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

REGIONAL BENCH – COURT NO. 1

Service Tax Appeal No. 75935 of 2016

(Arising out of Order-in-Original No. 39/COMMR/DGP/15-16 dated 14.01.2016 passed by the Commissioner, Customs, Central Excise & Service Tax Commissionerate, Durgapur, Satyajit Ray Sarani, City Centre, Durgapur – 713 216)

M/s. Sen Brothers **: Appellant**
Angadpur, Durgapur,
PIN – 713 215, District: Burdwan (West Bengal)

VERSUS

Commissioner of Central Excise and Service Tax **: Respondent**
Durgapur Commissionerate

AND

Service Tax Appeal No. 75979 of 2016

(Arising out of Order-in-Original No. 39/COMMR/DGP/15-16 dated 14.01.2016 passed by the Commissioner, Customs, Central Excise & Service Tax Commissionerate, Durgapur, Satyajit Ray Sarani, City Centre, Durgapur – 713 216)

Commissioner of Central Excise and Service Tax **: Appellant**
Durgapur Commissionerate

VERSUS

M/s. Sen Brothers **: Respondent**
Angadpur, Durgapur,
PIN – 713 215, District: Burdwan (West Bengal)

APPEARANCE:

Shri S.P. Majumder, Advocate for the Assessee

Shri S.S. Chattopadhyay, Authorized Representative for the Revenue

CORAM:

HON'BLE SHRI ASHOK JINDAL, MEMBER (JUDICIAL)
HON'BLE SHRI K. ANPAZHAKAN, MEMBER (TECHNICAL)

FINAL ORDER NOs. 76732-76733 / 2024

DATE OF HEARING: 08.07.2024

DATE OF DECISION: 27.08.2024

ORDER: [PER SHRI K. ANPAZHAKAN]

There are two appeals, both emanate from the common Order-in-Original No.39/COMMR/DGP/2015-16/2015-16 dated 14.01.2016, passed by the Commissioner, Customs, Central Excise & Service Tax Commissionerate, Durgapur.

1.1. Service Tax Appeal No. 75935 of 2016 – has been filed by the appellant-assessee, M/s. Sen Brothers, Angadpur, Burdwan, West Bengal, against the confirmation of demands of duty, interest and penalty on them.

1.2. Service Tax Appeal No. 75979 of 2016 - has been filed by the Revenue against the dropping the demand in the impugned order by the ld. adjudicating authority.

1.3. As both the appeals are filed against the common Order-in-Original, they are taken up together for decision by a common order.

The demands of Service Tax, Interest and Penalties involved in both the appeals are summarized below:

Sl.	Appeal Nos.	Period	ST (including cesses) and penalties.
1	M/s. Sen Brothers' Appeal **No. ST/75935/2016**	**2008-09 to 2012-13**	**Service Tax-Rs. 2,46,75,336/-** Interest- u/s 75, Penalty- Rs.2,51,00,821/-u/s 78 & further Penalty u/s 77.
2	Department's Appeal **No.ST/75979/2016.**		**Service Tax-Rs.3,74,75,898/-** Interest- u/s 75; Penalty- u/s 78.

2. The appellant-assessee, M/s. Sen Brothers, is a proprietorship firm engaged in providing 'manpower recruitment or supply agency service' and 'construction service'. The appellant-assessee claimed that they rendered manpower supply services to

M/s. Durgapur Cement Works (DCW), M/s. Durga High Tech Cement Ltd. (DHTC) all under M/s. Birla Cement Corporation Ltd., by supplying manpower to carry out their job. The appellant-assessee has rendered 'Construction Services' to IIT - Kharagpur, NIT - Durgapur, Durgapur Thermal Power Station (DTPS) and M/s. Mejia Thermal Power Station (MTPS), all under M/s. Damodar Valley Corporation (DVC). The appellant-assessee also undertook some trading activity wherein they have sold the goods to different customers, according to their specifications. The appellant-assessee claimed that the trading activity undertaken by them is exempted from levy of Service Tax and accordingly, the same was not shown in the Service Tax returns filed by them during the relevant period.

