

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

REGIONAL BENCH-COURT NO. 3

Service Tax Appeal No. 12318 of 2019 - DB

(Arising out of OIA-KCH-EXCUS-000-APP-059-2019 dated 13/06/2019 passed by Commissioner (Appeals) Commissioner of Central Excise, Customs and Service Tax-RAJKOT)

Commissioner of C.E.-Kutch (gandhidham)

.....Appellant

CENTRAL EXCISE & SERVICE TAX COMMISSIONERATE,
CENTRAL EXCISE BHAVAN PLOT No. 82,
SECTOR 8, GANDHIDHAM(KUTCH)
GANDHIDHAM(KUTCH), Gujarat

VERSUS

Adani Wilmar Ltd

.....Respondent

Village-dhrub, Mundra
KUTCH, GUJARAT

APPEARANCE:

Shri Tara Prakash, Deputy Commissioner (AR) appeared for the Appellant
Shri S J Vyas, Advocate appeared for the Respondent

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

Final Order No. 12927/2024

DATE OF HEARING: 19.11.2024

DATE OF DECISION: 02.12.2024

RAMESH NAIR

Revenue filed this appeal against the order of the Commissioner (Appeals) where the adjudication order was set aside and the appeal of the respondent was allowed.

1.1 The brief facts of the case are that the respondent filed claim for refund of Service tax paid on Ocean Freight during May, 2017 and June 2017 on the ground that as an abundant precaution, they had paid Service tax on full value of transportation services without availing of exemption under Sr. No. 10 of Notification No. 26/2012-ST dtd. 20.06.2012. The lower adjudicating authority vide order dtd. 08.06.2018 rejected the refund claim filed by the respondent on ground of CBEC Circular No. 206/4/2017 dtd. 13.04.2017 stating the benefit of the exemption would not be available in case where the services are rendered by a foreign shipping line as much as the said shipping lines are not registered in India and do not follow the provisions of Cenvat Credit Rules, 2004. The respondent filed appeal before the Commissioner (Appeals). By the impugned order, Commissioner (Appeals) set aside the adjudication order and allow the appeal filed by respondent. Hence, Revenue filed this appeal.

2. Shri Tara Prakash Ld. Deputy Commissioner (AR) appearing on behalf of Revenue reiterates the grounds of appeal. He submits that appellate authority has not considered the Circular No. 206/4/2017-Service tax dtd. 13.04.2017 issued by the Board which specifically states that the condition for availing exemption under notification No. 26/2012-ST dtd. 20.06.2012 (Sl. No. 10) is fulfilled by the foreign shipping lines. Hence, benefit of conditional exemption will not be available to the assessee and service tax will be paid on full value of services. In view of above the assessee is not entitled for refund of service tax paid on gross value @70% of transportation services.

3. On the other hand, Shri S.J. Vyas Ld. Advocate appearing on behalf of respondent submits that after considering all the provisions Ld. Commissioner (Appeals), correctly allowed the refund claim. Circular No. 206/4/2017 dtd. 13.04.2017 being contrary to the judgment of the Apex court in the case of SRF has no existence in the eyes of law as such is not binding. He placed reliance on the following judgments:-

(i) M/s. Artex Textiles Pvt. Ltd. Vs. CC, New Delhi – 2017(9)TMI 1204-CESTAT New Delhi.

(ii) M/s SRF Ltd. Vs Commissioner of Customs- 2015(4)TMI 561-Supreme Court.

(iii) The Commissioner of Customs Vs. Prashray Overseas Pvt. Ltd. – 2016(5) TMI 1106 – MADRAS HIGH COURT.

