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

Appeal(s) Involved:

ST/468/2009-DB

[Arising out of Order-in-Appeal No. 28/09 dated 27/02/2009 passed by Commissioner of Central Excise, Customs & Service Tax, Cochin]

M/s Agility Logistics Pvt Ltd
Door No.24/156, Willingdon Islnd Cochin
682003

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:

Mr. Prasad Pranjape, Advocate
PDS LEGAL
3/24, 2nd Floor, MITTAL CHAMBERS, 1st FLOOR NARIMAN POINT
MUMBAI
MH
400021

For the Appellant

Mrs. D.S. Sangeetha, Joint Commissioner (AR)

For the Respondent

Date of Hearing: 31/10/2019
Date of Decision: 14/11/2019

CORAM:

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

Final Order No. 21003 /2019

Per : S.S GARG

The present appeal is directed against the impugned order dated 20.02.2009 passed by the Commissioner (Appeals) whereby the Commissioner (Appeals) has rejected the appeal of the appellant.

2. Briefly the facts of the present case are that the appellant is engaged in providing services in the nature of clearing and forwarding, business auxiliary and logistics management pertaining to import and export of cargo and is registered with the Service Tax Department for the same. As a part of 'Logistics Management Service', the appellant provides services to its customers desiring to import or export its goods. The customer enquires with the appellant for the services along with freight charges that will be charged by the appellant to provide the cargo handling services to the customer. The appellant, thereafter, scouts for a shipping line which will offer a competitive rate and thereafter, the appellant chooses the shipping line that offers most competitive rate on the given date for the given cargo. The Revenue entertained the view that the services rendered by the appellant is 'Steamer Agent Services' and issued a SCN, besides these, the appellant was also issued SCN for the commissions received from airline for placing cargo with 'Business Auxiliary Services'. The SCN issued to the appellant was confirmed by the Original Authority and upheld by the Commissioner (A).

3. Heard both the parties and perused the records of the case.

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 definitions of Steamer Agent and Business Auxiliary Service. He further submitted that the appellant does not fall under the category of steamer agent because in order to fall under the category of steamer agent, the services rendered by the appellant have to fall under any three categories mentioned in the definition of 'Steamer Agent'. He further submitted that the appellant does not fall in any of the three categories mentioned in the

definition of 'Steamer Agent' and the Revenue has not mentioned in the SCN under which sub-category, the appellant falls. Therefore he submits that the SCN is also vague and does not spell out the charge against the appellant. He further submitted that the appellant does not book, advertise or canvas for cargo on any shipping line rather a customer desires of exporting or importing goods enquires with the appellant, the freight rate which the customer will be charged in order to export to a country or import from a country and the appellant enquires from various shipping lines, the rate that they will charged in order to export or import and thereafter, the appellant places an order for export and import of the customer's cargo with that of a shipping line which gives the most competitive rate at that point of time. He further submitted that the appellant in the present case is acting on a principle to principle basis vis-à-vis their customers who intend to import or export their cargo. Further, the appellant has not been appointed by any shipping line to act for or on their behalf, to book, advertise or canvas for cargo or provide container feeder services. Further, the appellant is not engaged in providing shipping husbandry services or administrative services for upkeep or renting of the ship. He further submitted that neither in the SCN is there any evidence nor the impugned order gives any findings supporting that the appellant has provided services as steamer agent, rather the impugned order, in fact, admits that the appellant has not provided any steamer agent service but confirms the demand on the ground that the appellant are carrying out ancillary activities that of a steamer agent. He further submitted that it is a settled law that the onus of proving the taxability is on the Department and in the absence of any actual evidence, the SCN cannot survive. For this submission, he relied upon the following decisions:

(i) UOI Vs Ahmedabad Electricity Co. Ltd., 2003 (158) ELT 3 (SC).

(ii) Phoenix Mills Ltd. Vs UOI, 2004 (168) ELT 310 (Bom.).

