

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,
EAST REGIONAL BENCH : KOLKATA**

Appeal Nos.ST/14 &15/2008 and ST/19/2010

(Arising out of Order-in-Original No.Commr./BBSR-I/St-06/2007 dated 30.10.2007, Commr./BBSR-I/St-14/2007 dated 28.12.2007 and Commr./BBSR-I/St-09/2009 dated 23.11.2009 all passed by the Commissioner of Central Excise, Customs & Service Tax, BBSR-I)

M/s Paradeep Port Trust

...APPELLANT(S)

VERSUS

Commissioner of Central Excise, Customs & Service Tax, BBSR-I

...RESPONDENT (S)

APPEARANCE

Shri Pulak Kumar Saha & Shri Manish Jalan, CAs for the Appellant
Shri S.S.Chattopadhyay, Suptd. (AR) for the respondent.

CORAM:
HON'BLE SHRI P. K. CHOUDHARY, JUDICIAL MEMBER
Hon'ble SHRI V.Padmanabhan, Member (Technical)

Date of Hearing : 09.10.2018

Date of Pronouncement: 15.11.2018

ORDER NO.FO/A/76929-76931/2018

Per Shri V.Padmanabhan :

The issues involved in these three appeals are common and relates to the same appellant for different periods. Hence, they are taken up for hearing and disposal through this common order. The details of the three impugned orders are as follows:

Appeal No.	O-I-O No. & Date	Period Involved	Amount Involved (Rs.)	SCN dated
ST/14/2008	Commr./BBSR-I/St-06/2007 dated 30.10.2007	16.07.2001 to 31.03.2006	8,18,98,432	26.10.2006

ST/15/2008	Commr./BBSR-I/St-14/2007 dated 28.12.2007	01.04.2006 to 31.03.2007	4,11,56,523	12.10.2007
ST/19/2010	Commr./BBSR-I/St-09/2009 dated 23.11.2009	01.04.2007 to 31.03.2008	2,05,84,149	21.10.2008

The appellant is a body corporate constituted under the Major Port Trusts Act, 1963. They are registered for payment of service tax since July, 2001 under the category of 'Port Service' defined under Section 65(82) of the Finance Act, 1994. The appellant entered into an agreement dated 28.06.1993 with the erstwhile South Eastern Railway, presently East Coast Railways (ECR). As per the terms of the agreement it was agreed that ECR will make necessary arrangement for interconnecting of Port Trust Railway System and ECR Railway System. Under this agreement, both parties have fixed interchange points and at these interchange points all inward wagons to and outward from the Port Trust Railway are interchanged between the parties. The appellant provided to the Railways under the agreement a bouquet of services, such as booking of goods, collection of freight, trafficking of goods to and from railway, maintenance of assets including railway track, shunting and placement of wagons within the port area etc. The amounts collected by way of port charges and haulage charges etc. from service recipients were remitted to the Railways on daily basis. For such services, in terms of the agreement, the appellant received lumpsum amounts representing the charges for billing, collection, account maintenance etc. from the Railways which was described as 'Terminal Charges'. The department noticed, while scrutinizing the balance sheet of

the appellant for the period commencing from 2001-2002 to 2005-2006, that such 'Terminal Charges' were not being included in the taxable value as required under Section 67 of the Act. Since the entire activities rendered by the appellant to the Railways was provided in the port area, department was of the view that the appellant was liable to payment of service tax on the 'Terminal Charges' under the category of Port Services. Though the appellant was making payment of service tax periodically under the category of Port Services, the receipt of Terminal Charges was not included or declared in the ST-3 Returns filed from time to time. Accordingly, show cause notice dated 26.10.2006 was issued to the appellant proposing to demand service tax by invoking the extended period of limitation (covering the five years period from 2001-2006). Subsequently, show cause notice dated 12.10.2007 (covering the period 01.04.2006 to 31.03.2007) and show cause notice dated 21.10.2008 (covering the period dated 01.04.2007 to 31.03.2008) were issued. These three show cause notices resulted in confirmation of service tax under the category of Port Services through issue of the three Order-in-Originals which are under challenge in the present appeals.

