

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD**

REGIONAL BENCH - COURT NO.I

Service Tax Appeal No.70493 of 2020

(Arising out of Order-in-Appeal No.NOI-EXCUS-001-APP-301-20-21 dated 07.07.2020 passed by Commissioner (Appeals) Central Goods & Services Tax, Noida)

M/s RGI Meditech Pvt. Ltd.,
(J-31, Sector-63, Noida-201301)

.....Appellant

VERSUS

**Commissioner of Central Excise &
Service Tax, Noida**

....Respondent

(4th Floor, C-56/42, Renu Tower, Sector-62, Noida-201301)

APPEARANCE:

Shri Nishant Mishra, Advocate for the Appellant

Shri Manish Raj, Authorized Representative for the Respondent

CORAM: HON'BLE MR. P.K. CHOUDHARY, MEMBER (JUDICIAL)

FINAL ORDER NO.- 70021/2024

DATE OF HEARING : 04 December, 2023
DATE OF DECISION : 04 December, 2023

P. K. CHOUDHARY:

The present appeal is directed against the Order-in-Appeal No.NOI-EXCUS-001-APP-301-20-21 dated 07.07.2020 passed by the Ld. Commissioner (Appeals), by which the appeal filed by the Appellant has been rejected and the Order-in-Original No.92/AC/CGST/DIV-III/19 dated 16.12.2019 has been upheld, rejecting the refund claim filed by the Appellant as barred by limitation.

2. The facts of the case in brief are that the Appellant is engaged in the manufacturing of adult diaper, hospital under pads etc., for which the Appellant imported certain raw material for use in relation to the manufacture of final products. For importing such raw material, the Appellant entered into an agreement with the foreign supplier for supply of goods on C.I.F

basis i.e. cost, insurance and freight basis, under which the foreign supplier arranged the carriage of goods by sea to the port of destination. As the services of ocean freight were provided to the foreign supplier and not to the Appellant, hence the Appellant was not required to discharge service tax on the ocean freight element.

3. The audit of the appliance unit for the period April, 2017 to June, 2017 was conducted on 19.02.2018, 02.02.2018 and 27.03.2018, during which the audit team pointed that service tax exemption on ocean freight has been withdrawn and accordingly the Appellant is liable to pay service tax on ocean freight under reverse charge mechanism. The Appellant was therefore directed to pay the amount of service tax along with interest and penalty immediately and pursuant to such direction, the Appellant paid an amount of Rs.10,67,046/- on 27.03.2018 under-protest.

Subsequently, the Appellant made enquiries whereupon the Appellant came to know that as the agreement with the foreign supplier was on C.I.F basis and it was the foreign supplier who entered into an agreement with the foreign shipping line for transportation of goods, hence the Appellant not being a service recipient was not liable to pay service tax on the amount of ocean freight.

4. Accordingly, the Appellant submitted application for refund of Rs.8,31,322/- of service tax wrongly paid on ocean freight under reverse charge mechanism on 04.12.2018. Upon submission of the refund claim, show cause notice dated 17.07.2019 was issued proposing to reject the refund on the ground that since bill of entry was filed in the name of the Appellant, hence the Appellant is the service recipient and accordingly the Appellant is liable to pay service tax in terms of Circular No.206/4/2017-ST dated 13.04.2017. The said show cause notice was adjudicated vide Order-in-Original dated 16.12.2019 rejecting the refund claim. Aggrieved with the same, the Appellant challenged the same in appeal, which was rejected by the Ld. Commissioner (Appeals) vide the impugned order.

5. Ld. counsel for the Appellant submitted that the agreement with the foreign supplier was on C.I.F basis and it was the foreign supplier who entered into an agreement with the foreign shipping line for transportation of goods and the Appellant was not privy to such an agreement. It was the foreign shipping line who was the service recipient, hence the Appellant was not required to pay service tax on ocean freight. The ld. counsel further relied on the decision of Hon'ble Gujarat High Court in **SAL Steel Ltd. v. Union of India (2020) 37 GSTL 1.**

6. Per-contra, the ld. DR relied and reiterated the findings recorded in the impugned order. As regards the decision of Hon'ble Gujarat High Court, the ld. DR submitted that the revenue has challenged the said decision before the Hon'ble Supreme Court but as on date there is no stay of the order of the High Court.

7. Heard both sides and perused the appeal records.

8. I find that the constitutional validity of Notification No.15/2017-ST dated 13.04.2017 and Notification No.16/2017-ST dated 13.04.2017 making the importer as a person liable to pay service tax on services by way of transportation of goods by a vessel from a place outside India up to the custom station of clearance in India, even in case of C.I.F contracts, was challenged before Hon'ble Gujarat High Court in **SAL Steel Ltd. v. Union of India (2020) 37 GSTL 1.** The validity of Circular No.206/4/2017-ST dated 13.04.2017 was also challenged in the said writ petition.

