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

REGIONAL BENCH - COURT NO.2

Service Tax Appeal No.407 of 2011

(Arising out of Order-in-Appeal No.240/ST/Kol/2011 dated 02.08.2011 passed by Commissioner of Central Excise (Appeals), Appeal-I, Kolkata.)

M/s. Naresh Kumar & Company Private Limited
(9B, Wood Street, 5th Floor, Kolkata-700016.)

...Appellant

VERSUS

Commissioner of Service Tax, Kolkata

.....Respondent

(GST Bhawan, 180, Shantipally, Rajdanga Main Road, Kolkata.)

APPEARANCE

Shri Sanjay Dixit, Chartered Accountant for the Appellant (s)

Shri K.Chowdhury, Authorized Representative for the Revenue

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

FINAL ORDER NO. 75532/2023

DATE OF HEARING : 8 May 2023
DATE OF DECISION : 05 June 2023

Per : P.K. CHOUDHARY :

The present Appeal has been filed by M/s Naresh Kumar & Co. Pvt. Limited to assail the Order-in-Appeal No 240/ST/Kol/2011 dated 02.08.2011 wherein the Ld.Commissioner (Appeals), Kolkata has confirmed the demand of Service Tax of Rs.15,01,089/- with applicable interest, penalty of Rs. 5,000/- under Section 77 and

Rs.15,01,089/- under Section 78 of Finance Act 1994 by confirming the classification under cargo handling services.

2. Briefly stated the facts of the case are that a single work order for carrying out the services of (i) Trucking, loading and unloading of dolomite boulders from mines to crusher plant (ii) Haulage to Sonakhan Railway siding through Trucks (iii) Haulage of Dolomite from stock-pile/washery through trucks (iv) Haulage of dolomite from crusher bins to stock piles (v) Loading of dolomite into all types of railway wagons by machine/manual labour, with separate rate for each activity, was entered between the appellant and M/s TISCO. Show Cause Notice (SCN) was issued proposing demand under cargo handling service on the services noted in (i),(iii) and (v) above which was confirmed by the adjudicating authority. Aggrieved by the adjudication order, the appellant preferred an appeal before the appellate authority which was rejected. The appellants have all along contended that they are not handling any cargo but are providing transportation services within the mines.

3. Shri Sanjay Dixit, Ld.Chartered Accountant appeared for the Appellant and argued the matter on merits and also on limitation.

4. The Ld. Chartered Accountant submitted that the services provided to TISCO were essentially for transportation of dolomite within the mining area which includes incidental loading and unloading by strongly relying on the nature of services provided by Appellant as specified in work order. Further reliance was placed on Section 65A of the Finance Act 1994 and the following decisions:

(i) M/s Tycoons Industries Pvt. Ltd. vs Commissioner of Service Tax, Kolkata, Final Order No 75013 & 75014 of 2019 pronounced on 07.01.2019.

(ii) Mirza Hasan vs Commr.(Appeal) Custom, C. Ex & ST, Raipur, Final Order No 50477/2022 dated 30.05.2022 (Tri-Del)

(iii) M/s MaaTarini& Co. vs Commr. C.Ex, Customs & ST, Bhubaneswar, Final Order No 75180 of 2022 dated 06.04.2022 (Tri-Kol)

5. The Ld. Chartered Accountant also emphasized that the period in dispute is for the period 01.06.2004 to 15.07.2005 and the show cause notice has been issued on 29.08.2008 by invoking the extended period of limitation, the entire demand falls outside the normal period of limitation. He submitted that since the issue involves classification of services which is in turn requires interpretation of the provisions of the Act, extended period of limitation cannot be invoked. It was also submitted that no positive act of suppression/willful misstatement with an intent to evade payment of service tax has been brought out in the proceedings.

