



સુવર્ણ - શુભમ (પ્રાઈવેટ) લિમિટેડના અધિકારીઓ દ્વારા સેવા કરવાની જાહેરાત
 090 THE POSITIVE 43, 1308 H H 31810878 (APKUS), GST & CENTRAL EXCISE

દ્વિતીય તબક્કાની ડી. ડી. સેવા / 2nd Floor, GST Bldg

કે. વી. સી. સેક્ટર / Kach Ghat on Ring Road

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વિસ્તૃત સુચીકૃત

ક	ડી. ડી. સેવા D.D. Service	સુચી નંબર 0281	તારીખ 31-03-2019
ખ	વિસ્તૃત સુચીકૃત Detailed Index	સુચી નંબર 0281	તારીખ 31-03-2019

વિસ્તૃત સુચીકૃત નામ / Detailed Index Name

KCB-EXCIS-000-APP-043-2019

વિસ્તૃત સુચીકૃત નામ / Detailed Index Name: 31-03-2019
 વર્ગીકરણ નંબર / Classification No.: 31-03-2019

ડી. ડી. સેવા નામ / D.D. Service Name: સુવર્ણ - શુભમ (પ્રાઈવેટ) લિમિટેડ
 Name of the D.D. Service: Suvragn Shubham Private Limited

આ અરજી સુચીકૃત નામ / This application is for the D.D. Service Name: સુવર્ણ - શુભમ (પ્રાઈવેટ) લિમિટેડ
 Name of the D.D. Service: Suvragn Shubham Private Limited

વિસ્તૃત સુચીકૃત નામ / Detailed Index Name: N/A
 Name of the D.D. Service: N/A

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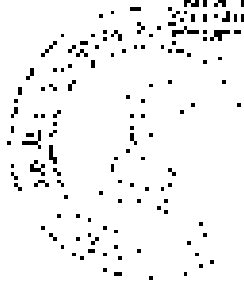
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IN ORDER IN APPEAL

M/s. Transworld Terminals Private Limited (hereinafter referred to as 'appellant') filed present appeal against Order-In-Original No. 25/2012-19 dated 25.1.2018 (hereinafter referred to as 'impugned order') passed by the Joint Commissioner General GST, Gandhidham (Kutch) (hereinafter referred to as 'the assessing authority').

2. The brief facts of the case are that the appellant had cargo service on lift on/lift off charges of the empty and loaded containers from the shipping line and transportation of loaded containers from CFS to port/jetty and vice versa, however, no service tax was paid by the appellant on transportation of empty containers from Jetty to CFS and vice versa by claiming benefit of exemption under Notification No. 25/2012-ST dated 20.6.2012. Statement of Sri. Anesh Parjya, Assistant Manager and Authorized signatory of the appellant was recorded on 19.2.2015 wherein he deposes that in case of imported goods, they charged service tax on the amount/CHA on composite service/bundled service lifting it from transportation of loaded container till unloading of imported goods in the trucks arranged by importer under the head of 'cargo handling service'; that in case of export of the goods, the exporters bring their goods for export to appellant's CFS; that in most of the cases, since the appellant has empty containers lying at CFS, the appellant after unloading the goods from exporter's vehicles shift them in to the empty containers lift on/loaded containers and transport of loaded containers to the port for which they billed the exporter composite charges including weightment charges under the head "Export Cargo Handling charges" and discharged service tax; that regarding activities of movement of empty containers from port to CFS and vice versa, they claimed to have provided service of transportation of empty containers and raised invoices and shown amount of empty lift on/lift off charges and amount of transportation of empty containers separately and paid service tax on amount of lift on/lift off charges for movement of containers from port to CFS and vice versa, however they treated transport of empty containers GTA service and availed exemption as the charges were below Rs. 1500/-; that in case of non-availability of containers, the lift on/lift off charges of empty containers along with transportation charges, composite invoices were issued on exporters/CHA as "empty containers for export stuffing". Show Cause Notice No. DCCE/RRUGS 23/2017-10 dated 31.1.2017 was issued to the appellant, demanding Service Tax of Rs. 19,77,676/- for the period from 1.7.2012 to 31.3.2015 under Section 73(i) of the Finance Act, 1994 (hereinafter referred to as 'the Act') along with interest under Section 76 of the Act and imposition of penalty under Section 78 of the Act. The impugned order confirmed Service Tax of Rs. 19,77,676/- along with interest and imposed penalty of Rs. 15,77,676/- under Section 78 of the Act.

