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:: ORDER- N-APPEAL ::

M/s Whison World Export, Plot No. 105/2, GIDC Estate, Veraval (hereinafter referred to as "Appellant") filed Appeal No. 42/528/BVR/2017 against Order in-Original No. AC/JKD/46/2017 dated 21.12.2017 (hereinafter referred to as 'impugned order') passed by the Asst. Commissioner, Central Goods & Service Tax, Junagadh Division, Bhavnagar Commissionerate (hereinafter referred to as 'lower adjudicating authority').

1. The brief facts of the case are that the Appellant was holding Service Tax Registration No. AABFW982050001 under the category of 'Transport of Goods by Road Service'. The Appellant was engaged in export of frozen fish and was availing GTA service for transportation of frozen fish but was not submitting any Service Tax returns showing these details. The jurisdictional Service Tax Range Superintendent claimed that the Appellant was liable to pay service tax on transportation service being recipient of service, on reverse charge basis but was not paying service tax. It appears that GTA service used for transportation of export of goods were exempted from service tax in terms of Notification No. 31/2012-ST dated 20.6.2012. However, the Appellant had not filed/submitted Form EXP-1/EXP-2 prescribed in said notification and hence, the jurisdictional Range Superintendent claimed that the Appellant was not eligible for exemption under the said notification and was required to pay service tax on GTA, being recipient of GTA service.

2.1 Show Cause Notice No. WADJ-30/STAX/DIV/2016-17 dated 10.4.2017 was issued to the Appellant calling them to show cause as to why Service Tax (SCY on net quantity demand) should not be recovered from them under Section 73(1) of the Finance Act, 1994 (hereinafter referred to as 'Act') along with interest under Section 75 and proposing imposition of penalty under Sections 76, 77 and 78 of the Act.

2.2 The Show Cause Notice was adjudicated vide the impugned order which confirmed demand of Service Tax of Rs. 2,09,789/- under Section 73(1) and ordered for its recovery along with interest under Section 75 of the Act and imposed penalty of Rs. 63,587/- @50% of service tax evaded for the period from April, 2015 to March, 2016 and penalty of Rs. 72,675/- @100% of service tax evaded during 2015-16 under Section 78 of the Act and Rs. 10,000/- each under Section 77(2) and Section 77(1)(c) of the Act.

3. Being aggrieved with the impugned order, the Appellant has preferred appeal, inter-alia, on the following grounds:



(i) The SCN is time barred. Non submission of returns are not ground for invoking extended period of limitation. The adjudicating authority has failed to submit any proof of any willful act as prescribed under Section 79(1) of the Act to evade service tax.

(ii) The adjudicating authority has erred in interpreting Section 65(105)(zap) and Section 65(50)(b) of the Act as service received directly from truck owner do not fall under the definition of GTA; that service received by the Appellant directly from the truck owner falls under the service of GTO(Goods Transport Operator) which is exempted from Service Tax Under Section 65(10)(p) of the Act.

(iii) The adjudicating authority has failed to prove as to why certificates of CHA are not admissible and also failed to prove that trucks were hired by them from GTA.

(iv) The adjudicating authority has failed to interpret Notification No. 3/2013-ST. Their export item frozen fish is known as marine product or sea food and hence, covered by said notification.

4. In Personal Hearing, Shri Jignesh Vyas, Advocate appeared on behalf of the Appellant and reiterated the grounds of appeal and submitted written submission to say that they have not taken service of GTA but trucks have been hired by them from individual truck owners through CHA or Clearing & Forwarding Agent; that the goods which have been transported are frozen Fish, which is sea food and hence, exempted otherwise also vide Notification No. 3/2013 dated 1.3.2013; that since the services have been provided to them by CHA and C & F, reverse charge is not applicable.

4.1 In written submission submitted during Personal Hearing, it has been contended that,

(i) The Appellant received transportation service directly from truck owners and drivers through their CHA and they have not availed services of Goods Transport Agency as reflected in certificates received from CHA declaring that trucks were not hired from any GTA. The Appellant has received transportation service but no consignment notes have been issued and hence, transportation in this case is not covered within 'Goods Transport Agency' in terms of Section 65b(26) of the Act.

