

Homa Engineering Works Vs. Commissioner of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Jul-19-2005

Judge : A Wadhwa, S T C.

Appellant : Homa Engineering Works

Respondent : Commissioner of Central Excise

Judgement :

1. The prayer in the stay petition is to dispense with the condition of pre-deposit of service tax amounting to Rs 68,50,50,147/- and penalty of Rs 1,37,00,000/- along with personal penalty of Rs 5,000/- imposed under section 77 of the Finance Act, 1944 @ Rs 200/- per day, during which they failed to pay service tax.

2. As per facts on record, the appellants are engaged in the business of repairing, chipping, cleaning and painting of the vessels of Coast Guard, Naval Dock and ONGC at Mazagaon Docks Ltd. During the period 16.07.2001 to 30.09.2003, the appellants did such job under contract with their customers for a value of Rs 12.93 crores approximately. They were issued a show cause notice dated 23.01.2004 alleging that the said services undertaken by the appellants are "Port Services" which are liable to service tax. The appellants took a categorical stand before the lower authorities that the services rendered by them for repairing of the vessels, under a contract with their customers cannot be treated as "Port Services" and hence are not liable to service tax. However, the authorities below by referring to the Board's Circular No.67/16/2003-ST dated 11.10.2003 and also by referring to the various provisions of Major Port Act and Finance Act, 1994, held against the

appellants and confirmed the demand as also imposed penalty.

3. Shri V Sridharan, Ld. Advocate arguing on behalf of the appellants has submitted that clause 67 of the Finance Act, 1994 refers to "Port Service" as "any service rendered by a port or any person authorised by such port, in any manner, in relation to a vessel or goods". Port has been defined in clause 66 as having the meaning assigned to it under section 2 (q) of the Major Port Trusts Act, 1963. Thereafter referring to the definition of "port" as given in the above section of Major Port Trust Act, he draws our attention to Section 42 detailing there the by Board or other person. He submits that the authorities below have taken note of clause (e) of Section 42, which is to the following effect.

"(e) - Piloting, hauling, mooring, remoooring, hooking, or measuring of vessels or any other service in respect of vessels; or any other service in respect of the vessels.

He submits that the expression or any other services in respect of the vessels has been interpreted by the adjudicating authority as the services carried out by the appellants for repairing, chipping, painting, etc. of the vessels, whereas he submits that the said expression has to be interpreted by taking its complexion from the previous expression appearing in the said sub clause. He submits that all the activities enumerated in the said clause relates to the entry or exist of the vessel from the port area and by applying the principles of ejusdem generics, the expression has to be construed as related to the activity of entry or exist of the vessels. For the above proposition, he relied upon the Hon'ble Supreme Court's decision as . He further submits that as per sub section (4) of section 42, where the Board authorises any person to perform the services mentioned in sub section (1), such authorised person shall not charge or recover for such services any sum in excess of the amount specified by the authorities, by notification in the official gazette.

4. In the instant case, submits the Ld. Advocate that the consideration for repairing of the vessel has been given to the appellants not in terms of the tariff rates, but the same are result of contract entered by way of negotiations. As such, it cannot be called to be a Port Service rendered by a person authorised by the port. He

submits that the said service was an independent repairing activity undertaken by the appellants. Such repairing activity was made liable to service tax subsequently and not during the relevant period. As such, submits the Ld. Advocate that the appellants had a strong prima facie case in his favour and should be granted unconditional stay. He has also referred to the fact that deposit of even a part amount of duty would result in financial hardship to the appellants.

5. Countering the arguments, Ld. DR draws our attention to Section 35 of the Major Port Trust Act, 1963, wherein power of Board to execute works and provide appliances as been detailed. As per sub section 2(1) the board has to provide for dry dock to carry out repairs or overhauling of the vessels. As such, submits the Ld. DR that this is a job, which the board can itself perform, or authorise other person to perform. Since the appellants has been authorised to do so, he steps into the shoes of the Board and as such, the services rendered by him has to be treated as port services rendered by any person authorised by the port and thus liable to service tax.

6. In his rejoinder, Ld. Advocate Shri Sridharan submits that the said section only provides the power of the Board to provide appliances, which include providing of dry docks by itself for further carrying out the repair activities, which cannot be equated with the activity itself.

7. After considering the submissions made by both sides and after examining the various provisions as referred to by both sides, we find force in the submissions of the Ld. Advocate, as detailed above. The activity of repairing by the appellants, in our prima facie view is not covered by a service rendered by the Port or any person authorised by the Board to do so, inasmuch as the provisions of section 42(e) cannot be extended and stretched so as to cover the repairing activity. We also find favour in the Ld. Advocate's arguments that sub section (4) of Section 42 provide for authorisation by the Board for the various services, at the rate specified by a notification in the official gazette. This reflects upon the fact that the various services, which can be authorised by the Board by any person are routine service for which various rates can be fixed. As far as repairing of the vessel, chipping and painting is concerned, the charges would definitely depend upon the extent of

work required to be done. Such consideration, we have been told, depends upon the contract arrived at after negotiations. As such, prima facie, we are of the view that the services of repairing of the vessels are not Port Services and not liable to service tax during the relevant period. We, accordingly, allow the stay petition unconditionally and fix the main appeal itself on 05 August 2005.

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