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

REGIONAL BENCH-COURT NO. 3

Service Tax Appeal No. 12568 of 2018- DB

(Arising out of OIA-BHV-EXCUS-000-APP-225-2017-2018 dated 23/03/2018 passed by the Commissioner (Appeals), GST & Central Excise, Rajkot)

Rajendra Ship Breakers Pvt Ltd **........Appellant**
Plot No 114, Ship Breaking Yard
Alang- Sosiya
Bhavnagar, Gujarat

VERSUS

Commissioner of C.E & S.T.- Bhavnagar **......Respondent**
Plot No.6776/B-1...Siddhi Sadan,
Narayan Upadhyay Marg,
Beside Gandhi Clinic,
Near Parimial Chowk,
Bhavnagar, Gujarat- 364001

WITH

Service Tax Appeal No. 10578 of 2020- DB

(Arising out of OIA-BHV-EXCUS-000-APP-021-2020 dated 29/04/2020 passed by the Commissioner (Appeals), GST & Central Excise, Rajkot)

GURU ASHISH SHIP BREAKERS **....... Appellant**
UB Aggarwal House, 2291/2292-A/1,
Hill Drive
Bhavnagar, Gujarat

VERSUS

Commissioner of C.E & S.T.- Bhavnagar **......Respondent**
Plot No.6776/B-1...Siddhi Sadan,
Narayan Upadhyay Marg,
Beside Gandhi Clinic,
Near Parimial Chowk,
Bhavnagar, Gujarat- 364001

AND

Excise Appeal No. 10329 of 2023- DB

(Arising out of OIA-BHV-EXCUS-000-APP-114-2022 dated 09/12/2022 passed by the Commissioner (Appeals), GST & Central Excise, Rajkot)

GURU ASHISH SHIP BREAKERS **....... Appellant**
UB Aggarwal House, 2291/2292-A/1,
Hill Drive
Bhavnagar, Gujarat

VERSUS

Commissioner of C.E & S.T.- Bhavnagar **......Respondent**
Plot No.6776/B-1...Siddhi Sadan,
Narayan Upadhyay Marg,
Beside Gandhi Clinic,
Near Parimial Chowk,
Bhavnagar, Gujarat- 364001

APPEARANCE:

Shri Sarju Mehta, Chartered Accountant for the Appellant
Shri M P Solanki, Assistant Commissioner (AR) for the Respondent

CORAM:
HON'BLE MEMBER (JUDICIAL), MR. SOMESH ARORA
HON'BLE MEMBER (TECHNICAL), MR. SATENDRA VIKRAM SINGH

Final Order No. 10388-10390/2025

DATE OF HEARING: 07.05.2025
DATE OF DECISION: 16.05.2025

SOMESH ARORA

The Appellant (M/s. Guru Ashish Ship Breakers) have filed Appeal Nos. ST/10578/2020 & E/10329/2023 against the impugned Orders-in-Appeals No. BHV-EXCUS-000-APP-021-2020 dated 29/04/2020 & BHV-EXCUS-000-APP-114-2022 dated 29/04/2020 passed by the Commissioner (Appeals), Central Tax & Central Excise, Rajkot. Similarly, M/s. Rajendra Ship Breakers Pvt Ltd. have filed Appeal No. ST/12568/2018 against the impugned order-in-appeal No. BHV-EXCUS-000-APP-225-2017-2018 dated 23/03/2018 passed by the Commissioner (Appeals), GST & Central Excise, Rajkot, involving the same issue.

1.1 The issue involved in Appeal Nos. ST/12568/2018 & ST/10578/2020 is that the department demanded service tax on the transportation charges borne by the appellant and shown in their Profit & Loss Account for their consignment sale during the F. Y. 2011-12 to 2013-14 in the case of M/s. Guru Ashish Ship Breakers & for F.Y. 2012-13 to January-2015 in the case of M/s. Rajendra Ship Breakers Pvt Ltd. The consignment agents of the appellant had paid the freight to the transporters and also discharged the service tax liability on such freight amounts paid by them. Since the service tax demanded by the department is already paid by their consignment agents, the appellant felt that it was not liable for payment of service tax on the freight amount which was shown by them in their books of accounts as expense.

1.2 The issue in appeal No. E/10329/2023 is that M/s Guru Ashsih Ship Breakers have availed Cenvat Credit of Rs. 9,96,643/- on GTA services, service tax of which was paid by their consignment Agent(s) whose details are given in the order-in-original dated 28.03.2022. It is alleged that the appellant has availed above Cenvat credit on ineligible documents during 2011-12 and 2012-13 and utilised the same for payment of Central Excise duty. The show cause notice proposes recovery of above Cenvat Credit under Rule 14 of the

CCR, 2004 read with Section 11A (4) of the Central Excise Act, 1944 alongwith interest and penalty under Rule 15A of the CCR, 2004. The above demand was confirmed by the adjudicating authority and upheld by the learned Commissioner (Appeals) vide order No. BHV-EXCUS-000-APP-114-2022 dated 09.12.2022.

