CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
BANGALORE

REGIONAL BENCH - COURT NO. 1

Appeals Involved:

Service Tax Appeal No. 263 of 2008

(Arising out of Order-in-Original No. 12/2008 dated 05/05/2008 passed by the Commissioner of Service Tax, Bangalore.)

M/s. DIRECT LOGISTICS INDIA PVT. LTD.
No.112, GROUND FLOOR, 4TH MAIN,
DOMLUR 2ND STAGE,
BANGALORE – 560 071.

Appellant(s)

VERSUS

Commissioner of Service Tax
BANGALORE SERVICE TAX- I
1ST TO 5TH FLOOR,
TTMC BUILDING,
above BMTC BUS STAND, DOMLUR
BANGALORE – 560 071.
KARNATAKA

Respondent(s)

WITH

(i) **Service Tax Appeal No. 1408 of 2011** (M/s. Direct Logistics India Pvt. Ltd. vs. CST, Bangalore.)

(Arising out of Order-in-Original No. 25/2011 dated 23.02.2011 passed by Commissioner of Service Tax, SERVICE TAX – BANGALORE.)

(ii) **Service Tax Appeal No. 25053 of 2013** (M/s. Direct Logistics India Pvt. Ltd. vs. CST, Bangalore.)

(Arising out of Order-in-Original No. 01/2012 dated 28.09.2012 and Corrigendum to the OIO dated 13.12.2012 both passed by Commissioner of Central Excise and Service Tax (Adjudication), Bangalore.)

(iii) **Service Tax Appeal No. 26575 of 2013** (M/s. Direct Logistics India Pvt. Ltd. vs. CST, Bangalore.)

(Arising out of Order-in-Original No. 13/2012 dated 11/01/2013 passed by Commissioner of Central Excise and Service Tax (Adjudication), Bangalore.)

(iv) **Service Tax Appeal No. 22806 of 2014** (M/s. Direct Logistics India Pvt. Ltd. vs. CST, Bangalore.)

(Arising out of Order-in-Original No. 32/2013-14 dated 06/03/2014 passed by Commissioner of Central Excise and Service Tax (Adjudication), Bangalore.)

APPEARANCE:

Shri Ravi Raghavan and Ms. Neetu James, Advocates (LAKSHMI KUMARAN & SRIDHARAN) for the Appellant

Shri K. B. Nanaiah, Asst. Commissioner, Authorised Representative for the Respondent

CORAM:

HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)
HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)

Final Order No. 20731 - 20735 / 2021

Date of Hearing: 01/09/2021
Date of Decision: 01/09/2021

Per: P.V. SUBBA RAO

These five appeals are filed by the appellant on the same issue and hence, are being disposed of together. The details of these appeals are as follows:

Sl. No	Appeal Nos.	ST/263/2008	ST/1408/2011	ST/26575/2013	ST/25053/2013	ST/22806/2014
1.	**Period Involved**	2003-2004 to 2005-2006	2006-2010	2009-2010	2010-2011	2011-2012
2.	**Show Cause Notice**	20.12.2006	1.03.2010	19.10.2010	9.09.2011	12.10.2012
3.	**Period beyond normal period of limitation**	April 2003 to October 2005	April 2006 to September 2008	NIL		NIL
4.	**Demand (In Rs.)**	79,79,919/- C&F Agent 5,53,604/- Steamer Agent	3,58,63,971	4,54,33,422	4,48,76,032	1,97,74,117
5.		**15,44,81,065**				
6.	**Amounts paid & appropriated (In Rs.)**	6,99,811/- towards demand 1,18,895- towards interest	-	-	-	-
7.	**Amounts paid as pre-deposit (In Rs.)**	10,00,000	35,86,397	45,43,342	44,87,603	15,00,000
8.	**Interest**	As applicable under Section 75 of the Finance Act, 1994				

