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

REGIONAL BENCH- COURT NO.3

Service Tax Appeal No.11098 of 2017
Service Tax Misc. Application (CO) No.10400 of 2017

(Arising out of OIO-SUR-EXCUS-002-COM-063-064-16-17 dated 19/01/2017 passed by Commissioner of Central Excise, Customs and Service Tax-SURAT-II)

C.C.E. & S.T.-Surat-ii **.....Appellant**
New C.Ex Building...Opp. Gandhi Baug,
Chowk Bazar, Surat,
Gujarat-395001

VERSUS

Essar Bulk Terminal Limited **.....Respondent**
27th Km, Essar House, Surat-Hazira Road,
Hazira, SURAT, GUJARAT

With

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VERSUS

Essar Bulk Terminal Limited **.....Respondent**
27th Km, Essar House, Surat-Hazira Road,
Hazira, SURAT, GUJARAT

APPEARANCE:
Shri Ghanshyam Soni, Joint Commissioner for the Appellant
Shri Vishal Agrawal, Shri Akshit Malhotra & Ms. Dimple Gohil, Advocates for the Respondent

CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
HON'BLE MEMBER (TECHNICAL), MR. RAJU

Final Order No. A/ 11044-11045 /2022

DATE OF HEARING: 07.06.2022
DATE OF DECISION: 29.08.2022

RAMESH NAIR

These appeals have been filed by Revenue against Order-In-Original No. SUR-EXCUS-002-COM-063 to 064-16-17 dated 19.01.2017 passed by the Commissioner, Central Excise & Service tax, Surat.

1.1 The brief facts of the case are that the respondent M/s Essar Bulk Terminal Ltd. (EBTL) are engaged in providing various taxable services under Section 69 of the finance Act 1994. During the course of Audit it was noticed that Respondent was also charging facility charges @0.18 USD on the basis of Gross Registered Tonnage of vessel per day at the birth in respect of other cargo, whereas, such "facility charges" @0.18 USD was not charged by Respondent in respect of vessels carrying the captive cargo of M/s Essar Steel (India) Ltd.(ESTIL), resulting in short payment of Service tax on such charges. It was alleged that payment of Service tax on Terminal Charges (Vessel Related Charges) without including the facility charges on Port Service provided to M/s ESTIL appeared to be not correct in accordance with the provisions of Section 67 of Finance Act, 1994 read with Rule 3 (a) of Service tax (Determination of Value) Rules, 2006, because it appeared that the value of taxable service ought to have been determined by the service provider to be equivalent to the gross amount charged by them to provide similar service to any other person in the ordinary course of trade; where the gross amount charged is not the sole consideration. Hence respondent ought to have included the value of Terminal Charges including 'facility charges' from M/s ESTIL at the prevailing value that was being charged by respondent for similar service to any other persons in terms of provisions of Rule 3(a) of the Service tax (Determination of Value) Rule, 2006. Therefore, Show Cause Notice dated 22.09.2015 was issued demanding Service tax along with interest and penalty. Further, a periodical show cause notice dtd. 17.03.2016 was also issued. After due process, both the show cause notices were adjudicated by the adjudicating authority vide impugned order dtd. 19.01.2017. He dropped the proceedings initiated against Respondent. Being aggrieved by the said Order-In-Original Revenue filed this appeal.

02. Shri Ghanshyam Soni, Learned Authorised Representative appearing on behalf of Revenue reiterating the grounds of appeal submits that Ld. Commissioner has not dealt-with the issue as to how the "facility charges" are held to have already been included in the uniform rate agreed between respondent and M/s ESTIL., especially when no evidence has been placed on record to support the case that such *"facility charges"* have already been included in the agreed uniform rate.

2.1 He also submits that the assessment to Service tax is based on the value of taxable services arrived in terms of Section 67 of the Finance Act , 1994. From the harmonious reading of the language used in Section 67 of the Act that, the terms "consideration" in the said section has not been used merely in terms of money alone, but also in other terms, in as much as, while clause (i) of sub-section (1) of Section 67, exclusively speaks of "consideration in money" the remaining two clauses viz. (ii) and (iii) of sub-section (1) of Section 67 envisages consideration in terms, other than in terms of money as well. He placed reliance on the following decisions.

(i) 2012(02) LCX 0012 – Commissioner of Customs, New Delhi Vs. Caryaire Equipment India Pvt. Ltd.

(ii) AIR 1981 SC 1274/(1981) 2 SCC 585- Sonia Bhatia Vs. State of UP.

2.2 He further argued that when examined in light of the facts prevailing in the instant case, though M/s ESTIL were only paying to Respondent the gross amounts as shown in their invoices without including the amount of "facility charges" which otherwise chargeable by respondent. M/s ESTIL have also passed on other valuable benefits – such as making available their own captive jetty to Respondent for operation, handling and maintenance- the quantum of which cannot be ascertained, hence the value in this case is to be arrived other than by resorting to clause (i) to Section 67(1) of the Act. Therefore, the findings of the adjudicating authority to the effect that in the instant case, the provisions of service is for a consideration wholly in money only and there is no evidence of additional consideration or additional money flow from M/s ESTIL to Respondent is totally erroneous and mis-placed.