6. Shri K. Chowdhury, Ld. Authorized Representative appeared for the respondent Revenue and reiterated the findings of the lower authorities. The Ld. Authorized Representative strongly relied on the following judgments to contend that the three services rendered by the appellant fall under the cargo handling services:

(i) Calcutta Industrial Supply Corpn. V Commissioner of S.T., Kolkata, 2019 (31) G.S.T.L 487 (Tri-Kolkata)

(ii) Commissioner of Central Excise, Raipur v Gayatri Carriers Pvt. Ltd. 2013 (32) S.T.R. 367 (Tri- Del)

7. Heard both sides and perused the appeal records.

8. We find that the issue involved in the appeal is as to whether the services rendered by the Appellant fall under the category of transportation within mines as contended by the Appellant or cargo handling services as alleged by the Revenue.

9. We take note that in the Show Cause Notice, only three out of the five services viz *(i) Trucking, loading and unloading of dolomite boulders from mines to crusher plant (iii) Haulage of Dolomite from stock-pile/washery through trucksto sonakhan railway siding* and *(v)*

Loading of dolomite into all types of railway wagons by machine/manual labour have been alleged to fall under cargo handling services. No demand has been proposed on the other two services viz *(ii) Haulage to Sonakhan Railway siding through Trucks* and *(iv) Haulage of dolomite from crusher bins to stock piles.* It has been observed in the SCN that services (i) and (iii) involve loading and unloading and no separate rate for transportation has been provided for the services and therefore they are classifiable under cargo handling service with respect to the fifth service, viz, *Loading of dolomite into all types of railway wagons by machine/manual labour.* It has been observed that it squarely falls under cargo handling service.

10. We also take note that in the OIO the adjudicating authority has confirmed the demand by observing that the two services noted above in (i)*and (iii)*are composite in nature involve loading and unloading and no separate rate for transportation has been provided for the services and therefore they are composite service classifiable under cargo handling service in terms of section 65(23) read with Section 65(2)(b) of the Finance Act 1994.

11. The appellate authority has confirmed the demand that all services provided by the Appellant are for handling of goods and therefore classifiable under cargo handling services.

12. We have carefully examined the nature of services provided by the Appellant specified in the work order. We find that the essence of the service to be provided by the Appellant is of transportation of dolomite within various locations in the mining area and its final loading into railway wagon which is evident from the scope of services. This constitutes a single taxable service for transportation of dolomite within different locations of the mining area involving incidental loading and unloading and finally loading the same at the railway siding. It is certainly not a case that five separate taxable services have been provided under a single work order. The scope of the work order has to be read and interpreted in the context in which it has

been awarded and the specification of separate rates for each sub-activity would not render each sub-activity to be a different taxable service. Therefore, separate rates for the various intermediate activities for carrying out this composite service have been provided in the work order. We therefore hold that stand of the Revenue is flawed in treating each sub-service/activity as a separate taxable service, based on separate rates for each of them, without ascertaining the essence of the contract.

13. Having held so, the next question for determination is the essential character of this composite service involving transportation and loading. Once it is found that the services are composite and has elements fitting into the definitions of both the services, recourse is to be taken to Section 65A.We note that Sub-section (2) clause (b) is relevant considering the facts of the case which provides that in case of composite service consisting of a combination of different services which cannot be classified in the manner specified in clause (a), shall be classified as if they consisted of a service which gives them their essential character, in so far as this criterion is applicable.

14. We find that four out of the five activities under the work-order viz of (i) Trucking, loading and unloading of dolomite boulders from mines to crusher plant (ii) Haulage to Sonakhan Railway siding through Trucks (iii) Haulage of Dolomite from stock-pile/washery through trucks (iv) Haulage of dolomite from crusher bins to stock piles are primarily for transportation of dolomite within mines and the activity of loading and unloading embedded therein is merely incidental and a necessity for carrying out the primary / principal services of transportation. We further note that that nearly 83% of the total consideration specified in aggregate for the entire composite service is for these transportation services. Therefore, we have no doubt in holding that the primary and predominant service which gives the essential character to this composite service is the service of transportation. We hold accordingly.

