# CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, WEST ZONAL BENCH : AHMEDABAD

REGIONAL BENCH - COURT NO. 3

**SERVICE TAX Appeal No. 13162 of 2013-DB**

[Arising out of Order-in-Original/Appeal No OIO-76/COMMR/2013 dated 08.07.2013 passed by Commissioner (Appeal) of Central Excise & ST, Rajkot]

**Surya Shipping** .... **Appellant**
Plot No. 246, Sector-07
Gandhidham, Kutch, Gujarat-370201.

*VERSUS*

**Commissioner of Central Excise & ST, Rajkot** .... **Respondent**
Central Excise Bhavan,
Race Course Ring Road Income Tax Office,
Rajkot, Gujarat-360001

**WITH**

**SERVICE TAX Appeal No. 10097 of 2016-DB**

[Arising out of Order-in-Appeal No OIA-KCH-EXCUS-000-APP-025-15-16 dated 30.10.2015 passed by Commissioner (Appeal) of Central Excise & ST, Rajkot]

**Surya Shipping** .... **Appellant**
Plot No. 246, Sector-07
Gandhidham, Kutch, Gujarat-370201.

*VERSUS*

**Commissioner of Central Excise & ST, Kutch** .... **Respondent**
Central Excise & Service Tax Commissionerate,
Centeral Excise Bhavan Plot No. 82, Sector 8,
Gandhidham(Kutch), Gujarat

**APPEARANCE :**

Shri J.C. Patel, Advocate for the Appellant
Shri T.K. Sikdar, Assistant Commissioner for the Respondent

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

**FINAL ORDER NO. A/12235-12236 / 2019**

DATE OF HEARING/ DECISION : 22.08.2019

**RAMESH NAIR :**

The factual background of the case are that the appellants are engaged in the activity of purchasing space on ocean going vessels from shipping companies and selling the same to various exporters for export of goods. In most cases, the appellants have on purchase of the space on ocean going vessels from shipping companies and sold the same to exporters at a profit. However, in some cases the appellant have also incurred loss. The shipping companies raise invoices on the appellants for freight and the appellants raise their invoices/ debit notes on the exporters for the freight charged by appellants to the exporters. The difference between freight charged by shipping companies to the appellants and that charged by the appellants to the exporters, represent the profit or loss, as the case may be, made by the appellants in respect of the said activity of buying and selling the space on ocean going vessels. The case of the department is that the profit or excess freight charged by the appellant to their customers, as compared to the freight charged by the shipping companies, the same is liable to service tax under the category of "Business Support Service" for which they are registered with service tax department. Accordingly, the demand of service tax was confirmed and the same was upheld by the Commissioner (Appeals). Therefore, the present appeal is filed by the appellants.

2. Shri J.C. Patel, Learned Counsel appearing on behalf of the appellant submits that the sale and purchase of space on ocean going vessels is activity of sale and purchase and no service is involved and therefore, on the activity of sale and purchase of space on ocean going vessels, service tax demand is not sustainable. He submits that this issue has been settled by various judgments delivered by various judicial fora. He placed reliance on the following judgments:-

(a) Chinubhai Kalidas & Bros. vs. CST, Ahmd. – 2018 (11) TMI 1024 –CESTAT AHMEDABAD

(b) CST, New Delhi vs. Karam Freight Movers – 2017 (4) GSTL 215 (Tri. Del.)

(c) Pawan Cargo FDorwards Pvt. Limited vs. Pr. Commissioner of Service Tax, Chennai – 2019-TIOL-152-CESTAT-MAD

(d) Islant Aviation India Pvt. Limited vs. CGST, Chennai - 2019-TIOL-2141-CESTAT-MAD

(e) Skylift Cargo Pvt. Limited vs. CST, Chennai – 2018 (2) TMI 320 – CESTAT CHENNAI

(f) CST, Chennai vs. AVR Cargo Agency Pvt. Limited - 2018-TIOL—097-CESTAT-MAD

(g) Phoenix Int. Freight Services Pvt. Limited vs. CST – 2016 (9) TMI 585 – CESTAT MUMBAI

(h) Greenwich Meridian Logistics (I) Pvt. Limited vs. CST, Mumbai – 2016 (43) STR 215 (Tri. Mumbai)

(i) CST, New Delhi vs. Continental Carriers - 2017-TIOL-3964-CESTAT-DEL

(j) Marinetrans India Pvt. Limited vs. CST, Hyderabad - 2019-TIOL-1260-CESTAT-HYD

(k) DHL Lemuir Logistics Pvt. Limited vs. CST, Bangalore – 2010 (17) STR 266 (Tri. Bang.)

