IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI

APPEAL NO: ST/87355/2018

[Arising out of Order -in-Appeal No: SK/GST (Audit - II)/MUM/14/Appeals-III/2018 dated 19.02.2018 passed by the Commissioner, CGST & CX(Audit-II), Mumbai.]

Ocean Diving Centre Ltd … ***Appellant***

versus

Commissioner of CGST & CX(Audit - II), Mumbai ***…Respondent***

<u>Appearance</u>:

Shri Sachin Chitnis, Advocate for appellant

Shri M.P. Damle, Assistant Commissioner (AR) for respondent

CORAM:

Hon'ble Dr. Suvendu Kumar Pati, Member (Judicial)

Date of hearing:	**03/12/2018**
Date of decision:	**03/04/2019**

<u>ORDER NO:</u> A/85658 / 2019

Imposition of penalty under Section 78 of the Finance Act of Rs. 30,39,054/- @ of 100% of service tax demand for the period prior to 08.04.2011 and @ 50% for period between 08.04.2011 and 14.05.2015 on the ground of suppression of fact of duty liabil... ity is

2. Briefly stated, the appellant has been engaged in supply of tangible goods services which company was raided by the Anti-Evasion Wing of Service Tax-I, Mumbai. It was pointed out by them that appellant was recipient of insurance auxiliary services from abroad for its vessels but fail to pay service tax under the revers charge mechanism for the period between 11.04.2008 and 31.03.2013 to the tune of 43,21,540/-. It had not paid duty for supply of tangible goods from 15.06.2008 to 31.11.2008 for which service tax demand of Rs. 8,95,482/- was also made. For wrong availment of Cenvat credit telephone used by directors, service tax demand of Rs. 28,439/- and payment of GTA which was made by utilizing Cenvat credit was held to be paid by cash to the tune of Rs. 9,659/-. Appellant discharged service tax demand totaling to Rs. 52,55,120/- along with applicable interest as per Section 75 of the Finance Act but was issued with show cause. It contested the penalty before the adjudicating authority, who confirmed 100% penalty on the duty demand, which was unsuccessfully challenged by it before the Commissioner (Appeals) CGST & CX (II) Mumbai, that resulted in passing of above order, which is under challenge.

3. In the memo of appeal and during course of hearing of the appeal Learned Counsel for the Appellant Mr. Sachin Chitnis

the service tax, though on merit, it has a good case to contest with. He further submitted that issue of 11 circulars (detail of which is presented in the tabular form in the written note of submission) between 1999-2011 by the Department would clearly establish that there was no clarity regarding taxability on services provided outside the territorial water of India and taxability under reverse charge mechanism for which appellant could not consider the duty demanded, as its liability. It was only after pronouncement of judgment by the Hon’ble Bombay High Court on 11.12.2008, in the case of Indian National Ship Owners Association reported in 2009(13) S.T.R 235 Mumbai, that was upheld by the Hon’ble Supreme Court on 14.10.2009 that clear picture has emerged for which CBEC had issued circular dated 29.09.2011 to clarify the exact nature of taxability on the reverse charge mechanism to be made effective only from 18.04.2006 and it was due to such confusion, appellant considered that insurance services for vessels was not taxable.

4. Learned Counsel for the appellant further submitted that such confusion also persisted in respect of mining services or supply of tangible services as Indian National Ship Owner Association had challenged the same before the Hon’ble Bombay High Court, as referred above, and appellant had not charged or recovered service tax

of *HEG Ltd* *report in 2010 (17) STR 178 (T) Upheld by Hon'ble Chhattisgarh High Court -2011 (24) STR 275 (Chat), ITC Ltd report in 2009 (14) STR 847 (T), Keltech report in 2008 (10) STR 280 (T), Andhra Pradesh Paper Mills report in 2011 (22) STR 126 (T), BSBK report in 2009 (16) STR 58 (T)* he contained that credit availed on telephone services used by Directors are eligible credits and referring to the decisions of the Tribunal in *Panchmahal Steel report in 2014 (34) STR 351 (T-LB), Panchmahal Steel report in 2015 (35) STR 965 (Guj), Nahar Industrial report in 2007 (7) STR 26 (T), Nahar Industrial report in 2012 (25) STR 129 (P&H), Cheran Spinners report in 2014 (33) STR 148 (Mad.), Flowserve report in 2014 (33) STR 634 (Kar.)*

