CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCPAL BENCH - COURT NO. IV

Service Tax Appeal No. 52279 of 2016

(Arising out of Order-in-Original No. DEL-SVTAX-001-COM-032-15-16 dated 04.04.2016 passed by the Commissioner of Service Tax, Delhi-I)

Commissioner of Service Tax, Delhi-I **Appellant**

VERSUS

M/s Export Inspection Agency, Delhi, **Respondent**
Thakkar Bapa Smarak Sadan,
2nd Floor, Dr. Ambedkar Marg,
New Delhi-110055

APPEARANCE:

Shri Harshvardhan, Authorized Representative for the Appellant
Shri Alok Yadav and Shri Nilotpal Shyam, Advocates for the Respondent

AND

Service Tax Appeal No. 52477 of 2016

(Arising out of Order-in-Original No. DEL-SVTAX-001-COM-032-20-15-16 dated 04.04.2016 passed by the Commissioner of Service Tax, Audit-I, New Delhi-110002)

M/s Export Inspection Agency, Delhi, **Appellant**
Thakkar Bapa Smarak Sadan,
2nd Floor, Dr. Ambedkar Marg,
New Delhi-110055

VERSUS

Commissioner of Service Tax, Audit-I **Respondent**
17-B IAEA House, M.G. Marg, I.P. Estate,
New Delhi-110002.

APPEARANCE:

Shri Alok Yadav and Shri Nilotpal Shyam, Advocates for the Appellant
Shri Harshvardhan, Authorized Representative for the Respondent

CORAM :
HON'BLE DR. RACHNA GUPTA, MEMBER (JUDICIAL)
HON'BLE MS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)

Date of Hearing:27.07.2023
Date of Decision: 05.10.2023

FINAL ORDER NOs. 51391-51392/2023

HEMAMBIKA R. PRIYA

The Department/appellant and the respondent have filed cross appeals against the order-in-original dated 04.04.2016 passed by the Commissioner of Service Tax, wherein the demand of Rs. 11,01,17,328/- + Rs. 4,40,00,00/- was confirmed and penalties of Rs. 21,00,000/- under Section 76 and Rs. 20,000/- under Section 77 was imposed. The period of dispute is between 2008-09 to 2012-13 and April 2013 to November 2013. Present in the common order for both the said appeals.

2. The brief facts of the case are that the appellant is a body created under Section 7 of Export (Quality Control and Inspection) Act, 1963 and works under the administrative and technical control of Export Inspection Council. The appellant is the field organisation of Export Council under Free Trade Agreement executed between India and foreign nation's products, eligible for Certificate of Origin required for preferential treatment in exporting country. This was subject to the said product being certified by certifying authority approved by both the countries. In pursuance to the said FTA, the appellant has been recognised as certificating authority for different food products. The Department alleged that the service provided by the appellant were exigible to service tax. Two show cause notices dated 17.04.2014 and 17.04.2015

were issued for the period 2008-09 to November 2013 wherein service tax of Rs. 11,01,17,328/- was demanded. The first appeal has been filed by the Department for failure of imposition of appropriate penalty by the Commissioner. The assessee who is referred as appellant herein after has filed the appeal against the demand and penalties imposed in the impugned order.

3. The learned counsel for the appellant submitted that the appellant performs sovereign function of the State and thus not liable to pay service tax for collecting fees in discharge of said function. He stated that the CBEC had clarified this issue by way of two circulars: Circular is 89/7/2006-ST dated 18th December 2006, wherein para 2 of the Circular, clearly states that the *activities performed by sovereign/public authorities under the provision of law are in the nature of statutory obligations which are to be fulfilled in accordance with law. The fee collected by them for performing such activities is in the nature of compulsory levy, as per the provisions of the relevant statute and it is deposited into the Government treasury. Such activity is purely in public interest and it is undertaken as mandatory and statutory function. These are not in the nature of service to any particular function.* The second Circular No. 96/7/2007-ST dated 23rd August 2007 was also similarly worded. Under Section 3 of the Export (Quality Control and Inspection) Act, 1963, the Central Government set up Export Inspection Council (EIC) to ensure sound development of export

trade of India through quality control and inspection. The learned counsel submitted that the appellant is under the administrative and technical control of EIC and is also the field organization of Export Inspection Council. Therefore, the appellant is nothing but a part of a statutory body i.e. EIC.

