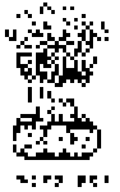


O/O THE PRINCIPAL COMMISSIONER (APPEALS), GST & CENTRAL EXCISE

2nd Floor, GST Bhavan,

Race Course Ring Road,

Rajkot – 360 001

[illegible]

[illegible]

[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]

[illegible]

KCH-EXCUS-000-APP-042-2019

[illegible]

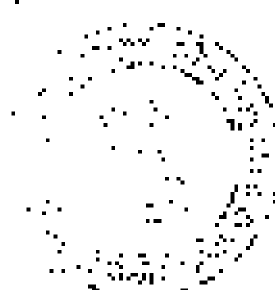
Passed by Shri Kumar Santosh, Principal Commissioner (Appeals), Rajkot

[illegible]

Appellant & Respondent :-

[illegible], Gujarat.

[illegible]



[illegible]

Revision application by Government of India

[illegible]

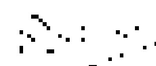
:: ORDER IN APPEAL ::

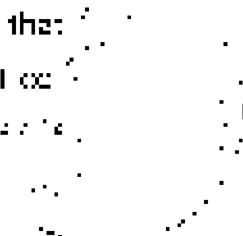
M/s. Transworld Terminals Private Limited, Bharat CFS, Zone-I, MPSEZ, Mundra (hereinafter referred to as 'appellant') filed present appeal against Order-in-Original No. 1/JC/2018-19 dated 21.5.2018 (hereinafter referred to as "impugned order") passed by the Joint Commissioner, Central GST, Gandhidham (Kutch) (hereinafter referred to as "the adjudicating authority").

2. The brief facts of the case are that Show Cause Notice No. IV/15-118/ST/ADC/2015 dated 15.3.2017 was issued to the appellant demanding service tax of Rs. 43,97,552/- on transportation income earned by the appellant during FY 2011-12 to FY 2014-15 under Section 73(1) of the Finance Act, 1994 (hereinafter referred to as "the Act) along with interest under Section 75 of the Act and for imposition of penalties under Section 78, Section 77 and Section 78 of the Act. The lower adjudicating authority vide impugned order confirmed the demand of service tax of Rs. 43,97,552/- along with interest and imposed penalty of Rs. 10,000/- for failure of appellant to furnish information to the department and also imposed penalty of Rs. 43,97,552/- under Section 78 of the Act.

3. Being aggrieved with the impugned order, appellant preferred the present appeal, *inter alia*, on the following grounds:

(i) The appellant facilitates transportation of empty and laden containers from port to CFS and vice versa and charged freight from their customers; that the transportation activity carried out by the appellant gets covered under Goods Transport Agency service; that in case of GTA service, liability to pay service tax is on the person liable to pay the freight; that in the present case, liability to pay freight lies upon the consignor or consignee and not on appellant being the transporter and therefore, appellant is not liable to pay service tax on GTA service provided for transportation of empty and laden containers; that the appellant specifically mentions the value on which service tax is liable to be paid by the service receiver after claiming abatement and the amount of service tax to be paid in the invoices raised towards transportation of empty containers; that the invoices raised by the appellant and copy of confirmation letter obtained from one of the customers P L Mumbai Private Limited evidencing the fact that service tax in respect of freight income earned by the appellant is paid by the customers were submitted in reply to SCN, however, the lower adjudicating authority has ignored the documentary evidence; that demanding service tax on same income from two persons would amount to double taxation; that the appellant relied on decisions in the case of J.K. Sugar Ltd. reported as 2016 (43) STR 292 (Tri.- All.) and Rucha Engineers Pvt. Ltd. reported as 2015 (39) S.T.R. 515 (Tri. - Mumbai) to say that once the service tax is paid, it cannot be demanded from the other party; that so





joint reading of Section 68(2) of the Act, Notification No. 30/2004-ST dated 31.12.2004, as amended (upto 30.6.2012) and Notification No. 30/2012-ST (w.e.f. 1.7.2012) and Rule 2(1)(d) of Service Tax Rules, 1994 provides that person liable to pay freight is the person liable to pay service tax under reverse charge; that the appellant also relied on decisions in the case of Gurcharan Singh reported as 2017-TIOL-1342-CESTAT-ALL, MSPL Ltd. reported as 2008-TIOL-2137-CESTAT-BANG, [illegible] Private Limited reported as 2019-TIOL-785-CESTAT-AHM in support of their contention.

