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

S.T.Appeal No.182/09

(Arising out of Order-in-Appeal No.37/ST/B-I/2009 dated 17.04.2009 passed by the Commissioner of Central Excise, Cus. & Service Tax, Bhubaneswar)

M/s Indian Rare Earths Ltd.

Applicant (s)/Appellant (s)

Vs.

CCEx, Cus. & S.Tax, BBSR I

Respondent (s)

Appearance:

Shri K. K. Achariya, Advocate for the Appellants(s)
Shri S. S. Chattopadhyay, Supdt. (AR) for the Revenue

CORAM:

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

Date of Hearing : 31.10.2018
Date of Pronouncement : 15.11.2018

ORDER NO. FO/A/76924/2018

Per Bench :

The present appeal challenges the Order-in-Appeal No.37/ST/B-I/2009 dated 17.04.2009.

2. The appellant is a manufacturer of Rare Earths. The dispute is regarding the consignment of Ilmenite (one of the rare earth minerals manufactured by the appellant), which was exported by them through Gopalpur Port. The appellant entered into a contract with Gopalpur Port for loading of the goods at the stockyard of the appellant, transporting them via the weighbridge to Gopalpur Port where the

goods were to be stacked in the port area, protected by turpoulin and loaded in barges for transport and loading to the vessel at port of anchorage for export. The appellant exported 50,200 MTs. of Ilmenite through Gopalpur Port in Orissa. Gopalpur Port issued a consolidated invoice for the transaction in which they charged service tax at the rate of 12.24%. After conclusion of the transaction, the appellant filed refund claim with the original authority for the amount of service tax paid. There was confusion in respect of the correct legal provision under which refund can be claimed by the appellant. Initially, they filed refund claim in terms of Rule 5 of Export of Services Rules, 2005. Soon appellant realized that the activity is regarding service and not export of goods. The refund claim was amended and made under Section 11B of the Central Excise Act, 1944. It was submitted that the service tax has been paid for the activity under "Cargo Handling Service". But the definition of this service does not cover export goods. As such, the appellant claimed refund of the service tax which was erroneously recovered by Gopalpur Port from the appellants. The refund claims were rejected by the original authority as well as by the first appellate authority for different reasons. Aggrieved by the decision of the ld.Commissioner (Appeals), the present appeal has been filed.

3. Heard Shri K.K.Achariya, ld.Advocate for the appellant as well as Shri S.S.Chattopadhyay, ld.D.R. for the Revenue.

4. The ld.Advocate for the appellant submitted that the activity in the contract with Gopalpur Port was in the nature of "Cargo Handling Service", but the definition of such service does not include export

cargo. In the present case, the contract was for export of Ilmenite and hence Gopalpur Port should not have charged the service tax. The service tax so charged by Gopalpur Port, has been claimed by them as refund and hence, the appellant will be eligible for the same. He emphasized that the claim for refund has been made in terms of Section 11B, within applicable time limit specified therein. He also submitted that the appellants have not availed cenvat credit of such service tax paid to the Gopalpur Port. On specific query from the Bench, whether refund of the amount has been claimed by Gopalpur Port, the ld.Advocate submitted that the appellant as well as Gopalpur Port, fall within the jurisdiction of the same Central Excise Authorities and as such both the agencies could not have claimed the refund of the same tax.

5. The ld.D.R. for the Revenue justified the impugned order of the rejection of the refund claims. He referred to the invoice issued by Gopalpur Port and submitted that the major part of the activity has been done within the port area and relating to stevedoring activity; hence, activity is liable to be classified under "port services", on which service tax is liable to be paid even on export cargo. He also refers to the contract executed by the appellant with Gopalpur Port dated 08.01.2007 in which the scope has been given in detail. This in turn refers to the Work Order dated 14.02.2002 giving the description of certain works entrusted to M/s Orissa Stevedores Ltd, Chatrapur. He further submitted that predominant character of the work is one of the stevedoring service, which has taken place only within Gopalpur Port.

Accordingly, he submitted that the activity is one of “port service” for which service tax is payable and hence refund cannot be granted.

