CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH AT HYDERABAD

Division Bench - Court No. – I

Service Tax Appeal No 211 of 2009

(Arising out of **Order-in-Appeal** No. 68/2008(H-II) S.Tax, dated 30.12.2008 passed by Commissioner of Customs, Excise & Service Tax, Hyderabad)

Orange Logisys Pvt Ltd., .. **APPELLANT**
43, Santosh Masion,
Sinivasa Colony, SR Nagar,
Hyderabad,
Telengana – 500 038.

VERSUS

Commissioner of Central Excise, .. **RESPONDENT**
Customs & Service Tax
Hyderabad – II
Kendriya Shulk Bhavan,
L.B. Stadium Road,
Basheerbagh, Hyderabad,
Telangana – 500 004.

Appearance
Shri Anwar Ali, Advocate for the appellant.

Shri Mir Anwar Mohiuddin, Assistant Commissioner for the Respondent.

Coram: **Hon'ble Mr. P.V. SUBBA RAO, MEMBER (TECHNICAL)**
Hon'ble Ms. RACHNA GUPTA, MEMBER (JUDICIAL)

FINAL ORDER No. A/31126/2019

Date of Hearing:21.11.2019
Date of Decision:21.11.2019

[ORDER PER: MR. P.V. SUBBA RAO]

1. Heard both sides and perused the records.

2. This appeal is filed against Order-in-Appeal No. 68/2008(H-II) S.Tax, dated 30.12.2008.

3. The facts of the case in brief are that the appellant have entered into an agreement with M/s EMU Lines Pvt Ltd., a shipping line to act as their agent for selling space on their ships. For selling this space, the principal namely M/s EMU has a sales tariff which they give to the appellant. The Appellant is also at liberty to sell the space after adding some profit on their own over and above the sales tariff and retain the difference as profit. In addition, the principal M/s EMU also reimburses to the appellant brokerage at a rate of 2% on the freight. The relevant paras of the agreement are as follows:

"This deed of agreement is executed on 21st July 2004 between M/s EMU Lines Pvt Ltd., having their registered office at Flat No. 201, 35A, Siddharth Chambers – II, Kalu Sarai, Hauz Khas, New Delhi – 110 016, (A company registered under the Companies Act – 1956) Herein after known as "Party No.1" (This expression shall include all the legal heirs, successors and assigns etc. unless the same appears to be repugnant to the context there of)

AND M/s Orange Logisys Pvt Ltd. having their office at Plot No. 43, Santosh Mansion, Srinivas Colony (East), S.R.Nagar, Hyderabad – 500 038 Hereinafter referred to as "Party No,2" (This expression shall include all the legal heirs, successors and assigns etc. unless the same appears to be repugnant to the context there of) on this agreement.

That whereas, EMU Lines Pvt Ltd., (Party No.1) is a registered Multimodal Transport Operator under the Multimodal Transportation of Goods Act – 1993 to carry the business multimodal transportation and has its own logo of service mark and trade name as EMU LINES, but does not have adequate infrastructure and marketing team to carry the business of multimodal transportation at Hyderabad and its surrounding in the state of Andhra Pradesh is desirous to make **an agreement / contract for the purpose of appointing the agency with M/s Orange Logisys Pvt Ltd.,** (Party No.2), which is a professionally managed concern and is believed to be having adequate infrastructure and well experienced marketing team.

That the Party No. 1 hereby appoints Party No. 2 to carry on / Commence the business multimodal transportation in the trade name of Party No. 1 and Party No. 2 accepts an appointment and agrees to perform the work described above. In performing the work, Party No. 2 shall act as an independent entity maintain its own distinct and separate legal existence and neither Party No. 2 nor its employees / Branch Incharges shall be, or be deemed to be, an agent or employees of the Party No. 1 for any purpose whatsoever.

That Party No. 2 has agreed to work as exclusively for Party No. 1, for marine exports under LCL basis, which means Party No. 2 shall not enter into any agreement / arrangement whatsoever relating to marine exports under LCL basis other than Party No. 1 and vice-versa.

That Party No. 2 shall indemnify against all claims which may be preferred by the employees Party No. 2 whether existing or to be employed in future and or any of the agents, sub-agents any other person or persons having any business dealings with Party No. 2 on account of the trade name of Party No. 1 by Party No. 2. All claims shall include the labour disputes, the industrial disputes, the outstanding recovery disputes and or all other disputes, which have not been specified in this deed of agreement.

That Party No. 2 shall be issuing Bill of Lading of Party No. 1 strictly adhering to the rules and regulations in this regard, to their customers and the dsaid Bills of Lading shall be signed by Mr. Subrahmanyar Sekhar and shall send the photocopy of the Bill of Lading issued and signed on a fortnightly basis to the Regional office of Party No. 1 based in CBD Belapur, Navi Mumbai.

