

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
MUMBAI**

REGIONAL BENCH - COURT NO. I

Service Tax Appeal No. 86553 of 2016

(Arising out of Order-in-Original No. 25/ST-VII/RK/2015 dated 31.12.2015 passed by the Commissioner of Service Tax, Mumbai-VII, Mumbai)

APL Logistics (India) Private Limited

.... Appellant

247 Park, Hincon House,
B-Wing, 8th Floor, L.B.S. Marg
Vikhroli (West), Mumbai – 400 083.

Versus

Commissioner of Service Tax-VII, Mumbai

.... Respondent

GST Bhavan,
115, Maharshi Karve Road
Opp. Churchgate Station
Mumbai – 400020.

Appearance:

Shri Prasad Pranjape, a/w Shri Kevin Gogri, Advocates for the Appellant
Shri Priyesh Bheda, Authorized Representative for the Respondent

WITH

Service Tax Appeal No. 86828 of 2016

(Arising out of Order-in-Original No. 25/ST-VII/RK/2015 dated 31.12.2015 passed by the Commissioner of Service Tax, Mumbai-VII, Mumbai)

Commissioner of Service Tax-VII, Mumbai

.... Appellant

GST Bhavan,
115, Maharshi Karve Road
Opp. Churchgate Station
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Versus

APL Logistics (India) Private Limited

.... Respondent

247 Park, Hincon House,
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Vikhroli (West), Mumbai – 400 083.

Appearance:

Shri. Priyesh Bheda, Authorized Representative for the Appellant
Shri Prasad Pranjape, a/w Shri Kevin Gorgi, Advocates for the Respondent

CORAM:

HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)

HON'BLE MR. M.M. PARTHIBAN, MEMBER (TECHNICAL)

FINAL ORDER NO. A/85566 – 85567/2024

Date of Hearing: 09.02.2024

Date of Decision: 10.06.2024

PER : M.M. PARTHIBAN

This appeal bearing No. ST/86553/2016 has been filed by M/s APL Logistics (India) Private Limited, Mumbai (herein after referred to, for short, as "the appellant assessee") assailing the Order-in-Original No.25/ST-VII/RK/2015 dated 31.12.2015 (hereinafter referred to, for short, as "the impugned order") passed by the Commissioner of Service Tax, Mumbai-VII, Mumbai. Further, Revenue has also filed an appeal bearing No. ST/86828/2016 against the impugned order for dropping the demands in respect of appellant's branches other than Mumbai.

2.1 The brief facts of the case are that the appellant assessee herein is engaged in providing taxable services under the category of Steamer Agents service, Goods Transport by Road service, Business Auxiliary Services, Business Support Services and for this purpose they had registered with the jurisdictional authorities of the Department. During the course of audit of the records of the appellant assessee by the Department officers, it was observed that the appellant assessee had shown income under various heads such as forwarders cargo fees, administration and documentation fees, freight and other services. Further, on examination of the terms and conditions mentioned in the Forwarders Cargo Receipt (FCR), the Department had interpreted that the services provided by the appellant assessee would fall under 'Clearing & Forwarding (C&F) agent services' in terms of definition under 65(25) of Finance Act, 1994 and sought the reasons for non-payment of service tax under the above taxable category from the appellant. In response to this, the appellant assessee by their letter dated 26.06.2006 had informed the Department that these incomes shown under various heads are on account of cargo handling services for export and hence such services are exempted from payment of service tax. As the Department was not satisfied with the reply, show cause proceedings were initiated for recovery of service tax on Clearing & Forwarding (C&F) agent services for the period from 1st April, 2003 to 31st March, 2008 by invoking extended period under Section 73(1) of the

Finance Act, 1994 for demand of non-payment of service tax along with interest, besides proposing for imposition of penalties under Section 76, 77 and 78 *ibid*.

2.2 The SCN dated 21.10.2008 issued in this regard was adjudicated by the learned Commissioner of Service Tax-VII, Mumbai in confirmation of the adjudged demands to the extent of service tax payable in respect of Clearing and Forwarding agent's services relating to Mumbai branch alone and by re-determining the amount of service tax by allowing certain charges/amounts as the same are not being subject to levy of service tax or includable in the value of service tax, and confirmed the demand of Rs.11,50,68,830/- alone under Section 73(2) *ibid* along with interest and imposed equal amount of penalty under Section 78 *ibid*, and further an amount of Rs.10,000/- as penalty under Section 77 *ibid*. Further, the Commissioner had also appropriated the amount of Rs.3,45,06,438/- paid by the assessee appellant for the period subsequent to 1st February, 2006 as service tax towards Business Auxiliary Service and further onwards from 1st June, 2006 as service tax towards Business Support Services. Feeling aggrieved with the said Order dated 31.12.2015 towards adjudged demands, the appellant assessee had filed the appeal bearing No. ST/86553/2016 before the Tribunal. On the other hand, Revenue/appellant department in review of the Order dated 31.12.2015 had interpreted that in view of the centralized registration taken by the appellant assessee in November, 2010 as distinguished with holding separate registrations for each branches located at different places, and on the basis of Board's instruction dated 16.03.2007 having force in law, the Commissioner of Service Tax, Mumbai-VII had jurisdiction over all the Branches of the assessee appellant for adjudication of the pending SCN. Therefore, the appellant department contended that the original authority confirming the service tax demand of Mumbai branch alone and dropping of the demands in respect of other branches is improper and on account of certain claims allowed without any verifiable data is unsubstantiated. Accordingly, the department appellant also filed a separate appeal bearing No. ST/86828/2016 before the Tribunal.

3.1 Learned Advocate representing the appellant assessee has submitted that the disputed period in the present appeal is during April, 2003 to March, 2008. The total demand of service tax confirmed in the impugned

order is Rs.11,50,68,830/- along with interest and penalties, against which they had filed this appeal; whereas the department appellant have also filed an appeal against the demand of service tax dropped by the original authority for an amount of Rs.25,99,10,158/- relating to appellants registration held at various other locations other than Mumbai, for which they had claimed that the original authority does not have jurisdiction and the same has been accepted by him. As regards the confirmation of the service tax demand for Rs.11,50,68,830/- in the impugned order, this relates to various services as given below:

Sr. No.	Description	Amount of S. Tax demand (in Rs.)
1.	Forwarders Cargo Fees (CFS charges)	82940187
2.	Documentation & Administration charges (FCR charges)	8161936
3.	Ocean freight	18335026
4.	Exchange Gain	1815144
5.	Brokerage	80287
6.	Other Services	3736250
	Total	115068830

3.2 Learned Advocate further submitted that the appellant had entered into an agreement dated 28.12.2002 (effective from 01.01.2002) with their overseas group entity viz. APL Logistics Hong Kong (APLL HK), under which they were providing support services to the customers of its overseas entity in consolidation of their export cargo from India. The nature of services included (i) receiving cargo from various Indian suppliers of an overseas buyer; (ii) sorting the cargo pertaining to various overseas buyers; (iii) stuffing the cargo in container to ensure safe transportation of cargo; (iv) transport of cargo to ports or airports; and (v) loading of container on ship/aircraft for transportation of cargo to overseas buyer. For performance of such services the appellant assessee have received the consideration as per the said agreement dated 01.01.2002. upon bringing the services provided by the appellant under the service tax net, they have started paying service tax under the category of Business Auxiliary Service (BAS) from February, 2006 and under the category of Business Support Services (BSS) from June, 2006.

3.3 As regards the income received as Forwarders Cargo Fees for the services provided in respect of export cargo, he stated that there is no principal and agency relationship between the appellant assessee and the exporter of the goods; the services provided by the appellant are to their

overseas entities in terms of the agreement entered with them, which are related to export of goods to the customers of their overseas entity. Hence, he claimed that the appellants do not carry out any clearing activities in relation to exporters in India. The goods are delivered by the exporters at the CFS station after customs clearance and the only activity carried out by the appellant is consolidation/segregation of cargo for the purpose of export. Thus, learned Advocate claimed that there is no case for provision of C&F services by the appellant and therefore the demand of service tax on this head is not sustainable.

3.4 In respect of International Ocean freight charges there is no levy of service tax, as has been held in a number of cases by the Tribunal as well as in the appellant's own case viz., *APL Logistics (India) Pvt. Ltd. Vs. Commissioner of Central Excise, Chennai-III* – 2014 (36) S.T.R. 1310 (Tri. – Chennai); *APL Logistics (India) Pvt. Ltd. Vs. Commissioner of Service Tax, Mumbai* – 2015 (37) S.T.R. 301 (Tri. – Mumbai) and Final Order No. A/1756/ 14/CSTB/C-I dated 17.11.2014 in Appeal No. ST/87451/2014-Mum. Thus, he pleaded that the decision taken on these cases as above is also applicable to the present case to the extent that the disputed issue is the same i.e., levy of service tax levy on 'ocean freight'.

3.5 The amount of income shown as exchange gain is arising by accounting of foreign exchange gain or loss based on the income booked by the appellant, and it is not towards any service to be identified with any individual customer. Thus, he claimed that there is no service tax liability. As regards the brokerage charges, learned Advocate had stated that the appellant has already paid service tax on the said charges and hence there is no case of any further demand on this account. The other services pertaining to recovery of certain expenses incurred by the appellant are towards reimbursement of actuals such as customs duty paid at actuals and are not towards any service. Therefore, he pleaded that the same is not liable to service tax. He also cited the decisions of the Tribunal in their own case dropping the demand against ocean freight, currency adjustment charges, bunkering charges, advance manifest charges in support of their claim against the levy of service tax on such charges.

3.6 On limitation, learned Advocate had stated that as the issue is relating to classification of services, interpretation of definition of taxable

service there cannot be any attribution of suppression of facts on the appellant. Further, as the Department itself has been adopting different classification of service in different jurisdictions, the appellant cannot be blamed with wilful mis-statement or suppression of facts. In view of this, he pleaded that the demand of service tax for extended period and consequential penalties cannot be sustained.

3.7 Learned Advocate had also stated that the adjudicating authority in the impugned order has rightly dropped the demand of service tax in respect of other locations which are beyond his territorial jurisdiction. He stated that it is an admitted fact that at the time issue a show cause notice, the appellant was having decentralised and separate Service Tax registrations for its branches across India. The allegation that the appellant did not provide data to other Commissioners is devoid of merit, as at different locations the Department had invoked levy of service tax on different category of services on the basis of data provided by the appellant. In the appeal filed by Department against dropping of the demands by the learned Commissioner, the clarification dated 16.3.2007 given by the Board has been wrongly quoted, since the said the circular only suggests that after the grant of centralised registration, the pending show cause notices can be adjudicated by the Commissioner having jurisdiction under the Centralised Registration. The circular nowhere suggests that SCNs which are issued beyond the territorial jurisdiction is valid in law. Therefore, learned Advocate prayed that the appeal filed by the Department may be dismissed.

3.8 Learned Advocate relied upon the following judgments in support of their stand: -

(i) Gudwin Logistics Vs. Commissioner of Central Excise, Vadodara – 2012 (26) S.T.R.443(Tri.- Ahmd.)

