

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

Appeal No. ST/150/2008

[Arising out of Order-in-Original No.24/2008 dt. 28.03.2008 passed by the Commissioner of Service Tax, Chennai]

Bax Global India Ltd.

Appellant

Versus

Commissioner of Service Tax, Chennai

Respondent

Appearance:

Shri Raghavan Ramabadran, Advocate
For the Appellant

Shri A. Cletus, ADC (AR)
For the Respondent

CORAM :

Hon'ble Ms. Sulekha Beevi C.S. Member (Judicial)
Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)

Date of hearing : 22.08.2017

Date of Pronouncement : 18-09-2017

FINAL ORDER No. 42113/2017

Per Bench

The Appellant is engaged in the business of Custom House Agent (CHA), Freight Forwarder services, besides providing logistics services such as Business Support Services (BSS) and Storage and Warehousing Services. The Appellant is registered with Service Tax



Commissionerate under CHA, BSS, Storage and Warehousing and GTA services. As regards, the Freight Forwarding Business, the Noticee has taken Central Registration at New Delhi under Business Auxiliary Service (BAS) and pays Service Tax on the commissions received from airlines/shipping lines. The demand of Service Tax has been confirmed on the following grounds:

a) Custom House Agents Services (CHA service) – Apart from agency fee, the Appellant collects documentation charges, cartage, break bulk charges, spread share charges, handling charges, handling charges, miscellaneous charges, etc. The Appellants pay service tax only on the agency fee / management fee and other charges are claimed as reimbursement of expenses.

The reimbursable expenses are not the actual cost of the said expenses but with substantial mark-up and as such an income for the Appellant. These expenses are in relation to CHA service. These charges are to be included in the taxable value under CHA service and Service Tax is payable on such charges.

b) Business Auxiliary Services (BAS) – The Appellant purchases space from Airlines and Shipping Lines for various exporters. Freight charges collected from the customers are not actuals and there is a markup over the actual freight. Procurement of space in the ship or airlines for the client exporters is classifiable under BAS under the category of “procurement of goods or services,



which are inputs for the client (Section 65 (19)(iv) of the Act. The mark up earned on the freight constitutes the consideration for rendering the said service. Similarly in respect of cartage income earned under Goods Transport Agency services, the difference between the income and the cost of cartage is the taxable value.

Accordingly, proceedings were initiated by department by way of issue of show cause notice dt. 14.09.2007 alleging that appellant is liable to discharge tax liability on income value of Rs.62,25,26,785/- constituting value not shown in the ST-3 returns on Custom House Agents service and similarly on value of Rs.19,93,51,831/- on services alleged to be Business Auxiliary Service. In adjudication proceedings, vide impugned order dt. 28.03.2008, adjudicating authority confirmed demand of service liability of Rs.5,93,29,726/- towards CHA service and Rs.2,17,49,198/- towards BAS service, totalling to Rs.8,10,78,924/- along with interest liability and imposing penalties under Section 76 & 78 of the Finance Act, 1994. Hence this appeal.

2.1 Today when the matter came up for hearing, Id. Advocate Shri Raghavan Ramabadran the grounds of appeal and also made oral and written submissions which can be broadly summarized as under :

In respect of demand under CHA service



- (i) Service Tax is paid on the CHA agency services at Chennai. The Appellant, besides being a CHA is also a Freight Forwarder. As far as the freight forwarder business, the Appellant is centrally registered at Delhi under the category of BAS and service tax is paid on the commission earned.
- (ii) The demand has been made on the basis of the entire revenue earned by the Appellant with the exclusion of air/ocean freight and GTA charges (inland freight).
- (iii) The Appellant submits that under CHA Service, Tax is payable only on the taxable service of Custom House Agency. The charges on which demand under CHA Service has been confirmed do not relate to the taxable service of CHA. These charges are:
- a) Documentation charges
 - b) Cartage
 - c) Break Bulk charges
 - d) Spread share charges
 - e) Handling charges
 - f) Management charges
 - g) Miscellaneous charges
- (iv) During the relevant time, the CBEC in their Circular No.43/1/97 dated 06.06.97 had clarified that only agency commissions are liable to tax under CHA services and not the gross value.
- (v) Thus, no Service Tax is payable on the services provided by third parties to the client for which the Appellant makes payment and collects the amount from the client either with margin or without



margin. Demand of Service Tax on the same is not sustainable as the services are not provided by the Appellant.

