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| आयुक्त का कार्यालय<br>केंद्रीय जी. एस. टी. एवं<br>केंद्रीय उत्पाद शुल्क ,अहमदाबाद – उत्तर,<br>कस्टम हॉउस, प्रथम तल,<br>नवरंगपुरा ,अहमदाबाद- 380009 | | OFFICE OF COMMISSIONER<br>CENTRAL GST & CENTRAL EXCISE,<br>AHMEDABAD- NORTH<br>CUSTOM HOUSE, 1ST FLOOR,<br>NAVRANGPURA, AHMEDABAD-380009 |
| फ़ोन नंबर./ PHONE No.: 079-27544557 | फैक्स/ FAX : 079-27544463 | E-mail:- oaahmedabad2@gmail.com |

निबन्धित पावती डाक द्वरा/By R.P.A.D

DIN 20210164WT000000B157

फा.सं./F.No. STC/15-19/OA/2018 आदेश की तारीख/Date of Order :- 29.01.2021

जारी करने की तारीख/Date of Issue :- 29.01.2021

द्वारा पारित/Passed by:- मारुत त्रिपाठी / *Marut Tripathi*
संयुक्त आयुक्त / Joint *Commissioner*

## मूल आदेश संख्या / Order-In-Original No. 38/JC/ MT /2020-21

जिस व्यक्ति(यों) को यह प्रति भेजी जाती है, उसके/उनके निजी प्रयोग के लिए मुफ्त प्रदान की जाती है।

This copy is granted free of charge for private use of the person(s) to whom it is sent.

इस आदेश से असन्तुष्ट कोई भी व्यक्ति इस आदेश के विरूद्ध अपील ,इसकी प्राप्ति से 60 (साठ) दिन के अन्दर आयुक्त (अपील), केन्द्रीय वस्तु एवं सेवा कर एवं उत्पाद शुल्क ,केन्द्रीय उत्पाद शुल्क भवन, अंबावाड़ी ,अहमदाबाद 380015-को प्रारूप संख्या इ.ए-1 (E.A.-1) में दाखिल कर सकता है। इस अपील पर रू .2.00 (दो रुपये) का न्यायालय शुल्क टिकट लगा होना चाहिए।

Any person deeming himself aggrieved by this order may appeal against this order in form EA-1 to the Commissioner(Appeals), Central GST & Central Excise, Central Excise Building, Ambawadi, Ahmedabad-380015 within sixty days from the date of its communication. The appeal should bear a court fee stamp of Rs. 2.00 only.

इस आदेश के विरुद्ध आयुक्त के शुल्क गये मांगे पहले से करने अपील में (अपील) 7.5% का भुगतान करना होगा, जहाँ शुल्क या शुल्क की विवादग्रस्त शुल्क या विवादग्रस्त शुल्क एवं दंड या विवादग्रस्त दंड शामिल है।

An appeal against this order shall lie before the Commissioner (Appeal) on payment of 7.5% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute. (as per amendment in Section 35F of Central Excise Act,1944 dated 06.08.2014)

उक्त अपील, अपीलकर्ता द्वारा प्रारूप संख्या इ.ए.-1 में दो प्रतियों में दाखिल की जानी चाहिए। उस पर केन्द्रीय उत्पाद शुल्क (अपील) नियमावली 2001 के नियम 3 के प्रावधानों के अनुसार हस्ताक्षर किए जाने चाहिए। उक्त अपील के साथ निम्नलिखित दस्तावेज संलग्न किए जाएं।

(1) उक्त अपील की प्रति।

(2) निर्णय की प्रतियाँ अथवा जिस आदेश के विरूद्ध अपील की गई है, उनमें से कम से कम एक प्रमाणित प्रति हो, या दूसरे आदेश की प्रति जिसपर रू) 2.00 .दो रूपये (का न्यायालय शुल्क टिकट लगा होना चाहिए।

The appeal should be filed in form EA-1 in duplicate. It should be signed by the appellant in accordance with the provisions of Rule 3 of Central Excise (Appeals) Rules, 2001. It should be accompanied with the following:

(1) Copy of accompanied Appeal.

(2) Copies of the decision or, one of which at least shall be certified copy, the order Appealed against OR the other order which must bear a court fee stamp of Rs.2.00.

विषय:- कारण बताओ सूचना/ Proceeding initiated against Show Cause Notice No. VI/1(b)/Tech-27/SCN/Vishal Shipping/2017-18, dated 19.04.2018 issued to M/s. Vishal Shipping Agencies Pvt. Ltd. Titanium Square B -207/208 Thaltej Circle, Thaltej Ahmedabad, Gujarat 380054.

BRIEF FACTS OF THE CASE:

M/s. Vishal Shipping Agencies Pvt. Ltd. Titanium Square B -207/208 Thaltej Circle, Thaltej Ahmedabad, Gujarat 380054 (herein referred to as the assessee), is holding Service Tax Registration No. AABCV6455CST003. They claim to be providing various taxable services viz. Business Auxiliary Services & Custom House Agent Services". They are engaged in the activity of providing complete solution for the transportation of cargo from the stage of collection of the shipments from the exporter's premises in case of exports and from the place of foreign exporters in case of import, up to the delivery of the same at the place of destination.

2. During the course of audit, it was revealed that assessee was raising a consolidated invoice to their clients for export / import of cargo including various charges such as freight charges i.e. charges for ocean/air freight, BIL (Bill of Lading) charges, O/O (Delivery order) charges, THC (Terminal Handling charges), Seal charges, etc. It was further observed that they are paying service tax on other charges above except on freight charges under the category of Business Auxiliary Service till 30.06.2012 and thereafter under the provisions of Section 66B of the erstwhile Finance Act, 1994 (hereinafter also referred to as the Finance Act, 1994 or Finance Act). It was also observed that the shipping lines/ Companies or their agents issues invoices in the name of the assessee for freight charges and other charges and paying service tax on THC & Seal charges in most of the cases. As far as freight charges are concerned in respect of the exports, no service tax is paid by the shipping lines/companies, as the service provided by the shipping lines for carriage of goods by vessel to the overseas destination is a service provided in a nontaxable territory party, i.e. Shipping/Liner Companies, who were the actual carriers of the cargo. The assessee's clients are not liable to make any payment to the third party, i.e. Shipping/Liner Companies, who were the actual carrier of the cargo. The assessee is approached by their clients or vice versa for exporting /importing their cargo. The slots in the liners/vessels were booked in advance by the assessee. On receiving the enquiry from their clients, the assessee books the cargo with the liners for onward transportation. As the activities undertaken by the assessee was providing logistic support in respect of export/import of international cargo which includes the activities of pickup of the cargo from the clients premises for delivery to the port, completion of all formalities within the port till boarding the same for export or even in some cases clearing the goods at port abroad and delivering the consignments to their clients customers, are the activities which are nothing but the 'Services' provided to their clients. Similar services in the reverse order were provided by the assessee in the case of import for their clients. The services were in the nature of facilitating their clients for export/import of their cargo through the shipping companies. The said services are covered under the definition of "clearing and forwarding agent services" as defined at Section 105( J) of the erstwhile Finance Act, 1994, till 30.06.2012, i.e. prior to Negative List Regime. Whereas, with introduction of negative list regime w.e.f. 01.07.2012, ***"service"*** *means any activity carried out by a person for another for consideration, and includes* a ***declared service.*** Therefore, assessee's activity of providing logistic support in respect of export/import of international cargo, at the same time availing the services of transporters (for domestic transportation), warehousing

services at port, CHA services, loader services, etc. till the boarding of cargo on vessel in case of export & the services of the shipping lines/companies for ultimate carriage of export cargo and vice versa in case of imports, is covered under the definition of "service" as provided under sub section (44) of the Section 65B of the erstwhile Finance Act 1994 and the definition of 'taxable service' as provided sub section (51) of Section 65B of the Act ibid. The relevant provisions applicable w.e.f. 01.07.2012 are reproduced hereunder for ease of reference:

*"Section 65B:*

*44) "service" means any activity carried out by a person for another for consideration, and includes a declared service, but shall not include-*

*(a) an activity which constitutes merely,-*

*(i) a transfer of title in goods or immovable property, by way of sale, gift or in any other manner; or*

*(ii) such transfer, delivery or supply of any goods which is deemed to be a sale within the meaning of clause (29A) of Article 366 of the Constitution, or*

*(iii) a transaction in money or actionable claim;*

*(b) a provision of service by an employee to the employer in the course of or in relation to his employment;*

*(c) fees taken in any Court or tribunal established under any law for the time being in force.*

***Explanation 1.-*** *..... "*

*"Section 65B:*

*"(51)* ***"taxable service"*** *means any service on which service tax is /eviable under Section 66B;"*

3.Therefore they are exigible to service tax in terms of Section 66B of the erstwhile Finance Act, 1994 which reads thus:

*SECTION [66B. Charge of service tax on and after Finance Act, 2012. -There shall be levied a tax (hereinafter referred to as the service tax) at the rate of [fourteen per cent.] on the value of all services, other than those services specified in the negative list, provided or agreed to be provided in the taxable territory by one person to another and collected in such manner as may be prescribed.]*

4.There cannot be any dispute on the fact that the assessee are providing services to their client for a consideration and therefore they are liable to pay service tax on the entire value of services provided by them including net margin on ocean freight (as claimed by them), in terms of the Section 66B supra.

5. It is also not the case of the assessee that the services provided by them are specified in the Negative List (Section 66D of the Act ibid) or it is their claim that the services provided by them

are exempted by virtue of any notification. The assessee during the course of providing the said service to their client in turn utilizes services of other agencies such as transporter, ware house keeper, CHA, loaders, etc. at port and the shipping lines/company, for which they are charging a consolidated amount. However in the invoices raised by the assessee to their clients, the narration is misdeclared as "Freight Charges" despite the fact that they have not indulged in actual transportation of the cargo at any point of time. With a view camouflage their activities they are segmenting a miniscule of the total amount charged as taxable service and pays service tax thereon under Business Auxiliary Service and thereby evading payment of tax on the major portion of the charges showing them as freight charges.

