

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
EASTERN ZONAL BENCH: KOLKATA**

REGIONAL BENCH – COURT NO. 1

Service Tax Appeal No. 75868 of 2017

(Arising out of Order-in-Original No. 17/COMMR/STA/KOL/16 dated 01.03.2017 passed by the Commissioner of Service Tax-II Kendriya Utpad Shulk Bhawan (3rd Floor), 180, Santipally, Rajdanga Main Road, Kolkata-700 107)

M/s. India Steamship : **Appellant**
A Division of Chambal Fertilisers & Chemicals Ltd.,
Birla Building, 9th Floor,
9/1 R.N. Mukherjee Road, Kolkata-700001

VERSUS

Commissioner of Service Tax Audit, Kolkata : **Respondent**
Kendriya Utpad Shulk Bhawan,
3rd Floor, 180, Shantipally, Rajdanga Main Road,
Kolkata-700020.

WITH

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Shri K. Satishchandra : **Appellant**
Executive President
M/s. India Steamship
A Division of Chambal Fertilisers & Chemicals Ltd.,
Birla Building, 9th Floor,
9/1 R.N. Mukherjee Road, Kolkata-700001

VERSUS

Commissioner of Service Tax Audit, Kolkata : **Respondent**
Kendriya Utpad Shulk Bhawan,
3rd Floor, 180, Shantipally, Rajdanga Main Road,
Kolkata-700020.

APPEARANCE:

Shri Arvind Baheti, Chartered Accountant for the Appellant

Shri J. Chattopadhyay, Authorized Representative for the Respondent

CORAM:

HON’BLE SHRI ASHOK JINDAL, MEMBER (JUDICIAL)
HON’BLE SHRI K. ANPAZHAKAN, MEMBER (TECHNICAL)

FINAL ORDER NOS.76064-76065/ 2024

DATE OF HEARING: 07.05.2024
DATE OF PRONOUNCEMENT:11.06.2024

ORDER: [PER SHRI K. ANPAZHAKAN]

The present appeal has been filed against the impugned Order-in-Original No. 17/COMMR/STA/KOL/16 dated 01.03.2017 passed by the Commissioner of Service Tax-II, Kolkata.

2. The facts of the case are that Ms. India Steamship (hereinafter referred to as the "**Appellant**") is engaged in the business of transportation of crude oil and petroleum products globally apart from other shipping related activities. The Appellant derives its revenue primarily from the following two sources:

a. Voyage Charter: Transportation of petroleum products through waterways from one port to another for freight.

b. Time Charter: Renting/letting out of ships for a fixed period in lieu of rental income. Export revenue accounts for nearly 80 percent of the Appellant's total Revenue.

2.1. Transportation of goods through waterways was brought under the service tax net with effect from 01 September 2009 vide **Notification No. 26/2009 – ST** dated **19 August 2009**. However, transportation of petroleum products has been specifically exempted vide **Notification No. 30/2009 – ST** dated **31 August 2009**. In so far as time charter is concerned, the Appellant was of the view that the said service is covered under the taxable category "supply of goods for tangible use", obtained registration with the Service Tax Authorities in the year 2008 and had been discharging the applicable tax thereon.

2.2. In the course of its business, the Appellant had incurred various foreign currency expenses towards procurement of goods and services from vendors

located outside India. Investigations were initiated against the Appellant with respect to service tax payment on these foreign currency expenses. The appellant sought advice from a law firm namely, Khaitan & Co regarding the applicability of Service Tax on these payments and as advised them discharged tax under 9 specified taxable under intimation to the authorities vide its letter dated 04 May 2012. Details of the service tax payments made by the Appellant under the 9 different taxable categories are summarized in the table below:

Sl. No.	Taxable Category	Nature of Payments made	Service Tax Paid (Rs.)	Interest (Rs.)
1	Business Auxiliary Service	Brokerage	1,18,96,802	44,87,029
2	On-line Information & Database Access of Retrieval Service	Data Retrieval Charges	1,82,479	68,047
3	Ship Management Service	Annual Fee/Retainer Fee, Navigation Dues	2,84,149	1,25,353
4	Legal Consultancy Service	Professional Service	59,127	13,984
5	Information Technology Service	Audio Visual Training Software	2,61,277	62,296
6	Technical Inspection and Certification Service	Fuel and Kit Testing	2,00,321	18,058
7	Advertising Agency	Advertisement Service	42,775	13,221
8	Business Support Service	Ship Valuation Service	66,000	10,245

9	General Insurance Service	P&I Insurance/ K & R Insurance/ Addl. Peril Insurance	2,06,06,212	66,68,250
Total			<u>3,35,99,142</u>	<u>1,14,66,483</u>

2.2. The service tax paid under the category – “Business Auxiliary Service” was subsequently refunded to the Appellant in light of the order of the Tribunal, Kolkata in Appellant’s own case in Service Tax Appeal bearing No. 76528 of 2016.

2.3. The appellant furnished details of year-wise and vendor-wise foreign currency payments along with the brief nature of expenses to the authorities vide its letter dated 12 September 2012. Based on the year-wise statement of foreign currency expenses furnished by the Appellant, a Show-cause Notice dated 17 October 2012 was issued to the Appellant alleging that all such payments were towards provision of taxable service and that the Appellant violated the provision of Section 66A read with Rule 3(iii) of the Import of Service Rules by not discharging service tax aggregating to Rs.88,75,35,408/- on a reverse charge basis.

2.4. The said Notice was adjudicated by the Ld. Commissioner of Service Tax-II, Kolkata, vide the impugned Order-in-Original dated 01.03.2017, wherein he has confirmed the demands made in the Notice along with interest and imposed equal amount of tax as penalty. Aggrieved against the said order, the appellant has filed the present appeal.

3. The appellant submits that the period involved in this case is from 2007-08 to 2011-12. Under the positive list regime, the onus was upon the Revenue to determine taxability and appropriate classification. In the Notice, if the department fails to classify the specific category under which service tax is to be paid, then the demand is not sustainable. This view has been settled by the decisions of the Hon'ble Supreme Court and the Tribunal in the following cases:

(i) Commissioner of Cus (Import), Mumbai Vs. Dilip Kumar & Co. [2018 (361) ELT 577]

(ii) Ms. Jetlite (India) Ltd. Vs. CCE, New Delhi [2011 (21) STR 119]

(iii) Hindustan Coca Cola Beverages Private Limited Vs. Commissioner of Service Tax [2016 (42) S.T.R. 696 (Tri. - Delhi)]

(iv) United Telecoms Limited Vs. Commissioner of Service Tax [2011 (22) S.T.R. 571 (Tri. - Bang.)]

(v) Reynolds Petro Chem Limited Vs. Commissioner of Central Excise and Service Tax - 2023 (68) G.S.T.L. 292 (Tri. - Ahmd)

(vi) Balaji Enterprises Vs. Commissioner of Central Excise and Service Tax - 2020 (33) G.S.T.L. 97 (Tri. - Del.)

3.1. in the instant case, leave alone classification, revenue has conveniently assumed that all foreign currency payments were towards the provision of taxable service. The Revenue has not examined whether all such services are liable to service tax under Reverse charge mechanism at the hands of the appellant, by applying the Import of Service Rules. Therefore, the demands confirmed in the impugned order wholly based on the basis of assumptions and presumptions is not sustainable.