He also submits that even as per the Board Circular B2/8/2004-TRU dated 10.09.2004 and Circular No. 80/10/2004-ST dated 17.09.2004 the issue has been clarified in favour of the assessee.

3. Shri T.K. Sikdar, Learned Assistant Commissioner (AR) appearing on behalf of the Revenue reiterates the findings of the impugned order.

4. We find that there is no dispute about the activity being carried out by the appellant i.e. they are engaged in purchase and sale of space on ocean going vessels. In the transaction of purchase and sale of space, they earn

some profit for the reason that in some cases, the sale price of the space to various exporters is more than the purchase price of the space paid to shipping companies. In our considered view, there is no service involved in such transaction as the purchase and sale of the space is an activity of sale and purchase and hence, not liable to service tax. This issue has been considered by various judgments time and again and this Tribunal held that since the activity of sale and purchase involves no service hence the profit earned on sale of space is not liable to service tax. In the case of *Chinubhai Kalidas & Bros vs. CST, Ahmedabad (supra)* this Tribunal held as under:-

> "**4.** We have gone through rival submissions. We find that the appellant have contended the brokerage and special commission/incentive is an income received in the activity of trading of freight space in various shipping lines. They have argued that the said issue is covered by the decision of Tribunal in the case of Continental Carriers 2017-TIOL-3964 CESTAT -DEL and also in the case of Karam Freight Movers 2017(4) G.S.T.L 215 (Tri.-Del.). In para 11 of decision in the case of Karam Freight Movers, following has been observed:
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> > *"11. On the second issue regarding the service tax liability of the respondent under BAS, we find that the impugned order examined the issue in detail. It was recorded that the income earned by the respondent to be considered as taxable under any service category, should be shown to be in lieu of provision of a particular service. Mere sale and purchase of cargo space and earning profit in the process is not a taxable activity under Finance Act, 1994. We are in agreement with the findings recorded by the origi8nal authority. In this connection, we refer to the decision of the tribunal in Greenwich Meridian Logistics (I) Pvt. Ltd. v. CST, Mumbai-2016 (43) S.T.R. 215 (tri.-Mumbai). The tribunal examined similar set of fact and held that the appellants often even in the absence of shippers, contract for space or slots in vessels in anticipation of demand and as a procured 4 ST/471/2009-DB from shipping lines. The surplus earned by the respondent arising out of purchase and sale of purchase and sale of space and not by acting for client who has space or not on a vessel. It cannot be considered that the respondents are engaged in promoting or marketing the services of any "client."*
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> Following the ratio of aforesaid decision, we do not find any merit in the impugned order as far as it relates to demand of Service Tax on brokerage and Commission income received from the shipping lines in so far as it relates to the sale and purchase of freight space. 4.1 It is noticed that Commissioner (A) in his order, in respect of Air Commission has set aside the penalty by observing as follows:
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> > *"11. However, in case of income from Air Commission, I find that there was an element of doubt, as evidenced by the litigation and subsequent clarification of DGST, issued only after the Hon'ble Bombay High Court intervened in the matter and directed the Director General vide order dated 27.02.2008, restored the writ petition filed in the subject matter*

*and recalled the order under which the directions were issued to the DGST, Mumbai because the DGST, Mumbai has inherent jurisdiction to entertain an appeal against the order of lower authorities and pass appropriate orders.. I feel that there thus exists a reasonable cause for the request of the appellants for no penalty under section 76 and 78 of the Finance Act, 1944 in respect if service tax demand against the air commission. In my view, when the appellant's activity of making arrangements for transportation of cargo by air was not clarified and was under dispute, the failure on their part is justified and I am inclined to waive the penalties imposed in respect of service tax demand against the air commission under section 76 and 78 of the Finance Act, 1994 under section 80 of the Finance Act, 1994."*

Having held that there was a reasonable cause for non-payment of duty, we find it just to set aside the invocation of extended period of limitation also in the instant case.