5.The assessee under the signature *bf* their authorized signatory has provided the details of Bifurcation of the Ocean Freight as follows:

| YEAR | PART-B NON TAXABLE INCOME | DEBIT | CREDIT | NET INCOME |
|---|---|---|---|---|
| 2012-13 | Total freight charges | 88258727 | 89536836 | 1278109 |
| 2013-14 | Total freight charges | 95175520 | 101129347 | 5953826 |
| 2014-15 | Total freight charges | 141305723 | 150333937 | 9028213 |
| 2015-16 | Total freight charges | 107961224 | 123634828 | 15673604 |
| 2016-17 | Total freight charges | 196378884 | 208100785 | 11721901 |
| | TOTAL | 629080078 | 672735733 | 43655653 |

7. From the foregoing it was evident that the so called freight charged by the assessee from their clients, during the period 2012-13 to 2016-17, was higher than the amount paid to the shipping lines/companies as freight. Therefore the additional consideration amounting to Rs. 4,36,55,653/- charged by the assessee from their clients, claimed to be net income was nothing but consideration received by them from their clients towards the aforesaid service of providing logistic support in respect of export/import of international cargo of their clients. Therefore the said amount is exigible to service tax. However the assessee had not paid service tax on the said amount in the guise of net income, which contention of the assessee did not appear to be proper as the same was nothing but additional consideration received by them from their clients for the services provided. The service tax not paid by the assessee works out to Rs. 60,40,712/- as under:

| Year | Consideration on which no service tax paid | Rate of Service Tax | Service Tax Payable |
|---|---|---|---|
| 1 | 2 | 3 | 4 |
| 2012-13 | 1278109 | 12.36% | 1,57,974 |
| 2013-14 | 5953826 | 12.36% | 7,35,893 |

| | | | |
|---|---|---|---|
| 2014-15 | 9028213 | 12.36% | 11, 15,887 |
| 2015-16 | 15673604 | 14.50% | 22,72,673 |
| 2016-17 | 11721901 | 15.00% | 17,58,285 |
| **Total** | 43655653 | | 60,40,712 |

8. The assessee, vide their letter dated 26/02/2018, has contended that Service Tax is not chargeable on Freight margin received for providing ocean freight service. They have contended as under:

*"Our company is engaged into activity of business commonly known in trade parlance as "Freight Forwarders". It includes booking space into the vessels/ships operating to the foreign country by any of the shipping company. Such spaces are sold to our customers at price negotiated with it for transporting their consignment to destination country of their exports. Any difference between cost at which the space is booked with shipping line and price at which the same is sold to our customer turns out to be the margin (termed herein as "Freight margin"), which is sought to be taxed by the audit team.*

*The activity comprising 'services' provided by the company is of transporting consignment of company's customer to the country of their export. Such services would call for the attention of Rule 10 of the Place of Provision of Services Rules, 2012, which prescribes that 'The place of provision of services of transportation of goods, other than by way of mail or courier, shall be the place of destination of the goods.' Therefore the company's services to transport its customer's consignment to country of export, by way of booking space on vessel operating to such destination country, would be deemed to have been provided at such destination country i.e. outside taxable territory.*

*..... Where provision of service is outside taxable territory the same would fall beyond the scope of charging section to levy service tax thereon. Consequently, where the service per-se is not taxable, there should arise no question to tax any part of value of consideration for providing the same. The margin amount comprised in value of consideration received 'for providing non-taxable service shall therefore be not taxable"*

9. The above contention of the assessee is belied in view of the following position in case of a freight forwarder/ clearing and forwarding agent acting as a principal:

(i) Freight forwarder buys space in airlines/shipping lines:

The Freight forwarder is given a quote for air/sea cargo transportation charges, i.e. tonnage/space rates on a pallet basis by an Airline/shipping line. Such quotes are usually offered by airlines/shipping lines for bulk cargo or large quantity basis. As per industry nomenclature, this quote is referred to as the "buy rate".

(ii) Airlines/Shipping lines issues Master Air Way Bill (Master AWB)/ Master Bill of lading (Master BL) at buy rate:

The airline issues a Master AWB to the freight forwarder based, on this buy rate. A Master AWB is basically a contract of carriage between the airline and the Freight forwarder. The Master AWB covers consolidated shipment of goods and lists the freight forwarder as the shipper.

The contractual arrangement is therefore only between the airline and the assessee.

(iii) Freight forwarder books space for the consignors/ultimate shippers:

The Freight forwarder quotes its customer (the ultimate shipper) consignors a higher rate on such bulk cargo space booked from airlines/shipping lines.

(iv) Freight forwarder issues House AWB/House BL under Master AWB/Master BL:

The Freight forwarder issues a House AWB/House BL to the ultimate shipper.

10. The assessee at no stage had been able to satisfy their claim of having acted as principal in the case of freight forwarding service provided by them. Only a bland statement that, they are acting as principal cannot take the place of proof of having acted so.

11. The assessee had not produced any documentary evidence in the form of Master AWB/Master BL issued by the airline/shipping lines in their favour or House AWB/House BL issued by them in favour of their clients whose goods are shipped, which should have been the case, had they acted as principals.

12. Whereas from the sample sets of invoices produced by the assessee during audit, it transpired that though the shipping lines or their (shipping lines') agents issues invoices in the name of the assessee no Bill of lading appeared to be issued by the assessee. On the contrary the Bill of Lading number mentioned in the shipper's invoice also appeared in the invoice issued by the assessee to their clients. Therefore it also appeared that the shipping lines or their agents are only issuing the Master Bill of lading, probably in the name of the original shippers (clients of the assessee). A couple of set of invoices produced by the assessee are reproduced in the Show Cause Notice

13. From the invoices it was seen that M/s. Swift Freight (India) Pvt. Ltd., Mumbai had raised an invoice dated 04.03.2017 in the name of the assessee as the customer and M/s. Ruparel Foods Pvt. Ltd. as the shipper, for total charges of Rs. 2,03,294/-, including freight charges of Rs. 1,79,182/-. The Master B/L number shown in the invoice is 769515683 and the House B/L number is 143117001760. Consequent to the above the assessee raised an invoice dated 10.03.2017 on their client M/s. Ruparel Foods Pvt. Ltd. for a total value of Rs.208181/- including freight charges of Rs. 1,87,389/-. The B/L number shown in the said invoice was 143117001760 which was the same as the House B/L number shown in the invoice of M/s. Swift Freight above. Thus it was seen that Mis. Swift Freight had acted as a principal in this case and in whose

favour the shipping line/company had raised a Master B/L number 769515683 and in turn Mis. Swift Freight had raised House BIL number is 143117001760 in the name of M/s. Ruparel Foods Pvt. Ltd., the client of the assessee. The said House BIL number was further reflected in the invoice raised by the assessee to their client, M/s. Ruparel Foods Pvt. Ltd.

14. From the foregoing it was clear that the assessee claiming that they have acted as principal for the exports on behalf of their clients is falsified. Another set of invoices reproduced in the Show Cause Notice also tell the same tale.

15. From the invoices it was seen that M/s. Hamburg SUD India Pvt. Ltd., Mumbai, the shipping line/company, had raised an invoice dated 02.03.2017 in the name of the assessee as shipper and also as the booking party, for Rs. 68,779/- including ocean freight of Rs. 51,337/-. The B/L number shown in the invoice is SUDUI7999A15M3G1, which appeared to be a Master B/L. In turn the assessee raised an invoice dated 10.03.2017 on their clients, M/s. Kings Dehydrated Foods Pvt. Ltd. for Rs. 98,506/- including freight charges of Rs. 86,447/-. The B/L number in the invoice raised by the assessee was the same as shown in the invoice of the shipping line, M/s Hamburg SUD. Therefore it was again seen that no House B/L is issued by the assessee, which they should have issued if they were acting as Principal.

16. As discussed supra, it was evident that the so called net income received by the assessee is nothing but consideration received towards the service provided by the assessee for providing logistic support for export/import of their customers' cargo as discussed herein before . Therefore the additional amount of Rs. **4,36,55,653/- charged by the assessee** ostensibly towards Freight charges and claimed to be the "Net income" was nothing but the amount charged towards the services provided by them for handling the cargo of their clients for exports/imports as amply discussed at Para 2 to 7 above. Therefore the assessee was liable to pay service tax on the entire consideration charged, including the amount of Rs. **4,36,55,653/- charged as above, in terms of Section 67 of the erstwhile Finance Act, 1994.**

17. From the discussion supra, it was therefore evident that the noticee had at no point of time declared that they had collected additional consideration from their clients which was not included in the value of services provided by them for the purpose of payment of service tax. Thus, they had willfully suppressed the facts by way of not declaring the same while filing the ST-3 returns and not disclosing the full facts with intent to evade the payment of Service Tax. Had the audit not been carried out, evasion of Service Tax would have gone unnoticed.

18. Thus it appeared that:

I) Service Tax amounting to Rs. 60,40,712/- on taxable value of Rs. **4,36,55,653/-** is not paid by the assessee which is recoverable from them under proviso to Section 73(1) of the Finance Act, 1994 along with interest under Section 75 of the Act.

II) the assessee has contravened the provisions of Section 67, 68, & 70 of the Finance Act,

1994 and Rule 6 and Rule 7 of the Service Tax Rules, 1994 in as much as:

(a) They have contravened the provisions of Section 67 of the Finance Act, 1994 in as much as they have failed to self-assess their service tax liability at the specified rates and in such manner and within such period as discussed supra;

(b) They have contravened the provisions of Section 68 of the Finance Act, 1994 in as much as they failed to pay the service Tax to the credit of the Central Government, by the 5th of the month immediately following the calendar month, in which the payments are received, towards the value of taxable services;

(c) They have contravened the provisions of Section 70 of the Finance Act, 1994 in as much as they failed to submit a correct half-yearly return incorporating the details of the Service Tax discussed supra, along with a copy of the Challan in form GAR-7, for the months covered in the half-yearly returns.

19. Therefore, M/s. Vishal Shipping Agencies Private Limited, was called upon to show cause as to why:

i. The additional amount charged by them towards the so called Freight charges from their Customers, amounting to Rs. **4,36,55,653/-** should not be treated as consideration received by them towards services provided by them.

ii. Services Tax amounting to Rs. 60,40,712/- (Rupees Sixty lakhs, forty thousand, seven hundred and Twelve Only) including Education cess and Higher Education Cess, not paid by them for the period 2012-2013 to 2016-2017 should not be demanded and recovered from them under proviso to section 73 (1) of the Finance Act, 1994 by invoking extended period;

iii. Interest at the appropriate rate as prescribed under section 75 of the Act ibid should not be recovered from them, from the date on which Service Tax was liable to be paid till the date on which Services tax is paid;

iv. Penalty should not be imposed on them under the provisions of Section 77 of the Act ibid for failure of furnish the prescribed returns correctly as required under Section 70 of the Act read Rule 7 of the said Rules.

Penalty under Section 76 and/or 78 of the Act ibid should not be imposed on them for suppressing the taxable value of the services and non-payment of due service tax with intent to evade payment of tax.

