

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH

SERVICE TAX APPEAL NO. 51370 OF 2016

[Arising out of Order-in-Original No. DLI/SVTAX/002/COM/08-15-16 dated
19.01.2016 passed by the Commissioner of Service Tax-II, New Delhi]

M/S. TIGER LOGISTICS (INDIA) LTD.

Appellant

804A-807, 8th Floor, 60, Skylark Building
Nehru Place, New Delhi 110019

Versus

Commissioner of Service Tax-II, Delhi

Respondent

5th Floor, 14-15, Farm Bhawan,
Nehru Place, New Delhi -110019

Appearance

Shri Amit Jain, Advocate for the Appellant

Dr. Radhe Tallo, Authorized Representative for the Respondent

CORAM: HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT

HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)

Date of Hearing: 26.11.2021

Date of Decision: 04.02.2022

Final Order No. 50095/2022

P.V. Subba Rao:

This appeal is filed by the M/s. Tiger Logistics¹ assailing Order in original dated 19.1.2016² passed by the Commissioner of Service Tax-II New Delhi whereby she adjudicated upon the Show Cause Notice³ dated 23.4.2015 and confirmed the demand of Rs. 3,59,11,270/- with interest and imposed penalty of equal amount under Section 78 and also imposed a penalty of Rs. 10,000/- each under Section 77(1) and 77(2).

-
1. Appellant
 2. Impugned order
 3. SCN

2. The prayer in this appeal is 'to partially set aside sub-para (i) of para 177 of the impugned order insofar as it confirms demand amounting to Rs. 2,08,92,006/- on:

- Mark up/ Differential of ocean freight
- Detention Charges
- Toll tax

And pass such other and further orders in favour of the appellant'.

3. This appeal assails the impugned order partially: The prayer is to:

- a) service tax on markup/differential of ocean freight, detention charges and toll tax be set aside;
- b) Demand beyond the period of five years from the date of SCN, i.e., October 2009 to March 2010 may be set aside;
- c) Penalties under Section 77 & 78 may be held to be unsustainable and set aside.

4. The submissions of the appellant with respect to the above are as follows:

Service tax on mark-up/ differential of ocean freight

- a) The appellant is a multi-modal goods transporter under the Multi-modal Goods Transport Act, 1993 and is registered with the Directorate General of Shipping. It provides (i) Customs clearance service; (ii) Transportation service; and (iii) Freight forwarding service.
- b) It books cargo space on ships with the shipping lines and in turn, sells it to its customers. The Shipping line issues a Master Bill of Lading in its name and in turn, it issues House Bills of Lading to its customers.

- c) The appellant pays the Shipping line for the entire space booked and the customers pay the appellant for the space which they purchase from the appellant.
- d) The total amount paid to the Shipping line can be less than what the appellant receives from selling the space or more than that. The price at which it sells space to its customers depends on market conditions. Thus, there could be loss if the appellant is unable to sell the total space it purchased from the shipping line or has to sell at a lower price or profit in a contrary condition.
- e) The demand of Service tax is on the differential between the purchase and sale price (or the mark-up) of the ocean freight under the category of Business Support Service (BSS) up to 30.6.2012 and under section 66B read with section 66D from 1.7.2012.
- f) The demand in the SCN was of Rs 2,17,22,185/- which was reduced to Rs. 1,93,79,692/- allowing cum-tax benefit.
- g) No service tax is leviable on this amount as it is only a case of trading the space on ships and the profit gained therefrom.
- h) The issue stands decided by various benches of Tribunal in the cases of **Satkar Logistics⁴**, **Nilja Shipping Pvt. Ltd.⁵**, **Surya Shipping⁶**, **ITC Freight services⁷**, etc.

Service tax on Container detention charges and toll tax

- i) The shipping containers are owned by the shipping lines which charge detention charges if the containers are held up beyond

4. 2021-TIOL-543-CESTAT-DEL
5. 2020-TIOL-461-CESTAT-MAD
6. TIOL-249-CESTAT-AHM
7. TIOL-445-CESTAT-BANG

the free period. The appellant pays the detention charges to the Shipping line and recovers the same from its customers.

