CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI
REGIONAL BENCH

Service Tax Appeal No. 164 of 2008

(Arising out of Order-in-Original No. 09/ST/2008/C dated 29.04.2008 passed by the Commissioner of Central Excise & Customs, Nagpur)

M/s. Kartikay Bulk Movers Pvt. Ltd. **Appellant**
Ghuggus Colliery, WCL,
Chandrapur 442 505.

Vs.

Commissioner of Central Excise, Nagpur **Respondent**
Telangkhedi Road, Civil Lines,
Post Box No.81, Nagpur 440 001.

WITH

Service Tax Appeal No. 250 of 2008

(Arising out of Order-in-Original No. 19/ST/2008/C dated 16.09.2008 passed by the Commissioner of Central Excise & Customs, Nagpur)

M/s. Triveni Coal Transport Pvt. Ltd. **Appellant**
303, Devika Harsh Apartment,
Kalpana Nagar, Nagpur – 14.

Vs.

Commissioner of Central Excise, Nagpur **Respondent**
Telangkhedi Road, Civil Lines,
Post Box No.81, Nagpur 440 001.

Appearance:

None for the Appellant
Shri Nitin M. Tagade, Joint Commissioner, Authorised Representative for the Respondent

CORAM:

HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)
HON'BLE MR. AJAY SHARMA, MEMBER (JUDICIAL)

Date of Hearing: 20.07.2022
Date of Decision: 20.07.2022

FINAL ORDER NO. A/85815-85816/2022

PER: SANJIV SRIVASTAVA

These appeals are directed against order-in-original Nos. 09/ST/2008/C dated 29.04.2008 and 19/ST/2008/C dated 16.09.2008 passed by the Commissioner of Central Excise &

Customs, Nagpur. By the impugned orders, the Commissioner has held as follows:-

Order-in-original No. 09/ST/2008/C dated 29.04.2008

"ORDER

22.1. I confirm and order recovery of Service Tax amounting to Rs. 1,19,84,476/-,+ Education Cess amounting to Rs. 1,79,170/- + Secondary & Higher Education Cess amounting to Rs. 2,843/-, total amounting to Rs. 1,21,66,489/- (Rupees One Crore Twenty One Lakh Sixty Six Thousand Four Hundred and Eighty Nine Only) on the taxable value of the "Cargo Handling Services" which had escaped assessment thereto during the period from 16-08-2002 to 31-03-2007, under Section 73, read with Section 66 and 68 of the Finance Act, 1994, which should be paid forthwith by the Noticee i.e. M/s. Kartikay Bulk Movers Pvt. Ltd.,, Ghugus Collieries, WCL, Dist: Chandrapur (M.S.).

22.2. I demand the interest at the appropriate rate on the confirmed demand of Rs. 1,21,66,489/- (Rupees One Crore Twenty One Lakh Sixty Six Thousand Four Hundred and Eighty Nine Only) under Section 75 of the Finance Act, 1994.

24.3. I impose a penalty of Rs.200/- (Rupees Two hundred) per day during which such failure continues or at the rate of two percent per month, whichever is higher, starting from the first day of the due date till the date of actual payment of outstanding amount of Service Tax on the Noticee i.e. M/s. Kartikay Bulk Movers Pvt. Ltd., Ghugus Collieries, WCL, Dist: Chandrapur (M.S.), under Section 76 of the Finance Act 1994. Provided that the total amount of the penalty payable in terms of this section shall not exceed the Service Tax payable.

24.4. I hereby impose penalty of Rs. 1,000/- (Rupees One Thousand only) on the Noticee M/s. Kartikay Bulk Movers Pvt. Ltd., Ghugus Collieries, WCL, Dist: Chandrapur (M.S.), under section 77 of the Finance Act 1994.

24.5. I also impose penalty of Rs. 1,21,66,489/- (Rupees One Crore Twenty One Lakh Sixty Six Thousand Four Hundred and Eighty Nine Only) on the Noticee i.e. M/s. Kartikay Bulk Movers Pvt. Ltd.,Ghugus Collieries, WCL, Dist: Chandrapur (M.S.), under section 78 of the Finance Act 1994."

Order-in-original No. 19/ST/2008/C dated 16.09.2008

"ORDER

28.1. I confirm and order for recovery of Service Tax amounting to Rs. 68,39,245/-, Education Cess amounting to Rs. 1,33,778/-, Secondary & Higher Education Cess amounting to Rs. 16,001/-, total amounting to Rs. 69,89,024/- (Rupees Sixty Nine Lakh Eighty Nine Thousand and Twenty Four Only) on the taxable value of the "Cargo Handling Services" which had escaped assessment thereto during the period from 27.01.04 to 15.11.2007, under Section 73, read with Section 66 and 68 of the Finance Act, 1994, which should be paid forthwith by the Noticee i.e. M/s. Triveni Transport Pvt. Ltd. 303, Devica Harsh Apartment, Kalpana Nagar, Nagpur-14 (M.S.).

