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

REGIONAL BENCH- COURT NO.3

Service Tax Appeal No. 10857 of 2022- DB

(Arising out of OIO-AHM-EXCUS-002-COMMR-74-2021-22 dated 30/03/2022 passed by Commissioner of Central Excise, Customs and Service Tax-AHMEDABAD)

CHARTERED LOGISTICS LIMITED **.....Appellant**
B-501, Steller, Opp. Arista, Sindhu Bhavan Road
Ahmedabad, Ahmedabad-Gujarat

VERSUS

C.C.E.-AHMEDABAD-II **.....Respondent**
Customs House... First Floor,
Old High Court Road, Navrangpura,
Ahmedabad, Gujarat-380009

APPEARANCE:
Shri Vikash Agarwal, Chartered Accountant, for the Appellant
Shri G. Kirupanandan, 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. 11539/2023

DATE OF HEARING: 05.04.2023
DATE OF DECISION: 19.07.2023

RAMESH NAIR

The present appeal is directed against the impugned Order-In-Original No. AHM-EXCUS-002-COMMR-74/2021-22 dated 30.03.2022 passed by the Commissioner CGST & Central Excise, Ahmedabad.

2. The brief facts of the case are that an intelligence was gathered by the officers of DGGI that appellant had provided taxable services in relation to 'managing distribution and logistics' and 'operational or administrative assistance' in business to M/s Reliance Supply Chain Solution Ltd. (M/s RSCPL) & M/s Fine Tech Corporation Pvt. Ltd. (M/s FCPL) from their various Branch Offices situated all over India. The service provided includes services like safe transportation of goods, upkeep of the vehicles, to check on route pilferages, maintain consistency, also provide drivers/ supervisors on 24 hours/ day basis and arrange diesel for the vehicles. Appellant had reportedly charged service charges on fixed lump sum basis per month per

vehicle and variable cost at agreed rate for their own vehicles which appeared to be the consideration received against "supply of tangible goods for use" service which was taxable. Appellant had not issued any consignment note/LR in regards to such services for transportation of any of the consignments. Appellant was not paying service tax on the aforesaid service activity. Therefore, an inquiry against Appellant was initiated by the DGGI officers; various summons and letters were issued to appellant to tender documents/details thereon and to record oral statements. In reply, Appellant submitted the Audited Balance Sheet/Profit & Loss Account, Copies of Work Orders with principal transporter M/s FCPL's copies of sample invoices raised in respect of the impugned services, Sale ledger accounts etc. M/s FCPL Mumbai also submitted the copies of the contract along with renewal letter and agreement entered into by them with Appellant. The scrutiny of agreement and documents reveal that Appellant has provided declared service of 'transfer of goods by way of hiring, leasing, licensing or in any such manner without transfer of right to use such goods" as defined under sub-section (22) of Section 65 read with Clause (f) of Section 66E of Finance Act, 1994 to M/s FCPL.

3. On the basis of the said investigation, show cause notice dated 31-08-2020 was issued to the appellant proposing the Service tax demand along with interest and penalty. In adjudication, the Learned Commissioner vide impugned Order-in-Original confirmed the demand of service tax of Rs. 4,16,81,579/- and imposed penalty of Rs. 4,16,81,579/- under Section 78 of the Act. He also imposed the penalty of Rs. 10,000/- under Section 77(1)(b) of the Finance Act, 1994. Aggrieved by the impugned order-in-original present Appeal has been filed.

4. Shri Vikash Agarwal, learned Chartered Accountant appearing on behalf of the appellant submits that the service provided by the appellant during the disputed period were exempt from payment of service tax. In the present matter revenue classified the service of appellant as "Supply of Tangible Goods for use Services. The learned Adjudicating Authority held that the benefit of exemption entry No. 22(b) of Notification No. 25/2012-ST cannot be extended to the Appellant, since the appellant failed to establish that the recipient of service M/s Fine Tech Corporation is a Goods Transport