2.1. On scrutiny of records, including balance sheet, bank statements, work orders, etc., vis-à-vis S.T.-3 returns filed by the appellant-assessee for the period from 2008-09 to 2012-13, the department alleged that they have not paid appropriate Service Tax and suppressed the gross value of taxable service rendered by them.

3. Accordingly, a Show Cause Notice dated 22.10.2013 was issued demanding Service Tax to the tune of Rs.6,21,51,235/- (including cess), under the category of 'cargo handling service'. In the Notice, it has been alleged that the appellant-assessee has provided the service of loading of cement in trucks and wagons to M/s. Birla Corporation Ltd.; the services rendered by them were covered under the definition of 'cargo handling service' as provided under Section 65(23) of the Finance Act, 1994. As the appellant-assessee had not obtained Service Tax

registration under the category of 'cargo handling service' and not paid service tax under the said category, Service Tax (including cess) totally amounting to Rs.6,21,51,235/- was demanded from them under the impugned Notice.

4. The Notice was adjudicated by the Ld. Commissioner of Central Excise and Service Tax, Durgapur vide the impugned Order-in-Original No. 39/COMMR/DGP/15-16 dated 14.01.2016, wherein the Ld. Commissioner has confirmed the demand of Service Tax to the tune of Rs.2,46,75,336/- (including cess) along with interest; he also imposed equal amount of tax as penalty. Further, the Ld. Commissioner has imposed penalty under Sections 77(1)(a), 77(1)(b) and 77(1)(c) and late fine in terms of Rule 7C of the Service Tax Rules, 1994. He has dropped the remaining demands raised in the Notice.

5. Aggrieved against the impugned order, the present appeals have been filed by both the sides.

6. The appellant-assessee submits that the Show Cause Notice was issued without specifying the nature of activity carried out by them and without classifying the service under any particular category of taxable service. They have pointed out that the entire demand in the Notice has been raised under the category of 'Cargo Handling Service'. However, the impugned order discussed the service tax liability of the appellant-assessee on the 'construction service' rendered by them without quantifying the service tax liability on the 'construction service'; it is a settled law that no service tax liability can be fastened on unidentified service. Accordingly, they submit that the

demands confirmed in the impugned order are not sustainable on this ground alone.

6.1. In support of this contention, the appellant-assessee relied upon the following decisions:

(i) Prakash Road Lines vs. Commissioner Of Central Excise, Customs and Service Tax [2022-TIOL-928-CESTAT-ALL]

(ii) Indian Machine Tools Manufacturers Association vs. The Commissioner of Central Excise [2024-TIOL-133-CESTAT-CHD]

(iii) R. Enterprise Vs. State of Gujarat [2024-TIOL-803-HC-AHM-ST-Z]

6.2. The appellant-assessee submits that the entire demand has been raised in the Notice on the basis of comparison of the figures as reflected in their Balance Sheet, profit and loss account and ST-3 Returns, for the period from 2008-09 to 2012-13. They contend that the demand of Service Tax by comparing the turnover found in the Profit & Loss Accounts/Balance Sheets/Bank Statements with that of the ST-3 Returns, without proper inquiry/investigation carried out by the Revenue and without any admissible evidence, is not sustainable. In support of this contention, they relied on the following decisions:

(i) Go Bindas Entertainment Pvt. Ltd. Vs. Commr. of S.T., Noida [2019 (27) G.S.T.L. 397 (Tri.-All.)]

(ii) Commr. of S.T., Ahmedabad vs. Purni Ads. Pvt. Ltd. [2010 (19) S.T.R. 242 (Tri.-Ahmd.)]

(iii) Numal Saikia Vs. Principal Commissioner of Central Goods and Services Tax and Customs [2022-TIOL-883-CESTAT-KOL]

7. It is submitted that the Show Cause Notice further alleged that the appellant-assessee did not obtain service tax registration for providing '**Cargo Handling Service'**, to M/s. Birla Corporation Ltd. and also did not pay Service Tax for such 'Cargo Handling Service'; the ld. adjudicating authority has held that the services provided by way of loading of Cement on trucks and wagons in the factory of M/s. Birla Corporation Ltd. falls under the definition of 'Cargo Handling Service', **<u>but neither the Show Cause Notice nor the impugned Order-in-Original reflects the amount of service tax that is payable under this head</u>.** In this regard, the appellant-assessee submits that the **CESTAT, Kolkata vide Final Order Nos. 77745-77746 of 2023, dated 19.12.2023**, in their own case, has held that the services provided to M/s. Birla Cement Ltd. do not come under the scope of 'Cargo Handling Service'. Accordingly, the appellant-assessee submits that the demand of Service Tax under the head 'Cargo Handling Service' does not survive.