**20. DEFENCE REPLY AND WRITTEN SUBMISSIONS:**

The assessee had filed their reply to the Show Cause Notice, vide their letter dated 23.7.2020, wherein they interalia stated as under:

A. FACTS :-

a. They were engaged in providing logistic services. They purchase container space available with a particular shipping line for a price and sell such container space to different customers at a price in the international ocean waters. The difference between the purchase price and sale price is our profit which is nothing but a trading profit and the same is shown on the credit side of the Profit & Loss A/c.

b. The transaction with any shipping line is on principal-to-principal basis and they are neither acting as an agent of any shipping line nor do they sell container space of any particular shipping line.

c. They do not have any written contract/agreement with any shipping line. They can approach any shipping line. Their activity is not controlled by any authority.

d. They book space for different routes with different shipping lines and act as a liner to allow the exporters to book the space required by them with them. Shipping lines sell the container space either on full container basis or on box basis and accordingly we sell the same on full container basis or they break up the box and sell on CBM (cubic meter) basis.

e. They book the container space with the shipping company for say $100. This amount is in fact paid by them in full to the shipping company. Thus, this is the purchase cost of their container space booking. Thereafter, they accept the cargo from the exporters and sell the container space to them for say $150. The difference of $50 is our profit.

B. ALLEGATIONS IN THE SCN :-

1. During the course of departmental audit, it was observed that they raised a consolidated invoice on our client for export / import of cargo including various charges such as freight charges for ocean / air freight, B/ L charges, THC, Seal charges etc. It was further observed that they were paying service tax on all charges except freight charges under the category of Business Auxiliary Service till 30.6.2012 and thereafter under the provisions of S.66B of erstwhile Finance Act, 1994. As far as freight charges were concerned in respect of exports, no service tax was paid by the shipping lines/ companies, as the service provided by the shipping lines for carriage of goods by vessel to the overseas destination was a service provided in a nontaxable territory. Their clients were not liable to make any payment to the third party i.e. shipping lines/.companies who were the actual carriers of the cargo. They were approached by their clients or vice versa for exporting/ importing their cargo. The slots in the liners/ vessels were booked in advance by them. On receiving the enquiry from their clients, they book the cargo with the liners for onward transportation. As the activities undertaken by them were providing logistic support in respect of export/ import of international cargo which included the activities of pick up of the cargo from the clients premises for delivery to the port, completion of all formalities within the port till boarding the same for export or even in some cases clearing the goods at port abroad and delivering the consignments to our

clients customers were the activities which were nothing but the 'Services' provided to our clients and covered under S.65B (44) of Finance Act, 1994.**[Para 2 of SCN].**

2. It was evident that the so called net income received by them was nothing but the consideration received towards the service provided by them for providing logistic support for export/ import of our customers cargo. Therefore, the additional amount of Rs.4,36,55,653/- charged by them ostensibly towards freight charges and claimed to be the "net income" was nothing but the amount charged towards the services provided by them for handling the cargo of our clients for exports/ imports. Therefore they were liable to pay service tax on the entire consideration charged including the amount of Rs.4,36,55,653/-. **[Para 18 of SCN]**

3. They had knowingly suppressed the value of taxable services, with an intent to evade payment of Service Tax. **[Para 21 of SCN]**

**C. SUBMISSIONS:**

**I. SERVICES, IF ANY, RENDERED BY THEM ARE NOT TAXABLE SINCE THE SAME HAVE BEEN RENDERED OUTSIDE INDIA :**

1. In terms of S.64 (1) of Finance Act, 1994, service tax provisions are applicable to the whole of India except Jammu & Kashmir.

2. In terms of S.65B (27) of Finance Act, 1994, India means
   (a) the territory of the Union as referred to in clauses (2) and (3) of article 1 of the Constitution;
   (b) its territorial waters, continental shelf, exclusive economic zone or any other maritime zone as defined in the Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act, 1976 (80 of 1976);
   (c) the seabed and the subsoil underlying the territorial waters;
   (d) the air space above its territory and territorial waters; and
   (e) the installations, structures and vessels located in the continental shelf of India and the exclusive economic zone of India, for the purposes of prospecting or extraction or production of mineral oil and natural gas and supply thereof;

3. In terms of S.65B (52) of Finance Act, 1994 "taxable territory" means the territory to which the provisions of Finance Act, 1994 apply.

4. In terms of S.66B service tax is leviable on the value of services, other than negative list services, provided or agreed to be provided in the taxable territory by one person to another.

In terms of S.66C (1) r/w/s 94 (2) (hhh) of Finance Act, 1994, Central Government has the power to make the rules to determine the place where services are provided, agreed to be provided or deemed to have been provided.

6. In terms of Notification No.28/2012-ST dt.20.6.12 issued in exercise of powers under S.66C (1) /w/s 94 (2) (hhh) of Finance Act, 1994 Central Government has made rules called as "Place of Provision of Services Rules, 2012" w.e.f. 1.7.2012.

7. In terms of Rule 10 of PPS Rules, 2012 "the place of provision of services of transportation of goods, other than by way of mail or courier, shall be the place of destination of goods".

8. And as can be seen in the present case, when they book the container space for export from India to other country, the destination of goods is that another country which is other than India and hence, in terms of Rule 10 of PPS Rules, 2012 place of provision of services is outside the Indian taxable territory and hence, not liable to service tax under the provisions of Finance Act, 1994 being outside taxable territory.

9. And hence, the demand proposed in terms of the above SCN in respect of the services rendered outside India is null & void.

## II. THEIR ACTIVITIES CANNOT BE CONSIDERED AS "SERVICES"

1. In the present case, they are neither providing any service to their customers nor to the shipping line. In the case of exports, they book container space with the shipping lines by paying freight in full and thereafter they sell that containers space to the exporters/ importers by charging freight. The difference arising out of this termed as "ocean freight surplus" is the profit made by them. No service is involved in the said transaction. It is buying and selling the container space on the ship to their customers. And sale of container space cannot be said to be a service.

2. Reliance may be placed on the decision in **Baroda Electric Meters Ltd. v/s CCE – 1997] 94 ELT 13 [SC]** wherein it has been clearly held that when the freight actually paid by the assessee is less than the amount collected by way of freight from the customers, differential amount is nothing but the profit made by the assessee on transportation. And hence, not liable to excise duty.

3. The above Supreme Court decision was relied upon in **Bax Global India Ltd. v/s CST – 2008] 9 STR 412 [CESTAT-BANG]** to hold that profit made in freight booking is not taxable at all.

4. When they book the container space from a shipping line they pay for the same and the transaction is over. When they sell that space to the exporter they receive the freight for the same and the transaction is over. The difference between the two is their profit. Basically there is no service involved at all.

5. Reliance may be placed on the decision in **CIT v/s Qatar Airways – 2011] 332 ITR 253 [BOM]** wherein agents of Airline companies were permitted to sell tickets at any rate between fixed minimum commercial price and published price. And it was held that the difference between the two earned by the agents was not the commission/ brokerage but it was their profit and no tax was deductible at source.

6. In the case of **Uniworld Logistics Pvt. Ltd. v/s CST – 2014] 33 STR 422 [TRI-CHE]** at the time of considering the stay application of the appellant it was observed that profit earned on ocean freight charges did not, prima facie, appear to be taxable under the head "Business Auxiliary Service" and unconditional stay was granted.

7. They neither acted on behalf of shipping line nor the exporter but on our own behalf. They had not caused purchase or sale on somebody's behalf and earned commission but they had invested our money in trading in the container space and earned profit out of the same. They had booked container space well in advance without any customers in hand and hence, it cannot be said by any stretch of imagination that they had procured those container space at that point of time for somebody. As such, it cannot be said that when the client approaches them afterwards for the container space, that the said container space booked in advance by them was procured by them for the client.

8. The person rendering the service would never invest his own money but the trader does. The person rendering service just tries to meet the parties and gets paid for the same by way of service charges. But the trader purchases and sells and earns profit on the same. Thus, person rendering the service is far away from the trader.

9. It may be noted that whenever any person renders any services, what he will earn is the "Service Charges" & "Service Charges" received cannot be compared with the profit earned. In the present case, what has been earned by them is the "Profit "& not the "Service Charges".

10. Even otherwise "Overseas transport" is out of the purview of the service tax law. What is taxable is the 'transport of goods through inland water" in terms of S.65 (105)(zzzzl) of the Finance Act, 1994 only upto 30.6.2012. From 1.7.2012, in terms of Rule 10 of Place of Provision of Services Rules, 2012, the place of provision of services of transportation of goods shall be the destination of goods. Thus, the service in relation to international ocean traffic was never taxable and since the "international ocean freight" is outside the purview of service tax law, any profit made is also outside the purview of service tax law. Thus, the service in relation to transport in international ocean traffic is not taxable. And since the 'international ocean freight" is outside the purview of service tax law, any profit made on the same will also be outside the purview of service tax law.

11. Having regard to the above, it can definitely be said that their **earning surplus on freight will not be liable to service tax.**

12. Prior to 1.7.2012, transportation of goods through inland water was taxable from 16.6.2009. The taxable service was defined under S.65 (105) (zzzzl) of Finance Act, 1994 and the same read as under :-

"taxable service" means any service provided or to be provided 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,—

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

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

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

13. From the above, it can be seen that any service provided in relation to transport of goods through national waterway or inland water was taxable under this category. However, the services provided in relation to transport of goods through international water were never taxable since they fell outside the taxable territory. The use of the words "in relation to" widens the scope of the definition to include booking of space in the cargo/ vessel in its ambit. In the present case, service tax is demanded from them on the profit made by them by booking the space in cargo / vessel for transporting goods in international water. Hence, prior to 1.7.2012 they were not liable to pay service tax.

14. Reliance may also be placed on S.65A (which was in existence prior to 1.7.2012) and S.66F w.e.f.1.7.2012 and CBEC Guidance Notes, which read as under:-

**SECTION 65A.Classification of taxable services.** - (1) ----

2) When for any reason, a taxable service is, *prima facie*, classifiable under two or more sub-clauses of clause (105) of section 65, classification shall be effected as follows :-

(a) the sub-clause which provides the most specific description shall be preferred to sub-clauses providing a more general description;

**SECTION [66F.Principles of interpretation of specified descriptions of services or bundled services.**— (1)---

(2) Where a service is capable of differential treatment for any purpose based on its description, the most specific description shall be preferred over a more general description

15. The CBEC Guidance Notes, in para 9.1.2, while explaining the scope of clause (1) of S.66F has clarified as under ;

'where a service is capable of differential treatment for any purpose based on its description, the most specific description shall be preferred over a more general description'

The services provided by a real estate agent are in the nature of intermediary services relating to immovable property. As per the Place of Provision of Service Rule, 2012, the place of provision of services provided in relation to immovable property is the location of the immovable property. However in terms of the rule 5 pertaining to services provided by an intermediary the place of provision of service is where the intermediary is located. Since Rule 5 provides a specific description of 'estate agent', the same shall prevail. Pandal and Shamiana is an existing service and will remain a subject of taxation. Likewise service provided by way of catering is a taxable service and entitled to

abatement. There is abatement when the two are provided in combination. Since the combination is more a specific entry than the two provided individually, there is no need to apply the later rule of bundled services, where the character could be judged by the service which provides it the essential character.