4. The learned counsel stated that Section 7 of the 1963 Act, makes it clear that Central Government may, by notification in the Official Gazette, establish or recognize, subject to such conditions, as it may deem fit, agencies for quality control or inspection or both. As per Section 10 of the 1963 Act, for discharging the function the Central Government may after the due appropriation made by the Parliament or law in this behalf, pay to the Council such sums of money as that Government considers necessary by way of grants, loan or otherwise. Section 17 empowers the Central Government to prescribe Fees chargeable for the purpose of examination and also the manner in which the account of the Council shall be maintained and audited. He further submitted that any rule made under the Act shall be laid before the Parliament. The Rules made under the Act clearly defines an agency, which according to the definition in Rule 2(b) means any agency for quality control or Inspection or both established or recognized by Central Government under Section 7 of the Act. It is submitted that all Export Inspection Agencies have been notified by the Central Government by way of issue of a Notification under Section 7 of the 1963 Act. Three such Notifications were issued in the years 1966, 1968 and

2003. It was also made clear by the EIC vide their letter dated 29.10.2013 addressed to all Commissioner of Customs that EIA are authorized to issue health certificates in respect of peanut and peanut product. They have reiterated that EIC/EIAs has been recognized as Competent Authority for issuance of health certificate for European Union and Malaysia as they have to implement the responsibilities assigned by Government of India. The learned counsel submitted that it would relevant to stated that the Fee collected by the agencies is fixed by the Government of India. He relied on the Public Notice No. 40/2009-2014 (RE-2010) dated 9th March, 2011, and other similar Notifications issued for other products, which includes specification of fees. All the Notifications mentioned that the fee to be paid is the fee for testing as fixed by the Central Government. Rule 14 specifies how and where the fund given to the Council is to be deposited, and Rule 16, provides that account is to be audited by C & AG, and Rule 17, provides that the Annual Report of the Council/Agencies shall be laid before the House of Parliament nine months from the closing of the accounting year. The learned counsel submitted that the Commissioner has concluded that EIA is an Agency recognised by the Government and not an Agency constituted by the Government. He submitted that this conclusion was wrong as is evident from the copies of the notifications issued by the Government of India. He further contended that the Commissioner has cited certain services which he has presumed

are sovereign functions and has concluded that, in those services, invoice is not issued. The learned counsel stated that the Commissioner appears to have not considered Circular No. 96/7/2007-ST wherein it is clearly mentioned that Regional Reference Standard Laboratory (RRSL) executes sovereign function and the fee charged according to provisions of the relevant statute is in the nature of compulsory levy and are deposited in Government account. Similarly, EIA also collects fee as per Government Notification as provided under the statute. The Commissioner had failed to examine whether the EIA was indeed performing a sovereign function. He submitted that CBEC had clarified that "exporters are already exempted from service tax in 'testing and analysis service' availed by them, through the 'Refund Route'. Any exporter who pays service tax on fee collected by EIC/EIA can claim refund of such service tax paid following the procedure prescribed in Notification No. 17/2009. Effectively, mean that if the recipient of a service is eligible to get refund of the service tax charged by the service provider, then there was no need to examine whether the provider was liable to pay service tax. The CBEC abdicated its responsibility to clarify whether service tax was indeed payable by the appellant in this case and whether the appellant were performing a sovereign function.

5. The learned Counsel further submitted that the amount demanded for the period 2008-09 to 2011-12 was barred by limitation as the show cause notice was issued on 17.04.2014,

