

FAX : 0532-2400149

REGISTERED / AD

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
38, MG Marg Civil Lines, Old Red Building, Allahabad-211001
Regional Branch, Allahabad

Dated: 27/12/2017

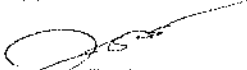
To

Appellant as per address in table below

Respondent as per address in table below

Final Order No. ST/A/71930/2017-CU/DBI dated 07/12/2017

I am directed to transmit herewith a certified copy of order passed by the Tribunal under section 01(5) of the Finance Act, 1994 relating to Service Tax Act, 1994.


Asstt. Registrar

Application	Appeal	Name and Address of Appellant
1	ST/70053/2017	Kanpur Cargo Movers 57, Raina Park Complex, P.b. Road, Nawabganj, KANPUR UTTAR PRADESH
		Name and Address of Respondent
2		C.C.E. & S.T.-Kanpur 117/7...SARVODYA NAGAR, KANPUR, UTTAR PRADESH-208005

Copy To

3 Advocate(s) / Consultant(s):

Anurag Mishra
117/10 SK APARTMENT
SARVODAYA NAGAR,
KANPUR,
UTTAR PRADESH

4 Bar Association, CESTAT, Allahabad

5 Director Publications, Customs, Excise. I.P. Estate, Delhi

6 M/s Centax Publications Pvt. Ltd., 1512-B, Bhishm Pitamah Marg, Opp ICICI Bank of Defence Colony New Delhi-3

7 Company Law Institute of India Pvt. Ltd., No.2 (old no.36), Vaithyaram Street, T. Nagar, Chennai-17

8 Taxmann Allied Service Pvt. Ltd., 59/32, New Rohtak Road, New Delhi-110005

9 LAWCRUX Advisors Pvt. Ltd., LAW House, 1-8, Sector-10, Faridabad 121003 (Haryana)

10 TaxIndiaOnline.com Pvt. Ltd., 2nd Floor, Vasant Arcade, Vasant Kunj, New Delhi - 110070

11 Mark Professional Services Pvt. Ltd., 108, Everest Block, Aditya Enclave, Hyderabad - 38

12 The ICFAI society, 52, Nagarjuna Hill, Punjagutta Hyderabad.-500082

13 M/S Knowledge Processing Pvt. Ltd.(taxmanagementindia.com), FF-19, 1st Floor, Cross River Mall, CBD Ground, Near Karkardooma Court, Delhi-110032

14 C.D.R. 15 Office Copy 16 Second Folder Copy 17 Guard File


Asstt. Registrar

**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL
REGIONAL BENCH : ALLAHABAD
COURT No. I**

APPEAL No. ST/70053/2017-CU[DB]

(Arising out of Order-in-Original No. KNP-EXCUS-000-COM-53-16-17 dated 25/10/2016 passed by Commissioner of Customs, Central Excise & Service Tax, Kanpur)

M/s Kanpur Cargo Movers

Appellant

Vs.

Commissioner of Central Excise & Service Tax, Kanpur

Respondent

Appearance:

Shri Anurag Mishra (Advocate)

for Appellant

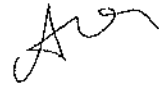
Shri Rajeev Ranjan (Joint Commr.) AR

for Respondent

CORAM:

Hon'ble Mr. Anil Choudhary, Member (Judicial)

Hon'ble Mr. Anil G. Shakkarwar, Member (Technical)

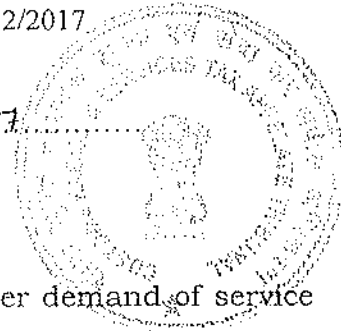


Date of Hearing : 07/12/2017

Date of Decision : 07/12/2017

FINAL ORDER NO. ~~71930/2017~~

Per: Anil Choudhary



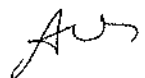
The issue in this appeal are whether demand of service tax amounting to Rs.10,22,575/- have been rightly made on the brokerage earned for providing taxable services under the head 'Business Auxiliary Service' for the period October, 2009 to June, 2012 and further July, 2012 to March, 2014. The other issue is whether penalties have been rightly imposed under Section 78(1) 70(1), 71(1(d) and 77(2) of the Finance Act, 1994 and further issue is whether show cause notice

have been rightly issued as regards the demand of Rs.1,14,15,678/- which amount had been admittedly deposited by the appellant along with interest prior to the issue of show cause notice.