4. Regarding merits of the case, the appellant submitted the nature of foreign currency expenses and the purpose for which such expenses were incurred, which is summarized below in a tabular form:

<u>Sl. No.</u>	<u>Nature of Payments</u>	<u>Amount of payment made</u>	<u>Remarks</u>
<u>1</u>	Bunker Supplier/Lubricant Supplier/Spares Supplier/Stores Supplier	2,67,00,78,079	Not Taxable – Purchase of Goods
<u>2</u>	Freight and Demurrage	1,63,93,96,862	Non-taxable and/or exempt service
<u>3</u>	Charter Hire	1,43,82,73,849	Non-taxable and/or exempt service
<u>4</u>	Port Disbursement	1,41,39,97,195	Not taxable as service covered under Rule 3(ii) and performed outside India
<u>5</u>	Dry Docking/ Special Survey	26,11,42,230	Not taxable as service covered under Rule 3(ii) and performed outside India
<u>6</u>	Maintenance	4,18,87,361	Not taxable as service covered under Rule 3(ii) and performed outside India
<u>7</u>	Survey fee/Ship Inspection	4,38,76,019	Not taxable as service covered under Rule 3(ii) and

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			performed outside India
<u>8</u>	Communication	3,24,56,339	Non-taxable and/or exempt service
<u>9</u>	Charterer's Expenses Recoverable	2,06,42,015	Non-taxable and/or exempt service
<u>10</u>	Armed Guard – Security guard on board the ship	1,56,25,480	Not taxable as service covered under Rule 3(ii) and performed outside India
<u>11</u>	Vetting Inspection	1,51,37,413	Not taxable as service covered under Rule 3(ii) and performed outside India
<u>12</u>	Insurance Claim Recoverable/Damage Claim/ Cargo Claim	1,30,28,893	Non-taxable and/or exempt service
<u>13</u>	Subscription	28,35,069	Not taxable as service covered under Rule 3(ii) and performed outside India
<u>14</u>	Medical tests	5,39,148	Non-taxable and/or exempt service
<u>15</u>	Rent	1,72,231	Renting of immovable property located outside India
<u>16</u>	Car hire	1,62,155	Not taxable as service covered under Rule 3(ii) and

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			performed outside India
<u>17</u>	Ballast Water Management Summit/Conference Fee	1,33,840	Not taxable as service covered under Rule 3(ii) and performed outside India
<u>18</u>	Filing fee	93,949	Non-taxable and/or exempt service
<u>19</u>	Bunker Convention Certificate	47,724	Not taxable as service covered under Rule 3(ii) and performed outside India
<u>20</u>	Tender fee	4,027	Non-taxable and/or exempt service
<u>21</u>	Photography charges	4,801	Not taxable as service covered under Rule 3(ii) and performed outside India
<u>22</u>	P&I Insurance/ K & R Insurance/ Addl. Peril Insurance	18,99,74,272	Taxable Service. Tax as applicable paid by the Appellant.
<u>23</u>	Brokerage	11,76,14,130	Tax paid by the Appellant but subsequently refunded.
<u>24</u>	Data Retrieval	57,24,367	Taxable Service. Tax as applicable paid by the Appellant.

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<u>25</u>	Annual Fee/Retainer Fee	43,02,951	Tax paid although not payable.
<u>26</u>	Professional charges	31,98,973	Taxable Service. Tax as applicable paid by the Appellant.
<u>27</u>	Audio Visual Training software	18,50,821	Taxable Service. Tax as applicable paid by the Appellant.
<u>28</u>	Ship Valuation	8,43,549	Taxable Service. Tax as applicable paid by the Appellant.
<u>29</u>	Fuel and KIT Testing	5,85,340	Taxable Service. Tax as applicable paid by the Appellant.
<u>30</u>	Navigation dues	3,92,095	Taxable Service. Tax as applicable paid by the Appellant.
<u>31</u>	Advertisement Fee	3,17,424	Taxable Service. Tax as applicable paid by the Appellant.
<u>32</u>	Report Collection charges	1,25,936	Tax payable but not paid.
<u>Total</u>		<u>7,93,44,64,542</u>	

