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

REGIONAL BENCH – COURT NO.2

Service Tax Appeal No. 234 of 2012

(Arising out of Order-in-Appeal No.40/Bol/2012 Dated 22.02.2012 passed by Commissioner (Appeal-IV), Central Excise, Kolkata.)

M/s. Sen Brothers
(Angadpur, Raturia, Durgapur-713215, Dist. Burdwan, West Bengal)

Appellant

VERSUS

Commr. of CGST & Central Excise, Bolpur
(Nanoor, Chandidas, Sian, Dist. Birbhum, W. B.-731204)

Respondent

With

Service Tax Appeal No. 75017 of 2013

(Arising out of Order-in-Appeal No.206/Bol/2012 Dated 11.10.2012 passed by Commissioner (Appeal-III), Central Excise, Kolkata.)

M/s. Sen Brothers
(Angadpur, Raturia, Durgapur-713215, Dist. Burdwan, West Bengal)

Appellant

VERSUS

Commr. of CGST & Central Excise, Bolpur
(Nanoor, Chandidas, Sian, Dist. Birbhum, W. B.-731204)

Respondent

APPEARANCE :
Mr. S. P. Mazumdar, Advocate for the Appellant
Mr. S. Mukhopadhyay, Authorized Representative for the Respondent

CORAM:
HON'BLE MR. R. MURALIDHAR, MEMBER (JUDICIAL)
HON'BLE MR. K. ANPAZHAKAN, MEMBER (TECHNICAL)

FINAL ORDER NO.77745-77746/2023

Date of Hearing : 19 December 2023
Date of Decision: 19 December 2023

ST/234/2012 & ST/75017/2013

PER R. MURALIDHAR:

The Appellants were given a Work Order by the Cement Company for packing cement and loading the same in the wagons and in the trucks. Since the Mechanical and other equipments were provided by the client, the Appellant was only proving the Manpower Services by deploying his workers. The Department issued Show Cause Notice on the ground that the Appellants were providing "Cargo Handling Services" and Service Tax was not being discharged by them. After due process, the demands were confirmed. On appeal, the Commissioner (Appeals) dismissed their Appeals. Being aggrieved, the Appellant is before the Tribunal.

2. The Appellant submits that the issue is no more *res integra*. They rely on the case law of **CCE, Bhopal Vs. Jagat Enterprises-2016 (42) STR 531 (Tri.-Del.) and Deputy Commissioner of Central Excise Vs. Sushil Company-2016 (42) STR 625 (SC).**

3. They also submit that the first Show Cause Notice for the period August 2002 to March 2006 was issued beyond the normal period of limitation of one year. They were properly registered with the Service Tax Department and were also filing their Service Tax Return.

4. In respect of Appeal No. ST/234/2012, the period involved is April 2006 to March 2008. Even in this case, the Department has invoked the extended period provisions to confirm the demand. They rely on the case law of **Nizam Sugar Factory Vs. Collector of Central Excise, A. P.-2006 (197) E. L.T. 465 (SC),** wherein the Supreme Court has held that extended period cannot be invoked for the second time for the same issue. Accordingly, the Learned Counsel

prays that the Appeals may be allowed both on merit as well as on account of time bar.

5. The Learned AR reiterates the findings of the lower authorities.

6. Heard both sides and perused the documents.

7. After going through the Work Order and factual matrix, it is seen that the Appellant has been given a contract for packing, loading, unloading of the cement bags for which they were providing manpower services.

8. On an identical issue in the case of **CCE, Bhopal Vs. Jagat Enterprises cited supra,** the Hon'ble Delhi Tribunal has held as under:-

> ***5.*** *We have heard the ld. AR and examined appeal records along with Cross-objection filed by the respondent. The short point for decision is the classification of services rendered by the respondent and their liability during the impugned period. It is seen that the respondent were registered with the department and were paying service tax for the same service under "Manpower Supply Agency" w.e.f. 16-6-2005. The Revenue's case is prior to that date, they should be charged service tax under "Cargo Handling Services". We have examined the impugned order. The following observations in Para 5 of the said order is crucial to the finding of the case :*
>
> *"Maihar Cement is having a completely automatic plant, from the stage of production of cement up to its delivery. Packed Cement bags automatically move on conveyer belt for loading into trucks or wagons. Labourers are required to keep watch on production, packing & delivery of cement and arranging the bags systematically in trucks and wagons. They are not required to carry or load the cement manually in truck/wagons. The bags are simply pushed for storage. These type of activities are not covered under the activity of Cargo Handling*

Services, as held by the Tribunal in the matter of M/s. J. & J. Enterprises v. CCE - 2006 (3) S.T.R. 655 (Tri.-Del.)".

