IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHENNAI

REGIONAL BENCH – COURT NO. I

Service Tax Appeal No. 347 of 2011

(Arising out of Order-in-Original No. 03/2011 dated 23.02.2011 passed by the Commissioner of Central Excise & Service Tax, Chennai-III Commissionerate, No. 26/1, Mahatma Gandhi Road, Nungambakkam, Chennai – 600 034)

M/s. Fifth Avenue Sourcing Private Limited : Appellant
1550, 18th Main Road, Anna Nagar (West)
Chennai – 600 040

VERSUS

The Commissioner of Central Excise and Service Tax : Respondent
Chennai-III Commissionerate
No. 26/1, Mahatma Gandhi Road, Nungambakkam,
Chennai – 600 034

WITH

Service Tax Appeal No. 181 of 2012

(Arising out of Order-in-Original No. 127/2011 dated 22.12.2011 passed by the Commissioner of Central Excise & Service Tax, Chennai-III Commissionerate, No. 26/1, Mahatma Gandhi Road, Nungambakkam, Chennai – 600 034)

M/s. Fifth Avenue Sourcing Private Limited : Appellant
1550, 18th Main Road, Anna Nagar (West)
Chennai – 600 040

VERSUS

The Commissioner of Central Excise and Service Tax : Respondent
Chennai-III Commissionerate
No. 26/1, Mahatma Gandhi Road, Nungambakkam,
Chennai – 600 034

AND

Service Tax Appeal No. 41232 of 2013

(Arising out of Order-in-Original No. 02/2013 (RST) dated 27.03.2013 passed by the Commissioner of Central Excise & Service Tax, Chennai-III Commissionerate, No. 26/1, Mahatma Gandhi Road, Nungambakkam, Chennai – 600 034)

M/s. Fifth Avenue Sourcing Private Limited : Appellant
1550, 18th Main Road, Anna Nagar (West)
Chennai – 600 040

VERSUS

The Commissioner of Central Excise and Service Tax : Respondent
Chennai-III Commissionerate
No. 26/1, Mahatma Gandhi Road, Nungambakkam,
Chennai – 600 034

APPEARANCE:

Shri N. Anand, Learned Advocate for the Appellant

Smt. Sridevi Taritla, Learned Additional Commissioner for the Respondent

CORAM:

HON'BLE MR. P. DINESHA, MEMBER (JUDICIAL)
HON'BLE MR. M. AJIT KUMAR, MEMBER (TECHNICAL)

FINAL ORDER NOs. 40125-40127 / 2023

DATE OF HEARING: 27.02.2023

DATE OF DECISION: 07.03.2023

Order : [Per Hon'ble Mr. M. Ajit Kumar]

These appeals are filed by M/s. Fifth Avenue Sourcing Pvt. Ltd. (FASPL) against the Order in Original Nos. 03/2011 dated 23.02.2011, 127/2011 dated 22.12.2011 and 02/2013 (RST) dated 27.03.2013 passed by the Commissioner of Central Excise, Chennai – III Commissionerate.

2. The facts of the case are that FASPL rendered services to foreign companies for evaluation of prospective garment manufacturers, processing purchase orders, customer management, tracking of delivery schedules, operational assistance for marketing, customer service, pricing policies, managing, distribution, logistics etc. They also rendered services to domestic vendors by procuring orders for them from foreign companies, rendered operational assistance in execution of purchase orders and ensured receipt of sale proceeds from foreign buyers. The case made out by Revenue against FASPL is that the above activities fall under the category of 'Business Auxiliary Service' (BAS) and the consideration received is liable to service tax. On the other hand, FASPL is of the view that the above services are liable to service tax under 'Business Support Services' (BSS) and that no service tax is payable as the said services is required to be treated as export of

services among other things. The present Show Cause Notices dated 12.01.2010, 07.04.2010 and 11.04.2011/19.04.2012 are follow up notices for the periods from April 2007 to September 2008, October 2008 to September 2009 and October 2009 to September 2011 respectively. Earlier, based on intelligence that FASPL did not pay service tax, DGCEI, Madurai, after conducting investigations alleged that the company had evaded payment of service tax. This resulted in the issue of Show Cause Notice to FASPL dated 15.02.2008 for the preceding period i.e., from July 2003 to March 2007. The same was adjudicated by the Commissioner of Service Tax, Chennai vide Order in Original No. 03/2009 dated 20.01.2009 wherein he has confirmed the duty along with interest and also imposed penalties.

