IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI
COURT No. I

APPEAL No. ST/89404/2014

(Arising out of Order-in-Original No. PUN-EXCUS-001-COM-015-14-15 dated 16.7.2014 passed by Commissioner of Central Excise, Pune-I)

Sanghvi Movers Ltd. **Appellant**

Vs.

Commissioner of Central Excise, Pune-I **Respondent**

Appearance:

Shri M.H. Patil, Advocate, for appellant
Shri M.K. Sarangi, Joint Commissioner (AR), for respondent

CORAM:

Hon'ble Dr. D.M. Misra, Member (Judicial)
Hon'ble Mr. Sanjiv Srivastava, Member (Technical)

Date of Hearing: 13.7.2018
Date of Decision: 13.7.2018

ORDER No. **A/87199/2018**

Per: Sanjiv Srivastava

The appeal is directed against order in original No PUN-EXCUS-001-COM-015-14-15 dated 16.07.2014.

2.0 Appellants are providing taxable services under the category of "Supply of Taxable Goods Services". They are registered and had paid service tax under the said category in respect of the supplies made. In case of supplies made to SEZ units/ Developers / Main

Contractors etc for development of SEZ Units, they had claimed exemption under Notification No 9/2009-ST dated 3.3.2009 & 17/2011-ST dated 01.03.2011. A show cause notice dated 19.12.2013, was issued to them demanding Service tax to the tune of Rs 2,61,20,477/- for the period 01.04.2009 to 31.03.2012, along with interest, by denying the exemption under the said two notifications in respect of supplies made to SEZ units/ developers/ main contractors. The show cause notice has been adjudicated by the Commissioner and following order passed:-

"21.1 I determine and confirm the demand of service tax amounting to Rs 1,04,29,326/- (Rupees One Crore Four Lakhs Twenty Nine Thousand Three Hundred and Twenty Six Only), as detailed in Annexure A to the Show Cause Notice dated 19.12.2013, under Section 73(2) of the Finance Act, 1994. I further direct the assessee i.e. M/s Sanghvi Motors Ltd., Pune, to pay the aforesaid demand forthwith.

21.2 I determine and confirm the demand of service tax amounting to Rs 1,56,91,121/- (Rupees One Crore Fifty Six Lakhs Ninety One Thousand One Hundred and Twenty One Only), as detailed in Annexure A to the Show Cause Notice dated 19.12.2013, under Section 73(2) of the Finance Act, 1994. I further direct the assessee i.e.

M/s Sanghvi Motors Ltd., Pune, to pay the aforesaid demand forthwith.

21.3 I order recovery of interest, at the appropriate rate(s) as applicable during the relevant period, on demand of service tax as confirmed at paras 21.1 and 21.2 above, under the provisions of Section 75 ibid.

21.4 I impose a penalty of Rs 40,000/- (Rs 5,000/- each for every half yearly ST-3 return for the period from April 2009 to March 2011 and Rs 10,000/- each for the period April 2011 to March 2012), for their failure to give correct facts and figures in the service tax returns filed by them during the period April 2009 to March 2012, under the provisions of Section 77(2) of the Act.

21.5 I impose a penalty of Rs 2,61,20,477/- (Rs 5,000/- each for every half yearly ST-3 return for the period from April 2009 to March 2011 and Rs 10,000/- each for the period April 2011 to March 2012), for their failure to give correct facts and figures in the service tax returns filed by them during the period April 2009 to March 2012, under the provisions of Section 77(2) of the Act.

21.6 However, since penalty is being imposed under Section 78/78(1) of the Act, I refrain from imposing separate penalty under Section 76 of the Act in view of provisions of fifth proviso to Section 78 and/ or second proviso to Section 78(2) of the Act, as the case may be, *21.7 I further give an option to the assessee, under the first proviso to Section 78 of the Finance Act, 1994 and/ or second proviso to Section 78(10 of the Act, as the case may be, to pay the reduced 25% of the penalty amounts as imposed under section 78/ 78(1) of the Act in para 21.5 above, provided the assessee pays the entire amount of Service Tax, as determined/ confirmed in para 21.1 and 21.2 above, along with interest payable thereon as ordered in para 21.3 above as well as the 25% penalty, within 30 days of communication of this order."*

3.0 Being aggrieved by the order Appellants have filed this appeal on various grounds mentioned below:

i. the services have been provided by the appellants which are wholly consumed within the Special Economic Zone and hence benefit of exemption under notifications 9/2009-ST dated 3.3.2009 and Notification No 17/2011-ST dated 1.03.2011 is admissible to them.

ii. In case of M/s JSL who were denotified as SEZ, service tax has been discharged by JSL on all the services availed by them from the Appellants hence demand of Rs 40,69,263 is not sustainable;

iii. Services provided by them to SEZ or a unit in SEZ is deemed export as per the provisions of Section 2(m)(ii) of the SEZ Act, 2005 and as per Rule 31 of the SEZ Rules, 2006, thus the appellants are exempt from payment of service tax on the services which are used or provided to a unit in SEZ.

iv. Exemption under the notifications 9/2009-ST is admissible to them as sub contractors of Contractors of SEZ Unit/ developer who has placed order on them for supply of the said cranes which were to be ultimately by SEZ Units/ developers in SEZ only.

v. Since there is no suppression or fraud in the case with intent to evade payment of tax, extended period of limitation is not invokable;

vi. Since there I no liability for payment of service tax no penalty should be imposed on them.

