**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL**
**SOUTH ZONAL BENCH AT CHENNAI**
**[COURT : Division Bench B1]**

**Appeal Nos.: ST/182 & 183/2012**

---

[Arising out of Order-in-Original Nos. 34 & 35/2011 dated 29.12.2011 passed by the Commissioner of Central Excise, Chennai-II Commissionerate, Nandanam, Chennai]

**M/s. Gordon Woodroffe Logistics Ltd.,** **: Appellant**
Kuber's, II Floor,
No. 42, Pantheon Road,
Egmore, Chennai – 600 008

**Versus**

**The Commissioner of G.S.T. & Central Excise,** **: Respondent**
Chennai South Commissionerate

Appearance:-
Shri. V. Prasanna Krishnan, Consultant
for the Appellant

Shri. B. Balamurugan, AC (AR)
for the Respondent

**CORAM:**
**Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)**
**Hon'ble Shri P. Dinesha, Member (Judicial)**

Date of Hearing/Decision: **07.02.2019**

**Final Order Nos. 40294-40295 / 2019**

**Per Madhu Mohan Damodhar :**

The appellants are engaged in providing Custom House Agent Service, Transport of Goods by Road Service, etc.

2. Pursuant to audit, it was noticed that the appellants were booking space for cargo transportations in airlines/ships and paid

the charges for the same. As and when the clients bring cargo for dispatch, the appellants collect freight charges for the transportation of the goods. While charging their customers towards such freight charges, the appellants bill/collect extra charges in excess of the charges paid to the airlines/ships.

3.1 The Department took the view that the said services appear to be classifiable under Business Auxiliary Services (BAS) as defined in Section 65(19) of the Finance Act, 1994. It appeared that for the period from October 2004 to December 2008, an amount of Rs. 2,14,63,001/- was payable on this service, which had not been discharged by the appellant. It further appeared that the appellant had not paid service tax in respect of the non-receipted expenditure incurred during the course of rendering of service and on certain invoices raised from their branches towards charges indicated as free home delivery. It appeared that the appellants were liable to pay service tax liability of Rs. 15,53,701/- with interest on these charges for the period from April 2006 to December 2008. On being pointed out, the appellant paid the amount of Rs. 15,53,701/- towards service tax and Rs. 1,87,792/- towards interest on 15.04.2009.

3.2 It further appeared that appellants had not discharged service tax liability on the commission received from steamer agents/airlines for the period prior to the registration and that in respect of their branches, no service tax was discharged for the commission received under Business Auxiliary Service. On being pointed out, the appellant paid an amount of Rs. 2,33,285/- towards service tax and Rs. 67,765/- towards interest on 15.04.2009.

4.1 A Show Cause Notice No. 86/2010 dated 05.04.2010 was issued to the appellants *inter alia* proposing demand of an amount of Rs. 2,14,63,001/- under Business Auxiliary Service and Rs. 17,86,986/- towards the non-receipted expenses and commission received. The Show Cause Notice also proposed demand of interest on the aforesaid amounts as also appropriation of the amounts already paid up along with imposition of penalty under various provisions of law.

4.2 Another Show Cause Notice No. 514/2010 dated 24.09.2010 was issued to the appellants *inter alia* proposing demand of an amount of Rs. 39,71,783/- as service tax liability payable on Business Auxiliary Service for the period from April 2009 to March 2010 and also proposed demand of interest and imposition of penalty under relevant provisions of law.

4.3 In adjudication, the Commissioner vide impugned Orders 34 and 35/2011 dated 29.12.2011 confirmed the demand of the following amounts :

**I. <u>With respect to Show Cause Notice dated 05.04.2010 :</u>**

(i) Demand of Rs. 1,92,04,675/- payable on Business Auxiliary Service;

(ii) Demand of Rs. 17,86,986/- in respect of non-receipted expenses and commission received;

(iii) Demand of interest on the above amounts;

(iv) Appropriation of the amounts already paid by the assessee;

(v) Imposition of penalty of Rs. 2,09,91,661/- under Section 78 of the Finance Act, 1994.

**II. <u>With respect to Show Cause Notice dated 24.09.2010 :</u>**

(i) Demand of Rs. 36,00,891/- payable on Business Auxiliary Service;

(ii) Demand of interest on the above amount;

(iii) Imposition of penalty under Section 76 of the Finance Act, 1994.

5. Hence, these appeals.

6. Today when the matter came up for hearing, Ld. Consultant Shri. V. Prasanna Krishnan appearing on behalf of the appellant made oral and written submissions, which can be broadly summarized as under :

**I. <u>In respect of the demand of Rs. 1,92,04,675/- and Rs. 36,00,891/- with interest payable under the category of Business Auxiliary Service :</u>**

(i) The dispute in respect of this tax liability is no longer *res integra* and has been conclusively decided by the Tribunal in a number of decisions;

(ii) The Tribunal in the case of ***M/s. Freight Systems (India) Pvt. Ltd. Vs. Commissioner of G.S.T. & Central Excise, Chennai South Commissionerate in Final Order Nos. 41012-41013/2018 dated 28.03.2018,*** in relying upon the earlier Tribunal decisions in ***M/s. Skylift Cargo (P) Ltd. Vs. Commissioner of Service Tax, Chennai in Final Order No. 42242-42244/2017 dated 20.09.2017, M/s. Leap International Pvt. Ltd. Vs.***

*Commissioner of Service Tax, Chennai in Final Order No. 40870/2018 dated 12.03.2018* and *M/s. Greenwich Meridian Logistics (I) Pvt. Ltd. Vs. C.S.T., Mumbai – 2016 (43) S.T.R. 215 (Tri. – Mum.)*, held that the demand of service tax on such freight charges under Business Auxiliary Services is unjustified.

