IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHENNAI

REGIONAL BENCH – COURT NO. III

Service Tax Appeal Nos. 40452 and 40453 of 2013

(Arising out of Order-in-Original Nos. 40 & 41/2012 dated 30.11.2012 passed by Commissioner of Central Excise, MHU Complex, No. 692, Anna Salai, Nandanam, Chennai – 600 035.)

M/s. International Seaport Dredging Limited **...Appellant**
5th Floor, Challam Towers No. 62/113,
Dr. Radhakrishnan Salai, Mylapore,
Chennai – 600 004.

Versus

Commissioner of GST and Central Excise **...Respondent**
Chennai Outer Commissionerate,
Newry Towers, No. 2054, I Block,
II Avenue, 12th Main Road, Anna Nagar,
Chennai – 600 040.

And

Service Tax Appeal Nos. 42060 and 42061 of 2013

(Arising out of Order-in-Original Nos. 14 & 15/2013 dated 28.02.2013 passed by Commissioner of Service Tax, Newry Towers, No. 2054, II Avenue, 12th Main Road, Anna Nagar, Chennai – 600 040)

M/s. International Seaport Dredging Limited **...Appellant**
5th Floor, Challam Towers No. 62/113,
Dr. Radhakrishnan Salai, Mylapore,
Chennai – 600 004.

Versus

Commissioner of GST and Central Excise **...Respondent**
Chennai Outer Commissionerate,
Newry Towers, No. 2054, I Block,
II Avenue, 12th Main Road, Anna Nagar,
Chennai – 600 040.

APPEARANCE:

For the Appellant : Shri Raghavan Ramabadran, Advocate

For the Respondent : Smt. Anandalakshmi Ganeshram, Superintendent / A.R.

CORAM:

HON'BLE MS. SULEKHA BEEVI C.S., MEMBER (JUDICIAL)
HON'BLE MR. VASA SESHAGIRI RAO, MEMBER (TECHNICAL)

DATE OF HEARING : 24.07.2023
DATE OF DECISION : 15.09.2023

FINAL ORDER Nos. 40803-40806/2023

Order : Per Ms. SULEKHA BEEVI C.S.

The issue in all these appeals being similar and connected they were heard together and are disposed of by this common order.

2. Brief facts are that the appellant, M/s. International Seaport Dredging Private Ltd., are engaged in providing Dredging Service. They are registered with the service tax Commissionerate and subsequently obtained centralized registration on 12.02.2009. During the course of audit, it was noted by the Department that appellant had not paid Service Tax on Dredging Services provided to Dredging Corporation of India (DCI) for Sethu Samudram Project and Dhamra Port Company Ltd., and also on certain services imported by them. Show Cause Notices for the different periods were issued to demand Service Tax on amounts received for Soil Stabilisation and Land Reclamation Services as Dredging Services, Charter-hire charges as Dredging Services, Maintenance and Repair Services, Man Power Recruitment and Supply Agency Services and other services. After due process of law, the authorities below confirmed the demand on the above and dropped all other issues. Aggrieved by the confirmation of demand of Service Tax, interest and penalties imposed the appellants are now before the Tribunal.

3.1 The Ld. counsel Shri Raghavan Ramabadran appeared and argued for the appellant. The details of the Show Cause Notice period involved and the issues are furnished below:-

Appeal No.	O-in-O	Period	Nature of services for which demand confirmed/dropped
1.ST/40452/2013	40&41/2012 dt. 30.11.2012	01.01.2009 to 31.03.2009	a) Soil stabilisation and land reclamation services alleged to be dredging services provided to Dhamra Port confirmed. b) Supply of Dredgers as Dredging Services confirmed c) Maintenance and Repair Service received from foreign service provider confirmed. d) Manpower recruitment and Supply Agency services received from foreign service provider confirmed.
2.ST/40453/2013		01.04.2009 to 31.07.2009	
3.ST/42060/2013	14&15/2013 dt. 28.02.2013	01.08.2010 to 31.03.2011	a) Soil stabilisation and land reclamation services incidental to dredging dropped. b) Manpower Recruitment and Supply Agency services confirmed. c) Maintenance and Repair Service received from foreign service provider confirmed.
4.ST/42061/2013		01.04.2011 to 30.09.2011	

3.2 The Ld. counsel submitted that the issues with regard to demand of Service Tax on (a) Soil Stabilisation and Reclamation Services treated as Dredging Services (b) Supply of Dredgers treated as Dredging Service (c) Maintenance and Repair Service received for repair of vessel from foreign service provider have already been considered by the Tribunal in the appellants own case and decided in favour of appellant as reported in *International Seaport Dredging Ltd. vs. Commissioner of Service Tax, Chennai 2018 (6) TMI 933 (CESTAT, Chennai).*

3.3 The Ld. counsel adverted to page 10 of the impugned Order-in-Original No. 40&41/2012 dated 30.11.2012 to assert that the issues considered in these appeals are the same as that have been decided in their earlier appeal for different period. At paragraph 12 of page 10 of the said Order-in-Original, the issues framed by the adjudicating authority read as under:-

"12.0 The issues to be decided in the subject notices are :

i. Whether the services offered to Dredging Corporation of India was 'Dredging Services' or 'Supply of Tangible goods' service?

ii. Whether the services offered to Dhamra Port Company were 'Dredging Services' or otherwise?

iii. Whether ISDL were liable to service tax for maintenance, repair services rendered by Foreign Service provider? And

iv. Whether service tax was payable on manpower supply services received from M/s. Bellsea?"