6. Heard both sides and perused the records.

7. The appellant has exported Ilminate through the Gopalpur Port. For the purpose of such export, Gopalpur Port was contracted to load the goods at the stockyard of the appellant, transport the same to the Gopalpur Port and ultimately load to the vessel through barges. It has been argued by the appellant that these activities are in the nature of “Cargo Handling Service”, but in terms of the definition of “Cargo Handling Service” , no service tax could be levied for export cargo and hence, the service tax has been wrongly recovered by Gopalpur Port. The service tax paid by the appellant to Gopalpur Port has been claimed as refund in the present proceedings.

8. The Revenue’s view is that the activity has predominantly been carried out within the port area. Transport and loading of goods on the vessel is in the nature of stevedoring and since this has been performed within the port area, service tax is liable under the category of “port services”. Accordingly, the refund claims filed have been rejected.

9. A perusal of the invoices issued by Gopalpur Port to the appellant indicates charging of service tax at the rate of 12.24%. The category is not indicated in the invoices. But from the activities carried out, it is seen that the export goods were to be stacked in the port area, covered by tarpaulin and ultimately, transported and loaded to the vessel at the port of anchorage. All these activities have been carried out in relation to the export cargo.

10. A perusal of the definition of "Cargo Handling Service" under Section 65(23) reveals that it includes loading, un-loading, packing or un-packing of cargo, but the definition makes it clear that it does not include handling or export cargo. When the complete list of activities contacted with Gopalpur Port considered, it falls to be classified under "cargo handling service" notwithstanding the fact that a part of the activities has been carried out within the port area. Since the definition excludes export cargo, levy of service tax on the activity, in our view, is not justified.

11. The Bombay Bench of the Tribunal in the case of J.M.Baxi & Company Vs. CST (Adjn.), Mumbai I : 2013 (31) STR 453 (Tri.-Mumbai), had occasion to consider a case of levy of service tax in respect of certain activities in connection with the export cargo performed within the port area. The Tribunal, by following the decision of the Hon'ble Karnataka High Court in the case of Commissioner Vs. Konkan Marine Agencies : 2009 (13) STR 7 (Kar.), took the view as follows :

> *"**6.1** The 'Cargo Handling Service' definition under Section 65(23) excludes from its scope, handling of export cargo. What is covered under the Port Services under Section 65(82) is a taxable service rendered in a Port area. If the handling of cargo is excluded from the scope of a taxable service, it cannot come within the purview of Port Service as defined. This is the view taken by the Hon'ble High Court of Karnataka in the case of Konkan Marine Agencies (supra). Therefore, there is merit in the claim of the appellant that the Service Tax liability is not attracted in respect of export transactions. However, the matter needs verification at the adjudicating authority's end. Therefore,*

we remand the matter back to the adjudicating authority to verify the particulars submitted by the appellant in this regard and satisfy himself that the amounts collected by the appellant pertain to handling of export cargo. The appellant is also directed to co-operate with the department for verification of the documents. Thereafter, the adjudicating authority shall pass a fresh order in accordance with law".

12. By following the above decision of the Tribunal, we come to the conclusion that the activity carried out by Gopalpur Port for the appellant is in the nature of Cargo Handling Service and not port service. Further, since these activities deal with export cargo, there is no liability for payment of service tax. Consequently, the service tax paid is liable to be refunded. However,the refund for such service tax paid will be payable to the appellant only if the Gopalpur Port has not claimed such service tax refund from the jurisdictional authorities.

13. In view of the above discussions, we hold that the service tax is not liable to be paid for the activities carried out by Gopalpur Port for the appellant, but the jurisdictional Assistant Commissioner/Deputy Commissioner is ordered to pay refund to the appellant only after due verification whether such refund has been claimed/paid to Gopalpur Port.

14. Appeal is allowed in the above terms.

(Pronounced in the open court on 15.11.2018)

Sd/	Sd/
(P.K.Choudhary)	**(V.Padmanabhan)**
Member (Judicial)	**Member (Technical)**

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