

(2011) 07 KL CK 0220

In the High Court Of Kerala

Case No : C.E. Appeal No's. 36 and 37 of 2010

Kerala State Industrial Enterprises Limited

APPELLANT

Vs

Commissioner of Central Excise, Customs and Service Tax,
Thiruvananthapuram

RESPONDENT

Date of Decision : 04-07-2011

Acts Referred:

Finance Act, 1994 — Section 65(102)

Citation : (2012) 54 VST 264

Hon'ble Judges : P.S. Gopinathan, J;C.N. Ramachandran Nair, J

Bench : Division Bench

Advocate : Joseph Kodianthara, Mathews K. Uthuppachan, Binu Mathew, B.J. John Prakash, Tom Thomas Kakkuzhiyil and V. Abraham Markos, for the Appellant; Thomas Mathew Nellimoottil, SC, CB Ex., for the Respondent

Final Decision : Dismissed

Judgement

C.N. Ramachandran Nair, J.—The common question raised in these two appeals filed by a public sector company under the control of the State Government is whether the "terminal charges" collected by them from various airline companies for the facilities provided in the AIR cargo terminal attract service tax for "storage and warehousing" provided u/s 65(102) of the Finance Act, 1994 (hereinafter called, "the Act"). We have heard senior counsel Sri. Joseph Kodianthara appearing for the appellant-company and standing counsel Sri. Thomas Mathew Nellimoottil appearing for the respondent. The appellant is maintaining an air cargo terminal very close to the Trivandrum Airport. Air cargo for export and passenger baggage for transport by air are brought to the terminal maintained by the appellant where the airline officials or the employees or agents of the cargo owners unload, x-ray and transport the goods to the plane. There is always a time lag between the arrival of the cargo and passenger baggage at the appellant's terminal and the shipment of the same by air. The cargo and the baggage at the appellant's terminal are handled by the airlines' officials or the owners or their employees or agents. All that the appellant

provides is the terminal facility for x-raying, security cheque, completion of customs formalities and short duration retention of goods for transit to the plane. The appellant's case is that air cargo as well as the passenger baggage are normally not stored or warehoused in the air terminal. However, occasionally the airline concerned may not be able to send the consignment by air within 48 hours of the cargo or baggage reaching the appellant's terminal and in such cases, for retention in the terminal beyond 48 hours, the appellant charges the airlines storage or warehousing charges on which they collect service tax u/s 66(1) read with section 65(102) of the Act and remit it to the Department. The Department's case is that the "terminal charges" collected by the appellant from the airlines for the facilities provided at the terminal which are for packing, repacking, x-raying, short duration safe custody of the air cargo and passenger baggage before loading on to the plane attract service tax for "storage and warehousing" and for the levy, the period of storage is immaterial. This argument found acceptance with the Tribunal which held that irrespective of the period of storage, the appellant is liable to pay service tax for "storage and warehousing" u/s 65(102) of the Act. It is against this order the appellant has come up with this appeal.

2. In order to appreciate the contentions, we have to refer to the two charging entries relevant in this regard which are extracted hereunder :

S. 65(102) "Storage and warehousing" includes storage and warehousing services for goods including liquids and gases but does not include any service provided for storage of agricultural produce or any service provided by a cold storage.

S. 65(23) "Cargo handling service" means loading, unloading, packing or unpacking of cargo and includes,--

(a) 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 ; and

(b) service of packing together with transportation of cargo or goods, with or without one or more of other services like loading, unloading, unpacking,

but does not include, handling of export cargo or passenger baggage or mere transportation of goods.

3. Senior counsel appearing for the appellant specifically referred to the latter part of section 65(23) which provides for exemption from service tax for the handling of cargo for export or passenger baggage. He has relied on Division Bench judgment of this court in Commissioner of Customs, Central Excise and Service Tax Vs. Federal Bank Ltd., and contended that Department cannot bring to tax a service which enjoys exemption under one entry of the Act by resort to another charging section of the very same Act. The standing counsel appearing

for the Department on the other hand contended that what the appellant does is not cargo handling but is "storage and warehousing" and by virtue of section 65(102) read with the charging section, service tax is payable on the "terminal charges" collected from the airlines.

4. Admittedly section 65(23) under which cargo handling service is brought under service tax, specifically excludes export cargo and passenger baggage from liability. Therefore, no service tax is payable for cargo handling service in respect of export cargo and passenger baggage. The appellant's specific case is that terminal charges collected by them for export cargo and passenger baggage falls within the description "cargo handling services" and so much so, by virtue of the exemption available to these two items u/s 65(23), there is no justification for the Department to levy service tax by treating the cargo handling service as a "storage and warehousing service". The standing counsel brought to our notice the admission made by the appellant in the appeal that the appellant or their employees are not handling cargo and they are only providing the terminal building for handling both the air cargo as well as passenger baggage where unloading, x-raying, short-time storage and loading takes place which are handled by employees of the goods owner or agents or the airlines concerned. Counsel for the appellant rightly contended that the exemption clause provided for exemption from service tax on export cargo and passenger baggage u/s 65(23) should enjoy a liberal construction. We completely agree with this contention because what is specifically excluded from levy should not be brought to tax under another charging entry and if the same is permitted, the same will frustrate the exemption clause. All fiscal statutes provide for tax/duty exemptions to encourage exports and section 65(23) also should be understood as part of the same scheme. However, we agree with the contention of the standing counsel that if charges collected by the appellant from the airline is really for storage and warehousing covered by section 65(102), service tax could be levied on such charges. In this regard what we notice is that the appellant is not claiming complete exemption from service tax on "terminal charges" collected and so much of the amount collected for storage and warehousing are subject to service tax. This happens only when retention of the air cargo or passenger baggage in appellant's terminal is beyond 48 hours. Therefore, the only question to be considered is whether retention up to 48 hours of the air cargo and passenger baggage for x-raying, for completion of all customs formalities and the time taken by the airlines to lift the cargo could be treated as storage and warehousing for the purpose of levy of tax u/s 65(102) of the Act.

