IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,
SOUTH ZONAL BENCH, CHENNAI

COURT HALL No.III

SERVICE TAX APPEAL No. 413 OF 2012

(Arising out of Order-in-Original No.22 & 23/2012 dt. 29.03.2012 passed by Commissioner of Central Excise, Chennai-II Commissionerate, M.H.U. Complex, Nandanam, Chennai 600 035)

M/s.Team Global Logistics Pvt. Ltd. **.... Appellant**
No.19, Mooker Nallamuthu Street, Parrys,
Chennai 600 001.

Versus

The Commissioner of GST & Central Excise, **...Respondent**
Chennai North Commissionerate
No.26/1, Mahathma Gandhi Road,
Nungambakkam,
Chennai 600 034.

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APPEARANCE :

Ms. Radhika Chandrasekar, Advocate
For the Appellant

Ms. O.M. Reena, Additional Commissioner (A.R)
For the Respondent

CORAM :

HON'BLE MS. SULEKHA BEEVI C.S., MEMBER (JUDICIAL)
HON'BLE MR. VASA SESHAGIRI RAO, MEMBER (TECHNICAL)

DATE OF HEARING : 30.11.2023

DATE OF DECISION :13.12.2023

FINAL ORDER No.41113-41114/2023

ORDER : Per Ms. SULEKHA BEEVI C.S.

The issue in both these appeals being the same, they were heard together and disposed of by this common order.

2. Brief facts are that the appellants are providing services relating to handling of export and import cargo. They are registered with the Service Tax Commissionerate for Business Auxiliary Service, Business Support Service, Cargo Handling Service and Transportation of Goods by Road Services. During the audit of accounts of the appellant by the Internal Audit Group of Service Tax Commissionerate, it was noticed that the appellant collects charges towards documentation, LCL, destuffing, transportation and delivery order in respect of import cargo and Terminal Handling Charges and

documentation charges in respect of export cargo. The appellant has paid the service tax on all the above charges.

3. On verification of financial accounts, it was noticed that "Net Operating Income" had been accounted for by the appellant as income after deducting the operative expenses. Hence the gross receipts as per General Ledger pertaining to the different periods viz. 2006-07 to 2008-09 (upto Jan'09) and Feb'09- September'09 was verified with the value of taxable services as reckoned by the appellant for payment of service tax. It was seen that the freight expenses from the gross receipts and the resultant net receipts was found to be higher than the taxable value adopted by the appellant for paying service tax. The appellant had not discharged service tax on the mark up (difference) received by them on freight charges. The activity of providing transportation services would come under 'Business Support Services'.

4. It was noticed by the department that there is short payment of service tax and the appellant has not discharged the service tax liability on the entire amount received for providing the services. Show cause notice was issued for the different periods proposing to demand the service tax along with interest and also for imposing penalties. After due process of law, the lower authorities confirmed the demand, interest and imposed penalties. Aggrieved by such orders, the appellant is now before the Tribunal.

5. The Ld. Counsel Ms. Radhika Chandrasekar appeared and argued for the appellant. Ld. Counsel adverted to para-9 of the OIO

dt. 29.03.2012 to submit that the show cause notice did not clearly provide as to details of the computation of the value alleged to be not included in taxable value by appellant. The appellant vide letter dt. 26.07.2010 requested the department to give details / break up of differential amount of service tax and as to how the demand has been raised. In reply vide letter dt. 31.5.2011, it was intimated to the appellant that the demand in the notice has been arrived on the basis of details of income and other charges in the Profit & Loss Account and the Ledger Accounts by the Internal Audit Group of Service Tax Commissionerate during the audit of appellant's accounts and had also provided break up of the taxable value.