Agency. However the term "Goods Transport Agency" has been defined in Section 66B sub-section (26) of the Finance Act, 1994, to mean any person who provides services in relation to transport of goods by road and issues consignment note, by whatever name called. It is undisputed that the recipient of Services M/s Fine Tech Corporation was providing services by way of transport of goods by road. Further the term consignment note is defined as per the Explanation to the Rule 4B of erstwhile Service tax Rules, 1994 to mean a document issued by goods transport agency against the receipt of goods, for the purpose of transport of goods by road in goods carriage. In the present matter the Director of the Appellant Company, Shri Lalit Gandhi had clearly mentioned in his statement Dated 08.06.2020 against the question no. 6 that the Freight amount was charged from M/s Fine Tech Corporation on the basis of LR (i.e. Lorry Receipts) prepared by the later, i.e. M/s Fine Tech Corporation. These LRs are consignments note only, which customarily referred as Lorry receipts or LR in the business of transport of goods by road. These LRs issued by M/s Fine Tech Corporation are described as "Consignment Note" only and contain all the prescribed information like serial number, date of issue, details of consignor and consignee, vehicle number, details of goods, place of origin and destination, and most importantly the person liable for making payment of Service tax. Therefore, it is abundantly clear that M/s Fine Tech Corporation was a Goods Transport Agency. The Appellant having provided the means of transportation of goods, on hire to a Goods Transport Agency was very well entitled to exemption as per Entry No. 22(b) of the Notification No. 25/2012-ST dated 20.06.2012 and therefore, the demand is liable to be quashed.

4.1 Without prejudice, he further submits that recovering Service tax from the Appellant would amount to double taxation, which was never the intention of the lawmakers. The very purpose behind the Exemption vide Entry 22(b) was to avoid double taxation, as the services by way of providing any means of transportation by road was exempted only and only when provided to a Goods Transport Agency, which means that either consignor or the consignee was to make the payment of Service tax on the same transaction.

4.2 Without prejudice, he also submits that Services of appellant are also covered by the Negative list vide clause (p)(i) of Section 66D of Finance Act, 1994. As per the said clause (p)(i) services by way of transportation of goods by road except the services of (A) a goods transportation agency; or (B) a courier agency; are covered under the Negative list and are not taxable service. The contention of the adjudicating authority, that two agencies cannot perform the same function at the same time, is based out of whims and fancies, as it frustrates the entire purpose behind this entry no. (p)(i) in the Negative list. Only for the reason that the Appellant is not issuing the Consignment Note, if the transportation activity is made taxable by significantly changing its classification, then it will disturb the entire eco system related to transportation industry. Even if the Appellant is providing dedicated trucks to M/s FCPL, it cannot be ruled out that they are primarily handling transportation activity, where the appellant is responsible for each and every aspect related to movement of goods, be it deployment of truck, drivers, repair or maintenance of the vehicle, responsibility for pilferage, taking care of the insurance, the documentation related to transportation activity. In fact the Negative list entry (p)(i) specifically excludes the goods transport agencies, and it is undisputed that the appellant had not issued the consignment note while providing services to M/s Fine Tech Corporation. The primary activity undertaken by the appellant remains of transportation of goods, and is entitled to be covered under Negative list vide entry No. (p)(i).

4.3 He also submits that in the present matter neither there was intention to evade payment of tax, nor there was any suppression of facts, and hence revenue grossly erred while invoking the extended period of limitation, and hence the show cause notice was time –barred, and entire proceedings arising out of the said SCN are liable to be quashed.

4.4 Post hearing the appellant filed an additional submission dated 09.05.2023 which is taken on record.

5. Shri G. Kirupanandan, Learned Assistant Commissioner (AR) appearing on behalf of the revenue reiterates the finding of the impugned order.

6. We have carefully considered the submissions made by both sides and perused the case records.

6.1 We find that the contract agreement with M/s FCPL was examined by the department and on the basis of that contract, it was alleged that appellant is engaged in providing taxable declared service of "transfer of goods by way of hiring, leasing, licensing or in any such manner without transfer of right to use such goods" as defined under Section 66(E)(f) of the Finance Act, 1994 under the category of supply of tangible goods for use service. The show cause notice has been adjudicated by the adjudicating authority and the adjudicating authority has recorded his finding as under:

