

**Homa Engineering Works Vs. Cce**

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**Court :** Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

**Decided On :** May-03-2007

**Reported in :** (2007)11STJ28CESTAT(Mum.)bai

**Judge :** A Wadhwa, V T M.

**Appellant :** Homa Engineering Works

**Respondent :** Cce

**Judgement :**

1. Vide impugned order, the authorities below have confirmed service tax amounting to Rs. 68,50,147/- against the appellant and penalty of Rs. 1,37,00,000/- under Section 78 along with personal penalty of Rs. 5,000/- stand imposed under Section 77 of the Finance Act, 1944 and penalty of Rs. 200/- per day, under Section 76 during which they failed to pay service tax. In addition, interest in respect of confirmed demand has been held to be payable.

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 dt.23.1.2004 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, dt.11.10.2003 and also by referring to the various provisions of Major Port Trust 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 authorized 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 Trust Act, 1963. Thereafter by 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 therein the scope of services to be provided 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, remooring, hooking, or measuring 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 relies upon the Hon'ble Supreme Court's decision as reported in 1989 (39) ELT 498 SC. He further submits that as per Sub-section (4) of Section 42, where the Board authorizes any person to perform the services mentioned in Sub-section (1), such authorized 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 authorized by the port. He submits that the said service was 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 impugned orders holding the activity of business carried out by the appellant amounts to 'Port Services', be set aside and appeal allowed.

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 etc. has 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 authorize other person to perform. Since the appellants has been authorized 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 authorized 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 which by itself for further carrying out the repair activities, which cannot be equated with the activity itself.

7. After considering the submissions by both the sides, we find that the disputed issue revolves around the interpretation of "Port Services" as appearing in Section 65(67) of the Finance Act and the various provisions of The Major Port Trust Act, 1963 (38 of 1963), to which our attention has been drawn to by both the sides. As such, for ready reference, we would like to reproduce the relevant Section of both the Acts: (66) "port" has the meaning assigned to it Clause (a) of Section 2 of the Major Port Trust Act, 1963 (38 of 1963); (67) "port service" means any service rendered by a port or any person authorized by such port, in any manner, in relation to a vessel or goods; (zn) to any person, by a port or any person authorized by the port, in relation to port services, in any manner; (99) "vessel" has the meanings assigned to it in Clause (z) of Section 2 of the Major Port Trust Act, 1963 (38 of 1963).

Section 2 - Definitions - In this Act, unless the context otherwise requires, - (q) "port" means any major port to which this Act applies within such limits as may, from time to time, be defined by the Central Government for the purposes of this Act by notification in the Official Gazette, and, until a notification is so issued, within such limits as may have been defined by the Central Government under the provisions of the Indian Ports Act; (z) "vessel" includes anything made for the conveyance, mainly by water, of human beings or of goods and a caisson; (1) A Board may execute such works within or without the limits of the port and provide such appliances as it may deem necessary or expedient.

(a) wharves, quays, docks, stages, jetties, piers and other works within the port or port approaches or on the foreshore of the port or port approaches, with all such convenient arches, drains, landing places, stairs, fences, roads, railways, bridges, tunnels and approaches and buildings required for the residence of the employees of the Board as the Board may consider necessary; (b) buses, railways, locomotives, rolling stock,

sheds, hotels, warehouses and other accommodation for passengers air goods and other appliances for carrying passengers and for conveying, receiving and storing goods landed, or to be shipped or otherwise; (c) moorings and cranes, scales and all other necessary means and appliances for loading and unloading vessels; (d) reclaiming, excavating, enclosing and raising any part of the foreshore of the port or port approaches which may be necessary for the execution of the works authorized by this Act, or otherwise for the purposes of this Act; (e) such breakwaters and other works as may be expedient for the protection of the port; (f) dredgers and other machines for cleaning, deepening and improving any portion of the port or port approaches or of the foreshore of the port or port approaches; (g) lighthouses, lightships, beacons, buoys, pilot boats and other appliances necessary for the safe navigation of the port and of the port approaches; (h) vessels, tags or other boats for use within the limits of the port or beyond those limits, whether in territorial waters or otherwise, for the purpose of towing and rendering assistance to any vessel, whether entering or leaving the port or bound elsewhere, and for the purpose of saving or protecting life or property and for the purpose of landing shipping or transshipping passengers or goods under Section 42; (i) sinking of tube-wells, and equipment, maintenance and use of boats, barges and other appliances for the purpose of the supply of water at the port; (j) engines and other appliances necessary for the extinguishing of fires; (k) construction of models and plans for carrying out hydraulic studies; (l) dry docks, slipways, boat basins and workshops to carry out repairs or overhauling of vessels, tugs, boats, machinery or other appliances.

