CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH
BANGALORE

Appeal(s) Involved:

ST/668, 676/2008-DB

[Arising out of OIA No.142-143/2008-ST dated 06/08/2008
passed by CCE,C&ST(Appeals), Cochin]

CHAKIAT AGENCIES,
SUBRAMANIAN ROAD, WILLINGDON ISLAND,
COCHIN

Appellant(s)

Versus

C.C.,C.E.& S.T-COCHIN-CCE
C R BUILDING,
I S PRESS ROAD, ERNAKULAM,
COCHIN,
KERALA
682018

Respondent(s)

Appearance:

Shri Kuriyan Thomas, Advocate
MENON & PAI
P.B. NO.1911
IS PRESS ROAD,
COCHIN
KERALA
682018

For the Appellant

Shri Madhupsharan, Asst. Commissioner(AR)

For the Respondent

Date of Hearing: 17/07/2018
Date of Decision:___________

CORAM:

HON'BLE MR. S.S GARG, JUDICIAL MEMBER
HON'BLE MR. P. ANJANI KUMAR, TECHNICAL MEMBER

Final Order No. ____________ / 2018

Per : S.S GARG

The appellants have filed these two appeals against the common impugned order dt. 06-08-2008 / 16-08-2008 passed by the Commissioner(Appeals) whereby the Commissioner(Appeals) has upheld the Orders-in-Original and dismissed the appeals. Since the issue involved in both the appeals is identical and there is a common impugned order, both the appeals are being disposed of by this common order.

2. Briefly the facts of the present case are that the appellant is providing taxable services viz. 'Steamer Agent, Storage and Warehousing and Cargo Handling Services' and had obtained Service Tax registration for these services. As it appeared from the records that the appellant had received an amount of Rs.14,633/- as brokerage in connection with the promotion of business of other establishment during the period from April 2004 to December 2005. Since the appellant had paid no service tax on the amount received, a show-cause notice was issued to the appellant demanding service tax and education cess on the amount alleging that the activities undertaken for the promotion of the business of others would fall under the category of 'Business Auxiliary Service' which is a taxable service w.e.f. 01/07/2003. The original authority adjudicated the case vide Order-in-Original confirming the demand and imposing penalty by holding that the services undertaken by the appellant attracts service tax under 'Business Auxiliary Service' and wilfully suppressed the facts with an intent to evade payment of tax. Aggrieved by the Orders-in-Original, appellant filed two appeals before the Commissioner(Appeals) and the Commissioner(Appeals) vide the impugned order dismissed the same. Hence the present appeals.

3. Heard both sides and perused records.

4. Learned counsel for the appellant submitted that the impugned order is not sustainable in law as the same has been passed without properly appreciating the facts and the law. He further submitted that the appellant is admittedly engaged in providing taxable services under the category of Customs House Agent service and during the course of his work, the appellant sometimes had to identify vessels for carrying cargo belonging to shippers to various destinations. The vessel suitable to the shipper is identified based on the requirements of the shipper; but the appellant never acts, at any point of time, as an agent of any particular steamer line or steamer agent. The brokerage that the appellant earns from the steamer line / steamer agent, for having opted to put the goods, entrusted by the shipper on the vessel owned by the said steamer line. A small part of the brokerage is earmarked for being passed on to the shipper, as a business incentive. He further submitted that the remuneration that the appellant is getting is merely a business incentive which is common in the trade in which the appellant is engaged in. he further submitted that the show-cause notice seeks to impose service tax twice under two different categories, in respect of one and the very same service. It is his further submission that any transaction of service can be taxed only once even if it appears to be fall under two or more categories. He further submitted that the appellant deals with the steamer lines on a principal-to-principal basis, by identifying the vessel suitable to the shipper, based on the requirements of the shipper. In support of his submissions,

appellant relied upon the following decisions:-

> CST, Chennai Vs. AVR Cargo Agency Pvt. Ltd. [2018-TIOL-2097-CESTAT-MAD]
> CST, New Delhi Vs. Karam Freight Movers [2017(4) GSTL 215 (Tri. Del.)]

5. On the other hand, the learned AR defended the impugned order and submitted that the services rendered by the appellant fall under the definition of BAS and therefore the appellant is liable to pay service tax on the commission / remuneration received by them.