much beyond the normal period of limitation. The sequence of events clearly shows that prior to the issue of clarification dated 19.03.2011 by the TRU holding the appellant liable to pay tax on test charges, indicates that there was no clarity on this issue prior to that date. In such circumstances, the appellant had the bona fide belief that they were not liable to pay tax on their income generated from these services based on the previous circulars of the Government. Therefore, the larger period is not liable to be invoked as the non-payment was not with the intention to evade tax. Further, for the same reason, no penalty could be imposed under Section 78 of the Finance Act, 1994. The same was also not imposable as per the provisions of Section 80 ibid. He relied on the Delhi High Court decision which held that the appellant is a statutory body empowered to inspect and issue certificates. Further, the Mumbai Bench of the Tribunal while dealing with the issue of levy of service tax on service charges collected by Maharashtra Industrial Development Corporation (MIDC) dismissed department's appeal observing that it is the statutory obligation of MIDC to provide and maintain amenities in industrial estates and thus, no service tax can be charged for discharging statutory function. The case of appellant is similar to MIDC as the appellant is also discharging statutory function wherein it is obliged to inspect and certify all the notified products for which statutory fees is being charged. Rule 2(d) of EIA Employees Rules, 1978 clearly defines Agency Employee as Agency

employee under deputation with the Central Government or local authority and vice versa. The learned counsel relied on the following decisions:

(i) Central GST, Delhi-III Vs Delhi International Airport Ltd. [2023 Live Law (SC) 457].

(ii) Commissioner of Central Excise, Nasik Vs Maharashtra Industrial Development Corporation [2018 (9) G.S.T.L. 372 (Bom.)].

6. Learned Authorised Representative submitted that under Section 3 of Export (Quality Control and Inspection), Act, the Central Government may by notification establish Export Inspection Council. Similarly, Export Inspection Agencies (EIA) are established or recognised under Section 7 of the said Act. As per Section 7(1) of the said Act, the Central Government may by notification establish or recognize such agencies.

7. The learned Authorised Representative relied on the Supreme Court's judgement in **Krishi Upaj Mandi Samiti, New Mandi Yard, Alwar – 2022 (2) TMI 1113 – Supreme Court** wherein it held as follows:

> **"9.** In the present case, it is the case onbehalf of the appellants that the activity of rent/lease/allotment of shop/land/platform/space is a statutory activity and the Market Committees are performing their statutory duties cast upon them under Section 9 of the Act, 1961 and therefore they are exempted from payment of service tax on such activities.
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> The aforesaid submission seems to be attractive but has no substance. Section 9(2) is an enabling provision and the words used is "market committee may". It is to be noted that in so far as sub-section (1) of Section 9 is concerned, the word used is "shall". Therefore, wherever the legislature intended that the particular activity is a mandatory statutory, the legislature has used the word "shall". Therefore, when under sub-section (2) of Section 9, the word used is "may", the activities mentioned in

> Section 9(2)(xvii) cannot be said to be mandatory statutory duty and/or activity. Under Section 9(2), it is not a mandatory statutory duty cast upon the Market Committees to allot/lease/rent the shop/platform/land/space to the traders. Hence, such an activity cannot be said to be a mandatory statutory activity as contended on behalf of the appellants. Even the fees which is collected is not deposited into the Government Treasury. It will go to the Market Committee Fund and will be used by the market committee(s). In the facts of the case on hand, such a fee collected cannot have the characteristics of the statutory levy/statutory fee. Thus, under the Act, 1961, it cannot be said to be a mandatory statutory obligation of the Market Committees to provide shop/land/platform on rent/lease. If the statute mandates that the Market Committees have to provide the land/shop/platform/space on rent/lease then and then only it can be said to be a mandatory statutory obligation otherwise it is only a discretionary function under the statute. If it is discretionary function, then, it cannot be said to be a mandatory statutory obligation/statutory activity. Hence, no exemption to pay service tax can be claimed."

8. The learned Authorised Representative submitted that in the governing section for EIA, the word used is 'may' and not 'shall'. Hence, it cannot be said that the appellant were discharging mandatory/statutory obligations.

9. The learned Authorised Representative submitted that Section 10(3) of Export (Quality Control and Inspection), Act lays down that the Council shall have its own fund. Rule 14 of Export (Quality Control and Inspection) Rules, 1964, lays down that it shall consist of income and receipts of the Council from other sources and all moneys belonging to the fund of the council shall be deposited in scheduled banks. He submitted that even after the deposit of money in the banks, the same does not cease to be the Council's fund. He further relied on para 10 of the Supreme Court's judgement (supra) wherein it was held that as long as the money is deposited in the Market

Committee Fund, it will continue to be the Market Committee Fund and could be utilized by the Market Committee for expanding/benefit of the Market Committee etc.