16. Reliance may also be placed on the Delhi High Court judgment in CST Vs. Globe Ground India Pvt. Ltd. - 2015] 40 STR 417 wherein after referring to S. 65A (2) (a) of the Finance Act, 1994 it was observed that the specific definition of a taxable service should be preferred over a general description.

17. "Advertising Agency Services" were made taxable w.e.f. 1.11.1996.

18. It was held in Zee Telefilms Ltd. Vs. CCE – 2006] 6 STJ 284 and MTV Network India Pvt. Ltd. Vs. CCE – 2007] 8 STJ 223 that Sale of space / site for the purpose of displaying advertisement was not covered under the definition of "Advertising Agency".

19. "Business Auxiliary Services" were made taxable w.e.f. 1.7.2003 and included promotion or marketing of service provided by the client.

20. In spite of the above heading, new service titled "Sale of space or time for Advertisement Services" was made taxable w.e.f. 1.5.2006 and included providing space for display, advertising, showcasing of any product etc.

21. In sale of space for advertising also profit margins are involved in a sense that one books the space for advertising at a particular price and sells it to some another company (who wants to advertise) at a higher price. The difference is the margin. And as can be seen, this is similar to selling of cargo space in that in one case space is sold for cargo and in another case space is sold for display/ showcasing of product.

22. If the margin involved in selling of cargo space is to be held as the consideration for the service involved in the purchase and sale of space and covered under "Business Auxiliary Services" as amounting to procurement of services for the client, there was no reason for not taxing the margins involved in the sale of space for advertisement under the same head since the activity in both the cases is similar as explained earlier.

23. But as has been noted above, legislature was aware that such margins could not have been taxed at all and hence, a new head "Sale of Space" was brought under service tax net w.e.f. 1.5.2006 even though "Business Auxiliary Services" were taxable since 1.7.2003.

And as is known, there is no separate heading for taxing profit margins involved in the sale of cargo space. As such, it cannot be taxed as a service.

It may be noted that booking of cargo space is nothing but the booking of ocean freight. The word cargo space is used by way of common usage for ocean freight because ultimately what is conveyed by cargo space is carrying of goods by ocean.

26. When the cargo space was booked by them what was booked was the ocean freight and this is even clear from the invoices raised by the ship liners on them which clearly mentioned the word" freight chargeable in foreign currency" and not attracting any service tax. The invoice in turn raised by them on our client also described the "ocean freight" for cargo only. Thus, what was paid for by them was the ocean freight and what was received by them was also on account of ocean freight. **As such, the service rendered by them to the client was concerning and in relation to the ocean freight only. And hence, no service tax was attracted on the same.**

27. Reliance may be placed in this connection on the oft quoted judgment of **Supreme Court in the case of Doypack Systems Pvt. Ltd. v/s UOI – 1988] 36ELT 201** wherein it was held as under :-

**Para 47 :** "They are of the opinion that the words "pertaining to" and "in relation to" have the same wide meaning and have been used interchangeably for amongst other reasons, which may include avoidance of repetition of the same phrase in the same clause or sentence, the method followed in good drafting. The word "pertain" is synonymous with the word "relate" [Corpus JurisSecundum, Volume -17 Page 693]

**Para 48 :** "The expression "in relation to" (so also "pertaining to" ) is a very broad expression which presupposes another subject matter. These are words of comprehensiveness which might both have direct significance as well as indirect significance depending on the context. In this connection reference may be made to 76 Corpus JurisSecundum at page 620 & 621 wherein it is stated that the term "relate" is also defined as meaning to bring into association or connection with. It has been clearly mentioned that "relating to" has been held to be equivalent to or synonymous with as to "concerning with" and "pertaining to" The expression "pertaining to" is an expression of expansion and not of contraction".

28. After 1.7.2012, the provisions of "Place of Provision of Services Rules, 2012" are applicable and the rule 10 of the same reads as under :-

**RULE 10. Place of provision of goods transportation services.** — The place of provision of services of transportation of goods, other than by way of mail or courier, shall be the place of destination of the goods.

29. Since in the present case destination of goods is outside the taxable territory, our services cannot be made taxable after 1.7.2012.

30. **It may not be out of place to refer to illustration underpara 5.9.6 of CBEC Guidance Note issued vide TRU circular dt.20.6.2012 (Taxation of Services - Education Guide)**

**Illustration :-**

A freight forwarder arranges for export and import shipments. There could be two possible situations here-one when he acts on his own account, and the other, when he acts as an intermediary.

When he acts on his own account (say, for an export shipment)

A freight forwarder provides domestic transportation within taxable territory (say, from the exporter's factory located in Pune to Mumbai Port) as well as international freight service (say, from Mumbai Port to the international destination), under a single contract, on his own account **(i.e. he buys-in and sells freight transport as a principal), and charges a consolidated amount to the exporter. This is a service of transportation of goods for which the place of supply is the destination of goods. Since the destination of goods is outside taxable territory, this service will not attract service tax.** Here, it is presumed that ancillary freight services (i.e. services ancillary to transportation-loading, unloading, handling etc.) are "bundled" with the principal service owing to a single contract or a single price (consideration).

31. In the light of the above submissions, it can definitely be said that profit earned by them on ocean freight cannot be made taxable for service tax as a "Service" after 1.7.2012 as no service was rendered by them.

32. The observation made in the SCN that no B/L was issued by them to our clients and that the B/L was issued only by the shipping line is not relevant at all since what needs to be seen is what was the nature of activity undertaken by them. And as has been stated above, they had undertaken the activity of transportation of goods by water though with the help of shipping line. Our relationship with the shipping line as also with client was on principal to principal only since they were not the agent of the shipping line. This view of ours finds support from the AAR decision cited below which clearly states that the service rendered if any by the assessee was in respect of transportation of goods by air or sea and was very much covered under Rule 10 of Place of Provision of Services Rules, 2012.

## III. CESTAT DECISIONS

1. The issue involved in the present show cause notice i.e. whether the freight margin is liable to service tax is now covered in our favour by the Tribunal decision in the case of **Greenwich Meridian Logistics India Pvt. Ltd. v/s CST – 2016] 43 STR 215 [TRI-MUM].** The department had filed an appeal against this order with the Bombay High Court. The same has been disposed off on 6.9.2018 by observing that the appeal against the CESTAT order lies with the Hon'ble Supreme Court only. **The appeal filed by the department with the Supreme Court was dismissed on account of delay.**

2. The aforesaid Tribunal decision was followed by the Tribunal in **Phoenix International Freight Services Pvt. Ltd. v/s CST – 2017] 47 STR 129 [TRI-MUM]** wherein it was again held that "freight margin" earned is not liable to service tax. It was further held that the issue involved was of interpretation of taxable service and hence, extended period was not invokable.

3. Reliance may further be placed in the matter of **Global Transportation Services Pvt. Ltd. – 2016] 45 STR 574 [AAR]** wherein it has clearly been held that freight margin in respect of outbound shipment (export) is not taxable in the light of R.10 of Place of Provision of Services Rules, 2012 on account of the fact that place of provision of service would be outside India. It was further held that freight margin in respect of inbound

shipment (import) also is exempt from levy of tax in the light of the exemption provided to transportation of goods by aircraft and vessel under S.66D of the Finance Act, 1994 as the same is service by way of transportation of goods by air or sea from a place outside India into Indian Customs area upto 31.3.2016. It was further held that the service rendered if any by the assessee was in respect of transportation of goods by air or sea and was very much covered under Rule 10 of Place of Provision of Services Rules, 2012.

4. Reliance is further placed on the decision in the case of **CST v/s Karam Freight Movers – 2017] 4 GSTL 215 [TRI-DEL]** wherein it was held that mere sale and purchase of cargo space and earning profit in process is not taxable activity.

5. In the case of **DHL Logistics Pvt. Ltd. v/s CCE – 2017] 6 GSTL 85 [TRI-MUM] the** Hon'ble Tribunal set aside the demand by holding that assessee booking space for their own trading activities and in absence of any client, no demand under BAS may be raised.

6. Similar view has been taken inSea Master Shipping & Logistics v/s CST – 2019] 25 GSTL 458 [TRI-HYD] & CST v/s Om Air Travels Pvt. Ltd. – 2019] 25 GSTL 460 [TRI-AHMD]

7. In the light of the above decisions, it can definitely be said that the freight margin earned by them was not liable to service tax.

**IV. ON LIMITATION:**

1. The SCN invokes the extended period by alleging suppression of facts. However, it can be seen from the above submissions that there was no suppression on their part with an intent to evade service tax. They had not paid service tax because they were under a bonafide belief that they were not rendering any service.

2. As per the settled law, extended period can be invoked only when the service tax is not paid with a malafide intention. And since, in the present case, there was no malafide intention on our part, extended period cannot be invoked.

3. As per settled law, extended period cannot be invoked and penalty cannot be imposed when the issue involved is of interpretation of statute. As can be seen, in Bax Global India Ltd. v/s CST – 2008] 9 STR 412 [CESTAT-BANG] it was held that profit made in freight booking was not taxable at all. Further recently in the case of Greenwich Meridian Logistics Pvt. Ltd. v/s CST & Phoenix International Freight Services Pvt./ Ltd. v/s CST it was observed that space or slots on vessels can be traded and the term freight is just the nomenclature used for the consideration for the said space, as such, this is a trading activity.

The three decisions referred to in para 3 above, clearly show that even the higher authorities administering service tax law were of the view that profit earned on ocean freight was not liable to service tax under the category of "Business Auxiliary Services". The decision in Bax Global is prevalent since 2008. Further, the decision in Greenwich & Phoenix have clearly held that the freight earning activity was a trading activity. So, the prevalent view is that profit made on freight booking is not liable to service tax under

the category of "Business Auxiliary Services' and hence, it cannot be said that there was a malafide intention on our part in not paying service tax on freight difference and as such, the demand is time barred.