(vi) No tax can also be demanded against services which are not provided by the Appellant and which are not related to the agency function, and which are not taxable under any other category. These services are in relation to export and import freight which are not taxable service. If a service is exempted or not taxable, the margin earned on such service is also not taxable. No service tax can also be levied in the case of export of services.

(vii) In the Appellant's own case relating to their Bangalore Office, similar proceedings were initiated pertaining to the period 2000-01 to 2003-04. The Tribunal, in Final Order dated 25/10/2007, reported in 2009 (9) STR 412 (Tri.Bang.), held that air freight is not a service rendered by CHA and the various such activities on which demand of Service Tax has been made are not related to CHA Service. These charges are charges collect fee, Delivery Order fee, Currency Adjustment Fee, Cartage Revenue, etc., which are also the subject matter in the present appeal. The Tribunal also held that even if any profit has been made on these activities, the same cannot be subjected to Service Tax. Further, similar proceedings initiated earlier was set aside by the Commissioner (Appeals), Bangalore vide Order-in-Appeal dated 30.11.2004. The Department did not file appeal against the same and thus the said order also attained finality.



In respect of demand under BAS service

(i) The Appellant is required to collect/remit freight charges for transportation of export goods of their clients. In terms of their arrangement with Airlines, the Appellant recovers the charges and remits the freight to the Airlines. The department, however, seems to levy service charge on the differential freight amount alleging that appellants are engaged in procuring of air freight charges for exports/import cargo and such services are input services to their customers.

(ii) The demand under BAS pertains to services which are in the nature of air/ocean freight. The Appellant merely collects the freight from the customers and remits the same to the airline/shipping liner. Thus, no service is provided to the importer.

(iii) Air freight in relation to export cargo is also not taxable. In the case of both import and export cargo, ocean freight is not a taxable service. Thus, any sum collected towards freight is therefore outside the purview of the Finance Act, 1994.

(iv) The Appellant submits that just because some amount in excess of actual freight has been collected, this will not alter the nature of the services. In this regard, the decision of the Hon'ble Apex Court in the case of *Indian Oxygen Limited v. CCE* [1998 (36)



E.L.T. 723 (SC)] and *Baroda Electric Meters v. CCE* [1997 (94) E.L.T. 13 (SC)] are relied upon. The latter decision was also followed by the Tribunal in the Appellant's own case, discussed supra.

(v) Booking of container space and selling the same to the exporter is an independent business activity. The Appellant is not providing any taxable service of procurement of services for the consignors as held in the impugned order. Whatever price realized by the Appellant in excess of the price paid for the container would belong to them in their own right. In case the appellant does not sell the space, the appellant has to pay for the container space booked by them and the loss would belong to the appellant. The amount of profit realizable is dependent on the Appellant's efforts and the market conditions and the amount collected represents the proceeds of space.

2.2 Ld. Advocate takes us to paras 17 to 19.5 of the impugned order to contend that the adjudicating authority had clearly found and concluded that reimbursement expenses charges collected in the invoices need not be subjected to service tax, and has referred to Board's instructions dt. 6.6.1997 in support of his view. However, in spite of such findings, the Id. Adjudicating authority has nonetheless merely confirmed the tax demands proposed in the SCN along with imposition of penalties.

3.1 On the other hand, Ld. A.R on behalf of Revenue supports the adjudication.



3.2 He submits that the demand is only on the mark up charges and not on the total gross income. He takes us to page 12 of the impugned order where the adjudicating authority has clearly held that assessee has collected more than the actual expenses incurred on behalf of client and that the excess amount collected is an income to the assessee while rendering the taxable service and therefore this income / profit would form part of the taxable value.