3.4 The facts of each issue was explained by the Ld. counsel as under:-

Services at Dhamra Port:

3.4.1 The present dispute revolves around dredging services rendered to Dhamra Port Company Limited ("Dhamra Port"). The appellant had undertaken the activities of dredging, soil stabilisation, land reclamation under separate agreements, as described herein below:

i. Dredging Services:

- The appellant provides dredging services by removing material including silt, sediments, rocks, sands, debris, etc., form the port / navigational route, so that the vessel can approach and berth at the port.
- The appellant has remitted applicable service tax on dredging services. This is an undisputed fact as is reflected in paragraph 4 of the Show Cause Notice No. 240/2010 dated 19.04.2010 and paragraph 4 of the Show Cause Notice No. 608/2010 dated 11.10.2010.

ii. Land Reclamation:

- The land reclamation process involved reclamation of land from the sea. The appellant was required to undertake activities such as construction of containment of dikes, extraction

of filling material from the respective locations, filling up of the proposed reclamation site with the fill material as specified by the customer for finally reclaiming the land.

- The appellant did not remit service tax on the land reclamation activities since the activity is classifiable as 'site formation services' under Section 65(105)(zzza) of the Act, and site formation services provided in the course of construction of ports were exempted from the levy Service Tax under Notification No. 17/2005 dated 07.06.2005.

iii. Soil Stabilisation:

- The soil stabilisation process in undertaken to stabilise the soil in the reclaimed area. The soil contains lots of water and hence, any structure placed on the land is likely to sink, unless the soil naturally stabilises, and such stabilisation process generally takes years. Accordingly, the soil stabilisation process is undertaken whereby vertical drains are installed to drain out the excessive water to expedite the soil stabilisation process and allow the development of cargo handling facilities at the port.
- The appellant did not remit service tax on the soil stabilisation activities since the activity is classifiable as 'site formation services' under Section 65(105)(zzza) of the Act, and site formation services provided in the course of construction of ports were exempted from the levy of service tax under Notification No. 17/2005.

Charter Hire Services – Dredging Corporation of India:

3.4.2 The appellant provided dredgers/equipment on charter-hire/lease to the Dredging Corporation of India

("DCI") for the Sethu Samudram Canal Project. The appellant's responsibility is limited to providing the dredger or equipment on lease to DCI. The appellant has been remitting service tax on the charter hire charges under the category 'Supply of Tangible Goods for Use' under Section 65(105)(zzzzj) of the Act form 16.05.2008, when the taxable category of supply of tangible goods for use was introduced in the Finance Act, 1944.

3.4.3 The consideration though was received during the impugned period, the services were provided prior to 16.05.2008 (before the service became taxable), and thus, no service tax was paid by appellant on the consideration received.

Import of Services – Maintenance and Repair:

3.4.4 The appellant's dredger-vessel required repair-work to be undertaken. In such situations, the appellant would engage Foreign Service providers to carry out maintenance and repair work on the dredger. The Foreign Service providers had physically taken the dredger(s) to their premises at Durban in South Africa for carrying out the repairs. As the repair work was performed outside India, the appellant did not remit service tax under reverse charge since the activity as per the Taxation of Services (Provided from outside India and received in India) Rules, 2006 (Import Rules), the appellant is not liable to pay tax for the services received / performed outside India.

5.1 The Ld. counsel submitted that the Tribunal in the appellants own case had occasion to consider all these three issues as reported in *[2018 (6) TMI 933]* and adverted to the same.

5.2 In regard to the demand of Service Tax as dredging services at Dhamra Port, for soil stabilisation and reclamation services, the Ld. counsel explained that appellant had entered into three separate contracts for dredging, soil stabilisation and land reclamation. The

appellant had discharged the service tax for dredging services provided by them. They are not liable to pay service tax for amounts received for land reclamation and soil stabilisation for the reason that these services in the nature of site formation services are exempted from payment of service tax when provided at port as per Notification No. 17/2005-ST.

5.3 In the earlier appeal, the Tribunal had remanded this issue to the adjudicating authority to verify whether the contracts are separate for the three activities and to consider the issue afresh. In such remand proceedings, the adjudicating authority *vide* Order-in-Original No. 15/2020 dated 31.10.2020 dropped the demand on amount received for Soil Stabilisation and Land Reclamation activities.

5.4 The appellant submitted that for the period from August 2010 to September 2011, the identical issue was held in favour of the appellant in Order-in-Original No. 14&15/2013 dated 28.02.2013 (paragraphs 6.5-6.5.1, 6.9) wherein the adjudicating authority held that the services are classifiable under site formation under Section 65(97a) and not taxable for the impugned period and dropped the demand. As on date, no appeal has been filed by the Revenue against the said order. Hence the findings therein have attained finality.