(1) A Board may undertake to carry out on behalf of any person any works or services or any class of works or services, on such terms and conditions as may be agreed upon between the Board and the person concerned.

(2) A Board may, if it considers it necessary or expedient in the public interest so to do, lend any of its vessels or appliances or the services of any of its employees to any person for such period not exceeding three months and on such terms and conditions as may be agreed upon between the Board and the person concerned.

(a) landing, shipping or transshipping passengers and goods between vessels in the port and the wharves, piers, quays or docks belonging to or in the possession of the Board; (b) receiving, removing, shifting, transporting, storing or delivering goods brought within the Board's premises; (c) carrying passengers by rail or by other means within the limits of the port or port approaches, subject to such restrictions and conditions as the Central Government, may think fit to impose; (d) receiving and delivering, transporting and booking and dispatching goods originating in the vessels in the port and intended for carriage by the neighbouring railways, or vice versa, as a railway administration under the Indian Railways Act, 1890 (9 of 1890); (e) piloting, hauling, mooring, remooing, hooking, or measuring of vessels or any other service in respect of vessels; and.

(f) developing and providing, subject to the previous approval of the Central Government, infrastructure facilities for ports.

(2) A Board may, if so requested by the owner, take charge of the goods for the purpose of performing the service or services and shall give a receipt in such form as the Board may specify.

(3) Notwithstanding anything contained in this Section, the Board may, with the previous sanction of the Central Government, authorize any person to perform any of the services mentioned in Sub-section (1) on such terms and conditions as may be agreed upon.

(3A) Without prejudice to the provisions of Sub-section (3), a Board may, with the previous approval of the Central Government, enter into any agreement or other arrangement, whether by way of partnership, joint venture or in any other manner with, any body corporate or any other person to perform any of the services and functions assigned to the Board under this Act on such terms and conditions as may be agreed upon.

(4) No person authorized under Sub-section (3) shall charge or recover for such service any sum in excess of the amount specified by the Authority, by notification in the Official Gazette.

(5) Any such person shall, if so required by the owner, perform in respect of goods any of the said services and for that purpose take charge of the goods and give a receipt in such form as the Board may specify.

(6) The responsibility of any such person for the loss destruction or deterioration of goods of which he has taken charge shall, subject to the other provisions of this Act, be that of a bailee under Section 151, 152 and 161 of the Indian Contract Act, 1872.

(7) After any goods have been taken charge of and a receipt given for them under this section, no liability for any loss or damage which may occur to them shall attach to any person to whom a receipt has been given or to the master or owner of the vessel from which the goods have been landed or transshipped.

Section 48 - Scales of rates for services performed by Board or other person - (1) The Authority shall from time to time, by notification in the Official Gazette, frame a scale of rates at which, and a statement of conditions under which, any of the services specified hereunder shall be performed by a Board or any other person authorized under Section 42 at or in relation to the port or port approaches) - (a) transshipping of passengers or goods between vessels in the port or port approaches; (b) landing and shipping of passengers or goods from or to such vessels to or from any wharf, quay, jetty, pier, dock, berth, mooring, stage or erection, land or building in the possession or occupation of the Board or at any place within the limits of the port or port approaches, (2) Different scales and conditions may be framed for different classes of goods and vessels.

(1) Within any port, fees may be charged for pilotage, hauling, mooring, remooring, hooking, measuring and other services rendered to vessels, at such rates as the Authority may fix.

(2) The fees now chargeable for such services shall continue to be chargeable unless and until they are altered in exercise of the power conferred by Sub-section (1).

(3) The Central Government may, in special cases, remit the whole or any portion of the fees chargeable under Sub-section (1) or Sub-section (2).

