CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
BANGALORE

REGIONAL BENCH - COURT NO. 1

Service Tax Appeal No. 49 of 2011

(Arising out of Order-in-Original No.65/2010 dated 30.09.2010 passed by the Commissioner of Service Tax, Bangalore.)

M/s. Joint Working Group
(HAL, CONCOR & MSIL)
Joint Air Cargo,
Opposite Helicopter Division
HAL Airport,
Bangalore – 560 037.

Appellant(s)

VERSUS

The Commissioner of Service Tax
No.16/1, S.P. Complex,
Lalbagh Road,
Bangalore – 560 027.

Respondent(s)

WITH

Service Tax Appeal No. 21938 OF 2014

(Arising out of Order-in-Appeal No.193/2014 dated 11.03.2014 passed by the Commissioner of Central Excise (Appeals-II), Bangalore.)

M/s. Joint Working Group
(HAL, CONCOR & MSIL)
Joint Air Cargo,
Opposite Helicopter Division
HAL Airport,
Bangalore – 560 037.

Appellant(s)

VERSUS

The Commissioner of Service Tax
TTMC, BMTC Building, 4th Floor,
Domlur, Old Airport Road,
Bangalore – 560 071.

Respondent(s)

APPEARANCE:

Shri Harish Bindu Madhavan, Advocate for the Appellant.

Shri M. A. Jithendra, Assistant Commissioner, Authorised Representative for the Respondent.

CORAM:

HON'BLE DR. D.M. MISRA, MEMBER (JUDICIAL)
HON'BLE MRS. R. BHAGYA DEVI, MEMBER (TECHNICAL)

Final Order No. 20534 – 20535 /2025

DATE OF HEARING: 07.01.2025
DATE OF DECISION: 30.04.2025

PER : R. BHAGYA DEVI

These two appeals are filed by the appellant M/s. HAL Joint Working Group against Order-in-Original No. 65/2010 dated 30.09.2010 passed by the Commissioner of Service Tax, Bangalore and Order-in-Appeal No. 193/2014 dated 11.03.2014 passed by the Commissioner of Central Excise (Appeals-II), Bangalore.

2. The appellant is a provider of various services under the categories of Airport Service, Cargo Handling Service, Storage and Warehousing Service. During the audit, it was noticed that that appellant had not paid service tax on various charges like Terminal Charges, Packing Charges, Unloading Charges, Overtime Charges, etc., and hence, notices were issued and the same was confirmed by the Commissioner/Commissioner (A) in the impugned orders along with interest under Section 75 of the Finance Act, 1994 and also imposed penalty under Section 76 and 78 of the Finance Act, 1994. Aggrieved by these orders, the appellant is in appeal before us.

3. The Learned Counsel for the appellant submitted that Joint Working Group was formed by the appellant through the Tripartite Agreement dated 15.01.2001 among M/s. Hindustan Aeronautics Ltd. HAL, M/s. Container Corporation of India Ltd., (CONCOR) and M/s. Mysore Sales International Ltd. (MSIL). These three companies which also includes the appellant were formed to establish an Air Cargo Complex at the Bangalore Airport for providing facilities for Handling Cargo on the premises belonging to the appellant for mutual benefit.

3.1 The appellant was appointed as a custodian under Section 45 of the Customs Act, 1962 for all goods unloaded in the customs area meant for import, export, and transhipment in accordance with the provisions of the Customs Act, 1962. As a custodian, the limited statutory responsibility of the appellant was to maintain the custody of the imported goods until the same is cleared for home consumption, warehoused or transhipped. The appellant was not engaged in warehousing activities as per the provisions under Section 58 of the Customs Act, 1962 hence, the activities undertaken by the appellant were limited to Cargo Handling Services of unloading, repacking and loading charges for export cargo and since Cargo Handling Services for the purpose of export is specifically excluded under Section 65(23) of the Finance Act, 1994, no service tax was discharged on the consideration received for the above services. However, for similar services for import cargo, appellant discharges service tax except for passenger baggage which is specifically excluded.