***Services at Sl. Nos. 1 to 21 are non-taxable/exempt/not imported. (Rs. 7,60,95,34,684)**

***Tax on Services at Sl. Nos. 22 to 32 has already been paid by the Appellant (Rs. 32,49,29,858)**

4.1 The appellant submits that the demands in the impugned order has been confirmed on the ground that the services received by the appellant qualify as 'import of services' and accordingly in terms of Section 66A of the Finance Act, the receiver is liable to pay service tax under Reverse Charge Mechanism. Import of Service Rules came into force in terms of Notification No. 11/2006-ST dated 19.04.2006. As per these Rules, in order to determine as to when each of the taxable services specified in Section 65(105) is considered to be provided from outside India and received by a person in India, all the taxable services have been categorized into three broad groups and separate criteria have been evolved for each groups under Rule 3(i) to Rule 3(iii) of the Import of Service Rules, discussed herein below for ease of reference.”

- i. **Immovable property related services:** Specified taxable services relating to immovable property are covered by Rule 3(i) of the Import of Service Rules and these are considered to have been provided from outside India and received in India only if the immovable property is located in India.
- ii. **Performance based services:** Specified taxable services involving physical performance are covered by Rule 3(i) and considered to be provided from outside India and received in India only if such services are partly or wholly performed in India.
- iii. **Recipient based services:** All other specified taxable services not falling under Rule 3(i) and Rule 3(ii) above are covered by Rule 3(iii) and considered to be provided

from outside India and received in India if the recipient of such services is located in India and services are used in relation to business or commerce

4.2. Therefore, to see whether a service is taxable at the hands of service receiver as import of service, the service has to be classified under the above three categories depending on the nature of such service and its classification under the provisions of the Act.

4.3. The appellant submits that most of the services where demand of service tax has been confirmed are 'performance based services' which are liable to pay service tax only if the recipient of service is located in India or wholly performed in India. In this case most of the services are performed outside India and hence they are not liable to service tax as per Rule 3(ii) of the said Rules. They have already paid service tax in respect of all those services which fall under category 3 above. However, the adjudicating authority has categorized all the services under Rule 3(iii) and confirmed service tax, which is legally not sustainable.

4.4. In view of the above explanations, the appellant submits that the demand of service tax confirmed in the impugned order is not sustainable. Accordingly, they prayed for setting aside the same.

5. Regarding the penalty imposed on regarding the penalty imposed on Shri K. Satishchandra, the Appellant stated that the Impugned Order has imposed Penalty under Section 9AA of the Central Excise Act, read with Section 83 of the Finance Act. It is submitted that Section 9AA deals with Offences by Companies and that the above provision indicates that in terms of Section 9AA, a person in charge of

the company can be penalized only if the person was in charge and responsible when the offence was committed; that it must be established that the offence was committed with his consent or negligence of such person. It is submitted that the Show Cause Notice has not invoked the provisions of Section 9AA to impose penalty on the Appellant. Hence, the penalty imposed under Section 9AA has gone beyond the scope of the Show Cause Notice.

5.1. Further, the Appellant submits that being Executive President of the company does not mean that he is responsible for the commission of offence. It is contended that the Department has to prove that the Appellant has purposely committed the offence. In the Impugned Order, there is no such finding that he has intentionally committed the offence. Further, the Appellant submits that he was appointed as Executive President by letter dated 18th October, 2011 and joined Services on 20th October, 2011. This proves that he was not at all in charge during substantial period wherein the offence has been committed. Further, it is their submission that in order to impose Penalty under Section 9AA, it is necessary that the person must be responsible for day-to-day affairs of the company; the appellant submits that he was not responsible for day-to-day affairs of the company during the relevant period and accordingly, pleaded that the Penalty imposed on him is liable to be set aside.

