

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHENNAI**

REGIONAL BENCH – COURT NO. III

Service Tax Appeal No. 00428 of 2010

(Arising out of Order-in-Appeal No. 43/2010 dated 26.03.2010 passed by the Commissioner (Appeals), Central Excise and Service Tax, Large Taxpayer Unit, 1775, Jawaharlal Nehru Inner Ring Road, Anna Nagar Western Extn., Chennai – 600 101)

M/s. Hyundai Motor India Limited

: Appellant

Plot No.H-1, SIPCOT Industrial Park,
Irrungattukottai, Sriperumbudur Taluk,
Kancheepuram District

VERSUS

The Commissioner of Central Excise & Service Tax : Respondent

Large Taxpayer Unit,
1775, Jawaharlal Nehru Inner Ring Road,
Anna Nagar Western Extension, Chennai – 600 101

APPEARANCE:

Shri S. Muthu Venkataraman, Advocate for the Appellant

Shri Arul C. Durairaj, Authorized Representative for the Respondent

CORAM:

HON'BLE MS. SULEKHA BEEVI C.S., MEMBER (JUDICIAL)

HON'BLE MR. P. ANJANI KUMAR, MEMBER (TECHNICAL)

FINAL ORDER NO. 42335 / 2021

DATE OF HEARING: 20.09.2021

DATE OF DECISION: **23.09.2021**

Order : Per Hon'ble Ms. Sulekha Beevi C.S.

The Tribunal vide Final Order No. 41431 of 2018 dated 01.05.2018 had earlier disposed of the above appeal. In paragraph 5 of the said order, the issue with regard to invoices issued by M/s. Natvar Parekh Industries relating to Port Services was discussed. In the appeal, the appellant had challenged the rejection of refund claim pertaining to port services. The Tribunal

applied the decision in the case of *M/s. SRF Ltd. v. Commissioner of Central Excise, Jaipur-I* reported in 2015 (40) S.T.R. 980 (Tri. – Del.) to hold that the rejection of refund claim alleging that the invoices in regard to port services have been issued by M/s. Natvar Parekh Industries and not by the port or any person authorized by the port, was unsustainable. The issue was thus found in favour of the appellant and the rejection of refund on this ground was set aside.

2. The Department on this issue approached the Hon'ble High Court against the above said Final order of the Tribunal. The Hon'ble High Court vide judgement in C.M.A. No. 690 of 2019 dated 28.01.2020 remanded the matter to the Tribunal to re-consider this issue pertaining to the refund claim of Service Tax paid on port services. The relevant paragraph of the Order of the Hon'ble High Court is reproduced as under:

" The Revenue has filed this appeal against the order of the learned CESTAT dated 01.05.2018. The limited ground on which the present appeal is pressed by the learned Senior Standing Counsel for the Revenue Mr. V. Sundareswaran is as discussed by the learned Tribunal in Paragraph 5(i) of the impugned order. Though the Coordinate Bench of this Court had admitted the appeal on 31.01.2019 on four substantial questions of law, the only question pressed by the learned Senior Standing Counsel for the Revenue is Question No.(a), which reads as follows:-

"(a) Whether the Tribunal was correct in allowing the appeal of the assessee in respect of the part of the refund claim relating to invoices for port services?"

.
.
.

7. *In these circumstances, we are left with no other option but to remand the case back to the learned Tribunal for deciding this issue between the parties once again. As was expected from the final fact finding body, the learned Tribunal ought to have discussed the relevant facts in the light of the order passed by the first appellate authority. But, we do not find any such discussion in the afore quoted paragraph 5(i) of the order passed by the learned Tribunal and therefore, we allow the present appeal of the Revenue, without answering the question of law at this stage, with a direction to the learned Tribunal to decide the said issue, after giving reasonable opportunity of hearing to both the parties once again, discussing the relevant facts in the matter. Accordingly, the Civil Miscellaneous Appeal is allowed. No costs."*

(Emphasis applied)

3.1.1 Learned Counsel Shri S. Muthu Venkataraman appeared and argued on behalf of the appellant. It is submitted by him that the appellant had filed application for refund of the Service Tax paid on taxable services received by them for use in the export of their goods. These services are in the nature of Goods Transport Agency (GTA), Port Services, Courier Agency, Storage and Warehousing and Business Auxiliary Services. That the present refund claim pertains to the period from April 2008 to June 2008 and the claim was filed in terms of Notification No. 41/2007-S.T. dated 06.10.2007. In the Show Cause Notice dated 12.09.2008, the allegation raised by the Department in respect of the claim for refund of Service Tax paid on port services is that the "service providers are not registered for the specified services." He referred to Annexure-I to the Show Cause Notice, in which the list of services, details of invoices and amounts involved are mentioned. In the remarks column of this Annexure against 'Port Services', it is stated by the Department as under:

"Covered under S. No. 2 of Notification no. 41/2007-ST dated 6.10.2007. But the invoices of the CHA was produced as evidence. The CHA is not registered for Port Services. Sl. No. 52 & 53 pertain to March 2008"

3.1.2 It is submitted by the Learned Counsel for the appellant that the only ground alleged in the Show Cause Notice for rejecting the claim for refund in regard to Port Services is that the invoices for payment of Service Tax have been issued by the CHA and that the CHA is not registered for providing Port Services. He referred to Sl. No. 2 of the said Notification and submitted that in Notification No. 41/2007-S.T., though the classification of service is mentioned as Section 65(105)(zn) of the Finance Act, 1994, the description of service is simply shown as "services provided for export of said goods." That as per the Notification, there is no requirement that the services are to be provided by the port or any person authorized by the port in respect of export of goods. Such requirement came to be introduced in the subsequent Notification, which is Notification No. 17/2009-S.T. dated 07.07.2009. That the Tribunal after taking note of this fact has correctly applied the decision in the case of *M/s. SRF Ltd. (supra)* wherein it has been held that the requirement in the subsequent Notification No. 17/2009-S.T. cannot be pressed into application to deny the refund.

3.2 Before the Hon'ble High Court even though the Department has raised the ground that the invoices have been issued by CHA and not by the port or any person authorized by the port, no such specific allegation has been averred in the Show Cause Notice. In the Show Cause Notice, the only allegation is that the CHA is not registered for providing 'Port Services'.

3.3 He adverted to the Circular issued by the Central Board of Excise and Customs (C.B.E.C.), Circular No. 112/6/2009-S.T. dated 12.03.2009; that in Sl. No. VII of the Table in the said Circular, it is stated that for granting refund of the Service Tax paid on taxable services used for export, it is not required to verify the registration certificate of the provider of service. That refund should not be denied in such cases, if otherwise in order; that procedural violations by the service provider have to be dealt separately. It is pointed out by the Learned Counsel for the appellant that the said Circular is issued specifically for clarifying the doubts and difficulties that have come up in implementation of the refund scheme under Notification No. 41/2007-S.T. That this clarification of the Board vide its above Circular dated 12.03.2009 was referred to by the Hon'ble High Court of Gujarat in the case of *Commissioner v. M/s. Adani Enterprise Ltd.* reported in 2014 (35) S.T.R. 741 (Guj.). The Hon'ble High Court has held that when the service provider obtained registration only for one service, but provided several services, the refund cannot be rejected on the ground that the service provider has not obtained registration. This decision in *M/s. Adani Enterprise Ltd. (supra)* was also relied by the Tribunal in the case of *M/s. SRF Ltd. (supra)*. He prayed that the appeal may be allowed.

4. Learned Authorized Representative Shri Arul C. Durairaj appearing on behalf of the Department supported the findings in the impugned order. It is submitted by him that the invoices for which the appellant has paid Service Tax on the wharfage charges were not issued by the port and therefore, the appellant is not eligible for refund. But the Registration number of Chennai Port is mentioned in the invoice issued by M/s. Natvar Parekh Industries. That the appellant is not eligible for refund.

5. Heard both sides.

6. The controversy is mainly due to the amendment that was brought forth in the definition of taxable service contained in Section 65(105)(zn) of the Finance Act, 1994 with effect from 01.07.2010.

7.1 The definition of "taxable service" as contained in Section 65(105)(zn) reads as under:

"to any person, by any other person, in relation to port services in a port, in any manner"

Prior to 01.07.2010, the said definition read as under:

"to any person by a port or any person authorized by the port, in relation to port services, in any manner"

7.2.1 From the above, it can be seen that prior to 30.06.2010, the definition of "Port Services" was such that only services rendered by a port or any person authorized by such port would come within the purview of taxable service. However, while giving the description of port services in Notification No. 41/2007-S.T. (supra), this description has not been adopted. The description of taxable services given in the Notification in regard to Port Services is "services provided for export of said goods". The requirement that the services have to be provided by a port or any person authorized by the port has been included in the description of port service in the subsequent Notification No. 17/2009-S.T. dated 07.07.2009. It would be more clear if the relevant portion of the Schedule of the Notification No. 41/2007-S.T. is reproduced; which is as under:

Schedule			
Sl. No.	Taxable Services		Conditions
	Classification under Finance Act, 1994	Description	
(1)	(2)	(3)	(4)
1.	Section 65(105)(d)	Services provided to an exporter by an insurer, including a re-insurer carrying on general insurance business in relation to insurance of said goods	(i) document issued by the insurer including re-insurer, for payment of insurance premium shall be specific to export goods and shall be in the name of the exporter.
2.	Section 65(105)(zn)	Services provided for export of said goods	-

(Emphasis applied)

7.2.2 At this juncture, it would also be relevant to notice the subsequent notification No. 17/2009-S.T., dated 07.07.2009, which is as below:

Sl. No.	Classification of sub-clauses of <u>Clause (105) of Section 65</u> of the said Act	Taxable Services	Conditions
(1)	(2)	(3)	(4)
2.	<u>(zn)</u>	Service provided by a port or any person authorized by the port in respect of the export of said goods.	