3.2 It is submitted that the show-cause notice dated 23.10.2009 did not specify the category of service on which service tax is being demanded and therefore, in view of the decision of the Hon'ble Supreme Court in the case of **CC import, Mumbai vs. Dilip Kumar and Co. (AIR-2018-S.C. 3606); Shubham Electricals vs. CST & ST, Rohtak: 2015 (6) TMI 786-CESTAT, New Delhi** and **Deo Associates Vs. CGST and CE, Patna: 2024 (3) TMI 500 - CESTAT, Kolkata**, show-cause notices and consequential orders are unsustainable.

3.3 The Learned Counsel further submits that the appellants were under *bona fide* belief and categorised their services under Cargo Handling Services but the Department classified them as Storage and Warehousing Services without providing any reasons for the same. It is also stated that it is a settled principle of law that when a classification proposed is changed by

the Department, the burden of proof lies with them. Relied on the following decisions:

- **HPL Chemicals Ltd. vs. CCE, Chandigarh: 2006 (197) ELT 324 (S.C.)**
- **Hindustan Ferodo Ltd. vs. CCE, Bombay: 1997 (89) ELT 16 (S.C.)**
- **Bombay Fluid Systems Components Pvt. Ltd. vs. CC: 2024 (22) CENTAX-144 (Tri.-Bom.)**

3.4 The Learned Counsel further submits that the services rendered by the appellant as a custodian are in the nature of statutory functions and hence, no service tax is payable on such statutory services based on the Board's Circular No.89/7/2006-ST dated 18.12.2006. Also relies on the decision in the case of **Asset Engineering vs. Mysore Sales International Ltd.: 2006 (205) ELT 114 (Kar.)** and **Mysore Sales International Ltd. vs. United India Insurance Co. Ltd.: 2009 (243) ELT 161 (Kar.)**. It is further stated that service tax is not liable on demurrage and overtime charges and relies on the decision in the case of **Hyderabad Menzies Air Cargo Pvt. Ltd. vs. CCE & ST, Hyderabad: 2024 (18) CENTAX 496 (Tri. – Hyd.)**. It is further stated that the demand on sale proceeds received from sale of abandoned cargo is also not liable for service tax. There is no evidence to show that there is suppression of facts and hence, mere non-payment of service tax cannot be alleged as deliberate intention to evade payment of tax, hence, the extended period of limitation cannot be invoked. Being a public sector undertaking, in the absence of *mala fide* intention, the question of interest and penalty does not arise.

4. The Authorised Representative on behalf of the Revenue submitted that non-mention of category of service tax in the show-cause notice will not erase the liability of the appellant. Relied on the decision in the case of **Standard Industries Ltd. vs. Commissioner of C. Ex. Mumbai: 2003 (158) ELT 623**

(Tri.-Mum.). He also relied on decision in the case of **Kerala State Industrial Enterprises Ltd. vs. CST, Trivandrum: 2011 (21) STR 423 (Tri.-Bang.)** to state that terminal charges collected by the appellant as a custodian was liable to service tax. It is also submitted that storage and warehousing of passenger baggage is not exempted for the reason that Cargo Handling Service does not apply to passenger baggage, hence demands confirmed by the authorities concerned are to be upheld along with interest and penalty.

5. Heard both sides. The first show-cause notice dated 14.09.2004 demanded service tax on various services confirmed by the adjudicating authority and upheld by the Commissioner (Appeals). The appellant is aggrieved only on the service tax demand confirmed of Rs.8,73,185/- collected as terminal charges, overtime charges and penalties in respect of export cargo for the period from 09.09.2002 to March 2004, demand of Rs.14,386/- collected as demurrage charges and overtime charges in respect of import baggage for the period 09.09.2002 to March 2004 and service tax amount of Rs.45,749/- collected as service charges towards abandoned cargo for the period August 2003 to March 2004. The Commissioner (Appeals) with regard to terminal and other charges in respect of export cargo held that it falls under the category of 'storage and warehousing service' and not under 'cargo handling service'. With regard to demurrage/overtime charges in respect of import baggage, he held that the claim of the appellant in respect of unaccompanied passenger baggage cannot be equated to passenger baggage which is excluded from payment of service tax. With regard to abandoned cargo, the claim of the appellant that it is only a sale proceeds of the abandoned cargo cannot be accepted in as much as the service charges are collected for the storage of the same till its disposal.