2. The Learned Counsel for the appellant argues that the show cause notice is time barred as the period of dispute involved is of F. Y. 2011-12 to 2013-14 whereas show cause notice was received by them on 28/01/2016. Hence, the demand notice for the period from April-2011 to November-2013 is time barred. The appellants are registered manufacturer and are filing returns regularly. The officers of the Central Excise department periodically audited the record of the appellant. In support of their contention, the appellant submitted a copy of Final Audit Reports No. 103/2011-12 dated 15/03/2012 and 211/2012-13 dated 08/03/2013. It is their contention that during the audit, the officers have processed each and every piece of information in the instant case. Since the appellants are filing returns regularly and their records were audited periodically, the Department is aware about the fact of the transportation charges borne by the appellant. Since all the facts and information were available to the officers of the department, there is no question of suppression of any information from the department and, therefore, it can be safely concluded that there is no suppression of facts with intent to evade payment of service tax in the instant case and hence, the proviso to Section 73(1) of the Finance Act, 1994 (hereinafter referred to as 'the Act') relating to extended period cannot be invoked in this case. For this plea, he relies on the following case laws:

(i) MTR Foods Ltd. v/s Commr. of C. Ex., Banglore reported in 2014(312) ELT 730 (Tri.-Bang.)

(ii) SDL Auto Pvt. Ltd. v/s Commr. of C. Ex., Delhi-IV reported in 2013(294) ELT 577 (Tri.-Del.)

2.1 He again submits that the entire demand is to be set aside on the ground of limitation only. Revenue authority cannot invoke the extended period of limitation, when the records were audited by the officers but they did not find any short-payment from records. The second audit party, doing the audit of same period or over lapping period, cannot allege that appellant has misstated or suppressed the facts from the departments. He relies on the case of Trans Engineers India Pvt. Ltd. - 2015 (40) S.T.R. 490 (Tri.-Mum.) in which it was held that- Revenue authority not to invoke extended period of limitation, when records of assessee audited by officers once and short-payment not found - Second audit party, doing audit of same period or overlapping period, could not have alleged misstatement or suppression of facts in view of authoritative judicial pronouncements in MTR Foods Ltd. [2012 (282) E.L.T. 196 (Kar.)] and Rajkumar Forge Ltd. [2010 (262) E.L.T. 155 (Bom.)], extended period cannot be invoked. Demand being beyond period of limitation, same was liable to set aside.

2.2 It was submitted that the Show Cause Notice issued to the appellant is time barred and subsequently impugned order is also void and bad in law. The department was fully aware of the activities and if the department was of the opinion that the appellant has not paid service tax on the transportation charges borne by them and shown in their Profit & Loss Account, it should have either advised them to pay the service tax or should have proceeded to take action against them within normal period of limitation. He also submitted that there is no evidence reflecting upon any positive act of suppression or misstatement with intent to evade payment of tax by the appellant. On the contrary, it can be seen that the demand arose against the appellant by taking out the figures from their ledger accounts and balance sheet for the relevant year. Balance sheet is a public document and available to all concerned. Reflection of the expenditure and the said activity in the ledger account and the balance sheet will reflect upon the absence of any willful suppression or mis-statement on the part of the appellant to invoke longer period of limitation.

2.3 For this argument, he relied on the following order: -

(i) Rama Paper Mills v/s CCE, Meerut - 2011(22) STR (19) (Tri.-Del.)

(ii) Crescent Shipping Agency (India) Ltd. (Commr. Appl.) 2012(28) STR (66)

He stated that position on limitation is same in respect of all the appellants and demand is unsustainable for all in totality on acceptance of their plea.

2.4 In addition, he further submits that there cannot be suppression of fact when it is not wilful and, therefore, it would not constitute a permissible ground for the purpose of invoking proviso to Section 73(1) of the Act. Hence, the proviso to Section 73(1) of the Act cannot be invoked in this case. He further submits that there is no evidence reflecting upon any positive act of suppression or misstatement with intent to evade payment of service tax by the appellant.

