CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH

SERVICE TAX APPEAL NO. 51456 OF 2018

(Arising out of Order-in-Original No. JAI-EXCUS-000-COM-43 dated 28.02.2018 passed by the Commissioner Central Goods and Service Tax & Central Excise, Jaipur)

M/s. Dunnrite Groupage Services Pvt. Ltd. **...Appellant**
93, NandPuri Colony, 22 Godown, Jaipur

Versus

The Commissioner Central Goods and Services Tax & Central Excise, **...Respondent**
CGST & Central Excise Commissionerate,
NCR Building, Statue Circle, C-Scheme,
Jaipur-302005

APPEARANCE:

Shri Yash Dhadda, Chartered Accountant for the appellant.
Shri Rohit Issar, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)

Date of Hearing/ Decision: 04.07.2023

FINAL ORDER NO. 50864/2023

JUSTICE DILIP GUPTA:

The order dated 28.02.2018 passed by the Commissioner CGST and Central Excise, Jaipur[1] confirming the demand of service tax with interest and penalty has been assailed in this appeal.

2. The appellant is primarily engaged in providing business auxiliary services[2], clearing and forwarding agent services, storage

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1. **the Commissioner**
2. **BAS**

and warehousing services and transportation of goods by road, rail and sea.

3. A show cause notice dated 17.10.2017 was issued to the appellant with the following allegations:

> "6. Whereas, on further examination of audited financial statements submitted by the assessee for the period from 2012-13 to 2015-16, it was observed that the assessee has collected an amount of Ocean Freight of Rs. 93,25,65,634/- from exporters and paid an amount of Ocean Freight of Rs. 66,35,77,298/- to the Shipping Lines (Annexure-A) as shown in their Profit & Loss account (RUD-8) and Balance Sheets submitted for the year 2012-13 to 2015-16 (RUD-9). Thus, the assessee collected and retr4ained an amount of Rs. 26,89,88,336/- as margin, which appears taxable under Business Auxiliary Service and on which Service Tax of Rs. 3,42,49,521/- appears recoverable from them under proviso to section 73(1) of the Act along with interest under section 75 of the Act and the assessee also appears liable to penalty under section 78 of the Finance Act, 1994/-."

4. The appellant submitted an explanation clarifying that where the freight forwarder acts as a principal while providing service of transportation of goods outside India and negotiates terms with the shipper/airline/ocean liner and with actual exporter, they are not covered under the category of intermediary and hence the Place of Provision of Services Rules 2010[3] would be applicable on them and they shall not be leviable to service tax on the margin of ocean freight.

5. The Commissioner confirmed the demand proposed in the show cause notice and the relevant portion of the order passed by the Commissioner is as follows:

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3. the 2010 Rules

> "13.7 I find that the assessee was making arrangements for provision of services of transportation through sea to the exporters and for those arrangements/services they were collecting service charges. Such services provided by the assessee fall under sub-clause (iv) of the definition of 'Business Auxiliary Services'. xxxxxxxxxx. The assessee had admittedly collected excess/margin amount on such ocean freight. It is thus clear that said margin amount which was being collected in excess of Ocean freight and retained by the assessee and not paid to the Shipping Lines is not the part of ocean freight. As such the same is not covered under non-taxable amount/category. Therefore, the difference of amount of ocean freight collected by the assessee from the exporter/service recipient and ocean freight paid to the Shipping Lines is the amount of margin and the same is taxable under 'Business Auxiliary Services' under Section 65(19)(iv) read with Section 65(105)(zzb) of the Finance Act, 1994. I am therefore of the view that the amount recovered over & above to the ocean freight would form part of the gross amount charged and is liable to service tax."

6. Learned chartered accountant appearing for the appellant placed reliance upon the decisions of the Tribunal in **Marinetrans India Pvt. Ltd.** vs. **CST, Hyderabad-ST**[4], **Direct Logistics India Pvt. Ltd.** vs. **Commr. of S.T., Bangalore S.T.-I**[5] and **Bhatia Shipping (P.) Ltd.** vs. **Commissioner of Service Tax-I, Mumbai**[6] to contend that the appellant was only trading in space and was not providing any service.

7. Learned authorised representative appearing for the department, however, supported the impugned order.

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4. 2020 (33) G.S.T.L. 241 (Tri.-Hyd.)
5. 2021 (55) G.S.T.L. 344 (Tri.-Bang.)
6. 2022 136 taxmann.com 407 (Mumbai-CESTAT)

8. The submissions advanced by the learned chartered accountant for the appellant and the learned authorised representative appearing for the department have been considered.

9. It is seen that the appellant provides cargo space to customers who are importers/exporters of goods. The appellant pays charges for space booking to different Shipping Lines/Airlines and later on sells such space to the exporters/importers at a slightly higher amount. The difference between the amount paid by the appellant to the Shipping Lines/Airlines and the amount recovered by the appellant from the customers (exporter/importers) is called the 'mark-up'.

10. The department was of the view that this 'mark-up' was for services provided by the appellant to the customers and was, therefore, liable to service tax under the category 'support services of business or commerce' covered under section 65(104) of the Finance Act. The department was also of the view that after July, 2012, the service was not covered by any service notified in the negative list and, therefore, continues to be taxable.

