

**Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench At Ahmedabad**

REGIONAL BENCH- COURT NO.3

Service Tax Appeal No.10371 of 2013
Service Tax Misc. Application (ORS) No. 10087 of 2023

(Arising out of OIO-90/COMMR/2012 dated 31/12/2012 passed by Commissioner of Central Excise, CUSTOMS (Adjudication)-RAJKOT)

Elegant Surveyors

Plot No. 134, Advance Apartment,
Ward 12-C, Lilashanagar, GANDHIDHAM, GUJARAT

.....Appellant

VERSUS

C.C.E. & S.T.-Rajkot

Central Excise Bhavan,
Race Course Ring Road...Income Tax Office,
Rajkot, Gujarat-360001

.....Respondent

APPEARANCE:

Shri Mihir Gupta & Shri Mayank Jain, Advocates for the Appellant
Shri. Vijay G. Iyengar, Assistant Commissioner (AR) for the Respondent

**CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
HON'BLE MEMBER (TECHNICAL), MR. C.L. MAHAR
Final Order No. A/ 10861 /2023**

DATE OF HEARING: 23.03.2023
DATE OF DECISION: 11.04.2023

C L MAHAR

M/s Elegant Surveyors, the appellant, has filed this appeal against the impugned order wherein service tax demand of Rs. 77,22,854/- (including Education cess and Secondary and Higher Education Cess) has been confirmed against the appellant under proviso to Section 73(1) of the Finance Act, 1994 (herein after referred to as the Act) besides demanding interest under Section 75, imposing equivalent penalty of Rs. 77,22,854/- under Section 78 and other penalties under Section 76 & 77 of the Act.

02. Briefly stated facts are that the appellant was engaged in providing the service under the category of "Port Service" classifiable under Section 65 (105) (zn) of the Act. The appellant obtained service tax registration with effect from 27.07.2007. The appellant had been providing port services since 2005. In the impugned order it has been held that the appellant had not discharged their tax liability amounting to Rs. 7,37,766/- during the period 2005-06 i.e. prior to obtaining service tax registration and further

suppressed its taxable value and failed to pay another tax liability of Rs. 69,85,088/- for the period 2006-07 to 2009-10. An amount of Rs. 33,12,188/- already deposited by the appellant has been appropriated in the impugned order towards their total tax liability of Rs. 77,22,854/-. Now the appellant is before us against the said confirmation of demand and interest and imposition of penalties.

03. The Learned Counsel arguing on behalf of the appellant has challenged the impugned order mainly on the ground that the service under the category of "port service" also include the service of "cargo handling service" and since the service provided by them was a cargo handling service, therefore they were eligible for benefit of service tax exemption under notification 10/2002-ST dated 01.08.2002 which exempted cargo handling service provided to any person by a cargo handling agency in relation to agriculture produce. To explain the nature of their services he stated that that they were engaged in providing services in respect of services of supervision of cargo and survey of bulk cargo in port area to M/s.Mundra Port and SEZ Ltd, Mundra. They were providing these services of cargo supervision / survey work in relation to cargo which comprise of agriculture produce as well as non-agriculture produce. As per contract, the scope of their work relates to handling of cargo received by rail or road, supervision over internal shifting of cargo within port, loading and unloading of cargo etc and reporting thereof. It is evident from the contract that the appellants are handling agriculture-based cargo as well as non-agriculture-based cargo. That, the appellants render Port Service as cargo handling agent in terms of the work orders which they procure or get from M/S Mundra Port and Special Economic Zone Ltd, Mundra, from time to time. These work orders are nothing but an authorization by the port to render Cargo Handling Services both for exports and imports for various goods mainly in break bulk cargo, within port area. He further pleaded that the above contention has been further supported and clarified by the Board vide Clarification No. B/11/1/2002-ST, dated 01.08.2002 on 'Cargo Handling Service'. Para No 5 of the clarification which is reproduced below:

"Cargo handling services are provided in the port also. Whether such service will be covered in the category of port services or cargo handling service? In this context it may be mentioned that port services cover any service provided in relation to goods or vessels by a port or a person authorized by the port. This includes the cargo handling service provided within the

port premises. Therefore to this extent there may be an overlap in cargo handling service and the port service. However, since port services cover all the services in relation to goods and vessels and therefore more specific to port, the service provided in a port in relation to handling of goods would be appropriately covered under port service and no separate levy will be attracted under the category of cargo handling agency service. Similar would be the case in respect of service provided for storage of goods in the port premises".

3.1 In lieu of the above circular, the appellants registered themselves with the Service Tax Department under the category of 'Port Service', even though they are primarily Cargo Handling Agents and surveyors for break bulk cargo. Though the service rendered by the appellants are classifiable under the category "Cargo Handling Service", the appellants registered themselves under the category "Port Service". If the same service is rendered outside the Port premises then the service provided by the appellants would be classifiable under 'Cargo Handling Service' without any dispute. Hence, the appellants submit that their Service Tax registration under 'port Service' should not be construed as incorrect and the issue on hand should be solely decided on the nature of taxable service which they are rendering.

3.2 Based on the above submission the appellant prayed that the appellant were only liable for a tax liability of Rs. Rs.39,88,858/- from 2006-07 and they had already paid a service tax of Rs. 81,09,567/-. Since the appellants has paid excess amount than demanded in the impugned order, the demand confirmed in the impugned order has become infructuous.

