

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL
NEW DELHI**

PRINCIPAL BENCH-COURT NO.-2

Service Tax Appeal No. 52948 of 2016

[Arising out of Order-in-Original No. JAI-EXCUS-000-COM-05-16-17 dated 12-08-2016 passed by the Commissioner of Central Excise, Jaipur I]

M/s Synergy Baxi Logistics Pvt Ltd.
A-12, Baxi Cottage, Burmese Colony, Jawahar Nagar
BY-pass, Jaipur (Raj)

Appellant

Versus

Commissioner of Central Excise, Jaipur-I
New Central Revenue Building, Statue Circle
C-Scheme, Jaipur

Respondent

Appearance

Shri Nikhil Gupta, Advocate

- for the appellant

Shri Vivek Pandey, Authorized Representative

- for the respondent

**CORAM: Hon'ble Mr. Anil Choudhary, Member (Judicial)
Hon'ble Mr. Bijay Kumar, Member (Technical)**

Date of Hearing: 26.07.2019

Date of Decision: 26.11.2019

Final Order No: 51549 /2019

Bijay Kumar:

1. M/s Synergy Baxi Logistics (for short 'the appellant') has filled this appeal challenging the Order-in-Original No. JAI-EXCUS-000-COM-05-16-17 dated 12.08.2016 (for short 'impugned order') passed by the learned Commissioner of Central Excise Jaipur (for short 'Commissioner') by which the Commissioner has confirmed the demand of service tax amounting to Rs. 61,12,779 (Sixty One Lakhs Twelve Thousand and Seven Hundred Seventy Nine Only) under Section 73(2) of the Chapter V of the Finance Act, 1994(for short the Act) along with penalty

of Rs. 40,56,390/- under Section 78 (1) of the Act on the Appellant. The impugned order has been passed in pursuance of Show Cause Notice dated 20.02.2015.

2. Brief facts of the case are that the appellant is registered with the service tax department for services falling under the category of "clearing and forwarding agent" and Goods Transport Agency(GTA) service and paying service tax as per the rate prescribed under the Act read with Service Tax Rules, 1994 (for short 'Rules'). During the course of audit by the department, it was observed that the appellant had entered into an agreement dated 10.11.2011 (the First Agreement) with its principal Akzo Nobel India Limited (for short 'Akzo') who appointed it as clearing and forwarding agent. Later on M/s Akzo and the appellant entered into another agreement with effect from 01.01.2013 and valid up to 31.12.2012 for providing GTA service, which as per the Department was with intention to not to pay the full service tax on C & F Agent service in terms of First Agreement.
3. It is the contention of the Revenue that the Second Agreement has been entered into by the appellant with Akzo during the validity of First Agreement in order to avoid payment of service tax on C & F service, hence it appeared that the Second Agreement was with sole intention to pay service tax on 25% of the value under 'Goods Transport Agency Service' and to avoid the service tax on 75% on the gross value. As per Revenue the same is also evident from the terms and conditions No. 6 of the Second Agreement which indicated that "any Government levy such as service tax or any other tax proposed by the

Government in future or past will be the liability of the company only". Therefore, the appellant was requested to deposit the service tax of Rs. 61,12,770/- along with applicable interest, which was not complied with leading to the issuance of the impugned SCN and consequently the subject impugned order.

4. Ld. Advocate on behalf of the appellant submits that the appellant was not engaged in providing or arranging transportation for Akzo during the period 1.10.2011 to 31.12.2012, which is evident from the contracts executed between and Akzo, Depot ledger, transportation charges and also a CA certificate filed on 18.07.2019 after taking leave from the Bench.

4.1 Ld. Advocate submits that the C & F agent and Transportation Services are two independent services and were rendered under two separate contracts, and therefore, the consideration for both the services cannot be clubbed together to levy services tax under the single service category of C & F service. This will be contrary to the Principle of classification of services as provided under Section 66 F of the Act. It is submitted that the appellant has never rendered or claimed reimbursement for freight services from Akzo during the period 01.10.2011 to 31.12.2012. During this period the Akzo used to arrange transportation of their own for this which is evident from the transporters bill in the name of Akzo. Further the C & F agreement dated 01.10.2011 (First Agreement) at Article 2.9, 2.10, 2.11 and Article 6 only provides for a contingent situation, where the appellant may be asked to arrange for transportation to

ensure timely dispatch of the goods on reimbursement basis, and therefore, this cannot be read as mandatory obligation on the part of the appellant to render transportation service. It is further contended that even Article 3 of the First Agreement dated 01.10.2011 only refers to the statutory compliance relating to handling, storage, loading and unloading of the goods and nowhere it talks about transportation. The transportation is the part of freight agreement dated 01.01.2013, second agreement. It is only after the agreement the appellant started transportation of consignment apart from C & F agreement.