4. We have carefully considered the submissions made by both sides and perused the record. We find that appellant filed refund claim for differential service tax paid on ocean freight during may 2017 and June 2017, since they have paid service tax on full value of the transportation service of goods in vessel without availing of exemption under Sr. No. 10 of Notification No. 26/2012-ST dtd. 20.06.2012 as amended. The relevant entry of disputed notification reads as under: -

"In exercise of the powers conferred by sub-section (1) of section 93 of the Finance Act, 1994 (32 of 1994) (hereinafter referred to as the said Act), and in supersession of notification number 13/2012-Service Tax, dated the 17th March, 2012, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i) vide number G.S.R. 211(E), dated the 17th March, 2012, the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts the taxable service of the description specified in column (2) of the Table below, from so much of the service tax leviable thereon under section 66B of the said Act, as is in excess of the service tax calculated on a value

which is equivalent to a percentage specified in the corresponding entry in column (3) of the said Table, of the amount charged by such service provider for providing the said taxable service, unless specified otherwise, subject to the relevant conditions specified in the corresponding entry in column (4) of the said Table, namely :-

TABLE

Sl.No.	Description of taxable service	Percent-age	Conditions
<i>(1)</i>	<i>(2)</i>	<i>(3)</i>	<i>(4)</i>
-	-	-	-
-	-	-	-
10	Transport of goods in a vessel	30	CENVAT credit on inputs, capital goods and input services, used for providing the taxable service, has not been taken under the provisions of the CENVAT Credit Rules, 2004.

4.1 We find that the CBEC vide Circular No. 206/4/2017 dtd. 13.04.2017 also issued clarification and clarified under para 4 and 4.1 of the Circular which is read as under:-

"4. It is pertinent to point out here that under notification No. 26/2012-S.T., dated 20-6-2012 (Sl. No. 10), there is an exemption on 70% of value of services of transportation of goods in a vessel subject to the fulfilment of the condition that Cenvat credit on inputs and capital goods used for providing the taxable service, has not been taken under the provisions of the CENVAT Credit Rules, 2004. This conditional exemption has been extended for the reason that out of the full value of such services, the exempted value of service has already suffered taxes (Central Excise) which would have been available as Cenvat credit to set off service tax on full value of service. In effect, service tax is levied on the value added only. However, in case of foreign shipping lines, their services being exports from their home country, are zero-rated in their home country and thus have suffered no taxes. Further the foreign shipping lines do not get registered in India and do not follow the provisions of Cenvat Credit Rules.

4.1 Thus, the condition for availing exemption under notification No. 26/2012-S.T., dated 20-6-2012 (Sl. No. 10) is not fulfilled by the foreign shipping lines. Hence, benefit of conditional exemption will not be available to them and service tax will be paid on full value of services. Further, the

amount of service tax payable under the option available under Service Tax Rules, 1994 has been prescribed accordingly."

4.2 We find that Vide Notification Nos. 15/2017-S.T. and 16/2017-S.T. respectively dated 13th April, 2017, the importer of goods as defined in the Customs Act, 1962 has been made liable for paying service tax in cases of services of transportation of goods by sea provided by a foreign shipping line to a foreign charterer with respect to the goods destined for India. This change has come into effect from 23rd April, 2017. The Shipping/steamer agents are no longer liable to pay the service tax for the services provided on or after 23rd April, 2017. Thus in view of the Notification No. 16/2017 -ST dtd. 13.04.2017 read with Notification No. 15/2017 -ST dtd. 13.04.2017, the importer was liable for payment of Service tax @1.4% on the CIF Value of the imported goods.

4.3 The Ld. Commissioner (Appeals) vide impugned order observed that in case of transport of goods in a vessel the respondent was made liable for payment of service tax on 30% value of service of transportation of goods in vessel and service tax paid on remaining 70% value of taxable service is liable to be refunded to the respondent as per Sr. No. 10 of Notification No. 26/2012-ST dtd. 20.06.2012. The grievance of the revenue in this matter is that Ld. Commissioner has not considered the provision contained in Notification No. 16/2017 -ST. dtd. 13.04.2017 according to which no exemption was granted to the respondent and the respondent was made liable for payment of service tax @1.4% on the full CIF value of the imported goods. However we noticed that even after the Notification No. 16/2017 -ST and 15/2017-ST the Notification No. 26/2012-ST dtd. 20.06.2012 has neither been withdrawn nor amended to the effect that exemption is not available in a case of service of transportation of goods in vessel provided by the foreign shipping lines. We find Notification provide the payment of service tax @1.4% on the CIF value whereas notification No. 26/2012-ST provided service tax on transport of goods in a vessel. Therefore, the Ld. Commissioner (Appeals), in the present matter rightly set aside the order passed by the lower adjudicating authority.

