Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench At Ahmedabad
REGIONAL BENCH- COURT NO.3

Service Tax Appeal No.10961 of 2013

(Arising out of OIO-17-SERVICETAX-2012 dated 22/01/2013 passed by Commissioner of Central Excise, Customs and Service Tax-SURAT-I)

ARKAY LOGISTICS LIMITED **.....Appellant**
27th Km, Surat-Hazira Road,
Surat, Gujarat

VERSUS

C.C.E. & S.T.-SURAT-I **.....Respondent**
New Building...Opp. Gandhi Baug,
Chowk Bazar,
Surat, Gujarat-395001

APPEARANCE:
Shri Vishal Agarwal & Ms. Dimple Gohil, Advocates for the Appellant
Shri Prabhat K. Rameshwaram, Additional Commissioner (AR) for the Respondent

CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
HON'BLE MEMBER (TECHNICAL), MR. RAJU
Final Order No. A/ 10796 /2023

DATE OF HEARING: 10.01.2023
DATE OF DECISION: 03.04.2023

RAMESH NAIR

This appeal is directed against Order-in-Original No. 17/Service tax/2012 dated 22.01.2013 passed by the Commissioner of Central Excise, Customs& Service tax, Surat-I.

02. Briefly stated the facts of the case are that the appellants are engaged in providing various taxable services. Acting on intelligence gathered by the officer of the DGCEI a team of officers of DGCEI, Zonal Unit, Ahmedabad, visited the Appellant's premises on 12.02.12 and certain documents were resumed under summons proceedings. Scrutiny of these documents revealed that Appellant has not paid appropriate Service tax in respect of handling & transportation of goods by multi-mode namely road-rail road , Sea-road etc., which appeared to be classifiable under "Cargo Handling Service" on full value till 14.11.2009. It further appeared that in the case of handling & transporting of goods by multi-modes, Appellant had provided various services like loading/ unloading/ stacking of the goods at respective rail or port yard, road transportation from plant to rail/ port head, transportation of goods by rail or sea and from destination rail/ port head to

M/s Essar Steel Ltd. various depots /stock –points/ job-workers' premises and accordingly charged composite rate per MT basis depending on various destination. Thus, it was alleged that looking to the scope of works, the aforesaid services appear to be classifiable under the category of "Cargo Handling Service" and accordingly service tax should have been discharged on entire amounts charged by them towards aforesaid service. However till 14.11.2009 Appellant had raised tax invoices bifurcating composite rate into different components like (a) transport transportation component (b) port services components in case of transportation by sea or cargo handling services component in case of transportation by rail and (C) rail freight or sea freight component in respect of handling & transportation of goods by multi-modes namely raod-rail-road, sea-road etc, and by this way they had not discharges service tax liability on entire amount of services charged at composite rate, in as much as Appellant had paid service tax only in respect of (b) component under respective head of service. In case of (a) component, Appellant had classified amount of such component under "transportation of goods by road Service" and indicated on invoice that M/s Essar Steel Ltd. shall be liable to pay service tax on abated value of such component. Whereas in case of (c) component i.e 'sea freight/and or rail freight', Appellant had not paid Service tax. It was alleged that similar modus had also been adopted by the Appellant in case of handling & transportation of goods services by multi modes provided to various buyers of steel of M/s Essar Steel Ltd. during the aforesaid period. It was alleged by the revenue that, during the period from 01.10.2006 to 14.11.2009, Appellant had not discharged service tax on full value charged towards multimode transportation services by way of bifurcating service charges into different components as mentioned above and thereby not correctly classifying the said services under the category of "Cargo Handling Services", as defined under Section 65(23) of the Finance Act, 1994. During the investigation statements of key persons of Appellant were recorded. After the detail investigation a show cause notice was issued to the appellant proposing to demand of Service Tax along with interest under the category of "Cargo Handling Service" and for imposing penalties. In adjudication, the adjudicating Authority in impugned order confirmed the demand of Service Tax along with interest and imposed penalties. Aggrieved by such order, the appellant is now before the Tribunal.