4.2 Ld. Advocate further submitted that as per trade notice No. 87-97/ST Transportation Service was liable to service tax under reversed charge at the hand of the consigner or consignee, even when these services were procured by C & F agent. And, accordingly, no fresh liability of service tax can be imposed on the appellant as Akzo has already been discharged applicable service tax under reversed charge in accordance with the provisions of Finance Act and Rules.

4.3 Ld. Advocate further placed reliance on the Trade Notice 87/97 dated 14/07/1997 issued by Madurai, Commissionerate and also CBEC Circular B-11/1/2002/TRU dated 01.08.2002.

4.4 Ld. Advocate also placed reliance on the following case laws;

- i. **Coal Handlers Pvt Ltd. vs CCE, [2015 (38) STR 897 (SC)]**
- ii. **E V Mathai & Co. vs. CCE, [2003 (157) ELT 101(Tri.-Bang.)]**
- iii. **Toll India Logistics Pvt Ltd. vs CCE, Final Order No. 40503/2018**
- iv. **Ashok Agarwal vs. CCE, [2012 (28) STR 362(Tri.-Del.)]**

- v. **United Shippers Ltd. vs CCE, [2015 (37) STR 1043(Tri.-Mum)]**
[Maintained in 2015 (39) STR J369(SC)]
- vi. **South India Corporation Ltd. vs CCE, [2011 (22) STR 70 (Tri.-Chennai)]**
- vii. **Balaji Heavy Lifters Pvt Ltd. vs CCE, 2013 (3) STR 255 (Tri.-Ahmd)]**

Ignoring the ratio laid down in the above judgment, Id. Adjudicating Authority has confirmed the demand on the appellant on the assumption that the appellant is engaged in rendering Transportation Service from the date of First Agreement itself and was also discharging service tax on the same under the first agreement. Further from 01.01.2013 by the second agreement, the appellant has artificially bifurcated C & F agreement and entered into a separate Transportation Agreement to evade paying of service tax on 75 % of the freight component.

4.5 Ld. Advocate further placed reliance on the decision of Hon'ble Supreme Court in case of **Coal Handlers Private Limited vs. CCE [2015 (38) STR 897(SC)]**. While discussing the meaning and scope of forwarding agent, the court held that the transportation service is not part of the forwarding operations. Further the same person can act both in the capacity of C & F agent as well as courier in a separate transportation and different contract.

4.6 Ld. Advocate also submitted that the appellant is not engaged in clearing of the goods, and therefore, even if it is C & F Service the demand of the tax on transportation service does not fall within the ambit of the C & F services as per the law

laid down by the various Court and Tribunals. The levy of service tax under the category of C & F Agent Service is possible only when the service provider is engaged in both clearing and forwarding operations. For this reliance is placed on the following case laws:

1. **Shri Nath Roadways vs. Union of India [2018 (16) GSTL 239 (Raj)]**

2. **Kwality Ice-cream Company vs. CST [2018-VIL-247 (Del-ST)]**

4.7 It is further submitted by the Id. Advocate that though this ground is not taken in appeal, however, the issue involved the question lack of jurisdiction of the Adjudicating Authority, and therefore, can be raised at hand such as held in the following case laws.

4.8 Further, Id. Advocate also submitted that the extended period of limitation is not invocable in the present case on account of the fact that the Akzo was discharging service tax under the reversed charge and also the question involved interpretation of law. Further, the whole exercise would also be revenue neutral in view of available credit to the Akzo on the service tax paid by the appellant. Accordingly, the demand for January, 2013 to March 2013 was also pleaded to be time barred.

