CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL CHENNAI

REGIONAL BENCH – COURT NO. I

Service Tax Appeal No. 40346 of 2016

(Arising out of Order-in-Appeal No.MAD-ST-000-APP-07-16, dated 29.01.2016 passed by the Commissioner of Central Excise (Appeals-I), Lal Bahadur Shastri Marg, C.R. Building, Madurai)

M/s. Bay Container Terminal Pvt Ltd., ...Appellant
21, Swamy Sivananda Salai, Chepauk
Chennai 600 005

Versus

Commissioner of GST and Central Excise ...Respondent
Central Revenue Building
Tractor Street
NGO A Colony
Tirunelveli 627 007

APPEARANCE:

Shri Thangaraj, Consultant for the Appellant
Shri N. Satyanarayanan, Authorised Representative for the Respondent

CORAM:

HON'BLE MR. VASA SESHAGIRI RAO, MEMBER (TECHNICAL)
HON'BLE MR. AJAYAN T.V, MEMBER (JUDICIAL)

FINAL ORDER No.40409/2025

DATE OF HEARING: 11.03.2025
DATE OF DECISION: 28.03.2025

Per Mr. Ajayan T.V.

The appeal has been preferred by the Appellants assailing the impugned Order-in-Appeal MAD-ST-000-APP-07-16 dated 29.01.2016 where by the appellate authority has upheld the Order in Original No.04/JC/ST/2015 dated 27.02.2015 of the Adjudicating Authority has confirmed the demand of service tax of an amount of Rs.39,68,954 for the period from April 2011 to June 2012 under Section 73(2) of the Finance Act, 1994 along with interest at appropriate rates and has imposed penalties equivalent to the above confirmed demand amounts, under Section 78 of the Finance Act, 1994.

2. The facts in brief are that the appellants are engaged in rendering 'Storage & Warehousing' and 'Maintenance & repair' services. The department was of the view that the appellants have not included the cost of material/goods used in the maintenance & repair service and they have paid service tax only on the labour cost and not on the gross billed amount which included the cost of material/goods. The department being of the view that the appellants are therefore not eligible to avail the exemption of Notification No.12/2003-ST dated 20.06.2003 in as much as the appellant's are not in a position to furnish any documentary proof for the value of materials and goods sold in the course of rendering the service raising the demand of service tax which stood confirmed as afore stated. The SCN also acknowledges that the appellant had been issued a Show Cause Notice earlier for the earlier period which stood confirmed vide Order in Original No.02/ST/Commr/2013 dated 15.03.2013 passed by Commissioner of Central Excise Tirunelveli.

3. Ld. Consultant Shri Thangaraj appeared and argued for the appellants. The Ld. Consultant submits that the adjudicating authority has erred in holding that the value of materials shown in the invoices should tally with the actual purchased cost of the materials and has not considered the Notification 12/2003 ST dated 01.07.2003 in proper prospective since the Notification exempts so much of the value of all the taxable services, as is

equal to the value of goods and materials sold by the service provider to the recipient of service, from the service tax leviable thereon under section (66) of the said Act, subject to condition that there is documentary proof specifically indicating the value of the said goods and materials. The Ld. Consultant submitted that the appellants enter into contracts which are divisible and the rate for supply of material and labour cost have been clearly spelt in the contract. It is submitted that the value of goods have also been shown separately in their invoices and thus the conditions in the notification ibid have been satisfied. The Ld. Consultant submitted that the appellants undertake repair of damaged parts of the containers used in international transport while they are under customs bond and on replacement of components the said containers along with cargos are exported. It is submitted that the components used in the containers that were exported, are also thus exported and VAT is not leviable on these components which stand exported, under local Sales Tax law. It is also submitted that the adjudicating authority has erred in holding that the value shown in the invoices are to be included in the taxable value under Rule 5 of the Service Tax determination of value Rules, 2006 without considering the exemption under Notification 12/2003 ST as well as the decision in the case of Intercontinental Consultants and Technocrats Pvt. Ltd. reported in 2013 (29) S.T.R. 9 (Del). The Ld. Counsel also placed reliance on various other decisions in support of the submissions made. The Learned Counsel also submits that the matter is settled in the appellants' favour for the past period *vide*

Final Order No.43447/2017 dated 20.12.2017 of this Tribunal and prayed that the appeal may be allowed.

4. Ld. AR Shri N. Satyanarayanan appeared for the Respondent and reiterated the findings of the Appellate Authority.

5. Heard both sides and perused the appeal records as well as the case laws submitted as relied upon. We find that the demand raised on the appellant for the earlier period and confirmed *vide* OIO No.14/2010 dated 29.10.2010 was the subject matter of the appeal No. ST/51/2011 preferred by the appellant. This Tribunal had, after appreciation of the facts therein, which are similar to the facts of the present appeal, allowed the appeal in the appellants' favour, vide ***Final Order No.43447/2017 dated 20-12-2017 in the case of M/s. Bay Container Terminal Pvt Ltd v CCE, & ST, Chennai***. The relevant paras are reproduced below: -

> "The only point of dispute in the present appeal is entitlement of the appellant for exemption under Notification No. 12/2003 dated 01.07.2003.
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> 2. The appellants are engaged in providing 'Repair and Maintenance Service' with reference to damaged sea containers meant for International Goods Transport. The repair work undertaken by the appellants is with reference to the containers which are covered by the Customs Bond intended for re-export. The lower authority denied the exemption on the material part on the ground that no supporting evidence of sale of goods during the course of providing such repair service by the appellants.
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> 3 The claim of the appellants was supported by the invoices raised by them. In fact, such invoices for repair charges indicate along with details of the container numbers, labour amount and material amount separately in US$ The service tax payable on the services (labour amount) is also indicated.

