केंद्रीय कर आयुक्त (अपील)

O/O THE COMMISSIONER (APPEALS), CENTRAL TAX,

सत्यमेव जयते

केंद्रीय कर शुल्कभवन,
सातवीं मंजिल,पोलिटेकनिक के पास,
आम्बावाडी, अहमदाबाद-380015

7th Floor, Central Excise Building,
Near Polytechnic,
Ambavadi, Ahmedabad-380015

☎: 079-26305065

टेलेफैक्स : 079 - 26305136

क फाइल संख्या : File No : **V2(ST)10/EA-2/Ahd-II/17-18** 3889 to 3893

ख अपील आदेश संख्या : Order-In-Appeal No..**AHM-EXCUS-002-APP-5-18-19**

दिनाँक Date : **26-Apr-18** जारी करने की तारीख Date of Issue 27/6/2018

श्री उमा शंकर, आयुक्त (अपील) द्वारा पारित

Passed by **Shri Uma Shanker** Commissioner (Appeals)

ग Arising out of Order-in-Original No **SD-01/09/AC/Interactive/17-18** Dated **02-Jun-17** Issued by **Assistant Commissioner,** Service Tax, Div-I, Ahmedabad

ध **अपीलकर्ता का नाम एवं पता**
Name & Address of The Appellants

M/s. Safe Sea Logistics Pvt Ltd
Ahmedabad

इस अपील आदेश से असंतुष्ट कोई भी व्यक्ति उचित प्राधिकारी को अपील निम्नलिखित प्रकार से कर सकता हैः–
Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate authority in the following way :-

सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण को अपीलः–
Appeal To Customs Central Excise And Service Tax Appellate Tribunal :-

वित्तीय अधिनियम,1994 की धारा 86 के अंतर्गत अपील को निम्न के पास की जा सकतीः–
Under Section 86 of the Finance Act 1994 an appeal lies to :-

पश्चिम क्षेत्रीय पीठ सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण ओ. 20, न्यू मैन्टल हास्पिटल कम्पाउण्ड, मेधाणी नगर, अहमदाबाद–380016

The West Regional Bench of Customs, Excise, Service Tax Appellate Tribunal (CESTAT) at O-20, New Mental Hospital Compound, Meghani Nagar,Ahmedabad – 380 016.

(ii) अपीलीय न्यायाधिकरण को वित्तीय अधिनियम, 1994 की धारा 86 (1) के अंतर्गत अपील सेवाकर नियमावली, 1994 के नियम 9 (1) के अंतर्गत निर्धारित फार्म एस.टी– 5 में चार प्रतियों में की जा सकेगी एवं उसके साथ जिस आदेश के विरूद्ध अपील की गई हो उसकी प्रतियाँ भेजी जानी चाहिए (उनमें से एक प्रमाणित प्रति होगी) और साथ में जिस स्थान में न्यायाधिकरण का न्यायपीठ स्थित है, वहाँ के नामित सार्वजनिक क्षेत्र बैंक के न्यायपीठ के सहायक रजिस्ट्रार के नाम से रेखांकित बैंक ड्राफ्ट के रूप में जहाँ सेवाकर की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 5 लाख या उससे कम है वहां रूपए 1000/– फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 5 लाख या 50 लाख तक हो तो रूपए 5000/– फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 50 लाख या उससे ज्यादा है वहां रूपए 10000/– फीस भेजनी होगी।

(ii) The appeal under sub section (1) of Section 86 of the Finance Act 1994 to the Appellate Tribunal Shall be filed in quadruplicate in Form S.T.5 as prescribed under Rule 9(1) of the Service Tax Rules 1994 and Shall be accompany ed by a copy of the order appealed against (one of which shall be certified copy) and should be accompanied by a fees of Rs. 1000/- where the amount of service tax & interest demanded & penalty levied of Rs. 5 Lakhs or less, Rs.5000/- where the amount of service tax & interest demanded & penalty levied is is more than five lakhs but not exceeding Rs. Fifty Lakhs, Rs.10,000/- where the amount of service tax & interest demanded & penalty levied is more than fifty Lakhs rupees, in the form of

crossed bank draft in favour of the Assistant Registrar of the bench of nominated Public Sector Bank of the place where the bench of Tribunal is situated.