> *"28. On perusing the above terms and conditions, it is forthcoming that M/s CLL owned or possessed fleet of trucks, and were to supply the trucks as per Annexure -1 along with drivers and supervision to FCPL and carrying out, on behalf of M/s FCPL services of transportation of goods by road. M/s FCPL was is in the business of transportation of goods by road, including Food, FMCG, F&V, clothing and various general merchandise to the network of its client business locations. M/s FCPL collects Goods from a number of distribution centers/suppliers and arranging its transportation to its client locations. Further, as per the agreement, M/s CLL was to be paid the consideration at the rate mentioned in Annexure -2 in the contract. Accordingly, I find that M/s CLL was to receive consideration at fixed rate per vehicle (Fixed Cost + Variable Cost per KM of Running of Vehicle). The determination factor for consideration was the number of vehicle supplied/deployed by M/s CLL. The consideration was not be determined with reference to the consignment loaded in the vehicles. Further, bill for the service was to be raised by M/s CLL on monthly basis. It is also admitted facts that M/s FCPL was issuing LR/consignment notes in respect of goods being transported using the vehicles supplied by M/s CLL. M/s CLL was not issuing the LR or Consignment Notes. Thus I Find that the transportation of goods was provided by M/s FCPL using the vehicles provided by M/s CLL. I therefore find that the essence of agreement was for deployment of a certain number of vehicles by CLL and such vehicles were to be used for transportation of goods on the directions and advise of and on behalf of the FCPL. I find that the consideration received by M/s CLL from M/s FCPL was for supply of vehicles as per Annexure -1 of the contract. Thus, the activity of transportation of goods was actually undertaken by FCPL who were in the business of transportation of goods by road and this activity was being performed by CLL, not on own account to their own clients (consigner or consignee) but on behalf and direction of FCPL. I therefore*

find that the M/s CLL has not provided services of transportation of goods by road to M/s FCPL, but they have provided the services of supply of Vehicles to M/s FCPL. I therefore, find that the service provide by the M/s CLL is not covered under the Negative list of Service at Sr. No. 66D (p) (i)(A) as has been claimed by M/s CLL. In view of the above factual and documentary evidence available on records, I find that the claim of M/s CLL that service provided by them was covered under Negative list of service under Section 66D (p)(i)(A) of the Finance Act, 1994 is not tenable and is unsustainable in law."

6.2 We find that in the present matter Learned Commissioner denied the benefit of entry of Section 66D (p)(i)(A) of the Finance Act, 1994 to the appellant on the ground that Appellant has not provided the services of transportation of goods by road to M/s FCPL, but they have provided services of supply of vehicles to M/s FCPL. However this finding of Ld. Commissioner is factually and legally not correct as evident from the scope of service mentioned in the agreement entered by the parties. The scope of service mentioned in agreement is reproduced as below:

I. Scope of Services:

1. To provide transportation services using ambient and refrigerated vehicles as per Annexure -1 at FCPL, DC/CPC locations for secondary (DC to stores)/ Local primary (Inter DC, CC to CPC)/ Regional transportation services.

2. For providing transportation services by you, FCPL shall from time to time instruct the truck operator to increase/ decrease the number of vehicles as per requirement of the DC.

From the above Scope of services it is clear that the main essence of contract is to provide the transportation services to M/s FCPL.

6.3 Further we also noticed that Section 66D of the Finance Act, 1994 gives list of services which were grouped under the "Negative List", the said negative list covers the items/services which are exempted from the levy of service tax. In the present matter appellant also have primarily argued that they are covered by the provisions of Section 66D (P)(i). The Relevant Section is reproduced here below:-

*"**SECTION 66D. Negative list of services.** - The negative list shall comprise of the following services, namely :-*

p) services by way of transportation of goods—

(i) by road except the services of—

(A) a goods transportation agency; or
(B) a courier agency;

The above entries provide that Service by way of transportation of goods by road is taxable only if the same is provided by (i) a Goods Transport Agency; or (ii) Courier Agency Service. Services of Road Transport provided by all the others are not taxable because they are covered by the above Negative list under Section 66D. In other words if any person is providing services of transport of goods by road, and is neither covered under the statutory definition of GTA, nor under courier agency, then he is not liable to pay any service tax on such transportation.

