CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
<u>CHENNAI</u>

REGIONAL BENCH - COURT No. III

Service Tax Appeal No.40063 of 2019

(Arising out of Order-in-Appeal No.460/2018 (CTA-II) dated 28.9.2018 passed by Commissioner of Central Tax (Appeals-II),CGST & Central Excise, Newry Towers, 2nd Floor, Plot No.2054, I Block, II Avenue, Anna Nagar, Chennai 600 040)

M/s.Vantec Logistics India Pvt. Ltd. **.... Appellant**
Building 3, No.124, Vallam A Village,
Sriperumbudur Taluk, Kanchipuram District,
Chennai 602 105.

VERSUS

The Commissioner of CGST & Central Excise **... Respondent**
Chennai Outer Commissionerate
Newry Towers, I Block, II Avenue,
12th Main Road, Anna Nagar,
Chennai 600 040

<u>APPEARANCE :</u>

Shri N. Prasad, Advocate, for the Appellant
Shri Anoop Singh, Authorized Representative for the Respondent

<u>CORAM</u> :

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

<u>FINAL ORDER No.40633/2024</u>

DATE OF HEARING : 06.06.2024
DATE OF DECISION : 06.06.2024

Per: Ms. Sulekha Beevi. C.S

Brief facts are that the appellant is engaged in rendering various services such as Goods Transport Agency, Clearing and Forwarding Service, Storage and Warehousing Service, Management or Business Consultant Service, Steamer Agent Service and also arranges transportation of export cargo through ships as well as through airliners. They are registered with the department for providing these services. During the course of verification of balance sheets for the year 2011-12 to 2014-16, it was seen that the appellant has paid service tax only on certain receipts but had not paid service tax on ocean freight as well as air freight. The department was of the view that the appellant has to pay service tax on such air freight and ocean freight charges collected by them for the period prior to 01.07.2012 under Business Support Service and for the period after 01.07.2012 in terms of Section 65B (44) of the Finance Act, 1994. After due process of law, the original authority confirmed the demand of service tax, interest and imposed penalties. On appeal, the Commissioner (Appeals) upheld the same. Hence this appeal.

2. Ld. Counsel Shri N. Prasad appeared and argued for the appellant. It is submitted that appellant is a private limited company incorporated under the Companies Act, 1956. The Appellant is inter alia involved in the activity of rendition of International Freight Forwarding and transportation of cargo by air and sea. The Appellant is engaged in the business of booking air and sea cargo by appointing International Air Transport Association (hereinafter referred to as the "IATA") and Multimodal Transport Operator (hereinafter referred to as the "MTO") agents, clearing and forwarding/freight consolidating, logistics management service, warehousing and distribution service which includes warehousing, inventory management, sorting and grading as per Clients instructions, packing and repacking, distribution with the help of third party and own vehicles and goods transport

agencies services. While so, in their Clearing and forwarding business division, the Appellant was involved in freight forwarding business (end to end) to its customers and execute the clearing and forwarding business by appointing agents (i.e., freight forwarders) since they (Appellants) do not possess the IATA and MTO license. Further, the Appellant is also involved in the provision of various services in relation to Import/Export of goods as international freight services, loading/unloading services, transportation of goods from the port/airport to the customers location and vice versa. The Customer has the option to avail the services as per their requirements. For the services rendered under this Clearing and Forwarding division, the Appellant is registered under the service category of "Clearing and Forwarding Service". The Appellant`s agents contact directly the Shipping lines/airlines for any negotiation of space or rates on behalf of the Appellant since the Appellant does not hold the license. The Airline mentions the name of the *Appellant as the "Principal forwarder"* in the *Master Airway Bill* (hereinafter referred to as the "MAWB") and the *Agent`s name as the "nominated agent"*. However, in certain MAWB`s, the agents name is only furnished in order to avoid insurance problems specific to such export shipments. Further, the Appellant nominates their Overseas group companies abroad for handling their shipments abroad. They raise the handling of shipping charges on their respective overseas companies and collect the same. However, if any extra charges are collected by the Overseas Companies for such shipments except Delivery Duty Unpaid (DDU), Delivered Duty paid (DDP) and prepaid, then the extra charges will be shared equally as "profit share".

