(2015) 05 CESTAT CK 0011

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Appeal No. 261 Of 2009

M/s. Khicha Industries APPELLANT

Vs

CCE-Jaipur-II RESPONDENT

Date of Decision : 14-05-2015

Acts Referred:

Finance Act, 1994 — Section (65)(19), 65(23), 76, 77, 78, 80

Citation : (2015) 05 CESTAT CK 0011

Hon'ble Judges : G. Raghuram, J;R. K. Singh, Technical Member

Bench : Division Bench

Advocate : Bipin Garg, B.B. Sharma

Final Decision : Allowed

Judgement

1. Appeal is filed against order in appeal dated 07/01/2009 which upheld the order-in-original dated 27/11/2007 in terms of which service tax demand

of Rs. 16,82,673/- was confirmed along with interest but no penalty under Sections 76, 77 and 78 of the Finance Act 1994 was imposed. The period of

demand in this case is from 16/08/2002 to 9/9/2004. The show cause notice was issued on 02/08/2007. The primary adjudicating authority observed

that the case involved interpretation of law, and consequently it gave the benefit of Section 80 ibid and did not impose any penalty under Sections 76,

77 and 78 ibid. The appellant was engaged in grinding of rock phosphate. As per the contract dated 06/10/1998 with the Rajasthan State Mines and

Minerals Ltd., the scope of work was as reproduced below:

(a) Transportation of Rock phosphate chips from JKT. Mines to your grinding unit

(b) Grinding of Rock phosphate to 100 mesh size powder.

(c) Filling packing ground rock phosphate into 50 kg, capacity HDFE bags stitching of bags, weighing and proper stacking of bags in

covered godowns. The HOPE bags will be provided by the company & these would be securely stored in you works.

(d) Loading of packed bags into trucks/other vehicles authorized by the company.

OR

(e) Transporting packed bags to Ranapratapnagar Railway station and loading the same into wagons Any damarrage/wharfago if levied by

railways would be to your account.

As per the said contract the payment rates were as under:

(i) For all works at para 1(a), (b), (c), & (d) -Rs. 255.30/-

(ii) For all works a para l(a), (b), (c) and (e)- Rs. 288.00/-

No other remuneration on any account will be payable to you.

The impugned demand was confirmed under cargo Handling Service [Section 65(23) ibid].

2. The appellant has contended that - (i) the primary purpose of the contract was grinding of rock phosphate and other aspects were only incidental,

(ii) it got registered under business auxiliary service and started paying service tax on the entire value of the contract w .e.f. 10/09/2004 ""when

production of goods on behalf of the client"" was added to the scope of business auxiliary service defined under Section (65)(19) ibid, (iii) the entire

demand is time-barred

3. The Ld. Departmental Representatives on the other hand contended that the scope of work did involve cargo handling, and therefore, the service

tax is leviable under cargo handling service.

4. We have considered the contentions of both sides.

5. We find that the contract is essentially for grinding of rock phosphate to 100 mesh size powder. Even the ""subject"" of the contract is ""contract for

grinding of rock phosphate. Thus, it is evident that the contract was not for cargo handling and the work other than grinding of rock phosphate was

incidental or ancillary to the main work of grinding. Further, even if the contention of the Ld. Departmental Representative that part of the work did

involve cargo handling is taken on board, we find that the payment rates were composite rates not amenable to identification as to what rate/amount was paid to those components of services which were arguably in the nature of cargo handling service. When quantification is not possible, the levy

fails. However, without elaborating on this judicial principle, we find that in the case of Commissioner of Central Excise Bhubaneswar versus B.K.

Thakkar 2008 (9) STR 542 (Tri-Kol) CESTAT while deciding a similar issue held that excavation, transportation and feeding of iron ores to crusher

plant for processing were incidental activities for processing, and therefore, the entire contracted activities did not get the character of cargo handling

service. Further, it is seen that from 10.09.2004, appellant has been paying service tax on the entire consideration received under business auxiliary

service on account of the fact that ""production of goods on behalf of the client"" was added to the definition of BAS from the said date. The Revenue

also gave them registration under business auxiliary service.

6. In the light of the foregoing analysis, we are of the view that the overall nature of contract did not make it amenable for coverage under cargo

handling service. Further, we find that the entire demand pertains to period beyond the normal period of one year from the date of show cause notice.

The primary Adjudicating Authority himself has recorded that the case involved interpretation of law and on that ground extending the benefit of

Section 80 ibid did not impose any penalties at all. Revenue has not filed any appeal against the impugned order for extending the benefit of Section 80

ibid. It is settled law that when the issue involves interpretation of law, extended period cannot be invoked. Also, the conditions for imposing penalty

under Section78 are identical to those required for invoking extended period. Therefore, when 78 penalty has been found to be unimposable, invocation

of extended period also cannot be sustained and as a consequence thereof, the entire demand is hit by time-bar.

7. In view of the analysis above, the impugned demand is set aside on merit as well as on the ground of time-bar. The appeal is allowed.