(Emphasis applied)

8.1 The Tribunal in the case of *M/s. SRF Ltd. (supra)* had analysed the very same controversy and observed in paragraph 5 of its order that in Sl. No. 2 of Notification No. 41/2007-S.T., there is no requirement that the services are to be provided by a port or any person

authorized by the port; though in Column 2 of the said Notification, the relevant Section is mentioned as Section 65(105)(zn), the description of services is given simply as “services provided for export of said goods”. In the subsequent Notification No. 17/2009-S.T., not only the relevant Section is mentioned as Section 65(105)(zn), the description of taxable service has been described as “service provided by a port or any person authorized by the port”.

8.2.1 In paragraph 6 of the said decision, the Tribunal had considered the objection raised by the Revenue that only if the service provider pays the Service Tax in respect of services rendered to the appellant therein under the head “Port Services” coming under Section 65(105)(zn) the refund could be allowed. The service provider in the case of *M/s. SRF Ltd. (supra)* had paid the Service Tax under Business Auxiliary Service and was not registered for Port Services. The contention of the Revenue that documents should evidence payment of Service Tax for specified service, namely, Port Service, was negated by the Tribunal by referring to the clarification issued by the C.B.E.C. vide Circular No. 112/6/2009-S.T. dated 12.03.2009. The relevant portion of the said Circular is reproduced as under:

S. No.	Issue Raised	Clarification
VII	The Service provider providing services to the exporter provides various services. But he has registration of only one service. The refund is being denied on the grounds that the taxable services that are not covered under the registration are not eligible for such refunds.	Notification No. 41/2007-S.T. provides exemption by way of refund from specified taxable services used for export of goods. Granting refund to exporters, on taxable services that he receives and uses for export do not require verification of registration certificate of the supplier of service. Therefore, refund should be granted in such cases, if otherwise in order. The procedural violations by the service provider need to be dealt separately, independent of the process of refund.

The Tribunal discussed that the above clarification issued by the Board throws light to the existence of problems when the service provider classifies or pays tax under a particular category of service which may not be covered under the sub-clauses specified in Notification No. 41/2007. This is also the situation in the present case.

8.2.2 Again, in *M/s. SRF Ltd. (supra)*, in paragraph 7, the Circular No. 334/1/2010-TRU dated 26.02.2010 was also referred to by the Tribunal. The Board, having taken note of the difficulties faced by taxpayers on the ground that they are not able to obtain permission letters for service provider authorizing such service provider to undertake a particular task inside the port, had issued the clarification. It is stated in the above Circular that to remove these difficulties, the definition of Port Services was amended to clarify that all services provided entirely within the port/airport premises would fall under the services. That specific authorization from the port / airport authority would not be a pre-condition for making the Port Services taxable.

9. The issue that has been considered in *M/s. SRF Ltd. (supra)* is exactly the issue that is presented by the facts of the present case. The said decision is therefore squarely applicable.

10. From the judgement of the Hon'ble High Court it is seen that instead of adverting to Sl. No. 2 of the Notification, the Revenue has wrongly drawn the attention of the Hon'ble High Court to Sl. No. 13 of Notification No. 41/2007-S.T. Sl. No. 13 of Notification No. 41/2007-S.T. relates to Customs House Agent services under Section 65(105)(h) of the Finance Act, 1994 and not Port Services. The rejection of refund claim is with respect to Service Tax paid on Port Services and not Customs House Agent services. Though the invoice is not issued by the port, as already discussed, as per Sl. No. 2 of the Notification No. 41/2007-S.T., it is not required to

establish that the services were rendered by the port or any person authorized by the port during the relevant period and this condition was included only in the subsequent Notification i.e., Notification No. 17/2009-S.T. The issue on merits is held in favour of the assessee.

11. From the above discussions, we hold that the rejection of refund on Port services cannot sustain and requires to be set aside. Ordered accordingly.

(Order pronounced in the open court on **23.09.2021**)

Sd/-
(SULEKHA BEEVI C.S.)
MEMBER (JUDICIAL)

Sd/-
(P. ANJANI KUMAR)
MEMBER (TECHNICAL)

Sdd