2019-TIOL-1509-CESTAT-KOL

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
EASTERN ZONAL BENCH, KOLKATA

Appeal No. ST/191/2011

Arising out of Order-in-Original No. 39/COMMR/ST/KOL/2010-11, Dated: 16.02.2011
Passed by the Commissioner of Service Tax, Kolkata

Date of Hearing: 18.12.2018
Date of Decision: 07.01.2019

M/s TYCOONS INDUSTRIES PVT LTD

Vs

COMMISSIONER OF SERVICE TAX
KOLKATA

Appeal No. ST/76262/2014

COMMISSIONER OF SERVICE TAX
KOLKATA

Vs

M/s TYCOONS INDUSTRIES PVT LTD

Appellant Rep by: Shri Ankit Kanodia, CA
Respondent Rep by: Shri A Roy, Suptd. AR

CORAM: P K Choudhary, Member (J)
V Padmanabhan, Member (T)

ST - Assessee worked inside the mining area as per an agreement entered into with M/s. TISCO - The work performed by assessee involved activity of transportation of minerals from the mine's pithead to railway siding and loading the same into railway wagons - The authorities below have held that the assessee have provided cargo handling services and hence have demanded service tax - The agreement itself provides for detailed break-up of rates for each of the four activities to be undertaken by assessee - The dominant activities undertaken by assessee under the contract in question are primarily the movement of mineral within mining area and transfer of mineral from the mines to crusher plant and loading to railway siding, if at all, includes loading and unloading which are merely incidental - Moreover, the activities under taken are principally the transportation of coal within mining area and hence, the gross amounts received for the same cannot be taxed under the category of cargo handling service - The definition of cargo handling service under FA, 1994, does not include the kind of activities undertaken by assessee and hence the same are not chargeable to service tax - As regards to demand on site formation services, the activity of making of 100 meters dia holes with contractors own equipment is not one relating to site formation - The assessee's activity is limited to supply of the machine and men - The entire job is undertaken by TISCO people and there is no liability on the part of assessee and hence, the appeal on this count also succeeds - There was no suppression or mis-statement by assessee regarding the nature of activities undertaken by them and hence the imposition of penalty on them is not at all justified - Since the activity cannot be classified as cargo handling service and the contract being the same nature for the said appeal, appeal filed by the department is dismissed: CESTAT

Assessee's appeal allowed

Case laws cited:

CCE, Ranchi v. M/s. Modi Construction Company reported in 2011 (23) S.T.R. 6 (Jhar.)... Para 5

Hira Industries Ltd - 2012-TIOL-566-CESTAT-DEL... Para 12

COMMISSIONER OF SERVICE TAX, RANCHI Versus HEC LTD. 2018 (9) G.S.T.L. 403 (Tri. - Kolkata)... Para 13

FINAL ORDER NO. 75013-75014/2019

Per: Bench:

As similar issues are involved, both the appeals are taken up together for hearing and disposal.

2. In the case of Service Tax Appeal No. ST/191/2011, covering the period from August 2005 to Feb 2008, the appellants M/s. Tycoons Industries Private Limited worked inside the mining area as per an agreement entered into with M/s. Tata Iron & Steel Limited (TISCO). The work performed by the appellants involved activity of transportation of the minerals from the mine's pithead to the railway siding (part of the mine) and loading the same into railway wagons. The authorities below have held that the appellants have provided cargo handling services, in terms of Section 65(23) read with Section 65(105)(zr) of the Finance Act, 1994 to M/s. TISCO and hence have demanded service tax on the gross amount received by the appellants on the activities of a) Trucking, Loading and Unloading of dolomite boulders from Mines to Crusher Plant; b) Hauling of dolomite from Stock Pile (loaded manually / with machines) to Sonakhan Railway Siding(part of the mine as per Mines Act, 1972); and c) Loading of dolomite into railway wagons.