5.1 The second show-cause notice dated 23.10.2009 deals with as to whether the appellant is liable to pay service tax on the amounts received as terminal charges, unloading charges, overtime charges under the category of storage and warehousing services for the period April 2004 to June 2008, on which demand of Rs.1,41,06,213/- is confirmed by the Commissioner in the impugned order. This is countered by the appellant on the ground that the above services are related to export cargo and Section 65(23) of the Finance Act, 1994 specifically excludes such export cargo from payment of tax. The Commissioner in the impugned order observed that the above services are in relation to warehousing the goods and hence, part of the storage and warehousing services and as per Board Circular F. No. B/11/1/2002 dated 01.08.2002 held storage and processing charges specifically include terminal charges. The second issue is with regard to service tax amount of Rs.6,84,887/- on the value collected as demurrage charges, packing charges, etc., in respect of unaccompanied passenger baggage and the claim of the appellant is that passenger baggage is excluded under Section 65(23) of the Finance Act, 1994 which has not been accepted by the Commissioner on the ground that these charges are collected after the completion of the expiry period of free warehousing and the demand is on the import baggage and not on the passenger baggage. The third issue is demand of Rs.6,42,038/- is towards storage of abandoned cargo.

6. The preliminary objection of the appellant that the first show-cause notice dated 14.09.2004 does not specify the category of services under which the demands are made and hence, for this reason itself the demand needs to be set aside. It is also submitted that the second show-cause notice dated 23.10.2009 cannot be sustained beyond the normal period since the earlier show-cause notice for the same issues had invoked suppression and confirmed the demands. We agree with the

appellant that the demands in the second show-cause notice cannot be sustained beyond the normal period.

7. To examine the issue on merits, one needs to refer to the relevant Sections reproduced below:

> **Section 65(23) reads "Cargo Handling Service"** means loading, unloading, packing or unpacking of cargo and includes-
>
> (a) cargo handling services provided for freight in special containers or for non-containerised freight, services provided by a container freight terminal or any other freight terminal, for all modes of transport and cargo handling service incidental to freight, and
>
> (b) service of packing together with transportation of cargo or goods, with or without one or more of other services like loading, unloading, unpacking, **but does not include, handling of export cargo or passenger baggage or mere transportation of goods.]**
>
> **Section 65(102) "storage and warehousing"** includes storage and warehousing services for goods including liquids and gases but does not include any service provided for storage of agricultural produce or any service provided by a cold storage,

As seen from the definition provided at Section 65(23), it categorically excludes handling of export cargo and there is no dispute that all the above charges are collected from customers of export cargo. There is also no dispute that the appellant was appointed as a custodian under Section 45 of the Customs Act, 1962 and the warehousing activities were specifically covered under Section 58 of the Customs Act, 1962. The adjudicating authorities in the impugned order ignoring these facts blindly confirms the demand based on the Board's Circular which only clarifies that the terminal charges form part of storage and processing charges which has no relevance to the services provided by the appellant with regard to export Cargo, hence we

do not find any justification in confirming the demand under 'storage and warehousing services'.

7.1 The relevant circular is reproduced below:

Circular F. No. B/1/2002-TRU

FINANCE ACT, 2002 - CLARIFICATION ON CHANGES

CIRCULAR F. NO. B/1/2002-TRU, DATED 1-8-2002

Kindly refer to section 149 of the Finance Act, 2002 (20 of 2002) which, inter alia, provides for the levy of service tax on 10 new services.

2. It has been decided that the levy and collection of service tax on the new services shall be effective from 16-8-2002 (Vide Notification No. 8/2002-ST, dated 1-8-2002).

3. As you are aware, certain legislative amendments were made in sections 73, 75, 78, 82, 83, 94 and 95 of the Finance Act, 1994 vide section 149 of the Finance Act, 2002. All these changes will now be effective from 16-8-2002. The Service Tax Rules, 1994 have also been amended. Notification No. 12/2002-ST, dated 1-8-2002 has been issued in this regard. These amendments are also effective from 16-8-2002.