4.4 As regard the disputed condition of Sr. No. 10 of Notification No. 26/2012-ST dtd. 20.6.2012 we find that the said condition provide that *"CENVAT Credit on inputs, Capital Goods and input services, used for providing the taxable services, has not been taken under the provisions of the Cenvat Credit Rules, 2004.* We find the Ld. Commissioner (Appeals) in this context

has considered the Judgment of Hon'ble Apex Court in the case of SRF Ltd (*Supra*) vis-a-vis disputed condition and dealt with the applicability of the said condition in the present matter. We do not find any reasons to interfere with the impugned order.

4.5 We also find that on the identical dispute allowing the refund claim on service tax paid on ocean freight the Tribunal in the matter of Panasonic Energy India Co. Ltd. Vs. Commr. Of Cus. C.Ex. & CGST, Indore - 2022(58)GSTL 315 (Tri. Del) held as under :-

"5. *After hearing both the parties and perusing the record, I am of the opinion that to adjudicate about the entitlement of the appellant for the refund of duty paid by him admittedly for the period prior GST Act, 2017 which rolled out on 1st July, 2017, but paid on 17-10-2018, the legal position first need to be understood :-*

(1) *As far as who is liable to pay Service Tax*

(2) *Whether the contract was CIF or it was on FOB basis makes any difference as far as the payment of service tax liability is concerned.*

(3) *Whether the appellant has paid the service tax rightly under Notification Nos. 15 and 16 of 2017.*

(4) *And finally as to whether the appellant is entitled for refund even in terms of Section 142 of CGST Act.*

5.1 *Under Rule 2(1)(d) of the Service Tax Rules, the expression "person liable for paying service tax" has been defined. By virtue of Notification No. 2/2017-S.T., dated 12-1-2017, the Central Government has inserted Clause (EEC) under Rule 2(1)(d) thereby laying down that the person in India who complied with Section 29, 30 or 38 read with Section 148 of the Customs Act, 1962 with respect to goods transported by a vessel from a place outside India upto the Custom Station of clearance in India was the person liable to pay service tax on such services.*

5.2 *By virtue of Notification No. 15/2017-S.T., the Central Government has substituted certain Explanations in the original Notification No. 30/2012-S.T., dated 20-6-2012. Explanation-V so substituted/inserted vide this Notification No. 15/2017-S.T. provides that the importer as defined under Section 2(26) of the Customs Act shall be the person liable to pay service tax in respect of services provided by a person located in non-taxable territory to a person located in non-taxable territory by way of transportation of goods by a vessel from a place outside India upto the Custom station of clearance in India. By virtue of Explanation-V so inserted, it would mean that the importer of goods would be liable for paying service tax on ocean freight in case where the service of transportation of goods in a vessel was provided by the vessel owner/operator to the overseas supplier-seller in CIF transactions.*

5.3 *By Notification No. 16/2017-S.T., Clause (EEC) of Rule 2(1)(d) of the Service Tax Rules has been substituted, and there also the importer as defined under Section 2(26) of the Customs Act is made liable to pay service tax on ocean freight in cases like CIF transactions. A new sub-rule i.e. sub-rule (7CA) has also been inserted in Rule 6 of the Service Tax Rules by this Notification, thereby providing that the value of the ocean freight may be calculated at the rate of 1.4% of the sum total of CIF for paying service tax thereon. Thus, the effect of the amendments*

vide the other Notification No. 16/2017-S.T. is also the same i.e. an importer like the Petitioner is made the person liable to pay service tax on ocean freight in case of CIF transactions, though the service of transportation of goods in CIF transactions is rendered by the ship owner/operator to the overseas seller/supplier, and not to the local importer.