4.9 Id. Advocate also submitted that the show cause notice has been issued in wake of service tax audit, which was declared to be unconstitutional view of the decision of Hon'ble Delhi High Court in case of **Mega Cabs Pvt Ltd. vs. Union of India [2016 (43) STR 67 (DEL)]** even though the decision was stayed by the Hon'ble Supreme Court in **[2016 (44) STR J277 (SC)]**. It is also submitted that the law on stay

order in case of *ultravires* provisions is well settled and that will not make the provisions declared to be *ultra vires* as *intra vires* placing reliance on the decision of **Shree Chamundi Mopends Ltd. vs Church of South India Thrust Association Madras [AIR 1992 SC 1439]** and **Pijush Kanti Chowdhry vs. State of West Bengal [2007 SCC Online Cal 267]**. It was further stated that the adjudicating authority should have refrained from passing the impugned order after the disposal of the appeal by Hon'ble Supreme Court.

4.10 It was also pleaded that the department has not allowed the benefit of duty paid by the Akzo on 25% of the value transport of services and as confirmed service tax on whole amount. The department also did not allow cum tax benefit in accordance with a Section 67(2) of the Act placing reliance on the decision of **Commissioner of Central Excise and Customs Patna vs. Advantage Media Consultant [2008 (10) STR 449 (Tri-Kol)]** which was maintained by Supreme Court as reported in **2009 (14) STR J49 (SC)]**

4.11 As per the direction of the Bench the Id. Advocate submitted a set of additional document including the ledger for the payment of service tax by the Akzo along with the payment of service tax pertaining to C & F service and also the bill of transport, where the consigner and consignee has been held to other than the appellant.

5. Ld. DR, however, reiterated the ground contained in the impugned order and also submitted a written reply. Ld. Departmental Representative has submitted that the appellant

has not issued the consignment note as per Rule 4B of Service Tax Rules as the same has not shown the distance covered in kilometres and the value of taxable service and the actual amount. The so called 'consignment note' has not shown the gross amount in figure but indicated as TBB i.e. to be billed, which is not proper. It is also submitted that the appellant did not fulfil the requirement of definition under Goods Transport Agency under Section 65B(126) of the Act because the monthly bill is issued by the appellant in terms of quantity of the paints in litre and not as function of distance covered. Thus the consignment note is not proper and this cannot be regarded as proper consignment note to prove that the appellant is a GTA service provider in terms of second agreement.

- 5.1 Ld. DR also submitted that the reliance placed by the Id. Advocate in case of **Rakesh Ahuja [2017(51) STR 322 (Tri-All)]** is not applicable on account of the fact that the assessee Rakesh Ahuja was paying service tax under BAS, (Business Auxiliary Service) after getting registered in March, 2005, whereas the Department was demanding service tax for the period from 2001-2005 under C & F service. The Tribunal in that case held that the appellant is not involved in clearing of the goods from the factories of their principal but only receives and store such goods when delivered to them and thereafter forward the same by way of sale or otherwise as per the direction of principal. They do not provide any service of clearing hence the service provided by the assessee was not classifiable under C & F service. The present case was stated to be different from that of Rakesh Ahuja (supra)

as the appellant is already registered and paying service tax under Clearing and Forwarding Agent Service from 2011. The appellant herein tried to separate their earlier activity under Second agreement dated 01.01.2013 by transport agreement, which is a part of existing C & F service.

5.2 Ld. DR also submitted that Territory Freight Agreement (second agreement dated 01.01.2013) provided for local freight charges at the rate of Rs. 1.09 per liter, Faridabad freight charges at the rate of Rs. 1.14 per Kg, country freight charges at the rate of Rs. 2.026 per Kg and labour charges for tertiary charges at the rate of Rs. 16,500 per month, will not fall under GTA services. In view of the rate fixed for various mode of transport, such as Mahindra Pickup, Tata 407, Tata 909, Tata 1109, Tata 1114, Tata 2515 for quantity of 1 MT, 2.5 MT, 5 MT, 8 MT, 9 MT, 16 MT and 19 MT. Accordingly, it was submitted that in view of transport charges made on the basis of lumpsum labour charges per month would not be the freight agreement and the qualification of the transportation carried out by the appellant in the second agreement is not legally sustainable.