3. It is the contention of the appellants that the work undertaken by them does not fall in the category of "cargo handling services". They have also stated that M/s. TISCO had examined the activities undertaken under the contract and had paid service tax under reverse charge mechanism on part of the contract under "Transport of goods by road agency service". Also, demand has been raised on certain part of the contract comprising of activity of Making of 100 meters dia holes with contractors own equipment under "Site formation and clearance, Excavation and Earth Moving and demolition service" and under "Maintenance and repair services" on the activity of maintenance of the crusher plant weilding operations, garage and pump operations. It is the contention of the Appellant that the work undertaken does not come under the purview of cargo handling services as has been held by the authorities below and also the activity of Making of 100 meters dia holes with contractors own equipment does not come under Site formation and clearance, Excavation and Earth Moving and demolition service.

4. In the case of ST/76262/2014, the Revenue is in appeal on the same activity for the period from March 2008 to March 2010, demanding service tax under cargo handling services only which has been dropped by the First Appellate authority vide order-in-appeal dated 16/05/2014, classifying the activity as transport of goods by road service as well as on the ground of limitation.

5. The ld. Consultant appearing on behalf of the assessee extensively referred to the contents of the agreement and also rate schedules of payment for various activities agreed upon, as per the said agreement. He stated that the activities as considered for cargo handling service by the department are part of the main activity of transportation of the minerals from the mine's pithead to the railway siding (part of the mine) and loading the same into railway wagons. He further stated that the activity carried out by the appellant was within the mining area and the goods transported within mining area cannot be called as cargo handling. This can be appreciated if the sample copy of the contract is examined. Following the decision of the Hon'ble High Court of Jharkhand in the case of
CCE, Ranchi v. M/s. Modi Construction Company reported in 2011 (23) S.T.R. 6 (Jhar.)
the activity of the appellant cannot be called as cargo handling service and Appellant shall succeed. He further argued that The contract categorically brings out the principal scope of the work undertaken by the appellant, which is transportation of mineral over a long distance. The incidental activity of stacking and further loading into railway wagons does not provide the essential character to the contract. He also submitted the copy of a certificate of costing for the total contract as issued by an independent Chartered Accountant dated 28/03/2013.

6. The ld. Consultant relied on various decisions in support of his submissions. He also relied on certain clarifications of the C.B.E. & C. on this issue. On the issue of site formation services, the Ld. Counsel stated that with respect to "Making of 100 meters dia holes with contractors own equipment', the appellant has merely supplied machines along with one operator for making these holes. The operator works under the supervision and control of TISCO management. The appellant has no control over the machine once it is in the mining area. Drilling operations are part of the Mining activities which has been outsourced to appellant. Site preparation for drilling like deployment of Dozer/Loader to clean the surface is not done by appellant. As per their directions, contractors have to deploy machine in the respective areas and start drilling operation. Subsequently the blasting activity is done by TISCO supervisors and staff. Hence, the above activity cannot be classified as site

formation services. As regards demand of Rs. 85,980/- under Maintenance and repair services, the Ld. Consultant has not pressed for the same.

7. The Ld. DR for the Revenue contends that the activity of the appellant to the extent of only Loading of dolomite into railway wagons calls for taxation under the "cargo handling services". The appellants are also engaged in stacking and further loading of the cargo in the railway wagons. This is not disputed. In such situation, the original authority is correct in holding that the appellant is liable to tax under "cargo handling service". It is further submitted that the responsibility of the appellant gets discharged only after completion of loading of limestone in the railway wagons. Further, he reiterated the impugned order for confirmation of demand under site formation services and maintenance and repair services.

8. Heard both sides and perused the appeal records.

9. We observe that to call an activity to be cargo handling service there should be an activity of movement of cargo from one place to another place without any internal movement within the mining area. Neither handling service outside the mining area is evident from the adjudication order nor destination outside such area has come to record. Therefore, when the factual evidence demonstrates movement of the excavated minerals within the mining area from one place to another, that operation cannot be called as cargo handling service.

