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

REGIONAL BENCH - COURT NO.2

Service Tax Appeal No.344 of 2010

(Arising out of Order-in-Original No.CCE/BBSR-II/S.Tax/No.04-COMMR./2010 dated 26.07.2010 passed by Commissioner of Central Excise, Customs & Service Tax, Bhubaneswar-II.)

M/s. S.K.Mineral Handling Private Limited
(At- Station Road, Barbil, Dist-Keonjhar, Orissa.)

...Appellant

VERSUS

Commissioner of Central Excise & Service Tax, Bbubaneswar-II
.....Respondent
(Rajaswa Vihar, C.R. Building, Bhubaneswar, Orissa.)

WITH

Service Tax Appeal No.279 of 2012

(Arising out of Order-in-Original No.CCE/BBSR-II/S.Tax/No.03/COMMISSIONER/2012 dated 27.02.2012 passed by Commissioner of Central Excise, Customs & Service Tax, Bhubaneswar-II.)

M/s. S.K.Mineral Handling Private Limited
(At- Station Road, Barbil, Dist-Keonjhar, Orissa.)

...Appellant

VERSUS

Commissioner of Central Excise & Service Tax, Bbubaneswar-II
.....Respondent
(Rajaswa Vihar, C.R. Building, Bhubaneswar, Orissa.)

APPEARANCE
Shri K.Kurmy, Advocate for the Appellant (s)
Shri J.Chattopadhyay, Authorized Representative for the Respondent (s)

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

FINAL ORDER NO. 75791-75792/2021

DATE OF HEARING : 17 September 2021
DATE OF DECISION : 17 September 2021

P.K.CHOUDHARY :

Both the Appeals have been taken up together for hearing and are being disposed of by a common order. The facts of the cases are as follows:-

Service Tax Appeal No.344 of 2010

This Appeal arises out of CCE/BBSR-II/S.Tax/No.04-COMMR./2010 dated 26.07.2010 passed by learned Commissioner of Central Excise, Customs & Service Tax, Bhubaneswar-II, confirming Service Tax demand of Rs.1,00,73,551/- under Section 73 of the Chapter V of the Finance Act, 1994 for the year 2007-08 under the category of 'Cargo Handling Services' along with interest and equal penalty under Section 78.

2. The Appellant is engaged in local transportation and wagon loading of Iron Ores. On wagon loading activities, the Appellant has discharged Service Tax liabilities under the category of 'Cargo Handling Services' however, no tax is paid on the value of local transportation of Rs.8,15,68,879/-.

3. The learned Commissioner issued Show Cause Notice dated 09.02.2010 demanding Service Tax of Rs.1,00,73,551/- under the category of 'Cargo Handling Services' on the said local transportation charges of Rs.8,15,68,879/- received during 2007-08 along with interest and proposing penalties under Section 76/ Section 78 of the Act. The said Show Cause Notice culminated into the impugned order and the demand is confirmed on the ground that the local transportation is for short distances, hence, it amounts to shifting and such shifting is taxable under the category of 'Cargo Handling Services'. The learned Commissioner placed reliance on Circular NO.232/2/2006-CX.4 dated 12.11.2007 issued by the Board.

4. The Appellant submits that, during the period under dispute they executed Work Order dated 09.08.2008 awarded by M/s. Rungta Mines Ltd., for wagon loading and local transportation. The rate for each service is separately provided in the contract. Further, M/s. SESA Goa Ltd., awarded Work Order dated 30.03.2007 for transportation of Iron

Ore by Dumpers (without any loading activity). The transportation against both the Work Orders were carried out upto lead/ distance of 07 K.M. by mechanically propelled transport vehicles like Tipper, Hyva, Dumper etc. where the unloading is done automatically without any human intervention as these vehicles are fitted with Hydraulic Jack facility for automated unloading.

Service Tax Appeal No.279 of 2012

5. This Appeal arises out of Order-in-Original No.CCE/BBSR-II/S.Tax/No.03/COMMISSIONER/2012 dated 27.02.2012 passed by Commissioner of Central Excise, Customs & Service Tax, Bhubaneswar-II, confirming Service Tax demand of Rs.2,56,93,751/- under Section 73(1) of Chapter V of the Finance Act, 1994 for the year 2008-09 to 2009-10 under the category of 'Cargo Handling Services' along with interest and penalties imposed under Section 77 and 78.

6. The Appellant in the instant case is engaged in local transportation and wagon loading of Iron Ores. On wagon loading activities, the Appellant has discharged Service Tax liabilities under the category of 'Cargo Handling Services', however, no tax is paid on the value of local transportation of Rs.22,70,84,938/-.