(iii) वित्तीय अधिनियम,1994 की धारा 86 की उप–धाराओं एवं (2ए) के अंतर्गत अपील सेवाकर नियमावली, 1994 के नियम 9 (2ए) के अंतर्गत निर्धारित फार्म एस.टी.-7 में की जा सकेगी एवं उसके साथ आयुक्त,, केन्द्रीय उत्पाद शुल्क (अपील) के आदेश की प्रतियाँ **(OIA)**(उसमें से प्रमाणित प्रति होगी) और अपर आयुक्त, सहायक / उप आयुक्त अथवा **अधीक्षक** केन्द्रीय उत्पाद शुल्क, अपीलीय न्यायाधिकरण को आवेदन करने के निदेश देते हुए आदेश **(OIO)** की प्रति भेजनी होगी।

(iii) The appeal under sub section (2A) of the section 86 the Finance Act 1994, shall be filed in Form ST-7 as prescribed under Rule 9 (2A) of the Service Tax Rules, 1994 and shall be accompanied by a copy of order of Commissioner Central Excise (Appeals)**(OIA)**(one of which shall be a certified copy) and copy of the order passed by the Addl. / Joint or Dy. /Asstt. Commissioner or Superintendent of Central Excise & Service Tax (**OIO**) to apply to the Appellate Tribunal.

2. यथासंशोधित न्यायालय शुल्क अधिनियम, 1975 की शर्तो पर अनुसूची–1 के अंतर्गत निर्धारित किए अनुसार मूल आदेश एवं स्थगन प्राधिकारी के आदेश की प्रति पर रू 6.50/– पैसे का न्यायालय शुल्क टिकट लगा होना चाहिए।

2. One copy of application or O.I.O. as the case may be, and the order of the adjudication authority shall bear a court fee stamp of Rs.6.50 paise as prescribed under Schedule-I in terms of the Court Fee Act,1975, as amended.

3. सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्यविधि) नियमावली, 1982 में चर्चित एवं अन्य संबंधित मामलों को सम्मिलित करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है।

3. Attention is also invited to the rules covering these and other related matters contained in the Customs, Excise and Service Appellate Tribunal (Procedure) Rules, 1982.

4. **सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सीस्तेत) के प्रति अपीलों के मामलों में केन्द्रीय उत्पाद शुल्क अधिनियम, १९४४ की धारा ३५फ के अंतर्गत वित्तीय(संख्या-२) अधिनियम २०१४(२०१४ की संख्या २५) दिनांक: ०६.०८.२०१४ जो की वित्तीय अधिनियम, १९९४ की धारा ८३ के अंतर्गत सेवाकर को भी लागू की गई है, द्वारा निश्चित की गई पूर्व-राशि जमा करना अनिवार्य है, बशर्ते कि इस धारा के अंतर्गत जमा की जाने वाली अपेक्षित देय राशि दस करोड़ रूपए से अधिक न हो**

केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत " माँग किए गए शुल्क " में निम्न शामिल है –

(i) **धारा 11 डी के अंतर्गत निर्धारित रकम**

(ii) **सेनवैट जमा की ली गई गलत राशि**

(iii) **सेनवैट जमा नियमावली के नियम 6 के अंतर्गत देय रकम**

⇨ **आगे बशर्ते यह कि इस धारा के प्रावधान वित्तीय (सं. 2) अधिनियम, 2014 के आरम्भ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्ज़ी एवं अपील को लागू नहीं होगे।**

4. For an appeal to be filed before the CESTAT, it is mandatory to pre-deposit an amount specified under the Finance (No. 2) Act, 2014 (No. 25 of 2014) dated 06.08.2014, under section 35F of the Central Excise Act, 1944 which is also made applicable to Service Tax under section 83 of the Finance Act, 1994 provided the amount of pre-deposit payable would be subject to ceiling of Rs. Ten Crores,

Under Central Excise and Service Tax, "Duty demanded" shall include:

(i) amount determined under Section 11 D;

(ii) amount of erroneous Cenvat Credit taken;

(iii) amount payable under Rule 6 of the Cenvat Credit Rules.