5. The contention raised by standing counsel that goods are not physically handled by appellant's employees by itself does not mean that the appellant is not handling the goods in the terminal building. X-ray unit is in the appellant's terminal and customs formalities including inspection are carried out in the said building. The unloading of goods, x-raying, customs inspection and re-loading amount to handling of goods in transit in the course of export, whether it be as cargo or as passenger baggage. What the appellant charges is for the facilities

provided in the terminal building for security check, x-raying and for completion of customs formalities. The Department can levy service tax only if any part of the charges levied by the appellant falls within the description of "storage and warehousing" referred to in section 65(102) of the Act. Storage and warehousing obviously is storing the goods for a duration of time providing safe custody to goods. Nobody sends the cargo or passenger baggage to the appellant's terminal building for storage because goods are sent there only for shipment by air. It so happens that there is a time lag between the arrival of the goods in the appellant's terminal and the actual despatch of goods by air. The short duration of time taken for unloading, x-raying, completion of customs formalities and time taken for unloading and transport to the plane cannot be said to be time of storage or warehousing of goods. Necessarily goods will have to wait until the airlines arranges flight and space in the aircraft for lifting the cargo. A reasonable time necessarily has to be provided by the appellant for the airlines to lift the goods after arrival at their terminal. The appellant's case is that considering the nature of operations, the airlines companies are given a maximum of 48 hours to lift the cargo without involving any liability for storage and warehousing charges. We are of the view that the Department should take a realistic approach keeping in mind the nature of business and the standard arrangement in other airports. Counsel for the appellant has referred to circular No. B11/1/2002 dated August 1, 2002 issued by Central Board specifically providing in clause 3(1) that the services provided in relation to export cargo and passenger baggage are excluded from tax net. However, contention of the standing counsel is that the circular is issued specifically clarifying the scope of exemption under cargo handling services provided u/s 65(23) of the Act. Even though circular is issued with reference to another charging section, what is clear from the circular is that the intention of the Government is as far as possible to avoid incidence of tax on export cargo and passenger baggage. After hearing both sides and after going through the orders and records of the case, what we find is that the Department has not conducted any enquiry as to whether the appellant is charging varying rates for the same cargo depending on the period of retention of the goods, whatever be the reason, in their terminal. If the appellant charges the same rates for the goods lifted after arrival in the terminal building after all processing and on completion of all formalities, i.e., within 48 hours, then there is no scope for levy of any service tax on the ground of storage and warehousing because the appellant is not charging for the same. On the other hand if the appellant charges more than the normal tariff of terminal charges on account of delay in lifting the goods within the cut-off period of 48 hours, then such charges over the normal rates are certainly attributable for storage and safe custody of goods which squarely falls within the scope of section 65(102) of the Act. Unfortunately none of the authorities including the Tribunal have chosen to find out whether from out of the terminal charges collected by the appellant from the airlines, any portion is attributable to storage and custody after completion of the formalities and handling of the goods at the terminal building. In other words, if the appellant has standard rates based on quantity, volume or type of cargo or the

nature of handling of cargo or passenger baggage in the terminal building irrespective of the time taken for the same within the cut-off period of 48 hours, then such charges cannot be treated as charges collected for storage or warehousing of goods. However, if on examination of the records and the appellant's operation with the airlines the Department notices that varying charges are levied, though under the common head terminal charges, then so much of the amount charged in excess of the normal charges for clearance without delay, can be subject to levy of service tax u/s 65(102) of the Act. The appeals are allowed in part reversing the findings of the Tribunal that the terminal charges levied by the appellant attract service tax u/s 65(102) of the Act, but with the finding that the additional charges if any levied over standard rates for handling and clearance of goods within 48 hours can be treated as charges attributable to storage and warehousing and tax can be levied thereon. The matter is remanded for conducting enquiry and for levying service tax, if any payable on any part of the charges collected, after issuing notice to the appellant and after hearing the appellant. Since the appellant's is not the unique business but identical business would be carried on by other agencies in international airports, it is for the Department to collect details from the Commissioners outside Kerala and to take a uniform pattern for levy. Before parting with the matter we hold that even if the appellant is found to be liable for payment of part of the handling charges as attributable to storage and warehousing charges following our judgment above, there is no scope for levy of penalty as no contumacious conduct can be presumed in the matter. So much so, penalty in any case will stand vacated. So far as dispute raised on the levy of tax on x-raying charges is concerned, the appellant has conceded the issue in favour of the Department and the appeals on that issue will stand dismissed.