10. He further relied on Allahabad High Court's decision in the case of **Greater Noida Industrial Dev. Authority – 2015 (40) STR 95 (All.)** observed:

> **"30.** It is left open to the appellant to raise all such legal as well as factual issues in respect of the second show cause notice dated 17th October, 2012 during remand *de novo* proceedings.
>
> The plea of the appellant that it is performing statutory duties and is a creation of a statute and therefore cannot be subjected to Service Tax does not appeal to us. Suffice is to mention that the Finance Act, 1994 makes no distinction between a statutory body i.e. a juristic person and an individual.
>
> **31.** As far as the circular dated 23rd August, 2007 issued by the Government of India, which has been so heavily relied upon by the appellant is concerned, we may record that under Clause 032.01, it has been provided that the Prasar Bharati Corporation (Doordarshan and All India Radio), which has been constituted under the Prasar Bharati (Broadcasting Corporation of India) Act, 1990 is liable to pay Service Tax for broadcasting services.
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> **32.** Similarly under Clause 999.01 with regard to the sovereign/public duties/functions, it has been clarified that activities assigned to and performed by the sovereign/public authorities under the provisions of any law are statutory duties. The fee or amount collected as per the provisions of the relevant statute for performing such functions is in the nature of a compulsory levy and are deposited into the Government account. Such activities are purely in public interest and are undertaken as mandatory and statutory functions. These are not to be treated as services provided for a consideration. Therefore, such activities assigned to be performed by a sovereign/public authority under the provisions of any law, do not constitute taxable services. Any amount/fee collected in such cases are not to be treated as consideration for the purposes of levy of Service Tax.
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> **33.** However, if a sovereign/public authority provides a services, which is not in the nature of an statutory activity and the same is undertaken for a consideration (not a statutory fee), then in such cases, Service Tax would be leviable as long as the activity undertaken falls within the scope of a taxable service as defined."

11. The learned Authorised Representative concluded his arguments by stating that the adjudicating authority has rightly concluded that the appellant is not discharging sovereign functions. As regards the Department's appeal, the learned Authorised Representative submitted that the benefit of reduced penalty was not available as the show cause notice period is 2008-09 to 2012-13. The entire period is not after 8.4.2011, therefore, the adjudicating authority had erred in extending the benefit of 1st proviso to Section 78(1). For the subsequent period as well, the adjudicating authority had erred in imposing penalty under the amended provisions.

12. We have heard the learned counsel for the appellant and the learned authorised representative. The primary issue for consideration before us is whether the services provided by the appellant are not exigible to service tax as they are sovereign functions. At the outset, it is important to appreciate the nature of the appellant. As per the portal of Ministry of Commerce, it is seen that the appellant is an autonomous body, and its role is to ensure that products notified under the Export (Quality Control and Inspection) Act 1963 meet the requirements of the importing countries in respect of their quality and safety. Further, in order to consider the issue before us, it would be appropriate to understand the meaning of 'Sovereign Function', in context of Service Tax. In this regard, we take note of the

Board's Circular No. 89/7/2006- ST Dated: 18th December, 2006 which is reproduced hereinafter:

"**Subject: Applicability of service tax on fee collected by Public Authorities while performing statutory functions /duties under the provisions of a law – regarding**

"A number of sovereign/public authorities (i.e. an agency constituted/set up by government) perform certain functions/ duties, which are statutory in nature. These functions are performed in terms of specific responsibility assigned to them under the law in force. For examples, the Regional Reference Standards Laboratories (RRSL) undertake verification, approval and calibration of weighing and measuring instruments; the Regional Transport Officer (RTO) issues fitness certificate to the vehicles; the Directorate of Boilers inspects and issues certificate for boilers; or Explosive Department inspects and issues certificate for petroleum storage tank, LPG/CNG tank in terms of provisions of the relevant laws. Fee as prescribed is charged and the same is ultimately deposited into the Government Treasury. A doubt has arisen whether such activities provided by a sovereign/public authority required to be provided under a statute can be considered as 'provision of service' for the purpose of levy of service tax.