7. The learned Commissioner issued Show Cause Notice dated 28.02.2011 demanding Service Tax of Rs.2,56,93,751/- under the category of 'Cargo Handling Services' on the local transportation charges of Rs.22,70,84,938/- received during 2008-09 to 2009-10 along with interest and proposing penalties under Section 77/Section 78 of the Act. It is observed that separate invoices are raised for loading and transporting. Tax is paid on loading but no tax is paid on transportation. The said Show Cause Notice culminated into the impugned order and the demand is confirmed on the ground that the local transportation is for short distances, hence, it amounts to shifting and such shifting is taxable under the category of 'Cargo Handling

Services'. The learned Commissioner placed reliance on Circular No.232/2/2006-CX.4 dated 12.11.2007 issued by the Board.

8. The Appellant submits that, during the period under dispute they executed Work Order dated 09.08.2008 awarded by M/s.Rungta Mines Ltd., for wagon loading and local transportation. The rate for each service is separately provided in the contract. Further, M/s.Sara International Ltd., awarded Work Order dated 27.07.2009 for transportation and loading of Iron Ore with separate rate for each of them. The transportation against both the Work Orders were carried out upto lead/distance of 03 K.M. by mechanically propelled transport vehicles like Tipper, Hyva, Dumper etc. where the unloading is done automatically without any human intervention as these vehicles are fitted with Hydraulic Jack facility for automated unloading.

9. On merit, it is submitted for both the Appeals that the work executed by the Appellant is for local transportation which cannot be classified under the category of 'Cargo Handling Services'.

10. The Appellant further submits that demands in the instant cases are partly barred by normal period of limitation as the demands are for 2005-06, 2006-07 and 2008-09 & 2009-10 respectively where the Show Cause Notices were issued on 01.02.2007 and 09.02.2010, and while issuing the earlier Show Cause Notices, the department had acquired knowledge of the facts of the case, hence, suppression of facts etc. cannot be imputed warranting invocation of extended period of limitation. During the relevant period, the normal period of limitation was one year from the relevant date. The Appellant further submits that the entire demands are raised on the basis of facts and figures appearing in its books of accounts, balance sheet, profit & loss account, hence no question of any suppression of facts etc. does arise either. The Appellant placed reliance on judgement of Hon'ble Supreme Court in the case of **Nizam Sugar Factory Vs. CCE reported in 2006 (197) E.L.T. 465 (SC)** and Tribunal's decision in **GAC Shipping (India) Pvt.Ltd. Vs. CCE reported in 2017 (49) S.T.R. 242 (Tri.).**

11. It is further submitted that in their own case for the period January 2005 to December 2005 (2005-06 and 2006-07), the Tribunal vide Final Order No.76384/2019 dated 23.10.2019 in Appeal No.ST/110/2009-DB reported in 2019-TIOL-3514-CESTAT-KOL, while dealing with similar facts has set aside the Order-in-Appeal and dropped the demand. It is argued that the case of the Appellant is directly covered by the judgement of the Tribunal in their own case which is accepted by the Department and has attained finality.

12. Heard both sides through video conferencing and perused the Appeal records.

13. We find that the issue is no more *res integra* in view of the Tribunal's decision in the Appellant's own case reported as **S.K.Mineral Handling Pvt.Ltd. Vs. CCE, C & ST, BBSR-II [2019-TIOL-3514-CESTAT-KOL]**, wherein it was held as under:-

> ***"2.*** *The facts of the case in brief are that during the period under dispute i.e. January, 2005 to December, 2005 the appellant executed composite activity of local transportation of Iron Ore from mines dump yard to the Rail Track Heads/Railway Siding upto lead of ½ km in Automated Tipping Trucks (goods carriage), with incidental loading into such tipping trucks and automated unloading at the Railway Track Head/Railway Siding.*
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> ***3.*** *The automated tipping trucks are fitted with Hydraulic Jack facility for automatic unloading without any human intervention. The appellant prepares bills for "local transportation" on their client. Department has confirmed Service Tax demand of Rs. 18,50,827/- on such activities. It appears from Page 16 & Page 17 of the show cause notice dated 1-2-2007 that the said transportation for short distance is treated by the department as "Shifting" for short distances which the appellant has claimed to be transportation but as per the show causing authority, it cannot be transportation activity but Cargo Handling activity. As per Para 8 of the show cause notice the rate is composite and no charges for loading, unloading is collected separately by the appellant. On perusal of the quantification of demand placed at Annexure-1 of the show cause notice (Page 309) it appears that there*

are separate contract for local transportation and wagon loading activities and the two contracts are distinct and separate and in the instant case service tax is already paid by the appellant on the wagon loading activities but no service tax is paid on the transportation/shifting activities on which service tax is now demanded.

