IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH: KOLKATA

Appeal No. ST/90/2010

(Arising out of Order-in-Appeal No. 91/ST/B-I/2009 dated 16/12/2009, passed by the Commissioner (Appeals), Central Excise, Customs & Service Tax, Bhubaneswar.)

M/s. Sainik Mining & Allied Service Ltd. Appellant (s)
Vs.
C.C.E. & S. Tax.-BBSR-I
Respondent (S)

Appearance:
Shri K, Kurmi & Rajesh Sharma, Advocates for the Appellant (s)
Shri s. S. Chattopadhyay, Suptd. (A. R.) for the Revenue

CORAM:
HON'BLE SHRI P. K. CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE SHRI V. PADMANABHAN, MEMBER (TECHNICAL)

Date of Hearing: -11.10.2018
Order No. FO/76814/2018

PER BENCH

The present appeal has challenged the Order-in-Appeal No. 91/ST/B-I/2009 dated 16/12/2009.

2. The brief facts of the case are that the appellant carried out various activities as per the contracts entered with M/s Mahanadi Coalfields Ltd. (MCL), Orissa. The disputed period is 16/08/2002 to 31/03/2006, during which the appellant carried out the activity of transfer of coal from Railway siding into Railway wagons by making use of equipments known as Pay Loaders. Since the appellant did not register such activity for payment of Service Tax, the Revenue issued Show Cause Notice taking the view that the activity covered will be liable for payment of Service Tax under the category of 'Cargo Handling Services'. Accordingly, Service Tax was demanded along with

interest and the issue was decided against them by the impugned order in which the penalty was also imposed in addition to confirmation of payment of Service Tax. The same is challenged in the present appeal.

3. The appellant is represented by Shri K. Kurmi, Ld. Advocate. He submitted that the Service Tax involved in the present case has already been deposited by the appellant. He conceded fairly that the issue on merit has been decided against the appellant in the case of Gajanand Agarwal Vs. Commissioner, reported in 2009 (13) S.T.R. 549 (Tri.-Kolkata).

He submitted that he is not presenting the appeal on merit but prayed that the penalty imposed may kindly be vacated keeping in view the fact that the levy was in its infancy during the period under dispute. He further pointed out that in the decision of Gajanand Agarwal Vs. Commissioner (Supra) which is against the appellant, the penalty involved was waived.

4. The Ld. DR justified the impugned order. He pointed out that the appellant did not even take up registration prior to the issue being taken up for investigation by the Department. Hence this amounts to suppression by the appellant.

5. After hearing both sides and perusal of the record, we note that the activity involved has been considered to be liable for payment of Service Tax under the category of "Cargo Handling Services" falling under Section 65 (23) read with Section 65 (105) (zr) of the Finance Act, 1994. We have perused the decision cited in the case of Gajanand

Agarwal. The observations of the Tribunal therein are reproduced below:-

> ***"17. It was noticed from the agreement of the parties that time was essence of the contract. The nature of activity that was carried by the Appellants was to load the cargo i.e. coal in the Railway wagons. Such an activity squarely falls under the definition of cargo handling service! provided by Section 65(23) read with Section 65(105) of the Finance Act, 1944 (sic) (1994) and brings the appellants to the fold of law for such service provided. Accordingly we decline to intervene to the orders passed by the Ld. First Appellate Authority except in the matter of penalty which we consider not imposable on the facts and circumstances of the case. We intervene to the Revisional order involved in Appeal case No. 41/06 and waive entire penalty imposed finding no justification of imposition since there was no willful suppression. We noticed that the appellants had no intention to cause evasion of revenue but at the infancy stage of implementation of law there appears to have confusion as to taxability. Accordingly, we waive the penalties levied under different Section of the law on all the appellants by the impugned orders. But we make it clear that when tax was leviable and realizable, the appellants shall be required to make payment of interest on the tax. Interest shall be calculated as per law in all cases and realised."***

6. By following the said decision, we uphold the levy of Service Tax under the category of "Cargo Handling Services". But we waive the penalties levied under various Sections by considering this as a fit case for invoking Section 80 of the Finance Act, 1944. In the result, appeals are partly allowed.

(Dictated and pronounced in the open Court.)

Sd/-	Sd/-
(V. PADMANABHAN)	**(P. K. CHOUDHARY)**
MEMBER (TECHNICAL)	**MEMBER (JUDICIAL)**

Pooja