- j) Similarly, where toll tax is charged by the local authorities, the appellant pays it and recover it from its customers.
- k) There is no service element in these. These are only reimbursements which the appellant receives from its customers.
- l) CBEC has issued Circular No. 121/2/2020-ST dated 26.4.2010 clarifying that the container detention charges beyond the pre-holding period is not a service but is in the form of penal rent and hence they are not exigible to service tax.
- m) Even otherwise, it is now settled in **South Eastern coalfields**⁸ that liquidated damages are not consideration for a service and are not exigible to service tax.
- n) The toll tax is a collection by the authorities which the appellant pays and gets reimbursed by its customers. Thus, no service element is involved in it.

Invocation of extended period of limitation

- o) The impugned order confirmed the demand invoking extended period of limitation on the ground that the appellant had suppressed facts.
- p) The Commissioner, had, observed in paragraph 166 of the impugned order that the appellant had failed to disclose the CENVAT credit availed and utilized in ST-3 returns. This observation was only in the context of demand of interest on

the ground of alleged delay in utilizing credit which demand has been dropped by the Commissioner.

- q) Relying on **Oriental Insurance Company Ltd.**⁹ and **Emaar MGF Land Ltd.**¹⁰ , it is argued that suppression has to be willful and mere omission is not sufficient to invoke extended period of limitation.

Demand for the period October 2009 to March 2010 is beyond even the extended period of limitation of five years

- r) Even in case of fraud, collusion, willful misstatement or suppression of facts, the demand can be raised only within five years, the demand in respect of this period needs to be set aside.

Penalties under section 77 &78 may be waived in terms of section 80

- s) Section 73(3) provides that where any service tax not levied or paid or short levied or short paid before the issue of notice, no Show Cause Notice can be issued. In the present case, service tax on legal service, cab operator service (on reverse charge basis), forklift charges, fumigation charges, and reversal of credit on some common services was done immediately on being pointed out along with interest. Hence, no SCN should have been issued and no penalty should have been imposed on the appellant.
- t) However, learned commissioner denied the benefit of this section invoking section 73(4). Since the demand has been confirmed invoking extended period of limitation, she held that the benefit of Section 73(3) cannot be given to the appellant.

9. 2021-TIOL-307-CESTAT- DEL

10. 2021-VIL-374-DEL-ST

- u) The benefit of Section 73(3) cannot be denied to the assessee and the bar on extending this benefit invoking section 73(4) has to be proved with evidence.

Prayer

- v) **The appeal may be allowed and the impugned order, to the extent it is prejudicial to the interest of the appellant be set aside with consequential benefits to the appellant.**

5. **In the synopsis submitted by the learned counsel, a prayer for refund of excess amount paid by the appellant was also made.**

6. Learned authorised representative of the department reiterates the arguments in the impugned order.

7. We have considered the arguments on both sides and perused the records. For a service tax to be leviable:

- a) a service must have been rendered;
- b) the service so rendered must be a taxable service within the meaning of section 65(105) of Chapter V of the Finance Act, 1994;and
- c) a consideration must have been paid for that service;

8. If a service is not rendered at all, no service tax can be levied regardless of the fact that an amount has been received. Similarly, if the service so rendered does not squarely fall within the definition of 'taxable service' under section 65 (105), no service tax can be levied. Even if it is doubtful whether the service is taxable or not, the benefit of doubt in respect of the charging section goes in favour of the assessee and against the revenue. The third important element is the

consideration for the service. Any amount received must be for the service and it cannot be for some other purpose. For instance, if any amount is received towards any compensation, such amount cannot be taxed.