2.1 It is submitted by the Ld. Counsel that the Appellant stipulates the terms and conditions to their Agents in the contract based on shipment business and ensures that the *Agent is no way connected to their end Customers*. In turn, the Appellant has *separate contracts with their end Customers* for clearing and forwarding of their goods from places in India and also abroad. It is *only the Appellant who is responsible for executing all the clearing and forwarding works to its end Customers* and also liable for any damages if any, that occurs during the shipment to the ultimate recipient/buyer of its customer. Therefore, the Appellant, undoubtedly has acted in the "*principal*" capacity to all its customers. While so, for the period between October, 2011 to September, 2016 (hereinafter referred to as the "disputed period"), the Show Cause Notice SCN No.11/2017(ADC) dated 20th April, 2017 had alleged non-payment of service tax on the *"Profit/mark-up"* earned by the Appellant on the buying and selling of ocean space under the head "*Business Support Service*" falling under Section 65(104c) of the Finance Act, 1994 for the period upto 30th June, 2012 and under "taxable service" for the period from 1st July, 2012, apart from the proposal to invoke extended period of limitation and thereby imposing consequential penalty under Section 78 of the Act and also imposition of interest under Section 75 of the Act. A reply dated 19th May, 2017 was also filed by the Appellant refuting the aforesaid allegations.

2.2 It is submitted that the order of the adjudicating authority is erroneous and opposed to the facts and circumstances of the case of the Appellant.

2.3 The Appellant submits that the modus operandi for them is to book the space with the shipping line and in turn sell the space in the shipping line to the exporter. It is *trading in cargo space* and there is *profit or loss* on the ocean freight element.

2.4 The Appellant submits that for the period up to 01.07.2012, there was a provision under the Act, to provide for levy of service tax on support services. This was *Section 65(105)(zzzq)* of the Finance Act which referred services provided by one person to any other in relation to *support services* of *business or commerce* as taxable. Section 65 (104c) defined support services of business or commerce. It consisted of two parts, which is the means part and the inclusive part. Neither of these parts applies to the Appellant. The main part of the definition of business support services refer to services provided in relation to business or commerce and includes evaluation of prospective customers, telemarketing, processing of purchase orders and fulfillment 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.

2.5 The Appellant submits that the object of support services was to *tax outsourcing services*. It is made clear by the Board Circular No. 334/4/2006-TRU dated 28.02.2006 and in the present case, no outsourcing is involved.

2.6 The Appellant submits that principle of *noscitur-a-socis* clearly applied even to the inclusive definition. The inclusive definition contemplated activities such as evaluation of prospective customers, tele-marketing, processing of purchase orders and fulfilment of services, information tracking of delivery schedule, *managing distribution and logistics*, Customer Relationship Management services, processing of transactions, Operational Assistance for marketing, formulation of customer service and pricing policies. The aforesaid activities looked essentially to *market related work*. The expression "*Managing, distribution and logistics*" would take its color from the *other words* found in the inclusive definition.

2.7 The Appellant submits that it is settled law that even in the context of inclusive definition, the principle of *noscitur-e-socis* will apply. Decision in *Bangalore Water Supply and Sewerage Board Vs Rajappa-AIR 1978 SC 548* was relied by the Ld. Counsel.

2.8 The Appellant submits that its business was that of a freight forwarder which involved the buying and selling of cargo space. This activity was only *trading in cargo space* rather than "Managing, Distribution and Logistics".

2.9 The Appellant submits that the activity of purchase and sale of cargo space in a liner is *not a taxable service*. The demand pertains to *profit on sale of cargo space i.e., sale of freight which is not taxable* under the Act.