6. On perusal of the show cause notice and the details of break up furnished by the department, the appellant came to understand that the demand has been raised on the profit earned by the appellant as a freight forwarder due to the difference between the freight charged to the shipper and the freight paid to the airlines/shipping lines. The appellant filed reply dated 07.12.2011 to the show cause notice wherein they explained the activity as a freight forwarder. They also explained as to how the excess amount received by them is not subject to levy of service tax. It is submitted that the appellant is carrying on business activities as 'Freight Forwarder/Freight Consolidators' and 'Cargo Consolidator' and mainly into Ocean/Air Freight forwarding business though the bulk of their business is related to Ocean Freight Forwarding and acting as a 'Freight Aggregator' or "Freight Consolidator" as is known in the commercial parlance. Appellant negotiates with shipping companies

and book the cargo space (entire space within a marine Container) with various shipping lines; owing to a good rapport with the Shipping Lines and their assurance of regular business, they are able to get a good Freight Rate from the shipping Company compared to rack rate which is normally charged by the shipping company to its retail / walk in customers. Thereafter, they sell the space so booked to exporters / importers / other Freight Forwarders and CHAs at market rate. In other words, the privity of ocean freight contract is between the appellant and customers on Principal to Principal basis and not between shipping line and the customers. The appellant undertakes the sea/air/road transportation of goods for customers and issues their own bill of lading to their customers which, in trade terminology, is known as 'House Bill of Lading'. The shipping/ airlines issue a Master Bill of Lading to the appellant on its "buy" rate. A Master Bill of Lading is basically, a contract of carriage between shipping/airlines and the appellant and covers a consolidated (aggregated) shipment of goods indicating the appellant as the shipper. The contractual arrangements for transportation of goods was therefore only between the appellant and shipping/airlines and the appellant issues their own airway bill (bill of lading) i.e. House Bill of Lading to its clients (ultimate shippers).

7. The appellant is neither the agent of shipping lines nor, an agent of any shipper. They deal directly in the ocean/air freight and take the risk of loss in case of not getting the committed cargo or getting the rate lower than negotiated rate charged by the shipping line to them or had to send out a Container due to time constraints

without filling it up to capacity. The difference between buy rate and sell rate is their margin on trading in cargo space and not at all related to any services rendered by appellant to anybody. It represents profit (or loss) from selling cargo space known in trade terminology as "air freight rebate", "freight differential" or "net operating income (or loss) from freight operations. The charges relating to Ocean Freight and Air Freight are recovered and accounted for in the Books of Accounts under various heads which are as under:

FREIGHT	Charges paid for transport of container to destination
BAF	To offset the effect of fluctuations in the cost of bunkers
CAF	Freight rates to offset losses or gains for carriers resulting from fluctuations in exchange rates of tariff currencies
CONGESTION	Charges paid for accumulation of vessels at a port to the extent that vessels arriving to load or discharge are obliged to wait for a vacant berth.
CSS	Congestion surcharge
FBS	To offset the effect of fluctuations in the cost of bunkers
FAF	Surcharge which is added to our freight rates to adjust for current extraordinary fuel prices.
HAZ	Spl. freight is charge for Hazardous Cargo.
PSS	To cover contingent peak season costs
SUEZ	This surcharge covers additional vessel, operational and associated costs that are incurred in case of port congestion

8. The above charges are for accounting purpose grouped under a single head called "Vessel Voyage Dispersal A/c' upto 31.03.2008. Besides, Ocean / Air freight and other expenses related to such freight, the appellant also recovers various charges like documentation, LCL, De-stuffing, transportation and delivery order charges, terminal handling charges etc. in respect of import cargo or export cargo as the case may be. These charges were recovered for the services provided by them as an integral part of their main business of freight forwarding. In other words, the various activities in respect of which charges are recovered, are not undertaken on standalone and independent basis.

9. The activities undertaken as freight forwarder in relation to the Ocean Freight is not exigible to levy of service tax since 'Sea Transportation Services' i.e. Ocean Freight is outside the purview of levy of service tax. On the other hand, though Air Transportation Service (i.e.) Air Freight is covered by the taxable entry viz. "Transportation of Goods by Air Services" as defined under section 65 (105) (zzn) of the Finance Act, 1994, the responsibility to discharge service tax liability is on the 'Air Craft Operator' under this category of services. The learned counsel submitted that the appellant is not liable to pay service tax in respect of ocean freight /air freight and other charges / expenses in relation to transport of cargo recovered from the customers.

10. The learned counsel asserted that the charges recovered under the head 'documentation, de-stuffing, delivery order charges,

LCL charges, transportation charges etc. are not standalone functions and only ancillary or incidental activities to the main activity of freight forwarding. Service tax is not payable even on such charges recovered from the customer. However, on misunderstanding of law, they were discharging the service tax liabilities in respect of all such charges except ocean freight or air freight and related charges.