2. The issue has been examined. The Board is of the view that the **activities performed by the sovereign/public authorities under the provision of law are in the nature of statutory obligations which are to be fulfilled in accordance with law. The fee collected by them for performing such activities is in the nature of compulsory levy as per the provisions of the relevant statute, and it is deposited into the Government treasury. Such activity is purely in public interest and it is undertaken as mandatory and statutory function.** These are not in the nature of service to any particular individual for any consideration. Therefore, such an activity performed by a sovereign/public authority under the provisions of law does not constitute provision of taxable service to a person and, therefore, no service tax is leviable on such activities.

3. However, if such authority performs a service, which is not in the nature of statutory activity and the same is undertaken for a consideration not in the nature of statutory fee/levy, then in such cases, service tax would be leviable, if the activity undertaken falls within the ambit of a taxable service."

13. In order to understand whether the appellant is discharging sovereign function, it is important to understand the nature of the appellant. It is accepted that the appellant is a body created under Section 7 of Export (Quality Control and Inspection) Act, 1963. The Export Inspection Agency is under the administrative and technical control of the Export Inspection Council. The appellant is the certifying authority for different food products which are to be exported to other countries as per the Free Trade Agreements executed between India and other nations. The appellant collects a fee for the purpose of examination, quality control or inspection. The structure of the fees for testing is fixed by Central Government. However, we note that as per section 10(3) of Export (Quality Control and Inspection) Act, 1963, the Council has its own fund which consist of income and receipts of the Council from other sources and all such money belonging to the fund of the Council is to be deposited in scheduled banks. From the above, we note that though the quantum of fee charged by the appellant is fixed by the Central Government, however the same is not deposited in the Government Treasury. Consequently, this clearly takes the functions of the appellant out of the ambit of para 2 of the aforesaid circular to para 3 of the said circular, which is 'provision of service'. Though the appellant's function is essential for inspection of export goods, but the usage of the term 'may' in Section 3 of the Export (Quality Control and Inspection) Act, 1963, for the establishment of the Export

Inspection Council, thus making it **NOT a mandatory statutory duty activity** of the Government. Consequently, it cannot be said that the appellant is discharging mandatory/statutory obligation.We find that our conclusion is buttressed by the judgement of the Supreme Court in the case of **Krishi Upaj Mandi Samiti, Alwar, Vs Commissioner of Central Excise and Service Tax, Alwar [2022 (2) TMI-1113- Supreme Court].** The relevant paras are reproduced hereinafter:

> "9. In the present case, it is the case on behalf of the appellants that the activity of rent/lease/allotment of shop/land/platform/space is a statutory activity and the market committees are performing their statutory duties cast upon them under section 9 of the act, 1961 and therefore their exempted from payment of service tax on such activities.
>
> The aforesaid submissions seems to be attractive but has no substance. Section 9(2) is an enabling provision in the words used is "market committee may". It is to be noted that in so far as subsection (1) of Section 9 is concerned, the word used is "shall". Therefore, wherever the legislature intended that the particular activities are mandatory statutory, the legislature has used the word "shall". Therefore, when under subsection (2) of section 9, the word used is "may", the activities mentioned in the subsection 9(2)(xvii) cannot be said to be mandatory statutory duty and/or activity. Under section 9(2), it is not mandatory statutory duty casted upon the market committees to a lot/lease/rent shop/platform/land/space to the traders. Hence such an activity cannot be said to be mandatory statutory activity as contended on behalf of the appellants. Even the fees which is collected is not deposited into the government treasury. It will go to the Market Committee Fund and will be used by the market committee(s). In the facts of the case on hand, such a fee collected cannot have the characteristics of the statutory levy/statutory fee. Thus, under the act, 1961, it cannot be said to be a mandatory statutory obligation of the market committees to provide shop/land/platform or rent/lease. If land/shop/platform/space on rent/lease then and then only it can be said to be mandatory statutory obligation otherwise it is only a discretionary function under the statute. If it is discretionary function, then, cannot be said to be a mandatory statutory obligation/statutory activity. Hence, no exemption for service tax and claimed."

