IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA

REGIONAL BENCH – COURT NO.2

Service Tax Appeal No.90 of 2009

(Arising out of Order-in-Appeal No.03/ST/B-II/2009 dated 15.01.2009 passed by Commr. of Central Excise, Customs & Service Tax, Bhubaneswar II)

M/s S.Kumar Handling Agency
Station Road, Barbil, Dist.-Keonjhar, Odisha

Applicant

VERSUS

CCEx., Customs & S.Tax, BBSR II
Rajaswa Vihar, C.R.Building, Bhubaneswar, Orissa

Respondent

APPERANCE :
Shri Kartik Kurmy, Advocate for the Appellant
Shri D.Halder, Authorized Representative for the Respondent

CORAM:
HON'BLE MR. P.K.CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR.C. J. MATHEWS, MEMBER (TECHNICAL)

FINAL ORDER NO.76982/2019

DATE OF HEARING : 24.09.2019
DATE OF PRONOUNCEMENT/DECISION : 24.12.2019

PER P.K.CHOUDHARY :

1. This Appeal arises out of the Order-in-Appeal No.03/ST/B-II/2009 dated 15th January, 2009 passed by the Learned Commissioner (Appeals) of Central Excise, Customs & Service Tax, Bhubaneswar Zone.

2. Breifly stated, the facts of the case are that during the period under dispute i.e. November' 2003 to March'2005, the Appellant executed composite contracts for local transportation of Iron Ore from mines dump yard to the Rail Track Heads/Railway Siding in Automated Tipping Trucks (goods carriage), with incidental loading into such tipping trucks & automated unloading at the Railway Track Head/Railway Siding. The tipping trucks are fitted with Hydraulic Jack facility and the unloading is done without human intervention. The rates are composite and no loading/unloading charges is collected separately by the Appellant. The Appellant raises their bills for local transportation on their client. No service tax is paid by the Appellant on these

transportation contracts. The Appellant also provides wagon loading service on which they have admitted service tax liabilities.

3. The Ld. Joint Director, DGCEI accordingly issued Show Cause Notice dated 07/08-02-2006 demanding Service Tax of Rs.13,64,574/- under the category of “Cargo Handling Service” defined U/s 65(23) read with Sec.65(105)(zr) for the period from November’2003 to March’2005 along with interest U/s 75 and proposing penalty U/s 76, 77 and 78. Under Para 3 on Page 15 of the Show Cause Notice, it is observed that the work of shifting of Iron Ore Lumps and Fines from dump yard to railway siding involves loading at dump yard and unloading at Railway siding and the work of shifting is nothing but loading of goods into tipper and movement of tipper within the area of stock yard upto 100 meters and then unloading at Railway siding. At page 16 under Para 6 of the Show Cause Notice, it is alleged that the activity of shifting shall be covered under “Cargo Handling Service” only as service related to movement of goods/transportation of goods is not taxable under GTA Service. At Page 17 under Para 8, it is observed that as the rates for transportation part is not segregated, hence, combined rate for shifting shall be taken for calculation of service tax under “Cargo Handling Service”.

4. The Learned Advocate for the Appellant Shri Kartik Kurmy took us through the bills raised by the Appellant for wagon loading and Local Transportation/Shifting to demonstrate that the wagon loading contracts and local transportation contract are separate. The Appellant has admitted service tax on wagon loading activities. The Learned Advocate submits that the Learned Commissioner(Appeal) in the impugned Order under Para 32 following the Board Circular No.B11/1/2002-TRU dated 01-08-2002 (Para 4) has sought to tax the entire consideration for transportation, loading, unloading under the category of “Cargo Handling Services” on the ground that for loading of tippers, transportation and unloading of tippers at the Railway Track Head/Railway Siding, there is no separate rates provided, therefore, as per the said circular the entire consideration shall be taxable under the category of Cargo Handling Services. The Learned Advocate further submits that so far as the transactions in question are concerned they

are a transporter and not Cargo Handling Agents and to attract the levy unless the twin test of handling of “cargo” by a “Cargo Handling Agent” are satisfied, no tax can be demanded by implication and without clear authority of law. In the instant case it is nobody’s case that the Appellant is a Cargo Handling Agent. The Learned Counsel further relied upon the decisions of this Tribunal in the case of Shri Raj Coal Carriers P. Ltd. Vs CCE vide Order dated 24-04-2019 bearing No.FO/75464/2019 in Appeal No.ST/158/2009, M/s Lakhanpur Coal Carriers Vs CCE vide Order dated 24-04-2019 bearing No.FO/75466/2019 in Appeal No.ST/159/2009 and Khanduja Coal Transport Company Vs CGST reported in 2019-TIOL-1018-CESTAT-DEL to contend that transportation for short distance cannot be taxed under the category of Cargo Handling Services but as transport services. The Learned Advocate further relied upon judgment of the Hon’ble Supreme Court in the case of CCE Vs Singh Transporters reported in 2017-TIOL-249-SC-ST to contend that transportation for short distance is taxable as transportation service. The Learned Counsel also contended that the demand is barred by normal period of limitation. He further submits that the major part of the demand in the instant case is barred by limitation as during initial stages of levy there were genuine interpretation dilemma in the trade and even within the department and the dispute relates to classification of service, hence, neither extended period of limitation can be invoked nor penalties can be levied.

5. The Learned Authorized Representative for the Respondent supports the impugned Order. It is contended by him that since the contract is composite for loading of tipper, transportation upto ½ km and unloading at Railway Track Head and under the contract the rate is composite, hence, as per Circular No.B11/1/2002-TRU dated 01-08-2002 the entire transportation charges shall be taxable under the category of “Cargo Handling Services”. It is further contended that since the Appellant is undertaking Loading of Wagon hence, they are “Cargo Handling Agent”.

6. Heard both the sides and perused the appeal records.

7. We find that service tax is demanded in the instant case only on the local transportation/shifting charges collected by the Appellant

which is inclusive of loading of tipper, transportation upto Railway Track Head and automated unloaded of tipper at the Railway Track Head. The Appellant is not disputing their liability on “Wagon Loading Charges”.

8. We find that the contract in dispute in the instant case is essentially for the transportation of goods which incidentally involving loading of tipper/unloading of tipper at Railway Track head/Railway Siding which cannot be taxed under the category of Cargo Handling Service simply because rates for loading of tipper at Dump Yard and unloading of tipper at Railway Siding is not provided separately. The Learned Commissioner (Appeal) has erred in placing reliance on Circular No.B11/1/2002-TRU dated 01-08-2002 which does not apply to the facts of the instant case. Further, so far as the transaction of transportation is concerned, it is no body’s case that the Appellant is a Cargo Handling Agent to attract the levy under the category of Cargo Handling Services.

9. We find that recently, while dealing with similar fact situations in the case of S.K.Mineral Handling P. Ltd. Vs. CCE vide Final Order No.76384/2019 dated 22-10-2019, this Tribunal has held that the activity of transportation/shifting of Iron Ore involving incidental loading of tipper/unloading of tipper at Railway Track head/Railway siding cannot be taxed under the category of “Cargo Handling Service”. It is further held that Circular No.B11/1/2002-TRU dated 01-08-2002 cannot be applied to such cases. It is also held that when it is no body’s case that the Assessee is a Cargo Handling Agent, Service Tax under the category of “Cargo Handling Service” cannot be demanded.

10. We accordingly, set aside the impugned Order and allow the Appeal.

(Order pronounced in open Court on 24.12.2019)

Sd/
(P. K. Choudhary)
Member (Judicial)

Sd/
(C.J.Mathews)
Member (Technical)

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