

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

REGIONAL BENCH- COURT NO. 3

Service Tax Appeal No. 97 of 2012-DB

(Arising out of OIO-STC/50/COMMR/AHD/2011 Dated-21/11/2011 passed by Commissioner of Service Tax-SERVICE TAX - AHMEDABAD)

Adani Enterprise Limited

Adani House, Near Mithakali Six Road,
Navrangpura, Ahmedabad
Gujarat

.....Appellant

VERSUS

C.S.T-Service Tax-Ahmedabad

7 Th Floor, Central Excise Bhawan, Nr. Polytechnic
Central Excise Bhawan, Ambawadi,
Ahmedabad, Gujarat-380015

.....Respondent

APPEARANCE:

Shri V.S. Nankani, Sr. Adv. & Shri Hardik Modh, Advocate for the Appellant
Shri T.G. Rathod, Additional Commissioner (Authorized Representative) for the Respondent

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

Final Order No. A/ 10251 /2022

DATE OF HEARING: 23.11.2021
DATE OF DECISION: 15.03.2022

RAMESH NAIR

Briefly stated the facts of the case are that the appellants are engaged in providing various taxable services and having centralized Service tax registration. DGCEI gathered an intelligence that Appellant have not paid the service tax on the lighterage charges collected from their clients at Belekari Port situated in the state of Karnataka, despite the fact that such lighterage services are appropriately covered under Port Services which is a specified taxable service as per Section 65(105)(z1) of the Finance Act, 1994. Further investigation revealed that appellant had entered into 30 years lease agreement with the state of Karnataka for use of the port land for stacking Iron Ore/Manganese Ore and other bulk cargoes at Belekari Port for export /import of the goods. The nature of Belekari port is officially recognized as a Lighterage Port, where barges are used for carriage of cargo from the shore to the ship and vice versa. Records resumed from appellant revealed that they have charged the amount from their clients against the provision of

barging/lighterage services at Belekeri Port and not shown the same in ST-3 returns during period 2006-07 and 2007-08. However they shown the said charges during the period 2008-09 they declared such charges as exempted income received while rendering port services. After October 2009 they have obtained the service tax registration under the category of 'Transport of Goods by way of Waterway Services', as provided under Section 65(105)(zzzzl) of the Finance Act, 1994. They have been paying service tax on such lighterage charges by classifying the service as 'Transport of Goods by Waterways Service', whereas during the period from April 2008 to Sept. 2009 they were declaring the same as exempted income collected while rendering Port Services. After the detail investigation a show cause notice was issued to the appellant for recovery of Service tax and was alleged that the barging activities namely transportation of the exported cargo from shore to point of anchorage through barges undertaken by the appellant at the Belikeri port, were in the nature of the "Port Services" and not covered under the category of "Transportation of Coastal goods and Goods Transported through National Waterways and Inland water service". On adjudication, demand of service tax was confirmed under the category of Port Service. Hence Appellant filed the present appeal before this Tribunal.

2. Shri. V.S. Nankani, Sr. Advocate & Shri. Hardik Modh, Learned Counsel appearing on behalf of the appellant submits that the new entry viz. "Transport of Coastal Goods transported through National Water Ways and Inland Water Ways" was introduced from Finance Act 2009, w.e.f. 06.07.2009 without changing another category of taxable service viz. "Port Service" It is a settled position in law that when a new entry is brought under Service tax levy, the same activity cannot be subjected to levy under an existing entry is brought under Service tax levy, the same activity cannot be subjected to levy under an existing entry unless the new entry is carved out of the existing entry as held by Hon'ble Bombay High Court in the case of **Indian National Shipowner's Association Vs. UOI**, as reported in 2009 (!4) STR 289(Bom). Therefore, there cannot be any demand for Service tax on coastal transportation of goods prior to July, 2009. In this factual and legal scenario, the demand of Service tax under the category of "Port Service" has to be set aside especially when the activity is squarely covered under the entry of coastal transportation of goods.

3. He reproduced the definition of taxable service "Transport of Coastal Goods and Goods transported through National Water Ways and Inland water ways" as defined in Section 65(105)(zzzzl) and explanation of section 65(105)(zzzzl) meaning of "Inland Water" is the same as defined in clause (b) of section 2 of Inland Vessel Act 1917 and contended that in view of the above explanation, transportation of goods through barges from Balekari Port to Mother Vessel and vice versa is classifiable under the new entry covered by Section 65(105)(zzzzl). After introduction of the new entry category from the finance Act ,2009, the appellant charged the service tax on the barging activities and deposited the tax. The department has accepted the classification and didn't raise any objection. Hence it is not open for the department to take different view for the period prior thereto. He also submits that introduction of the new entry having been enacted covering the activity of transportation of goods by inland water, without any change in the entry of port service, it has to be interpreted that earlier entry did not cover the taxable entry introduced subsequently. He placed reliance on the decision of **Jet Airway India Ltd. Vs CCE** reported in 2008(11)STR645(T). Reliance is placed upon following decision also:-