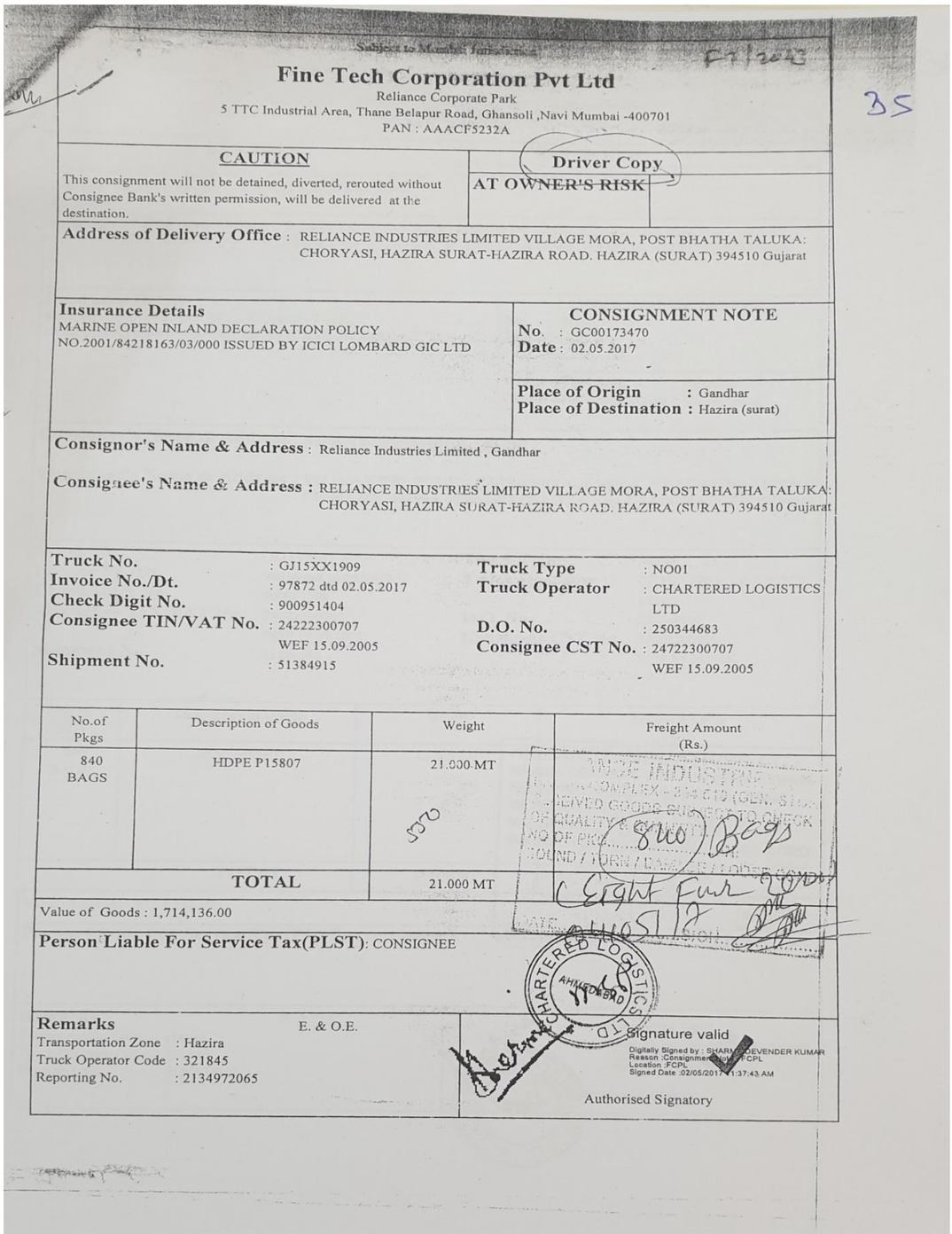
6.4 The Section 65B (26) provides the definition of Goods Transport Agency, which reads as follows:

(26) "goods transport agency" means any person who provides service in relation to transport of goods by road and issues consignment note, by whatever name called;

6.5 Accordingly, a person can be said to be Goods Transport Agency, if the person provides services in relation to the transportation of goods by road and issues the consignment note. From the above legal position, it clear that not all the person who transport of goods by road are qualified as Goods Transport Agency. To qualify as services of GTA, the GTA should issue necessarily a consignment note then only services provided by the GTA are taxable under Finance Act, 1994. In the present matter it is admitted fact that in case of supply of transportation of goods services to M/s FCPL. Appellant have not issued any consignment notes. M/s FCPL issued consignment notes/LRs to consignee/consignor of goods. In such circumstance Appellant is not qualified under the Goods Transport Agency as per the above definition of GTA. Services of transportation of goods by a person other than GTA are clearly exempt under Section 66D (P)(i)(A) of the Finance Act, 1994. By observing the above legal position we find that the services of appellant is clearly excluded from the taxable services since it is

covered in the 'Negative List' Entry under Section 66D (p)(i) of the Finance Act, 1994.