11. The difference between the selling price and the purchase price is nothing but profit or loss on air/ocean freight which cannot be subject to service tax. Air freight/ Sea freight per se is not subject to levy of service tax and for this reason itself the difference of freight charges cannot be subject to levy of service tax. The activity undertaken by the appellant is nothing but sale of cargo space and the difference between the purchase and selling price is nothing but profit earned on the freight booking and cannot be taxed under Business Support Service.

12. Ld. counsel referred to Board’s circular DOF No.334/4/2006-TRN dt. 28.2.2006 wherein clarification has been issued in respect of Business Support Services. Relevant part reads as under :

> “3.13 **Business Support Services :** Business entities outsource a number of services for use in business or commerce. These services include transaction processing, routine administration or accountancy, customer relationship management and tele-marketing. There are also business entities which provide infrastructural support such as providing instant offices along with secretarial assistance known as “Business Centre Services”. It is proposed to tax all such outsourced services. If these services are provided on behalf of a person, they are already taxed under Business Auxiliary Service. Definition of support services of business or commerce gives indicative list of outsourced services.”

13. Ld. Counsel argued that the instructions issued by the Board would show that in regard to BSS, the intention of the Government is to bring various outsourced services within the ambit of levy of service tax. In the present case, the shipper is the client of the appellant. The shipper is not engaged in transportation service and therefore it cannot be said that such transportation services have been outsourced to the appellant by shipper (their client) for the activity to fall under BSS. The allegation of the department that the services rendered by the appellant is managing, distribution and logistics service and therefore falls within the definition of BSS is without any basis. The amount shown as net operating income is the profit earned out of the difference in freight charges paid to shipping/airlines.

14. The issue as to whether profit earned on the difference in freight charges is 'consideration' received for providing services has been analysed and settled in favour of the assessee by various judicial pronouncements.. The following decisions were relied by the learned counsel :

> *(i) EMU Lines Pvt. Ltd Vs CGST & Central Excise - (2023) 4 Centax 122.* The Tribunal decision was affirmed by the Hon'ble Apex *Court in CGST & Central Excise, Belapur Vs EMU Lines Pvt. Ltd.- (2023) 4 Centax 129 (SC).*
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> *(ii) Greenwich Meridian Logistics (India) Pvt. Ltd. Vs CST (2016) 43 STR 215 (Tri.).*
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> *(iii) CST Vs Karam Freight Movers Final Order No.ST/A/5225/2017.*

(iv) CST New Delhi Vs Continental Carriers (2017) TIOL 3964

(v) International Clearing and Shipping Agency vide Final Order Nos.40974-40979/2023 dt. 01.11.2023. This Tribunal decision relied upon decisions *in Karam Flight Freight Movers, Continental Carriers and Greenwich Meridian Logistics (supra).*

(vi) Geodis Overseas Pvt. Ltd. Vs The Commissioner of Service Tax Final Order No.40265-40266/2022 dt. 24.6.2022

(vii) Bax Global India Ltd. Vs CST Final Order No.42113/2017 dt. 18.09.2027

(viii) Airogo Travels and Cargo Pvt. Ltd. Final order No.43487/2017 dt. 19.12.2017

*(ix) AVR Cargo Agency Final Order No.*40876/2018 dt. 2.3.2018

(x) *Argonaut Logistics India Pvt. Ltd. Final Order No.40682/2020 dt. 5.3.2020.*

(xi) Marinetrans India Pvt. Ltd. VST Hyderabad-ST (2019) TIOl 1260

(xii) Island Aviation India Pvt. Ltd. Vs CGST & C.Ex 2019-TIOL-2141-CESTAT-Mad.

(xiii) Tiger Logistics (India) Ltd. Vs CST-II New Delhi (2022) 63 GSTR 337 (Tri.-Del.)

15. The Ld. Counsel put forward arguments on the ground of limitation also. It is submitted that the issue is purely interpretational and that the appellant was under bonafide belief that these amounts need not be included in taxable value. The appellant has properly

accounted the receipts and has not suppressed facts with intent to evade payment of tax.

16. Ld. A.R Ms. O.M. Meena appeared and argued for the Department. The findings in the OIO dt. 29.03.2012 at para 19 – 24 were reiterated by the Ld.A.R. It is prayed that the appeals may be dismissed.