5.3 It was further submitted that the first agreement clearly mentioned that the Akzo desired to engaged in clearing and forwarding contractor of sufficient experience, expertise and infrastructural faculties to stock and forward the company's product from Gurgaon godown. It is clearly evident that the appellant is acting as the Clearing and Forwarding Contractor in terms of paragraphs A of the first agreement, 1.1 and 2.5 of the agreement. Reliance was also placed on the definition

of Forwarding Agent as per in Collines English Dictionary which defined Forwarding Agent as person, agency or enterprise in collection, shipment and delivery of goods. Thus, both the first and second agreement was defines a word suggesting Forwarding Agent to conduct the delivery/transport activities. Therefore, it was submitted that the transportation was being carried out by the appellant under C & F Agent Service and from 2013 onwards which they tried to separate out by means of second agreement. Reliance was also placed on the decision of Hon'ble Supreme Court in **Coal Handlers (supra)** and also the Principal Bench of CESTAT New Delhi in **Capital Enterprises case [2016 (43) STR 245(Tri-Del.)]**. It was argued by the Id. DR that the entire remuneration including the cost of dispatching the goods, are includible in the assessable value for C & F agent service. Ld. DR also placed reliance on **M/s Singh Transport Company vs. CCE, Bhopal [2017 TIOL 3602(Cestat-Del)]**

- 5.4 In the last Ld. DR submitted that the CA certificate date 21/1/2019 certifying that the appellant has not incurred any transportation cost during the period October, 2011 to December, 2012 is not admissible at this stage, as the same has not placed before the adjudicating authority. It was argued that as per the CESTAT procedure any new document which is not part of SCN or O-I-O should not be allowed and if it is to be introduced it as to done only by miscellaneous application. Accordingly, it was prayed that the appellant has not discharged the onus of proving that the said transport activity is of independent activity falling under GTA service.

And therefore, the service tax is required to be paid on the gross amount along with interest and penalty.

6. In rejoinder to the submissions made by the Id. DR, Id. Advocate submitted that the reliance placed in the case of **M/s Singh Trading Company (supra)** is not applicable in the fact and circumstance of the case on the ground that the issue in that case was of rendering both C & F agent and transportation services from inception and the appellant was also discharging service tax on the entire value under the service category of C & F service. However, on the later date, the said assessee artificially bifurcated the value into two invoices one for transportation of service and other for the balance amount. Further there is specific finding in para 7 that the said decision appellant that did not satisfy the requirement of GTA. It was submitted that the appellant in this case has started rendering transport service from 1.01.2013, only when new division for the transportation services was set up and separate freight agreement was signed. However, till 01.01.2013, the appellant was only engaged in storing and warehousing services and not at all engaged in rendering or arranging of any transportation services. Also in Singh Trading Company case(supra) the various Circulars issued by the Board and judgments on the disputed issue of classification of transportation services, were not brought to the notice of Hon'ble Tribunal for its consideration, and therefore, the decision is *per incuriam* and required to be not followed in the present case.
7. The issue before us is to decide as to whether the territory freight agreement, which has been entered upon by the

Appellant with its principal (Akzo) on 01.01.2013 is required to be considered as a part of First Agreement dated 01.10.2011, and therefore, the value of the transportation service is required to be added for computation of service tax under the Clearing and forwarding services being undertaken by the Appellant. In order to appreciate the content of the two agreements, it will be appropriate to reproduce the relevant paragraph of the two agreements:

FIRST AGREEMENT DATED 10.11.2011

Article 1: APPOINTMENT, PERIOD AND STATUS OF PARTIES

1.1 The Company hereby appoints the C& FC as its clearing and forwarding contractor to service customers located in and around Gurgaon and such other territories as may be directed by the Company from time to time on non-exclusive basis. The C&FC accepts such appointment and hereby agrees to stock and forward the Products in accordance with terms more particularly set out herein below and to perform and fulfil all such functions duties and obligations as are mentioned herein. Nothing in this Agreement shall prejudice the right of the Company to appoint any other contractor or agent or directly service the abovementioned territories.