**V. PENALTY U/S. 76, 77 &78 OF THE FINANCE ACT, 1994 AND INTEREST U/S. 75 OF THE FINANCE ACT, 1994 :-**

1. In the absence of any suppression on our part, penalty u/s. 78 of Finance Act, 1994 cannot be imposed.

2. As explained above, the Tribunal decisions in Bax Global and Uniworld Logistics (supra) held that profit made on ocean freight booking was not liable to service tax and hence, they cannot be said to have suppressed the information when they were guided by the said Tribunal decisions prevalent since 2008. And as such, penalty cannot be imposed on them.

3. It is submitted that proposal to impose simultaneous penalties u/s.76 & 78 of Finance Act, 1994 is not sustainable. The penalty that can be imposed under Section 78 is different and cannot fall, in respect of the same service tax evaded, under Section 76. These two provisions are mutually exclusive and the cases where guilty mind does not exist, will fall under Section 76 while those where such *mensrea* is required, will fall under Section 78. Therefore, there is no scope for proposing double penalty, i.e., both under Section 78 and Section 76. It is to be noted that, after realizing that penalties under both sections are exclusive, a proviso was inserted to S.78 w.e.f. 10.5.08 stating that if the penalty is imposed under S.78, provisions of S.76 shall not apply.

4. In the absence of any contravention of rules on our part, penalty under S.76/ 77/78 of Finance Act, 1994 cannot be imposed and interest under S.75 of Finance Act, 1994 cannot be recovered.

**VI. CUM TAX BENEFIT**

In the unlikely event of the demand getting confirmed, they submit that the amount held as "taxable" should be treated as inclusive of service tax and cum tax benefit should be granted to them.

**20.1 Further, during the course of the personal hearing held on 29.12.2020, the assessee filed further submissions, wherein they interalia stated as under:**

1. The issue involved is about the service tax liability in respect of "freight margin" earned by the Noticee.

Detailed written reply dt.4.9.19 has already been filed with you and they are e-mailing the same.

As can be seen from the written reply, the proposed demand is being contested on three grounds as under:-

a) Service tax is not leviable since the services have been rendered outside India.

b) Activities cannot be considered as services since freight surplus arises out of purchase and sale of space and hence, not taxable. Various Tribunal decisions which hold that such freight margin is not taxable have been relied upon. One of the decisions is in the matter of Greenwich Meridian wherein the departmental appeal was dismissed by the Hon'ble Supreme Court on account of delay. There is no contrary decision of any Tribunal on this issue.

c) Limitation

4. They relied upon the CESTAT Ahmedabad decision dt.22/8/2019 in Surya Shipping v/s Commissioner, Gujarat – 2020-TIOL-249 [copy enclosed] wherein after relying upon various Tribunal decisions (which have also been relied upon by us as state above] , the Hon'ble Tribunal has held that freight surplus arose out of trading activity of sale and purchase of space and profit earned on the same was not liable to service tax

5.. In the light of the above decisions, it can definitely be said that the freight margin earned by the Noticee was not liable to service tax.

**20.2** Further to the hearing granted on 29.12.2020, the assessee has filed further submissions, wherein they interalia stated as under:

III. As can be seen from the written reply dt.4.9.19, the proposed demand is being contested on three grounds as under:-

**A) Service tax is not leviable since the services have been rendered outside India. – (for detailed submissions kindly refer Para (c) (I) (6 to 8) on page 8 & 9 of the reply dt.4.9.2019)**

Rule 10 of Place of Provision of Services Rules, 2012 is being relied upon. SInce the destination of goods is that another country which is other than India, in terms of Rule 10 of PPS Rules, 2012 place of provision of services is outside the Indian taxable territory and hence, not liable to service tax under the provisions of Finance Act, 1994 being outside taxable territory.

**B) Activities cannot be considered as services - (for detailed submissions kindly refer Para (c) (II) (para 1 to 4&7 to 9 on page 9 – 13 of the reply dt.4.9.2019, Para 25 and 26 on page 20 & 21 of the reply dt.4.9.2019, Para 30 – 32 on Page 24-25 of the reply dt.4.9.2019)**

1. In the present case, Noticee neither provided any service to their customers nor to the shipping line. In the case of exports, the Noticeebooked container space with the shipping lines by paying freight in full and thereafter theysold that containers space to the exporters/ importers by charging freight. The difference arising out of this termed as "ocean freight surplus" was the profit made by the Noticee. No service is involved in the said transaction. It is buying and selling the containerspace on the ship to their customers. And sale of container space cannot be said to be a service.

2. Booking of cargo space is nothing but booking of ocean space.

3. The Noticee neither acted on behalf of shipping line nor the exporter but on their own behalf. The Noticee had invested their money in trading in the container space and earned profit out of the same.

4. The person rendering the service would never invest his own money but the trader does. The person rendering service just tries to meet the parties and gets paid for the same by way of service charges. But the trader purchases and sells and earns profit on the same. Thus, person rendering the service is far away from the trader.

5. TRU Circular dt.20.6.12 [Para 30 on page 23 & 24 of the reply dt.4.9.2019) supports the Noticee.

6. CESTAT decisions holding that freight surplus is not taxable have been cited from page 26 to 28 of the reply dt.4.9.2019

7. CESTAT Ahmedabad decision dt.22/8/2019 in **Surya Shipping v/s Commissioner, Gujarat – 2020-TIOL-249[copy enclosed]** wherein after relying upon various Tribunal decisions (which have also been relied upon by us as stated above] , the Hon'ble Tribunal has held that fright surplus arose out of trading activity of sale and purchase of space and profit earned on the same was not liable to service tax

**C)Limitation - (for detailed submissions kindly refer Para (c) (IV) on page 28 to 30 of the reply dt.4.9.2019)**

Extended period has been invoked but the same is being defended on the ground of bonafide belief and interpretation of statute.

21. **PERSONAL HEARING :**

Personal hearing in the matter was held on virtual mode on 29.12.2020, wherein Shri Rajeev Waglay, Advocate,represented the assessee, and reiterated the submissions made in their defence repy and additional written submissions.

**DISCUSSION AND FINDINGS:**

22. I have gone through the records of the case, the defence reply and the additional submissions made by the assessee, during the course of the personal hearing.

23. The assessee was raising consolidated invoices to their clients for export / import of cargo including various charges such as freight charges i.e. charges for ocean/air freight, BIL (Bill of Lading) charges, O/O (Delivery order) charges, THC (Terminal Handling charges), Seal charges, etc. They were paying service tax on other charges above except on freight charges under the category of Business Auxiliary Service till 30.06.2012 and thereafter under the

provisions of Section 66B of the erstwhile Finance Act, 1994 .The shipping lines/ Companies or their agents issued invoices in the name of the assessee for freight charges and other charges and paid service tax on THC & Seal charges in most of the cases. The clients of the assessee approached the assessee for exporting /importing their cargo. The slots in the liners/vessels were booked in advance by the assessee. The assessee booked the cargo with the liners for onward transportation, as per the requirement of the clients. It has been alleged in the Show Cause Notice that as the activities undertaken by the assessee was providing logistic support in respect of export/import of international cargo which includes the activities of pickup of the cargo from the clients premises for delivery to the port, completion of all formalities within the port till boarding the same for export or even in some cases clearing the goods at port abroad and delivering the consignments to their clients customers, such activities are nothing but the 'Services' provided to their clients. Similar services in the reverse order were provided by the assessee in the case of import for their clients. The services were in the nature of facilitating their clients for export/import of their cargo through the shipping companies. The said services are covered under the definition of "clearing and forwarding agent services" as defined at Section 105( J) of the erstwhile Finance Act, 1994, till 30.06.2012, i.e. prior to Negative List Regime. Whereas, with introduction of negative list regime w.e.f. 01.07.2012, ***"service"*** *means any activity carried out by* a *person for another for consideration, and includes* a ***declared service.*** Therefore, assessee's activity of providing logistic support in respect of export/import of international cargo, at the same time availing the services of transporters (for domestic transportation), warehousing services at port, CHA services, loader services, etc. till the boarding of cargo on vessel in case of export & the services of the shipping lines/companies for ultimate carriage of export cargo and vice versa in case of imports, is covered under the definition of "service" as provided under sub section (44) of the Section 65B of the erstwhile Finance Act 1994 and the definition of 'taxable service' as provided sub section (51) of Section 65B of the Act ibid, read with Section 66 B and Section 66 D of the Finance Act.

24. The so called freight charged by the assessee from their clients, during the period 2012-13 to 2016-17, was higher than the amount paid to the shipping lines/companies as freight. It has been alleged that **the additional consideration amounting to Rs. 4,36,55,653/-** charged by the assessee from their clients,was nothing but consideration received by them from their clients towards the aforesaid service of providing logistic support in respect of export/import of international cargo of their clients and that the said amount was chargeable to service tax. However the assessee had not paid service tax amounting to **Rs.60,40,712/-** on the additional consideration received by them on the pretext that the said amount was net income,implying that it was freight charges.

25. The issue to be decided is whether the additional consideration amounting to Rs. 4,36,55,653/- charged by the assessee from their clients, during the course of providing logistic support in respect of export/import of international cargo,is liable to Service Tax or otherwise; or whether the same should be considered as freight charges or Net income as claimed by the assessee, which as per the contention of the assessee is not liable to Service Tax.

26. At the outset, I hereby examine the activity of the asssessee.

27. They were engaged in providing logistic services. The slots in the liners/vessels were booked in advance by the assessee. The assessee booked the cargo with the liners for onward transportation, as per the requirement of the clients.They were providing logistic support in respect of export/import of international cargo which included the activities of pickup of the cargo from the clients premises, for delivery to the port, completion of all formalities within the port till boarding the same for export or even in some cases clearing the goods at ports abroad and delivering the consignments to their clients customers. Similar services in the reverse order were provided by the assessee in the case of import for their clients. The services were in the nature of facilitating their clients for export/import of their cargo through the shipping companies. In short, the assessee purchased container space available with a particular shipping line for a price and sold such container space to different customers at a price.It is the claim of the assessee that the difference between the purchase price and sale price is their profit which is nothing but a trading profit and the same is shown on the credit side of the Profit & Loss A/c.

28. It is also their contention that when the cargo space was booked by them,what was booked was the ocean freight and this is even clear from the invoices raised by the ship liners which clearly mentioned the word "freight chargeable in foreign currency" and not attracting any service tax. The invoice in turn raised by them on their client also described the "ocean freight" for cargo only. Thus, what was paid for by them was the ocean freight and what was received by them was also on account of ocean freight. **As such, the service rendered by them to the client was in relation to the ocean freight only. And hence, no service tax was attracted on the same.Further, they have also submitted that the** transaction with any shipping line **is on principal-to-principal basis** and they are neither acting as an agent of any shipping line nor do they sell container space of any particular shipping line.Thus basically it is argued by the assessee that they have provided the services of a freight forwarder acting as a principal.

