



प्रधान सचिव (आपिल) के कार्यालय, नया राधा कृष्ण रोड, राजीव गांधी नगर, दिल्ली-110028
 OFF THE PRINCIPAL COMMISSIONER (APPEALS) SERVICE AND PAYE OFFICE



निर्देशक कार्यालय, नया राधा कृष्ण रोड / New Radha Krishna Road

नया राधा कृष्ण रोड / New Radha Krishna Road

राजकीय राजधानी - 110028

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निर्देशक आदेशों का सूची

क्र.	आदेश संख्या Order No.	दिनांक Date	पृष्ठ संख्या Page No.
	13733/EXCUS/2017	17-10-2017	31/162617
	1321/EXCUS/2017		

आपिल नंबर / Case No. in Appeal No.:

KCU-EXCUS-000-APP-011-TO-012-2019

आदेश की तिथि /
Date of Order: **28.01.2019**

आदेश की प्रतिलिपि की तिथि /
Date of issue: **29.01.2019**

पुनरापेक्षा करने वाले / प्रेषित करने वाले का नाम /
Filed by: **Sudh Kumar Sarma, Principal Income Tax Officer (Appeals), Jaipur**

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M/s. Dolphin Management & Services, Plot No. - 305, Shop No. - 13 to 19, Ground Floor X, 1st Crossing,
B-11, Panchsheel Park,
The Secunderabad GST & Service Tax Office, Plot No. - 59, Sector 5, Upp. Horticultural Bypass, Guddabram,
500011

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:: ORDER-IN-APPEAL ::

The present appeals have been filed by M/s Dolphin Underwater Driving Service, Gandhidham (hereinafter referred to as "Appellant") and Assistant Commissioner, CCST Gandhidham Urban Division, Gandhidham on behalf of the Commissioner, Central GST & Central Excise Gandhidham (hereinafter referred to as "Appellant Department") in pursuance of the direction and authorization issued under sub-Section (1) of Section 84 of the Finance Act, 1994 against Order-in-Original No. 17/JC/2017-18 dated 31.10.2017 (hereinafter referred to as 'impugned order') passed by the Joint Commissioner, Central Excise & Service Tax, Gandhidham (hereinafter referred to as 'lower adjudicating authority').

2. The brief facts of the case are that the Appellant was engaged in providing underwater services relating to ship like procedure and bottom cleaning, survey, recovery, repairing, ship hull cleaning, welding, sunken ship salvage, underwater demolition, block sinking, photography, videography, hydro electric project works and all work relating to oil rigs. Investigation carried out against the Appellant revealed that services rendered by the Appellant were taxable under the category of 'Port Service', however, the Appellant had not taken Service Tax registration and had also not paid Service Tax during the period 2006-07 to 2010-11.

2.1 Show Cause Notice No. V.577AR GND/IC/170/7011 dated 26.9.2019 was issued to the Appellant calling them to show cause as to why Service Tax of Rs. 23,95,493/- 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 above Show Cause Notice was adjudicated by the Jt. Commissioner, Central Excise, Rajkot vide Order-in-Original No. 90/JC/2012 dated 29.10.2012 who held that the Appellant was liable to pay Service Tax under the category of 'Port Service' and confirmed Service Tax demand of Rs. 21,56,728/- under Section 73 of the Act along with interest under Section 75 and imposed penalty of Rs. 21,56,728/- under Section 78, Rs. 5,000/- under Section 77 and penalty as prescribed



under Section 75 of the Act. However, the demand of Rs. 2,38,755/- was dropped holding that services were provided to developer of SEZ in units situated in SEZ and hence, eligible for exemption under Notification No. 4/2004-ST dated 31.3.2004, as amended.

2.3 Being aggrieved, the Appellant preferred appeal before the then Commissioner (Appeals), Raikot which was decided vide Order-in-Appeal No. RJT-EXCUS-000 APP-490-13 14 dated 30.9.2013 by way of remand to the lower adjudicating authority (i) to verify and extend benefit under Notification No. 12/2003-ST dated 20.6.2013, if the Appellant is able to prove eligibility with documentary evidences and (ii) to verify and reduce the service tax demand in respect of services rendered outside port area on the basis of bill wise worksheet to be produced by the Appellant in de-novo adjudication.