1.2

1.3

Article2: CLEARING, STOCKING AND FORWARDING

2.1 The Company shall entrust to the C&FC at the Godown such quantities of the Products as may be decided by it from time to time. The C&FC undertakes to unload all consignments within reasonable time. The C&FC undertakes to indemnify and keep indemnified the Company from any loss, demurrage, penalty, or charges that may arise as a result of the C&FC's default in this regard. Upon unloading, the C&FC shall indicate in writing in the acknowledgement given to the carriers, any shortage / damages, if any, in respect of the Products consigned. No claims of the C&FC with regards short delivery / loss / damage shall be entertained by the Company and the C&FC shall be

solely responsible to make goods such losses to the Company, unless such claims are accompanied by short delivery / loss / damage certificate from the carriers.

2.2.....

2.3.....

2.4.....

2.5 The C&FC undertakes to forward the Products in the company's name in such quantities and in such manner and to such addresses as the Company may instruct from time to time. The Products shall be forwarded only against the Company's delivery advises duly signed by the Company's authorized personnel. The Company shall, from time to time, forward to the C&FC a list of names and specimen signatures of such authorized personnel. The C&FC shall not make any representation and / or give any warranty or guarantee in respect of the Products.

2.6 The C&FC undertakes to commence forwarding the Products upon receipt of the Company's delivery order within reasonable time and not later than 12 hours in any event. The C&FC undertakes to indemnify and keep indemnified the Company from any loss, demurrage, penalty, or charges that may arise as a result of the C&FC's default in this regard. In the event the C&FC does not have adequate stocks to respond to a particular delivery order, it shall promptly inform the Company forthwith upon receipt of such an order. The C&FC undertakes to forward the Products strictly by rotation on a "First manufactured First go" basis unless advised otherwise by the Company in writing.

2.7.....

2.8.....

2.9 The Company may require the C&FC to Stock Transfer the Products from time to time. In such events the Company shall send prior intimation in writing signed by duly authorized personnel in this regard. All expenses towards Octroi, if any, and freight charges incurred by the C&FC in this regard shall be borne by the Company. Freight charges in this regard shall be mutually agreed upon on a case-to-case basis.

2.10 The C&FC assures that wherever bank approved transporters are available, their services shall be utilized as a first priority. In case, bank approved transporters are not specified for certain places, care shall be exercised to dispatch the said

products through registered transporters or through reputed transporters. While entrusting the Products to transporters in the course of forwarding, the C&FC shall arrange and ensure that all the required excise gate passes / invoices / documents are carried by the transporters, The relevant invoices / documents / challans shall carry the name of the Company as the consignor and the name of the customer as the consignee and shall be in a standard format approved, printed, and supplied by the Company. Under no circumstances shall the C&FC deviate from the approved format without prior intimation from the Company in writing. The C&FC shall be solely liable and shall indemnify the Company against all losses in the event of non-delivery or short delivery to the consignee / customer. The Company's decision in this regard shall be binding on the C&FC.

2.11 Whenever the C&FC undertakes the delivery of the said products to various destinations, as may be instructed by the Company from time to time, either by its own transport or by engaging such other transport of its discretion, C&FC shall take all steps to protect the Company from any damages and / or shortages which may occur arising out of such transportation either during transit or otherwise.

THE SECOND AGREEMENT DATED 01.01.2013

Whereas

The company is desirous of engaging the services (defined in Article 2 below) of the Contractor to transport its paint products, particulars of which are set out in Exhibit A below (the "products") to its customers and the Contractor is desirous of accepting such engagement.

IT IS AGREED AS FOLLOWS

A) TERMS AND CONDITIONS

i).....

ii) The freight rate mentioned, the company shall reimburse the transporter, against proof of payment, octroi duty or other municipal or local levies as are lawfully payable including agreed incidental charges on such levies in respect of products materials carried by the transporters on the company's behalf. In case

road permits, police permission, toll etc., required for the transport of consignments/special consignments, it will be entirely the transporters responsibility to arrange the same at his cost.

iii) The transporter will be required to carry on occasion mixed loads to combined destination in different Municipal limits.

iv).....

v).....

vi).....

vii).....