(ii) Novocare Drug Specialities Pvt. Ltd. Vs. Commissioner of Central Excise, Mumbai-II – 2014 (34) S.T.R. 247 (Tri. - Mumbai)

(iii)Swagat Freight Carriers Pvt. Ltd. Vs. Commissioner of Service Tax, Mumbai – 2014 (33) S.T.R. 81 (Tri. - Mumbai)

(iv) INOX Leisure Limited Vs. Commissioner of Service Tax, Mumbai – 2016 (42) S.T.R. 497 (Tri. - Mumbai) affirmed by Hon'ble Supreme Court in dismissing Civil Appeal No. 3928 of 2016 filed by department

(v) V.N.S.S. Textiles Vs. Commissioner of Central Excise, Madurai – 2010 (19) S.T.R. 785 (Tri. - Chennai) affirmed by Hon'ble High Court of Madras in dismissing Civil Misc. Appeal No. 769 of 2010 filed by department.

4.1 Learned Authorised Representative (AR) appearing for the department, reiterated the findings made by the learned Commissioner. He further stated that in confirmation of the adjudged demands, the original authority was not at hasty and gave full chance to the appellant to produce relevant documents; however, as the appellant assessee had not shown any document in support of their claim of the income from interest, ocean freight, margin money, other services etc. being not subject to service tax, learned Commissioner has confirmed the demands of service tax as recorded in the impugned order at paragraph 18. He reiterated that the learned Commissioner has by laying stress on the word 'normally' appearing in the definition of C&F agent service, had held that the service tax is liable to be paid on services provided by the appellant, even though they are not providing all activities of C&F services.

4.2 Learned AR on the specific directions of the Tribunal for canvassing a new point that the appellant assessee was also engaged as the agent of importer/exporter in India for providing taxable services in India, besides having been engaged by APLL HK as their agent in terms of the agreement between them, had placed his written submissions dated 09.02.2024 on record. In these submissions inter alia, he stated that the parent company APLL HK had appointed two sister concerns i.e., the appellant and APLL WMS as agents and one of these agents has in turn appointed the appellant as their agent. Thus, the appellant is agent of APLL HK and also their sub-agent of APLL WMS. The appellant could have undertaken any activity on behalf of APLL HK since they already enjoy relation of principal-agent; there being no need for them to undertake any activity as agent of agent. This complex web has been created for confusion with deliberate intent to avoid tax. Thus, there is need to look into the pith and substance; since substantial work of C&F agent is being done by the appellants, the main demand needs to be confirmed. Thus, he pleaded that the impugned order is sustainable and the appeal filed by the department may be entertained.

4.3 Learned AR further submitted that the learned Commissioner had erred in not adjudicating the service tax claimed on activities at other

offices of the appellant assessee located outside Mumbai. He stated that the Commissioner had held that he lacks territorial jurisdiction, but that is improper in view of the Board's Circular F. No. 137/50/2007=CX.4 dated 16.03.2007. He claimed that after grant of centralized registration, the Commissioner has indeed been conferred with jurisdiction to adjudicate the cases. Hence, he pleaded that part of the impugned order where the demand of service tax has been dropped on the grounds of lack of territorial jurisdiction may be set aside.

5. Heard both sides and perused the records of the case. We have also perused the additional written submissions in the form of paper books submitted in this case by both sides.

6. The issues involved in these appeals is to determine the following issues viz.,

(i) whether the services provided by the appellant is leviable to service tax under the taxable category of 'Clearing & Forwarding Agent service' or not, in terms of the Finance Act, 1994 and Rules framed thereunder;

(ii) whether the services provided by the appellant is leviable to service tax under the taxable category of Business Auxiliary Service (BAS) from February, 2006 and under the category of Business Support Services (BSS) from June, 2006 or not, as claimed by the appellant, in terms of the Finance Act, 1994 and Rules framed thereunder; and

(iii) whether the Commissioner of Service Tax, Mumbai-VII has jurisdiction over all the Branches of the assessee appellant for adjudication of the SCN dated 21.10.2008 or not, under the Finance Act, 1994.

7.1 We find from the Show Cause Notice dated 21.10.2008, the department, on the basis of the documents submitted by the appellant assessee, had contended that "(para7)7. From the records submitted by the assessee, it was observed that an exporter having an order and on instructions from their buyer approaches the assessee with a vendor declaration form for booking their cargo and after obtaining approval from the assessee and the customs clearance, the cargo is handed over to the

assessee at Container Fright Station (CFS) hired by them. Thereafter, the assessee performs various checks and procedures in order to forward the goods to the ultimate consignee. A Forwarders Cargo Receipt (FCR) is issued by the assessee as agents of APL Logistics Hong Kong Ltd. (APLL) to the exporters. The assessee is a subsidiary company of APLL". Further, by referring to the terms and conditions of Forwarders Cargo Receipt (FCR) with specific reference to condition Sl. No.3 & 4, the Department had concluded that "(para 10)...the assessee acts as an agent and not a provider of services of a carrier or transporter or distributor of goods;...(para 13) ...the assessee is receiving the goods on behalf of the principal, holding the goods on behalf of the principal and on receiving the dispatch orders for the goods, deliver or forward them to carriers or transporters in accordance with the client's instruction. Receiver of the goods consolidates the cargo and forwards it to the transporters. Thus, they are providing freight forwarding services and the said activities would be falling under C & F services". Therefore, the SCN alleged that "(para14)their activities appear to be appropriately covered under the category of Clearing and Forwarding Agents' service" as per definition under Section 65(25) of the Finance Act, 1994.

7.2 In order to deal with the above specific issues raised in the SCN which have been confirmed by the learned Commissioner in upholding the levy of Service tax on Clearing and Forwarding agent service, by limiting the demand only in respect of Mumbai, we need to look into the factual evidences in the form of documents or other agreements providing the basis on which the various activities or services have been performed by the appellant assessee. It can be seen from the factual matrix of the case that the appellants have rendered certain activities or services to their overseas group entity viz. APL Logistics Hong Kong (APLL HK), under an agreement made effective from 01.01.2002. These services are in the nature of support services rendered to the customers of its overseas entity APLL HK, in consolidation of export cargo from India. The services provided by the appellant assessee included the following viz. (i) receiving cargo from various Indian suppliers/exporters of an overseas buyer; (ii) sorting the cargo pertaining to various overseas buyers; (iii) stuffing the cargo in the respective containers to ensure safe transportation of cargo; (iv) transport of cargo to ports or airports; and (v) loading of container on ship/aircraft for transportation of cargo to overseas buyer. For performance

of these services the appellant assessee have received the consideration as per above agreement.

7.3 We have perused the relevant clauses of the aforesaid agreement submitted as a part of the appeal paper book. The relevant clauses of the said agreement are extracted and given below:

**"AGENCY AGREEMENT
BETWEEN
APL LOGISTICS HONG KONG
AND
APL LOGISTICS (INDIA) PVT. LTD.**

*This Agreement is made **effective the 1st January, 2002**, between APL Logistics Hong Kong (hereinafter called "APLL HK") a company incorporated in Hong Kong and having offices at 16/F New T&T Center, 7 Canton Road, TST Kowloon, Hong Kong, and APL Logistics (India) Pvt. Ltd. (hereinafter called the "Agent") a company with its principal place of business at Technopolis Knowledge Park, A-Wing, 4th Floor, Nelco Complex, Mahakali Caves Road, Chakala, Andheri (East), Mumbai – 400 093, India.*

WHEREAS it is hereby agreed as follows:

ARTICLE 1 – SCOPE OF WORK

APLL HK hereby appoints the Agent to perform the work described in the article ('work'). The Agent accepts such appointment and agrees to perform the Work within the Territory pursuant to the terms and conditions as set out hereunder in this Agreement. For purposes of this Agreement, "Territory" shall be and include the area formed by, and included within, the continental geographical boundaries of India.

In consideration of APLL HK not appointing any other entity to perform the Work within the Territory, the Agent shall not subsequent to the effective date of this Agreement, and throughout the term and extend thereof, contract, with, perform, act for, not accept appointment by any other NVOCC (Non Vessel Operating Common Carrier) freight forwarder in competition with APLL HK for the same or similar Work regarding cargo moving to or from the Territory unless agreed to in advance in writing by APLL HK.

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A. Cargo Booking and Operations

1. To take charge of and report the procurement and securing of cargo for the Vessels (as used herein "Vessels" shall refer to vessels owned or operated by entities with whom APLL HK has entered into a current service contract, or with whom APLL HK has another contractual obligation related to the Work);

2. *To assist in the processing of cargo claims;*
3. *To place at the disposal of shippers such information as freight rates, terms and conditions of carriage of special of dangerous cargo and schedules of the Vessels;*
4. *At APLL HK's direction and approval, to negotiate rates for transportation and depot services;*
5. *To book cargo for APLL HK on the Vessels in accordance with the space and accommodation of the Vessels, routing schedules and tariffs as approved by or stipulated by APLL HK and subject to clauses and exceptions under the APLL HK Bill of Lading;*
6. *Upon receipt of cargo, to prepare and issue accurately the APLL HK of Lading in the form and standard prescribed by APLL HK and such documents as required by port Authorities at ports, in transit or at destination, relating to the Vessels' carriage or discharge of cargo form or to the Territory;*
7. *To arrange for container Freight Station ("CFS") and Container Yard ("CY") facilities and other cargo handling operations, to attend to the handling of and transshipment of cargo and to maintain contract with forwarding agents, shippers and consignees for the purpose of attending to transportation, storage facilities, palletisation, clearing of cargo and /or special cargo, heavy lifts, port and other authorities and trade organization;*
8. *To secure and effect delivery of cargo to the Vessel;*
9. *To coordinate and liaise with other agents of APLL HK concerning to Vessels' arrivals/departures, cargo space, booking, stowage survey and tracing of cargo;*
10. *To perform a container inspection program and to effect cleaning when necessary.*
11. *To take charge of and report the receipt of cargo.*
12. *To issue arrival notices, and upon of cargo at destination, collect original bills of lading and related charges on behalf of APLL HK.*
13. *To negotiate rates for and procure as required any destination services supplementary to the receipt of cargo including without limitation storage, warehousing, dispatching, information, transportation and depot services.*
14. *Upon receipt of cargo, to convey or prepare, process and issue all documentation as required by Port Authorities, Customs, or other governmental entities.*
15. *To secure and effect release of cargo from the Vessel.*

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ARTICLE 6 – REMUNERATION

1. *Monthly Remuneration Report, In consideration for the Work described in this Agreement, the agent shall be remunerated by APLL HK in response to a report submitted by Agent, the contents of which shall include, without*

limitation, the items described in Articles 4(A)(1)(a), (B)(1)(a) (and all reimbursable Costs elsewhere described), this Article 6 and in Schedule I hereto ("Monthly Remuneration Report") Within thirty (30) days of receipt of local currency at APLL HK's option, based on the period and exchange rate determined on a monthly basis. APLL HK will give the Agent thirty (30) days advance notice in the event APLL HK wishes to change the currency used to pay the Agent.

2. *Reimbursable Costs.* With specific reference to Reimbursable Costs, the Agent shall maintain customary and usual business records to establish that;

- i. The Reimbursable Costs incurred was reasonable in amount and incurred for the benefit of APLL HK for the business transacted; and
- ii. The Reimbursable Costs was actually incurred by the Agent; and
- iii. The reimbursable Costs was paid by the Agent.

Supporting documentation covering Reimbursable Costs shall consist of original invoices to the Agent, cancelled cheques, bank statement, bills, receipts, APLL HK approvals and account leaders which clearly and succinctly state those items which are incurred for the account of APLL HK and those which are incurred for the account of the Agent.

3. *Volume Reporting and Calculation of Remuneration Due.* Agent shall submit a statement detailing the freight volumes handled under this Agreement with the associated per document charges at the rates set forth Schedule I (Part I).