5.5 It is well settled law that if particular services are covered under one category of services, they cannot be taxable under any other category of services. Reliance is placed on *Indian National Shipowners' Association v. Union of India [2009 (14) S.T.R 289 (Bom.)]* as affirmed in *Union of India vs. Indian National Shipowners' Association [2011 (21) S.T.R.3 (S.C.)].*

5.6 The second issue is with regard to demand of service tax under the category of dredging services on the charter/hire/lease of dredgers provided to DCI for the Sethu

Samudram Canal Project. It is submitted that the appellant has been paying service tax on charter hire charges under the category of supply of tangible goods falling under Section 65(105)(zzzj) with effect from 16.05.2008. The said activity of charter of dredger cannot fall under dredging services. The very same issue was considered by the Tribunal in the earlier period of litigation and it was held to be not taxable under dredging services. The relevant paragraph reads as under:-

"4.1 We propose to address the matter issues wise:

(i) Services provided to Dredging Corporation of India (DCI):

The adjudicating authority has concluded mainly on the ground that the dredging vessel supplied by the appellants is required to be delivered with full complement of officers and crew who operate, control and supervise the dredging work. We are not able to appreciate such an interpretation. Even a plain reading of the agreement between the appellant and Dredging Corporation of India will indicate that it is "Charter Hire Agreement". The said Charter Hire Agreement lays down charter hire per week of operation, period of hire (4 months), place, date and time of delivery as also place, date and time of re-delivery. We also find that although the vessel is hired along with a complement of officers and crew, the decision where to do the dredging work, the hours of operation etc. are totally those of the Dredging Corporation of India and appellants have no role or say in that whatsoever. The positioning of one Appeal Nos.ST/502-504/2010 representative of the appellant on board the vessel may well be for co- ordination purpose, but it is nobody"s case that the said representative calls the shots in respect of dredging operations. From the sample of the invoice produced by the Ld. Advocate (page 351 of compilation), it is in fact seen that the billing has been done based on operational hours at 100% and at 85% and even at 0%. The DCI has also been billed towards wear and tear of the dredging equipment at Rs.3.60 per cubic metre. If the services provided by the appellant indeed was only "dredging service", the appellant would not have been able to bill DCI for such wear and tear charges. In our considered opinion, the activity of the appellants may possibly fall under supply of „Tangible Goods Service", but surely not under „Dredging Service". It is interesting to note that appellants have paid service tax amount of Rs.57,03,661/- towards the services provided to DCI under the category of Supply of Tangible Goods Services. In these circumstances, that part of the impugned order confirming demand of service tax in respect of the services provided by the appellants to Dredging Corporation of India under the category of "Dredging Service" cannot sustain and will therefore have to be set aside, which we hereby do."

5.7 The Department has confirmed the demand under maintenance and repair service for the repair service done by Foreign Service provider. The impugned order refers the vessel name as 'Pacific'. In fact the issue of repair charges paid for the vessel 'Pacific' was the subject matter of the

earlier appeal before the Tribunal and the Tribunal had remanded this issue. In remand proceedings, the adjudicating authority after noting that the vessel (Pacific) was repaired at Dry Dock of Colombo (Outside India) held that the demand cannot sustain and dropped the demand (paragraph 7.4 of O-I-O No. 15/2020). In the present appeal the issue is with regard to repair works of Vessel Orwell and not Pacific as wrongly noted in the order.

5.8.1 It is submitted that the dredger-vessel Orwell was taken to the premises of the Foreign Service providers for carrying out repairs to the vessel, i.e., the repairs were made outside India at overseas locations (Durban, South Africa) and therefore, it is non-taxable.

5.8.2 The Appellant submits that Rule 2(1)(d)(iv) of the Service Tax Rules, 1994, read with Section 68 (2) and Section 66A of the Act and Rule 3 of the Import Rules, provides that in cases where services are provided from outside India and such services are received in India then the recipient of services would be liable to pay service tax provided the respective conditions are fulfilled.

5.8.3 Rule 3 of the Import Rules categorise taxable services in the following three categories:

- location of immoveable property.
- situs of services/location where the services are provided;
- location of service provider

5.8.4 Rule 3(ii) of the Import Rules positions Section 65(105)(zzg) for ‘management maintenances and repairs services' under the second category i.e. they will be deemed as having been rendered in India if the situs of performance of services is in India. In other words, the Import Rules provide that such services would be taxable in the hands of the recipient of services located in India, provided that such

services are partly or fully performed in India. The services having been provided outside India, the demand is prayed to be set aside.

5.9 The fourth issue is with regard to the Manpower Recruitment and Supply Agency (MRSA) Services. This issue was also considered by the Tribunal for the earlier period (appeal). The demand was then set aside. The relevant discussion of the Tribunal reads as under:-

"(b) Manpower Supply Services:

(i) The dispute relates to salary payments paid to the "expatriate" employees employed under them. According to appellant, the salary payments had been routed through foreign companies who made Appeal Nos.ST/502-504/2010 payment to the said employees on behalf of the appellant in foreign currency and on reimbursement basis without any mark up.

(ii) The appellants have contended that with each of the expatriates, drafts for employment had been drawn up, which, inter alia, indicated the monthly salary payable. The appellant, therefore, contends that liability to pay salaries rested with the appellants and not with the foreign companies. They also pointed out that income tax had been deducted and TDS certificates issued to these employees in form 60.