3.3 It cannot be stated that appellant is acting as a pure agent as they do not receive only the actual amount incurred to procure such goods and services but they also collect certain amounts over and above the expenses incurred by them by way of documentation charges, handling charges and miscellaneous charges.

3.4 In respect of Business Auxiliary Service, Id. A.R submits that appellant purchased space from airlines and shipping liners. This space is allotted to various exporters for which they collected freight. Procurement of space in the ships/airlines for the client-exporters is a service and same is used by their clients as an input in relation to the export of their goods. Hence these activities would come under the category of Business Auxiliary Service and would be liable to service tax.

4. Heard both sides and gone through the facts.

5.1 The core issue in this appeal concerns the nature of services, if any, performed by the appellant and whether they would fall under



the ambit of Custom House Agent's Service (CHA) and Business Auxiliary Service (BAS) respectively.

5.2 The entire demand is based upon the income shown in the trial balance of the appellant including house air-way bill charges, bill of lading charges, agency fees, documentation charges, cartage/freight charges, break bulk charges, spread share charges, handling charges, management charges and other miscellaneous charges. Out of the above, assessee were paying service tax on the agency charges under CHA services and management charges under Storage and Warehousing Services and on cartage/freight charges they were paying service tax under GTA services. In para-5 of the impugned order, the adjudicating authority himself acknowledges that appellants were paying service tax on all other charges except that relating to air freight and ocean freight and the cartage, these appeared to be in relation to provision of taxable service of GTA service.

5.3 Taxable services of CHA is defined in Section 65 (105) (h) as "any services provided to a client in relation to the entry or departure of conveyances or import or export of goods". Definition of 'Custom House Agents' for the purpose of service tax has been adopted from Rule 2(c) of the Custom House Agents Licensing Regulations, 2004 which defines CHA as "a person licensed under these regulations to act as agent for the transaction of any business relating to the entry



or departure of conveyances or the import or export of goods at any Customs station".

5.4 The running thread throughout the impugned order is that there is an element of mark up over the various costs collected from their clients i.e appellants have collected an amount over and above the actual cost incurred which will be in the nature of commission. Presumably, for this reason, the adjudicating authority, while admitting to the non-inclusibility of reimbursable charges in taxable value, has nonetheless proceeded to confirm the demand proposed in the SCN.

Impugned order is self- contradictory . On one hand, the adjudicating authority has clearly weird to the correct thinking that reimbursable expenses cannot be taxed. He even concludes in para 18.5 that certain amounts over and above the expenses incurred by appellant by way of documentation charges, handling charges and miscellaneous charges are liable to be included in the taxable value and service tax liable to be paid on them. Further on, in para, 19.5. he concludes that mark up earned on the freight will constitute consideration for rendering services for procurement of cargo space in airlines / shipping lines and that similar is the case in respect of cartage income earned under GTA services and the difference between income and the cost of cargo is the taxable value. Having reached such a conclusion, we are unable to comprehend how the adjudicating authority, in spite of reaching such conclusions has



nonetheless in the order portion of the impugned order (pages 21 to 22) has peremptorily confirmed the entire tax income found in the trial balance of the appellant without any justification for his sudden change in stand.

5.5 We, however, find that on the same issue, in appellant's own case, the Tribunal in RE : *Bax Global India Ltd. Vs CST Bangalore* - 2008 (9) STR 412 (Tri.-Bang.) held that amount collected by CHA like cartage revenue, MSIL/JWG charges, due carrier, documentation charges etc. are for services rendered by third party and the appellant initially make payment for the activities on behalf of the client and later collected the amount from the client and that these are actually reimbursable expenses and not relating to the CHA activities. Even in respect of air freight, the Tribunal held that these charges cannot be said to be related to the activities of CHA. The relevant portion of the Tribunal's decision is reproduced below for ready reference.