9. As far as the differential in ocean freight is concerned, the appellant buys space on ships from the Shipping Line and the Shipping Line issues a Master Bill of Lading in favour of the appellant. In turn, it sells the space to its customers and issues a House Bill of Lading to each of them. The first leg is the contract between the Shipping line and the appellant. The second leg is the contract between the appellant and its customers. Evidently, anyone who trades in any merchandise or service buys low and sells high and the margin is his profit. To earn this profit, he also takes the risk of being unable to sell. In the appellant's case, if the space on the ships which it bought cannot be sold to its customers fully, or due to market conditions, or is compelled to sell at lower than purchase price, the appellant incurs loss. In a contrary situation, it gains profits. This activity is a business in itself on account of the appellant and cannot be called a service at all. Neither can the profit earned from such business be termed consideration for service. Respectfully following **Satkar Logistics, Nilja Shipping Pvt. Ltd., Surya Shipping** and **ITC Freight services**, we hold that the appellant is not liable to pay service tax.

10. As far as the container detention charges are concerned, these are charged by the owner of the container if the container is not returned to it within time. In other words, it is in the form of a penal rent. It is in the form of liquidated damages for failure to return the

container within the time indicated in the contract and not a consideration for a service. There is a difference between 'consideration under the contract' which is what each party to the contract does in return to the other party doing its part of the contract and 'compensation under the contract' which is a penalty for breach of contract by either frustrating the contract through non-performance or by not performing as per the conditions in it. This compensation can take the form of unliquidated damages where the court awards the compensation or liquidated damages where the compensation for breach of contract or its conditions is pre-decided and incorporated in it. The liquidated damages are not the purpose of the contract but are *in terrorem* to provide a strong incentive against breaching its conditions.

11. We also find that the Central Board of Excise and Customs has also clarified this aspect as far as the container detention charges are concerned, as follows:

Circular No. 121/3/2010-ST

F.No.332/29/2009-TRU
Government of India
Ministry of Finance
Department of Revenue
Central Board of Excise & Customs
(Tax Research Unit)

New Delhi-110001 dated the 26th April, 2010.

To
Director General of Service Tax, Mumbai
Director General of Central Excise Intelligence, Delhi
Chief Commissioner of Central Excise (All)
Chief Commissioner of Customs and Central Excise (All)
Commissioner of Service Tax (All)

Madam/Sir,

Subject: Service tax on Container Detention Charges - regarding

Generally marine containers are temporarily brought into a customs territory and have to be re-exported within a specified period. Normally, a Full Container Load is taken out of the port and the activity of stuffing or de-stuffing takes place at the premises of the exporter/importer. The shipping companies / steamer agent provide a pre-determined period within which the container (that has gone out of the port) is to be returned. This is called as 'pre-holding period' and the duration of the same is mentioned in the contract. In case there is any delay on the part of the customer in returning the container, the charges known as 'detention charges' are collected over and above the contracted amount by the shipping line.

3. Representations have been received in the Board that service tax has been demanded on such 'detention charges' under the 'Business Support Service (BSS)' or 'Business Auxiliary Service (BAS)'.

4. The issue has been examined. To retain the container beyond the pre-holding period is neither a service provided on behalf of the client (Business Auxiliary Service) nor is it an infrastructural support in the business of either the shipping lines or the customer (Business Support Service). Such charges can at best be called as 'penal rent' for retaining the containers beyond the pre-determined period. Therefore, the amount collected as 'detention charges' is not chargeable to service tax.

5. The Board desires that pending cases, if any, on this issue may be decided in line with the above clarification.

Yours faithfully,

(Gautam Bhattacharya)
Joint Secretary (TRU-II)
Tel: 2309302

12. In view of the above, the demand of service tax on container detention charges is unsustainable and is liable to be set aside.

13. Toll tax is an amount paid by the appellant to the authorities which it gets reimbursed by its Customers. None of the elements required to levy service tax are present in such a transaction. No service tax can be levied on these amounts as well.

14. We now examine the three interlinked issues of prayer for (i) the submission that once they paid duty on the taxable services, no SCN should have been issued at all in view of Section 73(3) of the Act, (ii) waiver of penalties invoking section 80; and (iii) prayer for demand for the period beyond the normal period, invoking extended period of limitation be set aside and consequential refund been sanctioned to the appellant.