(ii) Prior to 1.7.2012, service tax was levied only on the services defined to be taxable under Section 65(105) of the Act. Therefore, for the period from April, 2011 to June, 2012, it is must that the demand should be raised mentioning the specified taxable category and the lower adjudicating authority in his findings did not specify the category under which the disputed income shall get taxed which indicates that the lower adjudicating authority failed to understand the nature of transactions undertaken by the appellant and has failed to determine the category under which service tax is liable to be paid by the appellant. The department is under obligation to show that the appellant has carried out an activity which is subjected to service tax under the provisions of the Act. The appellant relied on decisions in the case of Shubham Electricals reported as 2015 (40) STR 1034 (Tri.-Del.) affirmed by the Hon'ble Supreme Court reported as 2016 (42) STR (J213); Brindavan Beverages Pvt. Ltd. reported as 2007 (213) ELT 487 (SC) to say that the impugned order confirmed demand of service tax without prescribing the taxable category is unsustainable in law.

(iii) The lower adjudicating authority has invoked valuation provisions under Section 67 of the Act for the purpose of levying service tax on freight and export cargo handling income earned by the appellant. The appellant submitted that valuation provisions cannot be invoked in a case where service itself is not taxable in the hands of the appellant. The impugned order has simply picked up the amounts from the financial statements of the appellant and confirmed service tax on the transportation income without providing reasonable justification as to why such income is taxable in the first place. The freight income is not taxable as the reverse charge mechanism provided under Service Tax Rules, which transfer the onus to pay service tax in respect of such income on the recipient of service and the cargo handling income in relation to export cargo is excluded from the definition of taxable service, thus question of invoking valuation provisions does not arise.

(iv) The impugned order in Para 26 & Para 27 has held that the appellant has not issued consignment notes and hence, not fulfilled mandatory requirement so

as to classify the transportation service provided by the appellant under the category of CHA service. The findings of the lower adjudicating authority were not part of the SCN issued to the appellant. The appellant submitted that audit officers were satisfied with the invoices and other related documents furnished to them by the appellant and therefore, findings of non-issuance of consignment note is baseless and uncalled for. The impugned order at Para 28.3 and Para 28.4 of the impugned order refers to statutory provisions and CBEC Circular and findings were recorded which were not part of the SCN. Hence, the appellant submitted that the lower adjudicating authority has traversed beyond the SCN. The appellant submitted that SCN is the foundation of any case and the adjudication has to be done within the four corners of the SCN and confirmation of demand on a ground which is different from the ground proposed in SCN is not permissible. The appellant relied on decisions in the case of Toyo Engineering India Limited reported as 2006 (201) ELT 513 (SC), XTB International Pvt. Ltd. reported as 2013 (298) ELT 271 (Tri. – Del.), Deepak Fertilizers & Petro Corporation Ltd. reported as 2009 (243) ELT 408 (Tri. – Mumbai).

