(2014) 03 CESTAT CK 0019

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Service Tax Appeal Nos. 434, 435 Of 2011

?M/s Jai Jawan Coal Carriers Private Limited — APPELLANT

Vs

CST, New Delhi — RESPONDENT

Date of Decision : 27-03-2014

Acts Referred:
Finance Act, 1994 — Section 65(105)(Zr), 65(23), 73(1), 75, 76, 77, 78, 80

Citation : (2014) 03 CESTAT CK 0019

Hon'ble Judges : G. Raghuram, J;Rakesh Kumar, Technical Member

Bench : Division Bench

Advocate : Srinivas Kotni, Pramod Kumar

Final Decision : Disposed Of

Judgement

1. The appellant entered into agreements with their clients - M/s Bharat Cooking Coal Limited, Orissa Mining Corporation etc. in terms of which they

were required to load the coal/mineral ore into their dumpers at the heaps of coal/mineral ore in the mines and thereafter transport the same within the

mines area up to the railway sidings, where coal/ore is unloaded into the railway wagons. The contracts mentioned separate charges for loading of

coal/ore at the heaps into dumpers/tipper trucks, transportation of coal/ore from the heaps to the railway siding and loading of the coal/ore into the

wagons at the railway siding. The department treating the entire activity of the appellant as Cargo Handling Service taxable under Section 65(105)(Zr)

readwith Section 65(23) of the Finance Act 1994, issued two show cause notices for demand of service tax alongwith interest and also for imposition

of penalty. The first show cause notice dated 23/04/09 was issued for demand of service tax including education cess amounting to Rs.1,34,96,894/-

alongwith interest thereon for the period from October 2003 to March 2008 and the second show cause notice dated 15/10/09 was issued for demand

of service tax including education cess amounting to Rs.4,48,228/- alongwith interest thereon under Section 75 of the Finance Act, 1994 for 2008-2009

period. Both the show cause notices, besides seeking of recovery of service tax including education cess, alongwith interest thereon under Section 75,

also sought imposition of penalty on the appellant under Section 76, 77 and 78 of the Finance Act, 1994. The first show cause notice dated 23/4/09 for

the period from October 2003 to March 2008 had been issued by invoking extended period under proviso to Section 73(1) of the Finance Act, 1994,

while the second show cause notice dated 15/10/09 for 2008-2009 period is within limitation period.

1.1 Both the show cause notices were adjudicated by the Commissioner, Service Tax, Delhi vide order-in-original dated 30th November, 2010 by

which the service tax demand, as mentioned above, including education cess, were confirmed alongwith interest thereon under Section 75 of the

Finance Act, 1994 and beside this, penalties were imposed under Section 77 and 78. Against these orders of the Commissioner, these two appeals

have been filed.

2. Heard both the sides.

3. Shri Srinivas Kotni, Advocate, the learned Counsel for the appellant, pleaded that in respect of similar activity in the case of Sainik Mining and

Allied Services Ltd. and G.G. Coal Transport Ltd. vs. Commissioner, Central Excise, Customs and Service Tax, Bhubneshwar reported in 2008 (9)

S.T.R. 531 has held that such activity is not covered by the definition of Cargo Handling Service, that same view has been taken by the Tribunal in the

case of M. Ramakrishna Reddy, Civil Contractors vs. Commissioner of Central Excise and Customs reported in 2009 (13) S.T.R. 661 and N.

Rajashekar & Co. vs. CCE, Mysore reported in 2008 (12) S.T.R. 760, that in views of these judgments of the Tribunal, the service tax demand by

treating the appellantâ??s entire activity as cargo handling is not sustainable, that in any case, the appellant are basically a transporter and their major

activity is transportation of coal/mineral ores from the coal/mineral heaps to the railway siding and the activity of unloading of the coal/mineral ores

into railway wagons for its subsequent transportation is an ancillary activity on account of which their entire activity cannot be categorized as cargo handling and subjected to tax on that basis, that in any case, even if the part of their activity relating unloading coal/mineral ore into railway wagons at

the railway siding is treated as cargo handling service and held as taxable, longer limitation period under proviso to Section 73(1) of the Finance Act,

1994 would not be available to the department as during the period of dispute, there were conflicting decisions on this issue, that in this regard he relies

upon the judgment of the Apex Court in the case of Continental Foundation Jt. Venture vs. CCE, Chandigarh-I reported in 2007 (216) E.L.T. 177

(S.C.), and that for the same reason no penalty would be imposable on the appellant. He also emphasized that since bulk of the activity of the

appellant is of transport, even if their activity is treated as Goods Transport Agency service, no service tax on the same can be charged from the

appellant as service tax on GTA service is chargeable only from the service recipient. He, therefore, pleaded that the impugned order is not correct.

