

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

REGIONAL BENCH- COURT NO. 3

Service Tax Appeal No. 408 of 2012

(Arising out of OIO-15/COMMR/2012 Dated- 13/03/2012 passed by Commissioner of Central Excise, CUSTOMS (Adjudication)-RAJKOT)

Gautam Freight Private Limited

Maitri Bhavan, Plot No. 18, Sector-8, Gandhidham
Kutch, Gujarat

.....Appellant

VERSUS

C.C.E. & S.T.-Rajkot

Central Excise Bhavan,
Race Course Ring Road...Income Tax Office,
Rajkot, Gujarat-360001

.....Respondent

APPEARANCE:

Shri. R. Subramanya, Advocate for the Appellant

Shri Ghanasyam Soni, Joint Commissioner (AR) for the Respondent

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

Final Order No. A/ 11763 /2022

DATE OF HEARING:20.10.2022
DATE OF DECISION:28.11.2022

RAMESH NAIR

The following issues involved in the present case are as under:-

- (i) Whether the service provided by the appellant within the port area is classifiable under Port service or Cargo Handling Service during the relevant period?
- (ii) If the services are classifiable under "Cargo Handling Services" whether the appellant has correctly availed and utilized Cenvat Credit of service Tax on input services which has been provided for the services in relation to export Cargo?
- (iii) Whether present Show Cause Notice is time barred or otherwise:
- (iv) Whether the penalties under Section 76 of Finance Act, 1994 and Section 78 ibid are imposable?

2. The brief facts of the case are that the appellant are engaged in providing the export Cargo Handling Service during the period June-2005 to September-2005. They have paid the Service Tax on such services and have

availed Cenvat credit of the Service Tax paid on relevant input services. The case of the department is that, as per the definition of Cargo Handling Service as defined as Clause (23) of Section 65 of the Finance Act, 1994. The Cargo Handling of export is excluded from the definition of Cargo Handling Service. Accordingly, it is the contention of the Revenue that since the appellant's output activity i.e. Cargo Handling of export cargo is not a taxable service, the appellant is not entitled for Cenvat credit of input service used for such non taxable service. Accordingly, the adjudicating authority has passed the following order:-

Order

"(1) confirm the demand of wrongly availed Cenvat Credit amounting to of Rs. 1,38,37,867/- (Rupees One Crore Thirty Eight Lakhs Thirty Seven Thousand Eight Hundred Sixty Seven Only) against M/s. Gautam Freight Private Limited, Plot No. 24-26, Sector 10-C, GIDC Area, Gandhidham (Kutch)-370201, under proviso to section 73 (1) of Finance Act, 1994 read with Rule 14 of Cenvat Credit Rules, 2004 and order for recover thereof from M/s. Gautam Freight Private Limited, Gandhidham.

(ii) I order for levy of interest under section 75 of Finance Act, 1994 on the amount of service tax, as confirmed against above named Noticee, M/s. Gautam Freight Private Limited, Gandhidham.

(iii) I impose penalty of Rs. 1,38,37,867/- (Rupees One Crore Thirty Eight Lakhs Thirty Seven Thousand Eight Hundred Sixty Seven Only) on the Noticee, M/s. Gautam Freight Private Limited, Gandhidham, under section 78 of Finance Act, 1994 read with Rule 15 of Cenvat Credit Rules, 2004. However, as provided in proviso to section 78 ibid, if the Noticee pays the amount of service tax confirmed along with interest thereon, within thirty days from the communication of this order, the amount of penalty shall be twenty-five per cent of the penalty imposed above. The benefit of reduced penalty shall be available only if the amount of penalty so determined has also been paid within thirty days from the receipt of this order.

(iv) I impose penalty on the Noticee, M/s. Gautam Freight Private Limited, Gandhidham, under section 76 of the Finance Act. 1994 and accordingly order that the Noticee shall pay in addition to service tax payable upto 09.05.2008, out of the amount of service tax confirmed at Sr. No. (1) above, and interest on that tax amount in accordance with the provisions of section 75 ibid, as ordered at Sr. No. (ii) above, penalty

(a) For the service tax due and confirmed for the period upto 17.04.2006 at the rate of Rs. 100/- for every day during which failure to pay such tax continues, provided CEIP the total amount of penalty shall not exceed the service tax due and confirmed for the period upto 17.04.2006, and

(b) For the service tax due and confirmed for the period from 18.4.2006 to 9.5.2008 at the rate of 2% of such service tax, per month, starting with the first day after the due date till the date of actual payment of the said outstanding amount of service tax due and confirmed for the period from 18.4.2006 to 9.5.2008, provided that the total amount of the penalty payable shall not exceed the service tax due and confirmed for the period from 18.4.2006 to 9.5.2008.