2. Shri Pulak Kumar Saha & Shri Manish Jalan, CAs appeared for the Appellant and Shri S.S.Chattopadhyay, Suptd. (AR) appeared for the respondent.

3. Ld. CA challenged the impugned orders mainly on the following grounds:

- i) He submitted that the activities are not liable to payment of service tax under Port Services. The service tax on Port Services becomes liable in respect of any service provided within a port in relation to vessels or goods. In the case of the agreement of the appellant with railways, such services were provided not in relation to vessels or goods, but in relation to railway freight. In this connection he referred

to the circular issued by the Railway Board vide Office Memorandum No.F(X)I-2001/23/2/Service Tax dated 20.04.2005. He submitted that on the basis of the aforesaid letter and also based on the bonafide belief, the appellant did not discharge service tax on the Terminal Charges collected from Railways.

- ii) He also referred to the communication issued by Ministry of Finance, Department of Revenue (CBEC) vide Office Memorandum dated 30.10.2006, in which it was clarified that similar issue pertaining to Chennai Port Trust was adjudicated by the Commissioner of Service Tax, Chennai vide his Order No.IV/16/116/2004/STC ADJ dated 11.05.2006. He submitted that vide the above order, service tax was ordered to be paid under the category of 'Business Auxiliary Service'.
- iii) He further submitted that w.e.f. 01.09.2007 (after the period of the present disputes) the appellant has started recovering Terminal Charges from customers in addition to freight and started depositing service taxes on such charges.
- iv) With reference to the first show cause notice dated 26.10.2006, he submitted that the department was not justified in invoking extended period, since they are not in possession of any cogent evidences to prove that service tax, so demanded was not levied and paid by reason of fraud, collusion, suppression of fact etc. The appellant had entertained a bonafide belief that no service tax was payable under Port Services on Terminal Charges. As such in the light of the decision of the Hon'ble Supreme Court in the case of Uniworth Textiles Ltd. [2013(288) ELT 161 (S.C.)], the department cannot invoke the suppression clause in the case of ordinary default.

4. Ld.DR justified the impugned orders.

i) He referred to the decision of the Larger Bench of the Tribunal at Chennai in the case of Western Agencies Pvt. Ltd vs. Commissioner of C.Ex., Chennai [2011(22) STR 305 (Tri.-LB)] and submitted that Larger Bench has held that any service rendered within the port area is to be covered within the definition of Port Service.

ii) He also referred to the clarification issued specially in the case of the present dispute by the CBE&C vide letter dated 16.07.2009. CBE&C has given the opinion that the Terminal Handling Services provided by Port towards the Indian Railways is appropriately classifiable under Port Service, since the service is provided within the port area by the port and is in relation to goods.

5. Heard both sides and perused the appeal records.

6. We have perused the copy of the agreement entered into by the appellant with the East Coast Railway. As per the agreement the appellant got the exclusive authority to provide the services of receiving and delivering, transporting booking and dispatching the goods originating in the vessels in the Port and intended for carrying by the neighboring Railways or vice versa. The scope of the agreement is to apply to all description of traffic interchanged between the Port Trust Railway and Southern Eastern Railway. The Port Trust is paid by the Railways for providing such services at the rate notified from time to time known as "Terminal Charges". The dispute is regarding the liability to pay service tax on such Terminal Charges.

7. The adjudicating authority was of the view that the appellant is in the position of a service provider to Railways. Further, he held that all the

services provided by the appellant are in relation to goods and further that such services are provided within the port area. As such he ordered payment of service tax under the category of Port Services.

8. We have perused the opinion given by the CBEC with reference to the present dispute and submitted by Id. DR to the effect that service tax is liable to be paid under the category of Port Services by the present appellant. But such opinion cannot be considered as binding precedent as far as this Appellate Authority is concerned.