(v) The impugned order has been passed demanding service tax on transportation income earned by the appellant as ascertained in the SCN. The SCN has simply picked up the amounts from the 'Transportation charges' income as reflected under the head 'Sale of services – container freight station' in the Profit & Loss account. The appellant submitted that the income recorded under the head 'Transportation charges' included the amount earned towards handling of export cargo. The said details were made available by them in reply to SCN and even then the lower adjudicating authority has confirmed the demand of service tax on export cargo handling income as transportation income. The export cargo handling income is outside the scope of taxable service for the period upto 30.6.2012 and w.e.f. 1.7.2012 the appellant has collected and paid service tax on the same. On a combined reading of Section 65(105) of the Act and Section 65(23) of the Act, it can be understood that the cargo handling service in relation to export cargo was out of the definition of cargo handling service and thereby out of the ambit of taxable service, meaning thereby, service tax cannot be levied on cargo handling service rendered in relation to export cargo up to 30.6.2012. The appellant relied on CBEC Circular No. B.11/1/2002-TRU dated 1.8.2002 and decision of Karnataka High Court in the case of Konkan Marine Agencies reported as 2009 (13) STR 7 (Kar.) in support of their contention and submitted that the appellant is not liable to pay service tax on Rs. 1,79,65,907/- pertaining to cargo handling service rendered in relation to export cargo for the period under consideration.

(vi) The department has issued two SCNs for the same period April, 2011 to [illegible]

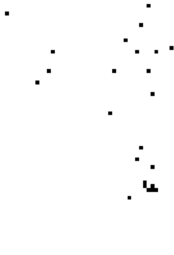
[illegible]

March, 2013 on different grounds. The SCN dated 15.3.2017 issued by the Assistant Commissioner has treated the freight and cargo handling income as taxable and demanded service tax; on the other hand, another SCN dated 15.3.2017 issued by the Joint Commissioner has treated the freight and cargo handling income as exempted income and demanded reversal of cenvat credit of inputs and input services under Rule 6(3) of Cenvat Credit Rules, 2004. The department cannot burn both the sides of the same candle and cannot demand service tax on the same income by holding two different positions and findings of the lower adjudicating authority at Para 21 of the impugned order is not correct, legal and proper.

(vii) The SCN was issued on 15.3.2017 for the period April, 2011 to March, 2013; that the SCN has to be issued within 5 years from the relevant date i.e. date of filing of ST-3 return, even in the case of fraud, collusion, suppression of facts, etc.; that the ST-3 return for the period April, 2011 to September, 2011 was filed on 17.12.2011 and the last date to issue SCN for the said period expired on 18.12.2016, therefore, SCN issued on 15.3.2017 is invalid and in violation of the law; that the appellant produced copy of ST-3 return for the period April, 2011 to September, 2011 in the Appeal Memo and submitted that the lower adjudicating authority has provided incorrect finding at Para 51.2 of the impugned order that ST-3 return was filed on 23.6.2012; that demand of service tax for the period April, 2011 to September, 2011 needs to be set aside on the above ground of limitation.

(viii) The appellant has fully co-operated throughout the entire investigation and all the relevant documents as and when called for were also submitted to the department. Audit of the records of the appellant has been conducted every year and all the information has been known to the department and no observation has been raised by the audit officers from the period 2008-09 to 2013-14. Based on, the department cannot allege suppression of facts and intent to evade payment of service on the part of the appellant when all the facts and all the details were always available with the department. The appellant relied on decisions in the case of Chandola Travels reported as 2015 (32) STR 762 (Tri. – Del.), Web Impression (India) Ltd. reported as 2014 (21) STR 482 (Tri. – Kolkata), Sas India Pvt. Ltd. reported as 2010 (19) STR 92 (Tri. – Bang.) and Hyundai Unitech Electrical Transmissions Ltd. reported as 2005 (187) ELT 312 (Tri. – Mumbai) wherein it has been held that suppression can be alleged only when the documents which indicate the guilty mind are put before the departmental officers. Hence, the demand of service tax pertaining to the period from April, 2011 to March, 2015 is barred by limitation of time.