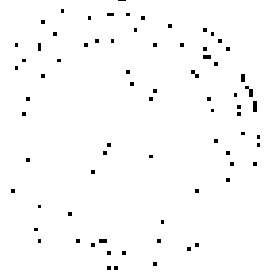


3 Being aggrieved with the impugned order, appellants preferred the present appeal, *inter-alia*, on the following grounds:

(i) The appellants charges freight and the customs for movement/transport of empty containers on which reverse charge is applicable as per Rule 2(1)(c) of Service Tax Rules, 1994 and Notification No. 30/2012-ST dated 20.6.2012; that invoices issued by the appellants clearly indicated that service tax liability shall be discharged by the recipient under reverse charge; that to qualify to be a C.A., any other document which contain the details as required in a consignment note can also qualify as a valid document and since, the appellants has not issued consignment notes they are not C.A. does not hold good; that the appellants relied on CBEC Circular No. 1047/2018-ST dated 2.3.2018, decisions in the case of *Shree International Pvt. Ltd.* reported as 2018 TMI 442-CESTAT DEL. and *Axis Commodities* reported as 2019-TMI-297-CESTAT-DEL in support of the contention.

(ii) The appellants submitted that paying service tax on movement of empty containers from 1.4.2015 cannot be construed as acceptance of mistake and that the appellants still believe that they had correctly classified the same as GTA service for the period under dispute. That demanding service tax on the same income from service provider would amount to double taxation and therefore service tax cannot be demanded from the appellants in respect of freight income earned by them on/off on service tax has been paid by the service recipient; that the appellants relied on decisions in the case of *Gurubhar Singh* reported as 2017 TMI 1342-CESTAT-ALLI, *VSP Ltd.* reported as 2008-TMI-2137-CESTAT-BANG., *Ang Plast Private Limited* reported as 2013 TMI 785-CESTAT-AM in support of the contention.

(iii) The department has issued multiple SCNs for the same period for the purpose of demanding service tax/reversal of central credit under Rule 5 of Central Credit Rules, 2004 (hereinafter referred to as CCR, 2004) on freight and cargo handling income earned by the appellants. SCN No. 13/1914-Mumbai/ST-Div./Jt Commr.28/2016 dt dated 15.2.2017 alleged that the appellants has not reversed amount of central credit attributable to exempted services under Rule 5 of CCR, 2004 for the financial years 2011-12 to 2013-14, considering transportation income is exempted from payment of service tax whereas, SCN No. 14/16-11818-MUM/2016 dated 19.3.2017 demanded service tax on transportation income for the financial years 2011-12 to 2014-15 and the impugned Show Cause Notice No. 30GF/RRU/314-34/2017-18 dated 31.3.2017 demanded Service tax of Rs. 13,73,526/- for the period from 1.7.2012 to 31.3.2015. True, the department has taken two different legal positions where two SCNs has demanded service tax on transportation income considering the same service as taxable service whereas SCN dated 15.2.2017 issued by the Joint Commissioner has demanded reversal of central credit applied on various input services considering



Signature: _____ Date: _____

transportation service as exempted service. The department cannot show that and said at the same time and for the same period since it is ultra viresly of justice. But 5 SCNs are issued to the same assessee.

(iv) Audit of records of the appellant has been conducted in 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 2006-09 to 2013-14. Later 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 upon the decision in the case of Nizam Sugar Factory reported as 2008 TIOU 53 SC 100, Channiala Travels reported as 2013 (52) STR 752 (14 - Del.), Web Impression (I) (7) Ltd. reported as 2011 (21) S.R. 482 (11 - Kharaj), Ajanta Transistor Clock Mfg. Co. reported as 2002 (139) ELT 242 (11 - Mumbai) and Diamond Power Infrastructure Limited reported as 2015 (40) STR 255 (11 - Ahmed) to say that there is no suppression of facts with intent to evade service tax and therefore, the extended period cannot be invoked and penalty under Section 78 of the Act cannot be imposed.

(v) The impugned order has relied upon decision in the case of South Eastern Coal Fields Ltd. reported as 2013 (41) STR 535 (11 - Delhi) wherein it was held that since the consignment note is not issued, the service recipient is not liable to pay service tax under reverse charge. The decision of the CBCTA has been challenged to the Hon'ble Supreme Court by the department, and the appeal has been dismissed by the Hon'ble Supreme Court reported as 2014 TIOU 253 SC 45. The appeal has been filed by the department contending that even if there is no consignment note, the service received by South Eastern Coal Fields Ltd. is that of CIA and therefore they are liable to pay service tax under reverse charge. Thus, the matter is under litigation and different interpretations are possible based on esse and factus ratios of each case. In the present case, the service recipients have paid service tax under reverse charge and hence, this is a clear distinct fact which includes the case relied upon in the impugned order.

