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

REGIONAL BENCH – COURT NO.1

Service Tax Appeal No.71473 of 2013
(On behalf of Appellant)

(Arising out of Order-in-Appeal No.76/ST/B-I/2013 dated 01.10.2013 passed by Commissioner (Appeals) of Central Excise, Service Tax, Customs, Bhubaneswar I)

M/s Sainik Mining & Allied Services Limited
Jagannath Project Office, P.O.-South Balanda, Talcher,Dist.-Angul-759116,Odisha

Appellant

VERSUS

Commissioner of Central Excise & Service Tax & Customs, Bhubaneswar I
C.R.Building, Rajaswa Vihar, Bhubaneswar-751007, Odisha

Respondent

APPERANCE :

Shri Debayan Dutta, Advocate for the Appellant
Shri K.Chowdhury, Authorised Representative for the Respondent

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

FINAL ORDER NO…77222/2023

DATE OF HEARING : 25.09.2023
DATE OF DECISION : 25.09.2023

Per Ashok Jindal :

The appellant is in appeal against the impugned order.

2. The facts of the case are that the appellant is engaged in hiring out of pay loaders on daily rental basis for their clients for loading and unloading of coal into tippers by the clients.

2.1 A show-cause notice was issued to the appellant alleging that during the period 2007-2008 on the basis of balance sheet and profit and loss account, the activity of the appellant is under the category of "Mining Services". Therefore, they are required to pay service tax.

2.2 The matter was adjudicated. The demand of service tax of Rs.15,33,624/- was confirmed along with interest and the penalty was also imposed.

2.3 Against the said order, the appellant is before us.

3. The ld.Counsel for the appellant submits that the loading and un-loading of coal by pay loader into tipper, is not taxable under "Mining Service". To support his contention, he relied on the decision of this Tribunal in the case of Sarvmangla Construction Company Vs. Commissioner of Central Excise & Service Tax, Raipur reported in 2018 (12) GSTL 33 (Tri.-Del.), which was affirmed the Hon'ble Apex Court in the case of Commissioner Vs. Barbrik Project Limited reported in 2018 (12) GSTL J28 (S.C.). He also relied on the decision of this Tribunal in the case of Gajanand Agarwal Vs. Commissioner of Central Excise, Bhubaneswar reported in 2009 (13) STR 138 (Tri.-Kolkata). He also submits that whole of the demand is barred by limitation. Therefore, the impugned order is to be set aside.

4. On the other hand, the ld.A.R. for the Revenue supported the impugned order.

5. Heard both the parties and considered the submissions.

6. A short issue involved is that whether the activity of loading and unloading by hiring out of pay loader on daily rental basis is taxable under "Mining Service" or not. The said issue has been examined by this Tribunal in the case of Gajanand Agarwal (supra), wherein this Tribunal has held as under :

"***12.*** *We have examined the sample agreement dated 22-7-03 produced for examination. That was executed between the first appellant and Mahanadi Coalfields Ltd. The sample work order dated 23-5-03 forming part of the agreement was also examined. That exhibits that the same forms part of the agreement. That further shows that there was hiring of pay loader for transferring of coal. The work order simply shows that there was a hiring of pay loader but the obligation of the appellants did not end with letting out of the pay loader. The appellants were required to carry out the object of loading of the quantity required by the work orders within the time frame and the rates were fixed for loading of the goods i.e. coal into Railway wagons. The ld. Advocate in the course of hearing was asked to explain whether the appellants were to simply deliver the pay loader to the Mahanadi Coal Fields Ltd. or anything else to be done. He explained that the appellants were to operate the pay loader and payment of Rs. 2.47 per tonne was to be made by Mohanadi Coal Fields Ltd. for loading of coal through the pay loader into the Railway wagons at the respective side. This clearly enables to conceive that plea of the appellant that letting out of the pay loader was not the primary object of the contract but the pay loader was an aid to perform the service of loading of cargo with certain contractual obligation defined by the contract executed by them. Accordingly, we are of the view that the plea of the appellant that the contract was for hiring of tangible goods is baseless. Once the activity carried out is found to be loading of cargo, such an activity is clearly covered by the category "cargo handling service". The appellants reliance on the format of agreement and work order giving a different nomenclature shall not help the appellant denying its liability stating that the activity carried out by the Appellant was not 'cargo handling service' when a combined reading of Section 65(23), 65(105)(zr) of the Act is made. Plea of appellants that the impugned orders be set aside* *exonerating the Appellants from the liability of tax as well as penalty does not sound well at all.*

13. *Learned Advocate specifically argued that in view of decision of this Bench in the case of M/s. Sainik Mining & Allied Services Ltd. v. CCE, C & ST., BBSR - 2008 (9) S.T.R. 531 (Tri.-Kolkata) and CCE, C & ST, BBSR-II v. M/s. Vinshree Coal Carriers Pvt. Ltd. - 2008 (10) S.T.R. 473 (Tri.-Kolkata), the Appellant shall not be at all liable for similar nature of activity carried out as that was in these two cases. Therefore the order of adjudication may be set aside. This does not appeal us for cargo handling done by the Appellant coupled with other contractual obligation of making pay loader available to perform the contract while in cited cases movement of goods within mining area was subject matter and those were only transportation.*