- a. Para -132 of Finance Minister's Budget Speech of 2009-2010 dtd. 06.07.2009
- b. United Shippers Ltd. Vs CCE, 2015 (37)STR 1043(Tri. Mumbai)
- c. M/s Essar Logistics Ltd. Vs. CCE 2016(2)TMI 222-CESTAT
- d. CST Vs. Nova Enterprises 2015(38)STR1012 (Tri. Ahmd)
- e. Velji P. And Sons (Agencies) Pvt. Ltd. and ors. Vs CCE 2007(8)STR 236
- f. HML Agencies (p) Ltd Vs CCE – 2018(12)GSTL 46
- g. H.K. Dave Ltd Vs CCE 2008 (12)STR561 (Tri.-Ahmd.)
- h. Shreej Shipping Vs. CST 2014(36)STR 569 (Tri. Ahmd)
- i. South India Corporation (Agencies) Ltd. Vs CCE 2010 (17)STR 170 (Tri. Bang)

XXXXXXXXXX

4. He also submits that appellant was not authorized to provide "Port Service". They had entered into agreement with government of Karnataka represented by Director of port and Inland Water Transport in Karnataka for a lease to use the port land for stocking Iron Ore/ manganese ore and other bulk cargoes at belekeri port for export of the goods for which the government accorded necessary sanction. In terms of the schedule, permission was restricted to area mentioned in the schedule appended to the agreement and activity of stevedore. The meaning of the expression "authorization of port"

appearing in the definition under Section 65(82) of the Act is one who has been authorized to operate / handle the port, operation in terms of the Major Port Trusts Act or the Indian Ports Act. In the present case they neither been authorized to operate the port nor they have carried out any activity on behalf of the port which were supposed to be carried out by the Port and therefore, the services provided by the Appellant will not fall under the taxable category of "Port Service" The Levy under the Port Service can attract only of those services which were rendered by a port or other port or any other person authorized by such port in relation to vessel or goods. He placed reliance on the case of **Velji P. and Sons (Agencies) Pvt. Ltd. and Ors Vs. CCE** , 2007(8)STR236 [Affirmed by the Hon'ble Supreme Court in 2009(13)STR J31(SC)] and reliance is also placed upon the decision in the case of **Ashok International Vs CCE** 2016 [43] STR 430.

5. He submits that the freight amount charged for barge transportation of the goods from the mother vessel to the jetty forms parts of the assessable value of the imported goods for the purpose of computation of Customs Duty in terms of Section 14 of the Customs Act, 1962 read with Customs Valuation (Determination of Price of Imported Goods) Rules, 2007 and the same cannot be levied for Service tax under the category of "Port Service". In the present case, the Appellant have already charged the freight amount to their customers which forms part of assessable value and therefore, the Service tax is not chargeable on the amount which the customs duty has already been paid. Reliance is placed upon following judgments:

- (I) Ispat Industries Ltd. Vs. Commissioner of Customs, Mumbai – 2006(202)ELT 561 (SC) [Affirmed in 2010(255) ELT A122 (SC)
- (ii) South India Corporation (Agencies) Ltd. Vs. Collector of Customs and Ors. [1987(30)ELT 100 (Cal.)
- (iii) United Shippers Ltd. Vs. CCE , 2015(37)STR 1043 (Tri. Mumbai) [Affirmed in 2015 (39) STR J369 (S.C.)]

6. He further submits that the contract has to be interpreted separately as per the tenor of the contract as the Appellant has charged separately for "Cargo Handling Service" and for the "Transportation activity" and therefore, the Service tax was leviable only on the amount charged towards cargo handling service. He placed reliance on the following decisions

- (i) Hira Industries Ltd. Vs. Commissioner of Central Excise – 2012 (28) STR 23.

- (ii) Mosaic India Pvt. Ltd. Vs CCE, 2005 (38) STR 577 (Tri. -Ahmd.)
- (iii) Essar Project (India) Ltd., Vs CCE & ST 2014(33)STR 696 (Tri. Ahmd)
- (iv) UOI Vs Mahindra & Mahindra Ltd., 1995 (76)ELT 481(S.C.)

