(2006) 08 RAJ CK 0070

In the Rajasthan High Court

S.B. Construction Company APPELLANT

Vs

Union of India (UOI) RESPONDENT

Date of Decision : 24-08-2006

Acts Referred:

Constitution of India, 1950 — Article 226
Finance Act, 1994 — Section 54, 65

Citation : (2007) 2 RLW 1606 : (2006) 4 STR 545 : (2007) 6 STT 385

Hon'ble Judges : R.P. Vyas, J;N.N. Mathur, J

Bench : Division Bench

Final Decision : Allowed

Judgement

1. By way of instant writ petition under Article 226 of the Constitution of India the petitioner S.B. Construction Company a partnership Firm engaged in construction and maintenance activities has challenged the order of the 3rd respondent Superintendent, Central Excise, Sri Ganganagar dated 25th April, 2005 to get the registration for the services of "Cargo Handling Service" and pay the service tax due thereon. The petitioner has been asked to give the details of amount received month-wise from 4th respondent Chief Engineer, Suratgarh Thermal Power Station, Suratgarh on the said services w.e.f. 16-8-2002 onwards so that the service tax liability of past period can be ascertained accordingly.

2. The necessary facts for deciding the controversy involved in the instant petition are that the petitioner was awarded a contract of unloading of coal through W.T. System, stacking/reclaiming of coal to S/R System and feeding of coal to boiler bunkers through conveyor system by order dated 29th March, 2004. It is averred that the petitioner has been carrying the said contract for the 4th respondent Rajasthan Rajya Vidyut Utpadan Nigam from 29th March, 2004 and 25th July, 2005 and identical contracts for every year for doing the same work.

3. It may be stated that the Government of India introduced the concept of service tax i.e. Tax an the services for the first time in the year 1994. The

Finance Act, 1994 provides the method of levy of service tax, taxable services and their valuation, procedure and the rules. Certain provisions of the Central Excise Act, 1944 also applies to the service tax. The Act of 1944 provides for imposition of service tax by Section 54. Section 65 of Finance Act, 1994 provides and defines various services on which service tax is levied. The Central Government decided to bring "Cargo Handling Service" also in the sweep of Service Tax and, therefore, Clause 20 was inserted vide Finance Act, 2002 w.e.f. 16-8-2002. The said Clause was renumbered as Clause 23 vide Finance Act, 2003 Clause 23 of Section 65 reads as follows:

Cargo handling services 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 services, incidental to freight but does not include handling of export cargo or passenger baggage or mere transportation of goods.

4. It will be relevant to refer to taxable services in respect of cargo handling under Clause (zr) of Sub-section (105) of Section 65 which reads as follows:

To any person, by a cargo handling agency in relation to cargo handling services.

5. The say of the petitioner Firm is that the services of maintenance and repairs rendered by it falls under tax net under other provisions of Finance Act and, therefore, the petitioner Firm has obtained a Certificate of Registration. The petitioner has also deposited a sum of Rs. 33,000/- as against the service tax in respect of maintenance and repairs contract. However, according to the petitioner Firm the services rendered by it cannot be brought under the definition of "Cargo Handling Services" as it is engaged only in handling of coal from railway wagons to required destination of Tharmal Power Station through Wagon Tippling System or through conveyor system, wherein machines are used with the aid of some manpower and manual loading and unloading and stacking, but in no way by transportation.

6. A counter has been filed supported by the affidavit of Shri Jag Ram Meena, Assistant Commissioner, Central Excise Division, Sikar. The say of the department is that the petitioner has been providing the services of unloading of coal wagon tippling system, stacking/reclaiming of coal to stacker/reclaimer system and feeding of coal to boiler bunkers through conveyor system under a contract with M/s. Rajasthan Rajya Vidyut Utpadan Nigam (M/s. Suratgarh Super Thermal Power Station, Suratgarh). Thus, the impugned services are covered under the category of "Cargo Handling Services" and is liable to pay the service tax. The Department has also referred to a Circular dated 1st August, 2002 issued by the Central Board of Excise and Customs (CBEC) clarifying that the activity of packing, unpacking, loading and unloading of goods meant to be transported by any means of transportation is within the ambit of Cargo Handling Services. A preliminary objection has also been raised to the effect that the petitioner Firm

has an alternate remedy by way of representation to departmental authorities.