14. *We had an occasion to deal with the meaning of 'cargo handling service' in an appeal much earlier to this i.e. in the case of I.T.W. India Ltd. v. Commssioner of C.Ex. & Cus, Bhubaneswar - 2007 (8) S.T.R. 490 (Tri-Kol). Section 65(105)(zr) of the Act declared cargo handling service to be "taxable service" w.e.f. 16-8-2002 and that section so far as may be relevant reads as under :*

(a) "65(105) "taxable service" means any service provided or to be provided, -

i. xx xx xx xx xx xx xx xx xx

(b) (zr) to any person, by a cargo handling agency in relation to cargo handling services;"

(c) In view of declaration of law as above, meaning of the term "cargo handling service" was provided by Legislature in Section 65(23) of the Act, which reads as under :

(23) "cargo handling service" means loading, unloading, packing or unpacking of cargo and includes cargo handling services provided for freight in special containers or for non-containerised freight, services provided by a container freight terminal or any other freight terminal, for all modes of transport and cargo handling service incidental to freight, but does not include handling of export cargo or passenger baggage or mere transportation of goods;

> *The word "service" is a noun of verb "to serve". To serve means to perform functions; do what is required for. It is an act of helpful activity - help, aid or to do something. With such normally understood meaning of the word "service", economic activity resulting in service were brought to tax by the Act. Consideration received by an assessee for the taxable service provided forms measure of taxation as value of taxable service.*

15. *Combined reading of provisions of section 65(105)(zr) and 65(23) of the Act throw light that cargo handling agencies are taxable entities. Cargo handling service provided by such entities attract the levy of service tax. Section 65(23) has a wide amplitude and has brought all like nature activities to its fold expressly and by inclusion of such like nature activities under the class 'cargo handling services'. However classification of service under this category is subject to two exceptions/exclusions: viz.,: (1) handling of export cargo or passenger baggage and (2) mere transportation of goods. These two activities are beyond the scope of such class from taxation for rationale behind them. Accordingly, cargo handling services provided in respect of domestic cargo only are liable to tax. Event of levy arises when service relating to or in relation to handling of cargo is provided by a cargo handling agency irrespective of mode of transport used for movement of* *such cargo. Precisely, following activities which are contemplated to be taxed as cargo handling service are :*

(1) By express terms :

(A) Loading, unloading, packing or unpacking of cargo;

(2) By inclusive terms :

(B) Handling service relating to cargo :

(i) Provided for freight in special containers or for non-containerised freight;

(ii) Provided by a container freight terminal or, by any other freight terminal; and

(3) Cargo handling service provided which is incidental to freight.

16. *What that appears to be necessity of law for taxation under the class cargo handling service is that the service provided should be relating to or in relation to cargo handling by a cargo handling agency. The service provided should be integrally or inseparably connected with handling of cargo or attributable thereto without being a mere activity of transportation of such cargo since transport service independent of cargo handling is an exception under the scheme of levy by Section 65(23) of the Act. Thus it can be said that loading, unloading, packing or unpacking of cargo and handling of cargo for freight in special containers or non-containerized freight and service provided by container freight terminal or other freight terminal for all modes of transport are subject matter of taxation under the class "cargo handling service". That apart, any activity incidental to freight of cargo is also liable to be taxed under such class. Mode of transport is irrelevant for incidence of levy once the service provided meets* *the test of handling of cargo in the manner envisaged by law. It is also not necessary that the cargo should only be meant for transport either by vessel in ships or aircrafts.*

17. *It was noticed from the agreement of the parties that time was essence of the contract. The nature of activity that was carried by the Appellants was to load the cargo i.e. coal in the Railway wagons. Such an activity squarely falls under the definition of cargo handling service! provided by Section 65(23) read with Section 65(105) of the Finance Act, 1944 (sic) (1994) and brings the appellants to the fold of law for such service provided. Accordingly we decline to intervene to the orders passed by the Ld. First Appellate Authority except in the matter of penalty which we consider not imposable on the facts and circumstances of the case. We intervene to the Revisional order involved in Appeal case No. 41/06 and waive entire penalty imposed finding no justification of imposition since there was no willful suppression. We noticed that the appellants had no intention to cause evasion of revenue but at the infancy stage of implementation of law there appears to have confusion as to taxability. Accordingly, we waive the penalties levied under different Section of the law on all the appellants by the impugned orders. But we make it clear that when tax was leviable and realizable, the appellants shall be required to make payment of interest on the tax. Interest shall be calculated as per law in all cases and realised."*

Thereafter, this Tribunal in the case of Sarvmangla Construction Company (supra) relying on the decision of the Tribunal in the case of Arjuna Carriers Private Limited Vs. Commissioner of Service Tax, Raipur reported in 2014 TIOL 3098-CESTAT-Delhi, held that the activity of handling of coal within the mining area, is not in conformity with the definition of "Mining Service".

7. Therefore, we hold that the activity undertaken by the appellant does not fall within the category of "Mining Service".

8. Accordingly, we do not find any merit in the impugned order and the same is set aside.

9. In the result, the appeal is allowed.

(Operative part of the order was pronounced in the open court)

(Ashok Jindal)
Member (Judicial)

(K.Anpazhakan)
Member (Technical)

mm