04. On the other hand, Learned Departmental representative have vehemently re-iterated the findings in the impugned order that the service provided by the appellant was duly covered under the category of "port service" defined under section 65(105)(zn) of the Act and benefit of notification no. 10/2002-ST dated 01.08.2002 was not admissible to the appellant since the said benefit was available for the service of "cargo handling service" only and not to the "port service" provided by the appellant.

05. We have carefully gone through the rival arguments. We find that the following provisions of law need to be examined before deciding the issue at hand.

"Section 65(82) "port service" means any service rendered by a port or any person authorized by the port, in any manner, in relation to a vessel or goods"

"Section 65 (105) (zn): 'taxable service' means any service provided or to be provided - to any person, by a port or any person authorized by the port, in relation to port services, in any manner":

"Section 65(23) cargo handling service" means loading, unloading, packing or unpacking of cargo and includes,-

- (a) cargo handling services provided for freight in special containers or for non containerised freight, services provided by a container freight terminal or any other freight terminal, for all modes of transport, and cargo handling service incidental to freight; and
- (b) service of packing together with transportation of cargo or goods, with or without one or more of other services like loading, unloading, unpacking, but does not include, handling of export cargo or passenger baggage or mere transportation of goods;]

Section 65(105)(zr) to any person, by a cargo handling agency in relation to cargo handling services

Notification No. 10 /2002-Service Tax dtd. 01.08.2002

In exercise of the powers conferred by section 93 of the Finance Act, 1994 (32 of 1994), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts the taxable service provided to any person by a cargo handling agency in relation to, agricultural produce or goods intended to be stored in a cold storage, from the whole of the service tax leviable thereon under section 66 of the said Act.

2. This notification shall come into force on the 16th day of August, 2002.

5.1 On going through the findings in the impugned order, we find that the Learned Adjudicating authority with respect to the relevant services provided by the appellant has observed as under:-

"The noticee were providing services of cargo supervision/ survey work in relation to cargo viz. wheat, fertilizer, sugar, soyabean, gypsum etc within port area.The noticee has rendered services of supervision over internal shifting of cargo within port area, loading, unloading of cargo and reporting thereof. They have correctly classified the services under Port Services since they are authorized by the Port Authority and services are in relation to vessels or goods. Since the noticee fulfilled both the conditions, their services are correctly classified under the category of "Port Services".....On going through the notification, I find that the notification grants exemption to a cargo handling agency providing taxable services in relation to agricultural produce or goods intended to be stored in a cold storage. In the present case, the noticee is not engaged in providing cargo handling services to agricultural produce or goods intended to be stored in a cold storage. The noticee has not brought on record any evidence to prove that they are engaged in such activities. In the absence of such evidence, I am unable to extend the benefit of this notification to the noticee."

Thus, it is an admitted fact that the noticee has rendered services of supervision over internal shifting of cargo within port area, loading, unloading of cargo and reporting thereof. These services would have been covered under the category of "cargo handling service" if provided outside the port area and therefore it can be construed that the appellant are a cargo handling agency which provide "port services" to M/S Mundra Port and Special Economic Zone Ltd, Mundra. Thus, in the facts of the case it can be safely concluded that the appellant is a cargo handling agency providing cargo handling service within the port area with authorisation from M/S Mundra Port and Special Economic Zone Ltd, Mundra i.e. "a port" but by virtue of definition of port services under Section 65(82) read with Section 65(105)(zn) of the Act, they are classified as "port service" and not "cargo handling service". It has also been clarified by CBEC vide Circular No. B/11/1/2002-ST, dated 01.08.2002. Para 5 of the clarification which is reproduced below:

"Cargo handling services are provided in the port also. Whether such service will be covered in the category of port services or cargo handling service? In this context it may be mentioned that port services cover any service provided in relation to goods or vessels by a port or a person authorized by the port. This includes the cargo handling service provided within the port premises. Therefore, to this extent there may be an overlap in cargo handling service and the port service. However, since port services cover all the services in relation

to goods and vessels and therefore more specific to port, the service provided in a port in relation to handling of goods would be appropriately covered under port service and no separate levy will be attracted under the category of cargo handling agency service. Similar would be the case in respect of service provided for storage of goods in the port premises".

5.2 On carefully reading the notification no. 10/2002-ST dated 01.08.2002, we find that the exemption is provided to handling of agriculture produce by a cargo handling agency and it is not service specific whether for "cargo handling service" or for "port service". Cargo handling agency can undertake handling of agriculture produce within or outside port. Thus, we find that the appellant were eligible for the benefit of the notification no. 10/2002-ST dated 01.08.2002.

06. In view of our above findings, we remand back the case to the original adjudicating authority to re-determine the demand and decide the case afresh after allowing the benefit of notification no. 10/2002-ST dated 01.08.2002 to the appellant. The appellant will be given an opportunity to produce all the necessary documents in support of their claim. The miscellaneous application filed by the appellant for adducing additional evidence is accordingly disposed of as the matter stand decided on merit.

(Pronounced in the open court on 11.04.2023)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(C.L. MAHAR)
MEMBER (TECHNICAL)

Mehul