2.10 The Appellant submits that it is settled law that in the absence of a clear charging provision, the activity cannot be brought to tax. Decision in *Commissioner of Wealth Tax, Gujarat-III, Ahmedabad Vs Ellis Bridge Gymkhana-(1998) 1 SCC 384* was relied.

2.11 The Appellant submits that the whole activity is outside the purview of service tax on account of the Place of Provision of Service Rules, 2012. What is sought to be taxed in the present case is the margin earned on the ocean freight cargo- *exports* (air and sea).

2.12 The Appellant submits that in terms of the Place of Provision of Service Rules, the place of provision of service is the place of destination of the goods. In terms of Rule 10, the place of provision of service of transportation of goods other than by mail or courier is *place of destination of the goods*. Only in respect of GTA, it is the location of the person that is liable to pay tax. The present service is not a GTA service but ocean freight. The destination of goods which is export is outside the territory of India. Therefore, on application of Rule 10 of the Provision of Place of Service Rules, the place of provision of service is outside the territory of India and, because the Finance Act itself, has only application, *within the territory of India*, there is no levy of service tax on export freight.

2.13 It is submitted that as per para 2.2 and 3.0 of the Board Circular No. 197/7/2016-ST dated 12.08.2016, the Appellant acts as a "*Principal*" undertaking the transportation of *goods to a place outside India and is also bearing the risks and liabilities of transportation*. Therefore, in view of the above, the Appellant will not be an "intermediary" and also export transactions are kept outside the ambit of service tax.

2.14 Without prejudice to the above, it is also submitted by the counsel that once the Agent acts "on behalf" of the Principal, the acts of the Agent are attributable to the Principal. In this regard, the decision of the Hon`ble Supreme Court in the case of CST, *Bangalore Vs Canara Bank* reported in 2023 (5) TMI 137 at page 2 of the judgment was relied

2.15 Appellant is only a freight forwarder and NOT a Multimodal Transport Operator under the Multimodal Transportation of Goods Act, 1993. As per Section 13 of the said Act, it is ONLY the Multimodal Transport Operator who is responsible for the complete Shipment, in which case, even the Invoice will be raised by the Multimodal Transport Operator/IATA Agent on the Customer/Exporter. Whereas, in the present case, the Invoice is raised by the appellant directly on its customer.

3. It is submitted that the Tribunal and the courts have held consistently that there is no liability for service tax on ocean freight or air freight. The following decisions were relied by the Ld. Counsel :

i) Greenwich Meridian Logistics (I) Pvt Ltd Vs Commr of ST, Mumbai - 2016 (43) STR 215 – (Tri.) – MUM -at para 5 to 14.

ii) Surya Shipping Vs CCE and ST, Rajkot 2020 (2) TMI 282 – (Tri.) – AHMD- at para 4 and 5.

iii) Nilja Shipping Pvt Ltd Vs CCE, Chennai-II- 2020 (3) TMI 752-(Tri)- CHN- at para 6 and 7.

iv) M/s. Geodis Overseas Pvt Ltd Vs Commissioner of Service Tax, Chennai reported in 2022 (6) TMI 1085-TRI-Chennai- at para 8.10 to 10.

v) M/s. AGX Logistics Pvt Ltd and Others Vs Commissioner of GST and Central Excise, Chennai reported in 2023 (12) TMI 527-Tri-Chennai-at para 6.1 to 8.

3.1 In this regard, it is submitted that, out of the above, Sl. Nos. (ii),(iii) and (iv) specifically pertains to cases where the demands were raised under "*Business Support Services*" and were set aside by the Tribunal.

3.2 It is submitted that Commissioner (Appeals) in para 10 of the impugned order has erred by rendering a finding that the Appellant had merely made arrangements for transportation of goods and has actually not transported the goods and therefore the service rendered by them is classifiable under "Business Support Service" and not under "international freight". In this regard, it is submitted that the above finding of the First Appellate Authority is erroneous on account of the fact that the said finding was rendered without understanding the modus operandi of the Appellant`s business.