6. The Ld. Departmental Representative reiterated the findings in the impugned order.

7. Heard both sides and perused the appeal documents.

8. We observe that the appellant has furnished details of year-wise and vendor-wise foreign currency payments along with the brief nature of expenses. The Department has considered the entire foreign expenses as charges paid towards provision of taxable service and confirmed service tax aggregating to Rs. 88,75,35,408/- on a reverse charge basis. However, we find that the impugned order has not classified the specific category under which the appellant was liable to pay service tax. In the positive list regime, the onus was on the revenue to determine taxability and appropriate classification. In the present case, we observe that notice fails to classify the specific category under which the appellant is liable to pay service tax. In the absence of such specific classification, the demand is not sustainable. This view has been taken by the Tribunal in the case of ***Ms. Jetlite (India) Ltd. Vs. CCE, New Delhi [2011 (21) STR 119]***. The relevant extracts of the judgement of the Tribunal is reproduced below:

*"88. The contention that the appellants have not produced any evidence to show that logo did not promote the business is totally devoid of substance in as much as that **the burden to prove the classification and to bring the assessee within the net of tax primarily lies upon the department. Failure of the department to establish the basic ingredient to prove the charge against the assessee can neither shift the burden, nor can give any advantage to the department.**"*

(emphasis supplied)

8.1. In the case of ***United Telecoms Limited Vs. Commissioner of Service Tax [2011 (22) S.T.R. 571 (Tri. – Bang.)]***, it has been observed as under:

"6. We find that no demand can be confirmed against any person towards service tax liability unless he/it is put on notice as to its exact liability under the statute. In the show-cause notice basic to the proceedings, the impugned activities were proposed to be classified under BAS and BSS. This proposal was confirmed by the Original Authority. We find that this order is not in accordance with the law. The impugned order held that UTL provided services on behalf of the client i.e. Director, e-Seva and sustained the demand. We find that under BAS, there are seven sub-clauses. Demand under sub-clause (vii) could be on activities relatable to either one of the preceding six sub-clauses. Therefore, if a notice issued proposing demand under BAS, the noticee will not be aware as to the precise ground on which tax is proposed to be demanded from him unless the sub-clause is specified. In the instant case, service tax was proposed to be demanded for an activity under BAS and BSS. Under BSS also several activities are listed as exigible under that head. In the absence of proposal in the show-cause notice as to the liability of the assessee under the precise provision in the Act, we find the demand to be not sustainable."

8.2. In the present case, we observe that the Notice failed to classify the specific category under which service tax is to be paid by the appellant. Accordingly, we hold that the demands of service tax confirmed in the impugned order is not sustainable on this count alone.

9. Regarding the merits of the case, we observe that the demands in the impugned order has been confirmed on the ground that the services received by the appellant qualify as 'import of services' and accordingly in terms of Section 66A of the Finance Act, the receiver is liable to pay service tax under Reverse Charge Mechanism.

9.1. The appellant submits that most of the services where demand of service tax has been confirmed are 'performance based services' which are liable to pay service tax only if the recipient of service is located in India or wholly performed in India. In this case, most of the services are performed outside India and hence they are not liable to service tax as per Rule 3(ii) of the said Rules. They have already paid service tax in respect of all those services which fall under category 3 mentioned in Para 4.1 above. However, the adjudicating authority has categorized all the services under Rule 3(iii) and confirmed service tax, which is legally not sustainable. Thus, we have to examine the service in relation to Import of service Rules, to determine the liability of service tax.

9.2. We observe that out of the total foreign currency payments, Rs.2,67,00,78,079/- pertains to expenditure incurred towards Bunker/Lubricant/Stores and Spares Supply. Bunker is the fuel which is used for running of ships and the amount paid to bunker supplier pertain to purchase of Fuel/Diesel. Such transactions which are purely in the nature of purchase of goods cannot be subjected to service tax. We observe that the Ld. Adjudicating Authority has travelled beyond the scope of the show cause notice to classify the supply of bunker as Steamer Agent Service. Since the supply of bunker has been made outside India, we hold that the same does not qualify as import of service. Further, it is a settled principle in law that Adjudicating Authority cannot travel beyond Show Cause Notice as held by this Tribunal in the case of ***Ganpati India International Private Limited Vs. CCE, Bolpur [2014 (35) S.T.R. 709 (Cal.)]***. Accordingly, we hold that the demand of service tax confirmed in the impugned order on this count is not sustainable.