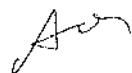
2. The brief facts as per the show cause notice dated 24/04/2015 are that the appellant is engaged in providing services in relation to Cargo Handling Services and are registered with the Department since the year 2004. With regard to some TDS information deducted for the year 2012-13 letter dated 13th September, 2014 was issued by the Assistant Commissioner, Preventive asking appellant to provide details on account of taxable services rendered by them, viz a viz details of tax paid relevant to the Financial Years 2009-10 to 2013-14. In response appellant by their letters furnished duplicate copy of their ST-2 certificate dated 25th October, 2014 and copies of the balance sheets for the years 2009-10 to 2013-14. But no details with respect to discharging of service tax liability by the appellant were furnished. Thereafter summons were issued with direction to produce copies of ST-3 returns filed by them for the Financial Years 2009-10 to 2013-14. In response Shri Manoj Chaturvedi proprietor appeared on 15th October, 2014 and informed that they have fully discharged the service tax liability of Rs.41 lakhs (approx) and furnished copies of GAR challan's dated 26th September, 2014, 27 September, 2014, copies of form 26AS (under IT Rules) of the firm for the years



2009-10 to 2013-14 and also computation of service tax amount. Upon further requisition the appellant filed Ledger accounts extracts, copies of bills issued, copies of ST-3 returns filed, description of services provided, details of Cenvat credit utilised for discharging their service tax liability for the period under consideration, description of the period for which payment of service tax amounting to Rs.41 lakhs related to, etc. The appellant further informed by the letter dated 20th October, 2014 and 11th November, 2014 that they have paid interest of Rs.5 lakhs vide the GAR challan's, Rs.12,05,000/- by challan dated 28th October, 2014 and Rs.2,33,000/- vide challan dated 8th November, 2014 enclosing copies thereof. Appellant also informed that their work/service pertains to filing/processing of documentation of various parties relating to the imports and exports at ICD Kanpur. That in addition they arranged containers/trucks for movement of Cargo of the parties to and from their destination, that the concerned employee of the firm who was responsible for maintenance of their books of accounts including work related to service tax, reported loss of the file and for which they had filed an FIR dated 27th January, 2014 at the jurisdictional police station. That the bank accounts of the firm reflect regular withdrawals of amount for payment of service tax, that the corresponding entries in the books of accounts of the firm, evidence payment of service tax. That only after 07 - 08 months they could know that the concerned

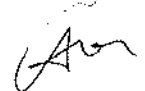


employee of the firm did not deposit service tax and also have not filed the returns and have forged the books of account/records. Only in January, 2014, when they could know about the mischief they started payment of service tax through cheques. Further, they have availed Cenvat credit while discharging service tax liabilities and also paid interest for the delay in discharging of the service tax liability and also enclosed the details of payment of tax and interest. In further response to summons etc. the proprietor – Manoj Chaturvedi, reiterated the facts already informed by them earlier and also informed that during the Financial Year 2013-14, they paid service tax through cheques in the month of January, 2014, February, 2015 and March, 2015, and thus they have deposited service tax to the tune of Rs.41 lakhs (against, the service tax liability of Rs.40,39,195/- along with amount of Rs.19,38,000/- on interest account). It is further stated that they have filed ST-3 Returns relevant to the period on 22nd October, 2014. A summary of all the invoices/bills issued by them during the period April, 2009 to March, 2014 was also enclosed. He also stated that they received services of Shipping Lines and Forwarder Companies to provide services to the customers and copies of the bills/invoices issued by the Shipping Lines and Forwarder Companies to them, on the basis of which they have taken Cenvat credit, Ledger accounts in respect of Shipping Lines and Forwarder Companies for the period under consideration was also



furnished. Further, Mr. Chaturvedi stated that in relation to providing services of export, the Shipping Lines and Forwarder Companies issue bills to their firm for charging Ocean Freight, Terminal Handling Charges and Bill of Lading Charges, etc. Subsequently they issued their bills to the customers for recovery of all the charges by the Shipping Lines and Forwarder Companies as well as agency charges of their firm. In the case of import of goods, they issued bills to the customers charging their agency charges and CONCOR/transport charges. Their employee, namely, Shri Farhad Hussain, who was authorized by the firm in the matters related to service tax have forged the records relating to cash payment of service tax and also did not file the ST-3 returns during the period October, 2009 to March, 2014. They had been discharging the service tax liability since the month of December, 2013 through cheques. Accordingly, they paid service tax by Challans amounting to Rs.41 lakhs along with further amount of Rs.19,30,000/- towards interest liability, for delayed payment.

3. It is further alleged in the show cause notice that from perusal of profit and loss account and balance sheet for the period under consideration the amount short paid under the head job work account/credit and job work account (Credit/TDS) is total value inclusive of service tax of all the bills issued by them, the amount shown under the head job work account – debit is total value inclusive of service tax of



all the bills issued by Shipping Lines/Forwarder Companies to the party. The amount shown under that brokerage in the profit and loss account is a share of profit of the Shipping Lines/Forwarder Companies from ocean freight. They do not maintain any Ledger account with respect to brokerage amount. TDS was deducted by Shipping Lines/Forwarder Companies under Section 194-I of the Income Tax Act on the payments made to them in the form of brokerage. Such payment and TDS is also reflected in form 26AS as brokerage, as alleged, in the balance sheets.