(ii) Food stuff has been exempted from service tax from 1.4.2013 vide Notification No. 3/2013 dated 1.3.2013. They had exported Fish(HSN No. 03038930) which is covered under food stuff. However, the adjudicating authority denied exemption on the ground that marine product is not specified

in the said notification, which is not correct. Even as per SCN, the Appellant is engaged in the business of Sea Food. Thus, it is accepted by the Department that their export item is food. So, they are eligible for exemption of notification above.

(ii) The Appellant received services from CHA like Customs clearing, Document preparation, Customs verification, Transportation, cargo handling, Terminal handling etc. for which CHA charges them by raising one common bill. Thus, all the services including transportation service was part of CHA service and service tax is payable CHA and they are not liable to pay service tax and relied upon the case law of Single Trading Company-2018(9) GSTL 201.

(iii) The penalty under Section 79 of the Act is not imposable when issue involved is interpretation of statute as held in Phoenix International Freight Service Pvt Ltd-2017 (47) STR 129.

Findings:-

5. I have carefully gone through the facts of the case, the impugned order, the Appeal Memorandum and written submission made at the time of Personal Hearing. The issue to be decided in the present appeal is whether the Appellant is liable to pay Service Tax under the category of 'GTA Service', as recipient of GTA service or not.

6. I find that the Appellant had availed transportation services for export of frozen fish. The lower adjudicating authority held that the Appellant liable to pay service tax of Rs. 2,09,788/- on transportation charges, being recipient of service during the period from April, 2011 to March, 2016. The Appellant has not disputed about transportation services availed by them for export of frozen fish but contested confirmation of service tax demand on the ground that they had exported Fish (HSN No. 03036930) which is covered under food stuff and transportation of food stuff is exempted from service tax with effect from 1.4.2013 vide Notification No. 3/2013-ST dated 1.3.2013.

6.1 I find that Notification No. 25/2012-ST dated 20.6.2012 was amended vide Notification No. 3/2013-ST dated 1.3.2013 effective from 1.4.2013, inter-alia, as under:

(a) Services provided by a goods transport agency, by way of transport in a goods carriage of:-

(i) Goods not including flour, tea, coffee, jaggery, sugar, milk products, salt and edible oil, excluding alcoholic beverages.

6.1.1 Since, there is no exemption for the period from 1.4.2011 to 31.3.2013,

the liability to pay Service Tax on STA availed by them cannot be disputed. It thus, have no option but to specify such services of taxband for the period from 1.4.2011 to 31.3.2013.

6.2 I find that Notification No. 25/2012-ST dated 20.6.2012 was further amended vide Notification No. 1/2015-ST dated 1.3.2015 effective from 1.4.2015, inter-alia, as under:

- (vi) in entry 21, for item (c) the following item shall be substituted, namely
- (d) "Milk salt and food grain including pulses and rice"

6.2.1 It is evident that foodstuff got deleted with effect from 1.4.2015 and replaced by milk, salt and food grains and by no stretch of imagination frozen fish can be considered as milk or salt or food grains. Hence, claim of the Appellant cannot be considered as valid for the period from 1.4.2015 to 31.3.2016 and thus, uphold confirmation of demand for tax arrears also.