⇨ Provided further that the provisions of this Section shall not apply to the stay application and appeals pending before any appellate authority prior to the commencement of the Finance (No.2) Act, 2014.

4(1) इस संदर्भ में, इस आदेश के प्रति अपील प्राधिकरण के समक्ष जहाँ शुल्क अथवा शुल्क या दण्ड विवादित हो तो माँग किए गए शुल्क के 10% भुगतान पर और जहाँ केवल दण्ड विवादित हो तब दण्ड के 10% भुगतान पर की जा सकती है।

4(1) In view of above, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute.

ORDER-IN-APPEAL

This is an **appeal filed by the department** against **Order-in-original No. SD-01/09/AC/Safe Sea/17-18 dated 26/05/2017** (hereinafter referred to as 'the impugned order') passed by the Assistant Commissioner, Service tax Division-I, Ahmedabad (hereinafter referred to as 'the adjudicating authority').

2. Briefly stated the facts of the case are that M/s Safe Sea Logistics Pvt. Ltd., 403, Anushree Complex, Near Bank of Baroda, Usmanpura, Ahmedabad-380 013 (hereinafter referred to as 'the respondent') were registered with Service Tax for providing services falling under the categories of (i) Clearing and forwarding Agent Services under Section 65(105)(j) of the Finance Act, 1994, (ii) Transport of goods by Road / GTA service under Section 65(105)(zzp), (iii) Works Contract service under Section 65(105)(zzzza) and (iv) Legal Consultancy service under Section 65(105)(zzzzm). On verification of records of the respondent by the Audit officers, it was noticed that the activities of end to end logistic solutions to Exporters, Shipping Lines and Airlines included buying cargo space from airlines/shipping lines, filing Import General Manifest, arranging transport for picking cargo from factory/ shipment site; getting containers cleaned; filing of Bill of Entry, loading, unloading, fumigating the containers, preparing / obtaining various documents *viz.* Bill of Lading, handling of cargo, Customs clearance of export cargo etc for which the respondent was receiving a lump sum amount as payment. The respondent had split its consideration into *'St.'* and *'no.St'* categories that stood for Service Tax and No Service Tax categories respectively. The services of 'Freight charges / Air Freight', Pallate charges, Concar charges etc. recovered from the clients were categorized as *'no St'* (non-taxable) for the purpose of payment of Service tax. It was pointed out by audit that the respondent was required to pay service tax on the gross amount received from the clients under the category of 'Business Support Service' till 30/06/2012. However, the respondent disagreed and hence a show cause notice F.No.CEA-II/04-194/CIR-IV/AP XV/OF/2015-16 dated 14/10/2016 (hereinafter referred to as 'the SCN') was issued to the respondent demanding an amount of **Rs.27,17,893/-** as Service Tax for the period from **April-2011 to June-2012** under the category of 'Business Support service' under Section 73(1) of the Finance Act, 1994 (hereinafter FA, 1994) along with interest under Section 75 of FA, 1994 and proposing to impose penalties under Section 76, Section 77 and Section 78 of FA, 1994. The adjudicating authority *vide* O.I.O. No. SD-01/09/AC/safe sea/17-18 dated 26/05/2017 (hereinafter referred to as 'the impugned order') has dropped the proceedings initiated in the show cause notice on the ground that in the instant case the respondent had worked on 'Principal to Principal' basis buying cargo space at bulk rates and selling these spaces to the customers and hence the respondent was not covered under the category of intermediary and was not liable to pay Service Tax in terms of 2.2 and para 2.3 of the C.B.E.C. Circular no. 197/7/2016-ST dated 12/08/2016.