9.3. We observe that foreign currency payment amounting to 1,63,93,96,861/- has been incurred towards Freight and demurrage charges. The freight is paid for transportation of Oil by ship from outside India to India or vice versa and Demurrage is an ancillary cost that represents liquidated damages for delay in discharge or loading of cargo. Transportation of goods through waterways was introduced as a taxable category with effect from 2009 vide Notification No. 26/2009-ST dated 19 August 2009. However, transportation of petroleum products was specifically exempted by Notification No. 30/2009-ST dated 31 August 2009. We observe that Demurrage charges were in the nature of penal charges paid by the Appellant. Such penal charges were not for any services received by the Appellant. Therefore, it is not leviable to Service tax. We observe that this issue has been clarified by Board Circular No. 121/2/2010 dated 26.04.2010. This view has also been taken by the Tribunal in the case of ***Tiger Logistics (India) Limited Vs. Commissioner of Service Tax – II, Delhi [2022 (63) G.S.T.L. 337 (Tri. – Delhi)]***. Accordingly, we hold that the demand of service tax confirmed on these foreign currency payments is not sustainable.

9.4. We observe that foreign currency payment amounting to Rs.1,43,82,73,848/- pertains to Charter Hire expenses. The Charter hire expenses have been paid for hiring vessels. The vessels are supplied to us for a specific time with no legal right of effective control and possession. Such payments could only be tested against the taxable category "Supply of Tangible goods for use service" – Section 65(105)(zzzzj) which is a performance-based service and therefore could not be taxed in India as the vessels were located outside India time Charter contracts are excluded from the ambit of the definition of the service tax, as held by the Tribunal

in the case of ***Petronet LNG Limited Vs. CST, New Delhi [2016 (46) S.T.R. 513 (Tri. – Del.)]***.

9.5. We observe that foreign currency payment amounting to Rs.1,41,39,97,195/- has been incurred under the category of 'Port Disbursement'. The Appellant submits that shipping business is globally functional, and it is not possible for the ship owner to establish an office at every port. Hence, in such a situation, agents at ports are appointed by the ship owners to run the business in other countries. Depends upon the nature of work performed by these agents, such works can be categorized either under the taxable category of "Port Service" as defined under Section 65(105)(zn) or under "Steamer Agent Service" as defined under 65(105)(i). We observe that both 'Port Service' and 'Steamer Agent Service' are performance-based services and therefore could not be taxed in India as the services were availed outside India. Accordingly, we hold that the demand of service tax confirmed on these foreign currency payments is not sustainable.

9.6. We observe that foreign currency payment amounting to Rs. 26,11,42,230/- incurred towards dry docking / special survey. The appellant submits that as per SOLAS formulated by the International Maritime Organisation (IMO), Dry-docking must be compulsorily carried out twice in every five years. Dry Docking is a technique used to remove a ship from the water so that the underwater portion of it may be inspected, repaired, maintained and/or altered. Such payments could only be tested against the taxable category "Maintenance or Repair Service" - Section 65(105)(zzg) which is a performance-based service and therefore could not be taxed in India as the services were availed outside India. We observe that the Id. adjudicating authority has not categorized this under any specific category of service. We agree with the submission of the

appellant that the expenses incurred can be categorized under the taxable category "Maintenance or Repair Service" - Section 65(105)(zzg) which is a performance-based service and therefore could not be taxed in India as the services were availed outside India. Accordingly, the demand of service tax confirmed under this category is not sustainable.

9.7 We observe that foreign currency payment amounting to Rs.74,18,87,361/- has been incurred towards ship repairs and maintenance. We observe that such payments could only be tested against the taxable category "Maintenance or Repair Service" - Section 65(105)(zzg) which is a performance-based service and therefore could not be taxed in India as the services were availed outside India. Accordingly, we hold that the demand of service tax confirmed on these foreign currency payments is not sustainable.