7. He also submits that extended period of limitation is not invocable in the present facts as the Show Cause Notice was issued on 05.01.2011 for the disputed period from November 2006 to May 2009. The Audit team of Service tax department audited the books of accounts maintained by the Appellant and raised the objection regarding applicability of Service tax on barging activity. The Appellant vide letter dtd. 14.12.2009 and 21.01.2010 clarified to the department that service in question was not liable to be taxed under the category of "Port Service ". The Audit party accepted the clarification and did not raise any objection. All the relevant facts related to the present case were in knowledge of the revenue at the time when the audit was initiated since 21.07.2009 by Service tax department. The Final Audit report was kept in abeyance by the Service tax Department when investigation was initiated by DGCEI on 21.10.2010. The said facts clearly reveals that the revenue was well aware of the activities being undertaken by the Appellant from 21.07.2009 and therefore, larger period of limitation ought not to have been invoked. The Appellant has acted on the basis of Circular No. B11/1/2002-TRU dtd. 01.08.2002 issued by CBEC and therefore, the question of suppressing the fact with an intent to evade tax does not arise. Allegation of suppression of facts with intent to evade Service tax not sustainable in the present matter and demand is barred by limitation. He placed reliance on the following decisions:-

- (i) Roma Henny Security Service Pvt. Ltd. Vs CST- 2017-TIOL-2196-HC-DEL-ST.
- (ii) Ruchi Infotech Ltd. Vs. CCE [(2015) 37 STR 131 (Tri. Del)]
- (iii) Simplex Infrastructures Ltd. Vs CCE 2016-TIOL-779-HC-KOL-ST
- (iv) Commissioner Vs. Meghmani Dyes & Intermediate Ltd. 2013(288)ELT 514 (Guj.)
- (v) Pahwa Chemicals Pvt. Ltd. Vs CCE Delhi 2005(189) ELT 257 (SC)
- (vi) Commissioner of C.EX Ahmedabad Vs Satia & Company – 2010 (262) ELT 530 (Tri. Ahmd.)
- (vii) H .Kumar Gadecha Vs. Commissioner of Customs, Ahmedabad – 2009 (243) ELT 248 (Tri. Ahmd.)
- (viii) Uniworth Textiles Ltd. Vs. Raipur – 2013(288) ELT 161 (S.C.)

(ix) United Shippers Ltd. Vs. Commissioner of Central Excise, Thane -II 2015 (37) STR 1043 (Tri. -Mumbai) – Affirmed by Hon’ble Supreme Court in case of Commissioner Vs United Shippers Ltd. – 2015 (39)STR J369 (SC)

(x) Coastal Energy Pvt. Ltd. Vs. Commissioner of Cus., C.Ex & S.Tax , Guntur-2014 (310) ELT (97) (Tri. Bang.) – Affirmed by Hon’ble Supreme Court in case of Commissioner Vs Coastal Energy Pvt. Ltd. – 2016 (340) ELT A 204 (S.C.)

8. He argued that issue is an interpretation issue and the bonafide interpretation of the Appellant was that they were not liable to pay Service tax, based on a strict reading of the provisions existing during the relevant point in time. It is settled principle in law that no penalty can be imposed where there is an interpretational issue / ambiguity in the relevant provisions. Reliance is placed upon the following decisions:

- (i) Tata Consultancy Services Vs Commissioner 2018 (18) GSTL 478
- (ii) Hindalco Industries Ltd. Vs. CCE 2018 (10) TMI 392 – Del.
- (iii) Suntex Business Solutions Pvt. Ltd. Vs CCE [2017 (51) STR 446 (Tri. Bang.)
- (iv) Uni Ads Ltd Vs CCE 2016 (42) STR 547 (Tri. Bang.)

9. Shri. T G Rathod, Learned Additional Commissioner (Authorized Representative) appearing on behalf of revenue opposed the contention of the Ld. Counsel and reiterated the findings of impugned orders. He also placed reliance on the following decisions:-

- (i) 2019 (27) GSTL 363 (Tri. -Hyd) – Cairn Energy India Pvt. Ltd. Vs CCE, Visakhapatnam -II
- (ii) 2020 (32) GSTL J 40 (SC) – Carin Energy India Pvt. Ltd. Vs Commissioner
- (iii) 2011 (22) STR 305 (Tri. LB) – Western Agencies Pvt. Ltd. Vs CCE Chennai
- (iv) 2015 (38) STRJ 123 (Mad) – Chidambaram Shipcare Pvt. Ltd. Vs CESTAT
- (v) 2004 (174) ELT 344 (Tri. -Mum) – Reliance Industries Ltd. Vs CC (Prev) Ahmedabad

10. We have carefully gone through the facts on records as well as the submission of the Appellant and the Revenue in details alongwith the case law

cited. The issue to be decided in the present appeal is whether the barge activity carried out by the Appellant for transportation of goods from port to Mother Vessel through barges and barging/ lighterage charges recovered from customers is taxable under port services or otherwise i.e service of water transportation The period of dispute is from November 2006 to May 2009.

11. The appellant has been providing Cargo Handling Service, transportation of goods by Water, clearing and forwarding, etc., in the port area. Belkari Port does not have sufficient draft for berthing of vessels and the cargo is required to be unloaded from the large vessel onto smaller barges and brought to the Jetty from the anchorage point of the vessels. The Appellant collected barging charges/ lighterage Charges from customers. The said activity which were being provided by the appellant in the port area and barging charges/ lighterage charges collected by the appellant have been held to be under the classification of 'port services' in terms of Section 65(82) of Finance Act, 1994 by the impugned order.