6. On careful consideration of the submissions of both the parties and perusal of the material on record and the decisions cited supra, we find that the services rendered by the appellant do not fall in the definition of BAS as it existed during the relevant time. We also find that the appellant is only getting an incentive for booking the space in the ship as per the requirements of the shipper and he is getting only brokerage from the steamer line or steamer agent which is nothing but a business incentive / commission. Further we find that this issue has been considered by the Tribunal in the case of AVR Cargo Agency Pvt. Ltd. (supra) wherein the Tribunal after considering the earlier judgments passed by the Tribunal on the same issue has held in para 5 and 6 as under:-

> 5. The issue whether the respondent is liable to pay service tax for the activity of booking space and selling the same to the client for air cargo goods has been decided by the Tribunal in the decisions cited by the Id. Counsel for the respondent. The Tribunal has held the issue in favour of the respondent. The relevant portion of the decision in the case of M/s. Continental Carriers (supra) is reproduced as under:-
>
> > *"5. We have heard both sides and perused the material available on record. We note that the tax liability on similar activities under the category of 'Business Auxiliary Service' has already come up for consideration before the Tribunal in the above mentioned cases and the Tribunal in the case of*

DHL Logistics (P) Ltd. (supra) has observed that:

"4.2. Demand has been made on service tax under the head of Business Auxiliary Service for the revenue earned as freight rebate. Ld. Counsel has argued that the income is generated as a result of appellants buying cargo space in bulk and selling the same to foreign shipper, he argued that various essential activity in which there is no third party involved except the appellant and the carriers. In these circumstances demand under Business Auxiliary Service cannot be sustain. It is argued that for sustaining demand under BAS, there has to be third party involved in the transaction namely a client. In the absence of any client, no demand under BAS can be raised. We find substantial force in the argument of Ld. Counsel, the freight rebate is a revenue stream generated out of trading of the space in the airline incentives. Unless the space is booked by the appellant specifically for a client the components of the Business Auxiliary Service do not come into play. In the instant case, there is no such allegation and the appellants are booking the space for their own trading activities. In these circumstances demand of service tax under BAS cannot be sustained and the same is set aside.

4.3. The next issue is relates to the income under the head of airline commission and airline incentive sought to be text under BAS. It is seen that the said income is generated during the course of booking of bulk cargo by the appellant with the airline. The appellant have received the incentive and commission from the airline. The appellants are engaged in buying and selling of space in the airline and depending on the volume of the space bought by the appellant from the airlines they received the commission/incentive. The appellants are not buying and selling space on the airline on behalf of their client but on their own behalf. To consider the activity of buying and selling the taxable activity under the head of BAS, the same should be done on behalf of the client. Thus, if the appellants were selling the space on carrier from the airline directly to the exporters without themselves purchasing the space then it could have been considered as an activity involving promotion of sales. In the instant case the appellant are directly buying themselves and thereafter selling the same to the exporters. In this activity they are receiving incentive and commission based on the total space purchase by them from the airline. This activities can be no stretch of imagination by considered as BAS as for any service to statute the BAS at least three parties should be involved in the transaction namely the service provider, service recipient and the client. In the instant case there are only two parties in the transaction, the seller of space and the buyer of space. Any commission/incentive received, as a result of this transaction of sale cannot be considered as supply of BAS. In view of above, the demand under the head of BAS for the Revenue generated as airline/airline incentive is set aside."

6. Similar ratio has also been followed in the case of Karam Freight Movers (supra). The observations of the Tribunal are as below:

"11. On the second issue regarding the service tax liability of the respondent under BA5, 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 safe 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 Logistic (I) Pvt. Ltd. vs. CST, Mumbal - 2016 (43) STR 215 (Tri-Mumbai) = ***2016-TIOL-869-CESTAT-MUM.*** *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"."*
>
> *7. As the issue has already been decided in favour of the assessee-Respondents in the above mentioned orders of the Tribunal, we find no merit in the present appeal filed by the Revenue and the same is dismissed."*
>
> 6. Following the above decision, we find that there is no merit in the appeal filed by the department. The same is dismissed dismissed.

7. The ratio of the above said decisions is squarely applicable in the present case and therefore by following the same, we are of the view that the impugned order is not sustainable in law and therefore we set aside the impugned order and allow the appeals with consequential reliefs, if any.

(Order was pronounced
in Open Court on **..................**)

P. ANJANI KUMAR	**S.S GARG**
TECHNICAL MEMBER	**JUDICIAL MEMBER**

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