3. The department has preferred the instant appeal mainly on the following grounds:

1) The findings of the adjudicating authority in the impugned order were contrary to the guidelines as given in para 4 of the C.B.E.C. Circular No. 197/7/2016-ST dated 12/08/2016 and without understanding it in its entirety. He has only discussed para 2.2 of the said circular while maintaining silence on para 2.1. It is settled principal that any statute should be read as it is and Court or adjudicating authority has no power to add or delete which is not in it. As per para 2.1 of the said Circular:

> "2.1 The freight forwarders may deal with the exporters as an agent of an airline/carrier/ocean liner, as one who merely acts as a sort of booking agent with no responsibility for the actual transportation. It must be noted that in such cases the freight forwarder bears no liability with respect to transportation and any legal proceedings will have to be instituted by the exporters, against the airline/carrier/ ocean liner. The freight forwarder merely charges the rate prescribed by the airline/carrier/ocean liner and cannot vary it unless authorized by them. In such cases the freight forwarder may be considered to be an intermediary under rule 2(f) read with rule 9 of POPS since he is merely facilitating the provision of the service of transportation but not providing it on his own account. When the freight forwarder acts as an agent of an air line/carrier/ocean liner, the service of transportation is provided by the air line/carrier/ocean-liner and the freight forwarder is merely an agent and the service of the freight forwarder will be subjected to tax while the service of actual transportation will not be liable for service tax under Rule 10 of POPS."

Further, in terms of para 4 of the said circular:

> Keeping this in mind, field formations may deal with cases purely on the basis of the facts of the case, the terms of contract between the entities concerned, the provisions of the Finance Act, 1994, the POPS Rules, 2012 and other rules.

Therefore, in terms of Para 4 the adjudicating authority was required to examine (i) Contract between CMA and the respondent; (2) Contract between the respondent and Exporter / shipper and (3) Bill of Lading etc. to arrive at final conclusion i.e. who is transporting the goods and bearing the legal responsibility. However, the adjudicating authority has examined only the pattern of invoicing followed in a few invoices. The adjudicating authority had failed to examine these contracts and bills of lading to check whether the freight forwarder is actually transporting the goods and whether they had undertaken all the legal responsibility for the transportation of the said goods and the attendant risk in providing the service of transportation of goods from a place in India

2) Further the adjudicating authority failed to observe that the respondent had actually collected much higher value of Ocean freight from shippers / exporters, in the invoices, than the amount which was actually paid by him to the shipping line, as such the respondent had willfully not mentioned the ocean freight margin i.e. excess and above the amount which is paid by him to the shipping line, in his invoice, which is a *modus operandi* was followed by the respondent in order to avoid the service tax liability by showing consolidated amount of ocean freight in the invoices, with the *mala fide* intention to get benefit of exemption of service tax available on the ground of Principal to Principal basis. The adjudicating authority failed to notice that the respondent himself is not engaged in transportation of ocean going vessels which is actually done by the shipping line and the respondent's role is limited to facilitating freight booking of ocean going vessels which they had booked in advance anticipating such customers or they make such bookings with the shipping line on behalf of the exporters / importers whenever there is such a request. The amount paid to the shipping line for such freight booking of ocean going vessel is termed as 'purchase value' and the amount collected from the exporters / importers is termed as 'sale value' by the said respondent. However, service can neither be purchased nor it can be sold. The usage of such words is misleading and adversely affects the taxability of the service provided. There is no denying the fact that 'Ocean freight' itself is not liable to service tax and therefore there is no service tax liability on the shipping line. However, the differential amount earned by the respondent is not 'ocean freight' but an amount for facilitating the exporters/ importers in booking the 'ocean going vessels'. The adjudicating authority failed to verify the respondent's contention that it was the actual service provider in case of transportation of goods by sea or air for export of goods outside India or for import of goods into India and

the actual service is not provided by airline or shipping line as it is not backed by any documentary evidence i.e. copy of contract etc.