9. It is further seen that the Chennai Bench of the Tribunal had occasion to adjudicate the identical dispute in respect of Chennai Port Trust with regard to the Terminal Charges received by them from Southern Railways. This decision is reported as Chennai Port Trust vs. Commissioner of Central Excise [2017 (5) GSTL 394 (Tri.-Chennai)]. The observations of the Tribunal are reproduced below:

"14.*The learned Consultant, Sh. Meenakshi Sundaram has made elaborate arguments which were mainly focused on the additional grounds raised in the miscellaneous application. Under an agreement called "Working Agreement" entered into by assessee with Southern Railway, the assessee undertook the activity of transporting Cargo (both imported and exported) between the dock and the entry point of the Port. It is the Railways who directly undertake transportation from and up to this entry point. Within the Port area, the assessee undertakes the activity of unloading/loading the cargo from/to the vessel to the railway wagons. The wagons are owned by Railways. The consideration for the services for loading/unloading/transportation was collected by assessee by cheque drawn in favour of Railway. The assessee issued the Railway receipts to the cargo owners/customers. The amount collected was then deposited in RBI by assessee in favour of Railways. For such services the assessee received Terminal Handling Charges (THC) which according to department is taxable under Business Auxiliary Service. The 14 services carried out by the assessee are as under :-*

1. *Harbour haulage charges - clause 3(a)*
2. *Level crossing maintenance - clause 4(iii)*

3. Maintenance of lines, sidings and signals and telecommunication installations - clause 5
4. Joint train examination - clause 6(a)(i)
5. Provision of facilities for repair of sick wagons - clause 7(a)
6. Placement of sick wagons and withdrawal of repaired wagons - 7(b)
7. preparation of list of damages and deficiencies of the stock tendered by the railway to the trust - clause 8(a)
8. Intimation of accidents to railway representatives - clause 10(i)
9. Restoration of track - clause 10(ii)
10. Assessment of damages caused due to accident - clause 10(iii)
11. Enquiry as regards accidental claim and compensation - clause 11
12. collection of freight - clause 18
13. Remittance of freight and other charges into the Reserve Bank of India - clause 19
14. Accounts maintenance - clause 20.

15. Out of these services, Sl. nos. 12, 13 and 14, namely the collection of freight, remittance of freight/other charges into the Reserve Bank of India and accounts maintenance, are the main activities according to department which would fall within the definition of Business Auxiliary Service. For better appreciation, the definition of Business Auxiliary Service as it stood from 1-7-2003 to 9-9-2004 and from 10-9-2004 onwards is as under :-

During the period 1-7-2003 to 9-9-2004	During the period from 10-9-2004 to 27-8-2007
(19) "business auxiliary service" means any service in relation to, - (i) promotion or marketing or sale of goods produced or provide by or belonging to the client; or (ii) promotion or marketing of service provided by the client; or (iii) any customer care service provided on behalf of the client; or (iv) any incidental or auxiliary support service such as billing, collection or recovery of cheques, accounts and remittance,	(19) "business auxiliary service" means any service in relation to - (i) promotion or marketing or sale of goods produced or provided by or belonging to the client; or (ii) promotion or marketing of service provided by the client; or (iii) any customer care service provided on behalf of the client; or (iv) procurement of goods or services, which are inputs for the client; or (v) production of goods

<i>evaluation of prospective customer and public relation services,</i> <i>and includes services as a commission agent, but does not include any information technology service.</i> <i>Explanation. - For the removal of doubts, it is hereby declared that for the purposes of this clause "information technology service" means any service in relation to designing, developing or maintaining of computer software, or computerized data processing or system networking, or any other service primarily in relation to operation of computer systems;</i>	<i>(vi) on behalf of the client; or provision of service on behalf of the client; or</i> <i>(vii) a service incidental or auxiliary to any activity specified in sub-clauses (i) to (vi), such as billing, issue or collection or recovery of cheques, payments, maintenance of accounts and remittance, inventory management, evaluation or development of prospective customer or vendor, public relation services, management or supervision,</i> <i>and includes services as a commission agent, but does not include any information technology service and any activity that amounts to "manufacture" within the meaning of clause (f) of section 2 of the Central Excise Act, 1944 (1 of 1944).</i> <i>Explanation.- For the removal of doubts, it is hereby declared that for the purposes of this clause, "information technology service" means any service in relation to designing, developing or maintaining of computer software, or computerised data processing or system networking, or any other service primarily in relation to operation of computer systems;</i>
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16.*The contention of the learned Consultant is that sub-clause (iv) of section 65(19) would be applicable only if the activities are incidental or auxiliary to the activities mentioned in sub-clauses (i), (ii) and (iii) whereas the contention of department is that the activities of billing, collection or recovery of cheques, accounts and remittances mentioned in sub-clause (iv) by themselves would be activities falling under the definition of Business Auxiliary Service. On bare perusal of the definition as noticed above, we have to say that the contention raised by the assessee does not hold water. The definition, as it stood prior to 10-9-2004, expressly mentions the words "billing,*