6.6 To substantiate the above a sample copy of 'Consignment Note' issued by Fine Tech Corporation Pvt. Ltd. is scanned below:



Fine Tech Corporation Pvt Ltd
Reliance Corporate Park
5 TTC Industrial Area, Thane Belapur Road, Ghansoli ,Navi Mumbai -400701
PAN : AAACF5232A

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CAUTION
This consignment will not be detained, diverted, rerouted without Consignee Bank's written permission, will be delivered at the destination.

Driver Copy
AT OWNER'S RISK

Address of Delivery Office : RELIANCE INDUSTRIES LIMITED VILLAGE MORA, POST BHATHA TALUKA: CHORYASI, HAZIRA SURAT-HAZIRA ROAD. HAZIRA (SURAT) 394510 Gujarat

Insurance Details
MARINE OPEN INLAND DECLARATION POLICY
NO.2001/84218163/03/000 ISSUED BY ICICI LOMBARD GIC LTD

CONSIGNMENT NOTE
No. : GC00173470
Date : 02.05.2017

Place of Origin : Gandhar
Place of Destination : Hazira (surat)

Consignor's Name & Address : Reliance Industries Limited , Gandhar

Consignee's Name & Address : RELIANCE INDUSTRIES LIMITED VILLAGE MORA, POST BHATHA TALUKA: CHORYASI, HAZIRA SURAT-HAZIRA ROAD. HAZIRA (SURAT) 394510 Gujarat

Truck No.	: GJ15XX1909	**Truck Type**	: NO01
Invoice No./Dt.	: 97872 dtd 02.05.2017	**Truck Operator**	: CHARTERED LOGISTICS LTD
Check Digit No.	: 900951404		
Consignee TIN/VAT No.	: 24222300707 WEF 15.09.2005	**D.O. No.**	: 250344683
		Consignee CST No.	: 24722300707 WEF 15.09.2005
Shipment No.	: 51384915		

No.of Pkgs	Description of Goods	Weight	Freight Amount (Rs.)
840 BAGS	HDPE P15807	21.000 MT	
TOTAL		21.000 MT	