14. We also note that the Allahabad High Court in the case of **Greater Noida Industrial Development Authority Vs. Commissioner of Customs, Central Excise - 2015 (40) STR (95) All.]** has held as follows:

> "30. It is left open to the appellant to raise all such legal as well as factual issues in respect of the second show cause notice dated 17th October, 2012 during remand *denovo* proceedings.
>
> The plea of the appellant that it is performing statutory duties and the creation of a statute and therefore cannot be subjected to service tax does not appeal to us. Suffice is to mention that the Finance Act, 1994 makes no distinction between a statutory body i.e., a juristic person and an individual.
>
> 31. As far as the circular dated 23rd August, 2007 issued by the Government of India, which has been so heavily relied upon by the appellant is concerned, we may record that under clause 032.01, it has been provided that the Prasar Bharati Corporation (Doordarshan and All India Radio), which has been constituted under the Prasar Bharti (Broadcasting Corporation of India) Act, 1990 is liable to pay service tax for broadcasting services.
>
> 32. Similarly under clause 999.01 with regard to sovereign/public duties/functions, it has been clarified that activities assigned to performed by the sovereign/public authorities under the provisions of any law or statutory duties. The fee or amount collected as per the provisions of the relevant statute for performing such functions is a nature of a compulsory levy and a deposited into the government account. Such activities are purely in public interest and undertaken is mandatory and statutory functions. These are not to be treated as services provided for a consideration. Therefore, such activities to be performed by a sovereign/public authority under the provisions of law does not constitute taxable services. Any amount/fee collected in such cases are not to be treated as consideration for the purposes of levy of service tax.
>
> 33. However, if a sovereign/public authority provides a service, which is not in the nature of statutory activity and the same is undertaken for a consideration (not a statutory levy), then in such cases, service tax would be leviable, as long as the activity undertaken falls within the scope of a taxable service as defined."

15. In view of the above discussions and decisions, we are unable to accept the contention of the appellant that the functions of Technical Inspection and Certification services

rendered by them is a statutory function. We have also considered the decisions quoted by the learned counsel for the appellant. As this issue was dealt in great detail by the Supreme Court in its decision in **Krishi Upaj Mandi Samiti** (supra) there cannot be any other varying interpretation taken subsequent to this judgment. Accordingly, we hold that the appellant is providing service any undertakes Technical, Inspection and Certification service and the same cannot take the garb of sovereign/statutory function.

16. We now address the second contention of the appellant that they are collecting the fee as mandated by the Central Government. We note that the learned AR has argued before us that Section 10(3) of Export (Quality Control and Inspection), Act lays down that the Council shall have its own fund. Rule 14 of Export (Quality Control and Inspection) Rules, 1964, lays down that it shall consist of income and receipts of the Council from other sources and all moneys belonging to the fund of the council shall be deposited in scheduled banks. The learned Authorised Representative submitted that even after the deposit of money in the banks, the same does not cease to be the Council's fund. We concur with this view. In this regard, we note that the Supreme Court in the judgement(supra)has gone on to define statutory levy and fees and held the following:

> "10. Next provision relied upon by the appellants – respective Market Committees is Rule 45 of the Rajasthan Agricultural Produce Market Rules, 1963(hereinafter referred to as 'Rules, 1963'), which reads as under: -

> "45. The Market Committee fund. -All money received by the Market Committee shall be credited to the fund called the Market Committee fund. Except where Government on application by the Market Committee or otherwise shall direct, all money paid into the Market Committee fund shall be credited at least once a week in full into Government treasury or sub-treasury or a bank duly approved for this purpose by the Director. All balance from the fund shall be kept in such treasury or sub treasury or bank and it shall not be withdrawn upon except in accordance with these rules."