3.3 It is submitted that the adjudicating authority in para 7.01 of the impugned order has erred by rendering a finding that the Appellant has discharged service tax on all charges (like freight charges, LCL charges, delivery order charges, documentation charges, BL fee, terminal handling charges, etc. However, has not discharged service tax on the mark-up portion pertaining to the freight charges(ocean/Air). In this regard, it is submitted that the service tax has been properly discharged by the Appellant on the respective categories on what the Appellant ought to discharge.

3.4 Without prejudice to the aforesaid submissions, the counsel further submitted that the adjudicating authority has erred by placing reliance on the MAWB to allege that the Appellant had acted as a Principal agent to their customers for handling their shipments. In this regard, it is submitted that the learned adjudicating authority has travelled beyond the SCN by placing reliance on an "Air-freight" document which was not even a subject matter of the SCN. It is a settled legal principal that the Authorities cannot travel beyond the scope of the SCN. In this regard, judgement of Hon'ble Apex Court in the case *CCE, Nagpur Vs Ballarpur Industries Ltd reported in 2007 (215) ELT 489(SC) at para 21* was relied.

3.5 The Appellant submits that they were under a bonafide belief that the said mark-up/profit on buying and selling of ocean space were not liable to service tax. It is a settled legal principle that if the Assessee is under a bonafide belief that the service tax is not applicable, then the larger period of limitation cannot be invoked. In this regard, reference was drawn to the decision in *Padmini Products Vs CCE reported in 1989 (43) ELT 195(SC) at para 8.*

3.6 The Appellant submits that the Adjudicating Authority has failed to see that for invoking the extended period of limitation, a mere omission to pay service tax is not sufficient. It should be deliberate. Something positive was required to be established by the Revenue. That burden was wholly on the Revenue. Yet, the SCN under challenge has not discharged that burden. In this regard, it is submitted that the CESTAT, New Delhi in the case of *M/s. SOTC Travels Services Pvt Ltd. (Formerly known as Kuoni Travel India Pvt Ltd) Vs Principal Commissioner of CE, Delhi-I(at para 33-41)* reported in 2021 (9) TMI 897 has held that even when an assessee has suppressed facts, the extended period of limitation can be invoked only when "suppression" or "collusion" is "*willful*" with an intent to evade payment of duty.

3.7 The Show Cause Notice has culled out all the figures only from the books of accounts (i.e., the final accounts- Profit and Loss Account and balance sheet) maintained by the Appellant. It is a settled legal principle that the final accounts are "public documents" and once the disclosure is made in the final accounts, though not to the revenue, the department cannot allege suppression of facts and invoke larger period. In this regard, the decision of this Tribunal, Chennai in the case of *Ford India Pvt Ltd Vs Commissioner, LTU, Chennai (at para 6) reported in 2018(1) TMI 1219 at para 6 to 8* was relied.

3.8 The present issue involves interpretation of the provisions of service tax law and therefore for this reason also, extended period of limitation ought not to be invoked and consequently the penalty under Section 78 of the Act cannot be sustained. In this regard, the decision of the Hon`ble Supreme Court in the case of *International Merchandising Company, LLC (Earlier known as International Merchandising Corporation) Vs Commissioner, Service Tax, New Delhi reported in (2023) 3 SCC 641 at para 28* was relied.