Value of Goods : 1,714,136.00

Person Liable For Service Tax(PLST): CONSIGNEE

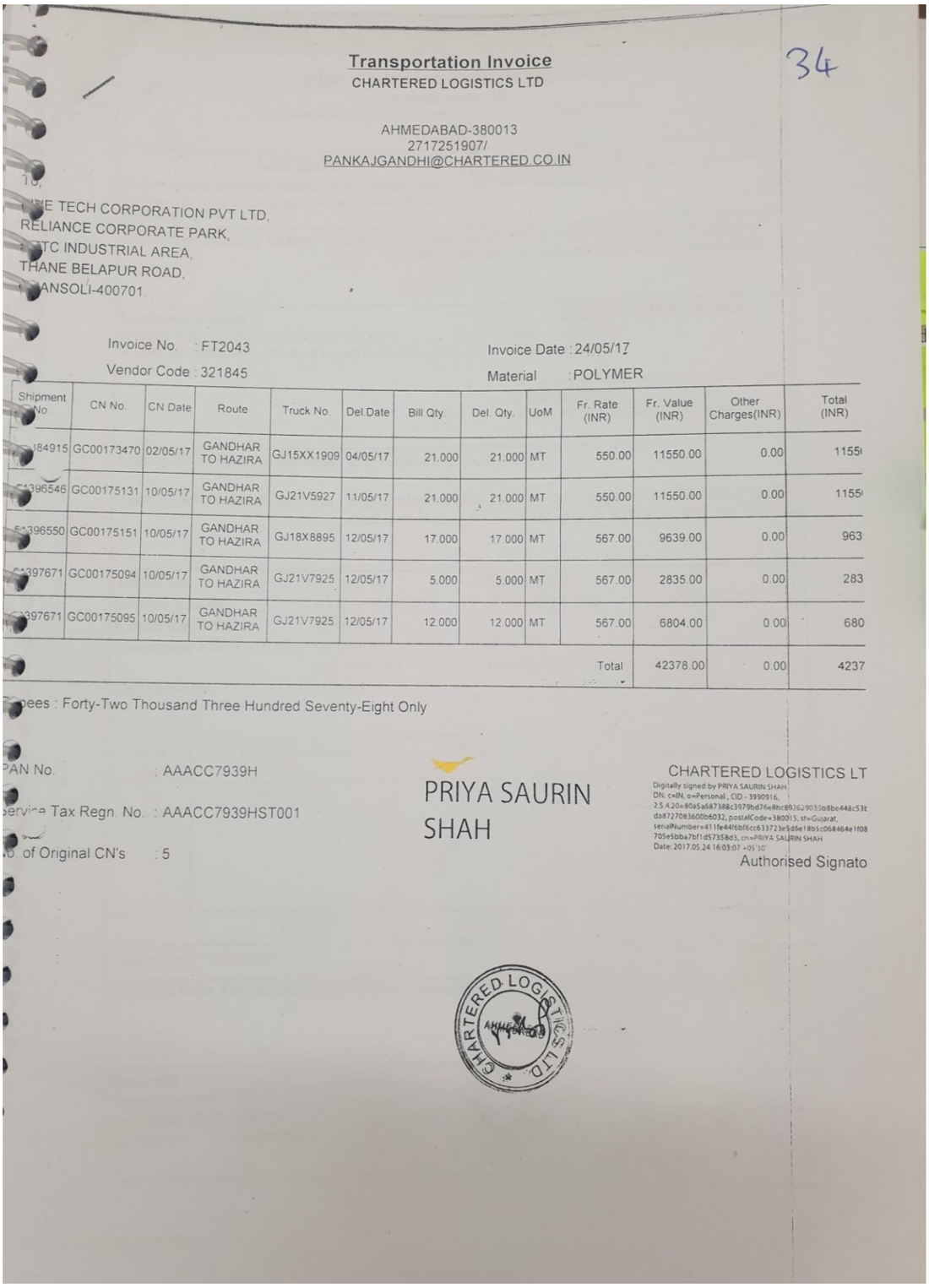
Remarks E. & O.E.
Transportation Zone : Hazira
Truck Operator Code : 321845
Reporting No. : 2134972065

CHARTERED LOGISTICS LTD AHMEDABAD

Signature valid
Digitally Signed by : SHARMA DEVENDER KUMAR
Reason :Consignment Note - FCPL
Location :FCPL
Signed Date :02/05/2017 11:37:43 AM

Authorised Signatory

On the basis of above 'Consignment Note', the appellant issued their Bills. Sample copy of their bill is scanned below:



Transportation Invoice

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CHARTERED LOGISTICS LTD

AHMEDABAD-380013
2717251907/
PANKAJGANDHI@CHARTERED.CO.IN

To,
E TECH CORPORATION PVT LTD,
RELIANCE CORPORATE PARK,
TC INDUSTRIAL AREA,
THANE BELAPUR ROAD,
ANSOLI-400701.

Invoice No. : FT2043 Invoice Date : 24/05/17
Vendor Code : 321845 Material : POLYMER

Shipment No	CN No.	CN Date	Route	Truck No.	Del.Date	Bill Qty.	Del. Qty.	UoM	Fr. Rate (INR)	Fr. Value (INR)	Other Charges(INR)	Total (INR)
84915	GC00173470	02/05/17	GANDHAR TO HAZIRA	GJ15XX1909	04/05/17	21.000	21.000	MT	550.00	11550.00	0.00	1155
396546	GC00175131	10/05/17	GANDHAR TO HAZIRA	GJ21V5927	11/05/17	21.000	21.000	MT	550.00	11550.00	0.00	1155
396550	GC00175151	10/05/17	GANDHAR TO HAZIRA	GJ18X8895	12/05/17	17.000	17.000	MT	567.00	9639.00	0.00	963
397671	GC00175094	10/05/17	GANDHAR TO HAZIRA	GJ21V7925	12/05/17	5.000	5.000	MT	567.00	2835.00	0.00	283
397671	GC00175095	10/05/17	GANDHAR TO HAZIRA	GJ21V7925	12/05/17	12.000	12.000	MT	567.00	6804.00	0.00	680
									Total	42378.00	0.00	4237