(ix) The lower adjudicating authority has relied on the decision in the case of



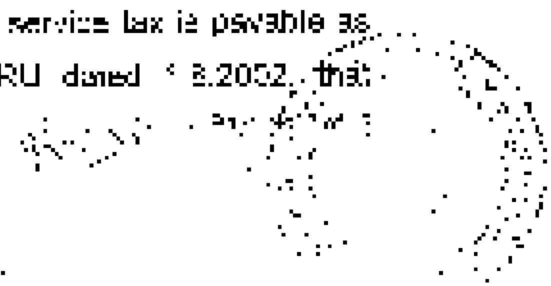
Karur Vysya Bank reported as 2017 (6) GSTL 436 (Tri. – Chennai) wherein it has been held that information required by the law to be disclosed to revenue by assessee, if not disclosed then such non-disclosure is attributable to intention of assessee that amounts to suppression. The lower adjudicating authority also relied on decision in the case of Chennai Port Trust reported as 2017 (5) GSTL 394 (Tri. – Chennai) wherein facts of the case were that the assessee has not disclosed terminal handling charges earned by the assessee from railways in the service tax returns thereby leading to invocation of provisions regarding suppression of facts with intent to evade payment of service tax against the assessee. Both these cases relied upon in the impugned order are completely opposite to the present case since, the department has conducted audit of records of the appellant every year and the department was aware of the nature of business activity conducted by the appellant and the audit reports were issued without any such observations.

(ix) Notwithstanding the above submissions, the appellant submitted that even if service tax is payable, the cum-tax benefit should be granted to them since the consideration received by the appellant should be treated as inclusive of service tax payable as per Section 67(2) of the Act. The appellant relied on decisions in the case of Maruti Udyog Limited reported as 2002 (141) ELT 3 (SC), Shakti Motors reported as 2008 (12) STR 710 (Tri. – Ahmd.) and Advantage Media Consultant reported as 2009 (14) STR 349 (SC);

(x) The service tax is not payable, interest under Section 75 of the Act cannot be recovered and penalty cannot be imposed under Section 78 of the Act. The appellant relied on decisions in the case of Jain Kalar Samaj reported as 2015 (38) STR 695 (Tri. – Mumbai) and Sundaram Textiles Ltd. reported as 2014 (36) STR 30 (Mad.) in this regard.

(xi) The existence of mens rea cannot be established and therefore, no penalty under Section 78 of the Act can be imposed. The appellant relied on decision of the Hon'ble Supreme Court in the case of Hindustan Steel reported as 1978 (2) ELT (J 159) to say that for failure to carry out the statutory obligation was the result of quasi criminal proceedings and that penalty would not ordinarily be imposed unless the appellant either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest or acted in conscious disregard of their obligations.

4. Personal hearing in the matter was attended by S/Shri Darshan Ranavat, Chartered Accountant and Umesh Pandya, Manager (Finance), who reiterated the grounds of appeal and submitted that the activity of cargo handling in respect of export cargo has been excluded from the definition, no service tax is payable as also explained in CBEC Circular No. B-11/1/2002-TRU dated 1.8.2002, that



services of transportation of empty containers from port to CFS and vice-versa are GTA only and hence, not payable by them; that demand for the period from April, 2011 to September, 2011 is time barred being beyond 5 years because SCN was issued on 15.3.2017 and service tax return for the period filed on 17.12.2011; that this is 2nd SCN for same period but issued by the Assistant Commissioner, Service Tax Division, Gandhinagar.

FINDINGS:

5. I have carefully gone through the facts of the case, impugned order, grounds of appeal and the submissions made during personal hearing. I find that the appellant has deposited Rs. 1,29,874/- equivalent to 7.5% of service tax confirmed vide impugned order and thus the appellant has complied with the requirement of Section 35F(i) of the Central Excise Act, 1944, as made applicable in service tax matters vide Section 83 of the Act. Therefore, I proceed to decide this appeal. The issue to be decided in the present case is as to whether confirmation of demand of service tax on the value of cargo handling service provided by the appellant in relation to export cargo and value of transportation charges recovered by the appellant towards transportation of empty containers is correct or not.