5.4 *Since the challenge is to the provisions empowering the Central Government to collect and recover service tax on Ocean Freight and the Petitioners have challenged such provisions only in respect of the CIF contracts, it is necessary to consider what is "ocean freight", what is "CIF", and how the CIF is different from the FOB contracts.*

5.5 *In the international trade, the goods are bought and sold by way of two different modes/methods, namely, the CIF contract and FOB contract. Therefore, I must give a fair idea about both these modes/methods, is necessary.*

5.6 *FOB (i.e. Free on Board) is a contract of sale between the foreign supplier and the local importer, where the importer would engage the vessel/ship owner or operator for importing goods into India. In the FOB contract, the service of transportation of goods by ship or vessel is received by the importer in India, whereas such service is rendered by the owner/operator of the foreign going vessel.*

5.7 *In the case of CIF contract, the overseas supplier would engage the vessel owner/operator for the transportation of goods to India. The hiring of the vessel/ship and also payment of the transportation charges i.e. ocean freight of such vessel owner/operator are made by the overseas supplier in the CIF contract. The service of transportation of goods by vessel is thus received by the overseas supplier from the foreign going vessel owner/operator in the CIF contract.*

5.8 *In the aforesaid context, I may refer to a decision of the Supreme Court in the case of Phulchand Exports Ltd. v. O.O.O. Patriot, (2011) 10 SCC 300, wherein Hon'ble Supreme Court has explained what is CIF contract and what are the obligations upon a seller under a CIF contract as :*

5.9 *In C.I.F. and F.O.B. Contracts (Fourth Edition) by David M. Sassoon dealing with essence of C.I.F. contracts, it is stated that essential feature of a C.I.F. contract is that delivery is satisfied by delivery of documents and not by actual physical delivery of the goods. Shipping documents required under a C.I.F. contract are bill of lading, policy of insurance and an invoice.*

5.10 *In Johnson v. Taylor Bros. 6, Lord Atkinson in the House of Lords explained the meaning of C.I.F. contract as under :*

"..... when a vendor and purchaser of goods situated as they were in this case (Seller in Sweden and buyers in England) enter into a CIF contract, such as that entered into in the present case, the vendor in the absence of any special provision to the contrary is bound by his contract to do six things. First, to make out an invoice of the goods sold. Second, to ship at the port of shipment of goods of the description contained in the contract. Third, to procure a contract of affreightment under which the goods will be delivered at the destination contemplated by the contract. Fourth, to arrange for an insurance upon the terms current in the trade which will be available for the benefit of the buyer. Fifthly, with all reasonable dispatch to send forward and tender to the buyer these shipping documents, namely, the invoice, bill of lading and policy of assurance, delivery of which to the buyer is symbolical of delivery of the goods purchased, placing the same at the buyer's risk and entitling the seller to payment of their price.....".

6. *In light of this distinction Section 26 of the Sale of Goods, 1930 Act draws relevance which reads as follows :*

"S. 26. Risk prima facie passes with property. - Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not :

Provided that, where delivery has been delayed through the fault of either buyer or seller, the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault :

Provided also that nothing in this section shall affect the duties or liabilities of either seller or buyer as bailee of the goods of the other party."

6.1 *The title of Section 26 shows that the rule provided thereunder is the prima facie rule subject to the agreement otherwise between the parties. This is clearly indicated by the expression "unless otherwise agreed" with which the section begins. The parties to the contract are, thus, free to by-pass the prima facie rule provided in Section 26 by making agreement otherwise. The prima facie rule in Section 26 is that the goods remain at the seller's risk until the property in the goods is transferred to the buyer. But when the property in the goods is transferred to the buyer the goods are at the buyer's risk whether delivery has been made or not. The above rule has some exceptions. The first proviso provides that where delivery of goods has been delayed due to the fault of either buyer or seller, the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault. The second proviso is further subject to the first proviso and provides that nothing in the section shall affect the duties or liabilities of either seller or buyer as bailee of the goods of the other party.*

6.2 *The obligations upon a seller under a C.I.F. contract are well known, some of which are in relation to goods and some of which are in relation to documents. In relation to goods, the seller must ship goods of contract description on board a ship bound to the contract destination. If there is a late shipment or the seller has put goods on board a ship not bound to the contract destination as stipulated, in our view, the logical inference that must necessarily follow is that the seller has not put on board goods conforming to a contract destination.*

7. *Reverting to the facts of the present case, it is observed that it is not the case of the Respondents that importers like the Petitioners have received services of sea transportation from the shipping lines. The Respondents have however pleaded that in case of the Indian importers receiving goods on the land mass of the country by virtue of CIF arrangements, they "indirectly" receive sea transportation service also; and therefore obligation to pay service tax can be shifted to them.*