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4. This Agreement may be amended only by mutual consent and in writing duly signed by the authorized representatives of both parties and annexed as Addendum to the Agreement.

IN WITNESS WHEREOF the parties hereto have caused this Agreement to be executed the day and year first above written.

APL LOGISTICS HONG KONG

APL LOGISTICS (INDIA) PVT. LTD.

Signed by:

Signed by:

Print Name: Rick Moradian

Print Name: Glynis Bryan

Title: Director / Regional President

Title: Director / CFO, APLL

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SCHEDULE I

Agent's Compensation

The following rates and conditions of compensation will apply commencing upon the date of execution of the Agreement and will continue unless terminated or amended by written agreement between the Agent and APLL HK:

A. Compensation

1. The Agent shall invoice APLI. HK monthly, in accordance with Articles 4 and 6 of the Agreement, for document charges arising from the creation and processing of APLL HK Bills of Lading as follows:

- a. FCL bills of lading: USD 25.00 each
- b. LCL bills of lading: USD 15.00 each.

1. In addition to the document charges described above, the Agent shall be entitled to collect for its own account any standard origin and destination charges.

2. Local Value-Added Tax (VAT) to be added to all invoices if applicable

B. Proof of Shipment and Audit. *If, upon audit of the Agent's records or otherwise, it is found that the Agent has received excess compensation erroneously or been improperly paid for uncollectible net ocean freight receivables resulting from billing errors, bad debts, or other causes, said excess compensation will be promptly paid to APLL HK or, at APLL HK's option, be credited to other funds due the Agent.*

C. Extraordinary Expenses. *From time to time the Agent may, outside of the normal course of business or in an emergency, incur expenses on behalf of APLL HK necessary to forestall further losses, damages, or claims without sufficient time to obtain advance approval from APLL HK. The Agent hereby agrees to notify APLL HK of the nature of such expenses within twenty-four hours, and APLL HK shall promptly reimburse the Agent for an amount up to, but not exceeding, USD 1,000.00, subject to receipt of appropriate supporting documentation and independent verification of the events giving rise to the expense."*

7.4 From plain reading of the aforesaid agreement entered into by the appellant assessee, it transpires that the said arrangement between the appellants and APLL HK is effective from 01.02.2002, and the scope of activities or work to be performed by the appellant is provided in the Article 1 – *Scope of work*. Similarly, the various other Articles of the said agreement comprehensively provide for the manner of the arrangement for various matters connected with the scope of work. These include marketing and public relations matters; computerization and software application development and acquisition; claims and indemnities; remittance of freight and inspection of accounts; accounts receivable and accounts payable; information and investigation; remuneration; appointing of additional sub-agencies; and other general clauses to standard agreement along with Schedules containing compensation; cargo release/guarantee policies; documents required to be collected, and documents not required, prior to cargo release; sample bank guarantee format; user agreement. The said agreement clearly provides that the appellant assessee is an 'agent' to APLL HK in performing various activities or providing various services in connection with the cargo handled by them. The nature of such activities

are wide enough to cover operational, financial, accounting, use of software and computerization, marketing work of APLL HK.

7.5 In order to appreciate by way of illustration, we find that the Clause A to Article-1 provide that the appellant assessee will arrange procurement and securing of cargo for its transportation through various vessels owned or operated by APLL HK; provide information on freight rates, terms and conditions of carriage of goods, negotiate rates; book the cargo for APLL HK; prepare and issue Bill of Lading for APLL HK and other documents required for Port authorities; arrange for Container Freight Station or Container Yard facilities for handling cargo; secure and effect delivery of cargo the Vessel for ultimate voyage of the vessel to export out of the country and co-ordinate and liaise with other agents of APLL HK concerning the Vessel's arrival/departure, cargo space, bookings, stowage survey and tracing of cargo. Similarly, with specific reference to import of goods the appellant assessee as per agreement is required to take charge and report of receipt of cargo; perform container inspection program and to effect cleaning when necessary; issue arrival notices; upon receipt of cargo at destination collect original bill of lading and related charges on behalf of APPL HK; upon receipt of cargo to convey or prepare, process and issue all documents as required for Port authorities, Customs or other governmental authorities; to secure and release of cargo from the Vessel. From the various clauses of the agreement and the number of activities carried out by the appellant as explained above, it could be clearly concluded that the appellant assessee is providing complete services for handling, receipt of and movement of international cargo carried by vessels in containers or other mode of packing, in a comprehensive manner. Thus, we are of the *prima facie* view that such activities of the appellant assessee can be considered as 'agent' of the principal APLL HK only and not as an agent of exporter or importer in India.

8.1 In order to address the disputed issues and in order come to a conclusion on the nature of such activities performed by the appellant assessee, whether it would be covered under the taxable service of 'Clearing & Forwarding agent's service or Business Auxiliary service or Business Support service, we would like to refer to the legal provisions of levy of service tax under the Finance Act, 1994 and the rules framed

thereunder as it existed during the disputed period which are extracted and given below:

Finance Act, 1994

"Definitions.

Section 65. *In this Chapter, unless the context otherwise requires,—*

(25) *"clearing and forwarding agent" means any person who is engaged in providing any service, either directly or indirectly, connected with the clearing and forwarding operations in any manner to any other person and includes a consignment agent;*

(23)¹*"cargo handling service" means loading, unloading, packing or unpacking of cargo and includes cargo handling services provided for freight in special containers or for non-containerised freight, services provided by a container freight terminal or any other freight terminal, for all modes of transport and cargo handling service incidental to freight, but does not include handling of export cargo or passenger baggage or mere transportation of goods;'*

(104C)²*"support services of business or commerce" means services provided in relation to business or commerce and includes evaluation of prospective customers, telemarketing, processing of purchase orders and fulfilment services, information and tracking of delivery schedules, managing distribution and logistics, customer relationship management services, accounting and processing of transactions,²[operational or administrative assistance in any manner], formulation of customer service and pricing policies, infrastructural support services and other transaction processing.*

Explanation.—For the purposes of this clause, the expression "infrastructural support services" includes providing office along with office utilities, lounge, reception with competent personnel to handle messages, secretarial services, internet and telecom facilities, pantry and security;

³**(19)** *"business auxiliary service" means any service in relation to,—*
(i) promotion or marketing or sale of goods produced or provided by or belonging to the client; or
(ii) promotion or marketing of service provided by the client; or
(iii) any customer care service provided on behalf of the client; or
(iv) any incidental or auxiliary support service such as billing, collection or recovery of cheques, accounts and remittance, evaluation of prospective customer and public relation services,
and includes services as a commission agent, but does not include any information technology service.

Explanation.—For the removal of doubts, it is hereby declared that for the purposes of this clause "information technology service" means any service in relation to designing, developing or maintaining of computer software, or computerized data processing or system networking, or any other service primarily in relation to operation of computer systems;

⁴**(19)** *"business auxiliary service" means any service in relation to—*

¹As per definition prior to its substitution by the Finance Act, 2008, w.e.f. 16-5-2008.

²Inserted by the Finance Act, 2006, w.e.f. 1-5-2006.

³ Prior to substitution by the Finance (No. 2) Act, 2004, w.e.f. 10-9-2004.

(i) promotion or marketing or sale of goods produced or provided by or belonging to the client; or

(ii) promotion or marketing of service provided by the client; or

(iii) any customer care service provided on behalf of the client; or

(iv) procurement of goods or services, which are inputs for the client; or

Explanation..—For the removal of doubts, it is hereby declared that for the purposes of this sub-clause, "inputs" means all goods or services intended for use by the client;

(v) production or processing of goods for, or on behalf of, the client; or

(vi) provision of service on behalf of the client; or

(vii) a service incidental or auxiliary to any activity specified in sub-clauses (i) to (vi), such as billing, issue or collection or recovery of cheques, payments, maintenance of accounts and remittance, inventory management, evaluation or development of prospective customer or vendor, public relation services, management or supervision, and includes services as a commission agent, but does not include any activity that amounts to manufacture of excisable goods.

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(105) "taxable service" means any service provided ⁵or to be provided, _

(j)⁶to any person, by a clearing and forwarding agent in relation to clearing and forwarding operations, in any manner;

(zr)to any person, by a cargo handling agency in relation to cargo handling services;

(zzb)to a client, by ⁷any person in relation to business auxiliary service;"

Service Tax Rules, 1994.

"Export of services.

Rule 6A. (1) The provision of any service provided or agreed to be provided shall be treated as export of service when,—

(a) the provider of service is located in the taxable territory,

(b) the recipient of service is located outside India,

(c) the service is not a service specified in section 66D of the Act,

(d) the place of provision of the service is outside India,

(e) the payment for such service has been received by the provider of service in convertible foreign exchange, and

(f) the provider of service and recipient of service are not merely establishments of a distinct person in accordance with item (b) of Explanation 3 of clause (44) of section 65B of the Act.

(2) Where any service is exported, the Central Government may, by notification, grant rebate of service tax or duty paid on input services or inputs, as the case may be, used in providing such service and the rebate shall be allowed subject to such safeguards, conditions and limitations, as may be specified, by the Central Government, by notification."

⁴Substituted by the Finance (No. 2) Act, 2004, w.e.f. 10-9-2004.

⁵Inserted by the Finance Act, 2005, w.e.f. 16-6-2005.

⁶Substituted for "to a client" by the Finance Act, 2008, w.e.f. 16-5-2008.

⁷Substituted for "a commercial concern" by the Finance Act, 2006, w.e.f. 1-5-2006.

EXPORT OF SERVICES RULES, 2005***"Export without payment of service tax."***

4. Any service, which is taxable under clause (105) of section 65 of the Act, may be exported without payment of service tax."

8.2 On careful reading of the definition of taxable service, under Section 65(25) *ibid* read with Section 65(105) (j) *ibid*, it is clearly provided therein that the services under the taxable category is 'clearing and forwarding operations' in any manner provided by one person to any other person, including a consignment agent. The scope of services has been specifically provided as 'clearing and forwarding services' and not as clearing or forwarding services, hence the services had to be understood as provided together in order to get covered under the taxable category. In this regard, the instructions issued by the Tax Research Unit of the Ministry of Finance vide Notification No. B.43/7/97-TRU dated 11.07.1997, while introducing the levy of service tax on this service would be more relevant in understanding the true scope of the taxable service.

"2. CLEARING AND FORWARDING AGENTS"

2.1 "Clearing and forwarding agent" has been defined as "any person who is engaged in providing any service, either directly or indirectly, connected with clearing and forwarding operations in any manner to any other person and includes a consigning agent." The taxable service has been defined as "any service provided to a client, by C&F agent in relation to clearing and forwarding agents are engaged/appointed by manufacturer of goods (both excisable and non-excisable goods).

2.2 Normally, there is a contract between the principal and the clearing and forwarding agent detailing the terms and conditions and also indicating the commission or remuneration to which the C&F agent is entitled. A clearing and Forwarding agent normally undertakes the following activities- (a) Receiving the goods from the factories or premises of the principal or his agents; (b) Warehousing these goods; (c) Receiving despatch orders from the principal; (d) Arranging despatch of goods as per the directions of the principal by engaging transport on his own or through the authorised transporters of the principal; (e) Maintaining records of the receipt and despatch of goods and the stock available at the warehouse; (f) Preparing invoices on behalf of the principal.

