CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
CHENNAI

REGIONAL BENCH - COURT No. III

Service Tax Appeal No.40895 of 2015

(Arising out of Order-in-Appeal No.36/2015 dated 30.01.2015 passed by Commissioner of Service Tax (Appeals-I), Newry Towers, 2051/1, II Avenue, 12th Main Road, Anna Nagar, Chennai 600 040)

M/s.AVR Cargo Agency Pvt. Ltd. **.... Appellant**
No.16 (Old No.4) Salai Street,
Choolai,
Chennai 600 012.

VERSUS

The Commissioner of GST &
Central Excise **... Respondent**
Chennai Outer Commissionerate,
Newry Towers, No.2054, I Block, II Avenue,
12th Main Road, Anna Nagar,
Chennai 600 040.

APPEARANCE :

Ms. Saravana Selvi P., Advocate for the Appellant
Ms. Anandalakshmi Ganeshram, Authorized Representative for the Respondent

CORAM :

HON'BLE MR. P. DINESHA, MEMBER (JUDICIAL)
HON'BLE MR. VASA SESHAGIRI RAO, MEMBER (TECHNICAL)

FINAL ORDER No.40008/2025

DATE OF HEARING : 12.11.2024
DATE OF DECISION : 02.01.2025

Per: Shri P. Dinesha

Facts in brief, as could be gathered from Para 2 of the OIA, reads thus:

The appellant is a provider of Custom House Agent service and Business Auxiliary Service. The Appellant while rendering CHA service are receiving Air freight from the clients and paying the same to the Airlines for forwarding cargo. As freight forwarders they are procuring the services of providing cargo space by airlines for their clients use for the export of goods which appeared to be classifiable under 'Business Auxiliary Service' under the category of procurement of goods or services which are inputs for the client with effect from 10.09.2004. This mark up on the cost incurred on the air freight appear to be the consideration received for rendering the above services and will form part of the value of such taxable service and service tax is payable on the paid differential freight charges under 'Business Auxiliary Service'. Hence show cause notice was issued proposing to demand service tax of Rs.1,52,027/- for the period from April 2009 to March 2010 along with interest and impose penalty under Section 76 of the Act. That came to be examined in the impugned order by the Commissioner (Appeals) and, vide the Order-in-Appeal, the Commissioner(Appeals) has upheld the demand confirmed in the OIO. It is against this OIA that the present appeal has been filed before this forum.

2. Heard Ms. P. Saravana Selvi, Ld. Advocate for the Appellant and Ms. Anandalakshmi Ganeshram, Ld. Assistant

Commissioner for the Respondent, we have carefully perused the documents placed on record and the orders of lower authorities placed in the Appeal memorandum; we have also carefully considered the decisions/orders relied upon during the course of arguments before us.

3. After hearing both sides, the only issue that arises for our consideration is, "Whether the demand of service tax under commission Agent service, insofar as the other receipts is concerned, is justified?"

4. We find from the order of this Bench [Final Order No. 40876/2018 dated 12.03.2018 in Appeal No.ST/529/2011] which has been relied upon by the ld. Advocate in the appellant's own case for an earlier period, wherein this Bench had considered the 'additional amount received as incentives based on the volume of transaction for the activity of forwarding cargo through the airlines' and, after following other orders of coordinate Benches, this Bench had ruled in favour of the assessee and held that the additional amount would not be liable to service tax. Relevant portion of the Final order *supra* is reproduced below for convenience:

"5. The issue whether the respondent is liable to pay service tax for the activity of booking space and selling the same to the client for air cargo goods has been decided by the Tribunal in the decisions cited by the ld. Counsel for the respondent. The Tribunal has held the issue in favour of the respondent. The relevant portion of the decision in the case of *Continental Carriers* (supra) is reproduced as under :-

> 5. We have heard both sides and perused the material available on record. We note that the tax liability on similar activities under the category of 'Business Auxiliary Service' has already come up for consideration before the Tribunal in the above mentioned cases and

the Tribunal in the case of *DHL Logistics (P) Ltd*. (supra) has observed that:

> "4.2. Demand has been made on service tax under the head of Business Auxiliary Service for the revenue earned as freight rebate. Ld. Counsel has argued that the income is generated as a result of appellants buying cargo space in bulk and selling the same to foreign shipper, he argued that various essential activity in which there is no third party involved except the appellant and the carriers. In these circumstances demand under Business Auxiliary Service cannot be sustain. It is argued that for sustaining demand under BAS, there has to be third party involved in the transaction namely a client. In the absence of any client, no demand under BAS can be raised. We find substantial force in the argument of Ld. Counsel, the freight rebate is a revenue stream generated out of trading of the space in the airline incentives. Unless the space is booked by the appellant specifically for a client the components of the Business Auxiliary Service do not come into play. In the instant case. there is no such allegation and the appellants are booking the space for their own trading activities. In these circumstances demand of service tax under BAS cannot be sustained and the same is set aside.
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> 4.3. The next issue relates to the income under the head of airline commission and airline incentive sought to be taxed under BAS. It is seen that the said income is generated during the course of booking of bulk cargo by the appellant with the airline. The appellant have received the incentive and commission from the airline. The appellants are engaged in buying and selling of space in the airline and depending on the volume of the space bought by the appellant from the airlines they received the commission/incentive. The appellants are not buying and selling space on the airline on behalf of their client but on their own behalf. To consider the activity of buying and selling the taxable activity under the head of BAS, the same should be done on behalf of the client Thus, if the appellants were selling the space on carrier from the airline directly to the exporters without themselves purchasing the space then it could have been considered as an activity involving promotion of sales. In the instant case the appellant are directly buying themselves and thereafter selling the same to the exporters. In this activity they are receiving incentive and commission based on the total space purchase by them from the airline. This activities can be no stretch of imagination by considered as BAS

> as for any service to statute the BAS at least three parties should be involved in the transaction namely the service provider, service recipient and the client. In the instant case there are only two parties in the transaction, the seller of space and the buyer of space. Any commission/incentive received, as a result of this transaction of sale cannot be considered as supply of BAS. In view of above, the demand under the head of BAS for the Revenue generated as airline/airline incentive is set aside."

6. Similar ratio has also been followed in the case of Karam Freight Movers (supra). The observations of the Tribunal are as below :

> 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. lt 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. v CST, Mumbai* - 2016 (43) STR 215 (Tri-Mumbai) = 2016- TIOL-869-CESTAT-MUM. 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 vessel. It cannot be considered that the respondents are engaged in promoting or marketing the services of any "client".
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> 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'.

6. Following the above decision, we find that there is no merit in the appeal filed by the department. The same is dismissed.”

5. From the above finding and the relevant brief facts as extracted in para one of this order, we find that an almost identical issue has been addressed to and answered in favour of the assessee, but however, the Revenue was unable to place on record any compelling grounds to deviate from the above order. Hence, we do not find any merit in the impugned order. For the above reasons, the impugned order and the demand confirmed/upheld therein cannot sustain and accordingly, we set aside the same. In the result, we allow the appeal with consequential benefits, if any, as per law.

(Order pronounced in the open court on 02.01.2025)

sd/-	sd/-
(VASA SESHAGIRI RAO)	**(P. DINESHA)**
Member (Technical)	Member (Judicial)

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