

(2008) 03 KAR CK 0001
In the Karnataka High Court
Case No : C.E.A. No. 12 of 2008

Commissioner of C. Ex.

APPELLANT

Vs

Konkan Marine Agencies

RESPONDENT

Date of Decision : 13-03-2008

Acts Referred:

Central Excise Act, 1944 — Section 35 G (2)
Contract Act, 1872 — Section 151, 152, 16

Citation : (2009) 221 CTR 467 : (2009) 13 STR 7 : (2009) 18 STT 115 : (2009) 22 VST 52

Hon'ble Judges : Deepak Verma, J;Anand Byraredddy, J

Bench : Division Bench

Advocate : C. Shashikantha, for the Appellant;

Final Decision : Dismissed

Judgement

Deepak Verma, J.—Heard Sri C. Shashikantha, learned Counsel appearing for the appellant, on admission. Records perused.

2. This appeal has been preferred by the Revenue u/s 35-G(2) of the Central Excise Act, 1944 (hereinafter shall be referred to in short as the "Act") against the order dated 6-8-2007 passed by the Customs, Excise and Service Tax Appellate Tribunal, Bangalore, (for short "CESTAT") in assessee's Appeal No. S.T/75/2007.

Assessee had filed appeal against the order in revision dated 20-12-2006 passed by the Commissioner of Central Excise, Mangalore.

3. Facts which lie in narrow compass, are as under:

For the period commencing from March, 2004 to September, 2004, assessee had paid service tax and interest amounting to Rs. 4,79,397/- under different challans under the category of "port service". The assessee had filed a refund claim for refund of service tax and interest paid for the aforesaid period and for the aforesaid amount. The reasons for assessee's claim for refund of service tax

and interest was that it had only handled export cargo and handling of export cargo has been exempted from payment of service tax under the category of "cargo handling service" and that they had erroneously paid service tax on such export cargo handled by it. The Assistant Commissioner, vide its order dated 4-3-2005 rejected the refund claim on the ground that the assessee has been rendering the services exclusively within the port premises and the service rendered by the assessee are rightly classifiable under the category of "Port Service" and there is no exemption of payment of service tax under the said category in respect of export cargo.

4. Against the said order, assessee preferred an appeal before the Commissioner (Appeals). The Commissioner (Appeals) after hearing both sides, remanded the matter to the adjudicating authority for determining the nature of service rendered by the assessee as to whether it is a "port service" or "cargo handling service". On examination of the records of service rendered and bills raised, etc., and applying the principles of natural justice, adjudicating authority decided the matter in favour of the assessee and classified it as "cargo handling service" and further holding that it would not be liable for payment of service tax on the same. However, the refund was not directed to be paid to the assessee instead it was directed to be deposited in Consumer Welfare Fund.

5. The Commissioner exercised the power conferred on him u/s 84 of the Act, and took the suo motu revision against the order of the adjudicating authority and issued notice to the assessee. The Commissioner of Central Excise, Mangalore, while deciding the revision noted that as per the provisions of statute, service should be provided by port or a person authorized by port and not by a port on an authorized agent of port rendering service on behalf of the port as contended by the assessee. Accordingly the order of the adjudicating authority was set aside and quashed and it held that it will fall within the category of "port service" and accordingly the refund of the assessee of the sum of Rs. 4,79,397/- stood rejected.

Assessee feeling aggrieved by the said order passed by the Commissioner in the revisional jurisdiction, filed an appeal before the CESTAT.

6. The CESTAT after hearing the parties, came to the conclusion that the service rendered by the assessee would not amount to "port service".

In other words, according to the CESTAT it would only be "cargo handling service". In any case, assessee would not come within the ambit of taxation as in respect of cargo handling service, especially in regard to cargo, meant for export is excluded from the purview. Thus the order of the Commissioner was set aside with consequential relief. Now this appeal by the Revenue against the said order u/s 35-G(2) of the Act.

We have accordingly heard the learned Counsel for the appellant. Perused the records.

7. Section 42 of the Major Port Trust Act, 1963, which is relevant to be discussed, is reproduced hereunder;

(1) A Board shall have power to undertake the following services:

(a) landing, shipping or transshipping passengers and goods between vessels in the port and the wharves, piers, quays or docks belonging to or in the possession of the Board;

(b) receiving, removing, shifting, transporting, storing or delivering goods brought within the Board's premises;

(c) carrying passengers by rail or by other means within the limits of the port or port approaches, subject to such restrictions and conditions as the Central Government may think fit to impose;

(d) receiving and delivering, transporting and booking and despatching goods originating in the vessels in the port and intended for carriage by the neighbouring railways, or vice versa, as a railway administration under the Indian Railways Act, 1890 (9 of 1890);

(e) piloting, hauling, mooring, remooring, hooking, or measuring of vessels or any other service in respect of vessels, and

(f) developing and providing, subject to the previous approval of the Central Government, infrastructure facilities for ports.

