(2014) 01 BOM CK 0251

In the Bombay High Court

Case No : Central Excise Appeal No. 2 of 2014

United Shippers Limited	APPELLANT
Vs	
Commissioner of Central Excise	RESPONDENT

Date of Decision : 30-01-2014

Acts Referred:

Central Excises and Salt Act, 1944 — Section 35G
Finance Act, 1994 — Section 65(23), 83

Citation : (2014) 72 VST 132

Hon'ble Judges : Mohit S. Shah, C.J;M.S. Sanklecha, J

Bench : Division Bench

Advocate : Naresh Thacker and Divya Jeswant, Advocate for the Appellant; Pradeep S. Jetly and Suchitra Kamble, Advocate for the Respondent

Judgement

1. At the request of counsel for both the parties, the appeal itself is taken up for final disposal at the stage of admission. This appeal has been filed u/s 35G of the Central Excise Act read with section 83 of the Finance Act, 1994 (the Act), challenging the order dated September 4, 2013 of the Customs, Excise and Service Tax, Appellate Tribunal (the Tribunal). By the impugned order dated September 4, 2013, the appellant was directed to pre-deposit Rs. 25 crores for the purposes of the appellant''s appeal being entertained on merits against the orders dated November 29, 2012 and February 18, 2013 passed by the Commissioner of Central Excise which confirmed in the aggregate service tax demand of Rs. 58.53 crores along with interest thereon and an equivalent penalty.

2. The basic dispute that arises between the parties is whether service tax is chargeable under the head "cargo handling service" even in respect of consideration received for transportation of goods in barges from a mother-ship to the jetty known as barging and transport of goods from one minor port to another. It is the case of the Revenue that the transportation in barges is only a part of the service of cargo handling service rendered by the appellant to its

customers and, therefore, includible. On the other, the appellant contends that transportation services are independent of the "cargo handling service" and cannot be included under the head "cargo handling service" for discharge of service tax. According to the appellant, the demand attributable to transport by barges is Rs. 51.13 crores and that to transport from one minor port to another is Rs. 7.40 crores.

3. The Tribunal by the impugned order dated September 4, 2013, prima facie, came to the conclusion that the activity of stevedoring, unloading, transportation from the mother-ship to the jetty in barges and, thereafter, to the customers'' destination are all the activities which form a composite service classifiable under the head of "cargo handling service" as defined u/s 65(23) of the Act. However, so far as the issue of transport of goods from one minor port to another minor port was concerned, the impugned order dated September 4, 2013 prima facie concluded that the same cannot be classified under the head "cargo handling service". The impugned order while directing the appellant to deposit Rs. 25 crores out of a total demand of Rs. 58.53 crores as service tax also records the fact that no financial hardship has been pleaded on behalf of the appellant.

4. Mr. Naresh Thacker, learned counsel appearing for the appellant submits that the impugned order dated September 4, 2013, directing the appellant to deposit an amount of Rs. 25 crores is unreasonable in facts of the present case. In support of the above, the following submissions were urged:

(a) The transportation service is a separate and distinct activity from the activity of "cargo handling service". The services provided by the appellants were three distinct services, namely:--

(i) cargo handling service;

(ii) transportation service, i.e., transportation of the cargo from the mother-ship to the jetty in barges; and

(iii) transportation of goods from one minor port to another minor port.

The appellant is charging its customers separately in respect of each of service rendered by them by issuing separate invoices. In the circumstances, it would not be appropriate to tax the service with regard to transportation, i.e., barging as well as from port to port under the head ''cargo handling service''.

(b) The barging service provided by the appellant of transporting goods from the mother-ship to the Jetty at long distance like 30 nautical miles between the anchorage point (where the mother-ship is anchored) to the Jetty of a minor port in barges cannot be compared with movements of the goods from the Jetty to the trucks or the customer''s destination near the port. Transportation of goods in barges for such long distances cannot, therefore, be considered as a part of cargo handling service.

(c) Further, it is submitted that while directing the appellant to deposit a sum of

Rs. 25 crores, the impugned order appears to have ignored the facts that an amount of Rs. 7.40 crores demanded on account of transportation from port to port has prima facie been found to be not sustainable.

(d) The demand to the extent of approximately Rs. 28 crores would be barred by limitation though the impugned order dated September 4, 2013 records the appellant''s contention that an amount of Rs. 31 crores is time-barred. It is submitted that the contention of the appellant that the demand to the extent of approximately Rs. 28 crores is time-barred, has not been considered by the Tribunal on the ground that the question of limitation would be gone into at the time of the final hearing of the appeal.

(e) The audit team of the Central Excise Department had on examination in 2008 of the appellant''s activities concluded that the services of barges are taxable under port service and had directed the appellant to pay service tax amounting to Rs. 28.11 crores under the head "port service". Therefore, the Department itself was of the view that the activity of barging cannot be included under the head "cargo handling service".

(f) Cargo handling service rendered in respect of export goods is exempted from service tax. The amount attributable to the above service has not been reduced while computing the demand.

(g) The appellant has not record any service tax from its customers on the barging service or on transporting goods from one port to another during the period 2003-04 to 2009-10.

5. On the other hand, Mr. Jetly, learned counsel appearing for the Revenue submits that the activities of the appellant of "cargo handling service" is a combined activity and includes not only the activity of loading and unloading of goods from the ship but also the transportation from the mother-ship up to the jetty and thereafter to the customer''s destination. This entire movement of the goods calls for handling of cargo and it is this service which is being provided by the appellant to its customers. The action of the appellant in splitting up one service, i.e., cargo handling service into three services is only with an intent not to pay service tax. This is clear from the fact that prior to 2003, the appellant was issuing only one invoice, covering all the three services. However, thereafter, the appellant started splitting its services finally into three parts, viz.: "Cargo handling service", transportation service (barging) and other port services. It was submitted that the services are composite service and would be taxable only under the heading "cargo handling service" as it is the service of "cargo handling service" which renders the essential character of the service provided by the appellant to its customers.

6. We have considered the rival submissions. We find that the issue on merits would require detailed consideration which could appropriately be done at the final hearing. However, we note that the Tribunal has not considered the contention of the appellant that the demand to the extent of Rs. 28 crores is

time-barred. We find that the appellant has a strong prima facie case with regard to the limitation in view of the fact that as late as in February 2008, the audit wing of the Department carried out a detailed examination of the appellant''s activities including barging and directed the appellant to pay service taxes under the head "port services". Thus, the Department itself was of the view that the activity of barging is not classifiable under the head "cargo handling service". However, all of a sudden for the first time in its show-cause notice dated October, 2008, the above service was sought to be classified under the head "cargo handling service". Therefore, considering the overall prima facie case on limitation and that the demand of approximately Rs. 7 crores attributable to transport of goods from one minor port to another, is prima facie held to be not sustainable, the pre-deposit would need to be reduced. It would meet the ends of justice if the appellant is directed to deposit an amount of Rs. 10 crores for the purpose of its appeal being entertained on merits by the Tribunal, including the amount of Rs. 5 crores already appropriated by the Department.

7. In view of the above, we modify the impugned order dated September 4, 2013 by directing the appellant to make a pre-deposit of Rs. 5 crores. The appellant shall deposit the same by February 28, 2014. On the appellant satisfying the Tribunal about the deposit of Rs. 5 crores as directed by us, the appeal of the appellant would be taken up for expeditious disposal in view of the large amount involved. The appeal is disposed of in above terms with no order as to costs.