collection or recovery of cheques, accounts and remittances” which are the services falling under Sl. Nos. 12 to 14 out of the fourteen services rendered by the assessee. It is not necessary that such services should be incidental or auxiliary to the services mentioned in sub-clauses (i), (ii) and (iii). As rightly argued by the department, the services of billing, collection of freight, etc., are stand alone services by themselves and would qualify to be Business Auxiliary Service.

17.*Another contention raised is that the services would be taxable as Business Auxiliary Service only if such services are provided on behalf of the client. That the assessee is not rendering any services on behalf of any client and therefore their activities are not Business Auxiliary Service. We are unable to appreciate this contention. The assessee, is preparing the Railway receipt, billing, collecting the Railway Freight and remitting the same in RBI for Railways. For utilizing the services of Railways within the Port area the customers have to pay charges to Railways. The assessee cannot collect freight from the customers unless authorized by the Railways. For this reason, the issuance of railway receipts and collection of freight is definitely rendered on behalf of Railways and the remittances of the amount in Reserve Bank of India is also rendered on behalf of Railways which would make the services rendered on behalf of client.*

18.*From the above discussions we find that the demand of service tax under Business Auxiliary Service is correct and proper.”*

10. By following the detailed decision of the Tribunal, we are of the view that the activity under taken by the appellant for Railways will be appropriately classifiable under the ‘Business Auxiliary Services’, and liable to payment of service tax.

11. Appellant has made a case on limitation for show cause notice dated 26.10.2006 that they entertained a bonafide belief that the terminal charge collected from ECR was not liable to payment of service tax under Port Service. They have cited that they received the copy of the Railway Board’s Office Memorandum dated 20.04.2005 which was addressed to the CBEC expressing the view that no service tax would be payable on Terminal Charges. They have further submitted that clarification has been issued by the CBEC to Railway Board attaching a copy of the Order passed by the

Commissioner of Service Tax, Chennai in respect of Chennai Port Trust. In this order the activity was ordered for payment of service tax under Business Auxiliary Service. But in the recent decision of the Chennai Bench, the view of the Commissioner, Service Tax, Chennai have been upheld.

12. We have also gone through the decision of the Hon'ble Supreme Court in the case of Uniworth Textiles Ltd. vs. Commissioner of Central Excise, Raipur [2013(288) ELT 161 (S.C.)], in which the Hon'ble Supreme Court has observed that mere non-payment of duties is not equivalent to collusion or willful mis-statement or suppression of facts. By following the decision of the Hon'ble Supreme Court, we are of the view that the demand for service tax has to be restricted to the normal time limit in respect of the initial show cause notice dated 26.10.2006.

13. In view of the above discussions, we uphold the demand for service tax under Business Auxiliary Service in respect of all the impugned orders. But in respect of Appeal No.ST/14/2008, the demand will be restricted normal time limit. We also set aside the penalty under Section 78. Penalty under Section 76 and 77 are, however, upheld. The adjudicating authority is directed to requantify the matter. The interest under Section 75 *ibid* will be payable.

(Pronounced in the open court on 15.11.2018)

S/d.

(P. K. CHOWDHARY)
MEMBER (JUDICIAL)

S/d.

(V.Padmanabhan)
MEMBER (TECHNICAL)