(2) A Board may, if so requested by the owner, take charge of the goods for the purpose of performing the service or services and shall give a receipt in such form as the Board may specify.

(3) Notwithstanding anything contained in this section, the Board may, with the previous sanction of the Central Government, authorise any person to perform any of the services mentioned in Sub-section (1) on such terms and conditions as may be agreed upon.

(3A) Without prejudice to the provisions of Sub-section (3), a Board may, with the previous approval of the Central Government, enter into any agreement or other arrangement, whether by way of partnership, joint venture or in any other manner) with, any body corporate or any other person to perform any of the services and functions assigned to the Board under this Act on such terms and conditions as may be agreed upon.

(4) No person authorised under Sub-section (3) shall charge or recover for such service any sum in excess of the amount specified by the Authority, by notification in the Official Gazette.

(5) Any such person shall, if so required by the owner, perform in respect of goods any of the said services and for that purpose take charge of the goods and give a receipt in such form as the Board may specify.

(6) The responsibility of any such person for the loss, destruction or deterioration of goods of which he has taken charge shall, subject to the other provisions of this Act, be that of a bailee under Sections 151, 152 and 161 of the Indian Contract Act, 1872.

(7) After any goods have been taken charge of and a receipt given for them under this section, no liability for any loss or damage, which may occur to them, shall attach to any person to whom a receipt has been given or to the master or owner of the vessel from which the goods have been landed or transhipped.

8. Bare perusal of the aforesaid Section makes it crystal clear that some of the services mentioned in the same, which may not be exhaustive are to be performed by the port itself, but in case port is desirous of rendering any of the service mentioned in the said section or any other service in addition to the same, port can authorize to give it to any other person, with the previous sanction of the Central Government. This is the mandate under Sub-section (3) of Section 42 of the Act. Exercising this power, Port has issued a Stevedoring Licence in favour of the respondent-assessee. The Stevedoring was issued in favour of the assessee by New Mangalore Port Trust as per Rule 60 of the New Mangalore Port Rules, 1976 read with Section 3(i) of the Department of Surface Transport, Ministry of Transport, Government of India's Notification dated 16-12-1985.

9. CESTAT recorded a finding that the service which was being rendered by the assessee cannot be said to be service on behalf of the port. In other words, it held that the assessee rendered services directly to its customers for the purpose of loading of export cargo and not on behalf of the port, but on its own behalf.

10. Learned Counsel for the appellant also placed reliance on the Circular issued by the Central Government dated 1-8-2002 to contend that such a service rendered by the assessee would attract service tax. To put the point across Para 5 has been put in service. For ready reference Paras 5 and 6 relevant for the decision of this case are reproduced hereinbelow:

5. Cargo handling services are provided in the port also. Whether such service will be covered in the category of port services or cargo handling service. In this context it may be mentioned that port services cover any service provided in relation to goods or vessels by a port or a person authorized by the port. This includes the cargo handling service provided within the port premises. Therefore to this extent there may be an overlap in cargo handling service and the port service. However since port services covers all the service in relation to goods and vessels and therefore more specific to port, the service provided in a port in relation to handling of goods would be appropriately covered under port service and no separate levy will be attracted under the category of cargo handling agency service. Similar would be the case in respect of service provided for storage of goods in the port premises.

6. All goods meant for export are excluded from the scope of this levy.

11. However, after going through Paras 5 and 6, we find that Para 6 clearly shows that all goods meant for export are excluded from the scope of levy of service tax.

It has not been disputed before us that the assessee was engaged in the business of cargo handling and especially for loading of cargo for export. If that be so, even this Circular does not help the appellant in any manner whatsoever.

Cargo handling service has been defined in Section 65(23) in the Finance Act, 1994. The said definition reads as under:

"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-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.

12. A bare reading of the aforesaid definition further makes it clear as day that in any case handling of export cargo would not attract service tax at all. After having gone through the aforesaid definition, it leaves no amount of doubt in our mind that such a service tax could not have been levied on the assessee which was handling loading of cargo, meant for export purpose.

We may further clarify that the definition of "port service" as found in Section 65(82) of the Finance Act would not be applicable to the facts of the present case. The definition of "port service" reads as under:

"Port Service" means any service rendered by a port or other port or any person authorised by such port or other port, in any manner, in relation to a vessel or goods.

13. According to the learned Counsel for the appellant since the assessee is a licence holder, therefore he would be the person authorized within the definition of "port service" as mentioned hereinabove.

We do not agree to the aforesaid contentions advanced by the learned Counsel for appellant for the simple reason that definition of "cargo handling service" as reproduced hereinabove and Section 65(23) clearly puts a bar with regard to the imposition of tax meant for export which also includes handling of the export cargo.

14. In view of this, we find that there is no scope for interference in the order of CESTAT. Appeal being devoid of merits and a substance, is hereby dismissed in limine and the order passed by the CESTAT stands confirmed.