(vi) The service tax is not payable interest under Section 79 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 Kalsi Sama, reported as 2015 (55) STR 965 (11 - Mumbai) and Sundaram Textiles Ltd. reported as 2014 (30) STR 30 (Mad) in this regard.

(vii) The existence of mens rea cannot be established and therefore, no penalty under Section 78 of the Act can be imposed. The appellants relied on decision of the Hon'ble Supreme Court in the case of Hindustan Steel reported as 1975 (2) ELT 158; to say that failure to carry out the statutory obligation was the result of quasi-criminal

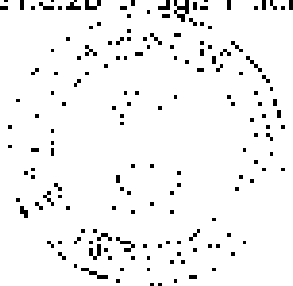
proceedings and that usually would not ordinarily be imposed unless the appellant either acted deliberately in defiance of law or was guilty of conduct contemptuous or dishonest or acted unconscionably disregarding his obligations.

4. Personal hearing in the matter was attended by Shri Dhanraj Ranavde, Chartered Accountant and Jitesh Pandya, Manager (Finance), who reiterated the grounds of appeal and submitted that this is 3rd SCN for period from July 2012 to March 2015 already covered by earlier two SCNs bearing dated 15.3.2017, one issued by the Joint Commissioner and another by the Assistant Commissioner, that services of transportation of empty containers from port to DFB and vice versa are GTA only as decided by the Hon'ble CESTAT in the case of Drolio Electronics Pvt. Ltd. reported as 2016-TICL-442 CESTAT CCL and hence, not payable by them and payable by service receivers; that they have submitted sample invoices indicating mention of service tax on GTA consignments and not by service provider that service receivers have already paid service tax and hence, department, can't ask service tax again; that they have been audited every year of dispute and audit records also attached under Appeal Memo and hence, suppression of facts can't be alleged as held in the case of Bharati Tele-ventures Limited reported as 2014 (33) STR 35 (Tri. - Mumbai) ; Para 5.13; that penalty under Section 75 of the Act is not applicable in this case.

FINDINGS:

5. I have carefully gone through the facts of the case the impugned order grounds of appeal and the submissions made during personal hearing. I find that the appellant has already deposited Rs. 1,49,825/- equivalent to 7.0% of service tax outlined vide impugned order and thus has complied with the requirement of Section 35(F) of the Central Excise Act, 1944, as made applicable in service tax matters vide Section 82 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 movement of empty containers from port to DFB and vice versa provided by the appellant is correct or not.

6. The appellant has strongly contended that multiple SCNs have been issued demanding service tax on transportation income earned by the appellant. I find that SCN dated 10.3.2017 issued by the Assistant Commissioner for the period from 2011-12 to 2014-15 demanding service tax on transportation income and surprisingly another SCN has also been issued to the appellant on same date i.e. 10.3.2017 by the Joint Commissioner demanding reversal of benefit credit availed on common input services considering transportation income as exempted from payment of service tax and the impugned SCN dated 31.3.2017 was issued by C&CEI for the period from 1.7.2012 to 31.3.2015 again demanding service tax on transportation income of the appellant.



(Signature)

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Hence, I find that the stance of the department was not clear to consider the income earned by the appellant towards transportation/movement of empty containers is liable to service tax under GTA or under Cargo Handling Service or otherwise and hence, I find that the argument of the appellant to this extent is correct.

7. The facts of the case indicate that the appellant has undertaken the activity of bringing empty containers from port to their CFS and vice-versa and the appellant has provided handling services like T/O or T/U off and stowing them in their empty container yard and these facts have not been disputed. It is also not disputed that the appellant has issued bills to the container lines, bifurcating the same in two parts – transportation charges and handling charges but they have not discharged service tax on transportation charges on the ground that it is a GTA service whereas, for handling charges, they have paid service tax. I find that the definition of Cargo Handling Service, as provided under Section 65(26) of the Finance Act, 1994, as it stood during relevant time, reads as under:-

(26) ‘‘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-containerized freight services provided by a container freight terminal or any other freight terminal, for all modes of transport and cargo handling services 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 casing, unloading, unpacking, but does not include handling of export cargo or passenger baggage or mere transportation of goods.