pees : Forty-Two Thousand Three Hundred Seventy-Eight Only

PAN No. : AAACC7939H
ervice Tax Regn. No. : AAACC7939HST001
o of Original CN's : 5

PRIYA SAURIN SHAH

CHARTERED LOGISTICS LT
Digitally signed by PRIYA SAURIN SHAH
DN: cn=PRIYA SAURIN SHAH, c=Personal, CID - 3990916, 2.5.4.20=80a5a687388c3979bd76e4bc8026290 3b8be448c53t da8727083600b6032, postalCode=380015, st=Gujarat, serialNumber=411fe44f6bf6cc63723e5d6e18b5c068464e1f08 705e5bba7bf1d57358d3, cn=PRIYA SAURIN SHAH
Date: 2017.05.24 16:03:07 +05'30'
Authorised Signato

CHARTERED LOGISTICS LTD. AHMEDABAD

From the above 'Consignment Note' issued by FCPL and the detail of the same appearing in Appellant's above bill, it can be seen that for the truck

provided by M/S chartered logistic the GTA service was provided by Fine Tech Corporation Pvt. Ltd. who have issued the consignment note therefore the services provided by the appellant to M/S FCPL does not fall under the category of GTA service even though the appellant have provided service of transportation of goods for the reason that the service of transportation provided by the appellant is to the GTA and for the said service consignment note was issued by FCPL to its client M/S Reliance Industries Ltd. therefore, for the entire activity that is transportation of goods by the appellant to FCPL for which the consignment note was issued by FCPL the GTA service provider is FCPL to its client M/S Reliance industries Ltd. Therefore, the activity of the appellant is clearly covered under section 66D (p)(i)(A) of the finance act ,1994 which clearly falls under negative list of services which is not taxable.

6.7 Now it is a settled law that even if a person has provided Goods Transport Service but not issued consignment note/LR, Service Tax from that person under GTA cannot be recovered. Some of the Judgments on this issue are given below:

- Narendra Road Lines Pvt. Ltd Vs. Commissioner Of Customs, Central Excise & CGST, Agra, 2022 (64) G.S.T.L. 354 (Tri. - All.)
- Mahanadi Coalfields Ltd Vs. Commissioner Of Central Excise & Service Tax, BBSR-I, 2022 (57) G.S.T.L. 242 (Tri. - Kolkata)
- East India Minerals Ltd Vs. Commissioner Of Central Excise, Customs & Service Tax, Bhubaneswar-Ii, 2021 (44) G.S.T.L. 90 (Tri. - Kolkata)

From the above Judgments, it is settled that a person even if provides Goods Transportation service but if he does not issue Consignment Notes/LR, he cannot be brought under the ambit of GTA. The case of the appellant is on much better footing on the admitted fact that the appellant's client FCPL is in fact the GTA who issued 'Consignment Note' in respect of the Transportation Service provided to M/s Reliance Industries Ltd. Therefore, appellant is not liable to pay Service Tax.

6.8 Without prejudice to the above, we also observed that in the present matter appellant also claimed alternative exemption related to their activity

as per the Sr. No. 22(b) of Notification No. 25/2012-ST dated 20.06.2012. For ease of reference the Sr. No. 22 of the Notification No. 25/2012-ST dated 20.06.2012 is reproduced as below.

