

**Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench At Ahmedabad**

REGIONAL BENCH- COURT NO.3

Service Tax Appeal No.10644 of 2013

(Arising out of OIO-12-SERVICETAX-2012 dated 31/12/2012 passed by Commissioner of Central Excise, Customs and Service Tax-SURAT-I)

ARKAY LOGISTICS LIMITED

27th Km, Surat-Hazira Road,
Surat, Gujarat

.....Appellant

VERSUS

C.C.E. & S.T.-SURAT-I

New Building...Opp. Gandhi Baug,
Chowk Bazar,
Surat, Gujarat-395001

.....Respondent

APPEARANCE:

Shri Vishal Agarwal & Ms. Dimple Gohil, Advocates for the Appellant
Shri Prabhat K. Rameshwaram, Additional Commissioner (AR) for the Respondent

**CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
 HON'BLE MEMBER (TECHNICAL), MR. RAJU**

Final Order No. A/ 10795 /2023

DATE OF HEARING: 10.01.2023
DATE OF DECISION: 03.04.2023

RAMESH NAIR

This appeal is directed against Order-in-Original No. 12/Service Tax/2012 dated 31.12.2012 passed by the Commissioner of Central Excise, Customs& Service tax, Surat-I.

02. Briefly stated the facts of the case are that the appellants are engaged in providing various taxable services. A search by DGCEI on 13.04.2007 revealed that appellant were providing services of loding, supervisions, weighment and inspection and inter-carting services for the raw materials and finished goods within the factory premises of M/s Essar Steel Ltd. (M/s ESL) However, no service tax was paid by Appellant on the services termed by them as inter-carting services provided to M/s. ESL. in respect of raw – materials and finished goods. The revenue alleged that such services of inter-carting appeared to be classifiable under “Cargo Handling Services”. Investigation also revealed that appellant has also not paid service tax on inter-carting services provided to units located in SEZ. After the detail

investigation a show cause notice was issued to the appellant proposing to demand of Service Tax along with interest and for imposing penalties. In adjudication, the adjudicating Authority *vide* order impugned herein confirmed the demand of Service Tax along with interest and imposed penalty and order for the appropriation of amount of service tax and interest paid during the investigation. Aggrieved by the said impugned order, the appellant is now before the Tribunal.

03. Shri Vishal Agarwal, Learned Counsel appearing on behalf of the appellant submits that for being taxed under the head Cargo Handling Service, a service provider has to render services in relation to cargo. The expression 'cargo' have not been defined in the Finance Act, 1994. However as can be seen from The New Lexicon Webster's Dictionary the expression 'Cargo' means – the freight of goods or luggage carried by a ship, aircraft. The movement / transport of goods within the factory, cannot be said to be freight conveyed in a ship, aircraft or a vessel. The services rendered by it only involved shifting of goods/ raw materials from the jetty (are within the factory) to production floor, from one production floor to another production floor and from the production floor to the dispatch area. The said services could not be taxed under the head of Cargo Handling Services as the same did not involve transportation of goods for the purpose of freight by truck, aircraft or ship.

3.1 He also submits that after referring to the terms of a work order placed on the Appellant by M/s Essar Steel Ltd., Learned Commissioner concluded that the services rendered by the Appellant were in nature of logistic management. Assuming without admitting the finding to be correct, and the services rendered by the Appellant were that of managing logistics, the same would have been taxable under the head of Business Support Services. The Learned Commissioner having come to a conclusion that the services rendered were other than cargo handling services, ought to have dropped the show cause notice.

3.2 He further submits that in terms of the different work orders placed by M/s Essar Steel Ltd., appellant was engaged for the purpose of moving of inputs/ raw materials from the jetty of M/s ESL, which is part of the factory ground plan to the production area, movement of semi-finished goods from one plant to other plant and for movement of the finished goods from the

production area to the jetty for being ultimately cleared outside the factory. It has been held in unequivocal terms that shifting of raw materials/ inputs /semi-finished goods /finished goods within the factory premises cannot be taxed under the head of Cargo Handling Services. He placed reliance on the following decisions:-

- MODI CONSTRUCTION CO. VS. CCE - 2008(12)STR 34 (TRI) AFFIRMED BY THE HON'BLE JHARKHAND HIGH COURT 2011 (23)STR 6
- GAYATRI CONSTRUCTION CO. VS. CCE 2012(25)STR 259 (TRI.)
- CCE VS. KUMAR ENGINEERING & CONTRACTORS 2010(18) STR 448 (TRI.)