6. At the outset, I find that the appellant has contended that multiple SCNs have been issued - one demanding service tax on transportation income earned by the appellant and another for reversal of cenvat credit under Rule 6(3) of CCR, 2004, considering transportation income and other income as value of exempted services. I also find that the impugned SCN dated 15.3.2017 issued by the Assistant Commissioner for the period from 2011-12 to 2014-15 demanding service tax on transportation income and export cargo handling income whereas another SCN issued to the appellant on same date i.e. 15.3.2017 by the Joint Commissioner demanded reversal of cenvat credit availed on common input services considering transportation income and export cargo handling income as exempted services. Hence, I find that the stand of the department was not clear whether to consider the income earned by the appellant towards rendering of export cargo handling and towards transportation of empty containers is liable to service tax or not and hence, I find that this argument of the appellant is correct to this extent.

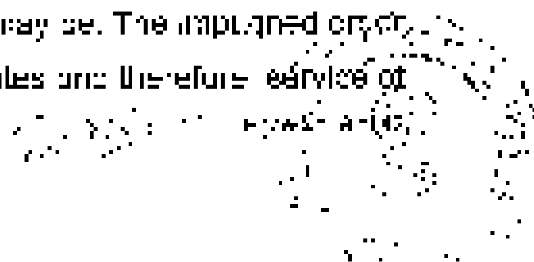
7. I find that the impugned order confirmed demand of service tax on income mentioned under the head "transportation charges income" in the financial records of the appellant during FY 2011-12 to FY 2014-15 considering the entire amount to be of transportation activities of the appellant. The appellant has submitted that out of total income of Rs. 4,18,22,814/- mentioned in their financial records as

transportation income. Rs. 1,79,63,307/- pertained to income earned towards rendering of cargo handling service in relation to the export cargo and Rs. 2,38,59,908/- pertained to income earned towards transportation of empty containers. The appellant has contended that activity of export cargo handling was out of purview of definition of 'Cargo Handling Service' under Section 65 (23) of the Act and was not a taxable service. I would like to reproduce definition of 'Cargo Handling Service' as provided under Section 65(23) of the Act, which reads as under: -

> (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.
>
> **(Emphasis supplied)**

7.1 It could be seen from the definition of 'Cargo Handling Service' as provided under Section 65(23) of the Act that handling of export cargo is excluded from the definition of 'Cargo Handling Service' which makes clear that the legislation has kept handling of export cargo out of purview of service tax net and thus, the activity of handling of export cargo is non-taxable service and therefore, service tax cannot be demanded on income pertaining to export cargo handling income for the period upto 30.6.2012. I further find that w.e.f. 1.7.2012 the classification of the services has been done away with and all the services except those specified in negative list of services are liable to service tax in terms of Section 66B of the Act inserted w.e.f. 1.7.2012 and therefore, service tax is payable on cargo handling service in relation to export cargo w.e.f. 1.7.2012. However, I find that the appellant has contended that they have started paying service tax on cargo handling service in relation to export cargo w.e.f. 1.7.2012 and therefore, no service tax can again be demanded on the said service even for the period from 1.7.2012 and onwards. Hence, I set aside the impugned order confirming demand of service tax on export cargo handling income.

8. I also find that the impugned order has confirmed demand of service tax on full value of transportation income. The appellant contended that the said income was earned by them towards transportation of empty containers from port to CFS and vice-versa provided by the appellant to their customers to whom invoices were raised for recovery of freight charges and the invoices indicating that service tax liability is on the consignor or consignee, as the case may be. The impugned order has held that the appellant had not issued consignment notes and therefore, service of



transport of empty containers cannot be considered as GTA service whereas, the appellant has contended that invoices raised for recovery of freight charges indicated that service tax liability is on the consignor or consignee, as the case may be as per Notification No. 35/2004-ST dated 31.12.2004 as amended and Notification No. 30/2012-ST dated 20.6.2012 and Rule 2(1)(d) of Service Tax Rules, 1994 and hence, service tax in respect of GTA service is required to be paid by the recipient of service under reverse charge. I would like to examine definition of 'Goods Transport Agency' as provided under Section 65(50b) of the Act and Rule 4B of Service Tax Rules, 1994 which reads as under:

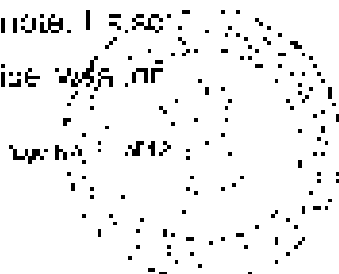
> (50b) "goods transport agency" means any person who provides service in relation to transport of goods by road and issues consignment note, by whatever name called;
>
> RULE 4B. Issue of consignment note. — Any goods transport agency which provides service in relation to transport of goods by road in a goods carriage shall issue a consignment note to the recipient of service:
>
> Provided that where any taxable service in relation to transport of goods by road in a goods carriage is wholly exempted under section 93 of the Act, the goods transport agency shall not be required to issue the consignment note.
>
> *Explanation.* – For the purposes of this rule and the second proviso to rule 4A, "consignment note" means a document, **issued by a goods transport agency against the receipt of goods for the purpose of transport of goods by road in a goods carriage, which is serially numbered, and contains the names of the consignor and consignee, registration number of the goods carriage in which the goods are transported, details of the goods transported, details of the place of origin and destination, person liable for paying service tax whether consignor, consignee or the goods transport agency.**
>
> ***(Emphasis supplied)***

8.1. I find that any person who provides service in relation to transport of goods by road and issues consignment note, by whatever name called, is Goods Transport Agency and the consignment note is a document issued by Goods Transport Agency which is serially numbered and contains name of the consignor and consignee, registration number of the goods carriage, details of goods transported, details of place of origin and destination and details of person liable for paying service tax. In the present case, I find that the appellant has transported empty containers and issued invoices as per explanation to Rule 4B of Service Tax Rules, 1994 containing all these details and therefore, the services of

transportation of empty containers is nothing but a GTA service. I further find that Rule 2(1)(d) of Service Tax Rules, 1994 provides that in relation to service provided by GTA, person liable to pay freight is a person liable for payment of service tax, which reads as under –

> *(d) "person liable for paying service tax"*
>
> *(i) ....;*
>
> *(A) ....*
>
> ....
>
> ...
>
> ....
>
> *(B) __in relation to service provided or agreed to be provided by a goods transport agency in respect of transportation of goods by road, where the person liable to pay freight is,__—*
>
> *(I) any factory registered under or governed by the Factories Act, 1948 (63 of 1948);*
>
> *(II) any society registered under the Societies Registration Act, 1860 (21 of 1860) or under any other law for the time being in force in any part of India;*
>
> *(III) any co-operative society established by or under any law;*
>
> *(IV) any dealer of excisable goods, who is registered under the Central Excise Act, 1944 (1 of 1944) or the rules made thereunder;*
>
> *(V) any body corporate established, by or under any law; or*
>
> *(VI) any partnership firm whether registered or not under any law including association of persons;*
>
> *any person who pays or __is liable to pay freight either himself or through his agent for the transportation of such goods by road in__ a goods carriage:*
>
> *Provided that when such person is located in a non-taxable territory, the provider of such service shall be liable to pay service tax.*
>
> ***(Emphasis supplied)***

8.2 I also find that the appellant has contended that the service receivers have paid service tax on transportation of empty containers under reverse charge mechanism as provided under Rule 2(1)(d) of Service Tax Rules, 1994 and Notification No. 30/2012-ST dated 20.6.2012. I further find that CESTAT, New Delhi in the case of [illegible] Electronics Pvt. Ltd. reported as 2010 ([illegible]) STR [illegible] (Tri. – Del.) has referred CBEC Circular No. 104/07/2008-S.T. dated 6-8-2008 to treat the transportation service together with loading and unloading as GTA service even when the service provider has not issued consignment note. I, also find that liability of payment of service tax in respect of GTA service was on