> *22. Services by way of giving on hire -*
>
> *(a) ----------,*
>
> *(b) to a goods transport agency, a means of transportation of goods;*

From the above provision we find that the services of providing vehicles on hire basis to GTA is covered under above Entry and this entry exempts the services by way of giving on hire a means of transportation of goods to a goods transport agency. Even if the contention of the revenue is accepted that the Appellant are not providing the transport of goods services to M/s FCPL and providing the vehicles on hire basis, the demand of service tax still not sustainable in the present matter. The Ld. Commissioner denied the benefit of above notification on assumption that the recipient of the services i.e M/s FCPL is not a Goods Transport Agency. However we have already discussed in above paragraph that in the present matter FCPL has issued consignment notes/ LRs for transportation of goods, hence M/s FCPL is clearly covered under the definition of Goods Transport Agency Service and if at all there is any Service Tax liability it is on the service recipient of FCPL i.e. M/s Reliance Industries Ltd. In view of this we also do not see any reason for denying the benefit of the exemption under this entry to the appellant.

6.9 Without prejudice to our above findings we further note that the entire show cause notice is based on the contract, which is for providing transportation services three dedicated vehicles, which contributes to only a small part of the total business with FCPL and the major and significant business with FCPL is covered by another contract which is undisputedly for providing destination-to-destination transportation services. The learned Commissioner erred while ignoring such a critical point while issuing the show cause notice therefore the show cause notice suffers from apparent error therefore, the proceedings of the show cause notice to that extent is vitiated. Moreover the small part of that business is admittedly related to

transport of fruits and vegetables, in such case even also the Service Tax is not chargeable under GTA also.

6.10 Without prejudice to the above, we also find that the appellant have strongly made a submission that there is no suppression of fact to invoke the extended period for demanding service tax. In this regard we find that in this case the period of demand is 01.10.2014 to 30.06.2017, whereas the show cause notice was issued by invoking extended period on 31.08.2020. From the impugned order we have observed that the adjudicating authority as regard the invocation of extended period given the finding that the appellant have misdeclared the services falling under 'negative list' in their ST-3 return.

6.11 We find that when an assessee under a bonafide belief claims any exemption, in the present case on the basis of negative list, than it is incumbent on the department to strictly examine the admissibility of such exemption. Once the assessee has declared as per their belief that the service falls under negative list and the same has been declared in their ST-3 return, it cannot be said that there is a suppression of the fact on the part of the appellant. In the present case the appellant have acted legitimately by entering in to legal contract with their service recipient M/s FCPL. All the transaction were recorded in their books of account and all documents such as invoices for their services were issued. Moreover, the issue involved in the present case is strict interpretation of the taxable service. Therefore, considering the overall facts of the case, we are of the opinion that extended period of limitation could not have been invoked. Therefore, the demand for the extended period is not sustainable on limitation also. The above view is supported by the following Judgments:

(a) In the case of *Pahwa Chemicals Pvt. Ltd Vs. Commissioners of Central Excise, Delhi* reported in *2005 (189) ELT 257 (Supreme Court)* the Hon'ble Apex Court held that mere failure to declare does not amount to wilful mis-declaration or wilful suppression and there must be some positive act on the part of the party to establish either wilful mis-declaration or wilful suppression. The Apex Court further held that

when the facts are before the department and the party is in the belief that affixing of label makes no difference, does not make a declaration, there would be no wilful mis–declaration or wilful suppression. If the department felt that the party was not entitled to the benefit of the notification it was for the department to immediately take up the contention that the benefit of the notification was lost.

(b) In the case of *Continental Foundation Joint Venture Vs. Commissioner of Central Excise Chandigarh–I* reported in *2007 (216) ELT 177 (SC)* the Apex Court held as under:

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

(c) In the judgment of the Hon'ble Supreme Court in the case of *Tamil Nadu Housing Board Vs. Collector of Central Excise, Madres* reported in *1994 (74) E.L.T. 9 (SC)*, wherein the Apex Court held that limitation for extended period invokable only if existence of both situations (1) suppression, fraud, collusion etc. and (2) intent to evade payment of duty proved. The Apex Court further held that once the Department is able to bring on record material to show that the appellant was guilty of any of those situations which are visualised by the Section, then only the burden shifts on the assessee.

From the above judgments, coupled with the facts in the present case discussed above the demand for the longer period is hit by the limitation also.

7. As per our above discussion and finding, the demand of Service tax, interest and penalty is not sustainable and the same is accordingly set aside. The appeal is allowed with consequential relief, if any, in accordance with law.

(Pronounced in the open court on 19.07.2023)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(C L MAHAR)
MEMBER (TECHNICAL)

Raksha