2.5 Without prejudice to the above submission, he submits that the appellant has received services of transportation and paid the service tax through his agent; that the appellant have not directly paid transportation charges for their consignment sale, but their consignment agent paid it and also the service tax payable thereon. Later on, after sale of the goods, as per agreement with their consignment agent, they have issued a consignment sale note in which expenses done for the sale of goods alongwith freight paid by them and the service tax paid thereon by them was collected from the sale price of the goods. Hence, they are not required to pay service tax under demand as the same already stand to paid. He drew our attention towards the conditions of the agreement executed between the appellant and their consignment agents. On perusing the same, it can be concluded that on behalf of the appellant, the consignment agent has to pay the transportation charges and the service tax. Accordingly, the consignment agents have paid the service tax on the transportation charges which was reimbursed to them as mentioned in the consignment sale note. Therefore, as per prevailing practice, the appellant is recording full sale price as their sale income and recording the expenses made by their consignment agent, which were reimbursed by the appellant to them under various heads of their expenses. It is also clarified that the transportation charges are shown in their invoice to arrive at the value on which central excise duty is to be paid as they have sold the goods on consignment basis. An Explanation to Rule 5 of the Central Excise (Valuation) Rules, 2000 stipulates that the freight from the factory to the depot/place of the consignment Agent shall be included in the assessable value. Accordingly, the appellant had shown transportation charges separately in the invoice and included in the price to arrive at the assessable value for payment of duty on such sale.

2.6 The appellant has not collected any transportation charges from anyone. The appellant further submitted that as per Rule 2(1)(d)(iv) of the Service Tax Rules, 1994 (hereinafter referred to as 'the Rules'), quoted in para-3 of the impugned notice dated 21.01.2016, the service tax on GTA is required to be paid by the person who pays the freight either himself or through his agent; that in the instant case, the appellant did not directly pay the freight to the transporter and the same was paid by their consignment agent which later on, was reimbursed. Likewise, service tax was required to be paid by the appellant who got it paid by their consignment agent(s) and subsequently reimbursed the service tax so paid by consignment Agent(s).

2.7 He further submits that mere detection by the department does not mean that non-payment was with intention to evade unless the department brings out clear facts that the appellants were having the knowledge that service. tax was payable on such services but still they chose not to pay the tax in order to evade the same; that no such fact has been narrated in the show cause notice or forthcoming during the audit; that since, the appellant have not evaded Service tax of Rs.12,69,250/- as demanded under the show cause notice as their consignment agent have already paid the same, the appellant is not liable for any penalty. There is no intention on the part of the appellant to defraud the revenue or to evade payment of service tax. Hence, the appellant is not liable to penalty and the same is also not justifiable. Also, the show cause notice was issued on the basis of Audit and there was no *mens rea* noticeable from the records nor any impeachable conduct in respect of the transaction, hence, no penalty could be levied.

2.8 The Cenvat Credit of Rs. 9,96,643/- availed by them is proper as their consignment Agent(s) have not taken credit of the same. Vide submission dated 14.05.2025, Learned Advocate submitted copy of the service tax return of one of the consignment agents(s) to show that consignment agent(s) had not availed Cenvat credit of the Service Tax so paid on GTA service.

3. The learned AR on the other hand, in rebuttal relies on para 6 of the findings in impugned order. Which is reproduced below:-

> ***"Para 6.*** *In this case, I would first find it relevant to discuss whether the appellant is liable to pay service tax on GTA services or not. Therefore, I would like to reproduce Rule 2(1) (d) (B) of the Service Tax Rules, 1994 which reads as under:*
>
> > *"Rule 2. Definitions.*
> >
> > *1*
> >
> > *(d) "person liable for paying service tax",*
> >
> > *(i) in respect of the taxable services notified under sub-section (2) of section 68 of the Act, means,*
> >
> > *(A)*
> >
> > *(B) In relation to service provided or agreed to be provided by a goods transport agency in respect of transportation of goods by road, where the person liable to pay freight is,*

(I) any factory registered under or governed by the Factories Act, 1948 (63 of 1948);

(II) any society registered under the Societies Registration Act, 1860 (21 of 1860) or under any other law for the time being in force in any part of India,

(III) any co-operative society established by or under any law;

(IV) any dealer of excisable goods, who is registered under the Central Excise Act, 1944 (1 of 1944) or the rules made thereunder,

(V) any body corporate established, by or under any law, or

(VI) any partnership firm whether registered or not under any law including association of persons;

any person who pays or is liable to pay freight either himself or through his agent for the transportation of such goods by road in a goods carriage.

Para 6.1 *On plain reading of the above Rules, it is clear that Service Tax on GTA Services are required to be paid by the person who pays or is liable to pay freight either himself or through his agent for the transportation of such goods by road in goods carriage. As per the invoices issued by the appellant for selling their goods, freight charges have been shown separately which means that the appellant or his agent has paid freight charges to the GTA. Thus, I am of the view that the appellant is the person liable to pay Service Tax on freight charges paid by them to GTA as per the provisions of Rule 2(1)(d)(B)(1).*

Further, the consignment notes issued by their agent also shows that they had deducted the freight charges as expenditure on sale of goods supplied by the appellant which proves that they have recovered the freight charges from the appellant.