3.3 He also submits that the statements made by the authorized Signatory, wherein he commented upon the work orders placed by M/s ESL, saying that it involved loading, unloading, stacking and cargo handling, have to be read contextually and the work order and it only reflects the understanding of the author of the statement. There being no dispute about genuineness of the work order, Learned Commissioner ought to have gone by the terms of the same instead of basing his findings on mere statement. In any case, the legal position that movement of goods within the plant cannot be taxed under the head of Cargo Handling Services, does not get circumscribed by the said statement.

3.4 He argued that Section 66A of the Finance Act 1994 specifically provides the service is to be classified under that head of service which gives the same its essential character. In the instant case, transportation / movement of goods within the factory is the dominant purpose of the contract and as such, since these services are not taxable under the head Cargo Handling Services, the work order /contract cannot be said to be for rendering Cargo Handling Services.

3.5 He also argued that the entire dispute is revenue neutral inasmuch as if at all any service tax was payable, on the services rendered by appellant, the tax so paid was available as credit to M/s ESL. He placed reliance on the following judgments:-

- CCE VS. COCA COLA 2007(213)ELT 490
- BRITCO FOODS LTD. VS. CCE -2001 (127)ELT 723

- COMMR. VS. INDEOS ABS LTD. – 2010(254)ELT 628 (GUJ.)
- COMMR. VS. TEXTILE CORPORATION MARATHWADA LTD. 2008(231)ELT 195
- RELIANCE INDUSTRIES LTD. VS. CCE 2009(244)ELT 254 (TRI,)

3.6 As regard the service tax demand on services provided to SEZ units of M/s ESL he submits that the submission urged in the preceding paragraphs apply on all fours, also in respect of the services rendered to the SEZ unit of M/s ESL.

3.7 He further submits that Section 26(1)(e) of the SEZ Act specifically provides the every developer and entrepreneur would be entitled for exemption from Service Tax under Chapter V of the Finance Act , 1994 on taxable service provided to a developer or entrepreneur to carry on the operation in the SEZ. Section 51 of the SEZ Act provides that the provision of the SEZ Act will have overriding effect over anything inconsistent in any other Act including in the Notification or the Rules made thereunder. Further, Rule 31 of the SEZ Rules provides that exemption from payment of Service tax on taxable services rendered to a developer or a unit, by any service provider, shall be available for authorized operations in an SEZ. Since the alleged services of Cargo Handling Services had been rendered by it to the SEZ unit to carry on its authorized operations, it was eligible for exemption from payment of Service tax.

3.8 Without prejudice, he also submits that even if one was to assume, as has been held in the impugned order, that exemption in terms of SEZ Act , has been operationalized by Notification No. 4/2004-ST dated 31.03.2004 even then the exemption in respect of services provided to a unit in the SEZ by a Service provider for consumption of the services within such SEZ, would be available to the Appellant. Irrespective of whether or not the services were rendered within the zone, the same were undisputedly for consumption within the SEZ for the purpose of the unit's authorized operations. Learned Commissioner has proceeded on an erroneous assumption that exemption in terms of Notification No. 4/2004-ST dated 31.03.2004 was available only in respect of services performed within the SEZ. The expression 'consumption' has to be read and understood to mean received by the SEZ unit for its authorized operations as distinct from having been provided within the SEZ. The exemption from payment of Service tax in terms of Notification No.

4/2004-ST read with Section 26(1)(e) of the SEZ Act and Rule 31 of SEZ Rules was available irrespective of whether or not the services were partly or wholly used within the SEZ. He placed reliance on decisions in the case of *Norasia Containers Liner Vs. CCE, New Delhi – 2011 (23)STR 295*.

3.9 He further submits that even in terms of Notification No. 9/2009 ST dated 03.03.2009 as amended by Notification No. 15/2009-ST dated 20.05.2009, complete exemption for services consumed wholly with the SEZ was extended. The services rendered by the appellant were wholly consumed within the SEZ. As such, the same are eligible for exemption in terms of the aforesaid Notifications.