4.0 Arguing for the Appellants, Sh M H Patil, Learned Advocate submitted

i. The entire services of supply of tangible goods (Cranes) were used by the SEZ units/ Developers/ contractors within the SEZ unit as is evident from the Purchase Orders/ Contracts/ Certificates/ Declarations of the SEZ units/ Developers/ Contractors; tax invoices of the Appellant, log books duly and jointly signed by the representative of the Appellants and SEZ units/ Devceloper/ Contractors.

ii. The demand has been made in respect of the supplies made to the party's as indicated in table 1 below:

Sno	Name	Status	Amount
1	M/s Tril Info Park Ltd	SEZ Unit	908650
2	M/s JSL	SEZ Unit	4069263
3	Vedanta Aluminum Ltd.	SEZ Unit	4925542
4	M/s Wardha Power Co Ltd	SEZ Unit	525871
5	M/s Alstom Projects India	Contractor	4264853
6	M/s BHEL	Contractor	559641
7	M/s Punj Lloyd Ltd.	Sub Contractor	2359499
8	M/s Samsung Engg Co Ltd	Contractor	5408244
9	M/s Sichuan Electric Power Design	Contractor	3086009
	Total		26107572

iii. Since the issue is in respect of supplies made to SEZ Units, the exemption under SEZ Act, 2005 SEZ Rules, 2006 would prevail over the service tax laws.

iv. SEZ Units/ Developers are standalone units and did not have any other business or operations.

v. He relied upon the following decisions in his favour

a. Jindal Stainless Limited [2017 (51) STR 130 (DEL)]

b. Fedco Paints and Contract [2017 (3) GSTL 364 (T)]

c. Reliance Port & Terminals [2015 (40) STR 200 (T)]

d. Norasia Containers Lines [2011 (23) STR 295 (T)]

e. Reliance Industries Ltd [2016 (410 STR 465 (T)]

f. Barclays Technology Centre Ltd. [2015 (38) STR 35 (T)]

g. Intas Pharma Ltd. [2013 (32) STR 543 (T)]

h. Sudhir Chand Jain [2018 (8) GSTL 302 (T)]

i. Tata Consultancy Services Ltd. [2013 (29) STR 393 (T)]

v. The entire demand is hit by limitation as they had not suppressed anything from the department with intent to evade payment of tax.

vi. They were audited during the period 29.05.2009 to 2.06.2009 and the audit party didn't raised any objections after auditing the records for the period January 2008 to April 2009.

vii. It was after second audit conducted in April 2012, for the period April 2009 to March 2011 that this show cause notice has been issued.

viii. They were filing the periodical ST-3 returns clearly showing the supply of crane to SEZ Unit/ Developers/ Contractors. Since the entire facts were disclosed by them in the ST-3 returns extended period of limitation is not invokable in this case.

xi. In any case if the tax is demanded from them, then the same will be admissible as refund to the SEZ/ Unit developer.

x. Since the issue is in respect of interpretation of exemption notification, no penalty is imposable.

xi. Appeal filed should be allowed.

5.0 Arguing for the Revenue, Shri M K Sarangi, Joint Commissioner, Authorized representative submitted that-

i. During course of audit it was found that the services in respect of appellant were claiming the benefit of exemption under notification 9/2009-ST or 17/2011-ST was not admissible to them as these service were not provided to SEZ unit/ Developer, but to Contractor/ Sub Contractor of the said unit or developer.

ii. No evidence has been provided by the appellant that the services provided by them to SEZ unit or entity in SEZ been consumed entired within the SEZ.

iii. In respect of services provided to contractor or sub contractor of the SEZ Unit/ Developer, the benefit of exemption shall not be available, because there is privity of contract between contractor and sub contractor, and not between the SEZ unit/ developer and the appellant who are providing the services to sub contractor. The notification No 9/2009-ST as amended by Notification No 15/2009-ST and Notification No 17/2011-ST give exemption from the payment of service tax to SEZ Unit/ Developer, who can claim tax concession either by way of upfront exemption or default option by claiming refund. Since Appellants have claimed the exemption under this notification and same is not admissible to them demand has been correctly confirmed against them.

iv. Further he relied upon the following case laws in his support-

i. Gamon India Ltd Vs CC Mumbai [2011 (269) ELT 289 (SC)]
ii. Tata Steel
iii. Neminath Fabrics [2010-256-HC-369-GUJ]
iv. Lakhan Singh Vs CCE [2016-46-STR-297-T-Del]
v. Vodafone Digilink Ltd [2013(29) STR 229 (Raj)]
vi. Touraid Travel Services {2014 (35) STR 234 (ALL)]

6.0 We have considered the submissions made in appeal and during the arguments. Issue involved is in respect of admissibility of exemption in respect of supplies made to SEZ unit/ developer.

6.1 Para 2.3 & 2.4 of the show cause notice specifying the contraventions for which exemption claimed is sought to be denied are reproduced-

"2.3 It was observed that the services provided by the assessee are consumed outside the SEZ, and hence the assessee is liable to pay Service Tax on the services provided to SEZ. The assessee has recovered an amount of Rs 5,54,99,316/- during the year 2009-10 and Rs 4,57,56,284/- during the year 2010-11 towards provisions of such services to the SEZ and the total

Service Tax liability thereon works out to Rs 1,04,29,326/- (including cesses) which assessee has failed to discharge.

2.4 Further, the Notfn No 9/2009-ST Dated 03-03-2009, as amended, exempts services provided by a contractor and received by a developers or unit of SEZ. It is seen that assessee is supplying the services not to a developer or the unit in SEZ but to a contractor who in turn provides the said services to the developer or SEZ unit. The services provided by the assessee are not directly received by the developer or SEZ unit, and therefore the assessee is not eligible to avail exemption from Service Tax under Notification No 9/2009-ST, dated 03-03-2009, as amended."

6.2 Annexure A to the Show Cause Notice gives the details of demand made as follows:

Table: Reasons for Demands			Amount in Rs
Year	Value of Services provided to SEZ	Service Tax + Cesses	Reasons/ Contraventions
1	**2**	**3**	**4**
2009-10	5,54,99,316	57,16,430	The services provided are not wholly consumed within the SEZ. so benefit of Notification not admissible
2010-11	4,57,56,284	47,12,896	
Sub total	**10,12,55,602**	**1,04,29,329**	
2009-10	4,80,10,101	49,45,040	The services provided are not provided directly to developer or SEZ Unit, so benefit of Notification not admissible
2010-11	9,16,84,936	94,43,548	
2011-12	1,26,45,951	13,02,533	
Sub total	**15,23,40,988**	**1,56,91,121**	
Total	**25,35,96,588**	**2,61,20,447**	

6.3 Thus it is seen that the benefit of the exemption is sought to be denied in respect of those services which have been-

i. Not wholly consumed within the SEZ;
ii. Provided to the contractors providing the services to SEZ unit or developer.