12. In this regard, it is necessary to go through the definition of "**Port Service**" provided in Finance Act. We find that, the definition of 'port services' before the amendment made by the Finance Act, 2010 (14 of 2010), dated 8-5-2010 (made effective from 1-7-2010) as given in the Section 65(82) was as under :

"Port Service" means any service rendered by a port or other port or any person authorised by such port or other port, in any manner, in relation to a vessel or goods".

After the said amendment made by the Finance Act, 2010, dated 8-5-2010 (made effective from 1-7-2010), the definition of 'port service' in Section 65(82) is :

"Port Service" means any service rendered within a port or other port, in any manner."

From above definitions of 'Port Service' before the amendment of 1-7-2010 and after the said amendment of 1-7-2010, We find that prior to 1-7-2010 focus/emphasis was on any service rendered by a port or

other port or any person authorised by said port or other port. But in the definition of 'Port Service' after the amendment of 1-7-2010, the focus/emphasis is on any service rendered within a port or other port. Thus prior to the amendment of 1-7-2010 each and every service rendered within a port or other port cannot be covered by the category of 'Port Service' unless it was specially rendered by such Port (a port or other port) or by a person 'authorised by such Port or other Port.

13. In this context, reference is made to CESTAT, Ahmedabad's decision in the case of ***Shreeji Shipping v. CCE, Rajkot*** : [2014 \(36\) S.T.R. 569 \(Tri.-Ahmd.\)](#). In the said decision it was held that the services rendered by anyone within the port would be taxed under the head of 'port services' only w.e.f. 1-7-2010, when there was amendment to the 'port services'.

In CESTAT, Bangalore's decision in case of *Aspwinwall & Co. Ltd.* [2011 \(21\) S.T.R. 257](#) (supra). CESTAT, Bangalore also quoted the decision of *Velji P. & Sons (Agencies) P. Ltd.* (supra). The relevant Paras from the said decision are reproduced below:

"16.1 In the case of Velji P. & Sons, the facts were: the assessee therein was rendering the services of hiring of the barges, cranes, forklifts and they were licenced by Gujarat Pipavav Port Limited to carry out such activities. Revenue was of the view that the services rendered by the appellant would relate to goods hiring vessel and hence would fall under the category of port services as defined under Section 65(42) of the Finance Act, 1994. While allowing the appeal filed by the assessee against an order holding that the services rendered by the assessee would fall under 'Port services', the Tribunal held as under :-

"6. After carefully considering the submissions made by both the sides, we find that the issue as to what service would get covered by the port services, scope of the "port service" was examined at length by the Tribunal in the case of Homa Engineering Works : [2006 \(1\) S.T.R. 19](#) (Tribunal) (citation supplied) referred supra. In para 8 of the said judgment, it has been observed that taxable services under the net of "Port Service" means any service rendered by a port or any person authorized by such port. The services being provided by the appellant are handling, stevedoring,

loading, unloading, tug hire and labour arrangement. Admittedly, such services are not required to be provided by the Port under the Major Port Trusts Act, 1963. A perusal of the Section 35 of the said Act, as reproduced in the case of *Homa Engineering Works*, clearly shows that power of the Board to execute the works and provide appliances do not include the above activities being undertaken by the appellant. As such, it cannot be said that the services being provided by the appellant were covered by the Port Services. Further, the Tribunal in the above case has observed that the authorization from the Port must be in respect of the services which the port itself is required to provide as such authorization would make an assessee step into shoes of the Port. Having already observed that such services were not required by the port, any authorization by the Port cannot convert the services into port services (emphasis supplied). In any case, we find that there is no authorization by the Port to the appellant to conduct the services on his behalf. Licenses issued by the Port authorities cannot be considered as authorization. Such licenses are issued by the Port authorities to all the persons working in the Port to ensure the safety and security of the Port Area and does not confer any power or authority of the Port on the person so issued with the licence. If the licences issued by the Port are taken as authorization, then such licences issued to Stevedores, ship chandlers, labourers, repairers of the vessels etc. would also become authorized persons by the Port to render services as Port services.

7. We further note that Section 42 of the Major Port Trusts Act provides for authorization by the Board for various services specified by that Port in the Official Gazette. For such authorization if effective, the same should have prior approval of the Central Government and the person so authorized cannot charge any excess payments than the amount specified in the tariff authority for Major Ports, by Notification in the Official Gazette. The licenses issued to the appellant are not governed by the statutory requirement of Section 42 inasmuch as the appellant is free to charge any amount from its customers for the services being provided

by it and such collections are not regulated by the Port. In this view of the matter, the licence given to the appellant cannot be held to an authorization (emphasis supplied).