3.10 He argued that investigation initiated by the DGCEI from April 2007 onwards, which ultimately culminated into SCN being issued on 10.01.2011, it is settled law that once the facts are within the knowledge of the Department, the extended period of limitation cannot be invoked. Therefore, from April, 2007 onwards, the extended period of limitation could not have been invoked. Further it is settled law that for invoking the extended period of limitation, mere non-filing of the return /non registration is not sufficient. Such an action must have been done deliberately and wilfully with intention to evade duty. In the absence of any evidence to show that failure, if any, was a deliberate and intentional on the part of the Appellant, extended period could not have been invoked. The only reason assigned for invoking the extended period of limitation by the Learned Commissioner in the impugned order, is that it has not disclosed the receipts of consideration towards the services in question in its ST-3 returns and has therefore, willfully and deliberately suppressed the facts with intention to evade duty. However appellant's belief that the amount received by it was not taxable and for this reason it did not show the consideration received by it in the ST-3 returns.

04. Shri Prabhat Rameshwaram, learned Additional Commissioner (AR) appearing on behalf of revenue opposed the contention of the Learned Counsel and reiterated the findings of impugned order. He also placed reliance on the following decisions:-

- GANGADHAR BULK MOVERS PVT. LTD. VS. CCE, NAGPUR -2012 (27)STR 258 (TRI. MUM)

- GAJANAND AGARWAL VS. CCE BBSR – 2009(13)STR 138 (TRI. KOL)
- VISHAL TRADERS VS. CCE, JAIPUR –I- 2010(19)STR 509 (TRI. DEL)
- SINGH BROTHERS VS. CCE, INDORE – 2009(14)STR 552 (TRI. DEL)
- DEPUTY COMMISSIONER VS. CENTRAL EXCISE VS. SUSHIL& COMPANY
- CCE, NEW DELHI VS. HARI CHAND SHRI GOPAL -2010(260) ELT 3 (SC)
- CCE, VISAKHAPATNAM VS. MEHTA & CO. 2011(264) ELT 481 (SC)
- CCE, SURAT –I VS. NEMINATH FABRICS P LTD. - 2010(256)ELT 369 (GUJ)

05. We have carefully gone through the facts on records as well as the submission of the Appellant and the Revenue in details along with the case law cited. The issue to be decided in the present appeal is whether the activity carried out by the Appellant for DTA and SEZ Unit of M/s Essar Steel Ltd. is taxable under the head of Cargo Handling Services and liable to service tax. The cargo handling service was introduced on 16.8.2002 and was defined as below:

"Cargo Handling Services" means loading, unloading, packing or unpacking of cargo and includes cargo handling services provided for freight in special containers or for non-containerised freight, provided by a container freight terminal or any other freight terminal, for all modes of transport and any other service incidental to freight but did not include handling of export cargo or passenger baggage or mere transportation of cargo."

Section 65(105)(zr) defines 'taxable service' as under -

" "taxable service" means any services provided or to be provided to any person, by a cargo handling agency in relation to cargo handling services."

From the definition given above, it is clear that loading, unloading, handling of cargo for all modes of transport and any other service incidental to freight would be covered by the definition of "cargo handling". The definition also very clearly specifies that *mere* transportation of goods will not be considered as cargo handling service. The definition itself clarifies that if the activity is only of transportation, then the said activity cannot be called as cargo handling service. Regarding the appellant's liability to service tax under the category of "Cargo Handling Services" it is seen that nowhere in the

proceedings before the adjudicating authorities, the exact nature of work carried out by the appellant has been elaborated and applied to the statutory definition. The Learned Commissioner also in para 11 and 12 of impugned order admitted that work order issued by the M/s Essar Steel Ltd., to Appellant are not for transport of goods but includes several activities to be performed by appellant. In such circumstance it cannot be held that the appellant activity covered under the "Cargo Handling Service".