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 already discharged service tax on wagon loading activities. In the show cause notice service tax is demanded only on the local transportation/shifting work (with incidental loading of tippers and automated unloading at Railway Track Head). The Learned Advocate further submits that the Learned Commissioner (Appeals) in the impugned Order under Para 33 following the Board Circular No. B11/1/2002-TRU, dated 1-8-2002 (Para 4) has sought to tax the entire consideration 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 submits that they are 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 not 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. v. CCE vide Order dated 24-4-2019 bearing No. FO/75464/2019 in Appeal No. ST/158/2009, M/s. Lakhanpur Coal Carriers v. CCE vide Order dated 24-4-2019 bearing No. FO/75466/2019 in Appeal No. ST/159/2009 and Khanduja Coal Transport Company v. 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 v. 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.*

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7. *We find from Page 16, 17 & 18 of the show cause notice that service tax is demanded 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 unloading of tipper at the Railway Track Head. A perusal of the show cause notice shows that the demand in the instant case is on the "Work of Shifting of Iron Ore Lumps and Fines from Dump Yard to Railway Siding" which involved loading at Dump Yard, transportation and unloading at Railway Siding. The appellant has already paid service tax on wagon loading activities which is clear from the quantification made in the show cause notice.*

8. *We find that the contract 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 (Appeals) has erred in placing reliance on Circular No. B11/1/2002-TRU, dated 1-8-2002 which does not apply to the facts of the instant case. Further, it is nobody's case that the appellant is a Cargo Handling Agent to attract the levy under the category of Cargo Handling Services."*

14. We find that separate rates in the work orders clearly indicates two separate contracts in one instrument. The learned Commissioner has erred in clubbing a divisible contract. The Tribunal in the case of Jai Jawan Coal Carriers Pvt.Ltd. Vs. CST reported in 2015 (37) S.T.R. 509 (Tri.-Del.), held thus :-

"6. *The appellant had entered into agreements with their various clients - Bharat Cooking Coal Ltd., Orissa Coal Mining Corporation Ltd. etc. in terms of which the appellant were to provide tipper trucks, load the coal/mineral ores at the coal/mineral heaps into the tipper trucks, transport the same to the railway siding located within the mines and unload the coals/mineral ore into the wagons for its transportation. On going through the sample work orders placed on record, we find that the work orders mention separate rates for transportation, tipper loading and wagon loading and according to the appellant, the invoices had been issued on this basis only. Since, the work orders prescribe separate rates for tipper loading that is loading of the coal/mineral ore into the tipper trucks, its transportation up to the railway siding and unloading of the coal/mineral ore into the railway wagons, the appellant's contracts with their clients has to be treated as separate contracts for transportation, loading and unloading of coal/mineral ores, though under one instrument. The coal/mineral ore loaded by the appellant at the coal/mineral ore heaps and thereafter unloaded into the wagons was meant for transportation to its destinations by railways and, therefore, the same would have to be treated as 'cargo' and its loading into the tipper trucks and thereafter unloading into the railway wagons would have to be treated as cargo handling service. Hon'ble Orissa High Court in para 22 of its judgment in the case of Coal Carriers v. CCE & CUS & ST, Bhubaneswar (supra) has observed that pre-transportation activities like packing/loading and post transportation activities like un-loading, un-packing are covered by cargo handling service and that cargo handling service is an adjunct service to the actual transportation of the goods. Since, in this case in the appellant's contracts with their clients, the activity of the loading of the coal/mineral ore into the tipper trucks and its subsequent unloading into the railway wagons for its transportation is clearly identified and separate rates are prescribed for the same, we hold that the service tax would be chargeable on the amount charged by the appellant for these services under Section 65(105)(zr) read with Section 65(23) of the Finance Act, 1994. However, service tax would not be chargeable on the amount charged for transportation, as even if this transportation within the mines is treated as GTA service provided* *by the appellant agency, the liability to pay service tax in respect of this activity would be of the service recipient."*

15. We also find that the decision of the Tribunal in the case of Jain Carrying Corporation Vs. CCE reported in 2014-12-TMI-506-CESTAT New Delhi, against which the Civil Appeal filed by the Department is dismissed by the Hon'ble Supreme Court reported in 2015 (39) S.T.R. J370 (S.C.), Para 9 of the said decision reads as follows:-

"9. We do not find any favour with the reasons given by the adjudicating authority, which stands reiterated by the ld.DR, which is to the effect that all the three services have to be taken collectively for treating the same as 'cargo handling services', which were introduced w.e.f. 16.08.2002 and the appellant are liable to pay service tax on the full consolidated compensation received by them for the said three different services, even though in respect of the services (a) and service (b), the appellant started paying service tax from the date of introduction of the different services. The contract may be a composite contract but the services stand clearly mentioned separately with separate rates for the same as indicated against each and every service. As already observed, the first two services fall under different categories which were introduced subsequently and for which the appellant had started paying service tax from those date, we find no reasons to hold that the said two services are part & parcel of the 'cargo handling services', which according to the Revenue falls under clause (c)".

16. In the above background of the case, it is observed that the demands of Service Tax on transportation charges is not sustainable. Further, the demand in the first case i.e. in Service Tax Appeal No.344 of 2010 is entirely barred by normal period of limitation and

in the second case i.e. Service Tax Appeal No.279 of 2012 is partly barred by normal period of limitation of one year.

In view of the above discussions, we set aside the impugned orders and allow the Appeals with consequential relief to the Appellants.

(Operative part of the order was pronounced in the open Court.)

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

Sd/
(P.V.SUBBA RAO)
MEMBER (TECHNICAL)

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