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**(2016) 04 SC CK 0102**

**In the Supreme Court Of India**

**Case No :** Civil Appeal No. 3106 of 2008

The Deputy Commissioner, Central Excise and Anr. APPELLANT

Vs

Sushil & Company RESPONDENT

**Date of Decision :** 13-04-2016

**Acts Referred:**
Finance Act, 1994 — Entry 23 Section 65

**Citation :** (2016) 4 Scale 292 : (2016) 13 SCC 223

**Hon'ble Judges :** A.K. Sikri;Rohinton Fali Nariman, JJ.

**Bench :** Division Bench

**Advocate :** Mr. A.K. Sanghi, Senior Advocate, Mr. P.K. Mullick, Mr. Ajay Kumar, Mr. B. Krishna Prasad, Advocates, for the Appellant; Mr. Kavin Gulati, Senior Advocate, Mr. Praveen Kumar, Ms. Babita Sant, Advocates, for the Respondent

**Final Decision :** Dismissed

## Judgement

1. The respondent-assessee herein is the holder of a Certificate of Registration in Form ST2 under Section 69 of the Finance Act, 1994 (hereinafter referred to as, "the Act"). This Certificate was given to him on 29.10.2004 under the category ''Business Auxiliary Service''. The respondent also obtained registration as `Manpower Recruitment Agency'' under the Act with effect from 01.07.2005.

2. During the course of audit of accounts of M/s. Birla Corporation Ltd. for the period August 2003 to January, 2005, the appellant-department found that the said company had entered into a contract with the respondent-assessee. After taking possession of a copy of this contract, the officer of the respondent-assessee namely, one Kailash Sharma was examined. On the basis of the statement given by him, the Department took a prima facie view that the contract was for the purpose of packing, loading and unloading etc. of the goods, for which labour was supplied by the respondent to M/s Birla Corporation Ltd. On this basis, a show cause notice was issued to the respondent-assessee alleging that the respondent was a service provider and, by clever means, it was a modus operandi to evade service tax as it was raising two separate bills for the same

work i.e. in one bill, the respondent was charging the amount of payments made to labour and by another bill, other expenses were raised and in this manner, service tax was not paid. The show cause notice further alleged that the aforesaid alleged services provided by the respondent to its customers amounted to ''Cargo Handling Service'', on which the respondent was liable to pay service tax.

3. The respondent challenged this show cause notice by filing a writ petition in the High Court, inter alia, contending that no services were provided by the respondent by entering into the aforesaid contract, as it was only supplying labour and the labour was not doing any work of packing, unpacking, loading and unloading of any cargo. The High Court, by the impugned Judgment, has accepted the plea of the respondent, resulting into allowing the writ petition and quashing the show cause notice. It is this Judgment of the High Court, the validity of which is questioned by the appellant-Department in the present appeal.

4. Before coming to the issue at hand, we may record the statement of Mr. A.K. Sanghi, learned senior counsel appearing for the appellant-Department, that it was not appropriate for the High Court to deal with the said writ petition, bypassing the adjudicatory machinery provided under the Act, more so when the statutory appeals against the adjudication orders are also provided. However, we find that the High Court has simply gone by the contract in question, which was entered into between the respondent and M/s. Birla Corporation Ltd. and taking into consideration all the averments, which were made in the show cause notice, on the basis of admitted facts, it has come to a conclusion that even when the allegations in the show cause notice are accepted, the said contract does not amount to providing any ''Cargo Handling Service'' as defined under Entry 23 of Section 65 of the Act. Therefore, we are of the opinion that the High Court did not commit any mistake or illegality in entertaining the writ petition when no disputed questions of fact were involved and the legal issue was to be decided on the basis of the facts, as admitted by the parties, which were so specifically recorded by the High Court itself.