B) TIME

i) The transporter should ensure 100% compliance against the service charter agreed between the sales and Commercial.

ii)

iii) The delivery time given the service charter in respect of each consignment should be strictly adhered to.

iv) The transporters will ensure that he produces original date and time of delivery as proof of delivery and shall be liable to indemnify the company for any loss or claim raised by the customer for false reporting to the company.

v) The transporter should ensure 100% submission of proof of delivery for all consignments of local along with the freight bill and for upcountry towns with in next 30 days of the last closing month.

E) PAYMENTS

While transporting the goods/materials form the company's suppliers/vendors the transporter must ensure that all the documents are handed over the driver.

i) The transporter shall be responsible for the safety of the products both in respect of quantity and quality form the time of handed over to the delivery to the customer/dealers at the proper place as aforesaid and the transporter shall be liable to indemnify the company for all transit losses, shortage, leakages and damages, howsoever caused' to the products entrusted to the transporter for carriage.

- ii)
- iii)
- iv) When the transporter lorries/three wheelers report at the company's works, these should be parked at place(s) directed by the company's staff. The transporters staff accompanying the lorry must observe the company's factory/ safety regulations. Any damage caused to the company's property or the property of any other party concerned, by the transporter truck/three wheeler or the transporter staff, either will fully or otherwise shall be made fully by the transporter transporting the goods. In the event of the transporter failure to do so and in the event if the transporter failure to do so and in the event of the company's having to discharge such obligation on the transporters behalf, the transporter shall be responsible to indemnify the company for all such expenses incurred by the company on the transporter account.

8. On reading of the terms and conditions of the two agreements, it is evident that the second agreement is offer for GTA service for the first time after execution of the second agreement which is specific to the transportation of the goods of the principal as per their direction. Therefore, the first agreement cannot be treated as a part of the second agreement as contended by the Revenue. In this regard, we also find that both the agreement has to be read in whole which is complete in itself. The first agreement relates to C & F Agent service. The CBEC trade notice No. 87/97 dated 14/07/1997 clarified that C & F agent normally undertakes following activities:

- a. Receiving the goods from factory or premises of the principal of the agent;
- b. Warehousing these goods;

- c. Receiving dispatch orders from the principal;
- d. Arranging dispatch of goods as per the direction of the principal by engaging transport on his own or through the authorised transporters of the principal.

9. The above trade notice makes it clear that the C & F agent's responsibility is restricted to arranging dispatch of goods as per the direction of the principal by engaging transport of his own or through third party transporter as authorised by the principal. Thus, the activity of C & F agent is primarily responsible for delivery and forwarding and not the transport activities as such. As per the agreement in case of exigency the appellant was to arrange for the transportation of consignments on behalf of the principal from the approved transporters. It is a clear admission on part of the appellant that no such transportation has ever been arranged by them on behalf of their principal till the second agreement was executed between them, which was specifically for transportation of the goods.

10. It has been held in the cases including those by Hon'ble Supreme Court that C & F agent services and GTA services are distinct and the transportation would not be part of C & F agent service.

11. We find that in case of **E V Mathai & Co. vs. CCE, Cochin, [2003 (157) ELT 101 (Tri.-Bang.)]**, wherein it is held that transportation services and C & F agent service are distinct and cannot be clubbed together for imposition of service tax. In this case, the assessee has entered into separate agreements with its customer with reference to transportation services and C & F agent service. Further separate bills were

also raised in relation to the two services. However, the Revenue sought to tax the transportation charge recovered by the Appellant assessee by treating them as a part of the value of C & F agent services provided by them. The relevant extract of the said case law is as follows:

"5. The impugned orders, appeals and submissions made at the time of personal hearing have all been carefully considered by me. The appellant functions as the C&F agent for M/s. Tata Tea Ltd., and M/s. Consolidated Coffee Ltd., under a contract. Separate contract has been entered into for transportation also. The issue to be decided here is whether the transportation charges will form part of the value of taxable service for the purpose of service tax on C&F agents. As per the data furnished by the appellant it is seen that in respect of transportation, the rate fixed is per kilogram of tea transported per carton of jam transported etc., Separate bill is being raised in respect of administration charges, telephone, stationery, postage and courier, month wise. The appellant is charging Service Tax on such bills only. The appellant has also produced a letter dated February 10th, 2001 of M/s. Tata Tea Ltd., wherein as per the appellants request the remuneration for C&F work is enhanced from Rs. 5000/- to Rs. 7000/- with effect from 1-1-2001 and valid till 31-3-2003. The value of taxable service rendered by a C&F agent is the gross amount charged by such agent from the client for the service of clearing and forwarding operations in any manner. The Service Tax will be computed on the gross amount of remuneration or commission paid to the C&F agent by the principal engaging such an agent. Further this commission/remuneration can be on the basis of a minimum on a flat rate or turnover basis depending on the consignments handled. It can also be variable based on performance. The appellant is found to be receiving for the C&F service provided by him to M/s. Tata Tea and Consolidated Coffee. As such Service Tax is to be levied only on this remuneration and not on transportation which is a separate activity governed by a separate agreement. In view of the observations, I pass the following order."

