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

REGIONAL BENCH - COURT NO.2

**Service Tax Appeal No.229 of 2009**

(Arising out of Order-in-Original No.06/Commr/ST/Kol/2009-10 dated 25 June 2009 passed by Commissioner of Service Tax, Kolkata.)

**M/s. Naresh Kumar & Co. Pvt.Ltd.**
(9B, Wood Street, 5th Floor,
Kolkata-700016)

**...Appellant**

*VERSUS*

**Commissioner of Service Tax, Kolkata**

**.....Respondent**

(Central Excise Bhavan, 180, Santipally,
Rajdanga Main Road, 3rd Floor,
Kolkata-700107)

**WITH**

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**.....Respondent**

**APPEARANCE**

Shri J.K.Mittal (Advocate) with Shri Pranabesh Ghosh (G.M.Accounts) for the Appellant (s)
Shri D.Haldar, Authorized Representative for the Respondent

**CORAM: HON'BLE SHRI P.K.CHOUDHARY, MEMBER(JUDICIAL)**
**HON'BLE SHRI P. VENKATA SUBBA RAO, MEMBER(TECHNICAL)**

**FINAL ORDER NO. 76188-76189/2019**

DATE OF HEARING : 25 June 2019
DATE OF DECISION : 25 June 2019

**P.K.CHOUDHARY :**

This appeal has been filed against the demand confirmed by the Ld.Commissioner vide the Order-in-Original dated 26.06.09 whereas the Revenue has also filed an appeal against the said order to the extent of the demand having been dropped in the aforesaid order. This is the second round of litigation before this Tribunal.

2. Briefly stated, the facts of the case are that the assessee is undertaking job for its clients (who are buyers of coal from Coal India Ltd and its subsidiaries) which include follow up on behalf of clients between collieries and railways, supervising, monitoring, witnessing the specified coal size and grade, ensuring optimum quantity of supply with correct measurement, organizing sampling and analysis of coal. Thus, the assessee basically carries out co-ordination among clients, collieries and railways for uninterrupted supply of coal. A Show Cause Notice dated 18.10.2004 was issued for the period from September 1999 to March 2004 proposing a demand of service tax under the category of 'Clearing and Forwarding' services. The Ld.Commissioner vide order dated 25.04.2006 confirmed the demand of service tax with interest and penalty against which the assessee preferred an appeal before this Tribunal. The Tribunal vide order dated 25.10.2007 set aside the said adjudication order with the direction for de-novo adjudication in light of the decision of the Larger Bench of this Tribunal in the case of Larsen & Toubro Ltd. Vs. CCE Chennai [2006 (3) STR 321 (Tri-LB)]. The Ld.Commissioner in the remand proceedings vide the impugned order

dated 26.06.2009, dropped a portion of the demand on account of computation for excluding commission amount and other charges, against which the Revenue is in appeal before us. The Ld.Commissioner, however, confirmed the demand of service tax under the category of Clearing and Forwarding services together with interest and penalty against which the assessee has preferred this appeal before us.

3. The Ld.Advocate for the assessee stated that the Appellant was carrying out the following activities:

(a) Liaisoning and follow up on behalf of the customers between collieries and railways,

(b) supervising, monitoring, witnessing the loading of specified size and grade of coal and shortage en-route, ensuring optimum quantity of supply, ensuring proper weighment,

(c) co-ordination receipt of necessary documents and submitting the same to the customers and

(d) organizing sampling and analysis of coal.

4. He submitted that the assessee is not physically handling or receiving or storing the coal for their clients but only liaisoning, supervising and co-ordinating the supply of coal. He submitted that the issue has already been decided in their favour by the Hon'ble Supreme Court in the case of Coal Handlers Pvt.Ltd. vs. CCE, Kolkata [(2015) 11 SCC 683 (SC)], wherein it has been held that the aforesaid activities cannot be classified as Clearing and Forwarding services. Further, he also submitted that relying on the aforesaid Apex Court decision, this Tribunal (Mumbai Bench) in their own case has already set aside the demand in identical set of facts which is reported in Naresh Kumar & Co. vs. CCE Nagpur [2019 (22) GSTL 76 (Tri-Mum)]. He further submitted that they are already discharging payment of service tax under the category of Business Auxiliary Services w.e.f. 10.09.2004 which is the correct classification under which tax can be levied and therefore, the present demand under the head 'Clearing and Forwarding' services cannot sustain. He also disputed the demand on

the ground of limitation and contested the imposition of penalty. In so far as the appeal filed by Revenue is concerned, he submitted that since the main issue of taxability stands decided in their favour, there remains no scope for further examination of valuation for determining the assessable value for raising demand under Clearing and Forwarding services.