(iii) We find merit in these averments. It is a usual practice to facilitate payment of the salaries of expatriate employees in foreign currency, to be payable in their home country. It is not the case that appellants had engaged services of a manpower service provider from abroad to have the services of these persons. It is also pertinent to note that drafts were drawn up by the appellants directly with their employees and not with any manpower supply provider abroad.

(iv) Further, even the foreign agents who had facilitated routing of the salaries to the secondees, were functioning as pure agents and, hence, on this core also, service tax liability under reverse charge basis will not arise. Hence, that part of the impugned order which has confirmed service tax liability in respect of the employment of expatriate persons, cannot sustain and requires to be set aside, which we hereby do."

5.10 The Ld. counsel was however, fair enough to submit that after the above order of the Tribunal, the Hon'ble Supreme Court, in the case of *Commissioner of Customs, Central Excise and Service Tax, Bangalore vs. M/s. Northern Operating Systems Pvt. Ltd. [2022 (61) GSTL 129 (SC)]* had occasion to consider similar issue of 'seconded employees' by foreign company and held that the activity would be covered under MRSA. It is argued by the Ld.

counsel that the true nature of the agreement between the appellant and foreign entities does not involve MRSA.

5.11 With regard to the issue of demand of Service Tax under MRSA, the Ld. counsel put forward detailed arguments. It is submitted that the appellant was under *bona fide* belief that there was no MRSA in the arrangement entered between foreign entities for providing employees. In the appellant's own case, the Tribunal had decided the issue in their favour. Being an interpretational issue, the penalties may be set aside. It is pleaded that the benefit of waiver of penalty under Section 80 may extended as the appellant has put forward reasonable cause for non-payment of tax. The Ld. counsel prayed that the appeals may be allowed.

6.1 The Ld. Authorised Representative Smt. Anandalakshmi Ganeshram appeared and argued for the Department. The main crux of argument was in respect of the demand of Service Tax under MRSA. It is submitted by the Ld. AR that the appellant's contention that manpower supplied by the non-resident service providers were absorbed as their own employees and only the payment to the employees was routed through the overseas service providers (M/s. N.V. Baggerwerken Decloedt and M/s. Bellsca Investments Ltd., Cyprus (Bellsee)) and that no service was involved as per the secondment agreement dated 01.11.2004 cannot be accepted. On a perusal of this agreement it can be seen that the appellant has requested Bellsea to depute the secondees for agreed tenure and the secondees shall resume their services with Bellsea upon completion of the secondment. The salient features of this agreement are as below:

> Clause B: Bellsea to depute 'Secondees' to the assessee initially for a period of 3 years and renewable further as per agreed terms

Clause ID: Bellsea agreed upon the terms and conditions relating to the secondment of the Secondees

Clause_1.1.b)- Definition of 'Secondees': Secondees means the employees of Bellsea to be deputed to the assessee

Clause 2.2.2:: During the period of secondment, Bellsea shall pay salaries net of income tax outside India and the assessee shsall provide perquisites and other benefits to the secondees

6.2 The appellant has also furnished copy of contract of employment dated 01.11.2004 entered with Mr. Bezshiyakh Vasyl of Russia, deputed by Bellsea Investments Ltd. and Form-16 in support of their defence. On perusal of this contract it can be seen that the same pertains to employment of the aforesaid individual as 1st Mate of one of the vessels of the appellant company. Apart from specifying the details of designation, scope of work, compensation, etc., it has been specifically provided in the said contract that M/s. Bellsea Investments Ltd. will directly remit the remuneration to the bank account of the secondee and the same will be reimbursed by the appellant. The relevant clause-B of the subject contract reads is reproduced below:

B. Remittance of Remuneration Outside India

Subject to applicable law, Bellsea Investments Limited who has seconded the Employee to the Company will directly remit on your behalf, a sum equal to you net remuneration (after deduction of taxes and other deductions) account, specified by you, outside India, representing remittance for personal purposes. The company will reimburse Bellsea Investments Limited accordingly.

6.3 The Ld. AR argued that it is evident from the above factual position that Bellsea deputed its personnel to the appellants and it only Bell sea who has paid the salaries to such persons deputed by Bellson by them to the appellant.

It is pertinent to note that outflow of foreign exchange for various purposes, including payment of remuneration to non-Indian employees is permitted and monitored by the Reserve Bank of India as per regulations stipulated. Whereas, it is observed that the appellant requested Bellsea to depute personnel to them and accordingly the charges for the service were paid to them. Further, it is also an admitted fact that Bellsea paid the remuneration to such personnel as per the terms and conditions of the agreement. It is also categorically mentioned in the agreement that any extension of deputation of such personnel can take place only upon terms and conditions mutually agreed upon by the appellant with Bellsea and not the employees.

6.4 It is very much apparent that the appellant has directly appointed these persons working in Bellsea as their employees, it can be reasonably understood that such persons have resigned their jobs with Bellsea and joined the appellant company in their individual capacity. It is substantiated with documentary evidence with regard to deputation of personnel to the appellant and extension of deputation to responsibility for payment of salaries is remains within the control of Bellsea itself. The above facts establish that the personnel deputed to the appellant continued to be employees of Bellsee. Under the facts and circumstance, personnel claimed to be the employees of the appellant are actually employees of the Foreign Service provider and the amount paid by the appellant to them as salary is nothing but a consideration for providing manpower services.