3) The adjudicating authority has failed to observe that the expenses incurred by the respondent on account of occupying space for ocean freight / Air on behalf of its customers i.e. importers / exporters was in fact reimbursable expenses which they should have collected on actual basis from its customers as 'reimbursement expenses' and should have charged service charges, separately in the invoices. Instead, in the instant case the respondent in order to hide the difference chose to raise a consolidated bill, which included such expenses as well as its service charges which is referred to as profit on purchase and sale of space for Ocean /Air freight on behalf of its customers. This is service that was in relation to supporting the business of its customers i.e. importers / exporters. Service as such cannot be traded as it is intangible in nature. Therefore, the services can only be rendered or provided. Whereas in the case on hand the respondent has termed its service charge as profit on purchase and sale of Ocean freight / Air freight on behalf of the customers. In fact such difference on account of purchase and sale of ocean / air freight was the consideration / remuneration for rendering service for facilitating the ocean / air freight. The adjudicating authority has overlooked the above facts and merely from the scrutiny of the invoices in relation to movement of cargo from the customer's premises has derived that the transportation of the containers was done by the freight forwarder and the respondent had undertaken all the legal responsibility. On the contrary, from the invoices issued by the shipping line i.e. M/s CMA CGM Agencies (India) Pvt. Ltd., it can be seen that the said shipping line had the responsibility to undertake activities such as terminal handling, documentation etc. to transport the container from India to outside of India. It is established practice in trade that the insurance of goods from factory premises to port is done by the shipper and from Indian port to foreign port the responsibility is on the shipping line. Therefore, there is no legal responsibility of freight forwarder at all in transportation of goods. Further, in the present case, CMA CGM Agencies Pvt. Ltd., renowned shipping agency has been issuing Bill of Lading, which is evident from the invoices and hence in the instant case the legal responsibility of transportation of goods is on the shipping line and not on the freight forwarder. Therefore, the observation of the adjudicating authority that the freight forwarder acted as 'Principal to Principal' while providing the services of transportation of goods with destination outside of India, is casual and faulty. The adjudicating authority had not examined the Bill of lading and Contract copy entered between M/s CMA CGM shipping Agencies Pvt. Ltd. and the appellant and therefore, his conclusion that there was no direct nexus between carrier and the exporter and the relationship between the respondent and the exporter is on 'Principal to Principal' basis is incorrect. The adjudicating authority's finding that the respondent was not covered under the category of intermediary and had acted on a principal to principal basis is incorrect as in the invoice issued by M/s CMA CGM Agencies (India) Pvt. Ltd., to the respondent, there is clear mention of forwarding agent commission from which it is inferred that a freight forwarder had acted as an agent and not as a principal. Also the Bill of Lading issued by the Shipping Line confirms that the transportation and legal responsibility in the instant case is of M/s CMA CGM and not of the respondent. Therefore, the respondent had acted as an intermediary and as per Rule 9 of the Place of provision of service rules, 2012, the place of provision of the intermediary service is the location of the freight forwarder and not a location outside India and hence service tax is liable to be paid by the respondent.

4. Personal hearing in the appeal was held on 25/04/2018, attended by Shri Ramratan Singh, Director and Shri Bishen Shah, C.A. The learned C.A. explained the case and stated that he would submit written submissions within 2 days.

5. The respondent submitted its written submission on 01/05/2018. The salient points of these submissions are as follows:

1) The respondent is rendering services relating to buying cargo space from airlines / shipping lines; filing Import General Manifest; Arranging transport for picking cargo from factory / shipment site, Getting containers cleaned; filing of Bill of Entry; Loading / Unloading; Fumigating the container; Customs clearance of export cargo; Handling cargo and Preparing / obtaining various documents viz. Bill of Lading; that for the said activities the respondent had received a lump sum amount (consideration), which the respondent had split into 'st' (service tax payable) and 'No st' (no service tax payable)