> That Party No. 2 shall keep all necessary records to the utilization of Bill of Lading of Party No. 1 and shall submit a weekly report to Party No. 1 on utilization of the same.
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> All terms and conditions in this agreement as well as relating to further dealings between Party No. 1 and Party No. 2 shall remain known to them only and in no case, it shall be disclosed to a third party by both the parties.
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> That Party No. 1 shall give a Sales Tariff to Party No. 2 from time to time and Party No. 2 shall be allowed to put his own mark up on the sales tariff and Party No. 2 shall keep this mark up as their profit margin. Party No. 1 shall re-imburse to Party No. 2 brokerage @ 2% on the freight and to Party No. 1 by Party No. 2."

4. A show cause notice was issued to the appellant demanding service tax under "Business Auxiliary Service" on the amounts which they have received for acting as an agent of the principal as they have been assisting the principal in their business. After following due process, the original authority confirmed the demand of Rs. 6,64,915/- upon the appellant which he ordered to be recovered with interest under section 75 and imposed a penalty of equal amount under section 78 of the Finance Act, 1994. He refrained from imposing any penalty under section 76 but imposed penalty of Rs. 1,000/- under section 77.

5. Aggrieved, the appellant before the First Appellate Authority, who set aside the penalties imposed under section 77 and 78 but upheld the confirmation of the demand. Aggrieved by this order of the First Appellate Authority, the present appeal is filed.

6. Learned Counsel for the appellant submits that the issue is no longer res-integra which has been decided in similar cases in the case of Sindu Cargo Services Ltd., [2019 (24) G.S.T.L 664 (Tri-Bang)] and Bhuvaneswari Agencies (P) Ltd., [2008 (14) VST 452 (Tri-Bang)] that in case where the space is paid on the ships and further sold for a profit, no service tax is leviable on the profit amount as it is a case of sale and purchase of the goods and is not a case of services being rendered. Learned DR, on the other hand seeks to distinguish the present case on the facts. He would submit that as far as the case laws relied upon by the appellant are concerned they were in the context where the assessee had purchased space on the ships and in turn sold it for a profit. Such a transaction is on principal to principal basis where any profit or loss is on account of the assessee. The present case is different as can be seen from the agreement. In the present case, agreement shows the assessee appellant has been appointed as "an

agent of the principal" namely the shipping line and they were getting paid a brokerage for rendering the service of selling space on their ships. The service tax is therefore proposed to be levied on this amount.

7. We have considered the arguments on both sides and perused the records. A plain reading of the agreement which the appellant had entered into with the shipping line shows that this is not a case of agreement on a principal to principal basis but the appellant is appointed as an agent by the shipping lines for rendering the service of selling their space on their ships. This, in our view clearly falls under the category of "Business Auxillary Service", the definition of which is as follows:

"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

Explanation - For the removal of doubts, it is hereby declared that for the purposes of this sub-clause, "service in relation to promotion or marketing of service provided by the client" includes any service provided in relation to promotion or marketing of games of change, organised, conducted or promoted by the client, in whatever form or by whatever name called, whether or not conducted online, including lottery, lotto, bingo;]

(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; or

(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.

Explanation - For the removal of doubts, it is hereby declared that for the purposes of this clause, -

(a) "Commission Agent" person who acts on behalf of another person and causes sale or purchase of goods, or provision or receipt of services, for a consideration, and includes any person who, while acting on behalf of another person - means any

(i) deals with goods or services or documents of title to such goods or services; or

(ii) collects payment of sale price of such goods or services; or

(iii) guarantees for collection or payment for such goods or services; or

(iv) undertakes any activities relating to such sale or purchase of such goods or services;

(b) "Excisable Goods" has the meaning assigned to it in clause (d) of Section 2 of the Central Excise Act, 1994;

(c)"Manufacture" has the meaning assigned to it in clause (f) of Section 2 of the Central Excise Act, 1944;

(Section 65(19) of the Finance Act, 1994)

"Taxable Service" means any service provided or to be provided to a client by any person in relation to business auxiliary service.

(Section 65 (105) (zzb) of the Finance Act, 1994)

We also find that penalties imposed by the lower authority have been set aside by the First Appellate Authority and the Revenue is not in appeal against such setting aside of the penalties. In our considered view, in the factual matrix, the appellant is liable to pay service tax on Business Auxiliary Services. The impugned order therefore calls for no interference and the appeal is liable to be rejected and we do so.

8. The appeal is rejected and the impugned order is upheld.

(Dictated and pronounced in open court)

(P. VENKATA SUBBA RAO)
MEMBER (TECHNICAL)

(RACHNA GUPTA)
MEMBER (JUDICIAL)

Jaya