6.5 The argument of the Ld. counsel for the appellant that the amounts are nothing but reimbursements and therefore not subject to levy of Service Tax prior to 2015 was countered by the Ld. AR by stating that the said issue was brought to the notice of the Hon'ble Apex Court in the case of *Northern Operating Systems P Ltd. [2022-TIOL-48-SC-ST-LB]*. However, the Apex Court held that secondment

agreement comes under the category of Manpower Supply Service and is subject to levy of Service Tax. The said decision of the Hon'ble Apex Court was followed by the Tribunal in the case of *M/s. Renault Nissan Automotive India Pvt. Ltd. [2023 (7) TMI 635-CESTAT CHENNAI]*.

6.6 In regard to the penalties imposed, the Ld. AR submitted that the appellant had not paid Service Tax and the same would not have come to light, but, for the scrutiny done by the Department officers. The appellant has not put forward any reasonable cause for the non-payment of the failure to pay the Service Tax and therefore the penalty imposed is legal and proper. The Ld. AR prayed that the appeals may be dismissed.

7. Heard both sides.

8.1 Out of the four issues narrated above, which arise for consideration in these appeals, the demand of Service Tax confirmed under the category of Dredging services at Dhamra Port, on the consideration received for activities of Soil Stabilisation and Land Reclamation has been decided by the Tribunal in the appellant's own case as reported in *[2018 (6) TMI 933-Cestat Chennai]*. It was explained by the appellant that three separate contracts for dredging, soil stabilisation and land reclamation were entered by them. In the present case also the demand is made under dredging services on amounts received for soil stabilisation and land reclamation services at Dhamra Port. In paragraph 14.2.0, the adjudicating authority has held that the activities undertaken were not stand-alone and therefore, the contract has to be considered as composite one. It is alleged that the amounts received for site formation and land reclamation though separately fixed or recovered from the Board authorities, as they are interconnected with dredging services, the appellant has to discharge Service Tax under the category of dredging services. This view does not find favour with us. On the very same set of facts, the Tribunal

had remanded the matter for the earlier period to examine the agreements. In such *denovo* adjudication, the original authority *vide* Order-in-Original No. 15/2020 dated 31.10.2020 has dropped the demand. Further in the appellant's own case for the different period on the very same agreements, the original authority *vide* Order-in-Original No. 14&15/2013 dated 28.02.2013 dropped the demands. In such order, the original authority has dropped the demand in respect of all the above three issues and has upheld the demand of Service Tax on manpower supply services only. The discussion by the adjudicating authority for setting aside the demand of Service Tax in regard to soil stabilisation and land reclamation activities is as under:-

"*7. Dredging service*

7.2 This taxable service covers dredging which is generally undertaken for removal of material such as silt, sediments, rocks etc. of rivers, ports, harbour, backwater or estuary for providing adequate draught for ships and other vessels and to maintain shipping channels. Service tax is leviable only on dredging of river, port, harbour, backwater or estuary and dredging in any other cases does not attract service tax. The definition of dredging is an inclusive definition and the activities specified are only indicative and not exhaustive.

As clarified by the Ministry, the dredging service is generally undertaken for removal of material such as silt, sediments, rocks, etc for providing adequate draught for ships and other vessels and to maintain shipping channels. It is therefore seen from the definitions and the clarifications reproduced above that soil stabilisation and land reclamation work are specifically included under site formation service [Section 65(97a)] whereas Dredging service is separately notified under Section 65(36a), eventhough both the services were brought under tax net on the same day ie, 16.06.2005. Therefore, soil stabilisation and land reclamation work undertaken by the assessee during the course of construction of port cannot be grouped as a composite service under dredging service.

6.9 In the present case, as already discussed it is established beyond doubt by the assessee that

i) No dredging work is involved in the soil stabilisation contract

ii) Land reclamation service is not incidental service to Dredging contract

> *iii) The dredging activity carried out under land reclamation contract is only for the purpose of reclamation of land to develop cargo handing facilities and this dredging activity does not contribute to the deepening of the navigational path of the ships.*
>
> *Therefore, I have no hesitation to hold that in terms of Section 65A(2)(a) of the Act the soil stabilisation and land reclamation services provided by the assessee during the course of construction of Dhamra Port are classifiable under Section 65(97a) - site formation service only and not under Dredging service. At this juncture it is pertinent to mention here that the facts of the case as discussed above have not been clearly brought out to the notice of my predecessors resulting in confirmation of the demand as mentioned in para 2 above. Consequently, I hold that the assessee is eligible for the exemption from payment of service tax on the aforesaid activities in terms of Notification No.17/2005-ST dated 07.06.2005. The service tax demanded in the show cause notice in respect of these activities is liable to be dropped.*

8.2 The Notification No. 17/2005-ST dated 07.06.2005 exempts site formation services (soil stabilisation, land reclamation) provided in the course of construction of road, airports, railways, transport terminals, bridges, tunnels, dams, major and minor ports. After considering the agreement, the original authority in the above extracted order has come to the conclusion that the consideration received for site formation services is exempted under the above Notification and cannot be subject to levy of Service Tax under dredging services. The facts entirely being the same, we are of the view that the demand of Service Tax under the category of dredging services for the amount received by the appellant for soil stabilisation and land reclamation services cannot sustained and requires to be set aside which we hereby do.