portions. The respondent had already discharged service tax in respect of Agency charges, documentation charges, CMC charges, Loading / Unloading charges etc. but no Service tax was charged on services such as Air freight / Ocean freight charges, concor charges, palate charges as these are not covered under Section 65(105) and therefore are outside the purview of service Tax. In the Finance Act, 1994, there are specific entries of levying tax on transportation of goods by road, rail, aircraft, pipeline etc., there is no entry levying tax on transportation by sea. Hence it is kept outside the tax net and it cannot be taxed under a general entry like Business Support Service and these services are rendered in respect of export cargo. Notification No.29/2005-ST dated 15/07/2005 exempts services rendered for transport of export goods by air. Similarly Service Tax is not attracted on income earned as Freight charges as a third party service provider. All the transactions were undertaken on a principal to principal basis where the freight forwarder buys the cargo space at bulk rates on 'principal' basis and then sells these spaces to the customers. Even the basis on which the SCN was issued had accepted the fact that the respondent was doing business on principal to principal basis. Hence Service tax was not attracted, which is attracted only where the service provider is acting in the capacity of pure agent. Through Circular F. No. B-43/1/97-TRU dated 06/06/1997, C.B.E.C. had clarified that service tax would be charged on 'service charges only' and statutory levy and other reimbursable charges would not be included in the taxable value. The Hon'ble high court in the case of Intercontinental consultants & Technocrats Pvt. Ltd. vs U.O.I. – 2013 (29) S.T.R. 9 (Del.) have held that if the expenses on air travel tickets are already subject to service tax and is included in the bill, to charge service tax again on the expense would certainly amount to double taxation which cannot be enforced by implication. The respondent also relies on (i) Suraj Forwarders vs C.S.T., Ahmedabad – 2016 (42) S.T.R. 843 (Tri. – Ahmd.); (ii) Shree Gayatri Cleaning agency vs C.S.T., Ahmedabad – 2015 (400 S.T.R. 189 (Tri.-Ahmd.) and (iii) Gujarat Maritime Board vs C.C.E., Bhavnagar – 2015 (38) S.T.R. 776 (Tri. – Ahmd.).

2) The respondent was registered under service tax and was submitting requisite details from time to time. It had made payment of service tax and filed ST-3 returns for the concerned period and it had not done any act resulting into any willful mis-statement or suppression of facts. It is not the charge in the SCN that the respondent is involved in any fraud or collusion for non-payment of service tax. The respondent was under a *bona fide* belief that it was not liable to pay service tax on the charges for which there were no specific entries in the finance Act, 1994. Therefore, non-payment of service tax on charges categorized under 'no st' portions should not be considered as willful suppression of facts with the sole intention to evade payment of service tax. The respondent relies on decisions of Hon'ble Supreme court in the case of Continental Foundation Joint Ventures vs C.C.E., Chandigarh –I – 2007-TIOL-152-SC-CX and in the case of Chemphar Drugs & Liniments vs Collector of Central Excise – 2002-TIOL-266-SC-CX and the decision of hon'ble High court of Gauhati in the case of Bordubi Engineering Works vs U.O.I. – 2016 (42) S.T.R. 803 (Gau). The SCN is time barred as it has not been issued within 12 months but has been issued after eighteen months w.e.f. 28/05/2012. Penalty under section 77 was not implemented as the respondent was not required to pay Service tax. As there is no proof of fraud of collusion or willful misstatement with intent to evade payment of service tax, penalty under section 78 cannot be imposed. Moreover, Section 80 is attracted as the respondent had reasonable belief that it was not liable to pay service tax. Simultaneous penalties under section 76 and section 78 cannot be imposed. The respondent also submits that it is eligible for cum-tax benefit under section 67(2) of the Finance Act, 1994.

6. I have carefully gone through the facts of the case on records and the grounds of appeal filed by the department. In the impugned order, the adjudicating authority has held that the respondent was providing the services on 'Principal to Principal' basis as freight forwarders and therefore, in terms of C.B.E.C. Circular No. 197/7/2016-ST dated 12/08/2016, it was not liable to pay service Tax as the destination of the goods was from a place in India to a place outside India. Accordingly, the proceedings initiated against the respondent in the SCN have been dropped in the impugned order. In the instant appeal filed by the department, the dropping of proceedings in the impugned order has been challenged on the grounds as discussed below.