3. We have heard Shri N. Anand, Learned Advocate on behalf of the appellant and Smt. Sridevi Taritla, Learned Authorized Representative (A.R.) on behalf of the Revenue.

4.1 The appellant has submitted that the issue is no longer *res integra* inasmuch as the present three appeals against the respective adjudication orders passed by the respondent were for the subsequent period, which were initiated on the basis of the initial Show Cause Notice dated 15.02.2008 based on an investigation by the Directorate General of Central Excise Intelligence (DGCEI). The matter initiated by the said show Cause Notice dated 15.02.2008, has been decided by this Hon’ble Tribunal in their favour and the Civil Appeal filed against the said order of the Tribunal was also withdrawn by the Department vide Order dated 18.12.2020 passed by the Hon’ble Supreme Court. Therefore, the impugned orders for the subsequent period are not sustainable in law.

4.2 He further contended that the services of the appellant rendered to foreign customers cannot also be subjected to Service Tax liability since it is “export of service” as per the Export of Service Rules, 2005

4.3 Further, he submitted that the demand is also hit by limitation since the Show Cause Notices are for a subsequent period; when an earlier Show Cause Notice has already been issued, the Revenue cannot plead suppression or mis-statement of facts in the subsequent Notices, as held in the case of *M/s. Nizam Sugar Factory v. Collector of Central Excise, A.P. [2006 (197) E.L.T. 465 (S.C.)].*

4.4 They have hence prayed to set aside the impugned order and allow their appeals.

5.1 The Learned Authorized Representative Smt. Sridevi Taritla appearing on behalf of Revenue has submitted a written submission dated nil during the hearing and stated that, in the instant case, the activities of the appellant are *prima facie* classifiable under two sub-clauses of clause (105) of Section 65 of the Act and hence, the provisions of Section 65A regarding classification of taxable service has to be considered before deciding the issue. It was submitted that the Hon'ble CESTAT has decided the classification without going into the provisions of the said section.

5.2 Further, she stated that FASPL retained certain margin during the course of transferring letter of credit issued by the foreign buyer for easy facilitation of realization of sale proceeds by the vendors in India; the LC margin retained by FASPL was nothing but consideration received for the marketing services rendered for vendors and identification and procurement services rendered to the buyers and hence, could not be classified as "export of service". She has further reiterated the points given in the impugned order.

6. We find that the present appeals are a follow-up of the original Show Cause Notice issued to FASPL dated 15.02.2008 for the period from July 2003 to March 2007, which resulted in the issuance of Order-in-Original No. 03/2009 dated 20.01.2009. Aggrieved by the said Order in

Original, the appellant preferred an appeal before the Tribunal at Chennai. The Tribunal vide Final Order No. 42008/2017 dated 07.09.2017 as reported in *2018 (14) GSTL 386 (Tri. -Chennai)* has held as under: -

> *"4.1 The first point is regarding classification of services rendered by the appellant with respect to foreign based clients. This aspect has been examined in detail with reference to LC margin which is substantial portion of the main demand. The Tribunal in the case of Fifth Avenue (supra) examining the identical set of facts and held that these services cannot be considered as BAS and should be treated as BSS, brought under tax liability only with effect from 1-5-2006. We note that even in the category of BSS these services are to be considered as export as both the conditions referred to for export of services have been fulfilled in the present case. The services are availed and consumed by the foreign based client and the consideration has been paid by the said client in convertible foreign exchange. The inference of the original authority is that the LC margin retained by the appellant should be considered in respect of local vendors also, is not supported by facts or law. This is explained by the arrangement as detailed in the letter issued by the bank."*

7. The Hon'ble Tribunal held that no tax liability would arise and that there was no justification for imposition of penalties and allowed the appeal filed by FASPL.

8. We find that the Revenue has taken the plea that the Tribunal in its judgement in the case of *M/s. Fifth Avenue v. Commissioner of Service Tax Chennai* in *Final Order Nos. 768-769/2009 dated 23.03.2009* has decided the classification without going into the provisions of Section 65A of the Finance Act, 1994.