3.9 It is submitted that for the subsequent period, i.e., October, 2016 to June, 2017, the learned Commissioner (Appeals) vide Order In Appeal No.75/2022 dated 14th December, 2022 has set aside the order of the learned Adjudicating Authority and allowed the Petitioner`s Appeal and the department has also not filed an appeal against the said order and the said order has attained finality. It is a settled legal principle that department cannot take a different stand for the earlier period for the very same transaction. Therefore, for this reason itself, the demand has to be set aside. The counsel relied on the decision of this Tribunal in the case of *M/s. Aircel Ltd Vs The Commissioner of Central Excise and Service Tax vide the order dated 9th February, 2023 at paras 12.1, 12.2, 13 and 14.*

4. It is prayed that the appeal may be allowed.

5. Ld. A.R Shri Anoop Singh appeared and argued for the Department. The findings in the impugned order was reiterated. It is submitted by the Ld. A.R that the activity of the appellant would fall under 'Business Support Service' as defined under Section 65 (104c) of the Finance Act, 1944 till 30.6.2012. For the period after the said date, the activity of the appellant would fall under the definition of services as per Section 65B (44) of the Act ibid. Para 7.17 of the order passed by the original authority was adverted to by the Ld. A.R to submit that the appellant has not collected the freight charges on actual basis from its customer. They have collected mark up value on the freight charges. Therefore the freight charges collected by them

are subject to levy of service tax. It is prayed that the appeal may be dismissed.

6. Heard both sides.

7. The issues to be considered are whether the air freight charges / ocean freight charges along with mark up collected by the appellant is subject to levy of service tax and whether the activity of the appellant would fall under 'Business Support Service' prior to 1.7.2012 and under Section 65B (44) of the Act for the period post 1.7.2012.

8. The Ld. Counsel has explained that the activity carried out by the appellant indicates that the appellant's subsidiary company in Japan viz. Vantec HTS Forwarding Ltd., Tokyo, Japan engages the appellant for transportation of the cargo to the foreign buyer. The appellant engages an agent viz. New Globe Logistik Pvt. Ltd., Mumbai as Multimodal Transporter for transport of their cargo. The appellant then raised invoices to the above foreign subsidiary on air freight / ocean freight charges including the mark up. The Department has proceeded to demand service tax on the air freight / ocean freight along with mark up entirely. The freight charges are collected for transportation of goods and not for providing any other service. In fact, from the activity that has taken place, it is nothing but payment of freight for transportation of cargo in airlines as well as shipping lines. The issue as to whether the air freight charges / ocean freight charges as well as mark up is subject to levy of service tax for the period prior to 1.7.2012 has been decided by the Tribunal in various cases. The Tribunal in the case of *Geodis Overseas Private Ltd. Vs CST Chennai* - 2022 (6) TMI 1085 CESTAT CHENNAI has considered the issue and held that the demand cannot sustain. Relevant part of the decision reads as under :

“8.1 The first issue is whether the charges collected by the appellant from its customers in the nature of ocean freight are subject to levy of Service Tax under Business Support Services.

8.2 This issue has been considered in various decisions of the Tribunal wherein the Tribunal has held that ocean freight charges are not subject to levy of Service Tax under Business Support Services or Business Auxiliary Services. The relevant discussion in the case of *M/s. Greenwich Meridian Logistics (I) Pvt. Ltd.* (*supra*) is reproduced 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.
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> 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."

9. The Tribunal in the case of M/s.A.G.X Logistics Private Ltd. M/s.C.A. Logistics Private Ltd. Vs CGST & Central Excise, Chennai – 2023 (12) TMI 527 – CESTAT Chennai has considered the very same issue for the period post-01.07.2012. The demand in the SCN of the said case was raised under Section 65B (44) of the Finance Act, 1994. The discussions by the Tribunal are as under :

> "3.2 The said Section 66D(p)(i) of the Finance Act, 1994, was omitted from the negative list with effect from 01.06.2016 and hence made taxable. In the present case, the demand is for the period from April 2015 to March 2017. In appeal Nos. ST/42511/2017 and ST/41626/2019, the demand is on ocean freight for both export and import whereas in the case of appeal No. ST/40296/2018, the demand of Service Tax is on the air freight as well as mark-up received while paying the freight charges to the liners. The Ld. counsel submitted that the activity does not involve rendering of service and it is mere buying and selling of cargo space for the purpose of transport of goods by ocean / air on principal-to-principal basis. Ocean freight and

air freight is not subject to levy of Service Tax. With effect from 2016, though freight charges for transportation of goods by way of air is subject to levy a Service Tax, the liability to pay Service Tax is on the air liners. The demand raised on the appellant is against the provisions of law.