15. The Ld. Chartered Accountant for the Appellant has relied on the judgment of the co-ordinate Bench of this Tribunal in the case of M/s Tycoons Industries Pvt. Ltd (supra) which is on identical facts as the Appellant in that case had been providing identical services within mines of TISCO and the demand was confirmed under the service category of cargo handling. The Co-ordinate Bench in Para 11 of its order, after examining the terms of agreement held that the essence of the contract is one for transportation of mineral within mining area and thereafter determined the classification of service in accordance with provisions of Section 65A of the Finance Act 1994. In Para 14 of the Order conclusively held that the activity of the appellants are principally for transportation within the mining area and therefore the gross amount received cannot be taxed under the category of cargo handling service. We are in agreement with the views expressed and the ratio laid therein is squarely applicable in the instant appeal.

16. The Ld. Chartered Accountant has also argued on the aspect of limitation. We find that the show cause notice was issued beyond the normal period of limitation which was one year at that relevant point of time. The issue in the present appeal is one involving interpretation of law. We further note that the issue of classification between the services of transportation and cargo handling was a vexed and disputable issue. It is a settled law that invocation of extended period cannot be sustained in such cases. Thus, the demand is not sustainable on the ground of limitation also.

17. On the other hand, the Ld. Authorized Representative appearing for the Revenue has placed strong reliance on the judgment of this Tribunal in the case of Calcutta Industrial Supply Corpn. V Commissioner of S.T., Kolkata reported in 2019 (31) G.S.T.L 487 (Tri-Kolkata). We note that in the said case three types of contracts were involved. The first contract related to transportation of coal inside mines with incidental loading of coal with composite rates for both the services within mines. The second contract was for transportation of

coal inside mines with incidental breaking, loading with separate rates for transportation and loading within mines.The third kind of contract was for hiring of pay loaders for mechanical transfer of coal into railway wagon and loading of coal into trucks/tippers within the mines.It was a categorical finding of the Ld. Commissioner that the contracts were mainly for loading and unloading of coal into railway wagon and tipper trucks mechanically with transportation of coal and such activity comes within the purview of the cargo handling services following Board's Circular no.232/2/2006-CEX.4 dated 12.11.2007 and falls within the purview of cargo handling service.It was further observed by the Ld. Commissioner that the handling aspect was very much prominent, and transportation was incidental to handling activity and therefore the service was classifiable under cargo handling service. On a perusal of the contracts the Tribunal came to a conclusion that in all the three contracts loading of coal into wagons in railway sidings and loading and unloading services were of predominant nature and therefore, it held that the services carried on under these three contracts would come within the definition of cargo handling service. Thus, in essence the decision in the said case was based on the nature of the services which the appellant was required to carry on which suggested that the predominant nature of the contract was loading and unloading and transportation was an incidental activity.The Bench further distinguished the case of Sainik Mining and Allied Services Limited vs. Commissioner of C. EX, Cus and ST, BBSR 2008 (9) STR 531 (Tri. Kol) by observing that in the case of Sainik Mining, the services undertaken were principally the transportation of coal whereas in the case of Calcutta Industrial Supply Corpn, the description of work in the work orders was found principally of loading, unloading of coal where the handling aspect was very much prominent. In such facts of the case, the Tribunal held that the services carried on by the appellant are more appropriately classifiable under 'cargo handling service' as the principal activity is loading and unloading and not transportation. Therefore, the facts and conclusion reached is clearly distinguishable from the facts of the instant appeal.

In view of the above discussions, the appeal filed by the appellant is allowed on merits as well as on limitation with consequential relief, if any, as per law.

(Order pronounced in the open court on 05 June 2023.)

Sd/

(P.K. CHOUDHARY)
MEMBER (JUDICIAL)

Sd/

(K. ANPAZHAKAN)
MEMBER (TECHNICAL)

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