ANNEXURE II

CARGO HANDLING SERVICE

1. The section referred to hereinafter are the sections or clauses of the Finance Act, 1994 as amended by the Finance Act, 2002. Reference to sub-clause or clause means clause or sub-clause of section 65 of the Finance Act, 1994 as amended by the Finance Act, 2002.

2. As per clause (21), the term "cargo handling service" means loading, unloading, packing or unpacking of cargo and includes cargo handling services provided for freight in special containers or for non-containerised freight, services provided by a container freight terminal or any other freight terminal, for all modes of transport, and any other service incidental to freight, but does not include handling of export cargo or passenger baggage or mere transportation of cargo. The taxable service, as per sub-clause (zr) of clause (90), is

any service provided, to any person, by a cargo handling agency in relation to cargo handling services.

3. The services which are liable to tax under this category are the services provided by cargo handling agencies who undertake the activity of packing, unpacking, loading and unloading of goods meant to be transported by any means of transportation namely truck, rail, ship or aircraft. Well known examples of cargo handling service are services provided in relation to cargo handling by the Container Corporation of India, Airport Authority of India, Inland Container Depot, Container Freight Stations. This is only an illustrative list. There are several other firms that are engaged in the business of cargo handling services.

3.1 The services provided in relation to export cargo and passenger baggage are excluded from tax net.

3.2 Mere transportation of goods is not covered in the category of cargo handling and is therefore not liable to service tax.

7. Passenger baggage has been excluded from the levy of service tax. In this regard a point has been raised as to whether unaccompanied baggage of a passenger attracts service tax under the category of passenger baggage. It is clarified that unaccompanied baggage of a passenger will not be leviable to service tax.

12. A clarification has been sought as to whether service tax is payable on abandoned cargo which are auctioned by the CFS as no service is rendered to any person. In the case of auctioned goods, the proceeds of the auction goes first to the cost of auction, then towards customs duties and then to the custodian of the goods. It is clarified that no cargo handling service can be said to have been rendered in such cases, therefore service tax is not leviable.

7. Another point raised is that AAI are collecting terminal charges which is only a facilitation charge for providing a ten terminal and as such does not involve any service. As per the Notification No. Cargo/13519/Pt.I, dated 4-6-1993 of the International Airport Authority of India "terminal charges" means charges payable to or collected by the Authority or Cargo Handling Agency for use of

facilities for processing of cargo. As per this notification "storage and processing charges" specifically include terminal charges also.

The Circular also clearly specifies that **the services provided in relation to export cargo and passenger baggage are excluded from tax net.** Hence, demand on Cargo Handling Services for the export purpose cannot be sustained. The reliance placed by the Commissioner on the above circular is misplaced as the terminal charges referred therein is against storage and warehousing charges and as rightly claimed by the appellant, they are the custodian under Section 45 of the Customs Act 1962.

8. With regard to service tax on unaccompanied baggage, the Circular reads as follows:

> **"7. Passenger baggage has been excluded from the levy of service tax. In this regard a point has been raised as to whether unaccompanied baggage of a passenger attracts service tax under the category of passenger baggage. It is clarified that unaccompanied baggage of a passenger will not be leviable to service tax."**

In view of the above clarification, service tax demanded on unaccompanied baggage is to be set aside.

9. The circular with regard to abandoned cargo also clarifies that no service tax is leviable under the category of 'Cargo Handling Service' (relevant portion of the circular reproduced below).

> **"12. A clarification has been sought as to whether service tax is payable on abandoned cargo which are auctioned by the CFS as no service is rendered to any person. In the case of auctioned goods, the proceeds of the auction goes first to the cost of auction, then towards customs duties and then to the custodian of the goods. It is clarified that no cargo handling service can be said to have been rendered in such cases, therefore service tax is not leviable."**

10. In view of the above, the impugned orders are set aside and both the appeals are allowed.

(Order pronounced in Open Court on 30.04.2025.)

(D.M. MISRA)
MEMBER (JUDICIAL)

(R. BHAGYA DEVI)
MEMBER (TECHNICAL)

rv