03. Shri Vishal Agarwal, Learned Counsel appearing on behalf of the appellant submits that in the impugned order, it has been duly noted that

the Appellant had been awarded the contract for movement of goods from the premises of M/s Essar Steel Ltd (M/s ESL) to M/s ESL's depot/ Job workers/Premises of its customers. Further in para 17.18 of the impugned order, it has been stated that Appellant had signed a contract only for transportation of goods by road and not for multi modal transportation. Appellant had charged a single composite rate of freight mutually agreed for transportation of goods by road as well as other multiple modes of transportation and however had bifurcated the same into different service components. Despite coming to the conclusion that Appellant had rendered transportation service, Learned Commissioner yet upheld the demand under the head of Cargo Handling Service which is clearly untenable.

3.1 He also submits that during the material period, Appellant rendered only Transportation services and in respect of these services, it cannot be called upon to discharge service tax under the head Cargo Handling Services. The Appellant has not rendered any handling services whatsoever insofar while discharging transportation service. The definition of Cargo Handling Service specifically excludes mere transportation of goods from the ambit of Cargo Handling Services. Therefore, the service of mere transportation, as provided in the present case cannot be categorized under the head of Cargo Handling Service. Since Transportation is the main element of the services provided by the Appellant, the handling of the cargo, if any, was incidental to the transportation service, consequently the said activity cannot be taxed under the head Cargo Handling Service.

3.2 He further submits that appellant had initially transported goods only by road and thereafter from April 2006 onwards, it informed M/s Essar Steel Ltd. and It's customer that it would use multiple modes of transportation such as road, rail, sea or a combination of the same whichever worked out to be the most efficient. It is relevant to point out here that the mandates of its client was only to transport the goods, but it was for the Appellant to decide the most efficient manner of doing so. Appellant's clients did not decide the modes of transportation nor were they concerned with the same. Therefore, it was wholly the Appellant's decisions and responsibility to transport the goods in a manner that was most effective. Even in the above arrangement, Appellant as a matter of abundant caution discharged service tax in respect of the amount attributable to the loading, unloading and handling of the goods at different locations in cases where multiple modes of transport had been adopted i.e. if the goods were loaded in a truck from the

factory of M/s. Essar Steel Ltd. and were carried to a railway yard for being carried further by rail, the amount attributable to handling of the goods at the railway yard was also taxed by the Appellant under the head cargo handling service. It is pertinent to note that the loading/unloading activities undertaken outside the factory were not undertaken by it at the behest of M/s ESL/it's client. The entire activities of handling the cargo was a part of the Appellant's responsibility to transport the goods, yet as a matter of abundant caution, it had discharged service tax on the component of cargo handling services. This being the case, the Appellant could not have paid service tax on the transportation services under the head of Cargo Handling Service. This distinction has been further clarified by the Central Board of Excise and Customs in para 3 of the Circular F.No. B.11/1/2002-TRU dated 01.08.2002 wherein it has been clarified that freight will not form part of the value of Cargo Handling Service. The scope of cargo handling service has to be limited to that portion which normally pertain to handling of cargo like loading, unloading, storing, securing etc. and cannot include transport cost, whether by road/rail/ship or by aircraft.

3.3 Without prejudice, he further submits that the show cause notice sought to levy service tax under the head of Cargo Handling Service on total amount charged by the appellant towards transportation of goods by Road, Sea transportation, rail transportation and other handling expenses incurred during such transportation. Whereas, the impugned order concluded in para 17.7 that insofar as transportation by road was concerned, there were no other services of loading, unloading, handling, etc., which was rendered by the appellant and that service that on the transportation services was rightly so discharged by M/s Essar Steel Ltd. In paras 17.09 and 17.10. it is recorded by the Learned Commissioner that the Appellant had not discharged service tax on the sea freight component or the rail freight component. Thereafter in para 17.14., 17,31, 17.8, the Learned Commissioner has concluded that the service of handling and transportation of goods by sea and rail were not transportation service but were classifiable under the head of Cargo Handling Services. Despite not accepting the case as made out in the show cause notice, the impugned order still confirms the entire service tax demanded in the notice which is clearly untenable.

3.4 He argued that impugned order proceeded on the erroneous premise that Appellant was also rendering handling service while transporting the

goods by sea and rail. This finding of the Learned Commissioner overlook the fact that such a handling if any, was on the Appellants own account and not for and on behalf of M/s ESL/ Customer of M/s ESL. In so far as M/s ESL/ Customer of M/s ESL are concerned they had only engaged by the Appellant for transporting goods form location 'A' to location 'B'. While doing so, the Appellant on its own account moved the materials from one mode of transport to another. The incidental loading, unloading and handling, for this purpose was on the Appellants own account and had not been undertaken as per the instruction or direction of M/s ESL/ It's customer.

