

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

Appeal No. ST/91/2008

(Arising out of Order-in-Original No. COMMR/BBSR-I/ST-06/2008 dated 27/02/2008, passed by the Commissioner, 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/76815/2018

PER BENCH

The present appeal is against the Order-in-Original No. COMMR/BBSR-I/ST-06/2008 dated 27/02/2008.

2. The brief facts of the case are that the appellant carried out various activities as per the agreements entered with M/s. Mahanadi Coal Fields Ltd. (MCL), Orissa. The main activities carried out by appellant which are the subject matter of the following dispute which covers the period 16/08/2002 to 31/03/2006 are briefly described below:-

- (i) The appellant carried out the activity of loading of coal from Railway siding into Railway wagons making use of Pay Loaders. Department's view was that such activity was

liable to payment of Service Tax under the category of "Cargo Handling Services".

- (ii) The appellant also transported coal from the pit head to various other points within mines. This activity was also considered by the Revenue as liable for payment of Service Tax under the Category of "Cargo Handling Services".
3. Show Cause Notices were issued covering the entire period of demand and after the due process of adjudication, the impugned order was passed in which the entire Service Tax demanded was confirmed under the category of 'Cargo Handling Services' along with interest. Further, penalties were also imposed under various sections of the Finance Act, 1994. This order is challenged in the present appeal.
4. The appellant is represented by Shri Kartik Kurmi, Ld. Advocate. Arguing the case of the appellant, he submitted as follows:-
- (i) The loading of coal into Railway wagons at the Railway siding was for onward transportation of coal to areas outside from mine. This issue has been decided on merit against the appellant in the case of Gajanand Agarwal V. Commissioner, reported in 2009 (13) S.T.R. 138 (Tri.-Kolkata). However, he submitted that since the levy was in its infancy, the penalty involved may be dropped. He further prayed that the demand may be restricted to normal time limit.

- (ii) Regarding the movement of coal within the mine area, he submitted that such activity has been held to be not liable to Service Tax under the Category of Cargo handling Services. In this connection, he relied on the following decisions where the issue has been decided in their favour. Sainik Mining Allied Services Ltd. Vs. Commr. Of C. Ex., Cus. & S.T., BBSR, reported in 2018 (12) G.S.T.L. 42 (Tri.-Kolkata). (ii) Sainik Mining and Allied Services Ltd. Vs. Commissioner- 2008 (9) S.T.R. 531 (Tri.)

5. Opposing the arguments, the Ld. DR, Shri S. S. Chattopadhyay submitted that contrary views has also been expressed by the Tribunal in the following cases:-

- (i) Orissa Stevedors Ltd. Vs. Commissioner of C. Ex., CUS. & S.T., BBSR-I 2015 (38) S.T.R. 964 (Tri.-Kol.).
- (ii) Commissioner of Central Excise, Raipur Vs. Gayatri Carriers Pvt. Ltd. 2013 (32) S. T. R. 367 (Tri.-Del.).

He finally submitted that since the case of Sainik Mining and Allied Services Ltd. Vs. Commissioner 2008 (9) S.T.R. 531 (Supra) has been distinguished by the Tribunal in the case of Gayatri Carriers Pvt. Ltd., the levy of Service Tax, confirmed by the Adjudicating Authority, may be upheld.

6. The dispute covers two activities. First is loading of coal at the railway siding into railway wagons for onward transportation to the destination. The second activity is the movement of coal within the

mine area from the pit head to railway siding and other designated points. Both activities have been ordered for payment of Service Tax under the category of "Cargo Handling Services".

7. After perusal of the case laws relied by both sides, we note that the first activity has been held to be liable for payment of Service Tax under 'Cargo Handling Services' in the case of Gajanad Agrawal v. Commissioner (supra) where the Tribunal observed as follows:-

"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."

8. By following the decision, we up-hold the levy of service Tax on merit but restrict such levy to the normal time limit. Keeping in view the fact that the levy of Service Tax under 'Cargo Handling Service' was in its infancy during the disputed period. By following the same

decision, we also waive penalties under various sections of the Finance Act by taking re-course to Section 80 of the Finance Act, 1994.

9. Next, we turn to the second activity of movement of coal within the mine from pit head to other areas. In this regard, we note that this activity has been considered in the appellant's own case for a different mine in the decision reported as 2018 (12) G.S.T.L. 43 (Tri.-Kolkata). For such movement of coal within the mine, the Tribunal has taken the view that the activity cannot be levied to Service Tax under the "Category of Cargo Handling Services". The observations of the Tribunal are reproduced below:-

7. After hearing both sides and on perusal of the records, we find that the activity mentioned in Sl. No. (2) above is for loading and transportation of coal from one point to another point within the mines. The contract is mainly for transportation of raw coal for further processing and involves, loading and unloading of the dumpers/tippers. We find that the activity has been decided in the appellant's own case in their favour as reported in Sainik Mining & Allied Services Ltd. v. Commr. of Central Excise, Customs & Service Tax, BBSR [2008 (9) S.T.R. 531 (Tri.-Kolkata). In the above case Tribunal observed as follows :

"8. We find that the activity undertaken by both the appellants for mechanical transfer of coal from the coal face to tippers and subsequent transportation of the coal within the mining area, does not come under the purview of cargo handing service. The dominant activities undertaken by the appellants under the contract in question are primarily the movement of coal within mining area and transfer of coal from the coal face to the tippers, if at all, includes loading and unloading which are merely incidental. Cargo in commercial parlance has a definite connotation which is carried as freight in a ship, plane, rail or truck and the activities undertaken by the appellants in terms of

the contracts on behalf of M/s. MCL to move coal within mining area do not fall in the category of cargo handling service. Moreover, the activities undertaken are principally the transportation of coal within mining area and hence, the gross amounts received for the same cannot be taxed under the category of cargo handling service. We have, therefore, no hesitation in our mind to hold that the definition of cargo handling service under the Finance Act, 1994, does not include the kind of activities undertaken by the appellants and hence the same are not chargeable to service tax. We also find that there was no suppression or misstatement by the appellants regarding the nature of activities undertaken by the appellants and hence the imposition of penalty on them is not at all justified. Accordingly, we set aside the impugned order and allow both the appeals with consequential benefit to the appellants."

10. The same has been followed by the Tribunal in various other cases. Consequently, we find no justification to uphold the demand of Service Tax under the category of Cargo Handling services for the work carried out in respect of transportation of coal within the Mining area.

11. The Ld. DR has sought to differentiate the decisions in favour of the appellant by citing certain other case laws in which similar activities have been considered and held the appellants liable to payment of Service Tax under the 'Category of Cargo Handling Services'.

12. We have perused cited decisions. After perusal of these decisions, we are of the view that the decisions of the Tribunal in the appellant's own case by Final Order dated 21/09/2017 as well as the earlier order dated 02/11/2007 will be more appropriate since these have been passed by the Tribunal in respect of identical activities for the same appellant for a different period.

13. In the light of above discussions, we set aside the levy of Service Tax in respect of movement of coal within the mine. In respect of levy of Service Tax for loading of coal into Railway wagon for onward transportation, we uphold the levy within the normal time limit. The Adjudicating Authority is directed to restrict such levy to the normal time limit.

14. The appeals are partly allowed.

(Dictated and pronounced in the open Court.)

Sd/-
(V. PADMANABHAN)
MEMBER (TECHNICAL)

Sd/-
(P. K. CHOUDHARY)
MEMBER (JUDICIAL)

Pooja