6.4 From the order of Commissioner it is evidenced that exmption is denied in respect of the services provided to,

i. M/s Tril Info Park Ltd (IT/ ITES SEZ Deveoper), Chennai on the ground that the services have not been wholly consumed within the SEZ, because the accompanying invoices show the site as “TRIL Park Tarmani” whereas the accompanying log sheets show the site as “Tril Info Park”
ii. M/s JSL Ltd SEZ Developer Bhubaneshwar, even though the services were provided by the Appellants to the SEZ Developer when he was notified as SEZ Developer, subsequently he was de-notified and consequently services provided were not wholly consumed in SEZ.
iii. Vedanta Aluminum Ltd SEZ Unit as the services provided has not been wholly consumed in SEZ as these services have been provided to a unit who

owns or carry on any business other than the operations in the SEZ.

iv. Wardha Power Company Pvt Ltd SEZ Unit- The services provided were not included in the list of approved services during the period 2009-10 and 2010-11, and neither the name of appellant was mentioned in the list of approved service providers. Further the services were not wholly consumed in the SEZ

v. In respect of the remaining Commissioner observed that in these cases the services were not provided directly to the SEZ Unit or developer but to Contractor providing the services to the SEZ unit or developer as indicated in table below:

Table 3: Services provided through Contractor to SEZ Unit/ Developer		
S No	Contractor	SEZ Unit/ Developer
1	M/s Alstom Projects India	Vedanta Aluminium Ltd
2	M/s BHEL	India Bulls Power Ltd Sinnar
3	M/s Danco Enterprises	ONGC Petro Additions Ltd
4	M/s Punj Lloyd Ltd.	ONGC Petro Additions Ltd
5	M/s Samsung Engg Co Ltd	ONGC Petro Additions Ltd
6	M/s Sichuan Electric Power Design	Wardha Power Company Ltd

7.0 Hon’ble Delhi High Court has in case of Jindal Stainless Limited Vs Un ion Of India [2017 (61) STR 130 (Del)] held as follows:-

"*29. Before proceeding further, it would be relevant to reproduce Section 26(1)(e) of the SEZ Act, 2005 and Rule 31 of SEZ Rules, 2006. Section 26(1)(e) reads as under:*

Section 26. Exemptions, drawbacks and concessions to every Developer and entrepreneur. –

(1) Subject to the provisions of sub-section (2), every Developer and the entrepreneur shall be entitled to the following exemptions, drawbacks and concessions, namely :—

(a) ……

(e) Exemption from service tax under Chapter V of the Finance Act, 1994 (32 of 1994) on taxable services provided to a Developer or Unit to carry on the authorised operations in a Special Economic Zone;

(f) ……….

(2) The Central Government may prescribe the manner in which, and the terms and conditions subject to which, the exemptions, concessions, drawback or other benefits shall be granted to the developer or entrepreneur under sub-section (1).

Rule 31 of the Special Economic Zone Rules, 2006 provides as under : "Rule 31 The exemption from payment of service tax on taxable services under section 65 of the Finance Act, 1994 (32 of 1994) rendered to a Developer or a Unit (including a Unit under construction) by any service provider shall be available for the authorised operations in a Special Economic Zone."

30 It is contended by the counsel for respondent that since the expression “authorized operations” refers to those operations which are to be carried out inside the

*Special Economic Zone, hence the words "in Special Economic Zone" as they appear in Section 26 and Rule 31 are to be read with "Taxable services" so as to mean that the exemption is available only with regards to to those services that are rendered in special economic zone. The aforementioned argument of the counsel for respondent has nio basis. It is well established law that statues have to be given strict interpretation. If the words of as tatue are precise and clear, they must be accepted as declaring the express intention of the legislature. It is equally well settled that a subject is not to be taxed unless the words of a taxing statue unambiguously impose tax on him. In Ajmera Housing Corpn Vs CIT reported at (2010) * SCC 723 the Apex Court observed as follows:*

"*36 It is trite law that a taxing statue is to be construed strictly. In a taxing Act one has look merely at what is said in the relevant provision. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. There is no room intendment. There is no equity about tax (See Cape Brandy Syndicate vs IRC (1921) 1 KB 64 and Federation of A P Chambers of Commerce & Industry Vs State of A P (2000 6 SCC 560)) In interpreting a tax taxing statue, the court must look squarely at the words of the statue and interpret them. Considerations of hardship, injustice and equity are entirely out of place in interpreting a taxing statue {Also see CST vs Modi Sugar Mills Ltd. AIR 1961 SC 1047]*"

31. A similar view was expressed in Hansraj & Sons Vs State of J & K reported at (2002) 6 SCC 227. The relevant portion reads as under:

"*22. A Constitution Bench of this Court in the case of A.V. Fernandez v. The State of Kerala, 1957 SCR 837 observed:*

"It is no doubt true that in constructing fiscal statute and in determining the liability of a subject to tax one must have regard to the strict letter of the law and not merely to the spirit of the statute or the substance of the law. If the Revenue satisfies the Court that the case falls strictly within the provisions of the law, the subject can be taxed. if, one the other hand, the case is not covered within the four corners of the provisions of the taxing statute, no tax can be imposed by inference or by analogy or by trying to probe into the intentions of the legislature and by considering what was the substance of the matter. We must of necessity, therefore, have regard to the actual provisions of the Act and the rules made thereunder before we can come to the conclusion that the appellant was liable to assessment as contended by the Sales Tax Authorities."