Sl. No	Appeal Nos.	ST/263/2008	ST/1408/2011	ST/26575/2013	ST/25053/2013	ST/22806/2014
9.	**Penalty**	Section 76 of the Finance Act, 1994 Section 77 of the Finance Act, 1994 Section 78 of the Finance Act, 1994		Section 76 of the Finance Act, 1994 Section 77 of the Finance Act, 1994		Section 77 of the Finance Act, 1994 Section 78 of the Finance Act, 1994
10.	**Order-in-Original**	12/2008 dated 5.05.2008	25/2011 dated 23.02.2011	13/2012 dated 11.01.2013	1/2012 dated 28.09.2012	32/2013-14 dated 6.03.2014

2. The issues which fall for consideration in these appeals are as follows:

a) Is the appellant liable to discharge service tax on the difference between the amounts charged by it from its clients towards Ocean Freight and the amounts paid by it to the Shipping line towards Ocean Freight under the head of 'Clearing and Forwarding Agency Service'?

b) In Service Tax Appeal No. 263 of 2008, is the appellant liable to discharge service the on the amounts which it received from the agents of the Shipping Line for booking cargoes under the head 'Steamer Agency Service'?

c) If so, can the differential amounts of Service Tax be demanded under Section 73 of the Finance Act, 1994?

d) Is the extended period of limitation invokable in the cases?

e) Can interest be charged on the differential service tax if held to be payable?

f) Are the penalties correctly imposed on the appellant under Sections 76, 77 and 78 of the Finance Act, 1994?

3. The appellants are engaged in various activities related to transportation of goods in the course of import/export by sea/air and are registered with the Service Tax Department under the category of Clearing and Forwarding Agent Service, Business Auxiliary Service, Port Service, Transport of Goods by Road, Business Support Service, Renting of Immovable Property Service and Transport of Goods through Waterways. The dispute relates to the amounts of service tax paid by the appellant under the category of "Clearing and Forwarding Agent Service". In appeal No. ST/263/2008, the dispute is also with respect to an amount of

Rs.5,53,604/- which according to the Revenue is to be paid by the appellant as service tax under the "Steamer Agent Service". The events which led to the present dispute are that the officers of the Commissionerate received intelligence that the assessee was grossly undervaluing the taxable services, conducted verification, recorded statements of Shri S. M. Ranga, General Manager (Finance) of the firm and came to the following conclusions.

a) The assessee receives the export cargo from their clients with the instructions for dispatch / exports of the destination by the advised mode of conveyance/liners. They undertake the activity of clearing and forwarding the goods to the destination as per the instructions of their clients. The said activities clearly fall under the category of Clearing and Forwarding Agents'.

b) The assessee raised invoices to their clients for the following:

- *i. Ocean Freight*
- *ii. Halting Charges*
- *iii. Fumigation Charges*
- *iv. Customs Documentation charges*
- *v. Bill of lading charges*
- *vi. Transportation charges*
- *vii. Service charges, etc.*

c) For Ocean Freight and other related services of other agencies, namely M/s. Airsea Forwarders, Bangalore, M/s. Rosemount Shipping (India) Pvt. Ltd., Bangalore etc., is availed, who in turn raise an invoice for such services provided, on the assessee.

d) The assessee raises a consolidated bill, which includes ocean freight and other charges on the shipper.

e) Though the prime activities undertaken by the assessee relate to that of a freight forwarder, they also arrange the incidental / ancillary services through other agencies. For example, the assessee *is not a CHA but gets the work done through other licensed CHA, and the assessee not being a shipping agent or shipping liners, gets the materials shipped through other agents.*

f) Scrutiny of the bills/invoices revealed that the assessee did not charge ocean freight, CHA charges etc., on actual basis. Extra realization had been affected without the same being accounted for towards value of taxable services. Service tax was paid by the assessee only on the amounts shown as "Service Charge" in their invoice. In other words, part of the value of the taxable service was concealed in the extra-realizations.

g) Profit and Loss account of the assessee shows the freight chargers and CHA charges under both the heads i.e., "Income" and "Expenditure". The amounts shown under the head "income" is much more than the amount shown under the head "Expenditure". The difference between the said income and expenditure appears to be a part of the value of taxable service that is leviable to service tax, apart from the "Service Charges". The assessee's statement dated 84/8/06 that the excess amount collected by them is towards overheads of the company and a small profit for further expansion (of the company) is a mere subterfuge for evasion of payment of service tax, by concealment of correct value of taxable service.

h) The assesse were engaged in providing Clearing and Forwarding Agency's service even before 2.5.2002, but have preferred not to get themselves registered and have paid the service tax for the said period, only after the department took up the investigation.

i) The assessee is also receiving a brokerage commission for en-block bookings, from the shipping lines. The said brokerage received appears to be taxable under "Steamer Agent Services" since 15.6.1997."