3.5 Without prejudice he also submits that assuming Appellant had rendered composite service of cargo handling as also transportation, applying the principle of classification of services as enunciated in Section 65A of the Finance Act, 1994, in case of composite services, the activity will be classified on the basis of that activity which gives the services its essential character. It will thus follow that where the main activity is transport of goods by road/rail/sea and the activity of loading/unloading of goods is a subsidiary and incidental activity, the service is rightly so classifiable under the heads applicable for transportation service and not under the head of Cargo Handling Services. The aforesaid position has been further clarified by the Board in its Circular No. 104/07/08-ST dated 06.08.2008. The Board has explained that in relation to transportation of goods by road, which is a single dominant service, the composite service may include various intermediary and ancillary services provided in relation to the principal dominant service of Road Transport of goods.

3.6 He further submits that even assuming that the services in question were not solely that of transportation but were a cluster of activities with each activity having its own identity, existence and independence, even if one was to assume this. The service ought to have been segregated depending upon the nature of activity and then classified under the appropriate category of taxable services under Section 65 of the Finance Act, 1994. He placed reliance on the case of CCE Vs. BSBK Pvt. Ltd. 2010(18)STR 555.

3.7 Without prejudice he also submits the even if one is to assume that the service in question are liable to tax under the head Cargo Handling Service, than in respect of the amount shown separately towards transportation, there can be no liability towards Service tax as has been

clarified by the Board in Circular F.No.11/1/2002-TRU dated 01.08.2002. As clarified in this circular, in a case where the Bill indicates separately the amount charged for cargo handling and the amount charged for transportation, then service tax is leviable only on the cargo handling charges.

3.8 He further submits that in para 17.21. of the impugned order, Learned Commissioner has referred to the view taken by the Appellant in its letter dated 18.11.2009 where it proposed to classify the multi modal transport activity in the category of Cargo Handling Service after 14.11.2009 and held that if that was the Appellant's view, it could not classify the different activities differently even for the earlier period. However this proposed to classify the services rendered by it post 15.11.2009 differently in view of its revised role of logistic management including arranging suitable modes of transport by road/sea and by rail along with other incidental activities pertaining to loading, unloading post clearance, handling, planning and arrangement etc. under the category of Cargo Handling Service as one composite activity to avoid multiple accounting and billing. The above proposal was made due to the change in the scope of services after 15.11.2009 which were different from those rendered earlier inasmuch as after 15.11.2009, the Appellant undertook post clearance handling, planning and arrangement of transportation by suitable transport mode i.e rail/road sea including any combination thereof and managing the logistics upto the delivery of the goods upto client's premises which was hitherto only transpiration services, thus instead of paying service tax in separate categories of services, the Appellant proposed to the department that on the entire amount incurred by it for transport of goods by any mode which included the other incidental activities like loading, unloading of goods, it might be allowed to pay service tax under one category, namely Cargo Handling Service. The aforesaid proposal was subsequently rejected by the department vide its letter dated 25.03.2010 and the appellant was directed to separately account for different services. The department cannot use the Appellant's own proposition contained in its letter dated 18.11.2009, which was subsequently rejected by the Department itself, to hold that service tax was attracted on the components attributable to freight pertaining to rail and sea even for the earlier period when these activities were outside the purview of service tax levy.

3.9 He also submits that in para 17.9 the Learned Commissioner has categorically held that the Appellant was required to pay service tax on the sea freight component during the period 16.11.2005 to 31.08.2009, as well as on the rail freight component during the period from 16.11.2005 to 14.11.2009. These findings of the Learned Commissioner are totally misconceived and unsustainable as Service tax came to be levied on both the services namely, transport of goods by sea and transport of goods by rail, only with effect from 01.09.2009, and under no circumstance can these amount be eligible to tax for a period before 01.09.2009 where there was no levy of service tax on said services.

3.10 He also argued that Learned Commissioner has also erred in solely relying upon the forced deposition of Appellant's Chief Executive Officer Mr. Himatsingka. The testimony was not tested in cross examination and will fall short of reliable evidence.