5. Coming to the issue as to whether the contract in question, whereby labour is supplied by the respondent to M/s. Birla Corporation Ltd., could be treated as ''Cargo Handling Service'' within the meaning of Entry 23 of Section 65 of the Act. This Entry reads as under :-

"''Cargo Handling Service'' means loading, unloading, packing or unpacking of cargo and includes cargo handling services provided for freight in special containers or for no containerized freight, services provided by a containers freight terminal, for all mode of transport and cargo handling service incident to freight, but does not include handling of export cargo or passenger baggage or mere transportation of goods."

6. The High Court, on the interpretation of the aforesaid Entry, has observed that two conditions for considering any service to be ''Cargo Handling Service'' need

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to be satisfied, namely; (1) there must be a cargo i.e. a packed or unpacked commodity accepted by a transporter or carrier for carrying the same from one destination to another. It is only after the commodity becomes a cargo, its loading and unloading at the freight terminal for being transported by any mode becomes a cargo handling service, if it is provided by an independent agency and; (2) the service provider must independently be involved in loading-unloading or packing-unpacking of the cargo.

7. The aforesaid meaning given by the High Court while interpreting Entry 23 of Section 65 is perfectly in order and justified. On that basis, we have to see whether the twin conditions mentioned therein are satisfied in the present case or not.

8. We find from the record that in the instant case, as per the contract entered into between the respondent and the customer, namely, M/s. Birla Corporation Ltd., the respondent was to supply manpower for working at the packing plant as per the customer''s requirement. The contractor-respondent was to ensure that manpower deployed on the work given by customer''s officers is executed properly, diligently, uninterruptedly and to the satisfaction of the customer in the factory premises of its works.

9. It is significant to note that no part of loading or unloading was assigned to the workers of the respondent-assessee upto transportation of the cement bags out of the factory. This work was, in fact, been performed by the automatic machines. It is through these automatic machines, the cement bags were loaded, unloaded, packed or unpacked and this included Cargo Handing 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 service incidental to freight, but does not include handling of export cargo or passenger baggage or mere transportation of goods.

10. On the reading of the aforesaid contract, coupled with the statement of Mr. Kailash Sharma, an officer of the respondent-Company, the High Court has rightly concluded that the aforesaid services would not fall within the definition of ''Cargo Handing Services''.

11. Mr. Kavin Gulati, learned senior counsel appearing for the respondent-assessee, has drawn our attention to a judgment of the Delhi Bench of the Tribunal in "J. and J. Enterprises v. Commissioner of Central Excise, Raipur," reported in 2006 (3) S.T.R. 655. In this judgment, almost similar services provided by the assessee were held not to be ''Cargo Handling Services''. In arriving at such a conclusion, the Tribunal had referred to the clarificatory instructions, being F. No. B11/1/2002-TRU dated 01.08.2002 and the relevant portion therein was extracted at paragraphs 3 and 15. These paragraphs read as under :-

"3. The services which are liable to tax under this category are the services

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provided by cargo handling agencies who undertake the activity of packing, unpacking, loading and unloading of goods meant to be transported by any means of transportation namely truck, rail, ship or aircraft. Well known examples of cargo handling service are services provided in relation to cargo handling by the Container Corporation of India, Airport Authority of India, Inland Container Depot, Container Freight Stations. This is only an illustrative list. There are several other firms that are engaged in the business of cargo handling services.

xx xx xx

15. Another doubt raised in relation to cargo handling services is that whether individuals undertaking the activity of loading or unloading of cargo would be leviable to service tax. For example, if someone hires labour/labourer for loading or unloading of goods in their individual capacity, whether he would be liable to service tax as a cargo handling agency. It is clarified that such activities will not come under the purview of service tax as a cargo handling agency."

The aforesaid clarification given by the Department itself negates the case of the Department insofar as the facts of this case are concerned.

12. We, therefore, uphold the conclusion of the High Court that services provided by the respondent-assessee did not amount to Cargo Handling Services and, therefore, no such service tax was leviable. The appeal is, accordingly, dismissed.

13. No costs.

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