

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH
CHENNAI**

Appeal No.ST/188-189/2012

[Arising out of Order-in-Original No.32 & 33/2011 dt.29.12.2011 passed by the Commissioner of Central Excise, Chennai – II Commissionerate]

Commissioner of Service Tax, Chennai

Revenue

Versus

Supply Chain Logistics (P) Ltd

Assessee

Appeal No.ST/206,207/2012

[Arising out of Order-in-Original No.32 & 33/2011 dt.29.12.2011 passed by the Commissioner of Central Excise, Chennai – II Commissionerate]

Supply Chain Logistics Pvt. Ltd

Appellant

Versus

Commissioner of Central Excise, Chennai

Respondent

Appearance:

Shri K.Veerabadra Reddy, JC (AR)
For the Revenue

Shri N.Viswanathan
For the Assessee

CORAM :

Hon'ble Ms. Sulekha Beevi C.S. Member (Judicial)
Hon'ble Shri V.Padmanabhan, Member (Technical)

Date of hearing / decision : 7.8.2018

Per Bench

FINAL ORDER No. 42216-42219/2018

These appeals emanate from the same impugned order and therefore are heard together and is disposed by this common order. The parties are referred to as assessee and department for the sake of convenience.

2. During the course of audit of accounts of the assessee, it was noticed that they were providing various services related to freight forwarding. During the course of providing such services, the assessee made booking of space for the cargo and thus procured cargo space from the shipping lines at specified agreed rates. The assessee solicit cargo from their clients and used the space booked for forwarding the cargo of such clients. For this service, they collected higher freight charges from their clients than the amount paid by them to the shipping lines. Thus, by booking the space for cargo and making available the same to the clients/actual user of space, the assessee charged the mark up on the amount paid to the shipping lines. The Department was of the view that such activity would come within the levy of Business Auxiliary Service till 30/4/2006 and there after under the category of Business Support Services. Show Cause Notice was issued proposing to demand the service tax on the said amount received by the appellant alongwith demand of interest and also proposing to impose penalties. After due process of law, the original authority confirmed the demand in respect of 2 Show cause notices Nos.266/2010 dt.10.4.2010 and 96/2011 dt.1.4.2011. While confirming the demand under Business Auxiliary Service for the period from 1/10/2004 to 30/4/2006, the adjudicating authority excluded the freight charges and the tax was levied only on the mark up value

/excess freight collected by the appellant. The department has filed the appeal aggrieved by such exclusion of freight charges. It is the case of the department that the adjudicating authority failed to see that the entire amount would be subject to levy of service tax for the reason that these activities would fall under managing logistics and distribution services. The assessee is in appeal against the confirmation of demand, interest and the penalties imposed.

3. On behalf of the assessee, the Ld.Counsel, Sh.N.Viswanathan submitted that the assessee negotiated with the shipping lines and booked certain cargo spaces on certain agreed rates (ocean freight) and sold the cargo space acquired by them to their customers at specified rate. Sometimes the assessee would make gain and sometimes the transaction would be loss depending upon the market conditions involving in the attendant business risk. The department has treated these transactions as 'managing distribution and logistics' which would fall under Business Auxiliary Service for the period upto 30/4/2006 and thereafter under Business Support Services with effect from 1/5/2006. He adverted to the decisions in the case of ***Greenwich Meridian Logistics (I) Pvt. Ltd. vs Commr. Of S.T., Mumbai 2016 (43) S.T.R.215 (Tri. – Mumbai)*** and submitted that the Tribunal has analysed the very same activity and the issue of its' taxability wherein the issue stands covered in favour of assessee. Similarly in the case of ***Phoenix International Freight Services Pvt. Ltd. vs C.S.T. Mumbai-II 2017 (47) S.T.R.129 (Tri. – Mumbai)*** the issue has been decided in favour of the assessee, wherein the Tribunal observed that in such activity of booking of cargo

spaces, the assessee is not rendering any service either to the shipping line or to the customers. It was held that the activity cannot be taxed under Business Auxiliary Services. In ***DHL Lemiur Logistics Pvt. Ltd. vs. Commissioner - 2016-TIOL-1455-CESTAT-MUMBAI***, the Tribunal has taken a similar view.

4. The Ld.AR, Sh.K.Veerabadra Reddy supported the grounds of appeal in the appeal filed by the department. He submitted that the adjudicating authority has confirmed the tax under Business Auxiliary Services from 1/10/2004 to 30/4/2006, but has however excluded the excess freight collected by the appellant for this period. After 1/5/2006 the adjudicating authority has confirmed the demand of service tax on the gross amount of freight collected. The adjudicating authority has erred in excluding the excess freight collected by the appellant for the period prior to 1/5/2006. He adverted to the Show cause notice and submitted that CBEC vide Circular No.59/8/2003-ST dt.20/6/2003 had clarified that activities like managing distribution and logistics would fall under Business Auxiliary Services. The adjudicating authority has failed to take note of this aspect while rendering the findings in the impugned order. Further, that the decisions relied by the Ld.Counsel will not be applicable to the facts of the case, as the activity of the appellants would fall under managing distribution and logistics services.

5. Heard both sides.

6. The activity carried out by the appellant, as stated in the show cause notice is that 'the assessee books space in cargo and procures cargo space from shipping lines at specified agreed rates. The assessee procures cargo from their clients and used the space in forwarding the cargo to their clients. For this they collect higher freight charges from their clients, than the amount paid by them to the shipping lines. Thus by booking a space for cargo and making available the same to the clients/actual user of space, they charged the mark up on the amount paid to the shipping lines'.