28.2. I demand the interest at the appropriate rate on the confirmed demand of Rs. 69,89,024/- (Rupees Sixty Nine Lakh Eighty Nine Thousand and Twenty Four Only)under Section 75 of the Finance Act, 1994.

28.3. I impose a penalty of Rs.200/- (Rupees Two hundred) per day during which such failure continues or at the rate of two percent per month, whichever is higher, starting from the first day of the due date till the date of actual payment of outstanding amount of Service Tax on the Noticee i.e. M/s. Triveni Transport Pvt. Ltd. 303, Devica Harsh Apartment, Kalpana Nagar, Nagpur-14 (M.S.), under Section 76 of the Finance Act 1994. Provided that the total amount of the penalty payable in terms of this section shall not exceed the Service Tax payable.

28.4. I hereby impose penalty of Rs. 1,000/- (Rupees One Thousand only) on the Noticee M/s. Triveni Transport Pvt. Ltd.

303, Devica Harsh Apartment, Kalpana Nagar, Nagpur-14 (M.S.), under section 77 of the Finance Act 1994.

28.5 I also impose penalty of Rs. 69,89,024/- (Rupees Sixty Nine Lakh Eighty Nine Thousand and Twenty Four Only) on the Noticee M/s. Triveni Transport Pvt. Ltd. 303, Devica Harsh Apartment, Kalpana Nagar, Nagpur-14 (M.S.), under section 78 of the Finance Act 1994. However, the noticee is given an option to pay only 25% of this penalty amount subject to condition that entire amount of Service Tax and interest along with the 25% penalty under Section 78 are paid within thirty days of communication of this order."

2.1 Acting on intelligence that the appellants were providing services under the category of cargo handling services and have not taken service tax registration under the said category and also have not discharged service tax liability on the amounts received from their clients, investigations were undertaken against the appellants. After conclusion of investigation, show cause notices dated 07.11.2007 and 13.06.2008 were issued to the appellants asking them to show cause as to why:-

<u>Show cause notice dated 07.11.2007</u>

"(i) The Service Tax amounting to Rs. 1,19,84,476/-, Education Cess amounting to Rs. 1,79,170/- and Secondary & Higher Education Cess amounting to Rs. 2,843/-, total amounting to Rs. 1,21,66,489/- (Rupees One Crore Twenty One Lakh Sixty Six Thousand Four Hundred and Eighty Nine Only) on the taxable value of the "CHS" which had escaped assessment thereto during the period from 01.10.02 to 30.06.07, should not be assessed and recovered from it under Section 73, read with Section 66 and 68 of the said Act.

(ii) The interest on the amount of Service Tax not paid should not be recovered from it from the relevant dates till the date of actual payment of Service Tax at the prescribed rate under section 75 of the said Act.

(iii) The penalty should not be imposed on it under Section 76 of the said Act for non-payment of Service Tax.

(iv) The penalty for suppressing the relevant details and also the value of its said taxable services with malafide and premeditated intent to evade payment of service tax should not be imposed on it, under Section 78 of the said Act.

(v) The penalty for contravention of various provisions of the said Act and the Rules made there under as mentioned hereinabove should not be imposed upon it, under section 77 of the said Act."

Show cause notice dated 13.06.2008

"20.1 The Service Tax amounting to Rs. 68,39,245/-, Education Cess amounting to Rs. 1,33,778/-, Secondary & Higher Education Cess amounting to Rs. 16,001/-, total amounting to Rs. 69,89,024/- (Rupees Sixty Nine Lakh Eighty Nine Thousand and Twenty Four Only) as detailed in Annexure-I(8) enclosed with the Show Cause Notice, on the taxable value of the "CHS" which had escaped assessment thereto during the period from 27.01.04 to 15.11.2007, should not be demanded and recovered from it under proviso to sub-section (1) of section 73, read with section 66 and 68 of the said Act.

20.2 The interest on the amount of ST not paid should not be recovered from it from the relevant dates till the date of actual payment of ST by M/s. The Noticee at the prescribed rate under section 75 of the said Act.

20.3 The penalty should not be imposed on it under Section 76 of the said Act for non payment of Service Tax.

20.4 The penalty for suppressing the relevant details and also the value of its said taxable services with malafide and premeditated intent to evade payment of service tax should not be imposed on it, under Section 78 of the said Act.

20.5 The penalty for contravention of various provisions of the said Act and the Rules made there under as mentioned hereinabove should not be imposed upon it, under section 77 of the said Act."

2.2 The show cause notices were adjudicated by the Commissioner as per the impugned orders referred to in para 1. Aggrieved appellants filed these appeals.