17. Heard both sides.

18. The issues that arise for consideration are (i) whether the amount accounted as net-operating income in the financial accounts of the appellant is a consideration received by the appellant for providing services under the category of BSS and (ii) whether extended period is invocable or not.

19. The main activity of appellant is freight forwarding. They book cargo for transportation by shipping lines / air lines and negotiates with the shipping lines / air lines for a better rate for the cargo space. Later, appellant may sell the space to other freight forwarders at a higher rate than what is being agreed upon with the liner. At times the appellant is required to pay less freight than what is collected from the client, depending on various factors. This excess amount is accounted by them as net operating income in their financial statements.

20. The demand has been raised under Business Support Service. The definition of Business Support Service as given in Section 65 (104c) reads as under :

> "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 for marketing, formulation of customer service and pricing policies, infrastructural support services and other transaction processing.
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> ***Explanation***. — For the purposes of this clause, the expression "infrastructural support services" includes providing office along with office utilities, lounge, reception with competent personnel to handle messages, secretarial services, internet and telecom facilities, pantry and security;

21. The allegation in the SCN is that that amounts are received for managing, distributing and logistics. The appellant being a freight forwarder has discharged the service tax on the amount received for providing freight forwarding services. The amount accounted under 'net operating income' is now brought to levy of service tax under BSS. This amount is only excess of the freight charges. The differential freight earned by the appellant is not consideration for services rendered by them to their client. The issue as to whether the difference in the freight charges is a consideration for services and is liable to service tax was analysed in various decisions. In the case of *Greenwich Meridian Logistics (I) Pvt. Ltd. Vs CST Mumbai -* 2016 (43) STR 215 (Tri.-Bom), the very same issue came up for consideration and the Tribunal held that the notional amount earned by the assessee from purchase and sale of cargo space cannot be subject to levy of service tax.

22. In the case of *CST New Delhi Vs Karam Freight Movers* - 2017 (4) GSTL 215 (Tri.) it was held that demand of service tax on the

income earned by the assessee is profit earned out of sale of cargo space and cannot be subjected to levy under BAS.

23. In the case of *CST New Delhi Vs Continental Carriers* – 2017-TIOL-3964-CESTAT-DEL, the same issue was considered. Relevant part of the order reads as under :

> "2. The brief facts of the case are that, the assessee-Respondents are engaged in various activities as Customs House Agent and Freight Forwarder. The dispute in the present appeal relates to their tax liability under the category of 'Business Auxiliary Service' for the period 01.07.2003 to 31.03.2007. As freight forwarder, the assessee-Respondents earned income of two types; one relating to profit on selling the space in the aircraft which they have purchased earlier and later made available to various cargo shippers, and another in the form of commission received from the airlines based on the business they provided to these airlines in transport of cargo. The Revenue sought to tax both the incomes under 'Business Auxiliary Services' by treating them as consideration for promoting the services of another person. The original authority held that the assessee-Respondents are liable to pay the Service Tax only with respect to Commission received from airlines w.e.f. 10.09.2004 when the consideration received as 'Commission' is specifically brought into the ambit of 'Business Auxiliary Service'. Other demands were dropped. Being aggrieved, the Revenue is in appeal.
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> … … ….
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> 6. Similar ratio has also been followed in the case of Karam Freight Movers (supra). The observations of the Tribunal are as below :
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> **"11. On the second issue regarding the service tax liability of the respondent under BAS, we find that the impugned order examined the issue in detail. It was recorded that the income earned by the respondent, to be considered as taxable under any service category, should be shown to be in lieu of provision of a particular service. Mere sale and purchase of cargo space and earning profit in the process is not a taxable activity under Finance Act, 1994. We are in agreement with the findings recorded by the original authority. In this connection, we refer to the decision of the Tribunal in Greenwich Meridian Logistic (I) Pvt. Ltd. vs. CST, Mumbai – 2016 (43) STR 2w15 (Tri-Mumbai). The Tribunal examined similar set of fact and held that the appellants often, even in the absence of shippers, contract for space or slots in vessels in anticipation of demand and as a distinct business activity. It is a transaction between principal to principal and the freight charges or consideration for space procured from shipping-lines. The surplus earned by the respondent arising out of purchase and sale of space and not by acting for client who has space or not on a vessel. It cannot be considered that the respondents are engaged in promoting or marketing the services of any "client"."**

> 7. As the issue has already been decided in favour of the assessee-Respondents in the above mentioned orders of the Tribunal, we find no merit in the present appeal filed by the Revenue and the same is dismissed."