… … …..

6.1 On perusal of the Annexure to the Show Cause Notice, it is seen that the demand is raised not only on the mark-up but also on the ocean freight and air freight. These charges are not subject to levy of Service Tax during the disputed period. The mark-up received by the appellant on the freight charges is due to the difference in the freight charges collected from the shipper and paid to the shipping / airliners. The issue is no longer res integra, the Tribunal in the case of Tiger Logistics (supra) held that the activity is trading of cargo space and there is no rendering of service. The demand of Service Tax on markup / differential of ocean freight was set aside. The relevant Paragraphs reads as under:-

"7. We have considered the arguments on both sides and perused the records. For a service tax to be leviable :

(a) a service must have been rendered;

(b) the service so rendered must be a taxable service within the meaning of Section 65(105) of Chapter V of the Finance Act, 1994; and

(c) a consideration must have been paid for that service;

8. If a service is not rendered at all, no service tax can be levied regardless of the fact that an amount has been received. Similarly, if the service so rendered does not squarely fall within the definition of „taxable service" under Section 65(105), no service tax can be levied. Even if it is doubtful whether the service is taxable or not, the benefit of doubt in respect of the charging section goes in favour of the assessee and against the revenue. The third important element is the consideration for the service. Any amount received must be for the service and it cannot be for some other purpose. For instance, if any amount is received towards any compensation, such amount cannot be taxed.

9. As far as the differential in ocean freight is concerned, the appellant buys space on ships from the Shipping Line and the Shipping Line issues a Master Bill of Lading in favour of the appellant. In turn, it sells the space to its customers and issues a House Bill of Lading to each of them. The first leg is the contract between the Shipping line and the appellant. The second leg is the contract between the appellant and its customers. Evidently, anyone who trades in any merchandise or service buys low and sells high and the margin is his profit. To earn this profit, he also takes the risk of being unable to sell. In the appellant„s case, if the space on the ships which it bought cannot be sold to its customers fully, or due to market conditions, or is compelled to sell at lower than purchase price, the appellant incurs loss. In a contrary situation, it gains profits. This activity is a business in itself on account of the appellant and cannot be called a service at all. Neither can the profit earned from such business be termed consideration for service. Respectfully following Satkar Logistics, Nilja Shipping Pvt. Ltd., Surya Shipping and ITC Freight Services, we hold that the appellant is not liable to pay service tax. . .

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18. We find that the only allegation of these elements held against the appellant in the impugned order is that of „suppression of facts" and the reason for this is that they have not disclosed the full value of the taxable services in their ST-3 returns. It is also accepted in the impugned order that these services were all duly recorded by the appellant. It is now well established legal principle that „suppression of facts" is not mere omission. It must be a deliberate act with mens rea to suppress and thereby evade. The facts brought out in the impugned order do not demonstrate the mens rea. On the other hand, they show that the appellant had recorded all the transactions in its records and when called for during investigation, provided full facts to the department based on which the SCN was issued. Insofar as the appellant did not dispute the demands of service tax, it paid the same along with interest even before the SCN was issued. In our considered view, this case is covered squarely by Section 73(3) and no SCN should have been issued to that extent.

19. The appellant disputed service tax on mark up which it received from trading space on ships and the reimbursements of the container detention charges and the toll taxes which it paid on behalf of its clients and got reimbursed. We have already found above that no service tax is leviable on these receipts."