11. The issue involved has been decided by various Division Benches of the Tribunal.

12. In **Marinetrans India,** the Division Bench held after considering the Circular dated 12.08.2016 issued by the Central Board of Excise and Customs that buying and selling space on ships does not amount to rendering a service and any profit or income earned through such transactions would not be leviable to service tax. The relevant portions of the order passed by the Tribunal is reproduced below:

"6. We have considered the arguments on both sides and perused the records. **It is not in dispute that the appellant herein is purchasing the space from the shipping lines and then is selling the same to exporters. It is the case of the Revenue that this amounts to acting as an intermediary for helping the business of the shipping lines and therefore they are liable to pay service tax on business auxiliary services on the profit which they receive.** It is the case of the appellant that this is a deal on principal to principal basis between them and the shipping lines and again between the exporters and them. They are not acting as an agent. They could purchase the space for a lower price and sell it at a higher price and thereby earn profit. On the other hand, if they failed to sell the space to exporters, after purchasing from the shipping lines, they may incur a loss. They are not receiving any commission whatsoever from the shipping line or from the exporters. **We have considered the Circular of the C.B.E. & C. cited by the Learned Departmental Representative at Para 2.1-3 which are as follows:**

> "2.1 The freight forwarders may deal with the exporters as an agent of an airline/carrier/ocean liner, as one who merely acts as a sort of booking agent with no responsibility for the actual transportation. It must be noted that in such cases the freight forwarder bears no liability with respect to transportation and any legal proceedings will have to be instituted by the exporters, against the airline/carrier/ocean liner. The freight forwarder merely charges the rate prescribed by the airline/carrier/ocean liner and cannot vary it unless authorized by them. In such cases the freight forwarder may be considered to be an intermediary under rule 2(f) read with rule 9 of POPS, since he is merely facilitating the provision of the service of transportation but not providing it on his own account. When the freight forwarder acts as an agent of an airline/carrier/ocean liner, the service of transportation is provided by the airline/carrier/ ocean-liner and the freight forwarder is merely an agent and the service of actual transportation will not be liable for service tax under Rule 10 of POPS.

> 2.2 The freight forwarders may also act as a principal who is providing the service of transportation of goods, where the destination is outside India. In such cases the freight forwarders are negotiating the terms of freight with the airline/carrier/ocean liner as well as the actual rate with the exporter. The invoice is raised by the freight forwarder on the exporter. In such cases where the freight forwarder is undertaking all the legal responsibility for the transportation of the goods and undertakes all the attendant risks, he is providing the service of transportation of goods, from a place in India to a place outside India. He is bearing all the risk and liability for transportation. In such cases they are not covered under the category of intermediary, which by definition excludes a person who provides a service on his account.
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> 3. It follows therefore that a freight forwarder, when acting as a principal, will not be liable to pay service tax when the destination of the goods is from a place in India to a place outside India."

> 7. **It is evident from the C.B.E. & C. circular also that the Revenue was also of the view that service tax is payable when one acts as an intermediary and not as a trader dealing on principal to principal basis on their own account which is undisputedly the case here.** We, further, find that in an identical case, in the case of Phoenix International Freight Service Pvt. Ltd. (supra**) the Tribunal has held that buying and selling space on ships does not amount to rendering a service and any profit or income earned through such transactions is not leviable to service tax.** We find no reason to deviate from this view taken by the Tribunal which view is also supported by the C.B.E. & C. circular cited above. In conclusion, the demand of service tax, interest and penalties are liable to be set aside and we do so."
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> **(emphasis supplied)**

13. In **Bhatia Shipping (P) Limited,** the Division Bench followed the earlier Division Benches and observed as follows:

"5. **The appellant is primarily engaged in the business of freight forwarding, clearing and forwarding and other allied activities that involve booking of Containers/Air Cargo with various Shipping Lines/Airlines for their customers and recovering other miscellaneous charges from their customers (mainly importers and exporters). The appellant provides cargo space to the customers who are importers/exporters of goods. The appellant pays charges for space booking to different Shipping Lines/Airlines and later on sells such space to the exporters/importers at a slightly higher amount.** The difference between the amount paid by the Appellant to the Shipping Lines/Airlines and the amount recovered by the Appellant from the customers (exporter/importers) is called the "mark-up".

6. **The Department was of the view that this "mark-up" was for services provided by the Appellant to customers and was, therefore, liable to service tax under the category of "support services of business or commerce**", covered under section 65(104) of the Finance Act, 1994 . The Department was also of the view that after July, 2012, the service was not covered by any service notified in the negative list and, therefore, continues to be taxable.

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10. A Division Bench of the Tribunal in the earlier decision rendered in **Satkar Logistics vs. CST**[7] accepted the contention advanced on behalf of the appellant that the appellant was only trading in space and was not providing any service. The Division Bench also noted that the issue involved in the Appeal was covered by the decision of the Tribunal in **Greenwich Meridian Logistics (India) Pvt. Ltd. vs. CST**[8] and **Commissioner of Service Tax, New Delhi** vs. **Karam Freight Movers**[9].

11. Subsequently, the decision earlier rendered in **Satkar Logistics** on 21.08.2018 was followed by the Division Bench of this Tribunal in **Satkar Logistics**.

(emphasis supplied)

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7. Service Tax Appeal No. 50411 of 2016 decided on 10.08.2021
8. (2016) 69 taxmann.com 100/55 GST 635 (Mum.- CESTAT)
9. (2017) 82 taxmann.com 363 (New Delhi- CESTAT)

14. It follows from the aforesaid decisions of the Tribunal that when the appellant merely trades in space on ships, it would not be providing any service and so no service tax can levied upon the appellant. It has, therefore, to be held that the Commissioner was not justified in confirming the demand.

15. The impugned order dated 28.02.2018 passed by the Commissioner, therefore, cannot be sustained and is set aside. The appeal is, accordingly, allowed.

(Order pronounced in open court)

(JUSTICE DILIP GUPTA)
PRESIDENT

(HEMAMBIKA R. PRIYA)
MEMBER (TECHNICAL)

JB, Shreya