8. After carefully going through the submissions made by both the sides and after going through the relevant provisions of law, as extracted above, we find that taxable services under the net of "Port Service" means any service rendered by a port or any person authorized by such port. As such, the services which can be taxed under the said category have to be either services rendered by port itself or any person authorized by such port. Admittedly, repair of the vessel is not being done by the port. The lower authority has held the appellant to be a person authorized by such port to undertake the activity of repairing of vessel.

9. The appellant is admittedly a partnership firm carrying on a business of all types of marine repairs for which purpose they are given a repair contract involving supply of material, steel removal job, fabrication, refitting, and overhauling of machinery, from the principle contractor like Mazagaon Docks Ltd. etc. For such purposes, they have been given vendor registration. They also receive direct contract of repair from foreign ship owners or through their steamer agent.

10. Revenue has placed reliance upon Section 35 of the Major Port Trust Act, 1963, which defines power of the Board to execute the work Sub-clause (1) to Clause 2 of the said Section stands invoked by Revenue in the impugned order. The said clause is to the effect that the work of the Board will include establishing of dry dock, slipways, boat basins and workshop to carry out repair or overhauling vessels/tugs, boats, machinery or other appliances. From this, it stand concluded by Revenue that in as much the Board's job is to execute the work provided in above Section, which in respect of performance itself, has been entrusted to the appellant, he will step into the shoes of the port and services provided by him should be considered as port services. However, on minute examination of the above provisions, we find that the work required to be executed by Board is to provide the facility like dry dock, etc. to carry out the repairs or overhauling of vessels etc. and not the repair job itself.

11. As such, we find that the powers of the Board to execute the work and provide compliance in terms of

Section 35(1) are not to the effect so as to carry out the repairing activity themselves. Understandably, the vessel which come on the port after sailing for a considerable period, would require minor/major repairing activities on account of the damages or mechanical faults incurred on account of vagaries of sea and for the subject purposes dry docks and workshops are established in the port for the purposes of rectifying the defect and to make the vessel sea worthy. However, extension of above facility does not mean that it is the duty of the Board to undertake the repairing activity themselves. In fact, under the said Section, the port is required to provide facility for repair and not to undertake the repair itself.

Ship breaking activities and ship manufacturing activities may also be done in the port area, for which purposes facility may be provided by the port, but that will not make the same as "port services".

12. Further, much reliance has been placed by Revenue on the provisions of Section 42(E) of the Major Port Trust Act. Admittedly, the activity of ship repair is not specifically mentioned in the said Section. The Revenue has sought to bring the same under the Clause - "or any other services in respect of vessels". Learned advocate for the appellant has strongly contested that all the activities mentioned in the said clause are relatable to movement of vessel and as such, the expression "or any other services in respect of vessels" has to take its colour from preceding entry.

We find force in the above contention of learned advocate. Where group of words followed by a general expression, the subsequent general expression has to derive its meaning from the previous expression.

Admittedly, piloting, hauling, mooring, remooring, hooking, or measuring of vessels are activities which are directly connected with the entry or exit of the vessel from port area. As such, the subsequent expression appearing in the said clause has to be held as covering the services which are in relation to the movement of the vessel and has to be understood and construed by applying the principle of ejusdem generis. We may, at this stage, borrow the observations made by Hon'ble Supreme Court in case of Sidhdheshwar Cotton Mills (P) Ltd. v. UOI , reproduced hereunder: 12. The expression ejusdem generis - 'of the same kind or nature' - signifies a principle of construction whereby words in a statute which are otherwise wide but are associated in the text with more limited words are, by implication, given a restricted operation and are limited to matters of the same class or genus as preceding them.

If a list or string or family of genus-describing terms are followed by wider or residuary or sweeping-up words, then the verbal context and the linguistic implications of the preceding words limit the scope of such words.

The draftsman must be taken to have inserted the general words in case something which ought to have been included among the specifically enumerated items had been omitted....

14. The principle underlying this approach to statutory construction is that the subsequent general words were only intended to guard against some accidental omission in the objects of the kind mentioned earlier and were not intended to extend to objects of a wholly different kind. This is a presumption and operates unless there is some contrary indication. But the preceding words or expressions of restricted meaning must be susceptible of the import that they represent a class. If no class can be found, ejusdem generic rule is not attracted and such broad construction as the subsequent words may admit will be favoured. By applying the above principles to the dispute before their Lordship, it was observed as under: 19. The preceding words in the statutory provision which, under this particular rule of construction, control and limit the meaning of the subsequent words must represent a genus or a family which admits of a number of species or members. If there is only one species it cannot supply the idea of a genus.