12. The two agreements have been perused by us very critically and we find that there is no interlinkages between the

two, the first agreement was exclusively for C & F agent service while the second agreement was for the transportation of goods. We also find Ministry, in its Circular dated 01.08.2002, has clarified that the transportation service and Cargo service can be treated together only if the services are provided in a composite manner. But if the two services are billed separately on actual basis the tax would be leviable only on the Cargo Handling charges. The relevant portion of the Circular is extracted as under;

Cargo Handling Service

1. The section referred to hereinafter are the sections or clauses of the Finance Act, 1994 as amended by the Finance Act, 2002. Reference to sub-clause or clause means clause or sub-clause of section 65 of the Finance Act, 1994 as amended by the Finance Act, 2002.
2. As per clause (21), the term "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 any other service incidental to freight, but does not include handling of export cargo or passenger baggage or mere transportation of cargo. The taxable service, as per sub-clause (zr) of clause (90), is any service provided, to any person, by a cargo handling agency in relation to cargo handling services.
3. The service which are liable to tax under this category are the services provided by cargo handling agencies who undertake the activity of packing, unpacking, loading and unloading of goods meant to be transported by any means of transportation namely trucks, rail, ship or aircraft. Well known examples of cargo handling service are services provided in relation to cargo handling by the Container Corporation of India, Airport Authority of India, Inland Container Depot, Container Freight Stations. This is only an illustrative list. There are several other firms that are engaged in the business of cargo handling services.

3.1 The services provided in relation to export cargo and passenger baggage are excluded from tax net.

3.2 Mere transportation of goods is not covered in the category of cargo handling and is therefore not liable to service tax

3.3 Cargo handling service provided in relation to storage of agriculture produce (scope of the term "agriculture produce" is given under the storage and warehousing services) or for goods meant to be stored in cold storage have been exempted from the levy of service tax.

4. A point has been raised as to what would be the value of service tax in a case where transport and cargo handling service is provided in a composite manner. The measure of tax is the gross amount charged by the cargo handling agency from the customer. Therefore, if lumpsum amount is charged for both transportation and cargo handling, the tax will be payable on the entire amount. On the other hand, if the bill indicates the amount charged for cargo handling and transportation separately on actual basis (verified by documentary evidence), then the tax would be leviable only on the cargo handling charges.

13. The appellant has submitted CA certificate and the relevant ledger on the direction of Bench which has also perused by us and perusal thereof leaves no room for any doubt regarding separate treatment for amount collected for C & F services and transportation services in their ledger and other books of accounts. We also perused the invoices with respect to both the services and find the same are independent of each other, and therefore, this cannot be clubbed together for charging of service tax under cargo handling services as has been held in the impugned order. Ld. Authorised Representative as vehemently argued that the consignment notes, which were issued by the appellant for the transportation activity, were not as per the provisions of Rule 4A of Service Tax Rules, 1994. For better appreciation of the requirement under

Rules 4 A and 4 B of the Rule, we reproduce the relevant portion of the Rules which is as under;

4A. Taxable service to be provided or credit to be distributed on invoice, bill or challan –

(1) Every person providing taxable service[, not later than [thirty] days from the date of [completion] of such taxable service or receipt of any payment towards the value of such taxable service, whichever is earlier, shall issue an invoice, a bill or, as the case may be, a challan signed by such person or a person authorized by him in respect such taxable service provided or [agreed]to be provided and such invoice, bill or, as the case may be, challan shall be serially numbered and shall contain the following, namely :-

- (i) the name, address and the registration number of such person;
- (ii) the name and address of the person receiving taxable service;
- (iii) description and value of taxable service provided or agreed to be provided; and
- (iv) the service tax payable thereon.