In that case this Court noted with approval, the following observation of Lord Russel of Killowen in Inland Revenue Commissioner v. Duke of Westiminser [1936] A.C.I, 24:

"I confess that I view with disfavour the doctrine that in taxation cases the subject is to be taxed if in accordance with a Court's view of what it considers the substance of the transaction, the Court thinks that the case falls within the contemplation or spirit of the statute. The subject is not taxable by inference or by analogy, but only by the plain words of a statute applicable to the facts and circumstances of his case."

The observations of Lord Russel in the aforementioned case were also referred by the Privy Council in the Bank of Chettinad v. Income Tax

Commissioner . The Privy Council did not accept the suggestion that in revenue cases "the substance of the matter" may be regarded as distinguished from the strict legal position.

23. A similar view was taken in Commissioner of Wealth Tax. Gujarat-III. Ahmedabad v. Ellis Bridge Gymkhana , in which it was observed:

"5. The rule of construction of a charging section is that before taxing any person, it must be shown that he falls within the ambit of the charging section by clear words used in the section. No one can be taxed by implication. A charging section has to be construed strictly. If a person has not been brought within the ambit of the charging section by clear words, he cannot be taxed at all."

24. Again in the case of Diwan Bross v. Central Bank of India, Bombay and Ors. , a three Judge bench of this Court, construing the principles of interpretation of fiscal statutes, quoted with approval, the observations in A.V. Fernandez v. State of Kerala (supra), and in State of Maharashtra v. Mishri Lal Tarachand Lodha, , in which it was observed:

"The Act is a taxing statute and its provisions therefore have to be construed strictly, in favour of the subject-litigant".

25. Following the ratio in the afore-mentioned decisions it was observed:

"These observations manifestly show that the courts have to interpret the provisions of a fiscal statute strictly so as to give benefit of doubt to the litigant. The principles deducible from the decisions referred to above are well established and admit of no doubt."

26. From the discussions in the foregoing paragraphs, the position that emerges is that the Notification No. SRO 348 in which the additional toll tax was levied was clearly *beyond the purview of Section 3 of the Act. Further, the finding of t he High Court that in the context of facts and circumstances of the case, processing of the dry fruits like almonds, walnuts and walnut kernels did not come within the expression 'manufacture' cannot be said to be erroneous. The judgment of the High Court upholding the levy of additional toll tax in the case is also unsustainable."*

32. A plain grammatical reading of Section 26(1)(e) of the SEZ Act, 2005 makes it clear that taxable services provided by a service provider to a Developer or a Unit/entrepreneur to carry out authorised operations in a Special Economic Zone are exempted from levy of service tax. Similarly, a bare perusal of Rule 31 of the SEZ Rules, 2006 make it abundantly clear that the exemption from service tax is available on services rendered to a developer or a unit/entrepreneur for carrying out authorised operations. ***Further, from a combined reading of Section 26(1)(e) with Rule 31 makes it evident that the only condition that is required to be satisfied to avail the service tax benefit under the said provisions is that the services must be rendered for the purpose of carrying out the "authorised operations in a special economic zone". Had it been the intention of the legislature that only those services are exempted from levy of service tax that are rendered within the special economic zones, the legislature would have categorically and clearly stated so in the statute. In the absence of such express intention, the court cannot add words to the statute to lead to an interpretation which could not have been the intention of the legislature."***

8.0 In case of Intas Pharma Ltd. Vs Commissioner Service Tax Ahmedabad [2013 (32) STR 543 (T-Ahmd)] it was observed:

"6. It requires to be noticed that exercising powers under Section 93(1) of the act, Government issued a Notification exempting the taxable services specified in Section 65(105) of the Act, when provided in relation to authorized operations in Special Economic Zone and received by the developers of the units in the SEZ, whether or not the said taxable services are provided inside the SEZ, from the whole of the Service Tax leviable thereon under Section 65 of the Act. Clause 'c" of this Notification (15/2009-ST) substitutes clause "c" of the earlier Notification No 9/2009-ST dated 3..03 2009. Clause "c" of the Notification No 9/2009-ST provides that the exemption claimed by the developer or units of SEZ shall be provided by way of refund of Service Tax of the specified services used in relation to authorized operations in the SEZ. Notification No 9/2009-ST was issued on 3.3.2009 in supersession of an earlier Notification No 4/2004-ST. Subsequently by Notification No 15/2009-ST dated 20.05.2009 amendments to earlier Notification (9/2009-ST) were issued. Accordingly, para 'c" of the earlier Notification (9/2009'ST) was substituted to read that the exemption claimed by the developer or units of SEZ shall be provided by way of refund of Service Tax paid on the specified services used in relation to the autrhorized operations in the SEZ, except for services wholly consumed within the SEZ.

7. We notice that the Special Economic Zone Act, 2005 was enacted providing for SEZ within the territory of India and for providing inter ali immunities/ exemptions from taxes/ duties/ cesses. Section 7 of the 2005 Act *enjoins that any goods or services exported outside or imported into, or procured from the domestic tariff area, by aunit in SEZ or a developer shall subject to such terms and conditions and limitations, as may be prescribed be exempt from payment of taxes/ duties/ cesses under all enactments specified in the First Schedule. The First Schedule does not enumerate the Act (Finance Act, 1994) as among the enactments in respect of which exemption from taxes/ duties/ cesses is available under section 7 of the 2005 Act. However Section 26(1)(e) enacts that subject to the provisions of sub section (2) thereof, every developer and entrepreneur shall be entitled to exemption from Service Tax under Chapter V of the Act on taxable services provided to a developer or unit to carry on the authorized operations in a SEZ.*

8. In view of the legislated exemption supra and since the provisions of 2005 Act are provided an overriding effect vide Section 51; and absent any provision in the Act which eclipses the overarching trajectory of the 2005 Act, the immunity to Service Tax in respect of taxable services provided in relation to SEZ is a legislatively enjoined immunity. Therefore, any Service Tax paid/ remitted by a service provider is liable to be refunded to the provider who has remitted Service tax in relation to taxable services provided to a developer or unit, to carry on authorized operations in a SEZ.

9. ……..