9. Clause (104c) of Section 65 of the Act is reproduced as under: -

> *"(104c) "support services of business or commerce" means services provided in relation to business or commerce and includes evaluation of prospective customers, telemarketing, processing of purchase*

orders and fulfilment services, information and tracking of delivery schedules, managing distribution and logistics, customer relationship management services, accounting and processing of transactions, [Operational or administrative assistance in any manner], formulation of customer service and pricing policies, infrastructural support services and other transaction processing."

10. Clause 19 of Section 65 of the Act reads as under: -

"(19) "business auxiliary service" means any service in relation to, —

(i) promotion or marketing or sale of goods produced or provided by or belonging to the client; or

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

*[* * * *]*

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

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

Explanation. — For the removal of doubts, it is hereby declared that for the purposes of this sub-clause, "inputs" means all goods or services intended for use by the client;]

(v) production or processing of goods for, or on behalf of, the client;

(vi) provision of service on behalf of the client; or
(vii) a service incidental or auxiliary to any activity specified in sub-clauses (i) to (vi), such as billing, issue or collection or recovery of cheques, payments, maintenance of accounts and remittance, inventory management, evaluation or development of prospective customer or vendor, public relation services, management or supervision, and includes services as a commission agent, [but does not include any activity that amounts to manufacture of excisable goods]."

11. We find from a plain reading of clause (104c) of Section 65 that "support services of business or commerce"

specifically relates to evaluation of prospective customers, telemarketing, processing of purchase orders and fulfilment services, information and tracking of delivery schedules, managing distribution and logistics, etc., which were the activities undertaken by the appellant, while the definition of business auxiliary service under clause (19) of Section 65 of the Act is more general in nature. Hence, the services have been correctly classified under the specific heading of 'support services of business or commerce' and does not require us to traverse through section 65A(2) of the Finance Act, 1994. Section 65A(1) states that for the purposes of this Chapter, classification of taxable services shall be determined according to the terms of the sub-clause of clause (105) of Section 65. The same having being satisfied the provisions of Section 65A(2) need not be examined. Moreover, none of the Show Cause Notices have taken recourse to section 65A(2) to decide on the classification of the service.

12. This Hon'ble Tribunal's judgment in the case of the appellant in *M/s. Fifth Avenue v. Commissioner of Service Tax Chennai* [*Final Order Nos. 768-769/2009 dated 23.03.2009*] as reported in *2009 (15) S.T.R. 387 (Tri. – Chennai)* and referred to by Revenue above, has at paragraph 4.1, clearly found without ambiguity that the services rendered to the vendors and the companies by the appellants therein conformed to the statutory definition of SSBC and hence, the services rendered to the vendors and companies were classifiable under SSBC and not under BAS. Hence section 65A of the Finance Act, 1994 was not required to be discussed in the order.

13. As regards Revenue's claim that the LC margin retained by FASPL was nothing but consideration received for the marketing services rendered for vendors and identification and procurement services rendered to the buyers and hence, could not be classified as "export of service". We find that the matter has also been examined in detail by the Hon'ble Tribunal at para 4.1 of Final Order No. 42008/2017 dated 07.09.2017 supra and reproduced

at para 6 above. The issue hence does not survive for fresh consideration.

14. We find that the Order in Original No. 03/2009 dated 20/01/2009, issued by the Lower Authority on identical grounds for the earlier period, was set aside and appeal allowed by the Hon'ble Tribunal vide Final Order No. 42008/2017 dated 07.09.2017 as reported in *2018 (14) G.S.T.L. 386 (Tri. - Chennai).* We respectfully follow the same. It was also brought to notice by the appellant that the appeal filed by the Department against the said judgment before the Hon'ble Supreme Court was dismissed as withdrawn in Civil Appeal No. 4763/2018, due to the litigation policy vide order of the Hon'ble Apex Court dated 18.12.2020.

15. We hence set aside the impugned orders and allow the appeals with consequential relief, if any, as per law.

(Order pronounced in the open court on **07.03.2023**)

Sd/-
(P. DINESHA)
MEMBER (JUDICIAL)

Sd/-
(M. AJIT KUMAR)
MEMBER (TECHNICAL)

Rex/Sdd