6.2 In the case of Direct Logistics India Pvt. Ltd. Vs. Commissioner of Service Tax, Bangalore [2021 (55) GSTL 344 (Tri.-Bang.)], the demand was raised on the mark-up received on the difference between the freight charges collected and paid to the shipping liners. The relevant Paragraphs reads as under:-

"14. It is undisputed that the appellant is registered with service tax department for "Clearing and Forwarding Agent Service" and has been paying service tax on the service charges. What is exigible to service tax under Section 65(105)(j) is any service provided or to be provided to a client by a Clearing and Forwarding Agent in relation to clearing and forwarding operations in any manner. Transport of goods is distinct from clearing and forwarding operations. In this case, the appellant is not only providing clearing and forwarding service but is also providing transport on its own account to its clients by purchasing freight space on the ships from the shipping lines. In some cases, they buy the space on the ship specifically to meet the requirement of the client and in other cases, the appellant buys space on the ship in anticipation of the clients" requirements and then sells the space to the clients. Trading in Ocean Freight is not a service being rendered to the client and no amount is being paid by the client to the appellant as per the records towards trading of cargo space. Evidently as any prudent business would, the appellant is buying space on the cargo ship at a lower price and selling it to its client at a higher price. The difference is its profit. It would have been a different case, if the appellant is organizing space on the ship for their clients and the client is paying shipping line directly and the service of organizing or arranging the space on the ship, the appellant gets paid service charge by the client. In such an arrangement, the amount being received would be a consideration for the service. The present arrangement is an arrangement of the trader who buys cargo space at a lower price and sells it at a higher price and enjoys the margin as profit.

> 15. The nature of the transaction is also clear from the fact that there are cases on record where the appellant had booked the space for higher amount on the ship but due to market conditions, had to sell the space to its customers at a lower price incurring loss. Therefore, in our considered view, the profits gained by the appellant by buying space on ships at lower price and selling at a higher price to the customers cannot by any stretch of imagination be called "Clearing and Forwarding Agent Service". No service tax can be charged on this amount. On an identical question, in the case of Seamax Logistics Ltd. v. Commissioner of Central Excise and Service Tax, Tirunelveli, reported in 2018 (7) TMI 262-CESTAT Chennai has held that no service tax is chargeable on the difference between the ocean freight collected from the clients and the ocean freight paid to the shipping lines.
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> 16. The second question which we have framed is whether in Service Tax Appeal No. 263 of 2008, the appellant is liable to discharge service tax on the amounts which it received from the agents of the Shipping Line for booking cargos under the head „Steamer Agency Service" or not. It is undisputed that the appellant received the amounts not from the shipping line but from its brokers. Charge of service tax under Section 65(105)(i) is leviable on a service rendered „to a shipping line, by a steamer agent in relation to a ship's husbandry or dispatch or any administrative work related thereto as well as the booking, advertising or canvassing of cargo, including container feeder services. There is nothing on record to prove either that the appellant was a steamer agent or that the appellant rendered service to a shipping line. The service, if any, is rendered by the appellant, it is to the broker and not to the shipping line. Therefore, no service tax can be charged on the disputed amount under the category of Steamer Agent Service on the amounts paid by the brokers to the appellant."

10. Following the above decisions, we hold that the demand of service tax for the period prior to 1.7.2012 as well as for the period post-1.7.2012 cannot sustain and requires to be set aside. Ordered accordingly.

11. It also needs to be stated that for the period from 2016 upto June 2017, the show cause notice was issued to the appellant on the same issue. Against the order of confirmation of demand by the original authority, the appellant filed appeal before Commissioner

(Appeals) who vide Order-in-Appeal dt. 14.12.2022 set aside the demand following the decisions of the Tribunal.

12. From the foregoing, we hold that the demand of service tax along with interest as well as penalty cannot sustain. The impugned order is set aside. The appeal is allowed with consequential relief, if any, as per law.

(Order dictated and pronounced in the open court)

sd/-

(VASA SESHAGIRI RAO)
Member (Technical)

sd/-

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

gs