2.4 In de-novo adjudication, vide the impugned order, the lower adjudicating authority extended the benefit of Notification No. 12/2003-ST to the extent of materials used for providing output services and classified the services rendered outside port area under the category of 'Maintenance & Repair Service'. The impugned order confirmed Service Tax demand of Rs. 2,28,526/- under Port Service and Rs. 7,07,111/- under 'Maintenance & Repair Service' under Section 73 of the Act along with interest under Section 75 of the Act and imposed penalty of Rs. 9,35,637/- under Section 78 of the Act, Rs 5,000/- under Section 77 of the Act and late fee of Rs. 2,000/- per return for failure to file ST 3 returns under Section 70 of the Act.

3. Being aggrieved with the impugned order, the Appellant has preferred the present appeal on the grounds that,

(i) The impugned order has travelled beyond the scope of Show Cause Notice inasmuch as SCN was issued to recover Service Tax under the category of 'Port Service', however, the impugned order has confirmed Service Tax demand of Rs. 7,07,111/- under the category of 'Maintenance & Repair Service'. Therefore, the impugned order confirming Service Tax demand of Rs. 7,07,111/- and imposing equal penalty under Section 78, is bad in law and liable to be quashed.



(ii) The confirmation of demand of Service Tax of Rs. 2,28,526/- under the category of 'Port Service' is not tenable inasmuch as ^{the} services were provided prior to 1.7.2010, when 'Port Service' was defined as any service rendered by a port or any person authorized by such port in any manner in relation to a vessel or goods. Since the Appellant did not hold any such authorization, they are not liable to be taxed under 'Port Service' and relied upon case law of *Aspinwall & Co-2011(21) STR 257*.

3.1. The impugned order was reviewed by the Appellate Department and appeal was also filed by them on various grounds, inter-alia, as below:-

(i) The adjudicating authority has not carried out proper verification and has failed to adhere to the terms of remand order of the Commissioner (Appeals), Rajkot and hence, the impugned order is liable to be quashed.

(ii) The Adjudicating authority has erred in extending the benefits of Notification No. 12/2003 ST in respect of goods/materials used for providing 'Port Service'. On verification of audited final accounts of the Appellant for the years 2006-07 to 2010-11, it is evident that no expenditure was made by the Appellant on account of purchase of goods. Hence, the materials used/consumed in providing service as certified by the Chartered Accountant is contrary to the audited final accounts. Thus, the certificate is not relevant for the purpose of allowing exemption under Notification No. 12/2003 ST. There are many judgements that merely certificates issued by Chartered Accountant cannot be relied upon and it has to be corroborated by material evidence.

(iii) The adjudicating authority has not passed any speaking order regarding verification of value of the goods/materials sold by the Appellant to the service recipient. The impugned order is silent about documentary evidences specifically indicating sale value of the goods i.e. invoices issued by the Appellant; that crucial requirement for exemption under Notification No. 12/2003-ST is that materials are sold and not consumed. The title of the goods should be transferred from service provider to service recipient in terms of the Sale of Goods Act. The



materials consumed while providing service are not intended to get benefit of exemption in terms of Notification No. 12/2003-ST.

(iv) The Appellant has not provided copies of relevant work orders to substantiate that services were provided outside port so as to cover under "other than port service". Various transactions claimed to be pertaining to 'other than port services' were actually required to be classified within 'Port Service'.

(v) The adjudicating authority has not recorded any findings for arriving at a conclusion that goods and materials were sold by the Appellant; that no attempt has been made to distinguish the services provided within port and outside port. The impugned order has been passed without any conscious attempt of verification and examination of case records in thorough manner. The impugned order has turned out to be non speaking order as held by the CESTAT in the case of *M/s Ranichandra Bekres Pvt Ltd- 2006(205) ELT 865*, wherein it has been held that, "Non recording of reasons would make a non speaking order".