7. The primary contention raised by the department is that even though the impugned order has been issued in light of the clarification issued by C.B.E.C. *vide* circular No. 197/7/2016 ST dated 12/08/2016 (hereinafter 'the said Circular'), the findings are in contrary to the guidelines given in paragraph 4 of the said Circular which stipulates that *"Keeping in mind, field formations may deal with cases purely* ***on the basis of facts of the case, the terms of contract between the entities concerned, the provisions of the Finance Act, 1994, the POPS Rules, 2012 and other rules****"*. Herein, 'POPS Rules, 2012 stands for 'Place of Provisions of Services Rules, 2012'. The contention of the department is that the stipulation in paragraph 4 of the said Circular has not been followed in as much as the adjudicating authority had not examined documents such as (i) contract between CMA and Safe Sea Logistics Pvt. Ltd. (ii) Contract between Safe sea Logistics Pvt. Ltd. and Exporter / shipper and (iii) Bill of Lading etc. to arrive at a final conclusion as to whether the respondent is actually transporting the goods and whether it had undertaken all the legal responsibility for the transportation of goods and all attendant risks in providing the service of transportation of goods, from a place in India to a place outside India. It is also contended that the adjudicating authority is silent on paragraph 2.1 of the said Circular while discussing paragraph 2.2 thereof. On examining this ground it is observed that in paragraph 21 of the impugned order, the adjudicating authority has clearly stated that the SCN issued by Audit itself envisages that the respondent is a freight forwarder providing end to end logistics solutions to the Exporters, Shipping lines & Airlines. This fact can be verified from the opening lines of paragraphs 2 and 2.1 of the SCN, which is reproduced as follows:

> *"2. Whereas on verification of records of the assessee by the Audit officers, it was noticed that:-*
>
> *2.1* ***The assessee is a freight forwarder providing end to end logistics solutions to the Exporters, Shipping lines & airlines.*** *The activities include* ***buying cargo space from airlines / shipping lines****; filing Import General Manifest; arranging transport for picking cargo from factory / shipment site; getting containers cleaned; filing of bill of Entry, loading, unloading, fumigating the container, preparing / obtaining various documents viz. Bill of Lading, handling the cargo, customs clearance of export cargo etc. and were receiving a lump sum amount (consideration) for the said activities…."*

From the above, it is clear that the adjudicating authority is correct in holding that the SCN envisages the respondent as providing 'end to end' service and there is no allegation in the SCN that the respondent had acted merely as a pure agent or intermediary under Rule 2(f) read with Rule 9 of POPS Rules, 2012. Paragraph 2.1 of the said Circular clarifies that an intermediary under Rule 2(f) read with Rule 9 of POPS Rules, 2012 is a freight forwarder dealing with the exporters as an agent of an airline / carrier / ocean liner, as one who merely acts as a sort of booking agent with no responsibility for the actual transportation in which case the freight forwarder bears no liability with respect to transportation and any legal proceedings will have to be instituted by the exporters, against the airline / carrier / ocean liner. The freight forwarder merely

charges the rate prescribed by the airline / carrier / ocean liner and cannot vary it unless authorized by them and in such a case the service of the freight forwarder will be subjected to tax while the service of actual transportation to a place outside India will not be liable for service tax under rule 10 of POPS rules, 2012. In this regard, it has clearly been brought out in paragraph 6 of the SCN, that the respondent cannot be considered as a 'pure agent' in the following terms:

> *"6. Further, it also appears that as per provisions contained in Rule 5(1) of service Tax (Determination of Value) Rules, 2006, any expenditure or costs that are incurred by a service provider in the course of providing taxable service, all such expenditure or costs shall be treated as consideration for the taxable service provided or to be provided and shall be included in the value for the purpose of charging service tax on the said service. Whereas the provisions under rule 5(2) of the above rule, does provide exclusions as a 'pure agent', however the assessee has neither claimed that they were a pure agent nor do they fall under the purview of a pure agent, as revealed on verification of records. Accordingly, all the amounts recovered by them from their clients are to be included in the taxable value for the purpose of charging service tax as specified in rule 5(1) of service Tax (determination of Value) Rules, 2006."*