9.1 The second issue is whether the service offered by the appellant to Dredging Corporation of India by way of charter-hire of vessel for dredging work of the Sethu Samudram Canal Project. The demand of Service Tax is under Dredging services. In paragraph 13.1.1, the facts have been discussed by the adjudicating authority as under:-

"13.1.1 A perusal of the Agreement dated 10.01.2008 between ISDL (Owner) and DCI (Charterer) at plain sight appears to be an agreement for charter-hire of vessel for dredging work of the Sethu Samudram Canal Project. However, on detailed scrutiny of the same, it is observed that not only has the vessel been leased out but also, the manpower. DCI have deputed only 3 persons for the said project. Hence, the contention that dredging was carried out by DCI appears far-fetched. Also, if the dredging activity was indeed carried out by DCI, there was no reason for ISDL, as the owner of the vessel to maintain the record of daily/weekly and monthly production and log sheets. That ISDL have rendered dredging services is further reinforced by the fact that at Sl. No. 8B of the General conditions of the Contract, it has been mentioned as follows:

> "The Vessel should be dredging for a minimum period of 22 days in any calendar month. In case of continuous shortfall during several continuous months, Charterer will have the right to terminate the Charter after giving 14 days notice to the owner." "

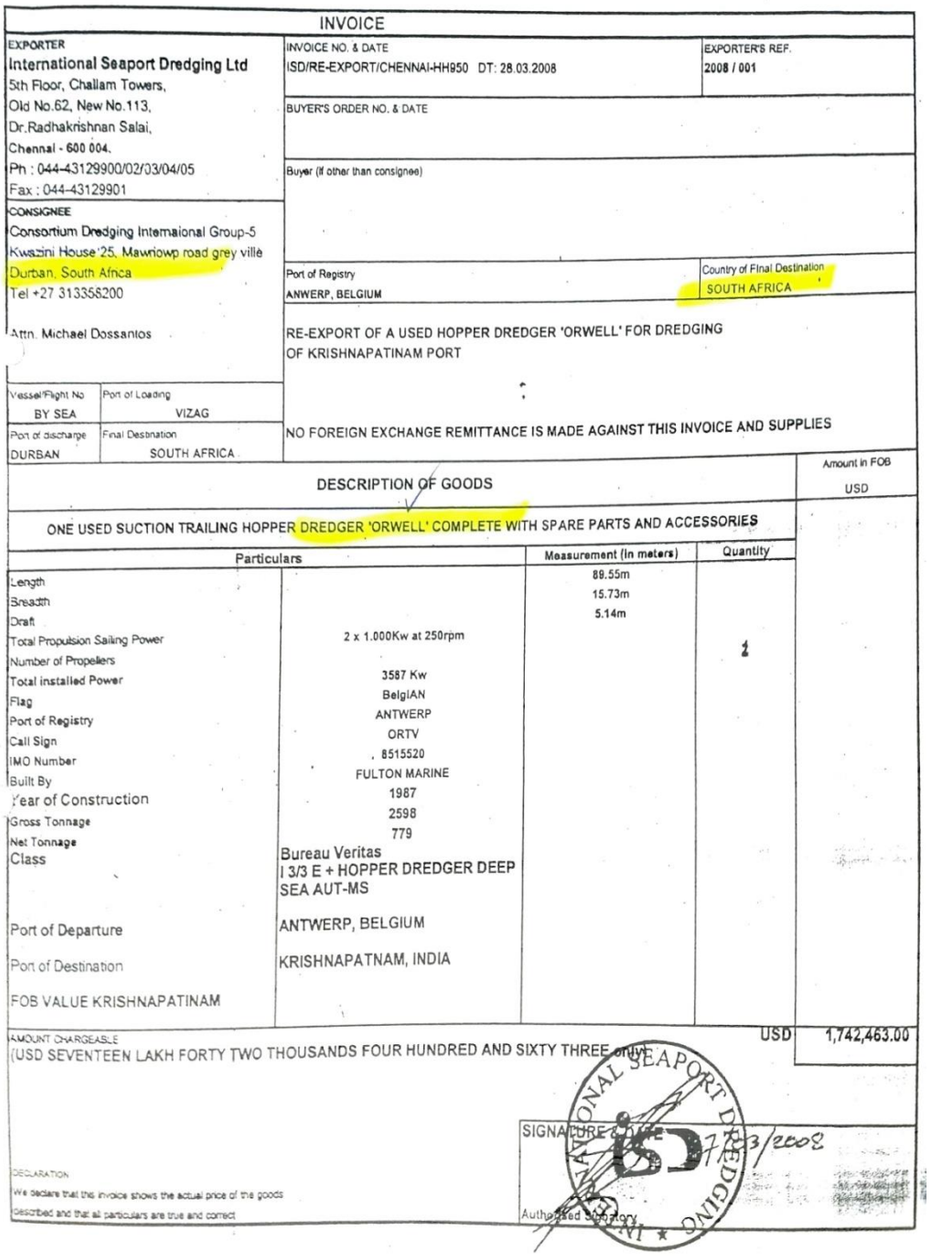
9.2 The very same issue was considered by the Tribunal in the appellant's own case for the earlier period wherein it was held that the charter/hire of vessel would at the best fall under Supply of Tangible Good Services and not under dredging services. Following the same, we are of the view that the demand of Service Tax on amount received by the appellant upon the charter-hire agreement under the category of dredging services cannot sustain and requires to be set aside which we hereby do.