29. However, on scrutiny of the invoices raised by the assessee as mentioned in the Show Cause Notice, it is evident that though the shipping lines or their (shipping lines') agents' issued invoices in the name of the assessee, no Bill of lading were issued by the assessee. On the contrary the Bill of Lading number mentioned in the shipper's invoice also appeared in the invoice issued by the assessee to their clients. Therefore it comes out clear that the shipping lines or their agents are issuing the Master Bill of lading, in the name of the original shippers (clients of the assessee).

30. In one case, for example, it was seen that M/s. Swift Freight (India) Pvt. Ltd., Mumbai had raised an invoice dated 04.03.2017 in the name of the assessee as the customer and M/s. Ruparel Foods Pvt. Ltd. as the shipper, for total charges of Rs. 2,03,294/-, including freight charges of Rs. 1,79,182/-. The Master B/L number shown in the invoice is 769515683 and the House B/L number is 143117001760. Consequent to the above the assessee raised an invoice dated 10.03.2017 on their client M/s. Ruparel Foods Pvt. Ltd. for a total value of Rs.208181/- including freight charges of Rs. 1,87,389/-. The B/L number shown in the said invoice was 143117001760 which was the same as the House B/L number shown in the invoice of M/s.

Swift Freight above. **Thus it was seen that M/s. Swift Freight had acted as a principal in this case** and in whose favour the shipping line/company had raised a Master B/L number 769515683 and in turn Mis. Swift Freight had raised House BIL number is 143117001760 in the name of M/s. Ruparel Foods Pvt. Ltd., the client of the assessee. The said House BIL number was further reflected in the invoice raised by the assessee to their client, M/s. Ruparel Foods Pvt. Ltd.

31. In another case, it was seen that M/s. Hamburg SUD India Pvt. Ltd., Mumbai, the shipping line/company, had raised an invoice dated 02.03.2017 in the name of the assessee as shipper and also as the booking party, for Rs. 68,779/- including ocean freight of Rs. 51,337/-. The B/L number shown in the invoice is SUDUI7999A15M3G1, which appeared to be a Master B/L. In turn the assessee raised an invoice dated 10.03.2017 on their clients, M/s. Kings Dehydrated Foods Pvt. Ltd. for Rs. 98,506/- including freight charges of Rs. 86,447/-. The B/L number in the invoice raised by the assessee was the same as shown in the invoice of the shipping line, M/s Hamburg SUD. Therefore it was again seen that no House B/L is issued by the assessee, which they should have issued if they were acting as Principal.

32. Thus it is crystal clear that the assessee claiming that they have acted as principal for the exports/imports on behalf of their clients is erroneous and misleading.

33. It construes from the explanation of the assessee that the space they procured from the shipping line is being provided to the exporters who use the said space for the export of their cargo. Thus, it is clear that procurement of space by the assessee is for exporters/importers. The exporters for the purpose of export of their cargo require the services of shipping line for transportation of their export cargo by sea. The containers required for export of cargo are offered by the shipping lines. The said services of shipping lines are obtained by the exporters through agents like the assessee. The assessee had booked the space with the shipping lines for their clients, who in turn use the containers so booked for the export/import of their cargo. Thus in such cases, services of shipping lines for transportation of export cargo are input services for the exporters for the purpose of export of their cargo. Thus, it appeared that procurement of space from the shipping line by the assessee and its subsequent transfer to exporters are in the nature of input services for the clients of the assessee.Thus the charges collected by the assessee from their clients in excess of what they pay to the shipping lines are nothing but charges collected by them towards provision of services to their clients. Further, the contention of the assessee that it was the profit they earned by trading of ocean freight is not tenable as ocean freight is the actual freight incurred towards transportation of cargo by sea and **only the amount the assessee pays to the shipping lines qualifies as ocean freight.** The extra amount they collected in the guise of profit of trading of ocean freight cannot in any way be considered as an element of ocean freight as it does not relate to actual cost of transportation, but is only an amount realised by the assessee for providing the service of procurement of space to the exporters/ importers.

34. Now, I come to the aspect of "Ocean Freight", which the assessee claims the amount received from their clients to be. It is to reiterate here that Service Tax is has been demanded only on the additional consideration received by the assessee from their clients and not on the Ocean freight itself. "Ocean Freight" is the amount which is received by the Shipping line. I find that it is clear in the present matter that the demand is not raised for the element of container space freight/ ocean freight as the same has been paid to the shipping line for transporting export cargo, but Service Tax is demanded only on the differential amount which has been retained by the assessee after making payment for ocean freight to the shipping line as extra consideration which is taxable under Service Tax. I find that the assessee has provided services to support the business of their clients. They have charged amounts from their clients in excess of what they pay to the shipping lines in the category of container ocean fright. I find that ocean freight is the actual freight incurred towards transportation of cargo by sea, thus only the amount paid by the assessee to the shipping lines qualifies as ocean freight. I find that the extra amount collected as over and above the basic ocean freight by the assessee, is not an element of ocean freight, as it pertains to the service provided to the clients, over and above the actual cost of transportation/Ocean Freight. The assessee is providing services to the exporters, including the service of procurement of bulk space to support the business of clients/exporters. It is also found that the extra amount collected by the assessee from their clients, viz. exporters is the consideration which they received in lieu of services provided by them and the said consideration they received is the value of taxable service provided by them and Service Tax is liable to be paid for providing such services.

35. The fact that bulk space has been booked on shipping lines by the assessee for the purpose of transportation, would not in any way affect the integral nature of services rendered by the assessee. Say for example, even if the assessee books the cargo/container space on behalf of the client without any pre-booking by him, and subsequently charges the extra consideration for booking such space from the client, the service provider would earn extra consideration, which would be nothing but commission earned by him for facilitating the booking of space for the transportation. This consideration cannot be considered as ocean freight. Here the assessee had pre-booked space, and in the process secured the additional margin in advance from the prospective clients/exporters. I therefore, find that such additional consideration recovered by the assessee from its clients is in the nature of consideration, which the assessee may choose to call by any nomenclature, be it 'profit' or 'trading activity'. However, the fact remains that in the process of rendering such service, the assessee has earned consideration for providing services to its clients, which is chargeable to service tax.

36. I find that the assessee has relied on the Tribunal decision in the case of **Greenwich Meridian Logistics India Pvt. Ltd/ v/s CST – 2016] 43 STR 215 [TRI-MUM] and** interpreted it to be in the favour of the assessee.

36.1. The decision of CESTAT is reproduced hereinunder.

*Agent of exporters - Handling logistics for delivery to consignee, taking responsibility for safety of goods, issuing document of title, and committing delivery to consignee - To ensure such safe delivery, agent contracting with carriers, by land, sea or air, without diluting its contractual responsibility to consignor - Shipper was not privy to minutiae of such contract for carriage - Often such contracts entered into even in absence of shippers, in anticipation of demand and as distinct business activity, with risk of its non-usage - HELD : Allotment of procured space to shippers at negotiated rates within total consideration in multi-modal transportation contract with consignor was distinct principal-to-principal transaction - Assumption of such risk was not within the scope of agency function - Notional surplus was earned from purchase and sale of space and not by acting for client - With space so purchased being allocable only by assessee, shipping line fails in description as client whose services are promoted or marketed - Hence, such surplus was not liable to Service Tax under Section 65(19) of Finance Act, 1994. [paras 11, 12, 13]*

*Business Auxiliary Service - Commission - From shipping lines for purchase/sale of space/slots for ocean transport of containers - It is liable to Service Tax under Section 65(105)(zzb) of Finance Act, 1994 - However, there was no justification for fastening same liability on all other receipts of assessee. [paras 6, 10]*

*Service Tax - Liability of - Each source of income must be looked at independently - Service provider is not necessarily specialist in rendering one service - Earnings of service entity may accrue from one or more services, some of which may be taxable - Finance Act, 1994 does not envisage determination of taxability from accounting entries - Manner or mode of booking profit in accounts of commercial organization has no bearing on application of Section 65(105) of Finance Act, 1994 to taxable activity - Nomenclature in accounts is not material to classification of service when taxable entry specifies legislative intent - Description of taxable service in Section 65(105) ibid as well as definition, if any, of terms therein are primary determinant for taxation of any service. [paras 7, 9]*

*Words and Phrases - Freight - Charged by shipping line - There is possibility of trading in space or slots on vessels - It cannot be said that such trading was figment and only freight was transacted - Freight, though used colloquially to describe all manner of carriage, is nomenclature assigned to consideration for space provided on vessel for particular voyage - Freight is charged by entity that is in possession of space on vessel from entity that requires space for carriage of cargo. [paras 10, 11]*

36.2 The relevant paras of the decision of CESTAT, are reproduced as under:

*7. Each source of income must, therefore, be looked at independently. A service provider is not necessarily a specialist in rendering one service; the earnings of a service entity may accrue from one or more services - some of which may be taxable. Finance Act, 1994 does not envisage determination of taxability from accounting entries. The manner or mode of booking the profit in the accounts of a commercial organization has no bearing on the application of Section 65(105) to a taxable activity. The nomenclature in the accounts that appears to have weighed heavily with the original authority is not material to classification of the service when the taxable entry specifies the legislative intent.*

*8. The Hon'ble High Court of Gujarat in Sports Club of Gujarat Ltd. v. Union of India [2010 (20) S.T.R. 17 (Guj.)] has observed that -*

*'9 ..... Service Tax was introduced in India vide the Finance Act, 1994. It is legislated by the Parliament under the residuary entry, i.e. Entry 97 of List I of the Seventh Schedule of the Constitution of India. It is an indirect tax and is to be paid on all the services notified by the Union Government for the said purpose. The said tax is on the service and not the service provider.'*

*and though in the context of dispute relating to 'mandap keeper', the judgment is particularly relevant here as it goes on to observe after drawing attention to Section 68 and Section 65 of Finance Act, 1994 that.*

*'12. A conjoint reading of the above provisions of the law goes to show that the services provided to a client, ... ... , falls under the category of taxable service'*

*9. The description of the taxable service in Section 65(105) of Finance Act, 1994 as well as the definition, if any, of the terms therein are the primary determinant for taxation of any service.*

*From the observation of the Hon'ble High Court of Gujarat supra, it is clear that the provision of service is manifest by the existence of service provider performing an activity for which consideration is received from the recipient of the service....*

*10. The original authority has proceeded on the assumption that there is only one payment and, that too, for freight charged by the shipping line. He has rejected the possibility of trading in space or slots on vessels by holding that trading in space or slots is a figment and freight is all that is transacted. This is a patent misconstruing of the usage of that expression. Freight, though used colloquially to describe all manner of carriage, is the nomenclature assigned to the consideration for space provided on a vessel for a particular voyage. **Freight is charged by the entity that is in possession of space on a vessel from an entity that requires the space for carriage of cargo.***