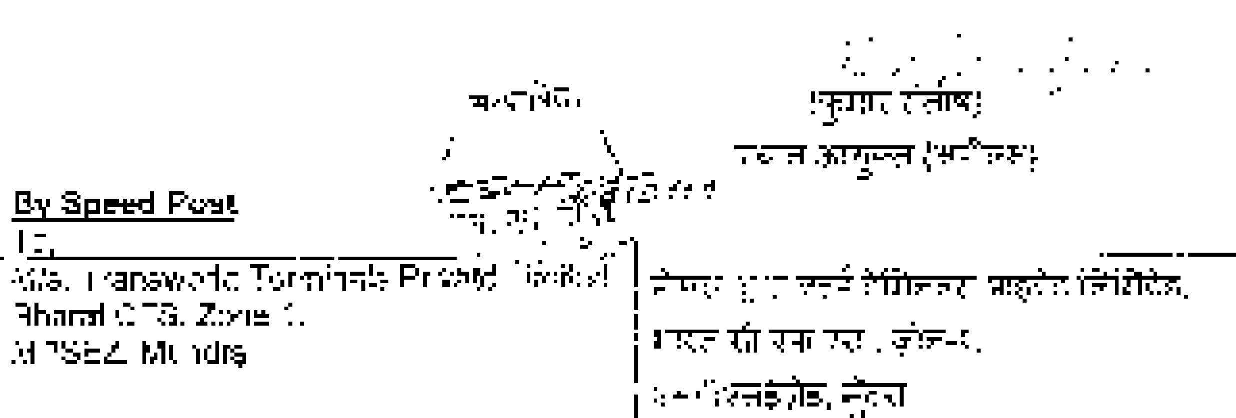
provision of the service even prior to 1.7.2012 and also w.e.f. 1.7.2012. Therefore, I hold that no service tax can be demanded from the appellant in respect of transportation income recorded by the appellant in their financial records. Hence I set aside the impugned order confirming demand of service tax on value of GTA service.

9. In view of above, I find that the entire demand of service tax on the value of export cargo handling and value of GTA service is not sustainable. Since the demand of service tax is not tenable, I set aside the impugned order for recovery of interest under Section 75 of the Act and penalties imposed on the appellant under Section 77 and Section 78 of the Act.

10. In view of above, I set aside the impugned order and allow the present appeal.

११. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।

11. The appeal filed by the appellant is disposed off in above terms.



सत्यापित

(कुमार संतोष)

प्रधान आयुक्त (अपील्स)

By Speed Post

To,

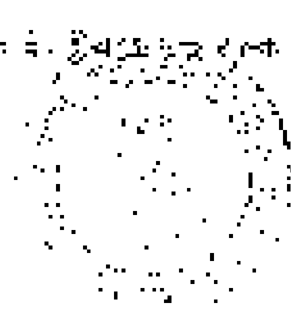
M/s. Transworld Terminals Private Limited, Bharat CFS, Zone 1, MPSEZ, Mundra	मेसर्स ट्रांसवर्ल्ड टर्मिनल्स प्राइवेट लिमिटेड, भारत सी एफ एस, ज़ोन-1, एमपीएसईज़ेड, मुंद्रा

प्रति:

(1) प्रधान मुख्य आयुक्त, केन्द्रीय वस्तु व सेवा कर एवं केन्द्रीय उत्पाद शुल्क, अहमदाबाद अंचल, अहमदाबाद को जानकारी हेतु।

(2) आयुक्त, केन्द्रीय वस्तु व सेवा कर एवं केन्द्रीय उत्पाद शुल्क, गांधीधाम को आवश्यक कार्यवाही हेतु।

(3) सहायक आयुक्त, केन्द्रीय वस्तु व सेवा कर एवं केन्द्रीय उत्पाद शुल्क, मंडल, मुंद्रा को आवश्यक कार्यवाही हेतु।



(4) गार्ड फ़ाइल