2.3 It has been decided that the person responsible for collecting the service tax in the case of services rendered by a clearing and forwarding agent shall be the person engaging/appointing a clearing and forwarding agent (Notification No. 26/97-service tax refers). It may be noted that unlike in the case of other service tax levies where the service provider is the person responsible for collecting the service tax, in the case of services rendered by the clearing and forwarding agents the service tax liability shall

be discharged by the person availing the service so rendered. In order words, the principal who engages a clearing and forwarding agent is the person responsible for collecting and paying the service tax to the exchequer, Commissioners of Central Excise may therefore take necessary action accordingly and also make this position clear by issue of suitable trade notice.

2.4 Further under the Finance Act, 1997 the value of taxable service rendered by a clearing and forwarding agent has been defined as the gross amount charged by such agents from the client for the services of clearing and forwarding operations in any manner. However, under service Tax rules it has been provided that the value of taxable service in relation to services rendered by clearing and forwarding agents to a client shall deemed to be the gross amount of remuneration or commission (by whatever name called) paid to such agent by the client engaging such agent (Notification No. 27/97-ST refers).

2.5 For their services rendered, the C&F agent receives commission or remuneration which usually consists of two components: (I) Minimum commission on a flat rate or turnover basis depending on the packages/consignments handled; (II) A variable commission based on performance which is computed on the performance indicators agreed upon between the agent and the principal. This is usually given as a percentage of the turnover. The above two constitute the remuneration or commission paid to the C&F agent by the principal.

2.6 In cases where C&F agents engaged for various towns, states or areas are paid only by the regional or the head office of the company appointing such agents, for service tax purposes it would suffice to register only such regional or head office. In such cases the regional office or the head office, as the case may be, should also be required to give an undertaking to discharge the service tax liability."

8.3 The above instructions clearly provide that 'clearing and forwarding services' relate to receipt of goods from factories or premises of manufacturer who is the principal and the C&F agent acts as his agent, in such receipt, warehousing of goods; receiving despatch orders from the principal manufacturer and arranging its despatch as per instructions of the principal and through his authorised transporters, maintaining records of stock, receipt and despatch on behalf of the principal, for which the C&F agents receives the remuneration as a commission, either as a percentage of turnover or in any other manner as variable commission based on certain performance indicators agreed upon between them. These aspects are clearly absent in the present factual matrix of the case. The present case is concerned only with handling of export/import cargo on behalf of the principal APLL HK, who is a vessel owner or a Non-Vessel Operating Common Carrier (NVOCC), involved in transportation of such cargo for

their clients, both of whom are situated outside India. Thus, on the basis of facts of the present case, we are of the considered view that the services/activities performed by the appellant assessee as per agreement dated 01.01.2002 does not fall under the category of 'clearing and forwarding agent' service.

8.4 In order to further examine whether the services provided by the appellant assessee to its overseas entity APLL HK is covered under the scope of any other services or not, we have also examined the relevant provisions of the Finance Act, 1994 and Rules framed thereunder. We find that the taxable services under the category of 'cargo handling service' covers under its scope various activities related to handling of cargo in import/export operations through containerised or non-containerised freight listed out in the 'means' portion of the definition; however, in the non-inclusion portion, the services relating to 'handling of export cargo' have been specifically excluded. Further, this service is limited in its scope, inasmuch as it covers only cargo handling activities and does not extend to financial, accounting, marketing services etc. as is the case of the appellants here. Thus, we find that 'cargo handling service' is not relevant to the services provided by the appellant assessee in the present set of facts in this case.

8.5 We further find that the various services provided by the appellant assessee, such as the activities of promotion or marketing of freight transportation services, sourcing of cargo and its consolidation for the clients of APLL HK, issue of Bill of Lading, invoices, collection of charges, maintenance of accounts and remittances, public relation services, management, marketing services etc. are more appropriately covered under the 'Business Auxiliary Service'. Further, at the time of introduction of service tax on new services in Union Budget 2006, the Tax Research Unit of the Ministry of Finance had issued the instructions vide D.O. F. No.334/4/2006-dated 28.02.2006 as follows:

"3.13 BUSINESS SUPPORT SERVICES: Business entities outsource a number of services for use in business or commerce. These services include transaction processing, routine administration or accountancy, customer relationship management and tele-marketing. There are also business entities which provide infrastructural support such as providing instant offices along with secretarial assistance known as "Business Centre Services". It is proposed to tax all such outsourced services. If these services are provided on behalf of a person, they are already taxed under

Business Auxiliary Service. Definition of support services of business or commerce gives indicative list of outsourced services."

8.6 Further, we find that the Ministry of Finance had also clarified vide Circular No. 59/8/2003 dated 20.06.2003, that C&F services are specifically covered and they do not fall under the taxable category of business auxiliary service as follows. Further, use of information technology or computers for providing Business Auxiliary Services (BAS) is clarified to have been covered under the scope of BAS in the said clarification as follows:

"2.1.3 Certain doubts have been raised in case of business auxiliary services. In this regard the following is clarified, While it is not possible to give an exhaustive list of business auxiliary services, the following are illustrations of services that are covered under this category viz. evaluation of prospective customers, processing of purchase orders, customer management, information and tracking of delivery schedules, accounting and processing of transactions, operational assistance for marketing, formulation of customer service and pricing policies, managing distribution & logistics. The services provided in relation to getting a customer, verification of prospective customer, processing of purchase order etc would also be covered under service tax, as the law specifically provides for inclusion of such services as business auxiliary support services. As regards the question whether insurance agents, C&F agents working on commission basis fall under the definition of business auxiliary service, it is clarified that they do not, as they are specifically covered within the definition of other specified taxable services, namely the Insurance service and C&F Service respectively. Under Section 65A of Finance Act 1994, it has also been provided that in case of overlap, a service would be classified under the head, (a) which provides most specific description, (b) in case of a composite service having combination of different taxable services, the service which give them their essential character and (c) in case the test of (a) and (b) does not resolve, the service which comes earlier in the clauses of Section 65, i.e. the service that was subjected to service tax earlier. Since Insurance services and C&F Services are more specific description and were also subjected to service tax prior to imposition of tax on business auxiliary service, the insurance agents, C&F agents working on commission basis would fall under those respective categories. From this, it follows that a particular service can be taxed only under one head of service. As per the definition of business auxiliary services, information technology service is outside the purview of business auxiliary service. In the explanation appended to the definition in the Act itself, it has been clarified that information technology service means any service in relation to designing, developing or maintaining of computer software or computerized data processing or system networking or any other service primarily in relation to operation of computer systems. In this regard, it is clarified that only if the output service provided by a service provider is in the nature of the above operations, such exclusion would operate. The mere fact that a personal computer or a laptop has been used for providing the service does not, ipso facto, make the service an information technology service. Similarly, the fact that any of the IT services mentioned in the explanation has been used by the service provider as an input service does not automatically make the output service an IT service. Therefore, in such cases, individual service has to be examined with reference to the explanation provided to the definition of business auxiliary service and only such output services which qualify to be IT services in terms of the said explanation shall remain excluded from taxable service under the heading business auxiliary service."

The above clarification clearly explain that the services provided by the appellant assessee in this case is in the nature of Business Auxiliary Services.

8.7 We also find that in the present case, the assessee appellant is providing services to APLL HK or by extension to the clients/customers of APLL HK who are situated abroad i.e., outside India. Any services that are provided outside the taxable territory and when such services fulfil the specified conditions provided Rule 6A of Service Tax Rules, 2005 to qualify as 'export' including the essential requirements that the recipient of service is located outside India, payment of service provided is received in convertible foreign exchange, this would be treated as export of services, and there is no levy of service tax thereon. Further, it was specifically provided under Rule 4 of Export of Services Rules, 2005 that any taxable services could be exported without payment of service tax. In other words, the provision of services that were under the tax net of service tax were those services provided within the territory of India except the State of Jammu and Kashmir. Services provided to any person situated outside taxable territory as a corollary are not liable to be paid with service tax. In the present case, it is not disputed that the services were rendered to APLL HK or by extending further to the clients/customers, both of whom are situated abroad outside India and the consideration were received in convertible foreign exchange as evidenced by compensation clause in Schedule-I to the agreement dated 01.01.2002. Thus, there is no scope for levy of service on the aforesaid components of services provided by the appellant assessee.

8.8 We further find that demand of service tax under Clearing and Forwarding agent service was confirmed on the basis of the terms and conditions of Forwarders Cargo Receipt (FCR) with specific reference to condition Sl. No.3 &4. On perusal of the sample copy of FCR produced by the appellant assessee, it is found that the appellant assessee had issued the document as agent of APLL HK for the 'buyer' situated abroad outside India to whom the export goods are sold by Indian business entity as 'seller' covering voyage of the export goods from India to destination port outside India, at the place of buyer. The word 'customer' has been explained in condition No.1 to include persons entering into an agreement with APLL HK, and therefore specific mention in condition No.3 & 4, that

any services provided by appellant assessee to the customers could include the clients/customers or business entities who have entered into an agreement or arrangement with APLL HK. These persons include clients of APLL HK or the business entities seeking the services of APLL HK for export of cargo being purchased by them from Indian exporters; similarly, such clients or business entities also make necessary arrangements with APLL HK for supplying goods to Indian buyers, who are buying from them as importers. Hence, we do not find it feasible to extend such reference to the term 'customer' in the FCR document to business entities situated in India, and treat the appellant assessee as 'agent' of these business entities in India and thus cover the services provided by the appellants under the taxable category of Clearing and Forwarding agent services for charging service tax.

9.1 We find that the dispute in respect of the services provided by the appellants assessee as taxable under various categories in respect of ocean freight, advance manifest charges/Forward Cargo Receipt charges, bunkering charges, currency adjustment charges/exchange gain including clearing and forwarding agent services, has been decided by the Tribunal in a number of cases holding that these are not leviable to service tax. In the appellants own case, the Co-ordinate Bench of the Tribunal in the case of APL (India) Pvt. Ltd. Vs. Commissioner of Service Tax, Mumbai – 2015 (37) S.T.R. 301 (Tri. - Mumbai) had decided that service tax is not leviable on these charges. The relevant paragraph of the said order is extracted and given below:

"4.2 *The short question for consideration is whether the ocean freight, currency adjustment charges, bunkering charges, advance manifest charges collected by the appellant on behalf of the shipping lines can be subjected to levy of Service Tax. It is undisputed that most of these charges form part of the transaction value in respect of customs matters and therefore, the question of levy of Service Tax on a customs transaction would not arise at all. If the appellants have collected these charges and remitted the same to the shipping lines, the whole amount received and transmitted cannot be said to be a consideration for the services rendered. What can be levied to Service Tax is the service rendered by the appellant either as a steamer agent or BAS in respect of collection of freight and other charges and only on the consideration received for the services rendered, Service Tax can be levied. In this view of the matter, the impugned order is clearly not sustainable in law and the matter has to go back to the adjudicating authority for de novo consideration. The appellant is also directed to co-operate with the department and submit all the requisite particulars, such as, the amount of ocean freight and other charges collected by them and the amount*

transmitted by them to the foreign shipping lines and the amount of consideration received/retained by them in respect of the services rendered and whether Service Tax liability has been discharged on the consideration received by them for rendering of the services. On submission of such information, the adjudicating authority shall examine the matter afresh and pass a speaking order after giving due opportunity of hearing to the appellant. Thus, the appeal is allowed by way of remand. Stay petition is also disposed of."