5.1 We also noticed that in the present matter Learned Commissioner has not disputed the facts that M/s Essar Steel Ltd. has a captive jetty which is being used by them for receipts of raw materials and also clearances of their finished goods. This captive jetty is a part of the factory of M/s Essar Steel Ltd. Any movement of goods from Jetty to production area and vice-versa is therefore, a movement within the plant. Appellant shift the raw materials/goods from the receipt area i.e Jetty to the production floor, from one production floor to another production floor and from production floor to the dispatch area. Clearly this activity of appellant cannot be considered as Cargo Handling Service. Appellant's services only involved movement of goods within the factory premises of M/s Essar Steel Ltd. Further the activity undertaken by the Appellant did not involve any packing or unpacking. From the work order referred in the impugned matter it is also clear that Appellant were concerned only with the movement of material within the factory area of M/s Essar Steel. In the present matter appellant merely shifts goods within the plant area and were not carrying any cargo.

5.2 We find that the Tribunal has dealt with the identical issue in case of *Sainik Mining & Allied Services Ltd. v. CCE* - 2008 (9) S.T.R. 531 related to transportation of coal within a colliery area where a demand under Cargo Handling Service was made against the contractors. The Tribunal in this case held that the dominant activities undertaken being primarily within a mine, the said activity is not taxable as Cargo Handling Service. Further in the case of *Modi Construction Co. v. CCE* - 2008 (12) S.T.R. the assessee was undertaking the activity of shifting of raw materials within the factory area and upto the crusher plant. Following the decision of *Sainik Mining* (supra), the Tribunal held that such activity of transportation within a factory cannot be taxed under the category of Cargo Handling Service. This decision of *Modi Construction* (supra) was affirmed by the Jharkhand High Court reported at 2011 (23) S.T.R. 6. In this regard, in Para 4 of the said decision of the

Hon'ble High Court, it was held that the activity of shifting the goods both finished and unfinished goods within the factory premises could not come within the definition of Cargo Handling Service. The said paragraph is extracted below :-

"4. In that view of the matter, since the activity of shifting the goods finished and unfinished goods within the factory premises could not come within the definition of cargo handling service and, therefore, this kind of service activity could not be termed as service activity."

5.3 We further find that the Hon'ble Allahabad High Court in the case of *CCE v. Manoj Kumar* - [2015 \(40\) S.T.R. 35](#) (Allahabad) held that if the cargo would not include loading or unloading for any movement to any destination, and the handling of cargo is only within the factory with reference to the storage; etc. then such activity cannot be brought under "Cargo Handling Services" in terms of Section 65(23) of the Finance Act, 1994. The Hon'ble Supreme Court in the case of *Sushil & Company* - [2016 \(42\) S.T.R. 625](#) (S.C.) upheld such reasoning with reference to the scope of the tax entry. The Hon'ble Apex Court observed that there are two conditions to be satisfied. There must be a cargo accepted by the transporter for carrying the goods from one place to another. A commodity becomes a cargo and thereafter only, loading and unloading in a freight terminal becomes a cargo handling service. Further, the service provider must incidentally be involved in loading or unloading or packing, unpacking of the cargo. However, these conditions are not met in the present case. As such, the impugned order confirming the service tax liability is without merit, hence the same is not sustainable.

5.4 We also find that in the present matter demand of service tax of Rs. 1,89,55,549/- also confirmed by the Learned Commissioner in respect of the disputed services provided by the Appellant to SEZ unit on the ground that the exemption under Notification No. 4/2004-ST dated 31.03.2004 is in respect of services which are consumed within the SEZ only and not services which are partly consumed in SEZ. Majority work of inter-carting is initiated outside the SEZ area or ends outside the limits of SEZ, thus services provided to SEZ are not consumed within the SEZ. The services provided to SEZ are exempt if the same are consumed within the limits of SEZ. The issue whether the appellant are eligible for the service tax exemption under

the Notification No. 4/2004 for the services rendered to SEZ unit and whether service tax payable or not on services provided to SEZ. For better appreciation, the relevant part of the notification is reproduced as under :-

".....the Central Govt. being satisfied that it is necessary in the public interest so to do, hereby exempts taxable service of any description as defined in clause (105) of Section 65 of the said Act provided to a developer of Special Economic Zone or a unit (including a unit under construction) of Special Economic Zone by any service provider for consumption of the services within such Special Economic Zone, from the whole of service tax leviable thereon under Section 66 of the said Act,....."

There is nothing in the notification to suggest that service has to be rendered in the geographical location of the SEZ unit. Such restricted interpretation would defeat the very purpose of the notification which is to provide relief to the deemed export to SEZ, from the burden of tax.