5. The Ld.DR for Revenue reiterated the findings of the Ld.Commissioner.

6. Heard both sides and perused the appeal records.

7. We find that the issued stands settled by the Mumbai Bench of this Tribunal in the assessee's own case. The Tribunal relying on the Apex Court decision in Coal Handlers case (Supra) observed that:

> *"3. Appellant's further submission is that taxing the gamut of services is not the intention of the law unless and until the clearing and forwarding services are said to have been provided. The scope of activity as enumerated above does not subscribe to this mandate of the law. He further submits that liaisoning, supervising, loading are not activity of clearing and forwarding. Revenue has not at all shown which activity was in relation to clearing and forwarding for taxability. Therefore the activity of "clearing and forwarding" consisting of two activities i.e. clearing and forwarding when carried out cumulatively and simultaneously, that only is taxable. Hon'ble Supreme Court while deciding the case in Coal Handlers Pvt.Ltd. v. CCE, Rage Kolkata-I – 2015 (38) S.T.R. 897 (S.C.) noticed that the activities of the nature as enumerated in Para 2 of the judgment should not fall within the scope of "clearing and forwarding" service. The Court has explained what constitutes clearing and forwarding operation and on the given facts and circumstances how the expression shall be interpreted. For this purpose, Learned Counsel places Para 11 of the said judgement which reads as under:-*
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> > *"11. From the reading of the definition contained in the aforesaid provision, together with its dictionary meanings*

*contained in Legal and Commercial dictionaries, it becomes apparent that in order to qualify as a C&F Agent, such a person is to be found to be engaged in providing any service connected with 'clearing and forwarding operations'. Of course, once it is found that such a person is providing the services which are connected with the clearing and forwarding operations, then whether such services are provided directly or indirectly would be of no significance and such a person would be covered by the definition. Therefore, we have to see as to what would constitute clearing and forwarding operations. As is clear from the plain meaning of the aforesaid expression, it would cover those activities which pertain to clearing of goods and thereafter forwarding those goods to a particular destination, at the instance and on the directions of the principal. <u>In the context of these appeals, it would essentially include getting the coal cleared as an agent on behalf of the principal from the supplier of the coal (which would mean collieries in the present case) and thereafter dispatching/forwarding the said coal to different destinations as per the instructions of the principal.</u> In the process, it may include warehousing of the goods so cleared, receiving dispatch orders from the principal, arranging dispatch of the goods as per the instructions of the principal by engaging transport on his own or through the transporters of the principal, maintaining records of the receipt and dispatch of the goods and the stock available on the warehouses and preparing invoices on behalf of the principal. The Larger Bench rightly enumerated these activities which the C&F Agent is supposed to perform."*

*4. It is his submission that Hon'ble Supreme Court has specifically held that liaisoning will not be covered by the definition of clearing and forwarding service. This can be* *appreciated from Para 12 of the above said judgment which is reproduced below:-*

> *"12. On the facts of the present case, we find that none of aforesaid activities are performed by the appellant. the <u>There is no role of the appellant in getting the coal cleared from the collieries/supplier of the coal</u>. Movement of the coal is under the contract of sale between the coal company and Ambuja companies. Even the coal is loaded on to the railway wagons by the coal company. The goods are not under any legal detention from which they need to be freed by the appellant. Not only this, destination of the goods is known to the coal company and the railway rakes are placed by the coal company for the said destinations. The destination is the factories of the principal itself, namely, Ambuja companies, where the coal is to be delivered by the coal company as per pre-determined/agreed covenants between them. Therefore, there is no occasion for Ambuja companies to instruct the appellant to dispatch/forward the goods to a particular destination which is already fixed as per the contract between the coal company and the Ambuja companies. The appellant does not even undertake any loading operation. The primary job of the appellant, as per the contract between the appellant and the Ambuja companies, is of supervising and liaisoning with the coal company as well as the Railways to see that the material required by Ambuja companies is loaded as per the schedule. At no stage custody of the coal is taken by the appellant or transportation of the coal, as forwarders, is arranged by the appellant. We are, thus, of the clear opinion that the services rendered by the appellant would not qualify as C&F Agent within the meaning of Section 65(25) of the Act."*

*5. On the aforesaid reasoning, appellant says that the term "clearing and forwarding" would cover only those activities which pertain to clearing of the goods and forwarding thereof to a destination, under the directions of the principal. Beyond this, no other activities shall be taxable under the above said taxing entry.*

*6. Per contra, Revenue pleads that the entire gamut of services stated in the show cause notice is extracted above shall be taxable.*

*7. It is inconceivable how an activity not being covered by the fold of law shall be taxable beyond its mandate. It is well settled law in Cape Brandy Syndicate v. Inland Revenue Commissioner – (1921) 1 KB 64, which is also approved by Apex Court that taxing provision should be considered strictly without leaving any intendment. When law prescribed certain activity shall only be taxable on occurrence of taxable event, without any evidence to that effect, there is no presumption in taxation. In absence of such evidence on record, it is not at all possible to hold beyond the ratio laid down by the Apex Court which is binding on Tribunal on the given facts and circumstances and akin to the facts in the judgment of the Apex Court."*

8. We find that the very essential requirement, in order to constitute clearing and forwarding services, of clearance of coal from the collieries is absent in the present case and that the assessee is only undertaking liaisoning related services to ensure smooth supply of coal. The present issue is no longer *res integra* and therefore, the appeal of the assessee is entitled to succeed. In so far as the appeal filed by the Revenue is concerned, the question of inclusion of other charges as deducted by the Ld.Commissioner will not arise inasmuch as the very taxability under the category of Clearing and Forwarding services cannot sustain and therefore, the appeal of the Revenue being devoid of any merit is liable to be rejected.

In view of the above discussions, the demand of service tax, interest and penalty are set aside. Accordingly, Service Tax Appeal No.229 of 2009 filed by the assessee is allowed and Service Tax Appeal No.231 of 2009 of the Revenue is rejected.

(Pronounced in the open Court.)

SD/

**(P.K.CHOUDHARY)**
**MEMBER (JUDICIAL)**

**SD/**

**(P.VENKATA SUBBA RAO)**
**MEMBER (TECHNICAL)**

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