3.2 Personal Hearing fixed on 23.10.2018, 13.12.2018 and 27.12.2018; however, no one appeared on behalf of the Appellant or Appellant Department on any of the given dates or thereafter. I take up both the appeals for decision on the basis of Appeal Memoranda.

Findings:

4. I have carefully gone through the facts of the case, the impugned order, contentions made by the Appellant and Appellant Department in the Appeal Memoranda. The issues to be decided in the present appeals are

- (i) whether the Appellant is eligible for benefit of Notification No. 12/2003-ST dated 20.6.2013 or not;
- (ii) whether the services rendered outside port area are taxable or otherwise;
- (iii) whether the impugned order is correct, legal and proper?

5. I find that the impugned order was passed in de novo proceedings in pursuance of the directions contained in Order-in-Appeal No. RJT EXCUS-

DDO-APP 410-13-14 dated 30.9.2013 issued by the then Commissioner (Appeals), Rajkot, which read as under:

"8.3 The Appellant had further contended that they provided the services related to water supply with the materials required for the purpose, and they had just raised the invoices, inclusive cost of consumables and therefore they are eligible for the benefit of the notification no. 12/2003-ST supra. In this regard I find that the appellants had neither submitted any documents evidencing that they had subcontracted their work related to repair and maintenance nor submitted any documentary proof specifically indicating the value of the said goods and materials used owing the provision of providing such services, as mandatorily required under the provisions of said notification.

Further, the increment to the extent of value of material used Notification No. 12/2003-ST supra as claimed by the appellant in the provision of services has to be granted to the appellant in consonance with the terms of the provisions of the said Notification. The appellant is hereby directed to produce the necessary documentary evidences and bill wise worksheet before the lower authority within a three week of receipt of this order, who shall after verifying the same and being satisfied that the benefit of the said Notification, if found proper, reduce the demand of service tax, along with consequential reduction of penalties.

8.4 The alternatively the appellants contended that their undertakers services are customer requirement based and the same were given not only at the ports but also at the various factories, dem. storerooms and customer site etc. And therefore the same cannot be classified under the port services.

I do find force in the above contention of the appellants, if the services have not been provided in the port area, the same cannot be covered under the Notification. However, the merits of the case of the appellant on this count. Since, the lower authority would be required to decide the same, the appellant is directed to produce the bill wise worksheet for the services provided at other than port area to the lower authority within three weeks, who shall after verifying and satisfying himself reduce the demand of service tax, along with consequential reduction of penalties."

(Emphasis supplied)

5.1 I find that the lower adjudicating authority extended benefit of Notification No. 12/2003-ST and reduced service tax demand on the basis of documents along with calculation sheet certified by the Chartered Accountant regarding material used while providing the services within port area and outside port area submitted by the Appellant. I find that the Appellant Department has argued that crucial requirement for exemption under Notification No. 12/2003-ST is, that the materials are sold and not consumed; that the title of goods should be transferred from service provider to service recipient in terms of Sale of Goods Act; that materials consumed while providing service are not intended to get benefit of exemption in terms of Notification No. 12/2003-ST; that no expenditure was made by the Appellant on account of purchase of goods

during the period 2006-07 to 2010-11 as per audited final accounts of the Appellant and hence the Appellant is not eligible for exemption under Notification No. 12/2003-ST.

5.2 I find that it is pertinent to examine the provisions of Notification No. 12/2003-ST dated 20.6.2013, as amended, which reads as under:

"In exercise of the power conferred by section 63 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 so much of the value of all the taxable services as is equal to the value of goods and materials sold by the service provider to the recipient of service, from the service tax leviable thereon under an item of the said Act subject to condition that there is documentary proof specifically indicating the value of the said goods and materials."

