the services provided by them fall under the

category of “Cargo Handling Service” or “Manpower Recruitment Agency”. This case was decided vide order- in-original dated 30/03/2007, holding that the service falls under the category of “Manpower Recruitment Agency”. As per para-5(e) of the SCN, it has been observed that ‘Prism Cement’ had paid for loading and unloading charges at the rate of rupees to 284.44 per BCNA wagon. It appeared to Revenue that loading/unloading is specifically inclusive in the scope of work and under all the agreements’ payment is linked to quantum of loading/unloading and responsibility of supervision of loading activity is with the contractor. The agreement also provides for penal charges for delay in loading. Wages and other benefit of the workmen are to be taken care of by the contractor only. Thus, it appeared to Revenue that the contract is for loading/unloading and not for supply of manpower. Accordingly, on the amount received from the service receiver for such activity, service tax was demanded as follows: –

Sr. No.	Period	Amount Received (Rs.)	ST Rate	Service Tax(Rs.)	Ed. Cess (Rs.)	Total (Rs.)
1.	March’03 to 13.05.03	845133/-	5%	42257/-	-	42257/-
2.	14.05.03 to 9.4.2004	7056858/-	8%	564549/-	-	564549/-
3.	10.09.04 to 15.06.05	4582930/-	10% + 2%	458293/-	9166/-	467459/-
	Total	12484921/-		1065099/-	9166/-	10,74,265/-

6. Accordingly, the SCN demanded service tax of Rs. 10,74,265/- invoking the extended period of limitation along with interest and further penalties were proposed under Section 76, 77 and 78 of the Act.

7. The SCN was adjudicated vide Order-in-Original dated 3.01.2012.

8. Being an ex parte order, in reply to the show cause notice, one Chartered Accountant, Shri Kanitkar and company had appeared and had sought adjournment from time to time and several adjournments were allowed during the period 15/09/2009 to 13/10/2011. But neither reply to the show cause notice was filed nor the counsel appeared for hearing in spite of being noticed that the date fixed for 13/10/2011 is by way of last opportunity. The proposed demand was confirmed with interest and equal amount of penalty imposed under section 78 of the Act. A penalty of Rs.25,000/- was also imposed and further Rs.5,000/- each for the offence of failure to obtain service tax registration and failure to file for ST-3 returns for the relevant period, within the prescribed time. However, the penalty under Section 76 was dropped, as penalty was imposed under Section 78.

9. Being aggrieved, the appellant preferred an appeal before the ld. Commissioner (Appeals), who in the impugned order observed that from the terms of agreement, it is obvious that it is the

responsibility of supervision of loading activity with the contractors/appellant. Penal charges for delay in loading/unloading, with other benefits of the workmen, are to be taken care by the appellant contactor. The terms and conditions of the relevant contracts establish that the agreement is for loading and unloading of cement and not for manpower recruitment agency service. The payment is also linked to the number of wagons loaded. The appellant is solely responsible to decide the manner of execution of work, without any interference, instructions or intervention by the client. Accordingly, the ld. Commissioner (Appeals) held that the service rendered by appellant is "Cargo Handling Service" as defined under Section 65(23) of the Finance Act. Further, it is on record that the ld. Commissioner observed that the appellant did not apply for registration nor declared taxable value and did not file ST-3 returns for the period under dispute, nor paid service tax. The appellant was required to file the ST-3 returns.

10. Ld. Counsel for the appellant pleaded that the issue in question is covered in their favour by an order No. 01/2011 dated 21.01.2011 passed by the ld. Commissioner (Appeals) in the appellant's own case where the similar agreement has been entered with M/s Rajashree Cement. He further submitted that activities performed by the appellant in the present case cannot be held to be covered under 'Cargo Handling Services'. He further submitted that they are only performing supportive and ancillary role in the

mechanized process of packing and unloading. He argued that the appellant is paying service tax w.e.f. 16.06.2005, when the activity of manpower supply became taxable and the department did not dispute the classification of services. The Counsel for the appellant further relied on the decision of this Hon'ble Tribunal in the case of ***J&J Enterprises vs. CCE, Raipur – 2006 (3) STR 655***. He also argued that extended period of limitation cannot be invoked in the present case as the appellant was under bonafide belief that activities performed by the appellant fall under manpower supply services which became taxable w.e.f. 16.06.2005 & they were paying tax regularly. He submitted that penalties cannot be sustained as there is no suppression on their part. He therefore prayed for setting aside the impugned order.

11. Ld. AR on behalf of Revenue submitted that activities performed by the appellant would fall under 'Cargo Handling Services'. He submitted that terms & conditions of the contract clearly establish that the same are for loading & unloading of cement and not for manpower recruitment agency service. He submitted that scope of work indicated in the contract is that of 'loading & unloading of cement'. The payment is also linked to number of wagons loaded. He submitted that the appellant is solely responsible to decide the manner of execution of work, without any interference by the client. The appellant is solely responsible to engage, retain, control, supervise, discharge, dismiss, retention, re-

employ its workers. He also relied upon the following decision to support its pleas:

i) Lakhan Singh & Co. vs. CCE, Jaipur-2016 (46) STR 297 (Tri.Del.)

ii) Sarvodaya Shramik Samiti vs. CCE, Bhopal -2017 (52) STR 293 (Tri. Del.)

iii) Coal Carriers vs. CCE&ST, BBSR-2011 (24) STR 395 (Orissa)

iv) Gajanand Agarwal vs. CCE, BBSR-2009 (13) STR 138 (Tri.)

He further submitted that Commissioner (Appeals) has rightly confired invokation of extended period of limitation & imposition of penalties.

12. Having considered the rival contentions & perusal of records, we find that terms & condition of contract mentioned in the final order No. 01/2011 dated 21.01.2011, passed by the Commissioner (Appeals), Mangalore, is similar to the show cause notice dated 09.01.2008 issued to the present appellant. We also find that activity of packing, loading/ unloading of cement bags cannot be taxed under the category of ‘Cargo Handling Service’, especially when w.e.f. 16.06.2005, the Department accepted the classification of said services under ‘Manpower Supply Services’. Considering the facts of the present case, we find that case of the appellant is covered by the order in Appeal No. 1/2011 dated 21.01.2011 passed by the ld. Commissioner (Appeals), Mangalore, in their own case &

order of this Hon'ble Tribunal in the case of ***J&J Enterprises*** (supra). Therefore, we find that the impugned order is not maintainable and the same is set aside & appeal is allowed with consequential relief to the appellant.

(Pronounced on 16.11.2018).

(Anil Choudhary)
Member (Judicial)

(C. L. Mahar)
Member (Technical)

Ckp