(c) For the service tax due and confirmed for the period from 10.5.2008 onwards, no penalty is imposed under section 76 of the Finance Act, 1994, as amended, in view of proviso V to Section 76 of the Finance Act, 1994, as amended.

Show Cause Notice No: [V.ST//AR.Gnd/236/2010](#) dated 14.10.2010 is decided in above terms."

Being aggrieved by the above Order-In-Original appellant filed the present appeal.

3. Shri. R Subramanya, learned Counsel appearing on behalf of the appellant submits that even though the export Cargo Handling was not taxable but the appellant have admittedly paid the service tax which is more than the amount of Cenvat Credit availed on input service attributed to such export Cargo Handling Service. Therefore, the Cenvat credit cannot be said to have been taken wrongly. In support of his submission, he placed reliance on this Tribunal's decision in the case of GATEWAY DISTRI PARKS LTD Vs. COMMISSIONER OF C. EX., RAIGAD-2019 (28) G.S.T.L. 135 (Tri.-Mumbai).

4. On the other hand, Shri. Ghanasym Soni, learned Joint Commissioner (Authorized Representative) appearing on behalf of the revenue reiterates the finding of impugned order. He submits that the Cenvat credit on the input service is allowed only when the same is used on output service. In the present case the Cargo Handling of export cargo does not fall under the taxable service, therefore, the condition of the Cenvat Credit Rules is not

complied with, accordingly, the appellant have wrongly availed the Cenvat Credit. In support, he placed reliance on the following Judgments:-

- GUJARAT NARMADA FERTILIZERS CO. LTD.-2009 (240) ELT 661 (S.C)
- KONKAN MARINE AGENCIES-2009 (13) STR 7 (Kar.)
- KONKAN MARINE AGENCIES-2007 (8) STR (Tri.- Bang.)

5. We have carefully considered the submission made by both the sides and perused the records. We find that the Cenvat Credit was denied by the adjudicating authority only on the ground that the same was utilized for payment of service tax on Cargo Handling Service in respect of export of Cargo which is excluded from the definition of Cargo Handling Service under Finance Act, 1994. Therefore, when the output service is not taxable Cenvat Credit was not admissible. We find that even though the export Cargo Handling Service is not taxable but the appellant have admittedly paid the service tax and the same was accepted by the department as no objection was raised regarding the payment of service tax. In this fact we are of the view that when the appellant has paid the service tax, the input service credit is admissible. It is the submission of the appellant that in each year of the period involved in the present case the appellant have paid more service tax on output service which is more as compared to the input credit taken during each year. The appellant has given the below chart in this regard:-

Period	Input Service Value	Input Credit taken	Output Service Value	Output Service Tax Paid	Page Nos
2005-06	19625235	20,01,811	55580803	56,69,247	1 to 5
2006-07	35131150	42,22,513	99262624	1,20,67,425	5 to 13
2007-08	43101802	53,26,561	174766445	2,15,80,430	13 to 22
2008-09	15661759	19,28,020	51184376	63,00,135	22 to 26
2009-10	3485079	3,58,962	13117428	13,51,095	26 to 27
Case Law relied upon - 2019 (28) GSTL 135 (Tri - Mumbai) - Gateway Distriparks Ltd vs CCE, Raigad					28 to 29

5.1 From the above chart it appears that the appellant have paid more amount of service tax as against the input tax credit, therefore, there is revenue neutral situation in the present case, however, this worksheet was given first time before this Tribunal which needs to be verified. As regard, the Cenvat credit in respect to the input service used in the non taxable output service on which the service tax paid this Tribunal has considered the issue in the below judgment:-

- Gateway Distriparks Ltd_Vs. CCE, Raigad-2019 (28) GSTL (135) (Tri.,- Mumbai)

6. We are of the view that the matter needs to be re considered in the light of the above observation as well as the judgment on the identical issue. Accordingly, we set aside the impugned order and remand the matter to the adjudicating authority for passing a fresh order. The appeal is allowed by way of remand to the adjudicating authority.

(Pronounced in the open court on 28.11.2022)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)