4.1. He also submitted that in any case, the Service Tax on the freight element (including margin on the same) cannot be sustained under the steamer agent category being in the nature of pure reimbursement or trading in service. He also submitted that the appellant filed an affidavit clearly stating that he does not provide any of the service mentioned in the definition of 'Steamer Agent Service' and therefore cannot be held liable to pay Service Tax on steamer agent and the said affidavit has not been considered by both the authorities and its contents have not been controverted by the Department. Therefore, the demand under steamer agent category is not tenable in law. Further, with respect to 'Business Auxiliary Service', the Learned Counsel submitted that though the appellant does not accept that they are liable to pay Service Tax under 'Business Auxiliary Service' category but since they have paid the Service Tax along with interest as stated at page 128 of the Appeal paper book, therefore they are not pressing this demand. He also submitted that during the relevant time, there was confusion about the taxability of commission received from airlines and now that they have made payment of tax along with interest, the penalty imposed may kindly be set aside. Learned Counsel also submitted that substantial demand is time barred because the issue involved in the present case relates to interpretation of taxability and there is no deliberate and positive evidence of wilful mis-statement or suppression of fact on the part of the appellant to invoke the extended period.

5. On the other hand, Learned AR defended the impugned order and submitted that the appellant is acting on behalf of the shipping line and therefore whatever commission is got from the airline, they are liable to pay Service Tax on that. In support of her submission, she relied upon the decision in the case of *Bhuvaneswari Agencies (P) Ltd. Vs CCE, Blore, 2007 (8) STR 167 (Tri. Bang.).*

6. After considering the submissions of both the parties and perusal of the material on record, we find that the issue to be decided in the present case is whether the appellant is liable to pay the Service Tax under the category of 'Steamer Agent Service'. In order to discuss this, it is a pertinent

to examine the definition of 'Steamer Agent' which is defined vide Section 65(100) and is reproduced herein below:

"steamer agent means" any person who undertakes, either directly or indirectly-
(i) To perform any service in connection with the ship's husbandry or dispatch including the rendering of administrative work related there to; or
(ii) To book, advertise or canvas for cargo for or on behalf of a shipping line; or
(iii) To provide container feeder services for or on behalf of a shipping line."

6.1. In order to attract Service Tax as steamer agent, one needs to perform any service in connection with shipping husbandry or dispatch including rendering of administrative work related thereto or book, advertise or canvas for cargo on behalf of shipping line or to provide container feeder service for an on behalf of shipping line. The case of the Revenue as made out in the SCN is that the appellant is acting as an agent of the shipping line and therefore, liable to pay Service Tax under that category whereas the appellant has filed an affidavit clearly stating that they do not perform any act which falls in the definition of 'Steamer Agent' as stated supra. Further, we find that Revenue has failed to bring any evidence on record while issuing the SCN and while passing the impugned order which justifies the categorization of appellant in the definition of 'Steamer Agent'. Further, the impugned order is contradictory because Learned Commissioner (A) in the impugned order has, in fact, admitted that the appellant has not provided any 'Steamer Agent Service' but still confirms the demand on the ground that the appellants are carrying out ancillary activity, that of a steamer agent. .We note in that view of the judgment of Phoenix *Mills Ltd.* and the Hon'ble Apex Court in the case of *UOI Vs Ahmedabad Electricity* (supra) that onus of proving the taxability is on the Department which in the present case, the Department has failed to establish the same. Further, we find that with regard to the same nature of service, the Department has classified under two different services, namely, 'Steamer Agent Service' and 'Business Auxiliary Service' which is also not tenable in law. Further, we find that the Department is seeking to demand Service Tax on the freight element also which is not tenable in law. As far as 'Business Auxiliary Service' is concerned, Learned Counsel has stated that they have paid the Service Tax along with interest therefore they did not press the demand under this Head. Since there was confusion about the taxability of commission received from airline during the relevant time and therefore there cannot be any mala fide intention to pay the Service Tax and therefore, the penalty imposed under 'Business Auxiliary Service' is set aside as they have paid the tax along with interest.

7. In view of our discussion above, we are of the considered view that demand of Service Tax under 'Steamer Agent Service' is not sustainable in law and therefore we set aside the same. Finally, Service Tax demand of 'Steamer Agent Service' is set aside and Service Tax demand of 'Business Auxiliary Service' is upheld. The appeal is partly allowed.

(Order was pronounced
in Open Court on **14/11/2019.)**

S.S GARG
JUDICIAL MEMBER

P. ANJANI KUMAR
TECHNICAL MEMBER

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