8. Licence means "a permission given for specific purpose; the licence holder cannot be interpreted as having the powers or authority of the person issuing the licence, unless the licence specifically mentions about it. To take a simple analogy the person issued with driving licence, under no stretch of imagination, can be said to be functioning as Road Transport Authority. Authorization may be issued by way of licence, but not all licences are authorizations. Hence, the licences issued by Ports to various agencies (under Sec. 123 of MPTA) should not be confused with the authorization (may be by way of licence) issued under Section 42 of MPTA". The difference between authorization under Section 42 of MPTA and a licence issued under Sec. 123 is clearly understood if the functioning of private container terminals (e.g. P & O) terminal in Navaseva in Mumbai, Visakha Container Terminal at Visakhapatnam etc.) operating in various major ports and some of the berths operated by private persons on BOT basis, is examined. In all these cases where private parties are operating container terminals of berths, the functioning is independent of the ports which has given such authorization and in all such cases they are governed by the scale of rates fixed by TAMP (refer above) under Sec. 48 by way of notifications published in the Official Gazette. Take for instance in Visakhapatnam Port, the Visakha Container Terminal Pvt. Ltd. has been authorized by Visakhapatnam Port Trust to handle the container cargo that is coming to Visakhapatnam Port. Here the TAMP has fixed the scale of rates, under Sec. 48 of MPTA, by way of Notification published in the Gazettes of India (which is mandatory requirement under Sec. 42 of MPTA). The Stevedores and other port service providers, issued with licences by Ports, have not conferred with functional authority as seen in the case of private agencies maintaining container terminal or berths. This difference in functional freedom will bring out clearly the difference

between an authorization given under Sec. 42 of MPTA and a licence given under regulations under Sec. 123 of MPTA.

9. In the light of the foregoing discussions and applying the ratio of law declared by the Tribunal in the case of Homa Engineering Works, we are of firm view that activities undertaken by the appellant does not fall under the category of Port Services."

16.2 Revenue, aggrieved by such an order, preferred Civil Appeal Nos. 2429-2430 of 2008 along with an application for condonation of delay before the Hon'ble Supreme Court. Their lordships on 24-3-2008 passed the following order.

"Delay condoned.

The Tribunal, relying upon its own decision in the case of M/s. Homa Engineering Works v. CCE, Mumbai, has allowed the present appeal filed by the assessee.

Against the aforesaid case in M/s. Homa Engineering Works v. CCE, Mumbai, Revenue has not filed any appeal in this Court.

In view of this, this appeal is dismissed. No costs".

17. It can be seen from the above reproduced ratio of the judgment of the Tribunal in the case of Velji P. & Sons (Agencies) P. Ltd. that the facts, of that case and the facts in these cases before us are identical wherein various services were rendered by the appellants herein within the port area. Since the ratio of the judgment of the Velji P. & Sons is squarely applicable in this case, the judgment had also having been upheld by the Hon'ble Apex Court, the ratio is binding on us. It is also to be noted that the judgment of the Hon'ble Supreme Court in the case of Velji P. & Sons seems to have been accepted by the Government of India, which can be ascertained from the fact that the Government of India in Finance Act, 2010 expanded the scope of many existing services and one of them being 'Port services'. The expansion of definition of 'Port services', which has been brought into play by the Finance Act, 2010, would seek to include all services provided entirely within airport/port premises would fall under these services i.e. 'Port services' and there is no pre-condition of any authorisation from the port authority for taxing the services. It is also seen from the Circulars issued by the

Government of India, more specifically, Circular dated 26th February, 2010, the scope of modifications or expansion of definition of 'Port services' would come into effect from notified date i.e. after the enactment of the Finance Bill, 2010. The said Finance Bill was passed by the Parliament and the President gave assent to it on 8-5-2010. It would imply that the modified/alterd or expanded definition of 'Port services' would definitely encompass the services rendered by the appellants herein, but from 8-5-2010. It is an admitted fact that the relevant period in all these cases is prior to 8-5-2010. Hence, the contentions raised by the counsels for all the appellants that the Finance Act, 2010, has removed the lacuna in the earlier port services, is correct.

18. Hence, in view of the foregoing reasonings, on the merits of the case whether all the services rendered by the appellants would fall under the category of 'Port services' or not, we hold that the services rendered by the appellants would not fall under the category of 'Port services' (emphasis supplied). As the impugned orders are set aside on merits, there can be no case of penalty or interest in respect of this issue."