4. Show-cause notices were issued proposing to recover the alleged differential service tax along with interest and imposed penalties upon the appellant under Sections 76, 77 and 78 of the Finance Act, 1994. After following due process, impugned orders were issued confirming the demand of service tax under Section 73 as indicated in Table in Para 1 along with interest. Penalties were also imposed under Sections 76, 77 and 78 of the Finance Act, 1994.

5. The appellant is engaged either by the shipper or the consignee to move their goods from the Port of Loading to the Port of Destination. Appellant agrees on a price with customer for such transaction and thereafter engages a shipping line to ferry goods from the port of loading to the port of discharge on terms agreed to between the shipping line and the appellant. This arrangement with the shipping line could be done beforehand where the appellant has a rate agreement / contract or it could be on case-to-case basis in which the shipping line is engaged after the appellant gets confirmation from the customer to move their goods. The appellant issues its own documents for Ocean freight and assumes full responsibility and liability towards the customer. In case of export, the appellant gets paid after it issues its own Bill of Lading (BL) to the client depending upon the payment terms agreed. In case of imports, appellant gets paid after it issues delivery order to its customers upon arrival of goods at the port of discharge as per the terms agreed with the customers. Appellant does not have any warehouse and the goods are always held in the ICDs or CFS pending clearances. The appellant has been raising bills upon the customers for their services under the following heads:

(i) Ocean Freight
(ii) Halting Charges
(iii) Fumigation Charges
(iv) Customs Documentation charges
(v) Bill of lading charges
(vi) Transportation charges
(vii) Service charges, etc.

6. Under dispute is the amounts which they have collected towards Ocean Freight from the customers which was in many cases higher than the amount which they had paid to the shipping line for the freight. The case of the Revenue is that the difference between the amount of freight actually paid to the shipping line and the amounts collected towards freight from the customers by the appellant should form part of the assessable value, as it cannot be attributed to the freight and it can only be attributed to the services rendered by the appellant which are in the nature of Clearing and Forwarding Agent Services. After examining the books of records and balance sheets of the appellant, demands were raised to charge service tax on this differential amounts.

7. The case of the appellant, on the other hand, is that their earnings from the difference between the amounts charged to their customers for Ocean Freight and the amounts actually paid to the shipping lines is in the nature of profit earned from their business of selling cargo space on the ships. Elaborating on the arrangements, the learned counsel explains that at times they book cargo space on the ship as per the customers' specific orders. At other times, they book the cargo space in bulk on the ship in anticipation of the customers' requirement. Their contract with the shipping line is on principal-to-principal basis. Once they book the cargo space on a ship, they are bound to pay the shipping line for the entire cargo space whether or not they are able to get sufficient customers to utilize the entire space booked by them. On the other hand, their relationship with the customers is also on principal-to-principal basis and they assure the customers of transport of their cargo on the ship. They charge their clients at one rate and pay the shipping line at a different rate and the difference is their business profit from trading in the cargo space on the ships. At times, if there are not adequate customers to take up the entire space booked by them on the ship, they may have to lower the rates to attract more customers. This even results in a situation where the total amount of rate which they have collected from the customers is much lower than the amount of rate which they have paid to their shipping lines.

8. In other words, it is the case of the appellant that in this business of booking cargo space on the ship and selling it to the customers, there could be profit or loss. By no stretch of imagination, can this profit or loss be called as service rendered to their customers. This service is not a part of the Clearing and Forwarding Agent Service rendered by the appellant, for which they are collecting service charges and have undisputedly paid service tax on them.