**II. <u>In respect of the demand of Rs. 15,53,701/- with interest on excess charges :</u>**

(i) The said demand with interest has been paid up voluntarily by the appellant during the Department audit. Ld. Consultant submits that the appellant is not contesting the said demand;

(ii) However, it is submitted that there cannot be any penalty in this case since the amount was already paid up on being pointed out;

(iii) Further, even on law, the matter is covered by the Supreme Court's judgement in the case of ***Union of India Vs. M/s. Intercontinental Consultants and Technocrats Pvt. Ltd. – 2018 (10) G.S.T.L. 401 (S.C.).***

**III. <u>In respect of the demand of Rs. 2,33,285/- on commission received from steamer agents/airlines :</u>**

(i) The demand of Rs. 2,33,285/- on airline/steamer commission is hit by limitation since it is even beyond the extended period of limitation that can be covered in the Show Cause Notice dated 05.04.2010;

(ii) Ld. Consultant draws our attention to paragraph 16.0 of the impugned Order to point out that even the adjudicating authority has noted that the demand is prior to October 2004. However, the authority has held that as the amount has been paid voluntarily with interest, the issue of time bar does not arise.

7. On the other hand, Ld. AR Shri. B. Balamurugan appearing on behalf of the Revenue opposes the appeals and supports the impugned Orders. Ld. AR also made a number of submissions which can be broadly summarized as under :

**I. <u>In respect of the demand of Rs. 1,92,04,675/- and Rs. 36,00,891/- with interest payable under the category of Business Auxiliary Service :</u>**

(i) He submits that by facilitating in finding airlines/shipping lines for transportation of cargo for their clients, the consideration is indirectly in the form of an amount, being the difference between the freight charges billed and the actual freight charges paid;

(ii) The said consideration will have to be taken as consideration for "procurement of goods or services which are inputs for clients". Hence, tax liability arises under Business Auxiliary Service.

**II. <u>In respect of the demand of Rs. 15,53,701/- with interest on excess charges :</u>**

(i) The adjudicating authority, after careful analysis, has found that the appellant had not disclosed the details of entire income either in the ST-3 returns filed by them or in any other communication and had therefore suppressed the facts with an intention to evade payment of service tax;

(ii) Hence, even though they have paid up the tax liability, the penalty under Section 78 ibid will still be attracted.

**III. <u>In respect of the demand of Rs. 2,33,285/- on commission received from steamer agents/airlines :</u>**

(i) Ld. AR reiterates the observations of the adjudicating authority in paragraph 16.0 of the impugned Order.

8. Heard both sides and have gone through the facts.

9. We intend to take up the issues one by one.

**I. <u>In respect of the demand of Rs. 1,92,04,675/- and Rs. 36,00,891/- with interest payable under the category of Business Auxiliary Service :</u>**

10.1 We find that the issue in dispute is fully covered in the appellant's favour by the Tribunal decisions cited by the Ld. Consultant for the appellant. The decision in the case of *M/s. Freight Systems (India) Pvt. Ltd. (supra)* relied upon by the Ld. Consultant is in fact applicable on all fours to the case on hand. We do not find any new grounds or reasons to deviate from the ratio laid down in those decisions viz., that the demand of service tax on freight charges under Business Auxiliary Services is unsustainable.

10.2 This being so, the demands of tax and penalties on this score cannot sustain and will require to be set aside, which we hereby do.

**II. <u>In respect of the demand of Rs. 15,53,701/- with interest on excess charges :</u>**

11.1 We find that this amount has already been paid up by the appellant and is not being contested in appeal. We take note of the fact that the amount has been paid up along with the interest liability thereof proximate to the audit conducted by the Department.

11.2 In the circumstances, we are of the considered opinion that imposition of penalty under Section 78 of the Act ibid in respect of this liability is unjustified and will require to be set aside, which we hereby do.

**III. <u>In respect of the demand of Rs. 2,33,285/- on commission received from steamer agents/airlines :</u>**

12. From the facts on record, it is clear that the amounts pertain to the period prior to October 2004. As the Show Cause Notice has been issued only on 05.04.2010, this demand cannot be covered even within the extended period of limitation of five years. The demands of tax and penalty in respect of this liability are squarely hit by limitation and hence, the same cannot be sustained. The appeal on this score is allowed.

13. To sum up :

(i) The demand of Rs. 1,92,04,675/- and Rs. 36,00,891/- along with interest and penalties imposed are set aside;

(ii) No interference is made with the demand of Rs. 15,53,701/- in respect of excess charges along with interest liability.

However, penalty imposed thereon under Section 78 of the Finance Act, 1994 is set aside;

(iii) The demand of Rs. 2,33,285/- along with interest and attendant penalties in respect of airline/steamer commission as well as corresponding penalty is set aside.

14. Both the appeals are allowed on above terms with consequential benefits, if any, as per law.

*(Operative part of the order was pronounced in open court)*

**(P Dinesha)**
Member (Judicial)

**(Madhu Mohan Damodhar)**
Member (Technical)

Sdd