8. *First, the Indian importers like the Petitioners have contracted for purchase and delivery of goods, and under CIF contract where the lump sum amount is paid for delivery of the goods on the land mass of the country; and what the importers receive in India is the goods, and not any service. Secondly, liability to pay tax cannot be fastened on a person if the charging provision does not charge or levy the tax; because a charging section has to be strictly interpreted, and not by way of inferences or presumptions about any indirect benefit to a person.*

9. *In Commissioner, Surat-I v. Patel Vishnubhai Kantilal & Co., [2012 \(28\) S.T.R. 113](#) (Guj.), the Hon'ble High Court has considered relevant case law on this proposition in paras 19 to 22 of this judgment and held at para 22 that the rule of construction of a charging section is that*

before taxing any person it must be shown that he falls within the ambit of the charging section by clear words used in the section. If a person has not been brought within the ambit of the charging section by clear words, he cannot be taxed at all.

10. *When the Respondents have admitted that the importers in India are not persons receiving service of sea transportation, and that it is the Respondent's case that the Indian importers were "indirectly" receiving such service and hence were persons liable to pay service tax on such service; it is clearly a case where the Respondents propose to charge service tax from the third parties i.e. the Indian importers by implication, and not by clear words of the charging section. The impugned provisions creating a charge of service tax on third parties though the Act of the Parliament provides for levy and collection of tax either from the person providing service or from the person receiving service are beyond the charging provision, and also beyond the Rule making power of Section 94 of the Finance Act.*

11. *Even if it is assumed that service tax can be recovered from a third party like the Indian importers in CIF contracts, there is no machinery provided for valuation of such service, and therefore also the impugned Rules and Notifications are unenforceable. It is an admitted position of fact that the Petitioners do not have any information about the actual amount of ocean freight paid by the overseas sellers/suppliers to shipping lines. The invoices and purchase orders when service tax is to be computed and assessed on the "value" of the service as laid down under the machinery provision of Section 67 of the Finance Act, no service tax can be assessed and charged from third parties like the Indian importers in CIF contracts, because "value" of sea transportation service is not available with them in CIF contracts.*

12. *Now coming to the two notifications of year 2017 under which the payment of Service Tax has been made in October, 2018. It is observed that the Notifications had been subject matter of challenge in a batch of writ applications, the lead matter being the Mohit Minerals Pvt. Ltd. v. Union of India and 1 Others [Special Civil Application No. 726 of 2018, decided on 23rd January, 2020] [[2020 \(33\) G.S.T.L. 321](#) (Guj.)]. The Court in Mohit Minerals (supra) and allied petitions declared the Notifications as ultra vires the Integrated Goods and Services Tax Act, 2017 on the ground that the same lacked legislative competency. Both the Notifications referred to above were declared to be unconstitutional.*

13. *In view of the aforesaid discussion, the writ application succeeds and is hereby allowed. The Notification Nos. 15/2017-S.T. and 16/2017-S.T. making Rule 2(1)(d)(EEC) and Rule 6(7CA) of the Service Tax Rules and inserting Explanation-V to reverse charge Notification No. 30/2012-S.T. is struck down as ultra vires Sections 64, 66B, 67 and 94 of the Finance Act, 1994; and consequently the proceedings initiated against the writ applicants by way of show cause notice and enquiries for collecting service tax from them as importers on sea transportation service in CIF contracts are hereby quashed and set aside with all consequential reliefs and benefits.*

13.1 *Since the Notification under which the payment was made have as such been struck down, any payment made pursuant thereto no more remains under the scope of the charging section, i.e. it cannot be called as duty. Still retaining the said amount will therefore unjustly enrich the Department. The consequence, accordingly, is that the appellant is entitled for the refund of the said amount.*

13.2 *Though the stand of Department is that the refund is qua amount paid by the appellant on October, 2018 i.e. after 1-7-2017, and paid as CGST amount, and the refund therefore is governed by GST law.*

13.3 Be that as it may, there is some controversy regarding the "transitional ITC" to be claimed under Section 140(1) of the CGST Act, 2017 which is claimed to have some vague reference that KKC cannot be taken as transitional ITC as CGST, while filing TRAN-1. In fact, qua Section 140(1) of the said Act, while the law permitted accumulated credit of KKC to be claimed as CGST ITC by way of transitional provisions, a retrospective amendment has been made vide CGST (Amendment Act), 2018 in this regard, which is not yet operationalized till date.