6. *Ld. Commissioner (Appeals) also observed that he had seen, through CD provided by the respondent, the actual process of packing and loading in the cement factory. He noted that all these activities are done automatically by machinery and conveyor owned by the cement manufacturer. The manpower supplied by the respondent is for mainly supervising and supplementing the mechanised packing and loading. We are in agreement with the reasoning and findings of the ld. Commissioner (Appeals).*

7. *Further, we notice that the Revenue has not given any reason as to why the impugned services were classifiable under "Cargo Handling Services" before 16-6-2005 and as manpower recruitment from 16-6-2005. The admitted fact is that the services remain same and there is no reason for different service tax treatment for different period. Considering the detailed discussions and findings in the impugned order we find no reason to interfere with the same. The Revenue has not succeeded in making any sustainable ground to overturn the said order. Accordingly, the appeal filed by the Revenue is dismissed. Cross-objection filed by the respondent is also disposed of. [Emphasis supplied]*

9. The Supreme Court in the case of **Deputy Commissioner of Central Excise Vs. Sushil Company-2016 (42) STR 625 (SC)** has held as under:-

6. *The High Court, on the interpretation of the aforesaid Entry, has observed that two conditions for considering any service to be 'Cargo Handling Service' need to be satisfied, namely; (1) there must be a cargo i.e. a packed or unpacked commodity accepted by a transporter or carrier for carrying the same from one destination to another. It is only after the commodity becomes a cargo, its loading and unloading at the freight terminal for being transported by any mode becomes a cargo handling service, if it is provided by an independent agency and; (2) the service provider must independently be involved in loading-unloading or packing-unpacking of the cargo.*

7. *The aforesaid meaning given by the High Court while interpretating Entry 23 of Section 65 is perfectly in order and justified. On that basis, we have to see* *whether the twin conditions mentioned therein are satisfied in the present case or not.*

8. *We find from the record that in the instant case, as per the contract entered into between the respondent and the customer, namely, M/s. Birla Corporation Ltd., the respondent was to supply manpower for working at the packing plant as per the customer's requirement. The contractor-respondent was to ensure that manpower deployed on the work given by customer's officers is executed properly, diligently, uninterruptedly and to the satisfaction of the customer in the factory premises of its works.*

9. *It is significant to note that no part of loading or unloading was assigned to the workers of the respondent-assessee upto transportation of the cement bags out of the factory. This work was, in fact, been performed by the automatic machines. It is through these automatic machines, the cement bags were loaded, unloaded, packed or unpacked and this included Cargo Handling Services provided for freight in special containers or for non-containerized 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.*

10. *On the reading of the aforesaid contract, coupled with the statement of Mr. Kailash Sharma, an officer of the respondent-Company, the High Court has rightly concluded that the aforesaid services would not fall within the definition of 'Cargo Handling Services'. [Emphasis supplied]*

10. The facts in the present case are identical. Therefore, we do not see any necessity to take a different view. Respectfully following the cited case law, we allow the Appeals on merits.

11. We also observe that the Department has invoked the provisions of extended period in both the Show Cause Notices issued to the Appellant. First of all, in the first SCN, no specific about suppression has been brought in by the Department. Further, while

issuing the second SCN, the Department was barred from invoking the extended period provisions when they have already issued the first Show Cause Notice by invoking such provisions as held by the Hon’ble Supreme Court in the case of Nizam Sugar Factory Vs. Collector of Central Excise, A. P, cited supra. Therefore, we hold that the demand in respect of the extended period in respect of the both SCNs is time barred and set aside the same.

12. The Appeals stand allowed thus. The Appellant would be eligible for consequential relief, if any, as per, law.

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

Sd/-
(R. Muralidhar)
Member (Judicial)

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

Pooja