*11. Slots may be contracted for by the shipper or its agent with the shipping line through the steamer agent. **Implicit is a uni-directional flow of consideration because the space belongs to the shipping line.** Steamer agent or agent of shipper may earn commission in such a transaction. Leaving that situation aside, the contention of the appellant is that it is a 'multi-modal transport operator' which entails a statutorily assigned role in cross-border logistics. According to Section 2 of the Multi-modal Transportation of Goods Act, 1993.*

*(m) "multimodal transport operator" means any person who -*

*(i) concludes a multimodal transport contract on his own behalf or through another person acting on his behalf;*

*(ii) acts as principal, and not as an agent either of the consignor or consignee or of the carrier participating in the multimodal transportation, and who assumes responsibility for the performance of the said contract; and*

*(iii) is registered under sub-section (3) of section 4;*

*and*

*(a) "carrier" means a person who performs or undertakes to perform for a hire, the carriage or part thereof, of goods by road, rail, inland waterways, sea or air;*

*12. The appellant takes responsibility for safety of goods and issues a document of title which is a multi-modal bill of lading and commits to delivery at the consignee's end. To ensure such safe delivery, appellant contracts with carriers, by land, sea or air, without diluting its contractual responsibility to the consignor. Such contracting does not involve a transaction between the shipper and the carrier and the shipper is not privy to the minutiae of such contract for carriage. The appellant often, even in the absence of shippers, contract for space or slots in vessels in anticipation of demand and as a distinct business activity. Such a contract forecloses the allotment of such space by the shipping line or steamer agent with the risk of non-usage of the procured space devolving on the appellant. By no stretch is this assumption of risk within the scope of agency function. Ergo, **it is nothing but a principal-to-principal transaction and the freight charges are consideration for space procured from shipping line. Correspondingly, allotment of procured space to shippers at negotiated rates within the total consideration in a multi-modal transportation contract with a consignor is another distinct principal-to-principal transaction. We, therefore, find that freight is paid to the shipping line and freight is collected from client-shippers in two independent transactions.***

37. First and foremost, the above decision is in the context of the agents of the exporters,here in this case, the assessee and the Shipping lines. The Tribunal has ruled that each source of income must be looked at independently. Service provider is not necessarily always rendering one service.Income from providing services may accrue from one or more services, some of which may be taxable. Manner or mode of booking profit in accounts of commercial organization has no bearing on application of Section 65(105) of Finance Act, 1994 to taxable activity. The nomenclature in accounts is not material to classification of service when taxable entry specifies legislative intent - Description of taxable service in Section 65(105) ibid

as well as definition, if any, of terms therein, are primary determinant for taxation of any service. The description of the taxable service in Section 65(105) of Finance Act, 1994 as well as the definition, if any, of the terms therein are the primary determinant for taxation of any service and the provision of service is evident by the existence of service provider performing an activity for which consideration is received from the recipient of the service.

38. It has been clarified vide the above decision of the Hon'ble Tribunal that there is possibility of trading in space or slots on vessels.Tribunal has made it clear that the term "Freight", though used colloquially to describe all manner of carriage, is a nomenclature assigned to consideration for space provided on vessel for particular voyage - **Freight is charged by entity that is in possession of space on vessel from entity that requires space for carriage of cargo.** This is a patent misconstruing of the usage of that expression. Freight, though used colloquially to describe all manner of carriage, is the nomenclature assigned to the consideration for space provided on a vessel for a particular voyage**. Freight is charged by the entity that is in possession of space on a vessel from an entity that requires the space for carriage of cargo.**Slots may be contracted for by the shipper or its agent with the shipping line through the agents. Thus from the above, it comes out clear that only the consideration received in lieu of the service provided by the Shiipling line or the freight forwarders can be termed as Ocean freight or Freight charges, as the **space belongs to the shipping line.**

39. In view of the above and the evidences brought forward on scrutiny of the invoices, it is quite apparent that the assessee had not provided the services of a Freight Forwarder or a Principal, as claimed by them. Thus, relying on the decision of CESTAT, in the case of M/s. Greenwich Meridian Logistics India Pvt. Ltd/ v/s CST – 2016] 43 STR 215 [TRI-MUM], I hold that the differential consideration received by the assessee from their clients, over and above the Freight charges, recovered from them is taxable under Service Tax,since the same has not been received towards Freight charges, but towards providing the service of facilitating the assesse's clients for removal of their cargo of export/import.

40. I find that all the decisions/ judgments relied upon by the assessee pertain to the service provided by the Freight Forwarders and Shipping lines. Therefore they distinctly differ from the case of the assessee, inasmuch as that they either pertain to commission charges or services rendered between the Shipping lines/Freight Forwarders and their agents.Thus the case laws cited by the assessee in their defence are not relevant to this case.

41. Rule 10 of the Place of Provision of Services Rules, 2012.

I find that the assessee has also sought shelter under Rule 10 of the Place of Provision of Services Rules, 2012, which prescribes that '*The place of provision of services of transportation of goods, other than by way of mail or courier, shall be the place of destination of the goods.*' It is the contention of the assessee that the service provided by them during the course of transporting its customer's consignment to the country of export, by way of booking space on vessel operating to such destination country, would be deemed to have been provided at outside taxable territory. As such when the provision of service is outside taxable territory the same would fall beyond the scope of charging section to levy service tax thereon. Consequently, they have contended that where the service per-se is not taxable, there should arise no question to tax

any part of value of consideration for providing the same; and as such the margin amount comprised in value of consideration received for providing non-taxable service shall therefore be not taxable"

42. They have relied on the decision of CESTAT in the matter of **Global Transportation Services Pvt. Ltd. – 2016] 45 STR 574 [AAR]** wherein it has been clearly held that freight margin in respect of outbound shipment (export) is not taxable in the light of Rule10 of Place of Provision of Services Rules, 2012 on account of the fact that place of provision of service would be outside India.

43. From the facts of the case, I find that the assessee has merely facilitated the assessee by providing logistic support in respect of export/import of international cargo which includes the activities of pickup of the cargo from the clients premises for delivery to the port, completion of all formalities within the port till boarding the same for export or even in some cases clearing the goods at port abroad and delivering the consignments to their clients customers. Booking of space on the vessel was not an independent service rendered by the assessee to its clients. Further, as clearly evident from the sample invoices, no Bill of Lading or Housing Bill of lading were issued to their customers for booking of space. This would have been the primary requirement/criteria to justify the assessee's claim they were indulged in the export of cargo outside India and were only recovering Freight charges from their customers. Since it has been proved that the assessee is not Forwarding Agent or a Principal; the activity of booking of space, for additional consideration, is nothing but the 'Services' provided to their clients. Further I hereby reiterate **"Freight" is charged by the entity that is in possession of space on a vessel from an entity that requires the space for carriage of cargo. and as the space belongs to the shipping line;only the consideration received in lieu of the service provided by the Shipling line or the freight forwarders can be termed as Ocean freight or Freight charges.** Consequently only the Shipping lines or the Freight Forwarders or the Principal can be said to be have been provided service to outside taxable territory. In the present case, the assessee has provided the service of booking of space, along with the other logistics, in lieu of recovering amount over and above the freight charges.

44. The assessee was engaged in the activities of arranging of all facilities such as handling, loading and unloading, transportation, etc. and also compliance of statutory formalities with Customs and other Container Terminals for both importers and exporters. Thus even in the case of importers, it cannot be interpreted that the services were provided in a non taxable territory. Thus the assessee is also liable to pay Service Tax for the services provided to importers for handling their import cargo. For the above said activities they charge their clients towards various expenses incurred on behalf of their clients which are accounted on various revenue heads such as Freight Charges/Air Freight, Customs EDI charges, Documentation charges, Handling charges, Delivery Order Charges etc and charges for the movement of the cargo from the premises to the required destination and vice versa; and also for taking care of all procedures involved in doing the same. As such they have not provided their services outside the taxable territory and thus Rule 10 of the Place of Provision of Services Rules, 2012, is not applicable in the case of the assessee.

45. I find that the para 5.9.6 of the Education Guide, cited in the Show Cause Notice is not much relevant here, as this para relates to Freight forwarders who act on their own and others who act as an intermediary. The case of the assessee does not pertain to Freight Forwarding charges but providing of collective services to the exporters and importers right from pick-up of goods from the doorstep of the customers and delivery of imported goods to their premises.

46. From the above also it is clear that the assessee had facilitated the exporters to run their business smoothly and without hindrances and as such they have provided support to their businesses. Therefore, I hold that the additional consideration amounting to Rs. 4,36,55,653/- charged by the assessee from their clients, by way of booking of space on shipping lines, during the course of providing logistic support in respect of export/import of international cargo, be considered as payment for providing services to their clients, as the same is classifiable under the definition of "service" as provided under sub section (44) of the Section 65B of the erstwhile Finance Act 1994 and the definition of 'taxable service' as provided sub section (51) of Section 65B of the Act ibid.Therefore the Service Tax amounting to **Rs.60,40,712/-,** demanded from the assesssee is required to be recovered and confirmed under Section 73(1) of the Finance Act, 1994, against the assessee, along with interest payable in terms of Section 75 of the Finance Act, 1994.

47. I find that it is clear in the present matter that the demand is not raised for the element of container space fright/ ocean freight as the same has been paid to the shipping line for transporting export cargo and the **Service Tax is demanded only on the differential amount** which has been recovered by the assessee over and above the freight charges paid to the shipping line.

48. I find that the assessee had provided services to support the business of their clients. They have charged amounts from their clients in excess of what they pay to the shipping lines in the category of container ocean fright. I find that ocean freight is the actual freight incurred towards transportation of cargo by sea, thus the amount paid by the assessee to the shipping lines qualifies as ocean freight. I find that the extra amount collected over the basic ocean freight by the assessee is not an element of ocean freight, as it pertains to the service element over and above the actual cost of transportation/freight. The assessee was providing services to the exporters, including the service of procurement of bulk space to support the business of clients/exporters and the extra amount collected by the assessee from their clients, viz. exporters is the consideration which they received in lieu of services provided by them and the said consideration they received is the value of taxable service provided by them. Thus I hold that the additional consideration of Rs.4,36,55,653/- is the taxable value of the services provided by the assessee.