13.4 That in terms of Notification No. 2/2019-C.T., dated 29-1-2019, various provisions of CGST (Amendment) Act, 2018 have been brought into force w.e.f. 1-2-2019 however insofar as the present issue is concerned, Section 28(b)(1) and Section 28(c)(1) of the said act have not yet been brought into force. It may be appreciated that although under Section 140(1) amendment has already been carried out stating that Cenvat credit of eligible duties is permitted to be taken as transitional credit w.e.f. 1-2-2019 by virtue of Section 28(a) of the GST (Amendment) Act, 2018, however it may be appreciated that "eligible duties" is not defined for the purpose of Section 140(1) of the CGST Act, 2017 as on date at all.

13.5 That explanation 1 and explanation 2 wherein the term eligible duty was required to be construed for the purpose of sub-section (1) of Section 140 of the CGST Act, 2017 has not been brought into force at all as on date. The explanation 3 is to be understood, by its very text, to be referring to eligible duties and taxes as stated in Explanations 1 & 2 and not otherwise. In other words, since Explanations 1 and 2 do not apply to Section 140(1) at all but apply to Section 140(3), (4) etc., as on date, there is no change in the legal effect insofar as credit on various cess including Education Cess and SHE as well as KKC is concerned which is taken under Section 140(1) of the CGST Act, 2017.

13.6 That had it not been the case, there was no real reason to exclude Section 28(B)(1) and Section 28(C)(1) of the CGST (Amendment) Act, 2018 at all.

13.7 Accordingly, since as on date the transitional credit of E-Cess and SHE Cess and KKC is otherwise eligible under Section 140(1) inasmuch as the restrictive amendments have not yet been brought into force at all and since explanation 3 to Section 140 limits its operation to Explanations 1 and 2 which do not deal with eligible duties for the purpose of Section 140(1) at all and since the term eligible duties is not defined for the purpose of Section 140(1) as on date. In any case, the entire discussion is utmost, academic, inasmuch as when Tax itself was not payable in the first place, as per the legal position as it exists, there is no reason why refund of such tax paid should not be allowed to the appellant.

13.8 At the same time, Be that as it may, after introduction of GST regime, Section 142(6)(a) of the CGST Act, 2017 is specifically enacted to provide for cash refund in case where any credit becomes due and available to an assessee after introduction of GST regime. The appellant referred to the following case law :-

- (a) Oswal Castings (P.) Ltd. Reported in [2019 \(24\) G.S.T.L. 649](#) (Tri. - Chan.)
- (b) MCPI Private Ltd. & Another v. Union of India & Others

14. But I am of the opinion that the issue is covered by the decision in the case of Mohit Minerals Pvt. Ltd. v. Union of India & 1 Other [2020 (1) TMI 974-Gujarat High Court = [2020 \(33\) G.S.T.L. 321](#) (Guj.)] where it was held that No tax is leviable under the Integrated Goods and

Services Tax Act, 2007, on the ocean freight for the services provided by a person located in a non-taxable territory by way of transportation of goods by a vessel from a place outside India upto the customs station of clearance in India and the levy and collection of tax of such ocean freight under the impugned Notifications is not permissible.

15. *This Court vide judgment and order passed in the case of Mohit Minerals Pvt. Ltd. v. Union of India [Special Civil Application No. 726 of 2018 and allied petitions] declared the Entry No. 10 of the Notification No. 10/2017-Integrated Tax (Rate), dated 28th June, 2017 as ultra vires Section 5(3) of the Integrated Goods and Services Tax Act, 2017 as well as Article 14 of the Constitution of India. I may quote paras 254 & 255 of the judgment rendered in the case of Mohit Minerals (supra). Paras 254 and 255 read as under :*

"254. In view of the aforesaid discussion, we have reached to the conclusion that no tax is leviable under the Integrated Goods and Services Tax Act, 2007, on the ocean freight for the services provided by a person located in a non-taxable territory by way of transportation of goods by a vessel from a place outside India upto the custom station of clearance in India and the levy and collection of tax of such ocean freight under the impugned Notifications is not permissible in law.