9.2 We further find that the Co-ordinate Bench of the Tribunal in another case relating to the appellant had also decided the issue of levy of service tax in favour of the appellant assessee, in the case of APL Logistics (India) Pvt. Ltd. Vs. Commissioner of Central Excise, Chennai-III – 2014 (36) S.T.R. 1310 (Tri. - Chennai). The relevant paragraphs of the said order is extracted and given below:

"8. *Ld. advocate submitted that they have mentioned ocean freight separately in their invoices. The sample invoice of 2010 placed by the appellant would show that "ocean freight" was mentioned separately. It is seen from the adjudication order that the ocean freight, advance manifest charges, bunkering charges (fuel adjustment charges due to variation in prices) and currency adjustment charges (due to fluctuation of foreign exchange rates) are all integral part of payments, which are remitted to the shipping lines.*

9. *In view of the above discussion, we find that the Service Tax is not leviable on ocean freight. It is appropriate that the adjudicating authority should examine all the issues in the light of the above decisions and appellants would be directed to produce documents for proper verification.*

10. *Accordingly, we set aside the impugned order and the matter is remanded back to the adjudicating authority to decide afresh after considering the submissions of the appellant in accordance with law. The appeal is allowed by way of remand. Stay application is disposed of. M.A. for change of cause title is allowed."*

9.3 In another case dealing with similar issue, we find that the Co-ordinate Bench of the Tribunal had decided the issue in favour of the appellant assessee, in the case of Gudwin Logistics Vs. Commissioner of Central Excise, Vadodara – 2012 (26) S.T.R. 443 (Tri. –Ahmd.). The relevant paragraphs of the said order are extracted and given below:

"19. *It can be seen that C.B.E.&C. had clearly clarified that essential characteristic of any services to get classified under the category of clearing & forwarding agent is relationship between the service provider and receiver and the same should be in the nature of principal (owner) and agent. In the entire case before us, we find that this relationship has not been established by the*

Revenue which is obvious as the appellant herein is not functioning as clearing & forwarding agent. The clinching point in this case is that the appellant herein is not receiving the goods from principal or storing the goods or dispatching the goods, as per the orders received from the principal or prepares the invoices on behalf of the principal. It is also on record that in these cases, the appellant does not receive any commission as remuneration for receipt/store/despatch and preparing invoices of the goods on behalf of the principal. In the absence of any such service being rendered by the appellant, circular issued by C.B.E.&C. would be binding on the lower authorities.

20. *We find that as correctly pointed out by Id. Counsel that judgment of Hon'ble High Court of Punjab & Haryana in the case of Kulcip Medicines will specifically cover the issue. With respect, we may reproduce the relevant paragraph from the judgment of Hon'ble High Court.*

"11. The question which falls for consideration is whether word 'and' used after the word 'clearing' but before the word 'forwarding' at two places in clause (j) be considered in a conjunctive sense or dis-junctive sense. It appears to be fairly well settled that the context and intention of legislature are the guiding principles. In that regard reliance may be placed on the judgment of Hon'ble the Supreme Court in the case of Mazagaon Dock Ltd. v. CIT (1958) 34 ITR 368. By necessary intendment the expression 'a clearing and forwarding agent in relation to clearing and forwarding operations, in any manner, contemplates only one person rendering service as 'clearing and forwarding agent' in relation to 'clearing and forwarding operations'. To say that if, one person has rendered service as 'forwarding agent' without rendering any service as 'clearing agent' and he be deemed to have rendered both services would amount to replacing the conjunctive 'and' by a disjunctive which is not possible. The counsel for the revenue has not been able to bring on record any material to show the word 'and' should be construed as disjunctive. He has not shown any 'trade practice' which may lead to a necessary inference that service of one kind rendered by one is invariably considered to comprise both. No argument has been advanced before us by him to canvass that the legislature intention is discernible from the scheme of the statute or from any other relevant material. Therefore the word 'and' should be understood in a conjunctive sense. (See Maharaja Sir Pateshwari Prasad Singh v. State of U.P. (1963) 50 ITR 731. In these circumstances if we read the word 'and' as 'or' then it would amount to doing violence to the simple language used by Legislature which cannot be imputed ignorance of English language. In that regard we place reliance on the judgment of Hon'ble the Supreme Court rendered in the case of Inayat Ali Khan v. State of U.P., (1971) 2 SCC 31 (Para 5) and para 6 of the judgment of Hon'ble the Supreme Court rendered in the case of APE Belliss India Ltd v. Union of India, [\(2001\) 132 E.L.T. 8](#). The observations of their Lordship reads thus :

"6.....A plain reading of the Section (sic Tariff Public Notice) clearly shows, as contended by Mr. Bhatt, that for an alloy steel to be considered as stainless steel, it will have to satisfy two conditions i.e. The alloy steel should be known in the trade as stainless steel and further, it should contain 11% chromium as a component of the alloy steel. This is clear from the use of the word "and". If the intention of the trade notice was to treat the two types of alloy steels as stainless steel, then it would have been made clear by using the word "or" instead of the word "and"."

12. We are further of the view that the circulars issued by the Board are binding and meant for adoption for the purposes of bringing uniformity. In that regard reliance may be placed on the judgments of Hon'ble the Supreme Court in the cases of Ranadey Micronutrients v. Collector of Central Excise - [1996 \(87\) E.L.T. 19 \(S.C.\)](#) and Paper Products Ltd. v. Commissioner of Central Excise - [1999 \(112\) E.L.T. 765 \(S.C.\)](#) = (1999) 7 SCC 84. If the aforesaid principle is applied to the facts of the present case there does not remain any doubt that the circular issued by the Board is to be considered as binding and cannot be deviated even by the department. On that account also the

expression 'clearing and forwarding agent' have to be interpreted in the light of the circular. "

21. Yet, in another case of *Karamchand Thapar & Bros v. U.O.I.*, Hon'ble High Court of Calcutta, in their judgment dated 22-7-09 had held as under :

"64. The real test of taxable service as clearing and forwarding agent is whether the activity includes inter alia receiving the goods from the factories or the premises of the principal or his agents, warehousing the goods, receiving despatch order from the principal, arranging despatch of goods as per the directions of the principal by engaging transport of his own or through the authorised transporters of the principal, maintaining records of the receipt and despatch of goods and the stock available at the warehouse.

65. In any case, the expression 'clearing and forwarding agent' is apparently conjunctive and not disjunctive. Only clearing activities would not attract service tax in the category of service of clearing and forwarding agent. Similarly only forwarding activity would also not attract tax in the category of service of clearing and forwarding agent. The service provider would necessarily have to be engaged in providing clearing and forwarding services in order to be taxable in the category of clearing and forwarding agent.

66. In *Commissioner of Central Excise, Panchkula v. Kulcip Medicines Pvt. Ltd.* reported in [2009 \(14\) S.T.R. 608](#) (P & H), the Punjab and Haryana High Court held that the expression "a Clearing & Forwarding Agent in relation to clearing and forwarding operations, in any manner", appearing in Section 65(104)(j) read with Section 65(25) of Chapter V of the Finance Act, 1994, contemplates only one person rendering service as 'Clearing & Forwarding Agent'.

67. The Court further held and observed that if, a person rendered service as "Forwarding Agent" without rendering any service as "Clearing Agent", he could not be brought within the tax net, since he could not be deemed to have rendered both services."

22. It can be seen from the above reproduced portion of the judgments, that law has been fairly settled which indicate that the clearing & forwarding services can be considered as being rendered, if both the activities are connected and simultaneously done. As has been reproduced by us, the appellant in this case, is not engaged in any kind of activities which are attributable to clearing & forwarding agent service.

23. Coming to the aspect of expressions in the definition of clearing & forwarding agent, more specifically "directly or indirectly", "in any manner", we find that the larger bench of this Tribunal, in case of *Larsen & Toubro v. C.C.E. Chennai*, [2006 \(3\) S.T.R. 321](#) (Tri-LB) (wherein, I was also one of the Member), had specifically held in Para 10, which is reproduced below :

"10. It appears to us that the expressions "directly or indirectly" and "in any manner" occurring in the definition of "clearing and forwarding agent" cannot be isolated from the activity of clearing and forwarding operations. A person may undertake to provide service of procurement of orders as agent of the principal without agreeing to provide services of clearing and forwarding of the goods. Clearing and forwarding has a very specific connotation in the context of movement of goods from the supplier to their destination and agents undertaking clearing and forwarding operations may never have been concerned with procurement of orders for the goods which are cleared and forwarded. A person entrusted with the work of commission agent for procuring orders for the principal cannot insist on also providing services as clearing and forwarding agent in respect of those goods and it would be open for the principal to engage some other person for the purpose of forwarding such goods. In cases where the buyer is under an obligation to take delivery of the goods from the vendor's premises, there would not be even any need on the part of the vendor to engage any forwarding agent, nor can a person engaged for the purpose of clearing and forwarding operations, insist on procuring orders for the principal in the absence of any stipulation to that effect."

24. *We find that the Id. Authorised Representative for the Department had been relying heavily on the judgment of Hon'ble High Court of Karnataka in the case of Mahavir Generics. We find that in the case of Mahavir Generics, the agreement between the principal and M/s. Mahavir Generics clearly indicated that M/s. Mahavir Generics will act as consignment agent of the principal and function as indicated in the contract.*

25. *Their Lordship have reproduced the entire agreement between the principal and M/s. Mahavir Generics wherein responsibility attributed to M/s. Mahavir Generics clearly indicated that they were functioning as 'consignment agent' which is covered under the inclusive definition of clearing & forwarding agent. In view of this reliance placed on said judgment will not carry the case of the Revenue any further.*

26. *In view of the foregoing, we are of the considered view that the impugned order which held that the appellant has been providing service of clearing & forwarding agent, are incorrect and is liable to be set aside and we do so."*

9.4 Further, in another case dealing with similar issue, we find that the Co-ordinate Bench of the Tribunal had decided the issue in favour of the appellant assessee, in the case of Swagat Freight Carriers Pvt. Ltd. Vs. Commissioner of Service Tax, Mumbai – 2014 (33) S.T.R. 81 (Tri. – Mumbai). The relevant paragraphs of the said order is extracted and given below:

"4. *The Id. Additional Commissioner (AR) appearing for the Revenue reiterates the findings of the lower authorities and submits that the appellant is rendering a bundle of services, some of which might come under "Clearing & Forwarding Agency Service".*

5. *After hearing both the sides and going through the records of the case, it is evident that the appellant is rendering freight forwarding service. Freight forwarding is distinct and different from "Clearing & Forwarding Agency Service" as defined in law. In the light of the decisions (supra) relied upon by the appellant, the services rendered by the appellant do not come under the category of "Clearing & Forwarding Agency Service". Accordingly, we set aside the impugned order and allow the appeal with consequential relief, if any, in accordance with law."*

9.5 The above orders of the Tribunal clearly provide that the services provided by the appellant assessee such as ocean freight charges, Forward Cargo Receipt charges/advance manifest charges/CFS charges, bunkering charges, foreign exchange gain or income/currency adjustment charges including clearing and forwarding charges are not liable to service tax. Further, we also find that the agreement dated 01.01.2002 entered by the appellants also provide for reimbursable expenses incurred by them as agent of APLL HK under Article 6 and for appointment of sub-agents with the approval of APLL HK under Article 7. Thus, we do not find that

appointment of sub-agents like APL Logistics and Warehouse Management Service (Hong Kong) Ltd. (APLL WMS), a company organized under Hong Kong laws, as unauthorized or deliberate action with an intention to evade tax. Further, we also take note of the payment of service tax already made by the appellant assessee with effect from February, 2006 towards Business Auxiliary Services provided by them and with effect from June, 2006 towards Business Support Services, which have been appropriated in the impugned order for an amount of Rs.3,45,06,438/-.