14. The Hon'ble Delhi High Court's decision in the case of **Airport Retail Pvt. Ltd. [2014 \(35\) S.T.R. 659 \(Del\)](#)** (supra) wherein it was held that the *respective services rendered within airport premises could not be charged service tax as 'airport services' because the amendment made by the Finance Act, 2010 is prospective and is effective after 1-7-2010 only*. The services rendered within the 'Port area', which is subject matter of the present appeal and services rendered within '*airport premises*' are comparable. Therefore, findings and the conclusion made by Hon'ble Delhi High Court in the said case are relevant and applicable *mutatis mutandis* to the present facts and subject matter of this appeal.
15. In view of above, in respect of the services rendered by the appellant during the relevant period, they cannot be made liable to pay service tax under the category of '**port services**'.
16. Further under the "Port Service", service provided by a Port, other port or **any person authorised by such port** is taxable. The Appellant liable to pay tax under above entry only if they had been authorized by

the Port to render services in relation to vessels or goods. In the present case department failed to produce any evidence by which it can be proved that the Appellant were authorized by the port for providing services at port. There is no authorization by the Port to the appellant to render the said services. We have gone through the lease agreement dtd. 03.04.2006 made between Appellant and Director of Port & Inland Water Transport, Government of Karnataka and observed that the said lease agreement is for use of Port Land for stacking and import /export of Iron Ore / Manganese Ore and other Bulk Cargoes at Belekeri Port. Further, permissions issued by the Port authorities to the appellant cannot be considered as authorization inasmuch as the said permission issued is basically to enter into the Port area. The appellant has merely arranged the facility on behalf of the importer or exporter on reimbursable basis and not on behalf of the Port. Therefore, in the present matter conclusion of Ld. Commissioner that Appellant have been authorised by the port Authorities for carrying lighterage of the cargo from the quay to the mother vessel by using barges and collect charges from customers, the said activity falls within the ambit of 'Port Service' is legally not correct and not sustainable.

17. W also find that the issue as to what service would get covered by the port services, scope of the "port service" was examined at length by the Tribunal in the case of **Homa Engineering Works referred** 2007 (7) S.T.R. 546 (Tri. - Mumbai) , supra. The extract of said judgment is as below :

7. After considering the submissions by both the sides, we find that the disputed issue revolves around the interpretation of "Port Services" as appearing in Section 65(67) of the Finance Act and the various provisions of The Major Port Trust Act, 1963 (38 of 1963), to which our attention has been drawn to by both the sides. As such, for ready reference, we would like to reproduce the relevant Section of both the Acts :-

"Finance Act, 1994

Section 5 - In this Chapter, unless the context otherwise requires,

-

(66) "port" has the meaning assigned to it clause (q) of Section 2 of the Major Port Trust Act, 1963 (38 of 1963);

(67) "port service" means any service rendered by a port or any person authorized by such port, in any manner, in relation to a vessel or goods;

(81) "ship" means a sea-going vessel and includes a sailing vessel;

(90) "taxable service" means any service provided, -

(zn) to any person, by a port or any person authorized by the port, in relation to port services, in any manner;

(99) "vessel" has the meanings assigned to it in Clause (z) of Section 2 of the Major Port Trust Act, 1963 (38 of 1963).

The Major Port Trusts Act, 1963 (38 of 1963)

Section 2 - Definitions - In this Act, unless the context otherwise requires, -

(q) "port" means any major port to which this Act applies within such limits as may, from time to time, be defined by the Central Government for the purposes of this Act by notification in the Official Gazette, and, until a notification is so issued, within such limits as may have been defined by the Central Government under the provisions of the Indian Ports Act;

(z) "vessel" includes anything made for the conveyance, mainly by water, of human beings or of goods and a caisson;

Section 35 - Power of Board to execute works and provide appliances

(1) A Board may execute such works within or without the limits of the port and provide such appliances as it may deem necessary or expedient.

(2) Such works and appliances may include -

(a) wharves, quays, docks, stages, jetties, piers and other works within the port or port approaches or on the foreshore of

the port or port approaches, with all such convenient arches, drains, landing places, stairs, fences, roads, railways, bridges, tunnels and approaches and buildings required for the residence of the employees of the Board as the Board may consider necessary;

(b) buses, railways, locomotives, rolling stock, sheds, hotels, warehouses and other accommodation for passengers air goods and other appliances for carrying passengers and for conveying, receiving and storing goods landed, or to be shipped or otherwise;

(c) moorings and cranes, scales and all other necessary means and appliances for loading and unloading vessels;

(d) reclaiming, excavating, enclosing and raising any part of the foreshore of the port or port approaches which may be necessary for the execution of the works authorized by this Act, or otherwise for the purposes of this Act;

(e) such breakwaters and other works as may be expedient for the protection of the port;

(f) dredgers and other machines for cleaning, deepening and improving any portion of the port or port approaches or of the foreshore of the port or port approaches;

(g) lighthouses, lightships, beacons, buoys, pilot boats and other appliances necessary for the safe navigation of the port and of the port approaches;

(h) vessels, tags or other boats for use within the limits of the port or beyond those limits, whether in territorial waters or otherwise, for the purpose of towing and rendering assistance to any vessel, whether entering or leaving the port or bound elsewhere, and for the purpose of saving or protecting life or property and for the purpose of landing, shipping or transshipping passengers or goods under Section 42;

(i) sinking of tube-wells, and equipment, maintenance and use of boats, barges and other appliances for the purpose of the supply of water at the port;

(j) engines and other appliances necessary for the extinguishing of fires;

(k) construction of models and plans for carrying out hydraulic studies;

(l) dry docks, slipways, boat basins and workshops to carry out repairs or overhauling of vessels, tugs, boats, machinery or other appliances.

