# CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
## West Zonal Bench At Ahmedabad

REGIONAL BENCH- COURT NO.3

**SERVICE TAX Appeal No. 10399 of 2015**
(Arising out of OIA-RJT-EXCUS-000-APP-234-14-15 dated 19.12.2014 passed by Commissioner of Central Excise, Custom & Service Tax- Rajkot)

**DWARKESH ENTERPRISE** **...Appellant**
BAZAR LINE, OKHA PORT,
OKHA, GUJARAT

*VERSUS*

**C.C.E. & S.T., RAJKOT** **...Respondent**
CENTRAL EXCISE BHAVAN,
RACE COURSE RING ROAD...INCOME TAX OFFICE,
RAJKOT, GUJARAT-360001

**APPEARANCE:**
Shri Jigar Shah & Shri Amber Kumrawat, Advocate appeared for the Appellant
Shri P. Ganesan, Superintendent (Authorized Representative) for the Respondent

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

**Final Order No. 11926 /2023**

DATE OF HEARING: 31.08.2023
DATE OF DECISION: 12.09.2023

**RAMESH NAIR**

The brief facts of the case are that the appellant are inter alia engaged in supply of drivers and cleaners to M/s Indian Roadline, Okha engaged in providing goods transport agency service. The Appellants are also engaged in carrying out activities of salt loosening, salt loading and handling at the salt panes of M/s TATA Chemicals. The Appellant have started paying service tax since 2010. For the period upto 31.03.2011, the Appellants had paid service tax on the total value of the services received as per Rule 6 of the Service Tax Rules, 1944. From 01.04.2011 onwards, the Appellant started paying service tax on the total value of invoices raised as per the provision of the Point of Taxation Rules, 2011. The Appellant have also availed the benefit of Notification No. 01/2009-ST, dated 05.01.2009 which provided full exemption from payment of service tax in respect of certain specified taxable services when they are provided to goods transport agency for providing transportation service to any person in relation to transportation of goods by road in a goods carriage. Manpower recruitment or supply service is one of those specified services. Further, the Finance Act, 2009 has given retrospective effect to Notification No. 01/2009-ST dated 5.1.2009. In view of this, if any service provider has provided the services taxable under any of the categories specified under the said notification but failed to charge and pay service tax, he will not be liable for payment of service tax w.e.f 01.01.2005. If any demand is pending in any proceedings, the same will also be set aside. Thus, in view of the above stated Notification, the Appellant have not paid service tax on the consideration received from M/s Indian Roadline, Okha, for supply of Manpower like cleaners, drivers and helpers for providing of GTA service. On the basis of information provided by the Appellant, it was observed by the department that during the period between October 2007 to March 2009 the Appellant had rendered Manpower Recruitment and Supply Agency Services and received total consideration of Rs. 3,49,80,166/- but did not pay service tax amounting to Rs. 42,34,958/-on the same. Further during the financial year 2009-10 to 2011-12 the Appellant rendered taxable service under the category of Manpower Supply service and Cargo Handling Service of Rs. 6,49,19,267/- however instead of paying service tax of Rs. 66,86,702- computed on gross amount billed, the Appellants have paid service tax of Rs. 62,52,461/- only computed on the amounts actually received, as reflected in their ST-3 returns. Therefore, the Appellants had short paid service tax by Rs. 4,34,241/-. Though, the Appellants during investigation have paid service tax of Rs. 46,69,199/- vide challan dated 29.12.2012, under protest but they are of the strong view that they are not liable to pay service tax and entire demand of service tax is liable to be set aside. In the above circumstances, Show Cause Notice dated 01.04.2013 was issued alleging that the Appellants were supposed to pay service tax on the Manpower Supply Service provided to GTA service provider during the period from October 2007 and March 2009 amounting to Rs. 42,34,958/-. It was also alleged that the Appellants had short paid service tax amounting to Rs. 4,34,241/- for the financial year 2009-10 to 2011-12 to the extent difference between total value of invoices raised and total value of actual consideration received. The Show Cause Notice also proposed to demand interest imposition of penalties under various Sections of Finance Act, 1994. The said Show Cause Notice has been adjudicated by the Learned Additional Commissioner vide order-in-original dated 05.03.2014 whereby the entire demand of service tax as proposed in the show cause notice has been confirmed on the ground that the appellant with regard to the man power supply service provided to GTA service provider did not comply with the condition enumerated in the Notification, therefore, they are not eligible to claim an exemption from the payment of service tax granted with retrospective effect from 01.01.2011. Further the Additional Commissioner has also held that the appellant had never given his defense submission on the allegation made into show cause notice about the short payment of service tax under the category of Cargo handling Service. Being aggrieved by the order-in-original passed by the learned Additional Commissioner, the appellant preferred an appeal before the learned Commissioner (Appeals) of the Central Excise, Rajkot. The learned Commissioner (Appeals) while disposing the appeal, upheld the demand of Rs. 42,34,958/- on the man power supply service provided to GTA service provider for non-compliance of the condition of the Notification and as regard the demand of Rs. 4,34,241/- remanded the matter to the adjudicating authority for verifying the fact about the actual calculation of service tax on the ground that the details of taxable services provided in payment received for rendering such services by the appellant during financial year 2009-2010 to 2010-2011 are not available on records with this office. Being aggrieved by the aforesaid order-in-appeal, the appellant filed the present appeal.