24. This Bench in the case of *M/s. International Clearing & Shipping Agency Vs CGST & CE Chennai* vide per Final Order No.40974-40979/2023 dated 01.11.2023 had an occasion to consider similar issue . Relevant part of order reads as under :

> "7.4.1 The third issue is the demand raised on freight and brokerage, etc.,. The Ld. Counsel submitted that the appellant receives a brokerage / rebate from the shipping line on the ocean freight that they have to pay to the shipping lines. It is in the form of the discounts or incentives paid to the CHA and such amount is not a consideration for providing any CHA services. In fact, the appellant does not provide any CHA service to the shipping line. They act as an agent on behalf of the importer / exporter. So the incentive or the discount received by the appellant from the shipping line cannot be treated as a consideration received for CHA services. In the case of *Commissioner of Service Tax, New Delhi Vs. Karam Freight Movers [2017 (4) GSTL 215 (Tri. Del.)],* the Tribunal observed that the mark-up value collected by the assessee from the exporter is an element of profit in the transaction. The said amount is not a commission earned by the assessee and is not while acting as an agent of the exporter or shipping line and cannot be considered as a consideration. The assessee while acting as an agent on behalf of the shipping line was discharging the Service Tax as Steamer Agency services. The Tribunal took the view that the markup value collected by the assessee being an element of profit in the transaction cannot be subject to levy of Service Tax. Similar view was taken by the Tribunal in the case of *Commissioner of Service Tax, New Delhi Vs. M/s. Continental Carriers* [2017-TIOL-3964-CESTAT-DEL] and in the case of *Greenwich Meridian Logistics (I) Pvt. Ltd. vs. Commissioner of Service Tax, Mumbai [2016 (43) STR 215 (Tri. Mumbai)].* In the present case also the Department does not have a case that the appellant has not discharged Service Tax on the agency commission received as a Steamer Agent or CHA. The demand is raised on the mark-up made which is the profit out of the difference in value of ocean freight collected by

the shipping line and paid by the exporter / client. The Tribunal in the case of *Greenwich Meridian Logistics (I) Pvt. Ltd. (supra)* held as under:-

> *"**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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> ***14.** We, therefore, find no justification for sustaining of the demand and, accordingly, set aside the impugned order. Demands, with interest thereon, and penalties in both orders are set aside. Cross-objections filed by the department are also disposed of."*

7.4.2 Following these decisions, we are of the opinion that the demand of Service Tax on freight brokerage cannot sustain and requires to be set aside. Ordered accordingly."

25. In the case of *EMU Lines Pvt. Ltd. Vs Commissioner of GST & Central Excise, Belapur* – (2023 (4) CENTAX 122 (Tri.-Bom) , the Tribunal had occasion to consider the issue as to whether the profit earned by sale and purchase of cargo space is subject to levy of service tax. The Tribunal considered the decision in the case of *Greenwich Meridian Logistics* (supra) and various other decisions and held that the demand cannot sustain. The said decision was upheld by the Hon'ble Apex court as reported in (2023) 4 Centax 129 (SC) .

26. After considering the submissions and following the decisions cited supra, we are of the considered opinion that the demand of service tax cannot sustain and requires to be set aside.

27. Ld. counsel has argued on the ground of limitation also. Demand has been raised after the verification of the accounts of the appellant by Audit Group. The quantification of demand has been arrived from the accounts maintained by appellant. We therefore do not find any positive act of suppression with intent to evade payment

of tax established by department Further, the issue is contentious and there are several decisions in favour of assessee. We find that the SCN issued invoking extended cannot sustain. The issue on limitation is also answered in favour of appellant.

28. In the result, the impugned orders are set aside. The appeals are allowed with consequential relief, if any.

(Pronounced in court on 13.12.2023)

sd/-

(VASA SESHAGIRI RAO)
Member (Technical)

sd/-

(SULEKHA BEEVI C.S.)
Member (Judicial)

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