255. In the result, this writ-application along with all other connected writ-applications is allowed. The impugned Notification No. 8/2017-Integrated Tax (Rate), dated 28th June, 2017 and the Entry 10 of the Notification No. 10/2017-Integrated Tax (Rate), dated 28th June, 2017 are declared as ultra vires the integrated Goods and Services Tax Act, 2017, as they lack legislative competency. Both the Notifications are hereby declared to be unconstitutional. Civil Application, if any, stands disposed of."

Say that since the Notification has been struck down as ultra vires, as a consequence of the same, the writ applicant seeks refund of the amount paid towards the IGST.

16. *It is thus eminently clear from the aforesaid observations made in the impugned order that the duty, which was paid by the petitioner, which was otherwise not payable on the exported goods and therefore, rebate of such duty was not admissible in terms of Rule 18 of the Central Excise Rules. However, the duty, which was paid by the petitioner is held to be treated as voluntary deposit. As per Section 142(3) of the GST Act, every claim for the refund filed by any person before, on or after the appointed day i.e. 1-7-2017 for refund of any amount of Cenvat credit, duty, tax, interest or any other amount paid under the existing law, should be disposed of in accordance with the provisions of existing law and any amount eventually accruing to such person should be paid in cash. I am of the considered opinion that in view of this clear provision, the Respondent No. 2 ought to have directed the sanctioning Authority to refund the amount of the duty refundable to the petitioner in cash instead of credit in Cenvat Account.*

17. *In case of M/s. Lanxess India Pvt. Ltd. (supra), the Commissioner (Appeals) has directed the sanctioning Authority to refund in cash. As per the GST transition provisions, the balance of credit lying un-utilized in account as on 30-6-2017 only gets carried forward. Hence, in the present case also, what was lying in Cenvat account of the petitioner before 10-7-2017 was to be carried forward in fresh account of Cenvat account after appointed day i.e. 1-7-2017.*

18. *I shall now look into few decisions on the subject.*

In Prabhat Cotton & Silk Mills Ltd. v. Union of India, reported in [1982 \(10\) E.L.T. 203](#) (Guj.), a Division Bench of this High Court while

interpreting the expression "India" under Section 12 of the Customs Act, 1962, observed thus;

"11. The first answer to this argument is that as per Section 12(1) duties of customs are levied on goods imported into or exported from India and the expression 'India' insofar as Section 12 is concerned refers to the Indian landmass and not the Indian territorial waters. This becomes evident on a true reading of Section 12(1) which reads as under :-

***"12. Dutiable goods.** - (1) Except as otherwise provided in this Act, or any other law for the time being in force, duties of customs shall be levied at such rates as may be specified under the Indian Tariff Act, 1934 (32 of 1934), or any other law for the time being in force, on goods imported into, or exported from, India."*

***19.** As a consequence of entire above discussion the point of adjudications as framed above all stands decided in favour of the appellant holding appellants to be entitled for the refund of the amount of service tax paid by them on 17-10-2018. Resultantly the order under challenge is hereby set aside. Appeal stands allowed with consequential benefit if any."*

4.6 We also find that High Court of Gujarat in Special Civil Application 726 of 2018 (*Mohit Minerals Pvt. Ltd. v. Union of India & 1 ors.*) [[2018 \(10\) G.S.T.L. 424](#) (Guj.)-] wherein it was held that no tax is leviable under the Integrated Goods and Services Tax Act, 2017, on ocean freight, for services provided by a person, located in a non-taxable territory, by way of transportation of goods on a vessel from a place outside India up to Customs station of clearance in India. However, the said judgment is pertaining to the GST but ratio of said judgment also applicable in Service tax matter.

5. In the light of the above, no grounds have been made to interfere with the order passed by the Learned Commissioner (Appeals). Accordingly, the appeal filed by revenue is dismissed.

(Pronounced in the open court on 02.12.2024)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)