> 10.1 Now, so far as the submission on behalf of the appellants relying upon Rule 45 of the Rules, 1963 that the fees, which is collected shall be deposited with the Government treasury and therefore also the Market Committees are exempted from payment of service tax is concerned, it is to be noted that on fair reading of Rule 45, the amount of fee so collected on such activities – when/lease shall not go to the Government. Rule 45 provides how the money received by the Market Committees shall be invested and/or deposited. It provides that all money received by the market committee shall be credited to the fund called the Market Committee fund. It further provides that all the money paid into the market committee fund shall be credited once a week in full into Government treasury or sub treasury, or a bank duly approved for this purpose by the Director and all balance from the fund shall be kept in such treasury or subtreasury or bank and it shall not be withdrawn except in accordance with the Rules. Therefore, it does not provide that on deposit of the money received by the market committees into the Government treasury/subtreasury or a bank duly approved, it ceases to be the Market Committee fund. It will continue to be the market committee fund. Even it is the case on behalf of the appellants that the fees collected, which will be deposited in the Market Committee fund will be utilised by the Market Committee for expanding/benefit of the Market Committee etc."

(Emphasis supplied)

17. In the instant case, we concur with the findings in the impugned order and the arguments of the learned Authorised Representative that as the money is not deposited in the Government Treasury, and is available with the appellant. The same is the consideration received by the appellant for providing the Consultancy Service which admittedly is not

transferred to the Government treasury. Hence this money cannot be equated with fee collected for discharging sovereign function.

18. The learned counsel for the appellant has submitted that the demand for the period 2008-09 to 2011-12 is barred by limitation, as the same was issued on 17.04.2014. The appellant has relied on the TRU's clarification dated 19/03/2011 wherein it was clarified that service tax was leviable on test charges. It has been contended before us that the issue of the aforesaid clarification clearly indicates that prior to this date, there was no clarity on the leviability of service tax on such test charges. He has further been submitted before us that being an agency constituted by the Central Government, there was no intention to evade payment of tax and for the same reason penalty under Section 78 and Section 80 of the Finance Act, 1994 was also not leviable. In this context, we note that the adjudicating authority has referred to the Notification No. 17/2009-ST dated 07.07.2009, which lays down the procedure for refund of service tax paid by exporters for availing various services during export of goods. In the Table of the said notification, serial number 4 refers to 'service provided by technical inspection and certification agency in relation to inspection and certification of export goods'. The intent of the wordings of the notification is clear- such services are liable to tax. The appellant is an autonomous body though under the Government of India but providing the services of technical

inspection and certification against consideration. Therefore, they were liable to tax, and this has been made quite clear in the said notification, which was issued in July, 2009. Consequently, the claim of the appellant that there was confusion with the regard to the applicability of service tax on test charges till the issuance of the clarification dated 19/03/2011 cannot be accepted.

19. It is brought on record that the appellant was apprised about the service tax liability on the impugned services through an office memorandum dated 19.03.2011. However, despite receiving the clarification, the appellant failed to get themselves registered and deposit their service tax liability to the government exchequer. To our minds, this establishes their intention to avoid payment of duty. We note that a plain reading of the provisions of Section 78 of the Finance Act, 1994, before the amendment makes it clear that the quantum of penalty to be imposed shall be equal 100% of the amount of such service tax. We note that the present demand covers the period from 2008–09 to 2013–14 (up to November, 2013) Therefore, the penalty for the period prior to 08.04.2011 should have been equal to 100% of the service tax not paid for this period. In view of the legal position prior to 08.04.2011, we hold that the Commissioner had erred in extending the benefit of reduced penalty under Section 78(1) for the period 2009-09 to 07.04.2011. However, the benefit of reduced penalty under the amended provision of section 78(1) was available to the appellant post 08.04.2011. In

view of the discussions above, we dismiss the appeal filed by the appellant (i.e. Appeal No. 52477 of 2016). We uphold the demand and the interest confirmed in the impugned order. However, in respect of the penalty under Section 78, we hold that the penalty for the period prior to 08.04.2011, shall be equal to the service tax not paid by the appellant. For the period post 08.04.2011, the benefit of the amended penal provision is extended to the appellant. The appeal filed by the department is allowed (i.e. Appeal No. 52279 of 2016). The impugned order is amended to the extent indicated above. The appeal filed by the appellant is dismissed.

(Pronounced in open Court on 05.10.2023)

(Dr. Rachna Gupta*)*
Member (Judicial)

(Hemambika R. Priya)
Member (Technical)

RM