9. As far as the demand on the service tax on the alleged "Steamer Agent Service" in appeal No.ST/263/2008 is concerned, it is the case of the appellant that during the disputed period they had received some commission from the agents of the shipping lines who are authorized by the shipping lines to book the cargo for a commission. The commission or brokerage which they receive from the agents cannot be called as Steamer agent service because no service is being rendered by them to the shipping lines at all. Steamer Agent and Steamer agent Service are defined in Section 65(100) and section 65 (105) (i) as follows:

> ***Section 65(100) "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 thereto; or*
> *(ii) to book, advertise or canvass 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;*
>
> ***Section 65(105)(i)****:defines taxable service as service rendered*
>
> ***'****to a shipping line, by a steamer agent in relation to a ship's husbandry or dispatch or any administrative work related thereto as well as the booking, advertising or canvassing of cargo, including container feeder services;'*

10. Learned counsel submits that the appellant is not a Steamer Agents at all and had not rendered any service to the shipping lines. What they have rendered is a service to the agents of the shipping line and received a commission therefrom. It cannot be called as 'Steamer Agent Service' exigible to service tax under Section 65(105)(j).

11. The appellant also contested the demands under appeal No.ST/263/2008 and ST/1408/2011 on grounds of limitation stating that no evidence has been put forth by the Revenue to justify invocation of extended period of limitation under Section 73 of the Finance Act, 1994. Appellant also contested the imposition of penalties upon them.

12. Learned Authorized Representative for the Department vehemently supports the impugned orders and submitted that the demands along with interest has been rightly confirmed and penalties have also been correctly imposed.

13. We have considered the arguments on both sides. Service Tax is charged under section 66 of the Finance Act, 1994 which reads as follows:

> **66. Charge of service tax**
>
> There shall be levied a tax (hereinafter referred to as the service tax) at the rate of twelve per cent. of the value of taxable services referred to in sub-clauses (a), (d), (e), (f), (g,) (h), (i), (j),(k), (l), (m), (n), (o), (p), (q), (r), (s), (t), (u), (v), (w), (x), (y), (z), (za), (zb), (zc), (zh), (zi), (zj), (zk),(zl), (zm), (zn), (zo), (zq), (zr), (zs), (zt), (zu), (zv), (zw), (zx), (zy), (zz), (zza), (zzb), (zzc), (zzd), (zze), (zzf), (zzg), (zzh), (zzi), (zzk), (zzl), (zzm), (zzn), (zzo), (zzp), (zzq), (zzr), (zzs), (zzt), (zzu), (zzv), (zzw), (zzx), (zzy), (zzz), (zzza), (zzzb), (zzzc), (zzzd), (zzze), (zzzf), (zzzg,) (zzzh), (zzzi), (zzzj), (zzzk), (zzzl), (zzzm), (zzzn), (zzzo), (zzzp), (zzzq), (zzzr), (zzzs), (zzzt), (zzzu), (zzzv), (zzzw), (zzzx), (zzzy), (zzzz), (zzzza), (zzzzb), (zzzzc), [(zzzzd), (zzzze), (zzzzf), (zzzzg), (zzzzh), (zzzzi), [(zzzzj), (zzzzk), (zzzzl), [(zzzzm), (zzzzn), (zzzzo), (zzzzp),(zzzzq), (zzzzr), (zzzzs), (zzzzt), (zzzzu), (zzzzv) (zzzzv) and (zzzzw)] of clause (105) of section 65 and collected in such manner as may be prescribed.

Therefore, for service tax to be charged, there must be a taxable service as defined in any of the clauses of section 65 (105) of the Act according to which

> (105) " taxable service" means any service provided or to be provided,-
>
> (a)
>
> (b)
>
> ..
>
> (i) *to a shipping line, by a steamer agent in relation to a ship's husbandry or dispatch or any administrative work related thereto as well as the booking, advertising or canvassing of cargo, including container feeder services;'*
>
> (j) ***'****to a client, by a clearing and forwarding agent in relation to clearing and forwarding operations, in any manner";*

The first issue identified by us to be decided in this case is "*Is the appellant liable to discharge service tax on the difference between the amounts charged by it from its clients towards Ocean Freight and the amounts paid by it to the Shipping line towards Ocean Freight under the head of 'Clearing and Forwarding Agency Service'?* The term "Clearing and Forwarding Agent" in Section 65(25) and the Clearing and Forwarding Agent Service defined under Section 65(105)(j) of the Finance Act, 1994 read as follows:

> ***Section 65(25): "Clearing and Forwarding Agent"*** *means any person who is engaged in providing any service, either directly or indirectly, connected with clearing and forwarding operations in any manner to any other person and includes a consignment agent;*
>
> ***Section 65(105)(j)****: to a client, by a clearing and forwarding agent in relation to clearing and forwarding operations, in any manner";*

14. It is undisputed that the appellant is registered with service tax department for "Clearing and Forwarding Agent Service" and has been paying service tax on the service charges. What is exigible to service tax under Section 65(105)(j) is ***any service provided or to be provided to a client by a Clearing and Forwarding Agent in relation to clearing and forwarding operations in any manner***. Transport of goods is distinct from clearing and forwarding operations. In this case, the appellant is not only providing clearing and forwarding service but is also providing transport on its own account to its clients by purchasing freight space on the ships from the shipping lines. In some cases, they buy the space on the ship specifically to meet the requirement of the client and in other cases, the appellant buys space on the ship in anticipation of the clients' requirements and then sells the space to the clients. Trading in Ocean Freight is not a service being rendered to the client and no amount is being paid by the client to the appellant as per the records towards trading of cargo space. Evidently as any prudent business would, the appellant is buying space on the cargo ship at a lower price and selling it to its client at a higher price. The difference is its profit. It would have been a different case, if the appellant is organizing space on the ship for their clients and the client is

paying shipping line directly and the service of organizing or arranging the space on the ship, the appellant gets paid service charge by the client. In such an arrangement, the amount being received would be a consideration for the service. The present arrangement is an arrangement of the trader who buys cargo space at a lower price and sells it at a higher price and enjoys the margin as profit.

15. The nature of the transaction is also clear from the fact that there are cases on record where the appellant had booked the space for higher amount on the ship but due to market conditions, had to sell the space to its customers at a lower price incurring loss. Therefore, in our considered view, the profits gained by the appellant by buying space on ships at lower price and selling at a higher price to the customers cannot by any stretch of imagination be called "Clearing and Forwarding Agent Service". No service tax can be charged on this amount. On an identical question, in the case of **Seamax Logistics Ltd. vs Commissioner of Central Excise and Service Tax, Tirunelveli, reported in 2018 (7) TMI 262-CESTAT Chennai** has held that no service tax is chargeable on the difference between the ocean freight collected from the clients and the ocean freight paid to the shipping lines.

16. The second question which we have framed is whether in Service Tax Appeal No.263 of 2008, the appellant is liable to discharge service the on the amounts which it received from the agents of the Shipping Line for booking cargos under the head 'Steamer Agency Service' or not. It is undisputed that the appellant received the amounts not from the shipping line but from its brokers. Charge of service tax under section 65(105)(i) is leviable on a service rendered **'***to a shipping line, by a steamer agent in relation to a ship's husbandry or dispatch or any administrative work related thereto as well as the booking, advertising or canvassing of cargo, including container feeder services.* There is nothing on record to prove either that the appellant was a steamer agent or that the appellant rendered service to a shipping

line. The service, if any, is rendered by the appellant, it is to the broker and not to the shipping line. Therefore, no service tax can be charged on the disputed amount under the category of Steamer Agent Service on the amounts paid by the brokers to the appellant.

17. As we have held in favour of the appellant and against the Revenue on demands on merits under both heads, it is unnecessary to look into the question of limitation. Consequently, the demands cannot be sustained.

18. Since no demand can be sustained, neither can any interest be charged, consequently, the penalties imposed upon the appellant also needs to be set aside and we do so. Thus, all the questions identified in the case in para 2 are answered in favour of the appellant and against the Revenue.

19. In view of the above, the impugned orders cannot be sustained and need to be set aside and we do so.

20. The appeals are allowed and the impugned orders are set aside with consequential relief, if any.

(Operative portion of the order was pronounced
in the open court on **01/09/2021.**)

(S.K. MOHANTY)
MEMBER (JUDICIAL)

(P.V. SUBBA RAO)
MEMBER (TECHNICAL)

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