8. In so far as the Department's appeal is concerned, the assessee submits that the ld. Commissioner has held that the services provided to **IIT, Kharagpur, and NIT, Durgapur** are exempt from payment of service tax under the category of '**Commercial or Industrial Construction Service'**, in view of the exemption provided under the Notification No. 25/2012-ST, dated 20.06.2012 and therefore, no Service Tax is payable. However, the assessee-respondent has stated that the Ld. Commissioner has not given any finding regarding the same service provided to BIT, Mesra. In this regard, the assessee submits that there is no such allegation in the Show

Cause Notice regarding the liability of service tax on the 'construction service' rendered by the assessee to M/s.BIT, Mesra; the Department in its appeal has accepted that the 'Commercial or Industrial Construction Service' provided to IIT, Kharagpur and NIT, Durgapur are exempt, but contended that the same service provided to BIT, Mesra, cannot get the same benefit of exemption under the Notification No. 25/2012-ST, dated 20.06.2012 since it cannot be termed as Government educational Institution. In this regard, the assessee submits that in the entire Show Cause Notice, there is no whisper about the 'Commercial or Industrial Construction Service' provided to BIT, Mesra and thus there was no proposal in the Show Cause Notice for charging service tax in respect of the service provided to BIT, Mesra. Further, it is submitted by the respondent-assessee that the ld. adjudicating Commissioner has not held that the 'Commercial or Industrial Construction Service' provided to BIT, Mesra is not eligible for the exemption. Thus, in the facts and circumstances of the case, they submit that the Department's appeal is not maintainable.

9. The Ld. Authorized Representative appearing for the Revenue submits that the benefit of the Notification No. 25/2012-S.T., dated 20.06.2012, is not available to BIT, Mesra, as it is a commercial concern. Regarding the service tax liability on 'Cargo Handling Service', he reiterated the findings in the impugned order.

10. Heard both sides and perused the appeal records.

11. We observe that the impugned order discusses about the service tax liability of the assessee on two services, namely, (i) cargo handling service; and (ii) construction service. However, it is observed from the Notice that the entire demand has been raised only on 'cargo handling service' and there is no separate demand raised for 'construction service'. It is a settled law that no service tax liability can be fastened on unidentified service. We observe that the Notice in this case was issued without specifying the nature of activity carried out by the appellant-assessee and without classifying the service under any particular category of taxable service. The entire demand has been raised in the Notice on the basis of comparison of the figures as reflected in their Balance Sheet, profit and loss account and S.T.-3 Returns, for the period from 2008-09 to 2012-13. The demand of Service Tax by comparing the turnover found in the Profit & Loss Accounts/Balance Sheets/Bank Statements with that of the ST-3 Returns, without proper inquiry/investigation carried out by the Revenue and without any admissible evidence, is not sustainable. We also agree with the submission of the appellant-assessee that the demands confirmed in the impugned order without quantifying the service tax liability under each category of taxable service is not sustainable.

11.1. In support of the above view, we rely upon the decision of the Hon'ble Allahabad High Court in the case of *M/s. Prakash Road Lines Vs. Commissioner of Central Excise, Customs and Service Tax [2022-TIOL-*

928-CESTAT-ALL], wherein it has been held as under:-

> *"11. ………………………………………….. The Department cannot cover up half-baked enquiry and issuance of demand under any judicial pronouncement. <u>Instead of proving the existence of distinct elements, to fasten tax liability, like service provider, classification of service rendered, service recipient and consideration received, the department cannot just rely on figures culled from Income Tax Returns, 26AS Statement, balance sheet, profit and loss account etc</u>. The impugned order has seriously erred in confirming the duty liability simply on the basis of the figures obtained from documents like Income Tax Returns etc. without causing a bare minimum enquiry with all the concerned parties…………………………………"*