10. The statutory definition of cargo handling service is as below:

> ***"cargo handling service" 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 more transportation of goods."***
>
> ***Section 65(105)(zr) defines 'taxable service' as under:-***
>
> ***"taxable service" means any services provided or to be provided to any person, by acargo handling agency inrelation to cargo handling services."***

11. We have examined the terms of agreement which is the basis of the activities carried out by the appellant. The agreement itself provides for detailed break-up of rates for each of the four activities to be undertaken by the appellant. A plain reading of these rate schedules will show that the essence of the contract is for transportation of mineral within the mining area. The Board vide circular dated 29-2-2008 clarified the application of Section 65A while classifying a composite service. It was clarified that such services shall be classified based on the service which gives the essential character to the activity. There is a need to determine whether a given transaction is the one containing main and ancillary element or the one containing multiple and separate measurable elements. In the case of transaction containing a measure of ancillary elements, classification is to be determined based on the essential features or the dominant element of the transaction.

12. We note that a similar issue came up for decision by the Tribunal in ***Hira Industries Ltd, 2012 (28) S.T.R. 23 (Tri.)*** = ***2012-TIOL-566-CESTAT-DEL***. Tribunal observed as below:

> ***"18. The next issue is the classification of service rendered by the transport contractors whether it is Transportation of Goods or Cargo Handling Service. We are not in agreement with the argument that the service involved is cargo handling service and not transportation service. When there is composite service, the service should be classified as per provisions in Section 65A of Finance Act, 1994. As per this section the sub-clause which gives the most specific description is to be adopted. If this criterion fails then the service is to be classified as the service which gives the essential character of the service. The composite service has elements fitting into the definitions of both the services. So, recourses is to be taken to section 65A(2)(b). Here it cannot be considered that transportation is for the purpose of loading and unloading but the contrary is true. That is loading and unloading is for transportation. Any person dealing with the situation perceives the services as one for transportation and not for loading and unloading. So on this count we are not in agreement with the argument of Revenue."***

13. Also, this bench in ***COMMISSIONER OF SERVICE TAX, RANCHI Versus HEC LTD. 2018 (9) G.S.T.L. 403 (Tri. - Kolkata)*** on a similar issue has held that "The activities carried out by the assessee-respondents are primarily transportation of goods and loading & unloading, etc., which are incidental to the transportation of goods. Such activities cannot be covered within the services of 'Cargo Handling' as has been rightly held by the lower authorities."

14. The dominant activities undertaken by the appellants under the contract in question are primarily the movement of mineral within mining area and transfer of mineral from the mines to crusher plant and loading to railway siding, if at all, includes loading and unloading which are merely incidental. Moreover, the activities under taken are principally the transportation of coal within mining area and hence, the gross amounts received for the same cannot be taxed under the category of cargo handling service. We have, therefore, no hesitation in our mind to hold that the definition of cargo handling service under the Finance Act, 1994, does not include the kind of activities undertaken by the appellants and hence the same are not chargeable to service tax. Thus, the demand of Rs. 80,62,565/- in respect of cargo handling service in the first appeal is set aside.

15. As regards demand of Rs. 20,96,816/- on site formation services, we are of the considered view that the activity of making of 100 meters dia holes with contractors own equipment is not one relating to site formation. On a careful reading of the definition of "Site formation and clearance, excavation and earthmoving and demolition" as defined under Section 65(97 a) of Finance Act, 1994 as amended we find what is covered is Drilling, boring and core extraction services for construction, geophysical, geological or similar purposes; but in the instant case, the appellants activity is limited to supply of the machine and men. The entire job is undertaken by TISCO people and there is no liability on the part of the appellant and hence, the appeal on this count also succeeds.

16. Since the appellants are no more disputing the demand of Rs. 85,980/- under maintenance and repair service, we refrain from any discussion on the same.

17. We also find that there was no suppression or mis-statement by the appellants regarding the nature of activities undertaken by the appellants and hence the imposition of penalty on them is not at all justified. Accordingly, we set aside the impugned order and allow the appeals with consequential benefit to the appellants subject to demand under maintenance service as stated above.

18. As regards Appeal No. ST/76262/2014, we find that since we have already decided that the activity cannot be classified as cargo handling service and the contract being the same nature for the said appeal, we dismiss the appeal filed by the department and uphold the Order of the Commissioner (Appeals-I), Kolkata in this regard.

(Pronounced in the court on 07.01.2019)

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