10. In so far as Notification No 15/2009-ST is concerned, Para 'c" of the earlier Notification No 9/2009-ST was substituted. The current requirement is that the exemption claimed by the developer or the units of SEZ shall be provided by way of refund of Service Tax paid on the specified services used in relation to the authorized *operations in the SEZ, except for services consumed wholly within the SEZ.*

11. On true and fair construction of Notification Nos. 9/2009 and 15/2009 issued under Section 93(1) of the Act, considered in the light of the overarching provisions of Sections 7 and 26(e) of the 2005 Act, the conclusion appears compelling that neither Notification Nos. 9/2009 nor 15/2009 disentitle immunity to Service Tax enjoined by the provisions of the 2005 Act. It therefore appears that Notification Nos. 9/2009 and 15/2009 merely contour the process by which the benefit of exemption/immunity to tax is operationalised. Notification Nos. 9/2009 and 15/2009 have provided a facilitative regime whereby a developer or units of SEZ, as recipients of taxable service are enabled the facility of claiming refund of Service Tax, remitted by taxable service providers in relation to the taxable services provided to a unit in a SEZ. On this harmonious construction, the immunity to Service Tax provided under Section 7 or 26 of the 2005 Act cannot be so interpreted as to be eclipsed the procedural prescriptions of Notification No. 9/2009 or 15/2009. These Notifications are calibrated to enable recipients of taxable services (exempt from liability to tax under the provisions of the 2005 Act), to claim refund of the Service Tax, wherever assessed and collected by Revenue or remitted otherwise by the taxable service provider, inadvertently. Considered in the light of this analysis, the substituted provisions, of clause/sub-paragraph 'c' of Notification No. 15/2009 cannot be inferred to have imposed any disability on the recipient of services consumed wholly within the SEZ, from seeking refund of Service Tax remitted on such transactions, by the providers of such services."

9.0 From the above decisions it is quite evident that in terms of section 26(1)(e) of the SEZ Act, 2005 the taxable services provided by a service provider to a Developer or a Unit in SEZ are exempt from payment of service tax. Section 51 of the SEZ Act, 2005 gives over riding effect to the provisions of this Act over all other Act and Rule 31 of SEZ Rules, 2005 provides the scheme for operationalizing the said exemption. { Reliance Ports and Terminals Ltd [2015 (40) STR 200 (T-Ahmd)]

10.0 Notification No 9/2009-ST as amended or 17/2011-ST as they were then are reproduced below:

GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(Department of Revenue)

New Delhi, the 3rd March, 2009.

Notification No.9/2009-Service Tax

G.S.R. (E).- In exercise of the powers conferred by sub-section (1) of section 93 of the Finance Act, 1994 (32 of 1994), and in supersession of the notification of the Government of India, Ministry of Finance (Department of Revenue), No. 4/2004-ServiceTax, dated the 31st March, 2004, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i) dated the 31st March, 2004, vide, G.S.R.248(E), dated the 31st March, 2004, except as respects things done or omitted to be done before such supersession, the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby exempts the taxable services specified in *clause (105) of section 65 of the said Finance Act, which are provided in relation to the authorised operations in a Special Economic Zone, and received by a developer or units of a Special Economic Zone, whether or not the said taxable services are provided inside the Special Economic Zone, from the whole of the service tax leviable thereon under section 66 of the said Finance Act:*

Provided that-

(a) the developer or units of Special Economic Zone shall get the list of services specified in clause (105) of section 65 of the said Finance Act as are required in relation to the authorised operations in the Special Economic Zone, approved from the Approval Committee (hereinafter referred to as the specified services);

(b) the developer or units of Special Economic Zone claiming the exemption actually uses the specified services in relation to the authorised operations in the Special Economic Zone;

(c) the exemption claimed by the developer or units of Special Economic Zone shall be provided by way of refund of service tax paid on the specified services used in relation to the authorised operations in the Special Economic Zone;

(d) the developer or units of Special Economic Zone claiming the exemption has actually paid the service tax on the specified services;

(e) no CENVAT credit of service tax paid on the specified services used in relation to the authorised operations in the Special Economic Zone has been taken under the CENVAT Credit Rules, 2004;

(f) exemption or refund of service tax paid on the specified services used in relation to the authorised operations in

the Special Economic Zone shall not be claimed except under this notification.

2. The exemption contained in this notification shall be subject to the following conditions, namely:-

(a) the person liable to pay service tax under sub-section (1) or sub-section (2) of section 68 of the said Finance Act shall pay service tax as applicable on the specified services provided to the developer or units of Special Economic Zone and used in relation to the authorised operations in the Special Economic Zone, and such person shall not be eligible to claim exemption for the specified services:

Provided that where the developer or units of Special Economic Zone and the person liable to pay service tax under sub-section (2) of section 68 for the said services are the same person, then in such cases exemption for the specified services shall be claimed by that person;

(b) the developer or units of Special Economic Zone shall claim the exemption by filing a claim for refund of service tax paid on specified services;

(c) the developer or units of Special Economic Zone shall file the claim for refund to the jurisdictional Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be;

(d) the developer or units of Special Economic Zone who is not registered as an assessee under the Central Excise Act, 1944 (1 of 1944) or the rules made thereunder, or the said Finance Act or the rules made thereunder, shall, prior to filing a claim for refund of service tax under this notification, file a declaration in the Form annexed hereto with the respective jurisdictional Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be;

(e) the jurisdictional Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, shall, after due verification, allot a service tax code (STC) number to the developer or units of Special Economic Zone within seven days from the date of receipt of the said Form;

(f) the claim for refund shall be filed, within six months or such extended period as the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, shall permit, from the date of actual payment of service tax by such developer or unit to service provider;

(g) the refund claim shall be accompanied by the following documents, namely:-

- *(i) a copy of the list of specified services required in relation to the authorised operations in the Special Economic Zone, as approved by the Approval Committee;*
- *(ii) documents for having paid service tax;*
- *(iii) a declaration by the Special Economic Zone developer or unit, claiming such exemption, to the effect that such service is received by him in relation to authorised operation in Special Economic Zone.*

(h) the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, shall, after satisfying himself that the said services have been actually used in relation to the authorised operations in the Special Economic Zone, refund the service tax paid on the specified services used in relation to the authorised operations in the Special Economic Zone;

(i) where any refund of service tax paid on specified services is erroneously refunded for any reasons whatsoever, such service tax refunded shall be recoverable under the provisions of the said Finance Act and the rules made thereunder, as if it is a recovery of service tax erroneously refunded.