"9. On a very careful consideration of the issue, we find that the appellants apart from the activity of the Customs House Agent undertake work as freight forwarders and other activities related to that. We have perused the details of the billing for their entire period under dispute. It is broadly categorized in the following way. The charges are relating to :-

- (1) Air exports
- (2) Air imports
- (3) Ocean exports
- (4) Ocean imports
- (5) Customs clearance
- (6) Logistic.

For example, in respect of Air exports, for the year 2000-2001 the Freight revenue is of the order of 8.8 crores. That means, this amount



represents the freight collected by the appellants towards air freight for the customers and then paid to the airlines. This amount has also been sought to be taxed under the Customs House Agent activity. This shows the adjudicating authority has not applied his mind to the details of the various activities undertaken by the appellants and how they relate to the amount collected by them. In respect of air exports apart from freight, they collected various other charges i.e. Cartage revenue, MSIL/JWG charges, due carrier, documentation etc. In all these cases the services are rendered by the third party and the appellants initially make payment for the activities on behalf of the client and later collect the amount from the clients. These are actually reimbursable expenses and they do not relate to any CHA activities. In these cases, on going through the statement, we find that in certain cases the appellants had incurred less cost and in certain cases, they had incurred more cost. In any case, the profit or loss incurred in respect of activities which are not related to CHA activities should not be the concern of the Department for the purpose of collecting service tax. The Apex Court's decision in *Baroda Electric Meters Ltd.* case (supra), even though it relates to the Central Excise, has definitely a bearing on this. If the appellant performs an activity which is not related to the customs house agent then service tax cannot be levied on that activity under the category of CHA services. Similarly, we have seen the break up of all other services. It was already pointed out by the appellants that in certain cases, the appellants directly render certain services which do not relate to CHA and they collect fees directly from the clients. These charges are 'charges collect fee', 'DO fee', 'Currency Adjustment Fee', 'Cartage revenue', etc. The appellants have clearly explained the nature of each of these charges. The Commissioner has not discussed the nature of each of the charges and given a finding whether it relates to CHA services. The definition of CHA as given in the Finance Act, 1994, Section 65(35) reads as follows :-

(35) "Customs House Agent" means a person licensed, temporarily or otherwise, under the regulations made under sub-section (2) of Section 146 of the Customs Act, 1962 (52 of 1962);

(105)(h) to a client, by a custom house agent in relation to the entry or departure of conveyance or the import or export of goods;

Regulation 2(c) of the Customs House Agents Licensing Regulations, 2004 defines customs house agent as under :

"(c) "Customs House Agent" means a person licensed under these regulations to act as agent for the transaction of any business relating to the entry or departure of conveyances or the import or export of goods at any Customs Station."

When we carefully go through the definition of the customs house agent, we find that the activity of the CHA relates to the entry or departure of conveyances or import or export of goods at any Customs station. Therefore the activity of the CHA is limited to the Customs Station. It cannot extend beyond it. For example, in the present case, the appellants collect air freight for export from the clients, but before collection he pays from his pocket to the Airliner. Thus this activity relates to transportation from a port in India or from a place in India to any other place in a foreign country. These freight charges cannot be said to be related to the activity of the CHA. In any case, the air freight fee is for a passage beyond India. This service is also not rendered by the CHA. The freight charges collected is for the transportation of the goods and the transportation service is rendered actually by the Airliner



and not the CHA. These points have not been properly gone through by the adjudicating authority. Similarly if we see the breakup of other services, they do not relate to CHA activity at all. Further we find that storage and handling charges came into the service tax net only with effect from 16-8-2002. In these circumstances, we are of the opinion that there is no merit in the impugned order. Moreover as contended by the learned Advocate, the major amount portion of the Billing represents freight charges and the Commissioner (Appeals) had already decided the issue in favour of the appellants. The order of the Commissioner (Appeals) has not been challenged by the Revenue. In such circumstances, we agree with the learned Advocate for the appellants that the Revenue cannot agitate over the issue which has become final. The demand is also time-barred. In view of the above observation, we are of the view that the impugned order is not sustainable. Summing up, we find that the appellants had already discharged the duty liability in respect of the Customs House Agent activities undertaken by him. As regards all the other activities, we find that they do not relate to customs house agent activities. Even if any profit has been made in respect of those activities, they cannot be subjected to service tax in view of the Apex Court decision in the *Baroda Electricity Meters Ltd.* case (supra). In fine the demand is not sustainable. There is no justification for imposition of any penalty. We set aside the impugned order and allow the appeal with consequential relief."