[Emphasis supplied]

11.2. We also observe that in the case of *M/s. Indian Machine Tools Manufacturers Association Vs. The Commissioner of Central Excise [2024-TIOL-133-CESTAT-CHD],* it has been held as under:

> *"11. <u>Coming to third and final issue as to whether any demand can be sustained on the basis of difference between the figures of ST-3 Returns and the balance sheets,we find that it is a settled principle of law that service tax can be levied only when there is a clear identification of service provider, service recipient and consideration paid for the same</u>. In the absence of any such evidence of the service recipient and the service provided, service tax cannot be demanded and confirmed. For this reason, we are of the considered opinion that it is not open for the Department to raise demands on the basis of other statutory returns like Income Tax Returns or balance sheets without proving that such service has been rendered by the assessee and consideration thereof has been received. …………………………."*

[Emphasis supplied]

11.3. By relying on the decisions cited above, we hold that the demands confirmed in the impugned order are not sustainable, as there is no separate demand raised for 'construction service' and 'Cargo Handling Service' in the impugned Notice.

12. Regarding the demand of Service Tax under the category of 'cargo handling service', the appellant-assessee contended that they have only supplied manpower for the purpose of loading of cement in the trucks and wagons; accordingly they have discharged Service Tax under the category of manpower supply service; thus the said service cannot be classified under the category of 'cargo handling service'. In this regard, the appellant-assessee submits that a similar issue, in their own case for the earlier period, has already been decided by this Tribunal vide *Final Order Nos. 77745-77746 of 2023 dated 19.12.2023 in Service Tax Appeal No. 234 of 2012 & anr. [CESTAT, Kolkata]* wherein this Tribunal held that the activity of supply of manpower for loading of cement would not be classifiable under the category of 'Cargo Handling Service'. The relevant paragraphs of the said decision are reproduced below:

> *"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 asunder:-*
>
> > *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" before16-6-2005 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 finding sin 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 23of 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 up to 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."*

12.1. Following the decision of this Tribunal mentioned *supra,* we hold that the activity of supply of manpower for loading of cement in trucks and wagons is not liable to be classified under the category of 'cargo handling service'. Accordingly, we hold that the demand of Service Tax under the 'category of cargo handling service is not sustainable. Further, we observe that the appellant-assessee has already paid Service Tax for the said activity under the category of manpower supply service and hence service tax cannot be demanded again for the same service.

13. Regarding the demand of service tax construction services rendered by the assessee, we observe that the ld. adjudicating authority has already allowed the benefit of Notification No. 25/2012-S.T. dated 20.06.2012 in the impugned order and dropped the demand in respect of the services rendered to IIT - Kharagpur and NIT – Durgapur. However, there is no finding given by the ld. adjudicating authority in respect of the same service rendered to BIT, Mesra.

13.1. A perusal of the work sheet mentioned in paragraph 5.4 (page 31) of the impugned order reveals that the construction services rendered by the appellant-assessee to M/s. BIT, Mesra has also been included and the value of the said services provided to M/s. BIT, Mesra has been excluded for the purpose of computing the service tax liability of the appellant-assessee. For the purpose of ready reference, the said work-sheet arrived at by the ld. adjudicating authority in the impugned order to demand Service Tax is reproduced below: -

Year	Value suppressed as per the SCN	Rate of S. Tax	S. Tax demanded as per SCN	Exemption Value of Service provided to IIT/ NIT/ BIT	Value against which S. Tax paid in pursuance to DAR No. 14/ST/2012-13	Amount on which S. Tax paid but not shown in ST-3 return	Value shown in ST-3 return but not considered in SCN	Value on which S. Tax is not payable	Amount of S. Tax not payable	S. Tax short paid
1	2	3	4	5	6	7	8	9 (5+6+7+8)	11	12 (4-11)
2008-09	100538208	12.36	12426523	24480602	10676825	0	0	35157427	4345458	8081065
2009-10	129137435	10.3	13301156	78420696	0	0	0	78420696	8077332	5223824
2010-11	136555257	10.3	14065191	101130822	0	0	0	101130822	10416475	3648717
2011-12	124046555	10.3	12776795	52256592	0	10202030	1682588	64141210	6606545	6170251
2012-13	77520790	12.36	9581570	64968360	0	0	0	64968360	8030089	1551480
Total	567798245		62151235	321257072	10676825	10202030	1682588	343818515	37475898	24675336