3.11 He further argued that in terms of the proviso to Section 73 of the Finance Act, 1994 the extended period can only be invoked in case of fraud, collusion, willful misstatement, suppression of facts or contravention of any of the provisions with intent to evade payment of Service tax. None of these ingredients are available in the present case nor has the department produced any evidence to substantiate the same. Appellant in a bona fide manner believed that not service tax was payable on the portion attributable to sea freight and rail freight and therefore it is not the case where the assessee deliberately did not pay Service tax. Further Service recipient were also eligible to avail credit, and therefore the entire dispute is revenue neutral and as such the extended period could not have been invoked. The jurisdictional Service tax authority had approved the return filed by the Appellant from time to time and in fact even the investigating officer of the DGCEI who searched the premises of the Appellant on 13.04.2007 did not find anything amiss in the practice followed by them at that stage and therefore, did not issue any Notice. Similarly in June 2009, August 2010 and March 2011 also audits were conducted but the audit team, did not find any infirmity in the practice followed by the Appellant. When the appellant proposed in its letter dated 18.11.2009 to classify the different activity under one composite head namely, Cargo Handling Service after 15.11.2009, the Jurisdictional Service tax authority of Surat-I, Commissionerate themselves vide their letter dated 25.03.2010 objected to the idea of having a composite service category as proposed by the Appellant and advised the

appellant to pay service tax on the different activities, classifying them under different heads. Thus even accordingly to the revenue, the Services rendered by the Appellant cannot be classified under Cargo Handling Services. This being the case, a change in the stand taken in the year 2012 cannot lead to invocation of the extended period of limitation.

04. Shri Prabhat Rameshwaram, learned Additional Commissioner (AR) appearing on behalf of revenue opposed the contention of the Learned Counsel and reiterated the findings of impugned order.

05. We have carefully considered the rival submission and perused the records. The issue to be decided in the present appeal is whether the activity carried out by the Appellant i.e. movement of goods from the premises of M/s Essar Steel Ltd. to Essar Steel Ltd.'s Depot/ Job workers/ premises of their customers is taxable under the head of Cargo Handling Services. The statutory definition of cargo handling service is as below :

> *"Cargo Handling Services" means loading, unloading, packing or unpacking of cargo and includes cargo handling services provided for freight in special containers or for non-conternerised freight, provided by a container freight terminal or any other freight terminal, for all modes of transport and any other service incidental to freight but did not include handling of export cargo or passenger baggage or mere transportation of cargo."*

Section 65(105)(zr) defines 'taxable service' as under -

> " *"taxable service" means any services provided or to be provided to any person, by a cargo handling agency in relation to cargo handling services."*

From the definitions given above, it is clear that loading, unloading, handling of cargo for all modes of transport and any other service incidental to freight would be covered by the definition of "cargo handling". The definition also very clearly specifies that *mere* transportation of goods will not be considered as cargo handling service. The definition itself clarifies that if the activity is only of transportation, then the said activity cannot be called as cargo handling service.Regarding the appellant's liability to service tax under the category of "Cargo Handling Services" it is seen that the Learned Commissioner in para 17.6 of the impugned order itself admitted the facts that Appellant have been awarded the contract by M/s ESL for movement of goods from their various premises to their various depots as well as job-

workers premises by road, rail and sea modes and accordingly appellant charged composite rate per MT basis depending on various destination. The said facts itself prove that the essence of the contract is transportation of goods from one place to other place via road/rail/sea modes. We note that a similar issue came up for decision by the Tribunal in Hira Industries Ltd, 2012 (4) TMI 430, CESTAT ND = 2012 (28) S.T.R. 23 (Tri.). Tribunal observed as below :

> *"18. The next issue is the classification of service rendered by the transport contractors whether it is Transportation of Goods or Cargo Handling Service. We are not in agreement with the argument that the service involved is cargo handling service and not transportation service. When there is composite service, the service should be classified as per provisions in Section 65A of Finance Act, 1994. As per this section the sub-clause which gives the most specific description is to be adopted. If this criterion fails then the service is to be classified as the service which gives the essential character of the service. The composite service has elements fitting into the definitions of both the services. So, recourses is to be taken to section 65A(2)(b). Here it cannot be considered that transportation is for the purpose of loading and unloading but the contrary is true. That is loading and unloading is for transportation. Any person dealing with the situation perceives the services as one for transportation and not for loading and unloading. So on this count we are not in agreement with the argument of Revenue."*