From the above extracts of the SCN it is clear that there is merit in the finding of the adjudicating authority that the SCN itself envisages the respondent as providing principal to principal services and that the respondent cannot be treated as an intermediary. In such a situation, the verification of various contracts and Bill of Lading would be travelling beyond the scope of the SCN. No reason or evidence has been adduced to show that that such verification was not carried out at the stage of framing the charges in the SCN. Therefore, the ground of appeal regarding non-verification of documents such as Contracts and Bill of Lading is not legally sustainable and fails to challenge the impugned order.

8. Further, in the departmental grounds of appeal, it has been alleged that the adjudicating authority had failed to observe that the respondent had actually collected much higher value of ocean freight from shippers / exporters, in the invoices in comparison to the amount that was actually paid by the respondent to the shipping line and that the expenses incurred by the respondent on account of occupying space of ocean freight / air freight on behalf of the customers was in fact reimbursable expenses which the respondent should have collected on actual basis from the customers as 'reimbursement expenses' and should have charged service charges separately in its invoice on which service tax was payable. However, there is no allegation in the SCN that the respondent was liable to collect the charges from the customers / exporters only on actual basis. The assertion in the grounds of appeal that service being intangible cannot be sold or bought is also not invoked in the SCN. Paragraph 5.1 of the SCN is reproduced as follows:

> *"5.1. Whereas on scrutiny on (sic) the records of the assessee, it appears that they had charged their customers for various services like Air / Ocean freight, filing Import General Manifest, for arranging transport for picking cargo from factory / shipment site, Bill of Entry, loading, unloading, preparing / obtaining*

various documents viz. Bill of Lading, handling the cargo, customs clearances for import / export cargo etc. ***The assessee being a freight forwarder, had purchased and sold space in Airways as well as Shipping Lines*** *and received / paid Ocean Freight, Air freight, Air commission etc. from concerned agencies ."*

In the above premise that the assessee had purchased and sold space in Airways as well as Shipping Lines, the SCN states that all the consideration are to be included in the value of service for charging service tax, by treating the entire transaction as 'Business Support Service', instead of splitting the receipts into taxable and non-taxable services. The submission in the grounds of appeal that the respondent had disguised its *modus operandi* by submitting that it was engaged in purchase and sale of ocean / air freight to show it as trading in ocean / air freight is contrary to the above standpoint in paragraph 5.1 in the SCN.

9. In view of the above, the contention of the department at the appellate stage that the adjudicating authority had failed to carry out the verification as stipulated in paragraph 4 of the said Circular and that the respondent was an intermediary in terms of paragraph 2.1 of the said Circular and not a principal in terms of paragraph 2.2 of the said Circular are not supported by evidence and are in contrast to the contents of the SCN. Thus the appeal fails on merits and is accordingly rejected.

10. **रेवेन्यू द्वारा दर्ज किया गया अपील का निपटारा उपरोक्त तरीके से किया जाता हैं।**
The appeal filed by Revenue is disposed of in the above terms.

(उमा शंकर)
आयुक्त (अपील्स-१)

Date: 26 / 04 /2018

Attested

(K. P. Jacob)
Superintendent (Appeals-I)
Central Excise, Ahmedabad.

By R.P.A.D.
To
M/s Safe Sea Logistics Pvt. Ltd.,
403, Anushree Complex,
Near Bank of Baroda, Usmanpura,
Ahmedabad – 380 013.

Copy to:

1. The Chief Commissioner of C.G.S.T., Ahmedabad.
2. The Commissioner of C.G.S.T., Ahmedabad (North).
3. The Additional Commissioner, C.G.S.T (System), Ahmedabad (North).
4. The A.C / D.C., C.G.S.T Division: VII, Ahmedabad (North).
5. Guard File.
6. P.A.