> 4. The Ld. AR contested that the evidence of purchase of such materials along with the supply to the service recipient with full details are lacking. We note that the invoices produced sufficiently indicate the complete details of service and materials undertaken. In fact, the entry of materials used is also can be seen from the illustrated invoices submitted. In this connection, we also note the clarification issued by the Board dated 22.09.2013 referring to the very same notification and the decision of the Hon'ble Supreme Court in Jain Brothers reported as 2012 (28) STR 162 (S.C.), to state that the cost of goods supplied during repair cannot be added to the value of the taxable service in view of the said exemption. The Ld. Advocate brought to our notice that in the appellant's own case in two other units in Tuticorin and Cochin, Revenue dropped the demands on the very same issue which reached the finality.
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> 5. In view of the above analysis, we find no merit in the impugned order. Accordingly, the same is set aside and the appeal is allowed."

6. Subsequently also, the appellants had preferred Service Tax Appeal No.40992/2013 being aggrieved by OIO No.02/ST/COMMR/2013 dated 15.03.2013 passed by the Commissioner of Central Excise, Tirunelveli confirming the demand of service tax made on the allegation of non-addition of the cost incurred by the appellant for replacement/repairs undertaken by them of damaged parts of the containers used in international transportation, in the taxable value. This appeal too was decided in the appellants' favour by placing reliance upon the earlier Final Order No.43447/2017 dated 20.12.2017 vide ***Final Order No.40625/2019 dated 29.03.2019 in the case of M/s. Bay Container Terminal Pvt Ltd v. The Commissioner of GST & Central Excise, Tirunelveli***. It is pertinent to note that the SCN has cited the aforementioned OIO as confirming the demand made for the very same issue. Moreover, recently this Tribunal had decided the issue in favour of the appellant yet again, albeit pertaining

to its premises at Chennai, vide ***Final Order No.40334/2025 dated 12.03.2025 in the Service Tax Appeal No. 41079 of 2015 in the case of M/s. Bay Container Terminal Pvt Ltd v. The Commissioner of GST & Central Excise, Chennai.***

7. That apart, in the present appeal, we further find that the Adjudicating Authority had relied upon Rule 5 (1) of the Service Tax (Determination of Value) Rules, 2006 to confirm the demand and the Appellate Authority also has upheld the reliance placed on Rule 5(1) of the Valuation Rules ibid in the impugned order in original. The appellate authority had rejected the appellant's contention that Delhi High Court has struck down the said Rule on the ground that there was no such decision of the jurisdictional High Court. We find that the Honourable Supreme Court has in the case of ***UOI v Intercontinental Consultants and Technocrats Pvt Ltd, reported in (2018) TIOL 76-SC-ST : 2018 (10) GSTL 401 (SC),*** affirmed the decision of the Delhi High Court wherein Rule 5(1) of the Service Tax Valuation Rules, 2006 which provided for inclusion of expenditures or costs incurred by the service provider in the course of providing taxable services, in the value of such taxable services, was stuck down as ultra vires Section 66 and Section 67 of the Act and as travelling beyond the scope of the said sections. Thus, we find the impugned order in appeal untenable on this count too.

8. Even otherwise, we also find that the demand is substantially barred by limitation since the SCN does not adduce any evidence of any positive act of wilful suppression or misstatement of facts with intent to evade service tax that has been made by the appellants. On the contrary, the appellants have been regularly filing their ST-3 returns. The only allegation is that the appellants have not included the value of materials for which the appellant had Bonafide believed that they are entitled to the benefit of the notification No.12/2003 and their belief has since been validated by the Apex Court decision in Safety Retreading cited supra. Even otherwise, entertaining a belief to the benefit of a notification cannot be viewed as malafide action on the part of the appellant. The fact that the matter was taken up to the Supreme Court only affirms the fact that the issue was debatable. It is also appropriate at this juncture to refer to the decision of the Apex Court in ***Uniworth Textiles Ltd v CCE, Raipur, 2013 (288) ELT 161 (SC),*** wherein the Apex Court has held that it is a cardinal postulate of law that the burden of proving any form of *mala fide* lies on the shoulders of the one alleging it. The Apex Court also noticed its observation in *Union of India* v. *Ashok Kumar & Ors.* - (2005) 8 SCC 760 that "it cannot be overlooked that burden of establishing *mala fides* is very heavy on the person who alleges it. The allegations of *mala fides* are often more easily made than proved, and the very seriousness of such allegations demand proof of a high order of credibility." In such circumstances, the Department could

not have invoked the extended period of limitation and the Appellants plea, that extended period of limitation ought not to have been invoked and equivalent penalty ought not to have been imposed, merits acceptance.

9. It is also a pertinent fact that the respondent has not brought to our notice any appeal preferred against this Tribunal's afore cited two orders in the appellants' own case involving the issue of entitlement to the benefit of the notification 12/2003 ibid. Thus, it appears that the issue has attained finality inter-se the parties. Therefore, we do not find any fresh reasons or new grounds that would compel us to deviate from the ratio of the earlier decisions of this Tribunal in the appellants' own case.

10. In view of the aforesaid discussions, the demand of service tax, interest thereon and penalties imposed on the appellants are untenable and the order in appeal impugned herein, cannot sustain and is liable to be set aside, which we hereby do so. The appellants succeed in their appeal. The appeal is allowed with consequential relief in law, if any.

(Order pronounced in open court on 28.03.2025)

(AJAYAN T.V.)
Member (Judicial)

(VASA SESHAGIRI RAO)
Member (Technical)

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