13.2. A perusal of the above work sheet shows that the ld. adjudicating authority has already excluded the value of construction services rendered to IIT - Kharagpur, NIT- Durgapur and M/s. BIT, Mesra also. From the above table, we observe that the ld. adjudicating authority has arrived at the balance Service Tax payable by the appellant-assessee as Rs.2,46,75,336/-. However, the ld. adjudicating authority has not mentioned under which category the appellant-assessee is liable to pay Service tax. We already observe that the demand of Service Tax confirmed in the impugned order is not sustainable, without specifying the category under which Service Tax is liable to be paid. In view of the above, we hold that the demand of service tax under the category of 'Construction service' is not sustainable. Since the demand of Service Tax itself is not sustainable, the question of demanding interest and imposing penalty on this demand does not arise.

13.3. We also observe that the ld. adjudicating authority has imposed various penalties under Sections 77(1)(a), 77(1)(b) and 77(1)(c) of the Finance Act, 1994 as well as Rule 7C of the Service Tax Rules, 1994 as the assessee have failed to take registration and not filed returns in respect of the services rendered. As the services rendered by the assessee have been held to be not liable to Service Tax under the category of 'cargo handling service', we hold that no penalty is imposable under Sections 77(1)(a), 77(1)(b) and 77(1)(c) and Rule 7C ibid.

14. In view of the above, we set aside the impugned order and allow the appeal filed by the appellant-assessee.

15. Regarding the appeal filed by the Revenue, it is observed that the Revenue has mainly filed the said appeal against extending the benefit of Notification No. 25/2012-S.T. dated 20.06.2012 for the construction services rendered to M/s. Birla Institute of Technology (BIT), Mesra, as it is a commercial concern.

15.1. We observe that the Show Cause Notice has demanded Service Tax only under the category of 'cargo handling service'; there is no demand of Service Tax under the category of 'construction service'. Further, we take note of the fact that there is no mention about the services rendered by the assessee (viz. M/s. Sen Brothers) to BIT, Mesra and there is no separate breakup of the demand Service Tax payable by the assessee for the service rendered to M/s. BIT, Mesra, either the Notice or in the impugned order. Accordingly, we hold that the demand of Service Tax on the services rendered by the assessee to BIT, Mesra is not sustainable. We observe that the ld. adjudicating authority has already allowed the benefit of Notification No. 25/2012-S.T. dated 20.06.2012 in the impugned order and dropped the demand in respect of the construction services rendered by the assessee to IIT - Kharagpur and NIT – Durgapur. The work sheet calculating the service tax liability of the assessee, as reproduced in paragraph 13.1 of this order reveals that the benefit of the notification 25/2012-S.T. dated 20.06.2012 has been extended to the construction service rendered by the assessee to BIT, Mesra also and the value of taxable services rendered to BIT, Mesra has already been excluded from the total value to arrive at the service tax liability of the assessee. Thus, we hold that the appeal filed by the Revenue deserves no merit and therefore, the Revenue's appeal is rejected.

16. In view of the above discussions, we pass the following order:

(i) The entire demand of Service Tax confirmed in the impugned order under the category of 'Cargo Handling Service' is set aside. The demands of interest and all penalties imposed on the appellant-assessee is set aside.

(ii) The dropping of the demands by the ld. adjudicating authority in the impugned order is upheld. Accordingly, the appeal filed by the Revenue is dismissed.

(iii) In the result, the appeals are disposed of in the above manner.

(Order pronounced in the open court on **27.08.2024**)

Sd/-
(ASHOK JINDAL)
MEMBER (JUDICIAL)

Sd/-
(K. ANPAZHAKAN)
MEMBER (TECHNICAL)

Sdd