Section 46 - Power of Board to undertake certain works

(1) A Board may undertake to carry out on behalf of any person any works or services or any class of works or services, on such terms and conditions as may be agreed upon between the Board and the person concerned.

(2) A Board may, if it considers it necessary or expedient in the public interest so to do, lend any of its vessels or appliances or the services of any of its employees to any person for such period not exceeding three months and on such terms and conditions as may be agreed upon between the Board and the person concerned.

Section 42 - Performance of service by Board or other person

(1) A Board shall have power to undertake the following services -

(a) landing, shipping or transshipping passengers and goods between vessels in the port and the wharves, piers, quays or docks belonging to or in the possession of the Board;

(b) receiving, removing, shifting, transporting, storing or delivering goods brought within the Board's premises;

(c) carrying passengers by rail or by other means within the limits of the port or port approaches, subject to such restrictions and conditions as the Central Government, may think fit to impose;

(d) receiving and delivering, transporting and booking and dispatching goods originating in the vessels in the port and

intended for carriage by the neighbouring railways, or vice versa, as a railway administration under the Indian Railways Act, 1890 (9 of 1890);

(e) piloting, hauling, mooring, remooring, hooking, or measuring of vessels or any other service in respect of vessels; and.

(f) developing and providing, subject to the previous approval of the Central Government, infrastructure facilities for ports.

(2) A Board may, if so requested by the owner, take charge of the goods for the purpose of performing the service or services and shall give a receipt in such form as the Board may specify.

(3) Notwithstanding anything contained in this Section, the Board may, with the previous sanction of the Central Government, authorize any person to perform any of the services mentioned in sub-section (1) on such terms and conditions as may be agreed upon.

(3A) Without prejudice to the provisions of sub-section (3), a Board may, with the previous approval of the Central Government, enter into any agreement or other arrangement, whether by way of partnership, joint venture or in any other manner with, any body corporate or any other person to perform any of the services and functions assigned to the Board under this Act on such terms and conditions as may be agreed upon.

(4) No person authorized under sub-section (3) shall charge or recover for such service any sum in excess of the amount specified by the Authority, by notification in the Official Gazette.

(5) Any such person shall, if so required by the owner, perform in respect of goods any of the said services and for that purpose take charge of the goods and give a receipt in such form as the Board may specify.

(6) The responsibility of any such person for the loss, destruction or deterioration of goods of which he has taken charge shall, subject to the other provisions of this Act, be that of a bailee under Section 151, 152 and 161 of the Indian Contract Act, 1872.

(7) *After any goods have been taken charge of and a receipt given for them under this section, no liability for any loss or damage which may occur to them shall attach to any person to whom a receipt has been given or to the master or owner of the vessel from which the goods have been landed or transhipped.*

Section 48 - Scales of rates for services performed by Board or other person -

(1) *The Authority shall from time to time, by notification in the Official Gazette, frame a scale of rates at which, and a statement of conditions under which, any of the services specified hereunder shall be performed by a Board or any other person authorized under section 42 at or in relation to the port or port approaches)*

-

(a) *transshipping of passengers or goods between vessels in the port or port approaches;*

(b) *landing and shipping of passengers or goods from or to such vessels to or from any wharf, quay, jetty, pier, dock, berth, mooring, stage or erection, land or building in the possession or occupation of the Board or at any place within the limits of the port or port approaches,*

(c) *carnage or portage of goods on any such place;*

(d) *wharfage, storage or demurrage of goods on any such place;*

(e) *any other service in respect of vessels, passengers or goods,*

(2) *Different scales and conditions may be framed for different classes of goods and vessels.*

Section 49A - Fees for pilotage and certain other services

(1) *Within any port, fees may be charged for pilotage, hauling, mooring, remooring, hooking, measuring and other services rendered to vessels, at such rates as the Authority may fix.*

(2) *The fees now chargeable for such services shall continue to be chargeable unless and until they are altered in exercise of the power conferred by sub-section (1).*

(3) *The Central Government may, in special cases, remit the whole or any portion of the fees chargeable under sub-section (1) or sub-section (2)".*

8. *After carefully going through the submissions made by both the sides and after going through the relevant provisions of law, as extracted above, we find that taxable services under the net of "Port Service" means any service rendered by a port or any person authorized by such port. As such, the services which can be taxed under the said category have to be either services rendered by port itself or any person authorized by such port. Admittedly, repair of the vessel is not being done by the port. The lower authority has held the appellant to be a person authorized by such port to undertake the activity of repairing of vessel*