**5.** Consequently demand is set aside and the appeal is allowed."

The issue was decided by this Tribunal in the case of *CST, New Delhi vs. Karam Freight Movers (supra)* wherein the following order has been passed:-

**"11.** On the second issue regarding the service tax liability of the respondent under BAS, we find that the impugned order examined the issue in detail. It was recorded that the income earned by the respondent to be considered as taxable under any service category, should be shown to be in lieu of provision of a particular service. Mere sale and purchase of cargo space and earning profit in the process is not a taxable activity under Finance Act, 1994. We are in agreement with the findings recorded by the original authority. In this connection, we refer to the decision of the Tribunal in *Greenwich Meridian Logistics (I) Pvt. Ltd.* v. *CST, Mumbai* - 2016 (43) S.T.R. 2l5 (Tri.- Mumbai). The Tribunal examined similar set of fact and held that the appellants often, even in the absence of shippers, contract for space or slots in vessels in anticipation of demand and as a distinct business activity. It is a transaction between principal to principal and the freight charges or consideration for space procured from shipping lines. The surplus earned by the respondent arising out of purchase and sale of space and not by acting for client who has space or not on a vessel. It cannot be considered that the respondents are engaged in promoting or marketing the services of any "client".

**12.** In the present case it was recorded that the respondent was already paying service tax on commission received from airlines/shipping lines under business auxiliary service since 10-9-2004. The original authority recorded that the show cause notice did not specify as to who is the client to whom the respondent is providing service. Original authority considered both the scenario, airline/shipping lines as a client or exporter/shipper as a client. In case the respondent is acting on behalf of airlines/shipping lines as client, it was held that they are covered by tax liability under BAS. Further, examining the issue the original authority viewed that commission amount is necessarily to be obtained out of transaction which is to be provided by the respondent on behalf of the client, that is, the exporters. The facts of the case indicated that the mark-up value collected by the respondent from the exporter is an element of profit in the transaction. The respondent when acting as agent on behalf of airlines/shipping lines was discharging service tax wef 10-9-2004. However, with reference to amount collected from exporters/shippers the original authority clearly recorded that it is not the case that this amount is a commission earned by the respondent while acting on behalf of the exporter and said mark-up value is of freight charges and are not to be considered as commission. Based on these findings the demand was dropped. We do not find any impropriety in the said finding. The grounds of appeal did not bring any contrary evidence to change such findings. Accordingly, we find no merit in the appeal by Revenue. The appeal is dismissed.**"**

In the case of *Pawan Cargo Forwarders Pvt. Limited vs. Pr. Commissioner of Service Tax, Chennai (supra)* dealing with identical issue following order has been passed:-

> **"5.** We find that the very issue had been addressed in the decisions of this Tribunal in the case of Skylift Cargo (P) Ltd. Vs CST Chennai (supra) and La Freight Pvt. Ltd. Vs CST Chennai (supra) relied upon by Ld. Advocate holding that mere sale and purchase of cargo space and earning profit in the process is not a taxable activity. The relevant portion of the decision in Skylift Cargo (P) Ltd. is reproduced for ready reference as under:-
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> > *"2. The facts of the case are that assessee M/s. Skylift Cargo (P) Ltd., [hereinafter referred to as assessees] are engaged in providing Cargo Handling Service, Clearing & Forwarding Service, Customs House Agent Service. They are also involved in the activities of booking domestic and international air cargo for various airlines for rendering the said bookings. Department took the view that the assessee were paying service tax under Business Auxiliary Service only on the commission amount without considering the incentive amount. Accordingly, proceedings were initiated against the assessee by way of issue of show-cause notices. These proceedings culminated in confirmation of demands of differential service tax liability of Rs.19,98,332/- and Rs.93,11,332/- respectively with interest liability thereon. Penalties, which were upheld by the impugned orders in respect of appeal nos.ST/00026/2008 and ST/20005/2009. Aggrieved, assessees are before this forum."*
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> We find that the facts of this case are pari materia with those in Skylift Cargo (P) Ltd. (supra) and La Freight Pvt. Ltd. Vs. CST Chennai (supra) relied upon by Ld. Advocate wherein the issue was held in favour of the assessee. We also find that the same view has been taken by this Tribunal earlier also in the case of Tax Global India Ltd. Vs CST Chennai [Final Order No.42113/2017 dt. 18.09.2017 in Appeal No.ST/150/2008]. We do not find any ground to take a different view. Hence following the ratio already laid down, we set aside the impugned order and allow the appeals with consequential benefits if any, as per law.**"**

5. In view of the above judgments and various other judgments cited by the Learned Counsel as above, the issue is no longer *res-integra* and in all the judgments it has been categorically held that any amount charged for

space on ocean going vessels, over and above the purchase price is not liable to service tax. Accordingly, the impugned order is set-aside, appeals are allowed.

*(Operative part of the order pronounced in the court)*

**(Ramesh Nair)**
**Member (Judicial)**

**(Raju)**
**Member (Technical)**

**KL**