5. He also submitted that Cenvat credit can be utilized for payment of service tax on GST Services for which appellant had rightfully availed the credits and utilized it respectfully and there was no malafide intention or suppression on the part of appellant to invoke Section 17 of the Finance Act. Referring to the judgments of *British Airways report in 2014 (36) STR 598 (T), Rochem Separation Systems report in 2015 (39)STR 112 (T), Jain Irrigation Systems report in 2015-TIOL-1674-CESTAT-MUM, Matrix Telecom P. Ltd report in 2013 (32) STR 423 (T), Essar Steel Ltd report in 2009 (13) STR 579*

report in 2015-TIOL-2586-CESTAT-MUM, Bharat Forge report in 2016-TIOL-12-CESTAT-MUM & Jet Airways report in 2016 (44) STR 465, and stressing his emphasis on the Tribunal's order in Jet Airways, Learned Counsel for the Appellant argued that appellant could have paid the entire service tax and availed Cenvat credit on supply of Tangible goods services as well as insurance vessels etc. it is revenue neutral situation and in case of reverse charge mechanism, Revenue neutrality is a good ground for which order of the Commissioner (Appeals) is required to be set aside.

6. In response to such submissions, Learned AR for the respondent department M.P. Damle has drawn attention of this court to para 7 & 8 of the Commissioner (Appeals) order to justify the reasoning and rationality of his order in reducing the penalty to 50% after 08.04.2011 and confirming the same at 100% for the disputed period between 01.04.2008 & 08.04.2011 for which he urged no interference by the Tribunal in the order passed by Commissioner (Appeals).

7. Heard from both the sides at length, peruse the case record, the relevant precedent set on the issues as well as the procedure of service tax applicability on reverse charge mechanism for services availed

in fact, their exist ed, lots of confusion till pronouncement of judgment by Hon'ble Bombay High Court . A s found from the additional written submissions , appellant was engaged in providing 'Management, Maintenance & Repair Services' classifiable under Section 65(105) (zzg), 'Supply of Tangible goods Services' classifiable under Section 65(105) (zzzzj), and 'Transport of Goods by Road Services' classifiable under Section 65(105) (zzp), read with Section 65(64), Section 65(50) and Section 65(50a) respectively under Clause V of the Finance Act, 1994, during the relevant period. During the period 01.04.2008 to 31.03.2013, the Appellant had insured the vessels wh ich we re used beyond territorial waters of India. The said services were received from foreign service providers situated outside India. Respondent Revenue Department entertained a view that the said services would be chargeable to service tax, under rever se charge mechanism under Section 66A of the Finance Act, 1994 read with Rule 2(1) (d) (iv) of STR, 1994. The Appellants are having specification vessels including accommodation, barges and tugs etc., which are primarily used by Oil and Gas Industr ies and are also providing water diving services. In the light of confusion within the industry and challenge o n levy, the Appellants registered themselves on 21.11.2018, under 'Supply of Tangible goods Services' classifiable

Department entertained a view that for the period prior to registration from 15.06.2008 to 30.11.2008, the Appellants are required to pay service tax. This being so, demand of service tax under supply of tangible services for the period prior to such registration, though not disputed, can never be considered to be in conformity to Section 265 of the Constitution of India. Despite the fact that appellant had obliged to meet duty such demand regarding Cenvat credit on telephone used by the directors and on payment of GTA through Cenvat credit utilization, judicial precedent had set the matter at next and the same needs no elaboration since not disputed by the appellant. Having regard to the fact that investigation by Anti-Evasion Wing had brought all those duty demand from the records maintained by the appellant and considering the fact that the issue is a bonafide dispute of legal interpretation of the newly introduced provision, no malafide can be attributed to the appellant so as to call for imposition of any penalty. Hence the order.

8. The appeal is allowed and the order passed by the Commissioner, CGST & CX(Audit-II), Mumbai in Appeal No. SK/GST (Audit-II)/MUM/14/Appeals-II I/2018 dated 19.02.2018 is hereby set aside.