38. *But the importers in CIF contracts i.e. the writ applicants herein are neither service providers nor service receivers in respect of transportation of goods by a vessel from a place outside India upto the Customs station of clearance in India. Section 68(1) and also the reverse charge Notification under Section 68(2) permit the Central Government to collect and recover service tax only from the person providing the service or from the person receiving the service, and not from a third party. The rule making power of section 94 also does not permit the Central Government to make rules for recovering service tax from a third party who is neither the service provider nor the service receiver.*

39. Therefore, the impugned provisions i.e. Rule 2(1)(d)(EEC) and Explanation V to Notification No. 30/2012-ST are ultra vires Section 65B(44) defining "service" and Section 68, and also Section 94 of the Finance Act.

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44. Even if it is assumed that service tax can be recovered from a third party like the Indian importers in CIF contracts, there is no machinery provision for valuation of the service, and therefore also the impugned Rules and Notifications are unenforceable. It is an admitted position of fact that the Petitioners do not have any information about the actual amount of ocean freight paid by the overseas sellers/suppliers to shipping lines. The invoices and purchase orders (Annexure-"D" to SCA No. 20785/2018) clearly show that the price of the goods was fixed on basis of quantity (i.e. DMT-Dry Metric Ton) for CIF Mundra Port basis. When service tax is to be computed and assessed on the "value" of the service as laid down under the machinery provision of Section 67 of the Finance Act, no service tax can be assessed and charged from third parties like the Indian importers in CIF contracts, because "value" of sea transportation service is not available with them in CIF contracts.

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58. In view of the aforesaid discussion, the writ application succeeds and is hereby allowed. The Notification Nos. 15/2017-ST and 16/2017-ST making Rule 2(1)(d)(EEC) and Rule 6(7CA) of the Service Tax Rules and inserting Explanation-V to reverse charge Notification No. 30/2012-ST is struck down as ultra vires Sections 64, 66B, 67 and 94 of the Finance Act, 1994; and consequently the proceedings initiated against the writ applicants by way of show cause notice and enquiries for collecting service tax from them as importers on sea transportation service in CIF contracts are hereby quashed and set aside with all consequential reliefs and benefits.

9. In view of above authoritative pronouncement, the issue involved in the present case is no more *res-integra* and the Appellant cannot be fastened with any service tax liability on ocean freight.

10. Further, the Appellant has specifically pleaded in its reply to show cause notice and appeal memo submitted before the Appellate authority that the goods were imported under C.I.F contracts. This categorical pleading of the Appellant has not been

disputed by the revenue in the adjudication order as well as the impugned order. This being the case, the present case is squarely covered by the dicta laid down in SAL Steel Ltd. (supra) and accordingly it is held that the Appellant is not liable to pay service tax on ocean freight.

11. As regards the appeal preferred by the revenue against the judgment of Hon'ble Gujarat High Court, no stay order has been passed by the Hon'ble Supreme Court and therefore the dicta laid down in SAL Steel Ltd. (supra) remains to be operative and therefore the appeal is liable to be allowed.

12. At this stage, it is also pertinent to note that the same argument regarding pendency of appeal against SAL Steel Ltd. (supra) was also raised by the revenue before a coordinate bench of this Tribunal in Commissioner of Service Tax, Ahmedabad v. Kiri Dyes and Chemical Ltd. being Service Tax Appeal No.10616 of 2021-SM and by Final Order No.A/10507/2023 dated 23.03.2023, the coordinate bench has held as under:-

4. I have carefully considered the submissions made by both the sides and perused the record. I find that the issue whether ocean freight/sea transportation service is liable to service tax or otherwise has been decided by jurisdictional High Court of Gujarat in the case of SAL Steel Limited. As regards the revenue's appeal pending before the Hon'ble Supreme Court against the aforesaid decision, I find that there is no stay against the said High Court judgment. In view of this position, I find no infirmity in the impugned order which was passed relying on the jurisdictional High Court judgment in the case of SAL Steel Limited. Accordingly, following the Hon'ble Gujarat High Court decision in the case of SAL Steel Limited, the impugned order is upheld and the revenue's appeal is dismissed. Cross objection is also disposed of.

13. Thus, after taking note of the fact that the revenue's appeal is pending but there is no stay order operating, the coordinate bench has dismissed the revenue's appeal and upheld the order deleting demand of service tax on ocean freight.

Ld. Counsel for the Appellant has also brought on record that the aforesaid order of the coordinate bench was challenged

by the revenue before the Hon'ble Supreme Court in Civil Appeal Diary No(s).31246/2023, in which after condoning the delay, the Hon'ble Supreme Court dismissed the Civil Appeal.

14. By respectfully following the dicta laid down in SAL Steel Ltd. (supra), the appeal filed by the Appellant is allowed with consequential relief.

(Operative part of the order pronounced in open court)

**Sd/-
(P. K. CHOUDHARY)
MEMBER (JUDICIAL)**

LKS