(Emphasis supplied)

5.3 I find that the provisions of Notification No. 12/2003-ST supra very clearly state that if the goods are sold by the service provider to the recipient of service, then value of such goods are allowed for deduction from value of taxable service subject to condition that there is documentary evidence showing value of such goods. I find that the lower adjudicating authority extended the benefit of Notification No. 12/2013-ST merely based upon the calculation sheet submitted by the Appellant. The adjudicating authority has not given findings to the effect that the Appellant submitted documentary evidences specifically evidencing value of goods and materials sold by the Appellant to the service recipient. I also find that the lower adjudicating authority erroneously considered goods/materials consumed by the Appellant for providing output service while extending benefit of Notification No. 12/2003-ST. The lower adjudicating authority failed to observe that 'consume' and 'sale' are different and have distinct meaning. When the goods / materials are sold, title of goods / materials are transferred from one party to another and such goods/materials are subjected to payment of VAT, then only goods/materials can be said to have been sold. So, when the goods/materials are used or consumed by the service provider while providing output service, it cannot be considered as goods / materials having been sold by service provider to the service recipient. There is no sale transactions by the Appellant during the years 2006-07 to 2010-11 as

per their final accounts for the said period. Thus, the lower adjudicating authority has not correctly read the provisions of Notification No. 12/2003-ST and has grossly erred in extending benefit of Notification No. 12/2003-ST in respect of goods/ materials used/consumed by the Appellant while providing the output service.

5.4. I rely on the order passed by the Hon'ble CESTAT, Mumbai in the case of S.S. Electricals reported as 2017 (52) S.T.R. 312 (Tn. - Mumbai), wherein it has been held that,

"5. The next issue raised by the appellant relates to tax benefit of Notification 12/2003-ST in respect of exclusion of the cost of material used during the provision of service. There is no general exemption in the manner used during provision of the service. However, Notification 12/2003-ST provides exemption subject to certain conditions. For the purpose of availing the exemption, the appellants were required to produce evidence of sale of material to their clients. Simply by consuming the material they do not become eligible to Notification 12/2003-ST. The appellants have failed to prove that they had sold the goods during the provision of service to the client and produce necessary evidence like payment of S.A. in instalment etc."

(Emphasis supplied)

6. I, therefore, hold that the Appellant is not eligible for benefit of Notification No. 12/2003-ST dated 20.6.2013 in respect of goods and materials used/consumed for providing 'Port Service'. The impugned order, to the extent of granting benefit of notification supra and excluding the value of goods and materials from assessable value, is set aside. The Appellant is directed to pay service tax in respect of services rendered within port area after including value of goods and materials in the assessable value along with consequent penalty under Section 78 of the Act.

7. Regarding issue of taxability of services rendered outside port area, the lower adjudicating authority in the impugned order has confirmed Service Tax demand of Rs. 7,07,111/- in respect of the services rendered outside port area under the category of "Maintenance & Repair Service", by giving findings as under:

"5.7 I find that the Commissioner Appellate has asked the appellant to re-assess the bill wise merchandise for the services provided at other than port area to the lower authority. The Appellant vide their letter dated 11/07/2017 submitted the documents along with the calculation & set

which was decided by a Chartered Accountant regarding service provided within port area, on 08/01/2018, and the tax demand of Rs. 7,07,111/- after excluding assessment item 10 on the basis of value of materials used under Notification No. 12/2010-ST. The respondent in his defence has argued that the appropriate classification of the services will be under the category of "Maintenance and Repair Service" for which they are liable to pay service tax."

