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

Service Tax Appeal No. 06 of 2012

(Arising out of the Order-in-Original No. 26/S. Tax/Commissioner/2011 dated 30.09.2011 passed by Commissioner of Central Excise & Service Tax, Jamshedpur.)

M/s N. Kumar & Co.,
6, Circuit House Area (North), Jamshedpur-831001.

...Appellant (s)

VERSUS

Commissioner of CGST & Central Excise, Jamshedpur.
143, New Baradwari, Sakchi, Jamshedpur-831001.

. ...**Respondent(s)**

APPERANCE :
Dr. Samir Chakraborty, Sr. Advocate & Shri Abhijit Biswas, Advocate for the Appellant
Shri K. Chowdhury, Authorized Representative for the Respondent

CORAM:
HON'BLE MR. ASHOK JINDAL MEMBER (JUDICIAL)
HON'BLE MR. K. ANPAZHAKAN MEMBER (TECHNICAL)

FINAL ORDER No...76005/2023

DATE OF HEARING : 19.06.2023
DATE OF DECISION : 19.06.2023

PER K. ANPAZHAKAN :

N. Kumar & Co (The Appellant) was engaged in providing shifting of various materials from one place to another within the premises of Tata Steel Ltd., Jamshedpur ("ISL") at their Jamshedpur Steel Works factory, under specific work orders. The jobs under the said work orders involved transportation of materials, loading and unloading there for while shifting of the various materials within the said Steel Works and other incidental work related thereto. These materials are mostly ores and Lime Stones, Hard Cole, Iron Ore Fines, Coke Breeze, Coal, etc. The transportations within the factory were effected mostly through

dumpers with tipper body so as to unload the materials mechanically. The work orders issued by Tata Steel separately provided for loading and unloading of materials and transportation of the materials within the factory premises under separate code numbers. The Appellant raised bills also separately upon Tata Steel for these activities.

2. In case of the amounts received in respect of loading and unloading of the materials, the Appellant paid service tax thereon upon classifying the job rendered under "Cargo handling Service" within the meaning of Section 65(23) of the Finance Act, 1994. In respect of the services of transportation of the materials within the factory premises, the Appellant classified the said services under "Goods Transportation Agency Services by Road," and not paid service tax under the bona fide belief that the service recipient TSL are liable to pay service tax in terms of Rule 2(1)(d)(v) of the Service Tax Rules, 1994. The Appellant stated that M/s.Tata Steel paid service tax on the transportation service upon availment of abatement as provided under Notification Nos. 32/2004-ST and 1/2006-ST as they satisfied the conditions laid down to avail the said exemption.

3. Pursuant to an Audit Report, a Show Cause Notice dated 04.11.2010 was issued by the Commissioner of Central Excise and Service Tax, Jamshedpur demanding service tax of Rs.2,71,28,727/-, for the period April 2005 to March 2010, alleging that the Appellant has short paid service tax on the Cargo Handling Service rendered by them to M/s.TSL. The Notice was adjudicated vide Order-in-Original dated 30.09.2011, wherein the demand of service tax raised in the Notice was confirmed along with interest and penalty of Rs 2,75,00,000/- was

imposed on the Appellant under Section 78 of the Finance Act, 1994. Penalty of Rs 5000/- imposed on the Appellant under Section 77 and Rs 5000/- penalty was imposed on M/s TSL under section 77 of the Finance Act, 1994.

4. In their submissions, the Appellant stated that they have rendered the services under a composite contract under the work orders issued by TSL. The Ld. Commissioner has considered loading and unloading the goods as the main job and the transport job as incidental to the main job of unloading and loading. Merely because they have paid service tax under Cargo Handling Service, in respect of the receipts on loading, unloading and stacking activities, it does not mean that they are liable to pay service tax on the total value received which is inclusive of transportation charges. It is a settled principle in law that ther is no estoppel in taxation matters. M/s TSL has already paid service tax on the transportation service, as a recipient of service. Hence, the Appellant was not liable to pay service tax on the same value under 'Cargo Handling Sevice'., since the activity of shifting the goods within the factory premises cannot come within the definition of 'Cargo Handling Service'.

5. The Appellant stated that in Appellant's own case the Tribunal, Kolkata has issued Final Order No.75532/2023 wherein it has been held that carrying out the services of trucking, loading and unloading of Dolomite boulders under a single contract, is to be classified as transportation service, since transportation within the mines cannot be categorized as 'Cargo Handling Service'.

6. The Ld. A.R. reiterated the findings of the adjudicating authority in the impugned order.

7. Heard both sides and perused the appeal records.

8. We observe that the Appellant has undertaken the work of shifting of various materials within the Tata Steel Works factory. A perusal of the contract revealed that it was a composite contract in which Transportation was the primary service. Loading, unloading and stacking of the cargo was incidental to the main work. Accordingly, service tax was payable on Transportation service on the total value received. However, the Appellant has paid service tax under the category of Cargo Handling Service, towards the receipts made for loading, unloading and stacking work. Just because they have paid service tax under Cargo Handling Service for the unloading, loading and stacking services, it does not mean that the Appellant were liable to pay service tax under cargo Handling Service on the total value. We observe that Tribunal, Kolkata has decided the same issue in Appellant's own case vides Final Order No.75532/2023. The relevant portion of the order is reproduced below:

> "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 trucks to 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.

11. 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.

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.

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.

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.

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.

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.

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.

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. "

8. Following the above decision of this Tribunal in Appellants own case on the same issue, we hold that the Appellant is not liable to pay service tax under the category of Cargo Handling Service'. Hence, the demand confirmed in the impugned order is not sustainable. Since demand of service tax is not sustainable, the demand of interest and imposition of penalty is also not sustainable. Accordingly, we set aside the impugned order.

9. In view of the above discussion, we allow the appeal filed by the Appellant.

(Dictated and pronounced in the open Court)

Sd/-
(Ashok Jindal)
Member (Judicial)

Sd/-
(K. Anpazhakan)
Member (Technical)

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