3. The exemption contained in this notification shall apply only in respect of service tax paid on the specified services on or after the date of publication of this notification in the Official Gazette.

4. Words and expressions used in this notification and defined in the Special Economic Zones Act, 2005 (28 of 2005) or the rules made thereunder, shall apply, so far as may be, in relation to refund of service tax under this notification as they apply in relation to a Special Economic Zone.

This notification was amended by the notification 15/2009-ST which read as follows:

GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(Department of Revenue)
New Delhi, the May 20, 2009.

Notification No. 15/2009-Service Tax

G.S.R. (E).- In exercise of the powers conferred by sub-section (1) of section 93 of the Finance Act, 1994 (32 of 1994), the Central Government hereby makes the following further amendments in the notification of the Government of India in the Ministry of Finance (Department of Revenue) No.9/2009-Service Tax, dated the 3rd March, 2009 which was published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i) *vide number G.S.R. 146(E), dated the 3rd March, 2009, namely:-*

In the said notification,-

(A) in paragraph 1, in the proviso,—

the sub-paragraph (c), the following shall be substituted, namely:-

"(c) the exemption claimed by the developer or units of Special Economic Zone shall be provided by way of refund of service tax paid on the specified services used in relation to the authorised operations in the Special Economic Zone except for services consumed wholly within the Special Economic Zone;"

(2) for sub-paragraph (d), the following shall be substituted, namely:-

"(d) the developer or units of Special Economic Zone claiming the exemption, by way of refund in accordance with clause (c), has actually paid the service tax on the specified services;"

(3) after sub-paragraph (f), the following sub-paragraph shall be inserted, namely:-

"(g) the developer or unit of a Special Economic Zone shall maintain proper account of receipt and utilisation of the taxable services for which exemption is claimed."

(B) in paragraph 2, for the words, "shall be subject to the following conditions", the words, " ,except for services consumed wholly within the Special Economic Zone, shall be subject to the following conditions" shall be substituted.

Notification No 17/2011-ST was issued in supersession of notification No 9/2009-ST and read as follows:

G.S.R. (E). – In exercise of the powers conferred by sub-section (1) of section 93 of the Finance Act, 1994 (32 of 1994) (hereinafter referred to as the Finance Act) read with sub-section 3 of section 95 of Finance (No.2), Act, 2004 (23 of 2004) and sub-section 3 of section 140 of the Finance Act, 2007(22 of 2007) and in supersession of the notification of the Government of India in the Ministry of Finance (Department of Revenue), No. 9/2009-Service Tax, dated the 3rd March, 2009, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), vide G.S.R.146(E), dated the 3rd March, 2009, except as respects things done or omitted to be done before such supersession, the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby exempts the taxable services specified in clause (105) of section 65 of the Finance Act, chargeable to tax under section 66 or section 66A of the Finance Act , received by a Unit located in a Special Economic Zone (hereinafter referred to as SEZ) or Developer of SEZ for the authorised operations, from the whole of the service tax, education cess and secondary and higher education cess leviable thereon.

2. The exemption contained in this notification shall be subject to the following conditions, namely:-

(a) the exemption shall be provided by way of refund of service tax paid on the specified services received for the authorised operations in a SEZ:

Provided that where the specified services received and used for authorised operations are wholly consumed within the SEZ, the provider of such services or the receiver of such services on reverse charge basis, as the case may be, has the option not to pay the service tax ab initio instead of the Unit or Developer claiming exemption by way of refund in terms of this notification.

Explanation.- For the purposes of this notification, the expression ―wholly consumed‖ refer to following taxable services, received by a Developer or Unit of a SEZ, for the authorised operations, namely:-

(i) services listed in clause(i) of sub-rule (1) of rule 3 of the Export of Services Rules, 2005 in relation to an immovable property situated within the SEZ; or

(ii) services listed in clause (ii) of sub-rule (1) of rule 3 of the Export of Services Rules, 2005, as are wholly performed within the SEZ; or

(iii) services other than those falling under (i) and (ii) above, provided to a Developer or Unit of SEZ, who does not own or carry on any business other than the operations in the SEZ;

(b) for the purpose of claiming exemption, the Developer or Unit of SEZ shall obtain a list of taxable services as are required for the authorised operations approved by the Approval Committee (hereinafter referred to as the specified services) of the concerned SEZ;

(c) the Developer or Unit of SEZ who does not own or carry out any business other than SEZ operations, shall furnish a declaration to that effect in Form A-1, verified by the Specified Officer of the SEZ, in addition to obtaining list under condition (b) above, for the purpose of claiming exemption;

(d) where the specified services received by Unit or Developer, are not wholly consumed within SEZ, i.e., shared between authorised operations in SEZ Unit and Domestic Tariff Area(DTA) Unit, refund shall be restricted to the extent of the ratio of export turnover to the total turnover for the given period to which the claim relates, i.e.,

Maximum refund	=	*service tax paid on specified services used*	*X*	*Export turnover of*

for SEZ Authorised Operations shared with DTA Unit for the period	*SEZ Unit for the period*

Total turnover for the period

Explanation.- For the purposes of condition (d),-

(1) "total turnover" means the sum total of the value of,- (i) all output services and exempted services provided, including the value of services exported; (ii) all excisable and non-excisable goods cleared, including the value of the goods exported; (iii) bought out goods sold, during the period to which the invoices pertain and the exporter claims the facility of refund under this notification.