15. The key question to be answered is whether the elements of (a) fraud or (b) collusion or (c) willful misstatement or (d) suppression of facts or (e) contravention of act or rules made thereunder with intent to evade payment of duty are present in this case. If these elements are found, then the penalty under section 78 must be sustained and the appellant will be covered under section 73(4) and will not be covered under section 73 (3) which states if the service tax is paid along with the interest no SCN should be issued. The appellant will also not be eligible to be considered for waiver of penalties under Section 80.

16. These sections read as follows:

SECTION 73. Recovery of service tax not levied or paid or short-levied or short-paid or erroneously refunded.

- (1) Where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, Central Excise Officer may, within thirty months from the relevant date, serve notice on the person chargeable with the service tax which has not been levied or paid or which has been short-levied or short-paid or the person to whom such tax 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 service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of —
(a) fraud; or

(b) collusion; or
(c) wilful mis-statement; or
(d) suppression of facts; or
(e) 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 person chargeable with the service tax or his agent, the provisions of this sub-section shall have effect, as if, for the words "thirty months", the words "five years" had been 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 thirty months or five years, as the case may be.

(1A) Notwithstanding anything contained in sub-section (1) except the period of thirty months of serving the notice for recovery of service tax), the Central Excise Officer may serve, subsequent to any notice or notices served under that sub-section, a statement, containing the details of service tax not levied or paid or short levied or short paid or erroneously refunded for the subsequent period, on the person chargeable to service tax, then, service of such statement shall be deemed to be service of notice on such person, subject to the condition that the grounds relied upon for the subsequent period are same as are mentioned in the earlier notices.

(1B) Notwithstanding anything contained in sub-section (1), in a case where the amount of service tax payable has been self-assessed in the return furnished under sub-section (1) of section 70, but not paid either in full or in part, the same shall be recovered along with interest thereon in any of the modes specified in section 87, without service of notice under sub-section (1).

(2) The Central Excise Officer shall, after considering the representation, if any, made by the person on whom notice is served under sub-section (1), determine the amount of service tax due from, or erroneously refunded to, such person (not being in excess of the amount specified in the notice) and thereupon such person shall pay the amount so determined :

[****]

(2A) Where any appellate authority or tribunal or court concludes that the notice issued under the proviso to sub-section (1) is not sustainable for the reason that the charge of,—

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

payment of service tax, has not been established against the person chargeable with the service tax, to whom the notice was issued, the Central Excise Officer shall determine the service tax payable by such person for the period of thirty months, as if the notice was issued for the offences for which limitation of thirty months applies under sub-section (1).

[* * *]

(3) Where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the person chargeable with the service tax, or the person to whom such tax refund has erroneously been made, may pay the amount of such service tax, chargeable or erroneously refunded, on the basis of his own ascertainment thereof, or on the basis of tax ascertained by a Central Excise Officer before service of notice on him under sub-section (1) in respect of such service tax, and inform the [Central Excise Officer] of such payment in writing, who, on receipt of such information shall not serve any notice under sub-section (1) in respect of the amount so paid :

Provided that the Central Excise Officer may determine the amount of short-payment of service tax or erroneously refunded service tax, if any, which in his opinion has not been paid by such person and, then, the Central Excise Officer shall proceed to recover such amount in the manner specified in this section, and the period of "thirty months" referred to in sub-section (1) shall be counted from the date of receipt of such information of payment.

Explanation.1— For the removal of doubts, it is hereby declared that the interest under section 75 shall be payable on the amount paid by the person under this sub-section and also on the amount of short payment of service tax or erroneously refunded service tax, if any, as may be determined by the [Central Excise Officer], but for this sub-section.

Explanation 2. — For the removal of doubts, it is hereby declared that no penalty under any of the provisions of this Act or the rules made thereunder shall be imposed in respect of payment of service tax under this sub-section and interest thereon.