2. Shri Jigar Shah, learned counsel appearing on behalf of the appellant submits that as regard the demand of service tax amounting to Rs. 42,34,958/- on the manpower recruitment or supply agency service provided to GTA service provider, the adjudicating authority and the Commissioner (Appeals) has confirmed the demand on the ground that the appellant have not complied with the condition of Notification No. 01/2009 inasmuch as in their invoice they have not mentioned the detail of consignment note of the service recipient. It is his submission that there is no dispute that the service were provided to a GTA service provider who has used such service in his output service of GTA, therefore, merely for procedural lapse such as non mention of consignment note details in the appellant's invoice, cannot be the reason for denial of Exemption Notification No. 01/2009. He further submits that the exemption notification is provided with the retrospective effect and that condition of Notification 01/2009 cannot be practically applied retrospectively therefore, this procedure lapse should not come in way to extend the substantial benefit of Notification No. 01/2009. In this regard, he placed reliance on the following judgments:

- Chowgule & Company Pvt Ltd. 2014 (8) TMI 214-CESTAT
- CCE vs Superior Adoration 2021 (3) TMI 214-CESTAT
- CCE vs Amara Raja Power Systems 2006 (201) ELT 599 (T)
- CC vs Malwa Industries Ltd. 2009 (235) ELT 214 (SC)
- Maliakkal Industrial Enterprises 2013 (290) ELT 330 (Kar.)
- CCE vs Reliance Industries Ltd. 2021 (12) TMI 848-CESTAT
- Excel Consultancy 2010 (19) STR 665 (T)
- Srichakra Tyres Ltd. vs CCE 1999 (108) ELT 361 (T)
- CCE vs Advantage media Consultant 2008 (3) TMI 59 -CESTAT
- GD Goenka Pvt Ltd. 2023 (8) TMI 995-CESTAT

- Gopal Zarda Udyog 2005 (188) ELT 251 (SC)
- Lubri Chem Industries Ltd. 1994 (73) ELT 257 (SC)

2.1 As regard the remaining demand of Rs. 4,34,241/- on cargo handling service, it is his submission that this service tax is relating to the amount of service provided before levy of service tax i.e. prior to 01.04.2011, therefore, the same is not taxable.

3. Shri P. Ganesan, learned Superintendent (AR) appearing on behalf of the Revenue reiterates the findings of the impugned order.

4. On careful consideration of the submission made by both the sides and perusal of records, we find that as regard the demand of Rs, 42,34,958/- the limited issue to be decided is that whether the appellant is eligible for the Notification 01/2009-ST dated 05.01.2009 which reads as under :

> "G.S.R. (E).- In exercise of the powers conferred by sub-section (1) of section 93 of the Finance Act, 1994 (32 of 1994) (hereinafter referred to as the Finance Act), and in supercession of the notification of the Government of India in the Ministry of Finance (Department of Revenue), No.29/2008- Service Tax, dated the 29th June, 2008, published in the Gazette of India Extraordinary, vide G.S.R.482 (E), dated the 29th June, 2008, except as things done or omitted to be done before such supercession, the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby exempts the taxable services specified in sub-clauses (j), (k), (zr), (zza), (zzb), (zzzf), (zzzq) and (zzzzj) of clause (105) of section 65 of the Finance Act, provided by any person to a goods transport agency for use by the said goods transport agency to provide any service, referred to in sub-clause (zzp) of clause (105) of section 65 of the Finance Act, to a customer in relation to transport of goods by road, from the whole of the service tax leviable thereon under section 66 of the Finance Act subject to the condition that the invoice issued by such service provider, providing services should mention the name and address of the goods transport agency and also the name and date of the consignment note, by whatever name called, issued in his behalf."