10.1 We find that at the time of issue of SCN dated 21.10.2008, demand of service tax was issued by the department to the appellant assessee on the basis of balance sheets for the period 2003-2004 to 2006-2007 for a total amount of Rs. 37,49,78,988/-. However, during the process of adjudication the appellants have produced the location specific registrations taken by them and the details of revenue/incomes in respect of such specific locations and the details relating to their unit at Mumbai. The adjudicating authority had taken these figures produced by the Chartered Accountant vide their certificate dated 18.12.2015 providing the figures for each of the financial year and for specific heads. The issue that whether the Commissioner of Service Tax, Mumbai-VII has jurisdiction over all the Branches of the assessee appellant for adjudication of the SCN dated 21.10.2008 or not, under the Finance Act, 1994, has been addressed in the impugned order as follows:

"8. The Show Cause Notice alleges that the Noticee had provided Clearing and Forwarding Agent's services, on which no Service Tax was paid by the Noticee during the period 01.04.2003 to 31.03.2008. Accordingly, demand of Service Tax amounting to Rs. 37,49,78,988/- has been made in the show Cause Notice by invoking the proviso to Section 73(1) of the Finance Act, 1994, besides proposing recovery of interest under Section 75 and imposition of penalty under Section 76, 77 and 78 ibid.

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I. Service Tax demand on revenue earned at location other than Mumbai - *The Noticee submits that during the period of Show Cause Notice, they were holding separate registration for each branch located at Mumbai, Kolkatta, Chennai, Cochin, New Delhi, Tuticorin and Bangalore. They had obtained centralized registration only in November 2010. The Audited Financials are for the revenue earned from all the locations. The Show Cause Notice dated 21.10.2008 has demanded a service Tax on the revenue shown in the Financials, which is for all the locations. As the Commissioner of Service Tax, Mumbai has jurisdiction only in Mumbai, the Service Tax demand on revenue earned by locations other than Mumbai is*

beyond jurisdiction and beyond the powers granted under Rule 3 of the Service Tax Rules, 1994.

It is seen from para 15 of the Show Cause Notice that the quantification of Service Tax payable has been done on the basis of the yearly income shown in Audited Annual Accounts. Thus, evidently the quantification of Service Tax demand is for all the locations, as the Annual Account consists of income pertaining to all the operations from all the branches. This being the case, the question that needs to be answered is whether the Commissioner of Service 1 Tax, Mumbai is within its powers to issue the Service Tax demand under Section 73(1) of the Finance Act, 1994, pertaining to branches located outside the jurisdiction of Mumbai.

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The Noticee's branches were located at Mumbai, Delhi, Cochin, Kolkatta, Tuticorn and Chennai. These branches were holding separate Service Tax registrations. In view of the **Orders issued by CBEC under the powers of Rule 3 of the Service Tax Rules, 1994, the jurisdiction of the Commissioner of Service Tax, Mumbai is limited to the areas covered within the limits of Municipal Corporation of Greater Mumbai and Thane District and the powers of the Commissioner of Service Tax, Mumbai to assess and collect Service Tax, per se was limited to the Service Tax liability arising out of the services provided by the Mumbai Branch of the Noticee.** In these circumstances, I tend to accept the submissions of the Noticee that the **demand of Service Tax pertaining to the branches located beyond the jurisdiction of the Commissioner of Service Tax Mumbai, is without the statutory powers and, therefore, not sustainable.** The total revenue pertaining to Mumbai branch for the period 2003-04 to 2007-08, as certified by Hemant V. Shah, Chartered Accountant vide CA Certificate dated 18.12.2015, is Rs. 104,84,29,547/-.

III. Service Tax is not payable on Interest on Time Deposit and Exchange gain:

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As per Section 67 of the Finance Act, 1994, the taxable value shall be the gross value charged for the output services provided or to be provided. When no service is rendered there cannot be any taxable value. **Interest earned on Time/Fixed Deposits is not towards any service rendered, therefore, no Service Tax can be charged on such income.** Hemant V. Shah and Co., Chartered Accountants, vide its above said CA Certificate dated 18.12.2015 have certified the amount of interest as under –

Period	Interest pertaining to Mumbai branch	Interest pertaining to branches other than Mumbai	Total
2006-07	1,90,715/-	5,88,559/-	7,79,60,541/-
2007-08	1,22,261/-	3,47,131/-	4,69,392/-

However, in respect of the foreign currency earned, the Noticee have not explained as to in respect of what activity the foreign exchange is

earned so as to examine whether the activity is leviable to Service Tax or otherwise. Since the claim made by the Noticee is unsubstantiated, I am constrained to take a view that the amounts earned due to foreign currency fluctuations will be part of the taxable value.

19. Keeping in view the discussions made in para 19 above, the Service Tax payable by the Noticee on the said 'Clearing & Forwarding services', for the period 2003-04 to 2007-08 has to be computed. As stated above, the Show Cause Notice had considered the value/income shown in the Balance Sheets for the respective years. However, the Noticee have now produced the CA Certificate dated 18.12.2015 issued by Hemant V. Shah & Co., Chartered Accountant, which is based on the financial records, viz., Trial Balance, Audited Financials, backup working basis from which trial balance is prepared and revenue recorded for Mumbai branch and other branches. The CA Certificate being legally acceptable document, I consider the values shown in the same for computing the Service Tax payable by the Noticee, which is as under –

(Amount in Rs.)

Period	Taxable value		Service Tax payable on value pertaining to Mumbai branch		Total Service Tax payable
	Mumbai Br.	Branches other than Mumbai	Service Tax	Education Cess	
2003-04	16,88,76,766/-	29,32,59,647/-	1,68,87,677/-	3,37,754/-	1,72,25,431/-
2004-05	30,79,98,559/-	51,86,26,024/-	3,07,99,856/-	6,15,997/-	3,14,15,853/-
2005-06	18,29,30,311/-	62,31,36,122/-	1,82,93,031/-	3,65,861/-	1,86,58,892/-
2006-07	18,88,14,219/-	72,32,54,491/-	2,26,57,706/-	4,53,154/-	2,31,10,860/-
2007-08	19,94,96,715/-	54,68,63,801/-	2,39,39,606/-	7,18,188/-	2,46,57,794/-
TOTAL					11,50,68,830/-

The total amount of Service Tax payable by the Noticee on the 'Clearing & Forwarding services' in respect of the Mumbai Branch for the period 2003-04 to 2007-08, works out to Rs. 11,50,68,830/-.

22. In view of the foregoing, I hold that Service Tax demand of Rs. 11,50,68,830/- pertaining to Mumbai branch, is liable to be determined as payable by the Noticee on the 'Clearing and Forwarding Agent's services' pertaining to the period 01.04.2003 to 31.03.2008. ..."

10.2 We find that the learned Commissioner had examined the details of registration held by the appellant assessee at Mumbai, Delhi, Cochin, Kolkatta, Tuticorn and Chennai. He had given a finding that these branches were holding separate Service Tax registrations. Accordingly, he had in exercise of the powers provided in terms of the Orders issued by CBEC under Rule 3 of the Service Tax Rules, 1994, providing the jurisdiction for exercise of the powers under Chapter V of the Finance Act, 1994, had restricted the demand of service tax to the amount of demand attributable

to the Mumbai branch on the basis of the details furnished by the Chartered Accountant in his certificate dated 18.12.2015.

10.3 We find that Rule 3 of the Service Tax Rules, 1994 provide for appointment of officers for the purpose of exercising the powers under Chapter V of the Finance Act, 1994. We further find that the SCN dated 21.10.2018 does not specifically mention that the appellants had centralized registration during the relevant period and thus they had issued demand notice covering all the locations/branches of the assessee appellant. Further, we also find that in different jurisdiction i.e., at Chennai, the Commissioner of Service Tax, Chennai had also issued show cause notice for recovery of service tax payable on the business auxiliary services for the period from 10.09.2004 to 30.04.2006 and 10.09.2004 to 31.01.2006 vide SCN 12.07.2007; Similarly one another SCN dated 18.09.2009 was also issued for recovery of service tax payable on business auxiliary services for the period from June, 2006 to December, 2008, which had also been decided by the Tribunal in the case of APL Logistics (India) Pvt. Ltd. Vs. Commissioner of Central Excise, Chennai-III reported in 2014 (36) S.T.R. 1310 (Tri.-Chennai) by setting aside the original order and remanding back the case to the original authority. Further, we also find similar demand of service tax on the issue of valuation of service tax under the category of steamer agent services was issued in Mumbai and the original authority had confirmed the demand for the period October, 2007 to March, 2012 which was decided by the Tribunal in the case of APL (India) Pvt. Ltd. Vs. Commissioner of Service Tax, Mumbai reported in 2015 (37) S.T.R. 301 (Tri. Mumbai) by holding that most of the charges such as ocean freight, currency adjustment charges, bunkering charges, advance manifest charges form part of the transaction value in respect of customs matters and remanded the case back to the adjudicating authority for passing a speaking order. In another case decided by the Co-ordinate Bench of the Tribunal in Final Order No. A/1756/14/CSTB/C-I & S/1271/14/CSTB/C-I in Appeal No. ST/87451/2014-Mum. dated 17.11.2014, the impugned order confirming service tax was set aside and remanded back for fresh decision on the basis of issues already decided by the Tribunal in the appellant's own case and in the case of Gudwin Logistics (supra). Further, the impugned order dated 31.12.2015 had by verifying the Chartered Accountant's certificate dated 18.12.2015 had dropped the service tax demand in respect of interest earned on time deposits/fixed

deposits. Therefore, we do not find any infirmity in the above decision of dropping of such demand on the basis of factual details and supporting evidential documents.

10.4 We further find that CBEC in the instructions issued vide F. No. 137/50/2007-CX.4 dated 16.03.2007, on the subject complete transfer of files, documents and investigation matters consequent to grant of Centralised Registration facility as provided under Rule 4(2) of Service Tax Rules, 1994 had clarified as follows:

"3.1 In such cases where an inquiry or investigation is advanced stage, the Commissioner of having jurisdiction over such branch/local office may continue to complete the pending inquiries or investigations, with the consent of the Commissioner having jurisdiction after grant of centralized registration. In such cases, the draft show cause notices will be prepared by the Commissionerate, who has investigated the case. However, action for issue of show cause notice or adjudication of pending show cause notices where personal hearings have not been completed on the date of grant of centralised registration, would be done by the Commissionerate, having jurisdiction subsequent a centralised registration.

3.2 the Commissioner, having jurisdiction subsequent a centralised registration, will ensure that all files, records and documents are transferred to his/her office, are properly recorded and entered in appropriate registers.

4. A report confirming transfer of all records, except as stated in para 3.1 above, may please be sent to DG ST by 15.04.2007. DG ST will send a consolidated report and the matter to Board by 25.04.2007."

10.5 On perusal of the above instructions, it appears that these are the nature of administrative instructions for proper handling of files, documents and investigation records by a single authority having jurisdiction over service tax matters in respect of centralised registration, and the manner of handling transitional issues from decentralized registration to centralised registration. However, we do not find that the said instruction dated 16.03.2007 and provide any legal authority for exercise of the powers conferred on the officers by the Board under Rule 3 of the Service Tax Rules, 1994.