(4) Nothing contained in sub-section (3) shall apply to a case where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of —

**(a) fraud; or
 (b) collusion; or
 (c) willful mis-statement; or
 (d) suppression of facts; or
 (e) contravention of any of the provisions of this Chapter or of the rules made thereunder with intent to evade payment of service tax.**

4(A) [* * * *]

(4B) The Central Excise Officer shall determine the amount of service tax due under sub-section (2)—

(a) within six months from the date of notice where it is possible to do so, in respect of cases falling under sub-section (1);

(b) within one year from the date of notice, where it is possible to do so, in respect of cases falling under the proviso to sub-section (1) or the proviso to sub-section (4A)].

(5) The provisions of sub-section (3) shall not apply to any case where the service tax had become payable or ought to have been paid before the 14th day of May, 2003.

(6) For the purposes of this section, "relevant date" means, —

(i) in the case of taxable service in respect of which service tax has not been levied or paid or has been short-levied or short-paid —

(a) where under the rules made under this Chapter, a periodical return, showing particulars of service tax paid during the period to which the said return relates, is to be filed by an assessee, the date on which such return is so filed;

(b) where no periodical return as aforesaid is filed, the last date on which such return is to be filed under the said rules;

(c) in any other case, the date on which the service tax is to be paid under this Chapter or the rules made thereunder;

(ii) in a case where the service tax is provisionally assessed under this Chapter or the rules made there under, the date of adjustment of the service tax after the final assessment thereof;

(iii) in a case where any sum, relating to service tax, has erroneously been refunded, the date of such refund.

SECTION 76. Penalty for failure to pay service tax.—

(1) Where service tax has not been levied or paid, or has been short-levied or short-paid, or erroneously refunded, for any reason, other than the reason of fraud or collusion

or willful mis-statement or suppression of facts or contravention of any of the provisions of this Chapter or of the rules made thereunder with the intent to evade payment of service tax, the person who has been served notice under sub-section (1) of section 73 shall, in addition to the service tax and interest specified in the notice, be also liable to pay a penalty not exceeding ten per cent. of the amount of such service tax :

Provided that where service tax and interest is paid within a period of thirty days of —

(i) the date of service of notice under sub-section (1) of section 73, no penalty shall be payable and proceedings in respect of such service tax and interest shall be deemed to be concluded;

(ii) the date of receipt of the order of the Central Excise Officer determining the amount of service tax under sub-section (2) of section 73, the penalty payable shall be twenty-five per cent. of the penalty imposed in that order, only if such reduced penalty is also paid within such period.

(2) Where the amount of penalty is increased by the Commissioner (Appeals), the Appellate Tribunal or the court, as the case may be, over the above the amount as determined under sub-section (2) of section 73, the time within which the reduced penalty is payable under clause (ii) of the proviso to sub-section (1) in relation to such increased amount of penalty shall be counted from the date of the order of the Commissioner (Appeals), the Appellate Tribunal or the court, as the case may be.

SECTION 77. Penalty for contravention of rules and provisions of Act for which no penalty is specified elsewhere. — (1) Any person, —

(a) who is liable to pay service tax or required to take registration, fails to take registration in accordance with the provisions of section 69 or rules made under this Chapter shall be liable to a penalty which may extend to ten thousand rupees;

(b) who fails to keep, maintain or retain books of account and other documents as required in accordance with the provisions of this Chapter or the rules made thereunder, shall be liable to a penalty which may extend to ten thousand rupees;

(c) who fails to —

(i) furnish information called by an officer in accordance with the provisions of this Chapter or rules made thereunder; or

(ii) produce documents called for by a Central Excise Officer in accordance with the provisions of this Chapter or rules made thereunder; or

(iii) appear before the Central Excise Officer, when issued with a summon for appearance to give evidence or to produce a document in an inquiry, shall be liable to a penalty which may extend to ten thousand rupees or two hundred rupees for everyday during which such failure continues, whichever is higher, starting with the first day after the due date, till the date of actual compliance;

(d) who is required to pay tax electronically, through internet banking, fails to pay the tax electronically, shall be liable to a penalty which may extend to ten thousand rupees;

(e) who issues invoice in accordance with the provisions of the Act or rules made thereunder, with incorrect or incomplete details or fails to account for an invoice in his books of account, shall be liable to a penalty which may extend to ten thousand rupees.