9.3 The third issue is with regard to demand of Service Tax under Maintenance and Repair Services received from the Foreign Service provider. The very same issue had come up for consideration in regard to the maintenance and repair services of the vessel 'Pacifique'. The matter was remanded to the adjudicating authority and in such *denovo* adjudication, the original authority held that the demand cannot sustain and dropped the same. The contention raised by the appellant is that the maintenance and repair services were performed on the vessel outside India and amount paid for such repair services to the Foreign Service provider cannot be subject to levy of Service Tax under reverse charge mechanism alleging import of services. That

repair and maintenance services are performance based services; as the services have been performed outside India, the provisions regarding import of services cannot be applied to demand Service Tax from the appellant. After perusal of the documents, the original authority analysed this issue in the remand proceedings as under to drop the demand. The relevant paragraphs read as under:-

> *"In this regard, the assessee had submitted that:-*
>
> *a. The 010 has referred a particular invoice and confirmed the demand on them;*
> *b. They have received repair and maintenance services from the various foreign service providers for the vessel located outside India.*
> *c. They have received services for vessels located at Colombo Ship yard & at Singapore. They have submitted documents to substantiate that the repair activities were carried out at Colombo, Sri Lanka & Singapore respectively.*
> *d. With regard to maintenance and repair services, the decide the applicability of service tax under import of services, the location of service' is to be determined and as all their services were carried out outside India, service tax will not be applicable on the same.*
>
> *Based on the above reply given by the assessee, I have examined the documents submitted by them to confirm their averments on the place of provision of service. I find that for the work carried out at Colombo Dockyard, they have submitted various documents such as work-done certificate/Invoice wherein date wise details of work done vis-à-vis the charges for the same has been given. In the said Invoice, charges for occupation of dock, wharfage, etc., were given, which indicate that the repair work have really been carried out at Colombo Dry Dock, Sri Lanka, only. Similarly, invoices issued by the ST Marine dry- docking yard for repair work carried out for the vessel 'Pacifique' at Singapore were also found available in the reply given by the assessee earlier and hence all the above confirm that the repair and maintenance work have been carried out outside India. As per Taxation of Service (Provided from outside India and Received in India) Rules, 2006, maintenance services are grouped under category (ii), i.e. the service receiver will be liable to pay tax if only these services are performed in India. Thus, based on the findings recorded above and as a similar view has been taken by the Adjudicating Authority No.14 &15/2013 dated by dropping the demand of service tax on repair and maintenance services, I hold that the demand of service tax made in the three subject SCN's (under de-novo adjudication) on repair and maintenance services is liable to be dropped."*

9.4.1 The Ld. counsel submitted that the original authority has referred the name of the vessel as 'Pacifique'. In fact, in these appeals, the repairs were with regard to Vessel Orwell and repairs were done at South Africa. Order-in-Original has erroneously mentioned the vessel name as 'Pacifique'. The invoice furnished at page 1196 of the type set is scanned below:-



INVOICE

EXPORTER
International Seaport Dredging Ltd
5th Floor, Challam Towers,
Old No.62, New No.113,
Dr.Radhakrishnan Salai,
Chennai - 600 004.
Ph : 044-43129900/02/03/04/05
Fax : 044-43129901

INVOICE NO. & DATE: ISD/RE-EXPORT/CHENNAI-HH950 DT: 28.03.2008
EXPORTER'S REF.: 2008 / 001
BUYER'S ORDER NO. & DATE:
Buyer (if other than consignee):

CONSIGNEE
Consortium Dredging International Group-5
Kwazini House 25, Mawlowp road grey ville
Durban, South Africa
Tel +27 313358200
Attn. Michael Dossantos

Port of Registry: ANWERP, BELGIUM
Country of Final Destination: SOUTH AFRICA

RE-EXPORT OF A USED HOPPER DREDGER 'ORWELL' FOR DREDGING OF KRISHNAPATINAM PORT

Vessel/Flight No	Port of Loading
BY SEA	VIZAG
Port of discharge	Final Destination
DURBAN	SOUTH AFRICA

NO FOREIGN EXCHANGE REMITTANCE IS MADE AGAINST THIS INVOICE AND SUPPLIES

DESCRIPTION OF GOODS — Amount in FOB USD

ONE USED SUCTION TRAILING HOPPER DREDGER 'ORWELL' COMPLETE WITH SPARE PARTS AND ACCESSORIES

Particulars		Measurement (In meters)	Quantity
Length		89.55m	
Breadth		15.73m	
Draft		5.14m	
Total Propulsion Sailing Power	2 x 1.000Kw at 250rpm		1
Number of Propellers			
Total installed Power	3587 Kw		
Flag	BelgIAN		
Port of Registry	ANTWERP		
Call Sign	ORTV		
IMO Number	. 8515520		
Built By	FULTON MARINE		
Year of Construction	1987		
Gross Tonnage	2598		
Net Tonnage	779		
Class	Bureau Veritas I 3/3 E + HOPPER DREDGER DEEP SEA AUT-MS		
Port of Departure	ANTWERP, BELGIUM		
Port of Destination	KRISHNAPATNAM, INDIA		
FOB VALUE KRISHNAPATINAM			

