# CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
## REGIONAL BENCH AT HYDERABAD

Division Bench
Court - I

## Appeal No. ST/867/2009

(Arising out of Order-in-Original No. 01/2009-ST-HYD III-ADJN-COMMNR dt.20.03.2009 passed by CCCE & ST, Hyderabad - III)

BSR & Company ….. Appellant(s)

Vs.

CCCE & ST, Hyderabad - III ….. Respondent(s)

Appearance
None for the Appellant.
Shri C. Mallikarjun Reddy, Superintendent/AR for the Respondent.

Coram:
**HON'BLE Mr. M.V.Ravindran, MEMBER (JUDICIAL)**
**HON'BLE Mr. P. Venkata Subba Rao, MEMBER (TECHNICAL)**

Date of Hearing: 20.02.2019
Date of Decision: 20.02.2019

## FINAL ORDER No. A/30395/2019

[Order per: P.V. Subba Rao.]

1. This appeal is filed against the Order-in-Original No. 01/2009-ST-HYD III-ADJN-COMMNR dated 20.03.2009.

2. None appeared on behalf of the appellant despite notice.

3. Heard the departmental representative and perused the records.

4. The appellant is a registered firm engaged in providing manpower for movement of materials including semi finished goods and waste within the factory of certain manufacturers. They entered into agreements with M/s ITC, Bhadrachalam for carrying out "loading/unloading/handling and transportation of reels/reams/bundles/pallets/loose broke/machine stage re pulp in trailer/truck to the godown within the mill premises." They felt that the aforesaid activities are not exigible to service tax but as a matter of

abundant caution got themselves registered with service tax department under the category of "manpower supply service" and "business auxiliary service". Between the period July, 2005 to September, 2007 they paid service tax including some interest component on manpower supply service. They also paid service tax under the head of business auxiliary service. The department conducted investigations with ITC, Bhadrachalam and during the course of investigation, the appellant deposited a sum of Rs.27,35,715/- towards service tax under the cargo handling service. A show cause notice dated 17.4.2008 was issued to the appellant calling upon them to explain:

(a) Why the services rendered by them should not be classified as cargo handling services instead of business auxiliary service and

(b) Differential duty along with interest should be collected from them

(c) Penalties under Sec.76,77, & 78 of the Finance Act, 1994 should not be imposed on them.

5. The impugned order confirmed the demand and interest and imposed penalties as proposed. Hence this appeal on following grounds:

(i) The entire movement of their activities was within the factory of manufacturer and there is no evidence that they have transported the goods outside the factory of manufacturer and hence cargo handling services does not apply to their case.

(ii) There was also violation of principles of natural justice inasmuch as they were denied cross examination of the persons whose statements were relied upon.

(iii) If they were liable to pay service tax under cargo handling service, they are entitled to the benefit of refund of service tax already paid by them under business auxiliary service and manpower supply service.

(iv) There is no scope for imposition of penalty under Sec.76,77 and 78 because there is no evidence on any of the violations by them. Extended period of demand can also not be invoked for this reason.

(v) The department was fully aware of the nature of their activities and they have already taken registration and were paying service tax and were advised by the department not to pay service tax under manpower supply service or business auxiliary service. Under these circumstances the department cannot classify services under cargo handling service and charge service tax from them.

6. Learned departmental representative reiterates the findings of the lower authority.

7. We have considered the arguments and perused the records. The nature of their activities as per the agreement clearly demonstrates that the appellant was undertaking the movement of materials from one place to another within the factory of the manufacturer and into their godown. It has been held by the Hon'ble Apex Court in the case of Sushil and Company [2016 (42) STR 625 (SC)] that for an activity to be charged as cargo handling service, the goods in question must be cargo in the first place and the following conditions have to be satisfied.

(a) There must be cargo i.e., packed or unpacked commodity accepted by a transporter or carrier for carrying the same from one destination to another. It is only after the commodity becomes cargo, its loading and unloading at freight terminal for being transported by any means may become cargo handling service if it is provided by an independent agency; and

(b) Services provided must independently involve any loading or unloading, any packing or unpacking of the cargo.

8. Therefore, material handling within the factory not being in the nature of cargo cannot be considered as cargo handling service. This view was also taken by the Tribunal-Delhi in the case of Gayatri Construction Ltd [2012 (25) STR 259], Jay Ram Yadav [2015 (40) STR 746] and Purushottam Lal [2015 (38) STR 161].

9. Since the entire agreement was for movement of goods within the factory, we find that there is no evidence that the appellant has actually handled cargo outside the factory of the manufacturer. They have indeed handled material and movement of material within the factory does not amount to cargo handling and it is only material handling. Therefore, no service can be charged and the impugned order needs to be set aside and we do so.

10. The impugned order is set aside and the appeal is allowed.

(Operative part of this order was pronounced in the open court
on conclusion of hearing)

(P.VENKATA SUBBA RAO)
MEMBER (TECHNICAL)

(M.V. RAVINDRAN)
MEMBER (JUDICIAL)

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