(2) Any person, who contravenes any of the provisions of this Chapter or any rules made there under for which no penalty is separately provided in this Chapter, shall be liable to a penalty which may extend to ten thousand rupees.

SECTION 78. Penalty for failure to pay service tax for reasons of fraud, etc. —

(1) Where any service tax has not been levied or paid, or has been short-levied or short-paid, or erroneously refunded, by reason of fraud or collusion or willful misstatement or suppression of facts or contravention of any of the provisions of this Chapter or of the rules made thereunder with the intent to evade payment of service tax, the person who has been served notice under the proviso to sub-section (1) of section 73 shall, in addition to the service tax and interest specified in the notice, be also liable to pay a penalty which shall be equal to hundred per cent. of the amount of such service tax:

Provided that in respect of the cases where the details relating to such transactions are recorded in the specified records for the period beginning with the 8th April, 2011 upto the 24 date on which the Finance Bill, 2015 receives the assent of the President (both days inclusive), the penalty shall be fifty per cent. of the service tax so determined :

Provided further that where service tax and interest is paid within a period of thirty days of — the date of service of notice under the proviso to

(i) sub-section (1) of section 73, the penalty payable shall be fifteen per cent. of such service tax and proceedings in respect of such service tax, interest and penalty shall be deemed to be concluded;

(ii) the date of receipt of the order of the Central Excise Officer determining the amount of service tax under sub-section (2) of section 73, the penalty payable shall be twenty-five per cent. of the service tax so determined :

Provided also that the benefit of reduced penalty under the second proviso shall be available only if the amount of such reduced penalty is also paid within such period :

Explanation. — For the purposes of this sub-section, "specified records" means records including computerised data as are required to be maintained by an assessee in accordance with any law for the time being in force or where there is no such requirement, the invoices recorded by the assessee in the books of accounts shall be considered as the specified records.

(2) Where the Commissioner (Appeals), the Appellate Tribunal or the court, as the case may be, modifies the amount of service tax determined under sub-section (2) of section 73, then, the amount of penalty payable under sub-section (1) and the interest payable thereon under section 75 shall stand modified accordingly, and after taking into account the amount of service tax so modified, the person who is liable to pay such amount of service tax, shall also be liable to pay the amount of penalty and interest so modified.

(3) Where the amount of service tax or penalty is increased by the Commissioner (Appeals), the Appellate Tribunal or the court, as the case may be, over and above the amount as determined under sub-section (2) of section 73, the time within which the interest and the reduced penalty is payable under clause (ii) of the second proviso to sub-section (1) in relation to such increased amount of service tax shall be counted from the date of the order of the Commissioner (Appeals), the Appellate Tribunal or the court, as the case may be.

80. Penalty not to be imposed in certain cases.

(1) Notwithstanding anything contained in the provisions of section 76, or section 77, no penalty shall be imposable on the assessee for any failure

referred to in the said provisions, if the assessee proves that there was reasonable cause for the said failure.

(2) Notwithstanding anything contained in the provisions of section 76 or section 77 or section 78, no penalty shall be imposable for failure to pay service tax payable, as on the 6th day of March, 2012, on the taxable service referred to in sub-clause (zzzz) of clause (105) of section 65, subject to the condition that the amount of service tax along with interest is paid in full within a period of six months from the date on which the Finance Bill, 2012 receives the assent of the President.

17. The findings of the Commissioner in the impugned order regarding the presence of any of the elements necessary for invoking extended period of limitation, holding that Section 73(3) would not apply and imposing penalty under Section 78 are contained in paragraphs 167 and 174 of the impugned order. Since in their ST-3 returns the appellants have not disclosed the service tax leviable on the disputed amounts and these came to light during the investigation from the data provided by the appellant, the Commissioner concluded that there was **suppression of facts by the appellant**. The relevant paragraphs read as follows:

“ 167. In view of the above discussion, I thus hold that due to suppression of facts from the department by the Noticee the extended period of limitation is invokable in the instant case.

.....