5.5 It is not in dispute that the service has been rendered by the appellant to a SEZ unit. The only ground on which the exemption is denied is that the service is not used wholly and exclusively within the geographical location of SEZ. Any service used for the authorized operations of SEZ should be treated as services consumed within the SEZ. The services used for export of goods manufactured by SEZ are to be treated as those consumed within the SEZ. Further that, the provisions of SEZ Act has overriding effect over the provisions of any other law in terms of Section 51 of SEZ Act, 2005. Section 26 of SEZ Act, 2005 provides various exemptions and concessions from duties and taxes. A harmonious reading of Section 51 and Section 26 of the SEZ Act would reveal that the units of SEZ are eligible for exemption from service tax for authorized operations of SEZ units. Export goods manufactured by SEZ unit are the most important authorized operation of such SEZ unit. Hence, the services consumed for such operation is to be exempted under the Notification No. 4/2004. The word "consumption" used in Notification No. 4/2004 has to be construed as service rendered to a developer/unit in SEZ. The service recipient/unit is situated in SEZ and therefore eligible for the benefit of exemption.

5.6 Without prejudice, we also find that prior to introduction of Notification No. 4/2004, exemption from service tax for services provided to

developer/unit in SEZ was covered by Notification No. 17/2002-S.T., dated 21-11-2002. This notification did not contain any restriction as contemplated by the department now. Notification No. 4/2004 was later superseded by Notification No. 9/2009-S.T., dated 3-3-2009. In such notification also, there is no restriction that the service has to be consumed within the geographical location of the SEZ. When the notification previous as well as after does not put forward any such restriction, the contention of the department that the exemption would be eligible only for the services which are consumed within the geographical area of the SEZ is without legal basis.

5.7 We further find that on identical dispute the Tribunal in the matter of *Norasia Container Line Vs. Commissioner of C.Ex., New Delhi 2011 (23) S.T.R. 295 (Tri. - Del.)* also held as under:

We have considered the submissions from both the sides. The notification No. 4/2004 uses expression "for consumption of services" within such "Special Economic Zone", but at the same time also uses the expression "taxable services provided to a unit of the SEZ". Both the expressions are required to be read harmoniously. In any case, the subsequently enacted SEZ Act further provides in Section 26 as under :

"Section 26.

Exemptions, drawbacks and concessions to every Developer and entrepreneur. - (1) Subject to the provisions of sub-section (2), every Developer and the entrepreneur shall be entitled to the following exemptions, drawbacks and concessions, namely :-

(a) xxxx

(b) xxxx

(c) xxxx

(d) xxxx

(e) Exemption from service tax under Chapter V of the Finance Act, 1994 (32 of 1994) on taxable services provided to a Developer or Unit to carry on the authorised operations in a Special Economic Zone;

(f) xxxx

(g) xxxx"

5. *It is clear from the above provision that there is no restriction regarding the consumption of the services and the exemption is extended to the services rendered to a unit in the SEZ for the purpose of authorised operation in the SEZ.*

6. *Rule 31 of the Special Economic Zone Rules, 2006 provides as under :*

"Rule 31

The exemption from payment of service tax on taxable services under section 65 of the Finance Act, 1994 (32 of 1994) rendered to a Developer or a Unit (including a Unit under construction) by any service provider shall be available for the authorised operations in a Special Economic Zone."

7. This Rule also states that exemption from service tax is available to services rendered to a unit in the SEZ for the authorised operations. There is no dispute that the containers provided to the units in the SEZ have been used by such units for the authorised operations, namely, for bringing inputs for manufacture and carrying the finished goods out of SEZ for export purposes. Therefore, we are of the view that the impugned services relating to supply of containers in the SEZ are exempt from payment of Service tax. We, accordingly, set aside the impugned order and allow the appeals.

From the above decision, it can be seen that the issue involved in the present case is absolutely identical to that of the above case, following the ratio of the aforesaid decision, in the present case too, the service provided for the authorized operation by the appellant to the SEZ based service recipient, demand of service tax is not sustainable. Since, we decide the matter on merit, we are not going into the issue of limitation.

06. From the discussions above, and also the decisions cited supra, we are of the considered view that the impugned order cannot be sustained hence, the same is set aside. Appeal is allowed with consequential relief, if any, as per law.

(Pronounced in the open court on 03.04.2023)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

Mehul