(2) "turnover of SEZ Unit" shall mean the sum total of the value of final products and output services exported during the period of which the invoices pertain and the exporter claims the facility of refund under this notification;

(e) any Developer or Unit of SEZ claiming the exemption shall declare that the specified services on which exemption and/ or refund is claimed to have been actually used for the authorised operations;

(f) the Developer or unit of SEZ claiming the exemption, by way of refund has actually paid the amount indicated in the invoice, bill or as the case may be, challan, including the service tax payable, to the person liable to pay the said tax or the amount of service tax payable under reverse charge, as the case may be, under the provisions of the Finance Act;

(g) no CENVAT credit of service tax paid on the specified services used for the authorised operations in a SEZ has been taken under the CENVAT Credit Rules, 2004;

(h) exemption or refund of service tax paid on the specified services other than "wholly consumed' services

used for the authorised operations in a SEZ shall not be claimed except under this notification;

(i) the developer or unit of a SEZ, who intends to avail exemption and or refund under this notification, shall maintain proper account of receipt and use of the specified services on which exemption is claimed, for authorised operations in the SEZ.

3. The following procedure should be adopted for claiming the benefit of the exemption contained in this notification, namely:-

(a) the Developer or Unit of a SEZ, who has paid the service tax under sections 66 of the Finance Act, shall avail the exemption by filling a claim for refund of service tax paid on specified services used for the authorised operations;

(b) the Developer or Unit of a SEZ who is registered as an assessee under the Central Excise Act, 1944 (1 of 1944) or the rules made there under, or the said Finance Act or the rules made there under, shall file the claim for refund to the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, having jurisdiction over the SEZ or registered office or the head office of the Developer or Unit, as the case may be, in Form A-2;

(c) the Developer or Unit of a SEZ who is not so registered under the provisions referred to in clause (b), shall, before filing a claim for refund under this notification, file a declaration with the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, having jurisdiction over the SEZ or registered office or the head office of the Developer or Unit, as the case may be, in Form A-3;

(d) the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may

be, shall, after due verification, allot a service tax code number to the Developer or Unit of SEZ, referred to in clause (c), within seven days from the date of receipt of the said declaration, in Form A-3;

(e) claim for refund shall be filed, within one year from the end of the month in which actual payment of service tax was made by such developer or unit to the registered service provider or such extended period as the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, shall permit;

(f) the refund claim shall be accompanied by the following documents, namely:-

(i) a copy of the list of specified services as are required for the authorized operations in the SEZ, as approved by the Approval Committee; wherever applicable, document specified in 2(c), i.e. , declaration in Form A-1;

(ii)invoice or a bill or as the case may be, a challan, issued in accordance with the provisions of Finance Act or rules made thereunder, in the name of the Developer or Unit of a SEZ, by the registered service provider, along with proof of payment for such specified services used for the authorised operations and service tax paid, in original;

(iii) a declaration by the Developer or Unit of SEZ, claiming such exemption, to the effect that—

(A) the specified services on which refund of service tax claimed, has been actually used for the authorized operations in the SEZ ;

(B) proper account of the specified services received and used for the authorised operations are maintained by the developer or unit of the SEZ and the same shall be produced to the officer sanctioning refund, on demand;

(C) accounts or documents furnished by the Developer or Unit as proof of payment of service tax claimed as refund, based on the invoice, or bill , or as the case may be challan issued by the registered service provider indicating the service tax paid on such specified services, are true and correct in all respects;

(g) the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, after verifying that,- (i) the refund claim is complete in all respects; (ii) the information furnished in Form A-2 and in supporting documents correctly indicate the service tax involved in the specified services used for the authorised operations in the SEZ, which is claimed as refund, and has been actually paid to the service provider, shall refund the service tax paid on the specified services;

(h) a service provider, shall provide the specified services falling under ‗wholly consumed' category, under exemption granted by this notification, to a Developer or Unit of SEZ, for authorised operations, subject to the production of documents specified in sub-para (b) of para 2 and in addition wherever applicable, documents specified in sub-para (c) para 2, i.e., declaration in Form A-1;

(i) where any refund of service tax paid on specified services is erroneously refunded for any reasons whatsoever, such service tax refunded shall be recoverable under the provisions of the said Finance Act and the rules made there under, as if it is recovery of service tax erroneously refunded;

4. Words and expressions used in this notification and defined in the Special Economic Zones Act, 2005 (28 of 2005) or the rules made thereunder, shall apply, so far *as may be, in relation to refund of service tax under this notification as they apply in relation to a SEZ.*

Explanation.- For the purposes of this notification, ―statutory auditor‖ refers to a Chartered Accountant who audits the annual accounts of the Developer or Unit of a SEZ for the purposes of the Companies Act, 1956 (1 of 1956) or the Income Tax Act, 1961(43 of 1961).

10.0 Notification No 9/2009-ST as amended by the Notification No 15/2009-ST and subsequently Notification No 17/2011-ST issued under Section 93 of the Finance Act, 1994, could not have eclipsed or restricted the exemption provided by the Section 26(1)(e) of the SEZ Act, 2005. In respect of the exemption notifications issued under Section 93(1) of the Finance Act, 1994 also it has been clarified as follows:

Circular No.142/11/2011 - ST

F. No.354 /30 /2011-TRU
Government of India
Ministry of Finance
Department of Revenue
Central Board of Excise and Customs
Tax Research Unit
North Block, New Delhi

18th May 2011

To
Chief Commissioners of Central Excise and Service Tax (All),
Director General (Service Tax),
Director General (Central Excise Intelligence),
Director General (Audit),

Commissioners of Service Tax (All),
Commissioners of Central Excise and Service Tax (All).

Madam/Sir,

Subject: SEZ - Service Tax Refund -- regarding.