174. I also find that the noticee failed to pay their due service tax in Govt. exchequer by suppressing the actual value of services provided by them by not filing Service Tax returns. I thus find that since they have willfully suppressed the facts regarding their service tax liability with intent to evade payment of service tax on the services provided by them to their customers/clients. Accordingly the noticee is liable to penal action under the provisions of section 78 of the Finance Act, 1994. I further find that since all the transactions relating to this case, are duly recorded in the specified records such as invoices and statutory books of accounts of the noticee during the subject period, therefore, I hold that penalty under the first proviso to section 78 (1) of the act, *ibid.*, is imposable on the noticee as stipulated in Law.”

18. We find that the only allegation of these elements held against the appellant in the impugned order is that of 'suppression of facts' and the reason for this is that they have not disclosed the full value of the taxable services in their ST-3 returns. It is also accepted in the impugned order that these services were all duly recorded by the appellant. It is now well established legal principle that 'suppression of facts' is not mere omission. It must be a deliberate act with *mens rea* to suppress and thereby evade. The facts brought out in the impugned order do not demonstrate the *mens rea*. On the other hand, they show that the appellant had recorded all the transactions in its records and when called for during investigation, provided full facts to the department based on which the SCN was issued. Insofar as the appellant did not dispute the demands of service tax, it paid the same along with interest even before the SCN was issued. In our considered view, this case is covered squarely by section 73(3) and no SCN should have been issued to that extent.

19. The appellant disputed service tax on mark up which it received from trading space on ships and the reimbursements of the container detention charges and the toll taxes which it paid on behalf of its clients and got reimbursed. We have already found above that no service tax is leviable on these receipts.

20. The appellant, having paid the service tax on those services which it rendered even before the SCN was issued and having argued that no SCN should have been issued to it as per Section 73(3), now in the synopsis submitted before us, has sought refund of the service

tax paid. We find this prayer cannot be accepted for more than one reason. Once we have held that section 73(3) applies and no SCN should have been issued demanding the service tax, the basis for forming such a view, viz., payment of service tax with interest cannot now be reversed. Secondly, if service tax is payable, the charge of tax continues to exist. The limitation of time – either normal period or extended period- apply only to the remedy available to the Revenue by issuing a demand. Efflux of time does not extinguish the underlying liability. It is like a time-barred debt. After the time limit, the charge of debt remains and only the remedy to the lender gets extinguished. If the debt is time barred and thereafter it is repaid, the borrower cannot claim refund of what has been paid on the ground that the lender could not have sued him for recovery of the debt.

21. In this case, once the service tax, admittedly due, has been paid, albeit late and on that basis we have accepted the plea of the appellant that section 73(3) applies and no SCN should have been issued at all, the appellant cannot claim refund of the service tax paid. This would also apply to any service tax paid beyond the period of five years.

22. In view of the above discussions, we find that the appellant had, through its conduct during the investigation by providing all the information and paying the service tax with interest to the extent it had not disputed, has made out a case for seeking waiver of penalty invoking section 80. The penalty imposed under section 77(1) and 77(2) on the Act is set aside.

23. In view of the appeal is partly allowed and the appeal is disposed of as below:

- a) The demand of service tax on mark up on ocean freight, container detention charges and toll taxes is set aside.
- b) The appellant's plea that the service tax to the extent it had not disputed and paid along with interest was covered by section 73(3) is accepted and the SCN to that extent is invalid. The provisions of section 73(4) are not applicable because the intention is not established in the impugned order but merely omissions.
- c) The penalty under section 78 is set aside as the suppression is not proved.
- d) The penalty under section 77(1) and 77(2) are set aside invoking section 80.
- e) The appellants' plea for refund of the service tax already paid is rejected as they have already accepted the charge of service tax which doesn't extinguish with time even if the remedy to the department in the form of issuing an SCN lapses.

24. The appeal is allowed and the impugned order is modified as above.

(Order pronounced on **04.02.2022**)

**JUSTICE DILIP GUPTA
PRESIDENT**

**P. VENKATA SUBBA RAO
MEMBER (TECHNICAL)**