10.6 Further, the records available in the present case do not indicate that on account of centralised registration being taken by the appellant assessee in November, 2010, the SCNs pending adjudication at different locations were transferred to the Commissioner of Service Tax-VII, Mumbai. As the

SCN in respect of the impugned order was issued on 21.10.2008, much prior to the centralised registration taken during November, 2010, there is no possibility for the jurisdictional Commissioner to assume jurisdiction over all the units of the appellant registered separately at different locations. In view of the above factual position, we do not find any merits in the appeal filed by the department stating that the dropping of the service tax demand raised in the SCN dated 21.10.2008 for locations other than Mumbai is legally sustainable.

11.1 As regards the penalties proposed in the show cause notice, the learned Commissioner had imposed penalty equal to the amount of service tax demanded under Section 78 *ibid*. The relevant paragraphs of the impugned order imposing penalty is extracted and given below:

*"23.Coming to the penalty, the show Cause Noticee has proposed imposition of penalty under the provisions Section 76, 77 and 78 of the Finance Act, 1994. As stated above the Noticee had suppressed the real nature of the service provided by them, apparently with intent to evade payment of Service Tax on the same. No ambiguity whatsoever, existed in the definition of Clearing and Forwarding Agent's services, as defined under Section 65(25) of the Finance Act, 1994 read with Section 65(105)(j) *ibid*. It is on record that the Noticee paid Service Tax on the impugned services from May 2006 onwards, albeit under the head of Business Support Service. However, no Service Tax was paid for the period prior to that. I, therefore, don't have any hesitation in holding that the non-payment of Service Tax to the tune of Rs.11,50,68,830/- by the Noticee was be resorting to suppression of the material facts with intent to evade payment of the same. ... In view of the foregoing, I hold that the Noticee is liable for penalty under Section 78 of the Finance Act, 1994, which shall be equal to hundred percent of the amount of such Service Tax determined as payable by the Noticee. As per the amended penal provisions, penalty under Section 76 of the Finance Act, 1994 cannot be imposed simultaneously when penalty is held to be payable under Section 78 *ibid*. Therefore, I do not impose any penalty under Section 76 of the Finance Act, 1994."*

11.2 The legal provisions contained in Section 73(1) *ibid* provide that extended period can be invoked for demand of service tax, in situations where there is any involvement of fraud, or collusion, or wilful misstatement, or suppression of facts, or contravention of any of the provisions of this Chapter or of the Rules made thereunder with intent to evade payment of service tax, by the appellant assessee. We find that neither in the show cause notice nor in the impugned order, there is any specific allegation or finding for invoking such legal provisions. On the other hand, we find that the show cause notice dated 21.10.2008 state that on the basis of balance sheets and records

ascertained from the appellants, the worksheet in the form of Annexure-A providing total demand of service tax was prepared by the Department. The above factual position indicates that there was no suppression of any information, inasmuch as the appellant have provided complete details in respect of the audited accounts and the balance sheets for the years 2003-2004 to 2006-2007 to the departmental officers during the course of audit of the appellant's records. We further find that in the grounds of appeal filed by the Department, it is stated that the bifurcation of the data location wise/unit wise was given by the appellant and much later date, after issue of centralised registration, and hence the department had issued SCN for the entire operation including the Mumbai finding no alternative. Thus, the Department claimed that the appellant by avoiding to provide the figures, had intentionally by design stopped the process of issuing to show cause notices by other jurisdiction, and thus they had intention to evade duty. We find from the factual details about various notices issued in other jurisdictions and that the entire data having been provided to the audit officers of the Department, there is no justification to claim suppression of facts in such a situation. Further, we find that there is no evidence or any document to indicate that the appellant assessee in any manner had attempted to evade service tax. On the other hand, we find that contrary to the claim of the Department, the assessee appellant had paid the service tax of Rs.3,45,06,438/- on various services for which service tax is payable under the Finance Act, 1994.

11.3 We further find that the Hon'ble High Court of Delhi in the case of Bharat Hotels Ltd. Vs. Commissioner of Central Excise (Adjudication) – 2018 (12) G.S.T.L. 368 (Del.) had elaborately discussed about the meaning of the words 'wilful mis-statement', 'suppression of facts' and the situations in which the extended period can be invoked for demand of service tax. The relevant paragraphs in the said Order of the Hon'ble High Court is extracted and given below:

"21. *The meaning of the words 'wilful misstatement' and 'suppression of facts' has been a subject matter of judicial scrutiny in various Supreme Court judgments which are necessary to be discussed before proceeding to the merits of this case. However, these words have been interpreted as given in Sections 28 of the Customs Act, 1962 (hereinafter referred to as "the Customs Act") and 11A of the [Central] Excise Act, 1944 (hereinafter*

referred to as "the Excise Act"). In order to determine if the same interpretation extends to Section 73 of the Act the following decisions of the Supreme Court have to be looked at. In the case of *Uniworth Textiles Ltd. v. Commissioner of Central Excise, Raipur* [(2013) 9 SCC 753 = [2013 \(288\) E.L.T. 161 \(S.C.\)](#)] the Supreme Court discussed its previous judgments to determine the applicability of the proviso to Section 28 of the Customs Act for extension of limitation period for issuing notice for payment of duties that have not been levied, short-levied or erroneously refunded. The relevant paragraphs of the judgment are excerpted below :

"9. The show cause notice was issued on 2-8-2001, more than six months after the appellant had imported furnace oil on behalf of Uniworth Ltd. in January, 2001. This time period of more than six months is significant due to the proviso to Section 28 of the Act. The Section, at the relevant time, read as follows :

28. Notice for payment of duties, interest, etc. -

(1) When any duty has not been levied or has been short-levied or erroneously refunded, or when any interest payable has not been paid, part paid or erroneously refunded, the proper officer may, -

(a) in the case of any import made by any individual for his personal use or by Government or by any educational, research or charitable institution or hospital, within one year;

(b) in any other case, within six months, from the relevant date, serve notice on the person chargeable with the duty or interest which has not been levied or charged or which has been so short-levied or part paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice :

Provided that where any duty has not been levied or has been short-levied or the interest has not been charged or has been part paid or the duty or interest has been erroneously refunded by reason of collusion or any wilful misstatement or suppression of facts by the importer or the exporter or the agent or employee of the importer or exporter, the provisions of this sub-section shall have effect as if for the words "one year" and "six Months", the words "five years" were substituted.

Explanation. - Where the service of the notice is stayed by an order of a court, the period of such stay shall be excluded in computing the aforesaid period of one year or six months or five years, as the case may be. (Emphasis supplied)

10. The section imposes a limitation period of six months within which the concerned authorities must commence action against an importer/assessee in case of duties not levied, short-levied or erroneously refunded. It allows the said limitation period to be read as five years only in some specific circumstances, viz. collusion, wilful misstatement or suppression of facts. Since the said show cause notice was issued after the elapse of six months, the revenue, for its action to be legal in the eyes of law, can only take refuge under the proviso to the section."

22. Section 28 of the Customs Act like Section 73 of the Act (in this case) relates to notice for payment of duty that has not been levied, short-levied or erroneously refunded. The proviso to Section 28 of the Customs Act and the proviso to Section 73(1) of the Act, both set out conditions for extension of limitation period for issuing of a Show Cause Notice. The difference between the two sections lies in the insertion of conditions of 'fraud' and 'contravention of any of the provisions of this Chapter or of the rules made thereunder with intent to evade payment of Service Tax' in Section 73 of the Finance Act, 1994. In *Uniworth* (supra), the Supreme Court discussed the interpretation of the proviso of a similar provision in Section 11A of the Excise Act and held that it is *parimateria* to the proviso to Section 28 of the Customs Act. The relevant paragraphs are excerpted below :

"13. This Court, in *Pushpam Pharmaceuticals Co. v. Collector of Central Excise, Bombay* [1995 Supp (3) SCC 462], while interpreting the proviso of an analogous provision in Section 11A of The Central Excise Act, 1944, which is *parimateria* to the proviso to Section 28 discussed above, made the following observations :

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18. We are in complete agreement with the principle enunciated in the above decisions, in light of the proviso to Section 11A of the Central Excise Act, 1944. However, before extending it to the Act, we would like to point out the niceties that separate the analogous provisions of the two, an issue which received the indulgence of this Court in *Associated Cement Co. Ltd. v. Commissioner of Customs* [(2001) 4 SCC 59] 3, at page 619 in the following words :

53. ... Our attention was drawn to the cases of *CCE v. Chemphar Drugs and Liniments* [(1989) 2 SCC 12], *Cosmic Dye Chemical v. CCE* [(1995) 6 SCC 117], *Padmini Products v. CCE* [(1989) 4 SCC 275], *T.N. Housing Board v. CCE* [1995 Supp (1) SCC 50] and *CCE v. H.M.M. Ltd. (supra)*. In all these cases the Court was concerned with the applicability of the proviso to Section 11A of the Central Excise Act which, like in the case of the Customs Act, contemplated the increase in the period of limitation for issuing a show cause notice in the case of non-levy or short-levy to five years from a normal period of six months....

54. While interpreting the said provision in each of the aforesaid cases, it was observed by this Court that for proviso to Section 11A to be invoked, the intention to evade payment of duty must be shown. This has been clearly brought out in *Cosmic Dye Chemical* case where the Tribunal had held that so far as fraud, suppression or misstatement of facts was concerned the question of intent was immaterial. While disagreeing with the aforesaid interpretation this Court at p. 119 observed as follows: (SCC para 6)

6. Now so far as fraud and collusion are concerned, it is evident that the requisite intent, i.e., intent to evade duty is built into these very words. So far as misstatement or suppression of facts are concerned, they are clearly qualified by the word 'wilful' preceding the words 'misstatement or suppression of facts' which means with intent to evade duty. The next set of words 'contravention of any of the provisions of this Act or Rules' are again qualified by the immediately following words 'with intent to evade payment of duty'. It is, therefore, not correct to say that there can be a suppression or misstatement of fact, which is not wilful and yet constitutes a permissible ground for the purpose of the proviso to Section 11A. Misstatement or suppression of fact must be wilful.

The aforesaid observations show that the words "with intent to evade payment of duty" were of utmost relevance while construing the earlier expression regarding the misstatement or suppression of facts contained in the proviso. Reading the proviso as a whole the Court held that intent to evade duty was essentially before the proviso could be invoked.

55. Though it was sought to be contended that Section 28 of the Customs Act is in *parimateria* with Section 11A of the Excise Act, we find there is one material difference in the language of the two provisions and that is the words "with intent to evade payment of duty" occurring in proviso to Section 11A of the Excise Act which are missing in Section 28(1) of the Customs Act and the proviso in particular....

56. The proviso to Section 28 can *inter alia* be invoked when any duty has not been levied or has been short-levied by reason of collusion or any wilful misstatement or suppression of facts by the importer or the exporter, his agent or employee. Even if both the expressions "misstatement" and "suppression of

facts” are to be qualified by the word “wilful”, as was done in the Cosmic Dye Chemical case while construing the proviso to Section 11A, the making of such a wilful misstatement or suppression of facts would attract the provisions of Section 28 of the Customs Act. In each of these appeals it will have to be seen as a fact whether there has been a non-levy or short-levy and whether that has been by reason of collusion or any wilful misstatement or suppression of facts by the importer or his agent or employee. (Emphasis supplied)”

23. *It is important to note the proviso to Section 11A of the Excise Act at this stage. It states that :*

“Where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, by the reason of -

- (a) fraud; or*
- (b) collusion; or*
- (c) any wilful misstatement; or*
- (d) suppression of facts; or*
- (e) contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty,*

by any person chargeable with the duty, the Central Excise Officer shall, within five years from the relevant date, serve notice on such person requiring him to show cause why he should not pay the amount specified in the notice along with interest payable thereon under Section 11AA and a penalty equivalent to the duty specified in the notice.”