7. We have heard learned Counsel for the parties and perused the pleadings. In order to appreciate the controversy involved it will be necessary to look into the actual nature of job assigned to the petitioner Firm, which has been placed an record as Annexure-3. It clearly appears that the 4th respondent gave contract to the petitioner Firm for unloading the coal from railway wagon to boiler bunkers of the Thermal Power Station. The contract has been awarded for unloading of coal through WT system, stacking/reclaiming of coal to S/R system and feeding of coal to boiler bunkers through conveyor system. For the convenience it can be divided into two parts as follows:

(i) Unloading of coal from railway wagons through wagon tippling system and feeding to boiler bunkers of all the units through conveyor system, as required,

(ii) Transportation of picked up coal/stones, Manual unloading and stacking thereof.

8. The scope of the said work has been summarized by the petitioner as under:

--Unloading of coal from railway wagons through tippling system/manual unloading system.

--Feeding of Coal into the bunkers of all the units either from wagon tipplers or from Coal stacked at the stockpile area.

--Feeding of Coal to stockpile area from wagon tipplers through Stacker/ Reclaimer.

--Collecting spilled coal from various conveyors, galleries, buildings, bunker floors, rail track area and putting on the near by conveyors for feeding to bunkers or stacking in stock-pile area.

--Collecting spilled Coal from various buildings/below the conveyor galleries/ bunker floor etc. and transporting and stacking the same to stock-pile area at the location to be decided by the Engineer In-charge.

--Segregating coal from the refuse dump house and transporting and stacking to the stock-pile area at the location to be decided by the engineer-Incharge.

--Transportation and stacking of stones from refuse dump house/ground floor of bunkers/bunker floor/conveyors/TP''s/ buildings or any other-location to the specified area in the Thermal Plant.

9. At this stage, it will be relevant to refer to definition clause which defines Taxable Services and particularly "Cargo Handling Services" as under:

Clause 90

...taxable services means any service provided

(zr) to any person by a Cargo Handling Agency in relation to Cargo Handling

Services.

The Dictionary meaning of word "Cargo" defined in various Dictionaries are as under:

Webster''s Dictionary:

''Cargo'' - Goods and Merchandise taken on abroad, vessel, aircraft etc. Webster''s IX New Collegiate Dictionary:

''Cargo'' - Goods or Merchandise conveyed in ship, aeroplane or vehicle.

Thus, it is evident that word ''Cargo'' means carriage of luggage in ship, vessel or aircraft.

10. In the instant case, the coal is handled/moved from railway wagons to the site of Thermal Power Station with the aid of wagon tippling system to be fed in the boiler bunkers through conveyor system. It is evident that handling of the coal is done through wagon tippling system or conveyor system, they are mechanical devices and no motor vehicle is involved in the said handling. The clarification made by the CBEC also supports the petitioner''s contention. It clearly appears that the Service tax has been levied under the ''Cargo Handling'', on such services which undertakes the activities of packing, unpacking, loading, unloading of goods to be transported by any means of transportation namely truck, rail, ship or aircraft. In the instant case the service provided by the petitioner Firm under the contract is distinct i.e. transporting coal from wagons to Thermal Power Station by conveyor belt and not by any means of transportation. Thus, we are of the view that the service rendered by the petitioner under the subject contract does not fall under the ambit of Cargo Handling Services and as such it is not liable to pay the service tax.

11. As far as the preliminary objection as to the relegating the petitioner to alternate remedy is concerned it is not in dispute that there is no statutory remedy available. It is settled position of law that the High Court has the power to entertain a petition under Article 226 of the Constitution of India, where the impugned action of the executive authority is without jurisdiction or is likely to subject a person to lengthy proceedings and unnecessary harassment. This aspect has been dealt with in great detail by a Division Bench of this Court in Guljag Industries Ltd. v. State of Rajasthan and Anr. reported in 129 STC page 3. Simply, asking a party to make representation to the Department, more particularly where the authority has taken decision on the issue involved touching the jurisdiction or authority, there is no purpose in relegating petitioner to such lengthy proceeding leading to unnecessary harassment. The preliminary objection stands overruled.

12. In view of the aforesaid, the writ petition is allowed. The notice dated 25th April, 2005 (Annex. 4) and communication dated 11-5-2005 (Annex. 6) are quashed and set aside.