9.8. We observe that foreign currency payment amounting to Rs.4,38,76,019/- has been incurred survey and ship inspection. We observe that obtaining these inspections/certifications is a statutory requirement and therefore not taxable as held in the case of *Harshita Handling v. Commissioner of Central Excise, Bhopal* [2010 (19) S.T.R. 596 (Tri. – Del.)]. Accordingly, we hold that the demand of service tax confirmed on these foreign currency payments is not sustainable.

9.9. We observe that foreign currency payment amounting to Rs 18,99,74,272/- has been incurred towards P&I Insurance/K&R Insurance/Addl. Peril Insurance. We observe that Insurance was taken from parties outside of India towards covering undeterminable risks e.g. third-party liabilities that Hull & Machinery insurer do not cover and K&R insurance for transiting HRAs. The appellant submitted that they have considered this as taxable Service and Tax has been paid under "General Insurance Service" along with applicable interest.

9.10. We observe that foreign currency payment amounting to Rs 11,76,14,130/- has been incurred towards Brokerage. The appellant submits that the shipping companies engages third parties known as ship brokers who act as intermediaries between ship owners who wants its ship to be employed and charterer who wants a particular ship for transportation of his goods and pays brokerage to such agents. We observe that the Appellant paid the tax on the said payments under the taxable category "**Business Auxiliary Service**" which was subsequently refunded pursuant to the order of the CESTAT, Kolkata in Appellant's own case in ***Service Tax Appeal Bearing No. 76528 of 2016.***

9.11. Thus, we observe that most of the services where demand of service tax has been confirmed are 'performance based services' which are liable to pay service tax only if the recipient of service is located in India or wholly performed in India. In this case, we observe that most of the services are performed outside India and hence they are not liable to service tax as per Rule 3(ii) of the said Rules. We also observe that the appellant have already paid service tax in respect of all those services which fall under category 3 (as listed in Sl. Nos. 22 to 32 of the Table mentioned in paragraph 4 above). However, the Id. adjudicating authority has categorized all the services under Rule 3(iii) and confirmed service tax, which is legally not sustainable. In view of the above discussions, we hold that the demands confirmed in the impugned order are not sustainable on merits also.

10. As regarding the penalties imposed of Shri K. Satishchandra, we observe that the Impugned Order has imposed Penalty under Section 9AA of the Central Excise Act read with Section 83 of the Finance Act. Section 9AA deals with Offences by Companies. A perusal of the above provision

indicates that in terms of Section 9AA, a person in charge of the company can be penalized only if the person was in charge and responsible when the offence was committed. It must be established that the offence was committed with his consent or negligence of such person. The department has not brought in any such evidence to substantiate the allegation against the Director. We also observe that the Show Cause Notice has not invoked the provisions of Section 9AA to impose penalty on the Appellant. Hence, we are of the view that the penalty imposed under Section 9AA has gone beyond the scope of the Show Cause Notice.

10.1. Further, we observe the appellant Shri K. Satishchandra was appointed as Executive President by letter dated 18th October, 2011 and joined Services on 20th October, 2011. This proves that he was not in charge of the affairs of the company during substantial period wherein the offence has been committed. Further, in order to impose Penalty under Section 9AA, it is necessary that the person must be responsible for day-to-day affairs of the company. However, we observe that there is no evidence brought on record to establish that the appellant was responsible for day-to-day affairs of the company during the relevant period. Accordingly, we hold that the penalty imposed on him is not sustainable and hence we set aside the same.

11. In view of the discussions above, we hold that the demands confirmed in the impugned order are not sustainable. Accordingly, we set aside the same. Since the demand itself is not sustainable, the question of demanding interest and imposing penalty on the appellant does not arise.

12. In view of the discussions above, we set aside the demands confirmed in the impugned order and allow the appeal filed by the appellants.

(Order Pronounced in Open court on 11.06.2024)

(ASHOK JINDAL)
MEMBER (JUDICIAL)

(K. ANPAZHAKAN)
MEMBER (TECHNICAL)

RKP