
(2015) 07 CESTAT CK 0018

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Appeal No. 305, 306, 456, 457 Of 2009

M/s Nizamsingh Chauhan And Anr.

APPELLANT

Vs

CCE, Bhopal

RESPONDENT

Date of Decision : 16-07-2015

Acts Referred:

Finance Act, 1994 — Section 65(23), 73(1), 76, 77, 78

Citation : (2015) 07 CESTAT CK 0018

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

Bench : Division Bench

Advocate : Govind Dixit, Amresh Jain

Final Decision : Dismissed

Judgement

1. Appeals Nos. ST /456-457 /2009 have been filed by the appellant - assessee against order-in-Appeal 155 & 156/BPL/2009 dated 5.3.2009 which

upheld the respective orders-in-original dated 13.10.2008 and 10.9.2008 only to the extent of sustaining the demand along with interest for the normal

period of one year under cargo handling service for the service rendered by these appellants to M/s Maganese Ore India Ltd. (MOIL) but the said

orders-in-original the demand under cargo handling service was confirmed for the extended period of five years along with interest and also penalties

were imposed under Section 76, 77 and 78.

2. The Revenue filed appeals Nos. ST /305-306/2009 against the said order-in-appeal on the ground that the Commissioner (Appeals) has incorrectly

set aside the demand for the period beyond the normal period and penalties were also unjustifiably dropped as the appellants were guilty of

suppression of facts.

3. No one appeared on behalf of the appellant-assessee when the case was called. The appellant-assessee sent a Fax received at 11.06 A.M. on the date of the hearing seeking adjournment on the ground that their Advocate was pre-occupied. 'As the request was received rather too late and that too to convey the Advocate's pre-occupation in such perfunctory manner it is not considered good and sufficient ground to grant adjournment and so we proceed to decide the appeals on merit.

3. The appellant - assessee has contended in their appeals that the activity undertaken by them did not fall under the category of cargo handling service as defined under Section 65(23) of the Finance Act, 1994 and their activity was covered under mining service as it related to mining and was carried out within the mining area and that mining service was not liable to service tax during the relevant period. They also contended that there was no suppression of facts and the details were given when asked for. They informed Revenue in writing that the service recipient (MOIL) had taken up the matter with the CBEC regarding the taxability of the activity and requested that the matter may be kept pending.

4. Revenue on the other hand has contended that there was no ambiguity about the activity being squarely covered under cargo handling service as the definition given in Section 65(23) *ibid* left no scope for any confusion in this regard and that the summons issued to the appellants were not answered inasmuch as they (i.e. the appellants) did not mark their presence in response to the summons and only sent their written submission and supplied the sought information almost three weeks after the date on which they were required to appear before the service tax officers along with the required details. So, the appellants are guilty of suppression of facts. Revenue also contended that suppression is sufficient to invoke the extended period as it is not required to be proved that suppression was with intent to evade payment of duty because the expression ""with intent to evade payment of duty"" does not appear in sub-clause (d) of proviso to Section 73(1) of the Finance Act, 1994

5. We have considered the contentions of both sides and we have also perused the contract under which the service was rendered. As is evident from Para-II of the tender document for railing and transport of Maganese Ore the service involved wagon loading, truck loading, transport including

stacking and de-stacking/rehandling of manganese ore. It is also seen that transport activity (excluding stacking) formed a very small part of the entire

service rendered, inasmuch as while hiring of truck including stacking was @ of Rs.1,15,000 / PMT, transport excluding stacking was only Rs.10,000 /

PMT, wagon loading was @ Rs.1,25,000/- PMT and truck loading @ 25,000/- / PMT and stacking/re-handling was also @ 10,000 / PMT. As the goods

were loaded on to the trucks and wagons they acquired the status of cargo. Therefore the activity performed by the appellant clearly fell under the

category of cargo handling service as defined in Section 65(23) ibid. This conclusion is in harmony with the ratio of the judgement in the case of Coal

Carriers Vs. CCE - 2011 (24) STR 395 (Ori.). The judgement of CESTAT in the case of CCE Vs. Vinshree Coal Carriers Pvt. Ltd. - 2008 (10) STR

4 73 (Tri.-Kolkata) holding transport of coals within the mining area not subjected to service tax under cargo handling service was passed following

the judgement of the CESTAT judgment in the case of Sainik Mining & Allied Services Ltd. Vs. CCE - 2007 (9) STR 531 (Tri.-Kolkata) where the

coal was transported inside the mine/colliery by deployment of machines and tipper trucks for transport of coal from quarry beds to surface

stocks/railway siding. Thus the facts in these two cases were quite different.

6. Coming to the Revenue's appeal that extended period was rightly invoked by the primary adjudicating authority and therefore demand for extended

period should be upheld and penalties restored, We find that the primary adjudicating authority has taken note of the fact that the service recipient M/s

Manganese Ore India Ltd. had made a representative to CBEC regarding (non) taxability of the impugned service. The service was rendered to a

public sector unit which had taken up the matter with CBEC contending that it was not taxable. It is thus evident that it is not a case where the

appellant - assessee could/would have intended to suppress the fact of rendition of the impugned service. The appellants also supplied the information

within about 3 weeks of the date on which they were summoned to appear before the Central Excise officer. The Commissioner (Appeals) has taken

due note of some of the judgements like in the case of Singh Brothers - 2009-TIOL-189- CESTAT-Del. where extended period was not invoked and

penalties set aside holding at that time that the issue was interpretational. In the given circumstances, we hold that the Commissioner (Appeals) finding

that the appellants are not guilty of suppression and do not deserve to be penalised the does not warrant any appellate intervention.

7. In the light of the foregoing discussion, we dismiss the appeals filed by the appellant assesseees as well as those filed by Revenue.