7.2 I find that the Appellant has challenged the above findings by contending that the impugned order has travelled beyond the scope of Show Cause Notice inasmuch as SCN was issued to recover Service Tax under the category of 'Port Service'. However, the impugned order has confirmed Service Tax demand of Rs. 7,07,111/- under the category of 'Maintenance & Repair Service'. I find that the Appellant Department has also contended that the impugned order has been passed without any conscious attempt of verification / examination of case records in a proper manner. I also find that the lower adjudicating authority has not followed the terms of the remand order of the then Commissioner (Appeals) who had allowed the plea of the Appellant by holding that if the services were rendered outside port area, then the same cannot be covered under 'Port Service'. The matter was remanded to the lower adjudicating authority for limited purpose of verifying the documents to ascertain whether the services were provided within port area or outside port area. Thus, it was not open for the lower adjudicating authority to determine classification afresh and covered the services rendered outside port area under 'Maintenance and Repair Service'. I also find that the impugned order is a non speaking order inasmuch as no detailed findings have been given by the lower adjudicating authority as to which documents and records have been verified/examined by him and what is the outcome of such verification/examination. The lower adjudicating authority has miserably failed to follow the directions of the then Commissioner (Appeals). The impugned order, so far as it relates to the issue of taxability of service rendered outside port area, is not sustainable in its present form. I, therefore, set aside the impugned order to the extent of service tax demand confirmed under the category of 'Maintenance and Repair Service' and remit the matter to the lower adjudicating authority with direction to pass speaking order after carrying out verification of the documents submitted by the Appellant and give detailed findings whether services were rendered outside port area or not.



If the services are rendered outside port area as claimed by the Appellant, then same is not liable to service tax and consequent penalties. The lower adjudicating authority is also directed to re calculate service tax demand in respect of services rendered within port area and consequent penalty under Section 78 of the Act.

8. The Appellant has contested the confirmation of Service Tax demand of Rs. 2.28,524/- under 'Port Service' and consequent penalty under Section 78 on the grounds that said services were provided prior to 1.7.2010 when 'Port Service' was defined as any service rendered by a port or any person authorized by such port in any manner in relation to a vessel or goods; that since the Appellant did not hold any such authorization, they are not liable to be taxed under 'Port Service'. I find that the then Commissioner (Appeals), Raikot in Order-in-Appeal dated 4.10.2013 has upheld the confirmation of demand under the category of 'Port Service'. If the Appellant has not contested the said Order-in-Appeal in higher Appellate forum, then it has attained finality. It is not open to the Appellant now to contest the taxability of services under 'Port Services'. The scope of impugned order in *de novo* adjudication was limited to eligibility of exemption Notification No. 17/2003-ST and taxability of services rendered outside port area. Thus, the contention of the Appellant is without any merits.


8.1 I rely on the Order passed by the Hon'ble CESTAT, Mumbai in the case of Shree Krishna Nylon Pvt Ltd reported as 2015 (327) E.L.T. 626 (Trib. - Mumbai), wherein it has been held that,


"From the above findings it is observed that the learned Commissioner (Appeals) has given a clear direction to the original authority to decide the case in the light of ONGC's case (supra). The matter was remitted to the original authority only for verification of the documents. It is admitted fact that the Revenue has not challenged his order by filing an appeal before the Tribunal. Hence the same attained finality. Therefore, the Revenue did not have liberty to file appeal before the Commissioner (Appeals) to second time challenging the finding of the final order-in-appeal dated 5-2-2008. In view of this, the learned Commissioner (Appeals) could not have taken a different view as against the case law in the earlier order-in-appeal dated 14-3-2008."

9. In view of above, I allow the appeal of the Appellant Department and reject the appeal of the Appellant.

9.1 उपरोक्तों द्वारा दल को यह अपीलें का निवेदन उपरोक्त तरीके से किया गया है .

9.1 The appeals filed by Appellant, is disposed off as above.

हस्ताक्षर,

R.P.A.D.
अधीनस्थ (अधीनस्थ)


(कुमार संजीव) अधीनस्थ
एग्जक्यूटिव (अधीनस्थ)

By R.P.A.D.

- To,
1. M/s Dolphin Underwater Drilling Service
Plot No. 305, Shop No. 11-13,
Komal Complex,
Gandhidham.
 2. The Commissioner,
GST & Central Excise,
Gandhidham.

Copy to:-

- 1) The Principal Chief Commissioner, GST & Central Excise, Ahmedabad Zone Ahmedabad for his kind information please.
- 2) The Asst Commissioner, GST & Central Excise, Gandhidham Urban Division, Gandhidham Commissionerate for necessary action in the matter.
- 3) Guard File.