AMOUNT CHARGEABLE: USD 1,742,463.00
(USD SEVENTEEN LAKH FORTY TWO THOUSANDS FOUR HUNDRED AND SIXTY THREE only)

SIGNATURE & DATE: 7/3/2008
Authorised Signatory

DECLARATION
We declare that this invoice shows the actual price of the goods described and that all particulars are true and correct

INTERNATIONAL SEAPORT DREDGING

9.4.2 From the above document, it is very much clear that the repair services were done outside India. The levy of Service Tax on Maintenance and Repair Services is on the

basis of the place of performance and therefore the demand cannot be sustained as the services have been performed outside India and not received in India. For this reason, we hold that the demand under this category cannot sustain and requires to be set aside which we hereby do.

9.5 The fourth issue is with regard to the demand of Service Tax on reverse charge basis under the category of Manpower Recruitment and Supply Agency (MRSA) services received from Foreign Service providers. In both the Orders-in-Original, the adjudicating authority has confirmed the demand. The issue as to whether secondment agreement entered by the appellant with the foreign companies for deputation of employees would come within the ambit of the definition of Manpower Recruitment And Supply Agency services was analysed by the Hon'ble Apex Court in the case of *Commissioner of Customs, Central Excise and Service Tax, Bangalore vs. M/s. Northern Operating Systems Pvt. Ltd. [2022 (61) GSTL 129 (SC)]*. The Ld. counsel for the appellant has submitted that the Hon'ble Apex Court in the said case did not refer to the application of the decision of the Apex Court in the case of *Union of India Vs. Intercontinental Consultants and Technocrats Pvt. Ltd. [2018 (10) GSTL 401 (SC)]* . Though in para 26, the said decision was brought to notice and referred to by the Hon'ble Apex Court, the Hon'ble Apex Court has only considered taxability under the category of manpower requirement and supply agency services and has not considered the valuation aspect. The discussion in paragraph 34 of the said judgment is as under:-

> ***"34.*** *The contemporary global economy has witnessed rapid cross-border arrangements for which dynamic mobile workforces are optimal. To leverage talent within a transnational group, employees are frequently seconded to affiliated or group companies based on business considerations. In a typical secondment arrangement, employees of overseas entities are deputed to the host entity (Indian associate) on the latter's request to meet its specific needs and requirements of the Indian associate. During the arrangement, the secondees work under the control*

and supervision of the Indian company and in relation to the work responsibilities of the Indian affiliate. Social security laws of the home country (of the secondees) and business considerations result in payroll retention and salary payment by the foreign entity, which is claimed as reimbursement from the host entity. The crux of the issue is the taxability of the cross charge, which is primarily based on who should be reckoned as an employer of the secondee. If the Indian company is treated as an employer, the payment would in effect be reimbursement and not chargeable to tax in the hands of the overseas entity. However, in the event the overseas entity is treated as the employer, the arrangement would be treated as service by the overseas entity and taxed."

9.6 The Ld. counsel for the appellant has adverted to the reply to the Show Cause Notice and the agreements entered with foreign company to argue that the amounts paid by the appellant to their employees were only actual reimbursements. Though activity may be taxable under MRSA as per the decision of the Hon'ble Apex Court in the case of M/s. Northern Operating Systems Pvt. Ltd. *(supra)*, the amount being in the nature of reimbursements cannot be included in the taxable value under Section 67 as it stood during the relevant period (prior to 2015). It is submitted that the decision of the Hon'ble Apex Court in the case of Intercontinental Consultants and Technocrats Pvt. Ltd. *(supra)* would apply on such reimbursed amounts.

9.7 By judicial discipline, we follow the decision of the Hon'ble Apex Court in the case of M/s. Northern Operating Systems Pvt. Ltd. *(supra)* and hold that the demand under this category is sustainable, and uphold the same.

9.8 The Ld. counsel has argued to set aside the penalties. We have already held that only the demand under MRSA survives. The said issue was interpretational in nature and has travelled upto to the Hon'ble Apex Court. Further, in the appellant's own case for the previous period, the Tribunal had set aside the demand under this category. We therefore find that the appellant has made out sufficient cause for non-payment of Service Tax and is a fit situation to

invoke Section 80 of the Finance Act, 1944 to set aside the penalties.

10. In the result, the impugned order is modified as under:-

i. The demand of Service Tax under the category of Dredging services for Dhamra Port on amounts received for soil stabilisation and land reclamation activity is set aside.

ii. The demand of Service Tax on the amount received for charter / hire of vessels to DCI is set aside.

iii. The demand of Service Tax on the amounts paid for repair and maintenance of the Vessel Orwell is set aside.

iv. The demand of Service Tax on Manpower Recruitment and Supply Agency services is upheld along with interest.

v. The penalties imposed are entirely set aside.

11. The appeals are partly allowed in above terms.

(Order pronounced in open court on 15.09.2023)

(VASA SESHAGIRI RAO)
MEMBER (TECHNICAL)

(SULEKHA BEEVI C.S.)
MEMBER (JUDICIAL)

MK