20. In the present case, the expressions 'bleaching, mercerizing, dyeing, printing, water-proofing, rubberizing, shrink-proofing, orandie processing' which precede the expression 'or any other process' contemplate processes which impart a change of a lasting character to the fabric by either the addition of some chemical into the fabric or otherwise. "Any other process" in the section must share one or the other of these incidents.

The expression "any other process" is used in the context of what constitutes manufacture in its extended meaning and the expression "unprocessed" in the exempting notification draws its meaning from that context. The principle of construction considered appropriate by the Tribunal in this case appears to us to be unsupportable in the context in which the expression "or any other process" has to be understood.

13. In the light of above declaration of law of Hon'ble Supreme Court, it has to be held that expression "or any other services in respect of vessels" has to be extended to the services which are connected with the movement of the vessel. It is nobody's case that repairing of vessel in the dry docks is connected with the movement of vessel. As such, the Revenue's reliance on the above provisions do not advance the case.

14. We also find a force in the appellant's argument that Sub-section of Section 42 provides for authorization by the Board for the various services at the rate specified by that port in the Official Gazette.

This has reflected upon the fact that various services, which can be authorized by the Board to any other person are routine services for which various rates can be fixed in advance. As far as the repairing of vessel is concerned, the charges would definitely depend upon the extent of work required to be done. We are informed that such consideration depends upon the contract arrived at after much negotiations. This fact leads us to hold that such contract services of repair of vessel cannot be held to be "port services".

15. During the course of arguments, it was also contended by Revenue that the appellant are given a licence and registration to carry out the services, which port is required to do. We have seen the by-laws governing grant of licence to carry out the work of vessels in the trustees dry docks. The same require the contractor/agent to submit an application for obtaining a licence for carrying out the work in dry dock. Such contractors must have facility such as enough number of painting gears and other necessary tools etc. The said contractor shall be bound to employ foreman and tindals of experience to supervise the work, who shall be bound to use reasonable means for preventing accidents to the men employed under them. It is further part of the said by-law that contractor desired to carry out the repairing to hull shall have a workshop of their own which shall be equipped with the accessories and appliances enumerated therein. The other clauses of the said by-laws are also to the effect that the contractor would be liable for any mis-hap or for any damage to the gear used by him and supplied by the Board. The said facts leads us to belief that contractor / sub contractor is an independent person, hired by the port to provide services to its customers, which may be ship owner or their agent.

16. We note that the category of maintenance and repair services was made leviable to service tax w.e.f. 1.7.03. The appellant had taken registration for the said services and had started paying duty thereafter. Revenue has not raised any objection to the said, registration of the appellant and payment of duty by them under the category of maintenance and repair services. If the services being rendered by them were already covered by the above services, there was no justification on the part of Revenue to accept their registration under the category of maintenance and repair of services. The said category having been created w.e.f. 1.7.03, we agree with the appellant that the said activity for the past period cannot be held to be covered under the category of port services.

17. Lower authorities also relied upon the Board's Circular No.67/16/2003-ST, dt.10.11.03, clarifying that ship repair activities at the dry docks would be taxable under the port services. The said clarification, though may be binding on the department officers, is not binding on the assessee. Having held, after examination of the relevant provisions of law that such activity would not be included under the expression 'port services', we hold that above circular issued by Board is not in accordance with the law.

18. We also note that the demand stands confirmed against the appellant by invoking the extended period of limitation. The period involved is 16.7.01 to 30.9.03, whereas the SCN has been issued on 23.1.04. There are no positive allegation of suppression or any mis-statement on the part of appellant with an intention to evade the duty. The issue involved is bonafide interpretation of provisions of law. The appellants have reflected their entire activity on the statutory document required to be maintained by them in the ordinary course of their

business. As such, we are of the view that there was enough reason for the appellant to entertain a bonafide belief that the services rendered by them are not covered by the port services and that they were not liable to pay duty. As such, in the absence of any positive act on the part of appellant, to suppress any relevant information from the Department, we are of the view that extended period of limitation is not available to for the Revenue. The demand is also, accordingly, held as barred by limitation to that extent.

19. In view of the above, we allow the appeal on merit and also on limitation.

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