20. We find that the decision cited by the revenue in the matter of **Cairn Energy India Pvt. Ltd. supra** is not applicable in the present matter. In the said case the assessee rendered pilotage service in a minor port based on the authorization granted by the Port Authority. Here Appellant was not authorized by the port for rendering the barging activity. In the present matter the case of **Shreeji Shipping supra** relied upon by Ld. Counsel is squarely applicable to the facts of the case in hand. In the said matter Tribunal held that "*in the absence of an authorization having been issued in favor of the Appellant under Section 32(3), they cannot be said to be rendering any service which has been authroized by the port*"

We further find that the decisions relied upon by the revenue 2011 (22) STR 305 (Tri. LB) – Western Agencies Pvt. Ltd. Vs CCE Chennai, 2015 (38) STRJ 123 (Mad) – Chidambaram Shipcare Pvt. Ltd. Vs CESTAT and 2004 (174) ELT 344 (Tri. -Mum) – Reliance Industries Ltd. Vs CC (Prev) Ahmedabad were rendered in the context of other issues and on different facts, hence not relevant in the present matter.

18. In the present matter, we also note that other than the barging charges, Appellant also collected charges from Customers for handling of the cargo and loading and unloading of cargo etc. and Appellant had paid the Service tax on the amount charged towards cargo handling activity. The Appellant have not paid the service tax on barging activity during the period November 2006 to May 2009. They also not charged any service tax to customers on receipts related to barging service. The new entry viz "Transport of Coastal Goods and Goods Transport through National Water ways and Inland Water Ways" was introduced from Finance Act 2009. Definition of Taxable Service as defined in Section 65(105)(zzzzl) reads as under

"to any person, by any other person, in relation to transport of —

- (i) coastal goods;*
- (ii) goods through national waterway; or*
- (iii) goods through inland water.*

Explanation. — *For the purposes of this sub-clause,—*

(a) "coastal goods" has the meaning assigned to it in clause (7) of section 2 of the Customs Act, 1962 (52 of 1962);

(b) "national waterway" has the meaning assigned to it in clause (h) of section 2 of the Inland Waterways Authority of India Act, 1985 (82 of 1985);

(c) "inland water" has the meaning assigned to it in clause (b) of section 2 of the Inland Vessels Act, 1917 (1 of 1917);

From the above provision it is clear that in so far as lighterage / barging (sea transportation) services are concerned, such services, if provided for carrying coastal goods or in respect of transportation through national waters or inland waters was for the first time brought into tax net w.e.f. 1-9-2009. The disputed activity of Appellant fell within the ambit of the aforesaid taxing entry w.e.f. 01.09.2009 only. The Appellant also paying service tax on their disputed activity w.e.f. 01.09.2009. Undisputedly, prior to 1-9-2009 transportation of goods by water way was not taxable and could not have been taxed under the head of port services. We agree with the argument of Ld. Counsel of Appellant that when a new entry is brought under the Service tax levy, the same activity cannot be subjected to levy under an existing entry unless the new entry is carved out the existing entry as held by the Hon'ble Bombay High Court in the case of **Indian National Shipowner's Association Vs UOI -2009(14)STR 289 (Bom)**. In the case of **Jet Airways India Ltd. Vs CCE – 2008(11) STR 645(T)** the Tribunal by relying the decision of **Board of Control for Cricket In**

India Vs Comm. Of Service tax Mumbai 2007 (7) S.T.R. 384 (Tri. - Mumbai) it was held that once the new entry is introduced with effect from the date without disturbing the earlier entry, it has to be interpreted that new entry is not covered by the previous entry. In view of legal position, the activity of Appellant not liable to Service tax under "Port Service". The activity of Appellant fall under the ambit of taxable service w.e.f 01.09.2009 only.

19. As regard the limitation issue argued by the Learned Counsel, We find that in the facts of the present that firstly the issue involved is of pure interpretation of legal provisions therefore, it cannot be said that the Appellant had any *mala fide* intentions and have suppressed any fact with intention to evade payment of service tax. It is also on record that the Appellant have represented the matter before Audit team and also before department during the investigation of case. This clearly shows that there is no suppression or willful misstatement on the part of the Appellant. The Appellant in the present matter also provided all the details /documents/ records related to the disputed activity before department. In this circumstances charge of suppression or willful misstatement do not survive against the Appellant. Thus extended period of limitation is also not invocable in the present matter and no penalty is payable.

20. In view of above discussion and finding, we hold that the impugned order is required to be set aside and we do so. The appeal is allowed with consequential reliefs, if any, in accordance with law.

(Pronounced in the open court on 15.03.2022)

**(RAMESH NAIR)
MEMBER (JUDICIAL)**

**(RAJU)
MEMBER (TECHNICAL)**