[Provided further that in case the provider of taxable service is a goods transport agency, providing service to any person, in relation to transport of goods by road in a goods carriage, an invoice, a bill or, as the case may be, a challan shall include any document, by whatever name called, which shall contain the details of the consignment note number and date, gross weight of the consignment and also contain other information as required under this subrule.]

4B. Issue of consignment note.- Any goods transport agency which provides service in relation to transport of goods by road in a goods carriage shall issue a consignment note to the recipient of service: Provided that where any taxable service in relation to transport of goods by road in a goods carriage is wholly exempted under section 93 of the Act, the goods transport agency shall not be required to issue the consignment note [to the recipient of service]. Explanation.- For the purposes of this rule and the second proviso to rule 4A, "consignment note" means a document, issued by a goods transport agency against the receipt of goods for the purpose of transport of goods by road in a goods

carriage, which is serially numbered, and contains the name of the consignor and consignee, registration number of the goods carriage in which the goods are transported, details of the goods transported, details of the place of origin and destination, person liable for paying service tax whether consignor, consignee or the goods transport agency.

14. From the above reproduced statutory provisions it is clear that the appellant has disclosed the levy of service tax on the basis of weight of consignment except distance covered in kilometres mentioned therein. The consignment note issued by the appellant appears to contain all the relevant information including the payment of service tax by consigner but for the actual amount which is written as TBB (to be billed). The appellant by arrangement with their principal has decided to have monthly settlement of transport bill consignment wise which is also evident from the ledger produced by the appellant. Further, to strengthen their submission, which we are also in agreement, the appellant has submitted a CA certificate stating that the principal has paid the service tax on the reverse charge basis as contemplated under the Act. Therefore, we do not find any force in the arguments raised by the Revenue regarding inappropriate consignment note.
15. The dispute in this case is for the inclusion of freight amount in the value of C & F service for which a separate agreement has been entered into with the principal, which we do not consider legally tenable. We also do not find anything wrong in the appellant is recovering the transportation charge on the basis of liter per Kg, as what is required is that as the GTA service provider issues consignment note in terms of Rule 4B of the Service Tax Rules as stated above.

16. The CA certificate which has been produced by the appellant is being objected by the Id. AR on the ground that the same was not before the adjudicating authority but we find that this argument of no use as the CA certificate was produced on the direction of the Bench. We find that the issue regarding inclusion of transportation charge in the cargo handling services have been decided by this Tribunal in many occasions in various cases some of which are as under

- (i) In the case of **Balaji Heavy Lifter Private Limited vs. CCE, Rajcot [2013(30) STR 225 (Tri.-Ahmd)]** it is held that if the two services are billed separately then there is no question of including them together for computation of taxable value for payment of service tax. Relevant paragraphs of the order are as under:

"8. It can be seen from the above reproduced clarification given by the Board that in 2002 itself, the Board has clarified that if the bill amount indicates cargo handling service separately and transportation separately on actuals basis, then the Service Tax liability can be levied on cargo handling service only. We find that the arguments raised by both sides on the merit can be considered at the final disposal of appeal. At the same time, the Board's circular which has issued in 2002 was correctly followed by the appellant herein, raising separate bills for cargo handling service and transportation.

9. In our view, the appellant has made out a *prima case* for waiver of pre-deposit of the amounts on limitation at this juncture. Accordingly, the application for waiver of pre-deposit of amounts involved is allowed and recovery thereof stayed till the disposal of appeal."

17. Therefore, the ratio laid down in this case is equally applicable in case at hand.

18. In view of aforesaid analysis and precedent decisions of this Tribunal, we held that the impugned order is not sustainable, accordingly, there is no question of imposition of any interest and penalty also. Ld. Advocate has also various other grounds including that of limitation which we do not find necessary to deal with as we have held impugned order is not sustainable on merit itself. Accordingly, we allow the appeal with consequential benefit, if any.

(Order pronounced in open court on **26.11.2019**)

(Bijay Kumar)
Member (Technical)

(Anil Choudhary)
Member (Judicial)

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