6.3 I find that the Appellant availed transportation service for export of frozen fish and the Appellant has claimed that frozen fish is required to be considered as food stuff because fish is sea food. In this regard, I find that frozen fish has not been specifically mentioned in clause (c) of Entry No. 21 reproduced at Para 6.1 supra, even sea food or marine product has not been listed in clause (d). As per the principles of ejusdem generis or auxiliary specific, which are well settled principles of interpretation, the words of general and wider import used in an entry surrounded by other relevant terms has to draw its colour and meaning from such surrounding words and that should not be lost sight of. The items appearing in clause (d) are flours, tea, coffee, jaggery, sugar, milk products, salt and edible oil and frozen fish is no way related to any of the items covered under foodstuff. I, therefore, hold that frozen fish is not eligible for exemption contained in Entry No. 21(d) of Notification No. 25/2012-ST dated 20.6.2012, as amended even during the period from April, 2013 to March, 2015 also. For the period from 1.4.2011 to 31.3.2013 as well as for the period from 1.4.2015 to 31.3.2016, the Appellant is not eligible for exemption in any case as held at Para 6.1.1 and 6.2.1, therefore, uphold the confirmation of service tax demand of Rs. 2,09,796/-.

6.4 The Appellant has also argued that they have not arranged trucks but their CHA arranged trucks for transportation of frozen fish as export goods and that transportation service was part of CHA service and hence, service tax on transportation service is payable by their CHA and not by them. I find that it is not disputed that transportation service was availed by the Appellant in connection with export of frozen fish. Merely because trucks were arranged by CHA for transportation of export goods of the Appellant and the fact that

transportation charges were paid by CIA as pure agent of the Appellant and later recovered from the Appellant, does not make CIA liable to pay service tax on transportation service. I also find it pertinent to reproduce findings of the lower adjudicating authority as under:

"14. . . . I find from the facts on record that the Noticee says, raised for transportation charges by the CIAs. On going through sample copies of such invoices, it is seen that the same specifically mentioned that service tax on transportation charges will be paid by the consignee. It is therefore clearly established that the Noticee has to pay service tax on the transportation charges incurred by the service provider."

7. Regarding imposition of penalty under Section 78 of the Act, I find that the Appellant has suppressed the facts of non payment of Service Tax and also availment of transportation service as they have not submitted Service Tax Returns showing these details to the Department and hence, penalty under Section 78 of the Act is mandatory as has been held by the Hon'ble Supreme Court in the case of Rajasthan Spinning & Weaving Mills reported as 2009 (238) F.L.T. 3 (S.C.). Since there are ingredients for invoking extended period of limitation for demand of duty, Imposition of penalty under Section 11A is mandatory. The ratio of the said judgment applies to the facts of the present case. I, therefore, uphold the penalty @50% of Service Tax demand for the period from 1.4.2011 to 14.5.2015 as per provision to Section 78 of the Act and @100% of Service Tax demand for the period from 15.5.2015 to 31.3.2016, as per Section 78 of the Act since these transactions have been shown in their books of account by the Appellant.

8. In view of above, I uphold the impugned order for demand confirmation and modify the penalty imposed under Section 78 to the extent, as above.

9. अंगोल्ककों द्वारा दते वी वङ्गे अंगोळ वर शीमल अरंभवत तसोवे से विव्या जाता हे ।

9. The appeal filed by the Appellant is disposed off as above.

By B.P.A.D.

To,

M/s. Wenzel World Export,
Plot No. 105/2,
GMC Estate,
Mumbai-400 269,
Gir Somnath District.

सहायक
अधीक्षक

शुल्क

अधिकारी, मुंबई

शुल्क
(कुमार सेतोष)

प्रधान आयुक्त (अधीक्षक)

विनयकर मार्ग अक्षपीठ,
मुंबई-४०००१३, लीआइसीसी इस्टेट,
मैदावळ - ४००२०७, तिल्ला गिर सोमनाथा

प्रतिक्रिया :-

- 1) प्रधान मुख्य आयुक्त, वरतु एवं सेवा कर के संबंध में आदि शुल्क, मुद्रागत सेवा, अहमदाबाद को संबन्धित हेतु।
- 2) आयुक्त, वरतु एवं सेवा कर के संबंध में आदि शुल्क, अहमदाबाद आयुक्तनाम्य भावनगर को आवश्यक जानकारी हेतु।
- 3) सहायक आयुक्त, वरतु एवं सेवा कर, वरतु एवं सेवा कर की सूची के संबंध में आवश्यक जानकारी हेतु।
- 4) गाँव पत्रिका,