7. It can be seen from the above narration in the Show cause notice that for booking of cargo space they receive a small incentive over and above the freight charges from the shipping liners. The very same activity has been considered by the Tribunal in the decisions relied by the Ld.Counsel for appellant. In Phoenix International Freight Services Pvt. Ltd., the Tribunal observed as under :-

“Net income earned as a freight forwarder :

6.1 In this service Revenue wants to tax the appellant on the ground that he has earned additional amount from their clients on the space which has been booked by the appellant with particular shipping lines. Under this category, the appellant books space in advance in a shipping line, and as per the requirement of the customers sells the space to the customers in a particular shipping line at a premium or profit, i.e., appellant books the space in advance with the shipping line, say for ₹ 100/- per sq. ft. and sells the space to any of the customers who would like to use the space at ₹ 115/- per sq. ft. The additional amount of ₹ 15/- earned by the appellant is being regarded by him as a profit in trading and selling of space. Revenue's contention is that this amount is for the services rendered to the client. In our considered view, the appellant herein, under this head, is not rendering any service either to the shipping line or to the customers. The appellant books the space and make payment to the shipping line in advance and/or, as and when the bills is raised, and sells the same to their customers at a profit. The appellant is not rendering any service either to the shipping line or to its customers, more so, under business auxiliary service. This view of ours is fortified by the decision of this very same bench in the case of *Greenwich Meridian Logistics (India) Pvt. Ltd.* (supra) and by a Coordinate Bench of this Tribunal in the case of *DHL Lemuir Logistics Pvt. Ltd.* (supra). Since the issue involved in this case is already decided against the Revenue, respectfully following

the same, we set aside the impugned orders in both the appeals as regards the demand raised and confirmed under this issue.

Airline incentive income :

6.2 On perusal of the records, we find that the airline incentive scheme is nothing but an amount given by the airlines to the appellant for rendering various services related to booking, preparation of bill, collection of realization by the appellant on behalf of the airlines. This portion of the findings is not contested seriously by the appellant as it is undisputed and accepted that the appellant is rendering these kind of service which, in our view, would fall under the category of promotion and marketing of airline services. Inasmuch as the appellant is encouraging the various airlines for booking the space in a specific airline, we do not find any merits in the submission made by the learned Counsel on this point and we hold on merits against the appellant on this issue.”

8. Similarly in the case of Greenwich Meridian Logistics India Pvt. Ltd., the Tribunal observed as under :-

10. The original authority has proceeded on the assumption that there is only one payment and, that too, for freight charged by the shipping line. He has rejected the possibility of trading in space or slots on vessels by holding that trading in space or slots is a figment and freight is all that is transacted. This is a patent misconstruing of the usage of that expression. Freight, though used colloquially to describe all manner of carriage, is the nomenclature assigned to the consideration for space provided on a vessel for a particular voyage. Freight is charged by the entity that is in possession of space on a vessel from an entity that requires the space for carriage of cargo.

11. Slots may be contracted for by the shipper or its agent with the shipping line through the steamer agent. Implicit is a uni-directional flow of consideration because the space belongs to the shipping line. Steamer agent or agent of shipper may earn commission in such a transaction. Leaving that situation aside, the contention of the appellant is that it is a ‘multi-modal transport operator’ which entails a statutorily assigned role in cross-border logistics. According to Section 2 of the Multi-modal Transportation of Goods Act, 1993.

(m) ”multimodal transport operator” means any person who -

(i) concludes a multimodal transport contract on his own behalf or through another person acting on his behalf;

(ii) acts as principal, and not as an agent either of the consignor, or consignee or of the carrier participating in the multimodal transportation, and who assumes responsibility for the performance of the said contract; and

(iii) is registered under sub-section (3) of section 4;

and

(a) ”carrier” means a person who performs or undertakes to perform for a hire, the carriage or part thereof, of goods by road, rail, inland waterways, sea or air;

12. The appellant takes responsibility for safety of goods and issues a document of title which is a multi-modal bill of lading and commits to delivery at the consignee’s

end. To ensure such safe delivery, appellant contracts with carriers, by land, sea or air, without diluting its contractual responsibility to the consignor. Such contracting does not involve a transaction between the shipper and the carrier and the shipper is not privy to the minutiae of such contract for carriage. The appellant often, even in the absence of shippers, contract for space or slots in vessels in anticipation of demand and as a distinct business activity. Such a contract forecloses the allotment of such space by the shipping line or steamer agent with the risk of non-usage of the procured space devolving on the appellant. By no stretch is this assumption of risk within the scope of agency function. *Ergo*, it is nothing but a principal-to-principal transaction and the freight charges are consideration for space procured from shipping line. Correspondingly, allotment of procured space to shippers at negotiated rates within the total consideration in a multi-modal transportation contract with a consignor is another distinct principal-to-principal transaction. We, therefore, find that freight is paid to the shipping line and freight is collected from client-shippers in two independent transactions.”

13. 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 Finance Act, 1994 will not address these independent principal-to-principal transactions of the appellant 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.

9. Similar decision has been taken by the Tribunal in the case of DHL Lemiur Logistics Pvt. Ltd. It is very much clear that the activities which has been considered in these decisions is the very same activity which the department has proposed to tax in these show cause notices. Following the decisions cited above, we are of the view that the demand cannot sustain. The impugned orders confirming the demand, interest and penalties are set aside.

In the result, the appeals filed by the assessee are allowed. Consequently the appeals filed by the department are dismissed.

(Operative part of the order pronounced in open court)

(V.Padmanabhan)
Member (Technical)

(Sulekha Beevi C.S)
Member (Judicial)

Vsr