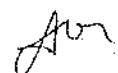
4. Further some brokerage received by them from Shipping Lines/Forwarder Companies, Mr. Chaturvedi stated that the Shipping Lines Companies like M/s APL India Private Ltd., M/s Mediterranean Shipping Company, etc. in lieu of payment of ocean freight made by the appellant on behalf of their clients, granted a share from such ocean freight to the appellant, but in lieu of receiving a share of profit from Forwarder Companies in the form of brokerage, they do not provide any service. Payment of ocean freight is made by the exporter directly to these Forwarder Companies. Year wise breakup of such brokerage received was furnished. Accordingly, the show cause proposed to demand the,

- I. Service tax admitted and paid,
- II. Service tax on the ocean freight,
- III. Service tax on the brokerage earned from the Shipping Lines/freight forwarders.



5. The SCN was adjudicated on contest vide the impugned Order-in-Original dated 25/10/2016 wherein the demand of Rs.1,14,15,678/- was confirmed under the head providing of cargo handling service for the period October, 2009 to June, 2012 and further from July, 2012 to March, 2014. Cenvat credit availed Rs.75,25,999/- was allowed and further the amount already deposited/paid Rs.1,17,11,011/- was ordered to be appropriated. Further tax of Rs.10,22,575/- was confirmed after allowing cum tax benefit on the brokerage earned from the Shipping Lines/Freight Forwarder. However, the proposed amount of Rs.39,37,638/- relating to ocean freight was dropped. Further interest was demanded and the same stood appropriated from the amount of Rs.19,38,000/- already deposited. Further the interest Rs.2,965/- was confirmed on account of interest payable for the period between the date of utilizing the Cenvat credit prior to payment of service tax and date of actual payment of service tax. Further penalty of Rs.1,20,84,597/- was imposed under Section 78(1), Rs.5,000/- under Section 70(1), Rs.5,000/- under Section 77(1(b) Rs.5,000/- under Section 77(1(d) and Rs.5,000/- under Section 77(2) of the Finance Act, 1994.

6. Being aggrieved the appellant is before this Tribunal. As regards brokerage, the Learned Counsel states that the issue is no longer res Integra and the same is decided in favour of the assessee by Coordinate Bench of this Tribunal in M/s Greenwich Meridian Logistics India Pvt. Ltd. versus CST 2016



(43) S.T.R. 215 (Tri.-Mumbai) wherein it was observed that each source of income must be looked at independently. Service provider is not necessarily specialist in rendering one service. Earnings of service entity may accrue from one or more services, some of which may be taxable. The Finance Act does not envisage determination of taxability from accounting entries, manner or mode of booking profit in accounts of commercial organization has no bearing on application of Section 65(105) of the Finance Act, to the taxable activity. Nomenclature in accounts is not material to classification of service event, taxable entry specifies legislative intent. The description of taxable service in the Act as well as in any of the terms therein are primary determinant for taxation of any service. Under similar facts and circumstances, wherein the course of audit it was seen that the assessee had ocean freight surplus and it was explained that these profits are arising from purchase and sale of space or slots for ocean transport of container and the same was proposed to be taxed under BAS, this Tribunal held, the notional surplus earned thereby arises from purchase and sale of space and not by acting for a client who has space or slot on a vessel. Section 65(19) of the Finance Act will not address these independent principal-to-principal transactions of the assessee and with the space so purchased being allocable only by the appellant, the Shipping Line fails in description as client whose services are promoted or



marketed. We find that the facts herein are squarely covered in the favour of the assessee being similar to in the case of M/s Greenwich Meridian Logistics India Pvt. Ltd. (Supra) also. Accordingly we set aside the demand of Rs.10,22,575/- on account of brokerage. So far the other demand of Rs.1,14,15,678/- confirmed by the impugned order, we find that this amount was admittedly paid & declared in ST-3 Returns, prior to issue of the show cause notice. Accordingly we hold that the show cause notice as regard this amount is bad and not sustainable. Further in the facts and circumstances we find that the appellant - assessee have taken adequate measures for meeting the service tax liability, being the facts on record that there was defalcation of the amounts by its staff, drawn towards payment of service tax is not disputed and further appellant have on discovering the defalcation by its employee, deposited the tax forthwith with interest. Under these facts and circumstances we hold that the penalty under Section 78(1) is not tenable and we set aside the same. The other penalties, however, are not interfered with. Thus the appeal is allowed as indicated herein.

(Dictated & Pronounced in Court)

-Sd/-

(ANIL G. SHAKKARWAR)
Member (TECHNICAL)

-Sd/-

(ANIL CHOUDHARY)
Member(JUDICIAL)

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महामुद्रा मुद्रा/Certified True Copy

सहायक प्रजीविज्ञ (Asst. Biologist)
सीमावर्ती, जल-संसाधन एवं वन विभाग
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