5.6 The second issue is whether free booking of space in shipping liners would amount to BAS or not. The appellant in respect of demand under BAS. The appellant pre-books the slots even before they get an order from their exporter or other client. It is not the case that the appellants are doing on behalf of client only after they get an export order. The Tribunal in RE : *Greenwich Meridian Logistics (I) Pvt. Ltd. Vs CST Mumbai* – 2016 (43) STR 215 (Tri.-Mumbai) held that while notional surplus was earned from purchase and sale of space however that it was not by acting for the client. The relevant portion of the order is reproduced below :

"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

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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."

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5.7 Similar view has been expressed by the Tribunal in the case of *DHL Lemuir Logistics Pvt Ltd. Vs CCE Thane - 2017 (47) STR 309* (Tri.- Mumbai) wherein the Tribunal held as follows :

" 7.In the context of these *contra* transactions of specified space on the air carrier, we examine the taxable service and the definition thereto. The taxable service according to Section 65(105)(zzb) of Finance Act, 1994 is that provided or agreed to be provided :

to a client, by any person in relation to business auxiliary service'

and relevant extract of Section 65(19) of Finance Act, 1994 defining 'business auxiliary service' is :

'any service in relation to

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promotion or marketing of service provided by the client; (ii) or

any customer care service provided on behalf of the (iii) client; or

procurement of goods or services, which are inputs for the (iv) client; or

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provision of service on behalf of client; or (v)

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and includes services as a commission agent... ..'

A harmonious reading of the provisions supra points to the 'client' being an essential ingredient in the rendering of a taxable service; the client is the one who pays the consideration for rendering of such service. No record of any receipts from airlines has been brought on record to evince the flow from them as clients. On the contrary, the appellant pays the airlines for booking of space in aircraft. The airlines, therefore, lack the distinguishing characteristics of a client. The excess reimbursement is the true market price paid by the consignor to the appellant over and above the price at which slot was pre-booked from the airline. Of the many activities listed in the definition supra, the closest may, at best, be the procurement of services that are inputs for a client. However, here too, the appellant does not, in relation to the amounts entered in the books of accounts, procure space for the client but on its own behalf which are then sold to its clients. As no commission is involved in this trading of 'freight slots', the appellant

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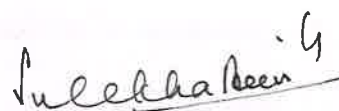
can hardly be designated as commission agent. Therefore, pre-booking of slots which may realise upon allotment to a customer does not conform to the definition supra and hence is not liable to tax within the scope of the show cause notice. The Tribunal in *Greenwich Meridien Logistics (I) Pvt. Ltd. v. Commissioner of Service Tax Mumbai* [2016 (4)TMI 547-CESTAT-MUMBAI = 2016 (43) S.T.R. 215 (Tri.-Mum.)] found in favour of the assessee in a parallel matter relating to ocean freight. The demand of ₹ 2,56,896 fails the test of authority of law and is set aside."

5.8 We do not find any cogent ground or reason to deviate from the ratio already laid down by the Tribunal in the appellant's own case and in *DHL Lemuir Logistics Pvt. Ltd.* (supra). This being so, the impugned order cannot sustain and will have to be set aside, which we hereby do. In consequence, appeal is therefore allowed with consequential benefits, if any, as per law.

(pronounced in court on 18-09-2017)



(Madhu Mohan Damodhar)
Member (Technical)



(Sulekha Beevi C.S.)
Member (Judicial)

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प्रमाणित प्रति / Certified True Copy


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