Thus, for charging of Service Tax on the freight charges, the person liable to pay service tax is the person who pays the freight charges. In the instant case, the appellant is the person who is liable to pay service Tax on the freight charges."

3.1 He therefore pleads that the extended period is correctly invoked by the adjudicating authority, in view of the above submission and the case is maintainable even on merits, as the service tax has not been paid in accordance to machinery provisions of law.

4. We have considered the rival submissions.

4.1 We find that main thrust of the arguments of the appellant is on limitation. The same has been pursued with force before us emphasizing that they were subjected to regular audits even previously and all the records were made available as is evident from final audit reports of dates 15.03.2012 and 08.03.2013. They were filing returns regularly and the department was well aware about the facts of the transportation charges not paid by the appellants and that all the information for the purposes of present show cause notices has been found out from their records only and nothing in any case was concealed. They have relied on various case laws including of MTR Foods Ltd. (cited supra), SDL Auto Pvt Ltd (cited supra), Trans Engineers India Pvt Ltd (cited supra) for their purpose. That all facts and figures and transactions were duly reflected in their ledger accounts as well as balance sheets for the relevant year, and were called out from their available documents only.

4.2 We find force in the above submission and on the basis of case laws quoted, we agree that extended of limitation cannot be applied. Even on merits, it is not denied that the consignment agent(s) to whom they were the principal had paid the amount of freight and since, under Rule 2(1)(d)(iv) of the Service Tax Rules, 1994, the service tax can be paid either by the person who is liable to pay freight or through his agent. In the instant case, service tax as per law was paid by the consignment agent (who had paid freight on behalf of the appellant) which was later on claimed from the appellant who showed in his books as expense. It is not disputed that the consignment agent(s) had paid the service tax in the case and therefore, there was no loss of Revenue to the Government. The tax got discharged as per law between the appellant and the consignment agent(s). Hence, no tax in any case escaped being paid. We are in agreement with this proposition.

4.3 In view of the foregoing, we find that Appeal No. ST/12568/2018 & ST/10578/2020 succeed both on merits as well as on limitation, as the orders passed cannot be allowed to sustain. Both the Appeals are therefore allowed with consequential relief to the party.

4.4 Regarding recovery of Cenvat Credit of Rs.9,96,643/-, the appellant mentioned that the above credit is of service tax paid on GTA services by their consignment agent(s). Since their consignment agent(s) have taken reimbursement of expenses toward transportation charges and the service tax amount from them, they are entitled to avail the Cenvat credit. Another argument is on invocation of extended period. We find that service tax on GTA service was paid by the consignments agent(s) of the appellant. It is also not disputed that the service tax amount and the transportation charges had been adjusted by their consignment agent(s) in the consignment sale advice. The department's allegation is that the appellant availed Cenvat credit without having any specified documents with them and this fact came to notice only during audit of appellant's records. The availability of cenvatable documents cannot be known from the ST-3 returns. Therefore, appellant's contention that extended period is not invokable in the instant case, is not justified. Had audit not been conducted and the documents and supporting invoices not been seen by the audit officers, the fact of availment of Cenvat credit without specified documents would not have come to notice. Regarding the main allegation, we find that Rule 9 of the CCR, 2004 specifies various documents on which Cenvat credit can be taken. Cenvat credit can even be availed on mentions challan evidencing payment of service tax by the service recipient. The lower authority has confirmed demand on the ground that the appellant has not produced eligible documents. Vide written submission dated 14.05.2025, the learned Advocate has produced copy of ST-3 returns of one of their Consignment Agent M/s Yashoda Traders to show that the Consignment(s) have not taken the Cenvat credit. Still, the appellant has to produce valid/eligible documents for availing Cenvat credit as required under Rule 9 of the Service Tax Rules. We therefore, deem it fit to remit this matter to the adjudicating authority with liberty to the appellant to produce eligible/valid documents justifying availment of Cenvat credit. The learned Adjudicating authority will decide the matter after verifying the documents and pass reasoned order within three months from the date of receipt of this order. Needles to say, the appellant shall produce eligible documents before the said authority within one month.

5. Appeals are accordingly disposed of.

(*Order Pronounced in the open court on 16.05.2025*)

(SOMESH ARORA)
MEMBER (JUDICIAL)

(SATENDRA VIKRAM SINGH)
MEMBER (TECHNICAL)

Raksha