03. Shri Vishal Agrawal, along with Shri Akshit Malhotra and Ms. Dimple Gohil appeared on behalf of respondent reiterates the findings of the impugned order. He also reiterates the submission made in their cross-objection. He submits that apart from the grounds on which the adjudicating authority dropped the demand raised in the show cause notices, the adjudicating authority ought to have dropped the demand on other ground also, which is submitted in the cross objection, the same is reproduced below: -

(a) The entire matter was purely revenue neutral as M/s ESTIL, its own group company, was entitled to the entire credit of service tax paid by it. In

view of this, no demand of service tax could have been raised as held by the Hon'ble Supreme court in following matters:-

- Commissioner Vs. Coca Cola – 2017 (213) ELT 490 (SC)
- Commissioner Vs. Textile Corporation – 2008(231) ELT 195 (SC)
- Nirlon Ltd. Vs. Commissioner – 2013(320)ELT 22 (SC)

(b) The demand is also not sustainable on limitation. All the relevant facts were always in the knowledge of the department as successive EA-2000 Audit of its records were conducted in March 2011, June & July 2012 wherein copies of the agreements between M/s ESTIL and the Respondent were duly furnished. In view of this the very basis on which suppression have been alleged, does not survive and the extended period could not be invoked. In view of this, the entire demand is time barred. He placed reliance on the decisions in the case of CCE Vs. Pragati Concrete Products – 2015-TIOL-223-SC-CX.

04. Heard both sides and perused the records. We find that the issue to be decided in this case is that when "facility charges" charged by the respondent from other customers but not from M/s ESTIL, the same is included in gross value of service provided by them to M/s ESTIL.

4.1 We noticed that the entire case of the department is on the presumption that the respondent have not recovered facility charges from M/s ESTIL whereas they recovered said charges in case of other customers. On the plain reading of Section 67 of the Finance Act, 1994, it is clear that only the actual consideration for the services provided by the service provider to the service recipient shall alone be chargeable to service tax unless there is any extra consideration flowing from service recipient to the service provider. In the present case, neither it is a case of extra consideration flowing from the service recipient to the service provider nor there is any proof of such extra consideration, therefore the gross amount charged by respondent to M/s ESTIL being sole consideration will alone be liable to Service tax and no any other notional amount will be added on assumption and presumption basis. In support of our this view, we place reliance on the decisions of Vimla Infrastructure India Pvt. Ltd. Vs. Commr. Of C.EX. Raipur [2020 (41) GSTL 354 (Tri. - Del.), wherein it is held in Paragraph 42 as under:-

> ***42.*** *It is difficult to accept the reasoning given by the Commissioner for not accepting the rate agreed under the work orders to conclude that the Appellant had not disclosed the correct consideration for the taxable service. In the first instance, this reasoning is incorrect and secondly even the summary contained in the chart shows that in some cases the Appellant charged lesser amount per metric ton from the non-members of the consortium as against the members of the consortium. This clearly shows that the prices are fixed on a variety of factors that have been indicated by Learned Counsel for the Appellant and no uniform rate can be applied in all cases. The Commissioner has even mentioned that there was no agreement between the Appellant and the independent members, which fact is apparently incorrect. Rules 3 and 4 of the 2006 Rules could also not have been invoked in the facts and circumstances of the case as they apply only when consideration is wholly or partly not in terms of money. This would be clear from a bare perusal of Rule 3 which is in regard to a case where value of consideration is not wholly or partly consisting of money or when such value is not ascertainable. The Commissioner was, therefore, not justified in holding that the Appellant had suppressed the taxable value in the ST-3 returns.*

4.2 Further we also find from the agreement entered into between Respondent and M/s ESTIL that it was evident that the charges for cargo handling and port services were negotiated rates, on the understanding that 25 million MT of cargo would be handled from 2012-13 onwards and that there would be a 3% escalation on the agreed base rate. The agreement inter alia envisaged that M/s EBTIL would maintain a minimum of 10-meter draft, in the channel leading to the bulk terminal and that if that draft was increased from 10 to 12 meters it would be entitled to a fee escalation of Rs. 21/per MT in respect of the raw materials handled by the respondent. We agree with the contention of the respondent that alleged charges are already taken into consideration while arriving at combined uniform rate. In this context we would also refer to Explanation to clause 2 of Rule 5 of Service tax (Determination of Value) Rules, 2006 which clarifies that the value of taxable services is the total amount of consideration consisting of all components of the taxable service and it is immaterial that the details of individual components of the total consideration is indicated separately in the invoice. Therefore we don't find any force in the department's contention that respondent has not included the value of "facility charges" in the related taxable service charges. We therefore do not find any infirmity in the findings of Order under challenge. Accordingly the impugned order is sustainable on merit itself.

4.3 However the respondent in their cross objection also raised some additional ground on which also the demand is not sustainable. One of the ground of cross objection is time bar. We find that the respondent was registered with the service tax department and were regularly filing their statutory ST-3 returns wherein the respondent declared the value of services provided by them as per the invoice raised by them. The revenue was well aware about the overall activities of the respondent. Revenue's contention that the service charges towards facility charges was not declared in the ST-3 returns therefore there is suppression of fact. We find that the respondent have correctly made full and true disclosure of the value consideration of the service provided by them. There is no column in the ST-3 return form to declare any notional value which is not the part of the consideration. The contract was submitted to the department from time to time which contains all terms and condition of service provided by the respondent to the service recipient M/s ESTIL. Therefore there is absolutely no suppression of fact on the part of the respondent. Accordingly, we hold that the demand proposed in the show cause notice is not sustainable on limitation also.

05. As per our above discussion and finding, the impugned order is liable to be upheld and we do so. The appeals filed by the revenue are dismissed.

06. As per our discussion and findings, we hold that the impugned order does not suffer from any infirmity and therefore, is sustained. The Appeals of the revenue are dismissed accordingly. CO also stands disposed of.

(Pronounced in the open court on 29.08.2022)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

Mehul