(Emphasis supplied)

7.1 Thus, for classifying any activity/service as Cargo Handling Service, the presence of cargo is a must. I find that the transportation of empty containers cannot be considered as cargo handling service. In view of the fact that there is no cargo and in view of Para 11 of Annexure - I to Board's Circular No. 8/1/1/2002 TRU dated 01.06.2002, which specifically reads as under:-

14. CFSs also sometimes undertake stowing/washing/repairing and handling of empty containers for the shipping lines for which they charge the stowing fees. Empty containers cannot be treated as cargo. Therefore, its activities mentioned above do not come within the purview of cargo handling services.

(Emphasis supplied)

7.2 In view of above, transportation of empty containers from port to CFS and vice-versa can't be called Cargo Handling Service and no service tax is payable on such transportation charges under Cargo Handling Service as held in Order in Appeal No. 6CH-EXCUS-000-AP.7-195-TO-194-20-7-18 dated: 5.3.2018 in the case of Siddhi Vinayak Logistics.

(Signature)

8. The impugned order 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 conducted business to qualify to be a GTA. Any other document which contains the details as required in a consignment note can also qualify as a valid document and since, the appellant has not issued consignment notes they are not GTA. *Consignment note* would like to examine the definition of 'Goods Transport Agency' as provided under Section 5b(53b) of the Act and Rule 4B of Service Tax Rules, 1994 which reads as under:

(53b) '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;

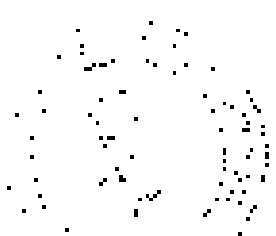
RULE 4B - Issue of consignment note. - Any goods transport agency which provides service in relation to transport of goods by road in a goods carriage shall issue a consignment note to the recipient of Service.

Provided that where any taxable service in relation to transport of goods by road in a goods carriage is wholly exempted under section 63 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. In view of above, 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 those details and therefore, the service of transportation of empty containers is nothing but a GTA service. I also find that CESTAT New Delhi in the case of Diellia Electronics Pvt. Ltd reported as 2015 (43) STR 361 (Trib. - 03) has referred CBEC Circular No 104/27-2008-ST, dated 08-2008 to treat the transportation service together with



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loading and unloading as GTA service even when the service provider had not issued consignment note. 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: -

(a) person liable for paying service tax -

(i)

(ii)

.....

.....

.....

(b) in relation to service provided or supposed 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, 1946 (62 of 1946);

(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 state sales tax under;

(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 the agent for the transportation of such goods by road by a goods transport agency.

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)

3.2 I 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)(a) of Service Tax Rules, 1994 and Notification No. 33/2012-ST dated 25.8.2012. I also find that liability of payment of service tax in respect of GTA service was on recipient of the service even prior to 17/2/12 and also from 17/2/12 onwards. Therefore, I find that the appellant is not liable to pay service tax on transportation of empty containers from part to part and vice versa and accordingly, demand of service tax contained under the impugned order is liable to be set aside and deleted.

(Emphasis supplied)

8.3 Since no service tax is payable by the appellant, I set aside the order for recovery of interest under Section 73 of the Act, as well as for imposing penalty under Section 78 of the Act.


9. In view of above, I set aside the impugned order and allow this appeal.

१.१. अपीलकर्ता द्वारा लगे की गई अर्जी का निवेदन अर्थात् अर्जी को ठीक माना है।

§ 1. The appeal filed by the appellant is disposed of in above terms.

आदेश।

आदेश।


(कुमार कृष्ण)
पञ्चम आयुक्त (अपील)

By Speed Post

To,

M/s. Transward Technicals Private Limited
Bharat CFS Zone-1
WPSF7, Murda

गैरत ट्रांसवर्ड टेक्निकल प्राइवेट लिमिटेड,
भारत सी एफ़े ज़ोन-1,
एमपीएसएफ़े-7, मुंदरा

प्रति:

(1) स्थान मुख्य आयुक्त, केन्द्रीय वस्तु एवं सेवा कर एवं केन्द्रीय आरक्षक शुल्क, अहमदाबाद क्षेत्र, अहमदाबाद को जमावारी हेतु।

(2) आयुक्त, केन्द्रीय वस्तु एवं सेवा कर एवं केन्द्रीय आरक्षक शुल्क, गदिमपुत्रा को अ.उ.व.क. कार्यालय हेतु।

(3) सहायक आयुक्त, केन्द्रीय वस्तु एवं सेवा कर एवं केन्द्रीय आरक्षक शुल्क अहमदाबाद, मुंदरा को आवश्यक कार्रवाई हेतु।

कुमार कृष्ण