49. The fact that bulk space has been booked on shipping lines by the assessee for the purpose of transportation, would not in any way affect the integral nature of services rendered by the assessee. Say for example, even if the assessee books the cargo/container space on behalf of the client, without any pre-booking by him, and subsequently charges the extra consideration

for booking such space from the client, the service provider would earn extra consideration for facilitating the booking of space for the transportation. This consideration cannot be considered as ocean freight. Thus, here the assessee has pre-booked space, and in the process secured the margin from the prospective clients/exporters. I, therefore, find that such additional consideration recovered by the assessees from its clients is in the nature of consideration, which the assessee may choose to call by any nomenclature, be it 'profit' or 'trading activity'. However, the fact remains that in the process of rendering such service, the assessee has earned consideration, which is chargeable to service tax under the definition of "clearing and forwarding agent services" as defined at Section 105( J) of the erstwhile Finance Act, 1994, till 30.06.2012, i.e. prior to Negative List Regime. Whereas, with introduction of negative list regime w.e.f. 01.07.2012, ***"service"*** *means any activity carried out by* a *person for another for consideration, and includes* a ***declared service.***

50. In view of the above, I hold that the so called net income received by the assessee is nothing but consideration received towards the service provided by the assessee for providing logistic support for export/import of their customers' cargo as discussed herein before . Therefore the additional amount of Rs. **4,36,55,653/- charged by the assessee** ostensibly towards Freight charges and claimed to be the "Net income" is nothing but the amount charged towards the services provided by them for handling the cargo of their clients for exports/imports as discussed above. Therefore the assessee was liable to pay service tax amounting to Rs. 6040712/- on the entire additional consideration of Rs. **4,36,55,653/-, in terms of Section 67 of the erstwhile Finance Act, 1994.**

51. From the discussion supra, it was also evident that the assessee had at no point of time declared that they had collected additional consideration from their clients which was not included in the value of services provided by them for the purpose of payment of service tax. Thus, they had willfully suppressed the facts by way of not declaring the same while filing the ST-3 returns and not disclosing the full facts with intent to evade the payment of Service Tax. Had the audit not been carried out, evasion of Service Tax would have gone unnoticed. Thus the assessee suppressed the fact of receipt of additional consideration from the department and the fact of rendering such taxable services came to the knowledge of the department during the audit of books of account. Therefore, I find that the assessee have knowingly suppressed the facts involved in the present case. Thus, I do not find any *bonafide belief* on their part in the instant case. Thus they have evaded the Service Tax on the consideration charged/received for the service as mentioned hereinabove. Thus, they deliberately mis-stated and withheld the full facts of their said activities/services with intent to evade the payment of Service Tax due thereon. Therefore, I conclude that this is a fit case for invoking the extended period of limitation for demand under proviso to Section 73(1) of the Act. In view of the above, I hold that the assessee is rightly required to pay Service Tax to the tune of Rs. 60,40,712/- on the additional consideration amounting to Rs.4,36,55,653/- received by them.

52. The assessee has evaded the payment of the above amounts of Service tax. Hence as per the provisions of Section 75 of the Finance Act, 1994 (as amended), the assessee are required to pay interest on the amount of service tax, from the date they were required to make the payment till the date they deposit the service tax amount in the Government exchequer.

Section 75 states that-

*"Every person , liable to pay the tax in accordance with the provisions of Section 68 or rules made thereunder, who fails, to credit the tax or any part thereof to the account of the Central Government within the period prescribed, shall pay simple interest at such rate not below ten per cent and not exceeding thirty-six per cent per annum, as is for the time being fixed by the Government, by notification in the Official Gazette, for the period by which such crediting of the tax or any part thereof is delayed."*

53. As regards imposition of penalty under Section 76, 77 and 78 of the Act. I have already held that the demand under the notice is recoverable by invoking the extended period of time under Section 73 of the Act and Section 75 of the Act mandates levy of interest on delayed payment of Service Tax. Therefore, the demand is recoverable alongwith interest under the said Section. Further, I find that, Section 78 of the Act provides as follows:

**SECTION 78. Penalty for failure to pay service tax for reasons of fraud, etc. —**

*(1) Where any service tax has not been levied or paid, or has been short-levied or short-paid, or erroneously refunded, by reason of fraud or collusion or willful mis-statement or suppression of facts or contravention of any of the provisions of this Chapter or of the rules made thereunder with the intent to evade payment of service tax, the person who has been served notice under the proviso to sub-section (1) of Section 73 shall, in addition to the service tax and interest specified in the notice, be also liable to pay a penalty which shall be equal to hundred per cent of the amount of such service tax :*

***Provided** that in respect of the cases where the details relating to such transactions are recorded in the specified records for the period beginning with the 8th April, 2011 upto the 24 date on which the Finance Bill, 2015 receives the assent of the President (both days inclusive), the penalty shall be fifty per cent. of the service tax so determined :*

***Provided further** that where service tax and interest is paid within a period of thirty days of — the date of service of notice under the proviso to*

*(i) sub-section (1) of section 73, the penalty payable shall be fifteen per cent. of such service tax and proceedings in respect of such service tax, interest and penalty shall be deemed to be concluded;*

*(ii) the date of receipt of the order of the Central Excise Officer determining the amount of service tax under sub-section (2) of section 73, the penalty payable shall be twenty-five per cent. of the service tax so determined :*

***Provided** also that the benefit of reduced penalty under the second proviso shall be available only if the amount of such reduced penalty is also paid within such period :*

***Explanation.** - For the purposes of this sub-section, "specified records" means records including computerized data as are required to be maintained by an assessee in accordance with any law for the time being in force or where there is no such requirement; the invoices recorded by*

*the assessee in the books of accounts shall be considered as the specified records.*

*(2) Where the Commissioner (Appeals), the Appellate Tribunal or the court, as the case may be, modifies the amount of service tax determined under sub-section (2) of section 73, then, the amount of penalty payable under sub-section (1) and the interest payable thereon under section 75 shall stand modified accordingly, and after taking into account the amount of service tax so modified, the person who is liable to pay such amount of service tax, shall also be liable to pay the amount of penalty and interest so modified.*

*(3) Where the amount of service tax or penalty is increased by the Commissioner (Appeals), the Appellate Tribunal or the court, as the case may be, over and above the amount as determined under sub-section (2) of section 73, the time within which the interest and the reduced penalty is payable under clause (ii) of the second proviso to sub-section (1) in relation to such increased amount of service tax shall be counted from the date of the order of the Commissioner (Appeals), the Appellate Tribunal or the court, as the case may be.*

54. It is observed that where any Service Tax has not been levied or paid or has been short-levied or short-paid by the reason of suppression of facts or fraud or collusion or wilful mis-statement or contravention of any of the Act or the Rules made thereunder with intent to evade payment of Service Tax, Section 78 of the Act provides for mandatory penalty and the person, liable to pay such Service Tax, shall also be liable to pay a penalty in addition to such Service Tax and interest thereon. The amount of penalty leviable under this section is equal to hundred percent of the amount of Service Tax evaded. In view of the findings given in foregoing paras, as extended period of time for demand under proviso to Section 73 of the Act is invokable in the present case, I find that the assessee has rendered themselves liable for penalty under Section 78 of the Act for the various acts/commission committed by them, as discussed in foregoing paras. Penalty under Section 78 of the Finance Act, 1994 is mandatorily imposable as has been held by the Apex Court in the case of Dharmendra Textile Mills Ltd-2008 (231) ELT 3 (SC) and Rajasthan Spinning & Weaving Mills Ltd-2009 (238) ELT 3 (SC).

55. Further, as the penalty is payable under Section 78 of Finance Act 1994, hence the penalty under 76 will not apply.

56. As regards imposition of penalty under Section 77 of the Finance Act, 1994, I observe that in the present case the assessee had failed to comply with provisions of the Act/Rules inasmuch as they have failed to self-assess the correct taxable value and not showed the same in their statutory returns. Hence, they are liable to penalty under this Section 77 of the Finance Act also.

57. In view of the foregoing discussion, I pass the following order:

**ORDER**

(1) I hold that the additional amount charged by them towards the so called Freight charges from their Customers, amounting to Rs. **4,36,55,653/-** should be treated as consideration received by them towards services provided by them.

(ii). I confirm the demand of Service Tax amounting to **Rs.60,40,712/-** (Rupees Sixty lakhs, forty thousand, seven hundred and Twelve Only) including Education cess and Higher Education Cess,, not paid by them for the period 2012-2013 to 2016-2017 and order the same be recovered from them under proviso to section 73 (2) of the Finance Act, 1994 by invoking extended period.

(iii) I order the recovery of interest on the confirmed demand of Service tax of Rs.60,40,712/- (Rupees Sixty lakhs, forty thousand, seven hundred and Twelve Only) at the prescribed rate from the assessee under Section 75 of the Finance Act, 1994; from the date on which Service Tax was liable to be paid till the date on which Service tax is paid;

(iv) I impose Penalty of **Rs 10,000 (Rupees Ten Thousand only)** on the assessee under Section 77 of the Finance Act, 1994 for the failure to self-assess the correct taxable value and not showing the same in the statutory ST -3 returns; as required under Section 70 of the Act read Rule 7 of the said Rules.

(v). I impose penalty on the assessee equal to the amount of service tax evaded i.e **Rs.** Service Tax amounting to Rs.60,40,712/- (Rupees Sixty lakhs, forty thousand, seven hundred and Twelve Only) under Section 78 of the Finance Act, 1994 for suppressing the value of taxable services provided by them from the department with an intent to evade payment of Service Tax.If the service tax amount is paid along with appropriate interest as applicable, within 30 days from the date of receipt of this order, then the amount of penalty under Section 78 shall be reduced to 25% of the service tax amount, provided such penalty is also paid within such period of 30 days.

58. The Show Cause Notice No. VI/1(b)/Tech-27/SCN/Vishal Shipping/2017-18, dated 19.04.2018 issued by Joint Commissioner, Central Tax Audit, Ahmedabad, is decided and disposed off in above terms.

**(Marut Tripathi)**
Joint Commissioner
C.G.S.T. &C.Ex.,
Ahmedabad (North)

**BY R.P.A.D./HAND DELIVERY**

F.No. STC/15-19/OA/2018

Date : 29 /1/2021.

To

M/s. Vishal Shipping Agencies Pvt. Ltd.
Titanium Square B -207/208
Thaltej Circle, Thaltej ,
Ahmedabad, Gujarat 380054

Copy to :

1. The Commissioner, Central Goods and Services Tax and Central Excise, H.Q.,Commissionerate Ahmedabad – North.
2. The Deputy Commissioner, Central Goods and Services Tax and Central Excise, Division – VII, Commissionerate Ahmedabad – North.
3. The Superintendent, Central Goods and Services Tax and Central Excise, AR-I, Division – VII, Commissionerate Ahmedabad - North
4. Guard File.