24. *As noticed in the excerpted portions of the Supreme Court’s judgment, the material distinction between the provisos of Section 11A of the Excise Act and Section 28 of the Customs Act was contemplated in Associated Cement Co. Ltd. v. Commissioner of Customs (supra) [[2001 \(128\) E.L.T. 21 \(S.C.\)](#)]. The only material difference in the language of the two provisions is that the phrase ‘with intent to evade payment of duty’ is not used in Section 28 of the Customs Act. The Court held that the words ‘fraud’ and ‘collusion’ inherently imply the requirement of an intent, which in this case is the intent to evade payment of duty. With respect to misrepresentation and suppression of facts the Court held that the fact that these words are preceded by the word ‘wilful’ means that there should be an intention to evade payment of duty behind these acts. And, therefore, in *Uniworth* (supra), the judgments of the Supreme Court interpreting the proviso to Section 11A of the Excise Act were applied in the interpretation of the proviso to Section 28 of the Customs Act.*

25. *The meaning of the phrase parimateria has been explained in an American case in the following words: “Statutes are in parimateria which relate to the same person or thing, or to the same class of persons or things. The word par must not be confounded with the word simlis. It is used in opposition to it - intimating not likeness merely but identity. It is a phrase applicable to public statutes or general laws made at different times and in reference to the same subject.” [United Society v. Eagle Bank, (1829) 7 Connecticut 457, p. 470, as cited in CRAIES, Statute Law, p. 134 (7th Edition)]. The provisos to Sections 11A of the Excise Act, 28 of the Customs Act and Section 73 of the Finance Act, refer to the same class of persons, i.e., persons from whom tax has been not been levied, or has been short-levied or erroneously refunded. The subject matter of these provisos*

is issuance of a Show Cause Notice in order to collect such tax. Further, there seems to be no difference in language of the proviso to Section 11A of the Excise Act and Section 73(1) of the Finance Act. Since, the pith and substance of both these provisions is the same, the various judgments of the Supreme Court discussing the interpretation of proviso to Section 11A of the Excise Act can be extended to interpret Section 73(1) of the Finance Act. Further, since proviso to Section 28 of the Customs Act is *parimateria* to proviso to Section 11A of the Excise Act (as held in *Uniworth*), the interpretation of proviso to Section 28 may also be extended to interpret the proviso to Section 73 of the Finance Act. *Uniworth* (*supra*) is also authority on the meaning of 'wilful misstatement' and 'suppression of facts'; the Court held that :

"...

12. ... The conclusion that mere non-payment of duties is equivalent to collusion or wilful misstatement or suppression of facts is, in our opinion, untenable. If that were to be true, we fail to understand which form of non-payment would amount to ordinary default? Construing mere non-payment as any of the three categories contemplated by the proviso would leave no situation for which, a limitation period of six months may apply. In our opinion, the main body of the Section, in fact, contemplates ordinary default in payment of duties and leaves cases of collusion or wilful misstatement or suppression of facts, a smaller, specific and more serious niche, to the proviso. Therefore, something more must be shown to construe the acts of the appellant as fit for the applicability of the proviso.

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14. In *Sarabhai M. Chemicals v. Commissioner of Central Excise, Vadodara* [(2005) 2 SCC 168], a three-judge bench of this Court, while referring to the observations extracted above, echoed the following views :

"23. Now coming to the question of limitation, at the outset, we wish to clarify that there are two concepts which are required to be kept in mind for the purposes of deciding this case. Reopening of approvals/assessments is different from raising of demand in relation to the extended period of limitation. Under Section 11A(1) of the Central Excise Act, 1944, a proper officer can reopen the approvals/assessments in cases of escapement of duty on account of non-levy, non-payment, short-levy, short-payment or erroneous refund, subject to it being done within one year from the relevant date. On the other hand, the demand for duty in relation to extended period is mentioned in the proviso to Section 11A(1). Under that proviso, in cases where excise duty has not been levied or paid or has been short-levied or short-paid or erroneously refunded on account of fraud, collusion or wilful misstatement or suppression of facts, or in contravention of any provision of the Act or Rules with the intent to evade payment of duty, demand can be made within five years from the relevant date. In the present case, we are concerned with the proviso to Section 11A(1).

24. In the case of *Cosmic Dye Chemical v. Collector of Central Excise, Bombay* [(1995) 6 SCC 117], this Court held that intention to evade duty must be proved for invoking the proviso to Section 11A(1) for extended period of limitation. It has been further held that intent to evade duty is built into the expression "fraud and collusion" but misstatement and suppression is qualified by the preceding word "wilful". Therefore, it is not correct to say that there can be suppression or misstatement of fact, which is not wilful and yet constitutes a permissible ground for invoking the proviso to Section 11A.

25. In case of *Pushpam Pharmaceuticals Co. v. C.C.E.* [[1995 \(78\) E.L.T. 401 \(S.C.\)](#)], this Court has held that the extended period of five years under the proviso to Section 11A(1) is not applicable just for any omission on the part of the assessee, unless it is a deliberate attempt to escape from payment of duty. Where facts are known to both the parties, the omission by one to do what he might have done and not that he must have done does not constitute suppression of fact."

26. Again, the Supreme Court in *Continental Foundation Joint Venture Holding v. Commissioner of Central Excise, Chandigarh-I* [(2007) 10 SCC 337 = [2007 \(216\) E.L.T. 177 \(S.C.\)](#)], held that :

"10. The expression "suppression" has been used in the proviso to Section 11A of the Act accompanied by very strong words as 'fraud' or 'collusion' and, therefore, has to be construed strictly. Mere omission to give correct information is not suppression of facts unless it was deliberate to stop the payment of duty. Suppression means failure to disclose full information with the intent to evade payment of duty. When the facts are known to both the parties, omission by one party to do what he might have done would not render it suppression. When the Revenue invokes the extended period of limitation under Section 11A the burden is cast upon it to prove suppression of fact. An incorrect statement cannot be equated with a wilful misstatement. The latter implies making of an incorrect statement with the knowledge that the statement was not correct. "

27. Therefore, it is evident that failure to pay tax is not a justification for imposition of penalty. Also, the word 'suppression' in the proviso to Section 11A(1) of the Excise Act has to be read in the context of other words in the proviso, i.e. "fraud, collusion, wilful misstatement". As explained in *Uniworth (supra)*, "misstatement or suppression of facts" does not mean any omission. It must be deliberate. In other words, there must be deliberate suppression of information for the purpose of evading of payment of duty. It connotes a positive act of the assessee to avoid paying excise duty. The terms 'misstatement' and 'suppression of facts' are preceded by the expression 'wilful'. The meaning which has to be ascribed is, deliberate action (or omission) and the presence of an intention. Thus, invocation of the extended limitation period under the proviso to Section 73(1) does not refer to a scenario where there is a mere omission or mere failure to pay duty or take out a license without the presence of such intention."

11.4 In view of the factual position of the case as discussed above in paragraphs 11.1 and 11.3, and on the basis of the judgement of the Hon'ble High Court of Delhi as above, we are of the considered view that invocation of extended period for demand of service tax in the present cases is not sustainable. Consequent to this, we also find that the penalty imposed on the appellants under Section 78 *ibid* also does not survive on the above grounds.

11.5 We further find that the issues relating to demand of service tax from several locations having separate service tax registration by issue of show cause notice by DGCEI answerable to single authority i.e., the Commissioner of Service Tax, Mumbai was decided by the Tribunal in the case of *Inox Leisure Limited Vs. Commissioner of Service Tax, Mumbai* – 2016 (42) S.T.R. 497 (Tri.- Mumbai) by holding that such action is without jurisdiction and the demands were set aside. The relevant paragraphs of the said order of the Tribunal is extracted and given below:

"10. Above discussion on the basis of the Agreements leaves no room for doubt to hold that the appellant provided BAS to its client CCIPL on which tax is payable. However, we agree with the appellant that the service tax on import of 'Architect Services' attracts levy of service tax only from 18-4-2006 onward. We need not dwell on this issue that service tax on import of services is payable by the recipient of the service under Section 66A only w.e.f. 1-5-2006 when the Section 66A was brought into effect. This is the settled legal position as held by the Hon'ble Bombay High Court in the case of Indian National Ship-owners Association (*supra*).

11. On the issue of invocation of extended time period for part of the demand for period prior to one year before the issuance of show cause notice dated 6-10-2008, we find that the various locations of the appellant were duly registered under service tax. In such case, responsibility is cast on the appellant to furnish details to the authorities at prescribed frequency under Rule 7 of the Service Tax Rules and declare the services rendered, assess the tax due and make the payment of service tax by the due date. It is only in pursuance of investigation carried out by DGCEI that the non-payment of service tax came to light. In these circumstances the demand under the extended time period under Section 73 is sustainable.

12. Equivalent penalty in terms of Section 78 is also payable on account of the fact that there was suppression of facts which warrants penalty under Section 78.

13. In view of the above, we pass following order :

(a) Demand of service tax on 'pouring fees' and 'signing fees' is upheld to the extent of demand on services rendered within the jurisdiction of Service Tax, Commissioner Mumbai. The demand quantum may be worked out and intimated by the Commissioner to the appellant within 15 days of the receipt of this Order.

(b) The demand in respect of such services rendered outside the jurisdiction of Mumbai is set aside.

(c) Demand on Architect fees is set aside.

(d) Appropriate interest under Section 75 of the Finance Act is payable.

(e) Appropriate penalties under Sections 76, 77 and 78 of the Finance Act are payable keeping in view the demand upheld by us.

14. Appeal is partly allowed in above terms."

11.6 The above order was appealed against by the department in Civil Appeal No.3928 of 2016, and the Hon'ble Supreme Court dismissed the said appeal by observing that they find no reason to interfere with the Order passed by the Tribunal.

12. In view of the foregoing discussion and analysis, we are of the considered view that services provided by the appellant assessee in the present set of facts is not liable to service tax under the taxable category Clearing and Forwarding Agent's service. Therefore, the impugned order

dated 31.12.2015 is liable to be set aside to the extent it had confirmed the adjudged demands proposed in the SCN. Accordingly, by setting aside the impugned order dated 31.12.2015, the appeal filed by the appellants is allowed in favour of the appellants. Further, the appeal filed by the department is dismissed on the basis of the findings discussed above in paragraphs 10.1 to 10.6 and on the basis of the order passed by the Coordinate Bench of the Tribunal which was upheld by the Hon'ble Supreme Court as explained in paragraphs 11.3 and 11.4. However, the service tax already paid by the appellant assessee towards taxable services of Business Auxiliary Service and Business Support Services at Rs. 3,45,06,438/- during the disputed period is confirmed as having been credited to the Government Exchequer as service tax by the payments made by the appellant assessee.

13. In the result, the appeal is allowed in favour of the appellants by setting aside the impugned order and dismissing the appeal filed by the department.

(Order pronounced in open court on 10.06.2024)

(S.K. Mohanty)
Member (Judicial)

(M.M. Parthiban)
Member (Technical)

Sinha