Subsequent to the issuance of Notification 17/2011-ST dated 01. 03. 2011, representations have been received seeking clarification on certain doubts. These doubts and clarifications are as follows:

	QUESTIONS	CLARIFICATIONS
1.	To claim the refund arising out of service tax paid under section 66A, no proforma is prescribed in the notification; how to claim it?	In the notification, there is no difference in treatment of service tax paid under section 66 and section 66A of Finance Act, 1994. Where refund arises, Table - A, in Form A-2 can be used for making a refund claim.
2.	(i) In the notification, what is the treatment for service tax paid on taxable services which do not fall in the category of "wholly consumed services", and also are not 'shared services' ? Is refund available? (ii) Whether in the case of category (iii) services referred in paragraph 2(a) of the notification, 'proportionate refund' applies to only 'shared services' i.e. services that are used both for SEZ (Special Economic Zone) authorised operations as well as DTA (Domestic Tariff Area) operations?	All taxable services (under section 66 or section 66A) received by a SEZ Unit/Developer for the authorised operations, have been exempted in the first paragraph of notification 17/2011-ST, subject to conditions. In Paragraph 2, conditions attached to this exemption are prescribed. In terms of paragraph 2(a), refund route is the default option for all who intend to claim the exemption granted by the notification in its first paragraph. However, an exception is provided in the form of ab initio(upfront) exemption, to the 'wholly consumed' services. Services which fall outside the definition of 'wholly consumed' services can be categorized as those which are used exclusively by the SEZ Unit/Developer, for the authorised operations in

		SEZ or shared with DTA operations. *Para 2(d) of the notification is applicable to refund arising from 'shared services' only. Thus exemption to services exclusively used for the authorised operations of SEZ Unit/Developer, will continue to be available by way of refund, as specified in paragraph 2(a) itself, subject to other conditions. To claim this refund, Table-A, provided in Form A-2 may be used.* *It is clarified that only such services shall be considered as exclusively used by SEZ Unit/Developer, for the authorised operations, as they satisfy the following criteria:* *(i) Invoice is raised in the name of the SEZ Unit/Developer or in the invoice, it is mentioned that the taxable services are supplied to the SEZ Unit/Developer for the authorised operations;* *(ii) Such services are approved by the 'Unit Approval Committee (UAC)', as required for the authorised operations;* *(iii) Receipt and use of such services in the authorised operations are accounted for in the books of accounts of the SEZ Unit/ Developer.*
3. - *-* *10*	*……*	*……*

11.0 During the course of arguments and in the Appeal paper book appellants have produced the copy of the invoices and attached log sheets in respect of the supplies made by them to SEZ Unit developers/ Units. There is no dispute about the fact that these invoices, logsheets and contracts were also produced and examined by the Commissioner during the course of adjudication. From the perusal of the invoices and log sheets it is quite evident that each log sheet is signed jointly by the crane operator, user/ Client Site in Charge, Site Engineer/ Site Supervisor and Project Manager certifying the usage hours of tangible goods on daily basis at the respective site. These weekly log sheets are then made the basis for issuance of the invoice by the service provider to the service recipient. There is no dispute that the sites in respect of which these invoices/ log sheets are, belong to the SEZ Unit or a developer and these services have been wholly consumed at the said site. Thus in our view the services provided by the appellant in respect of these sites have been provided by the appellant to the SEZ Unit or developer. Further there appears to be no dispute also about the fact that these services are falling in the category of the approved services for the SEZ Operation, in respect of those SEZ Unit/ Developer.

12.0 Since as per the documents produced along with appeal, there is no dispute in respect of the fact that these services have been provided to a SEZ Unit / Developer and consumed within the SEZ, the exemption is admissible in respect of the services so provided. Commissioner also has not sought to state the contrary but has only sought to deny the exemption on the ground that in these instances the exemption should not have been allowed affront but by way of the claim of refund by the SEZ Unit/ Developer. However from the plain wordings of the Section 26(1)(e) of SEZ Act, 2005 read with Rule 31 of The SEZ Rules, 2006, and notification No 9/2009-ST dated 03-03-2009 as amended by Notification No 15/2009-ST we are of the view that Appellants have substantially complied with the conditions prescribed. Since there has been substantial compliance the order of Commissioner holding that these services have not been wholly consumed within the SEZ is not sustainable. It was only by the notification No 17/2011-St dated 1.03.2011 that for determining whether services have been consumed wholly within the SEZ, categorization of services was done, and in respect of services provided by the appellant (category III services), the services were to be considered as wholly consumed within SEZ only if the

SEZ unit or Developer does not own or carry on any business other than SEZ operation was introduced. Commissioner has heavily relied on the circular issued in respect of this notification for denying the exemption in respect of even the past cases which were covered by the exemption under Notification No 9/2009-ST as amended. Further for claiming the exemption under notification No 17/2011 SEZ unit or developer was required to file a declaration as prescribed in form A-1 to that effect. In the present case Appellant have produced the said Form A-1. From the copies of such form A-1 from Tril Info Park Ltd (page 651 of Appeal Paper book), India Bulls Realtech Limited (page 653 of paper book) and M/s ONGC Petro Additions Ltd (page 654 of paper book) it is quite evident that these services have been wholly consumed by them and that they do not own or carry out any other business of providing taxable service or manufacture in Domestic Tariff Area. From the above certificates also it is quite evident that these services have been wholly consumed for authorized operations by the SEZ Unit/ Developer. Accordingly we are of the view that benefit of exemption in the present case cannot be denied.

13.0 Issue in respect of the supply of service to the Contractors of the SEZ Unit or Developers is no longer res-integra. This tribunal has in case series of case as listed below herd that exemption shall be available even if the services for consumption in SEZ by the SEZ Unit/ Developer are provided through the Contractor of SEZ Unit/ Developer. Refer Commissioner of Service Tax Mumbai-1 Vs FEDCO Paints and Contracts [2017 (3) GSTL 364 (T-Mum)]

14.0 Since the matter has been decided in favour of appellants on the merits we are not going into the issue of limitation etc.

15.0 Appeal filed by the Appellants is allowed.

(Pronounced in court)

(Dr. D.M. Misra)
Member (Judicial)

(Sanjiv Srivastava)
Member (Technical)

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