5.1 The activities undertaken by the appellants under the disputed contract and discussed by the Learned Commissioner in impugned order primarily involves transportation of goods via Road/ Rail/ Sea. The activities incidentally even if involve some loading and unloading of goods while carrying out the principal activities under the contracts, such incidental activities of loading and unloading undertaken by the appellant cannot give the entire contracted activities the character of 'cargo handling services'. As such, in our view, the activities undertaken by the Appellant are primarily in the nature of transportation. Also, this Tribunal in *Commissioner of Service Tax, Ranchi* v. *HEC Ltd.* - 2018 (9) G.S.T.L. 403 (Tri. - Kolkata) on a similar issue has held that -

> *"The activities carried out by the assessee-respondents are primarily transportation of goods and loading & unloading, etc., which are incidental to the transportation of goods. Such activities cannot be covered within the services of 'Cargo Handling' as has been rightly held by the lower authorities."*

5.2 Further, there is no dispute on the facts that the main work of Appellant during the disputed period was transportation of goods and further in the present matter there was no element of packing involved. We also

noticed that the Learned Commissioner in impugned order in para 17.7 held as under:

> *" 17.7 I find that in case of goods transportation of road, M/s ELL were providing merely transportation services as other services like loading/unloading etc. was being handled and managed by M/s ESL by themselves and therefore M/s ELL have raised invoices indicating the value of freight charged per MT depending upon various destinations as fixed by contract under the category of "Transportation of Goods by Road" services and also indicating the "person liable to pay services tax" in such cases as M/s ESL, with computation of Service tax on abated value."*

The above finding of Learned Commissioner itself shows that the appellant's activity is not covered under the "Cargo Handling Service. From the above observation we hold that the services rendered by the appellant did not qualify to the definition as Cargo Handling Service.

5.3 We also find that Learned Commissioner in the present matter also confirmed the service tax demand related to the sea freight and rail freight components under the "Cargo Handling Service", which is prima-facie wrong. As discussed above, the activity of Appellant was transportation of goods and not cargo handling service. Further on "Rail Freight" and "Sea Freight" service tax cannot be demanded under the Cargo Handling Service. We also agree with arguments of Learned Counsel that Service tax came to be levied on both the services, namely transport of goods by Sea and Transport of goods by rail, only w.e.f. from 01.09.2009, therefore under any circumstances these amounts of Sea and Rail transportation received during a period before 01.09.2009 shall attract levy of service tax on said services.Besides, neither the Show Cause Notice nor impugned order throws any discussion as to how the disputed activities of appellant could be brought under the ambit of service tax net i.e. under 'cargo handling service'.We find that in the present matter revenue could not satisfactorily establish that the disputed activity of appellant is covered under the head of "Cargo Handling Service". Thus, for all the reasons stated above, the impugned order passed by the Commissioner deserves to be set aside.

5.4 As regard the limitation issue argued by the Learned Counsel, we find that in the facts of the present case that firstly the issue involved is of pure interpretation of legal provisions therefore, it cannot be said that the Appellant had any *mala fide* intentions and have suppressed any fact with

intention to evade payment of service tax. It is also on record that the Appellant have represented the matter before the Audit team and also before department during the investigation of case. This clearly shows that there is no suppression or wilful misstatement on the part of the Appellant. The Appellant in the present matter also provided all the details/documents/records related to the disputed activity before department, which were statutorily maintained and existed all the time as per statutory requirement under the various taxation laws such as Income Tax, Companies Act etc. In these circumstances charge of suppression or wilful misstatement does not survive against the Appellant. Thus extended period of limitation is also not invokable in the present matter.

5.5 The facts also on records that when appellant proposed vide letter dated 18.11.2009 to classify the different activity under one composite head "Cargo Handling Service" after 15.11.2009, the Jurisdictional Service tax authorities themselves vide letter dated 25.03.2010 objected the idea of having composite service category as proposed by the Appellant and advised the appellant to pay service tax on different activities classifying them under different heads. Thus even according to the revenue, the services rendered by the appellant cannot be classified under Cargo handling Service. All these factors show that there was confusion on the part of the officers also as regards the correct scope of the services being provided by the appellant. As such, we are of the view that the non -levy, if any, is not on account of a *mala fide* intention on the part of the appellant and no suppression or misstatement with an intent to evade service tax can be attributed to the appellant. As such, we are of the view that the demand is also hit being barred by limitation.

06. In view of our above discussion and finding, the impugned order is not sustainable, hence, we set aside the impugned order and allow the appeal with consequential relief if any, as per law.

(Pronounced in the open court on 03.04.2023)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

Mehul