The above notification was given retrospective effect in the Finance (No.2) Bill, 2009 which is reproduced below:

> "(H) (1) The notification of the Government of India in the Ministry of Finance (Department of Revenue) No. G.S.R. 10(E), dated the 5th January, 2009, issued in exercise of the powers conferred by sub-section (1) of section 93 of the Finance Act, 1994, granting exemption from the whole of service tax leviable under section 66 to any person providing specified taxable services to goods transport agency, shall be deemed to have, and to always have, for all purposes, validly come into force on and from the 1st day of January, 2005, at all material times.
>
> (2) Refund shall be made of all such service tax which has been collected but which would not have been so collected as if the

> notification referred to in subsection (1) had been in force at all material times.
>
> (3) Notwithstanding anything contained in the Finance Act, 1994, an application for the claim of refund of service tax shall be made within six months from the date on which the Finance (No. 2) Bill, 2009 receives the assent of the President.
>
> Explanation.—For the removal of doubts, it is hereby declared that the provisions of section 11B of the Central Excise Act, 1944, shall be applicable in case of refunds under this section."

From the combined reading of the Notification and the relevant Section 113 Section (H) it is provided that for the period from 01.01.2005, the services provided to GTA service provider has been exempted subject to condition that the invoice issued by such service provider, providing services should bear the mention of name and address of the goods transport agency and also the name and date of consignment note by whatever name called issued in his behalf. In the present case the limited dispute is that the appellant have not mentioned the name and date of consignment note in the invoice issued by them for providing manpower supply service to the GTA service provider. On this ground, the benefit of exemption has been denied. We find that the period of demand is for October 2007 to March 2009. The retrospective amendment came into effect only on 19.08.2009, whereby the Finance (No.2) Bill, 2009 was given assent by the President of India.

Before that the exemption notification No. 01/2009 was not available to the assessee, therefore, presuming to comply with the condition of Notification No. 01/2009 cannot be expected from the assessee. Therefore, the appellant have not mentioned the name and date of the consignment note in their invoice issued to their service recipient who is undisputedly GTA service provider. However to extend the benefit of such notification even though the procedural lapse can be ignored, but the fact that the service provided by the appellant to the GTA service provider which has been used in providing a GTA service needs to be established, which can be established not only on the basis of invoice alone which is not bearing the consignment note number but on any other documents details of the service recipient. Therefore, for that purpose, the matter needs to be remanded to the adjudicating authority. Needless to say that merely for non-mention of details of consignment note the benefit of Notification No. 1/2009 cannot be denied, if otherwise established on the basis of other document that the service provided by the appellant has been used by the service recipient in their output service of GTA service. As regard the demand of Rs. 4,34,241/- on cargo handing service, the learned Commissioner (Appeals) appreciating the submission of the appellant remanded the matter to reconsider the said demand based upon the fact whether the service was provided prior to its levy or thereafter and the payments received therefore, the record to this fact was not available before him. We are therefore, of the view that there is no infirmity in the order of the Commissioner (Appeals) to the extent it relates to the demand of Rs. 4,32,241/- remanding the matter to the adjudicating authority, therefore, this portion of the Commissioner (Appeals) order is upheld.

5. As per our above discussion and findings, we are of the considered view that the matter needs to be remanded for reconsideration of the overall issue. The issue regarding time barring of the demand is also kept open for reconsideration by the adjudicating authority. Accordingly, the impugned order is modified to the above extent. Appeal is disposed of by way of remand to the adjudicating authority.

(Pronounced in the open court on 12.09.2023)

**(RAMESH NAIR)**
**MEMBER (JUDICIAL)**

**(RAJU)**
**MEMBER (TECHNICAL)**

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