4. Shri Pramod Kumar, the learned Jt. CDR, defended the impugned order by reiterating the findings of the Commissioner in it and pleaded that the

Tribunal in the case of CCE, Raipur vs. Gayatri Carriers Pvt. Ltd. reported in 2013 - TIOL - 884 - CESTAT - DEL. has held that the activity of M/s

Gayatri Carriers Pvt. Ltd. of loading the coal at the coal heaps into the tipper trucks, and its transportation to the coal stock yard within the mines

would be classifiable as cargo handling service, that the same view has been taken by the Tribunal in the case of Gajanand Agarwal vs. CCE, BBSR

reported in 2009 (13) S.T.R. 138 (Tri. - Kolkata) and also in the case of Gangadhar Bulk Movers Pvt. Ltd. vs. CCE, Nagpur reported in 2012 (27)

S.T.R. 258 (Tri. - Mumbai), that Honâ??ble Orissa High Court in the case of Coal Carriers vs. CCE & CUS & ST, Bhubaneswar reported in 2011

(24) S.T.R. 395 (Ori.) has held that loading of coal at the railway siding within the mines into the railway wagons would be taxable as cargo handling

service under Section 65(105)(Zr) readwith Section 65(23) of the Finance Act, 1994, that in view of this, the activity of the appellant has to be

categorized as cargo handling service and service tax has been correctly demanded in respect of the same on this basis, that longer limitation period

has been correctly invoked as the appellant have suppressed the relevant facts from the department, that for the same reason, the penalty under

Section 78 has been correctly invoked and that in view of the above, there is no infirmity in the impugned order.

5. We have considered the submissions from both the sides and perused the records.

6. The appellant had entered into agreements with their various clients - Bharat Cooking Coal Ltd., Orissa Coal Mining Corporation Ltd. etc. in terms

of which the appellant were to provide tipper trucks, load the coal/mineral ores at the coal/mineral heaps into the tipper trucks, transport the same to

the railway siding located within the mines and unload the coals/mineral ore into the wagons for its transportation. On going through the sample work

orders placed on record, we find that the work orders mention separate rates for transportation, tipper loading and wagon loading and according to the

appellant, the invoices had been issued on this basis only. Since, the work orders prescribe separate rates for tipper loading that is loading of the

coal/mineral ore into the tipper trucks, its transportation up to the railway siding and unloading of the coal/mineral ore into the railway wagons, the

appellantâ??s contracts with their clients has to be treated as separate contracts for transportation, loading and unloading of coal/mineral ores, though

under one instrument. The coal/mineral ore loaded by the appellant at the coal/ mineral ore heaps and thereafter unloaded into the wagons was meant

for transportation to its destination by railways and, therefore, the same would have to be treated as â??cargoâ?? and its loading into the tipper trucks

and thereafter unloading into the railway wagons would have to be treated as cargo handling service. Honâ??ble Orissa High Court in para 22 of its

judgment in the case of Coal Carriers vs. CCE & CUS & ST, Bhubaneswar (supra) has observed that pre-transportation activities like

packing/loading and post transportation activities like un-loading, un-packing are covered by cargo handling service and that cargo handling service is

an adjunct service to the actual transportation of the goods. Since, in this case in the appellant?s contracts with their clients, the activity of the loading of

the coal/mineral ore into the tipper trucks and its subsequent unloading into the railway wagons for its transportation is clearly identified and separate

rates are prescribed for the same, we hold that the service tax would be chargeable on the amount charged by the appellant for these services under

Section 65(105)(Zr) readwith Section 65(23) of the Finance Act, 1994. However, service tax would not be chargeable on the amount charged for

transportation, as even if this transportation within the mines is treated as GTA service provided by the appellant agency, the liability to pay service tax in respect of this activity would be of the service recipient.

7. Next comes, the question of limitation. The show cause notice dated 23/4/09 is for the period from October 2003 to March 2008 and this demand

has been confirmed by invoking extended period while the second show cause notice dated 15/10/09 being for 2008-2009 period is within time. During

the period of dispute, there were conflicting decisions on the issue involved in as much as in the case of Sainik Mining and Allied Services Ltd. and

G.G. Coal Transport Ltd. vs. CCE, Customs and Service Tax, Bhubneshwar (supra), in respect of similar activity, the Tribunal had taken the view that

the same is not taxable as cargo handling service while in the case of CCE, Raipur vs. Gayatri Carriers Pvt. Ltd. (supra) and Gajanand Agarwal vs.

CCE, BBSR (supra), the Tribunal in respect of similar activity had taken a contrary view. In view of this, keeping in view the Apex courtâ??s

judgment in the case of Continental Foundation Jt. Venture vs. CCE, Chandigarh-I (supra), the non-payment of service tax has to be treated on

account of bonafide belief of the appellant that their activity was not taxable and accordingly the longer limitation period under proviso to Section 73(1)

of the Finance Act, 1994 would not be available to the Department. In view of this, the duty demand in respect of the value of service for loading of

coal/mineral ore into the tipper trucks and thereafter loading of the coal/ore into the railway wagons would survive only for the normal limitation period

which has to be quantified by the original Adjudicating Authority. As regards, the penalty on the appellant under Section 77 and 78, since as discussed

above, during the period of dispute there were conflicting decisions by the Tribunal with regards to taxability of the appellantâ??s activity, it has to be

held as the non-payment of service tax by the appellant was due to bonafide belief on the part of the appellant that their activity is not taxable.

Therefore in view the provisions of Section 80 of the Finance Act, 1994, the penalty under Section 77 and 78 would have to be waived. Ordered

accordingly.

8. In view of the above discussion, the matter is remanded to the Commissioner for quantification of service tax demand within normal limitation

period. The service tax would be chargeable only on the amount charged by the appellant for loading of coal/mineral ore into the tipper trucks and

thereafter unloading of the coal/mineral ore from the tipper trucks into the railway wagons. Service tax would not be chargeable on the amount

charged by the appellant for transportation. The appeals stand disposed of as above.

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