3.1 These appeals were earlier decided by this Tribunal vide order Nos. A/2326/13/CSTB/CI dated 20.11.2013 and A/1175/14/CSTB/C-I dated 13.06.2014 observing identically in both the orders as follows:-

"6. We find that the main contention of the appellants is that the activity does not fall under the taxable service of 'cargo handling service'. For ready reference, the provisions of Section 65(23) of the Finance Act are reproduced below:-

> *"Cargo handling service' means loading, unloading, packing or unpacking of cargo and includes cargo handling service provided for freight in special containers or for non-containerized freight, services provided by a containers freight terminal, or any other freight terminal, for all modes of transport and cargo handling services incidental to freight, but does not include handling of export cargo or passenger baggage or mere transportation of goods."*

The provisions of the above Section are interpreted by the Hon'ble Orissa High Court in the case of Coal Carriers (supra) relied upon by the Revenue. The Hon'ble High Court, after taking into consideration the activity undertaken in the mines, which is similar to the activity undertaken by the appellants, held that the activity such as hiring of pay loaders for mechanical transfer of coal within the mining area comes under the scope of taxable service of 'cargo handling service'. The Hon'ble High Court also confirmed the demand which was confirmed by invoking extended period of limitation, where the assessee in that case relied upon the Board circular. As the issue involved in this appeal is already settled by the Hon'ble Orissa High Court in *the case of Coal Carriers (supra) and the ratio of the above decision is fully applicable on the facts of the present case, as the terms and conditions of the work orders are similar to the work orders which are under consideration before the Hon'ble High Court, therefore we find no infirmity in the impugned order. The appeal is dismissed."*

3.2 These orders were challenged by the appellants before the Hon'ble High Court of Bombay in Central Excise Appeal (cel) Nos. 10 of 2015 and 22 of 2014. The Hon'ble High Court restored the appeals for consideration with direction to decide the appeals as per the judgment of the Hon'ble Apex Court in the case of Coal Carriers [2011 (24) STR 395 (Ori.)].

3.3 Accordingly these appeals were restored by the Tribunal vide miscellaneous order No. M/87458-87459/16/STB dated 25.04.2016. Thereafter this matter has been listed on 01.05.2019, 24.05.2019, 05.07.2019, 21.08.2019, 03.12.2019, 13.01.2020, 11.03.2021, 05.07.2021, 05.10.2021, 10.11.2021, 15.12.2021, 09.02.2022 and 27.04.2022 with none appearing on behalf of the appellant. The note on cause list specifically states that appeals of 2010 and before will not be adjourned.

3.4 Rule 20 of the CESTAT (Procedure) Rules, 1982 provides as follows:-

"Rule 20. Action on appeal for appellant's default. — Where on the day fixed for the hearing of the appeal or on any other day to which such hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing, the Tribunal may, in its discretion, either dismiss the appeal for default or hear and decide it on merits :

Provided that where an appeal has been dismissed for default and the appellant appears afterwards and satisfies the Tribunal that there was sufficient cause for his non-appearance when the appeal was called on for hearing, the Tribunal shall make an order setting aside the dismissal and restore the appeal."

4.1 Since the issue involved in the matter is in a very narrow compass and has to be considered only in terms of the decision of Hon'ble Apex Court in civil appeal filed against the decision of Hon'ble Orissa High Court in the case of Coal Carriers.

4.2 We took up the matter for consideration after hearing the learned Authorised Representative.

4.3 Arguing for the Revenue, learned AR submits that now the issue pending before the Hon'ble Supreme Court has been finally decided by it upholding the order of Hon'ble Orissa High Court. Accordingly these appeals need to be dismissed.

5.1 We have considered the impugned orders along with the submissions made in the appeals along with the earlier orders of this Tribunal and the order of the Hon'ble High Court.

5.2 Vide its order dated 08.07.2011 while admitting these appeals, they were tagged with Civil Appeal Nos. 6038-6039 of 2007. The Hon'ble Supreme Court vide its order dated 08.03.2017 while disposing of the Civil Appeal Nos. 6038-6039 of 2007 detagged these civil appeals, as is evident from the order dated 08.03.2017 holding as follows:-

"<u>C.A. Nos. 6038-6039 of 2007</u>

The appeals are allowed in terms of the signed reportable judgment.

<u>C.A. Nos. 5595-5596, 7384-7385 and 7386-7387 of 2011</u>

De-tagged and be listed separately for hearing."

5.3 The appeals of Coal Carriers were disposed by Hon'ble Supreme Court vide order dated 17.01.2020 stating as follows:-

"All these applications are preferred permitting applicants/appellants to withdraw the main civil appeals being Civil Appeal Nos. 5595-5596/2011, C.A. Nos.7384-7385/2011 and C.A. Nos. 7386-7387/2011. Prayer is not opposed by the

learned counsel appearing for the respondent/Excise Department.

Under circumstances, all these applications are allowed. Civil Appeal Nos.5595-5596/2011, C.A. Nos. 7384-7385/2011 and C.A. Nos. 7386-7387/2011 stand dismissed as withdrawn so as to enable the appellants to avail the benefit of the scheme."

5.4 Since the appeal against the order of Hon'ble Orissa High Court has now been dismissed by the Hon'ble Apex Court, we have no hesitation in following the same as has been done by the Tribunal vide its earlier orders dated 20.11.2013 and 13.06.2014.

6.1 Accordingly the appeals are dismissed on merits as well as for non-prosecution.

(Order pronounced in the open court)

(Sanjiv Srivastava)
Member (Technical)

(Ajay Sharma)
Member (Judicial)

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