CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI
REGIONAL BENCH

Service Tax Appeal No. 86166 of 2017
And
ST/Cross/91124 of 2017
(On behalf of Respondent)

(Arising out of Order-in-Original No. 59-60/STV/SKD/2015-16 dated 13.01.2016 passed by the Commissioner of Service Tax, Mumbai-V)

M/s. Team Global Logistics Pvt. Ltd. **Appellant**
701, 702, A-Wing, Times Square Building,
Andheri Kurla Road, Andheri (E), Mumbai 400 059.

Vs.

Commissioner of Service Tax-V, Mumbai **Respondent**
3rd Floor, Utpad Shulk Building, Bandra Kurla Complex,
Bandra (E), Mumbai 400 051.

Appearance:

Shri Bharat Raichandani, Advocate, for the Appellant
Shri Nitin Tagade, Joint Commissioner, Authorised Representative for the Respondent

CORAM:

HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)
HON'BLE DR. SUVENDU KUMAR PATI, MEMBER (JUDICIAL)

FINAL ORDER NO. A/85093/2022

Date of Hearing: 02.02.2022
Date of Decision: 02.02.2022

PER: SANJIV SRIVASTAVA

This appeal is directed against order in original No 59-60/STV/SKD/2015-16 dated 13.01.2016 of the Commissioner of Service Tax V, Mumbai. By the impugned order, the Commissioner has held as follows:

"ORDER

I Show Cause Notice bearing F. NO, ST/DN-V/Gr.IV/TGL/71/2011/1709 dated 20.04.2011

i. I confirm the demand of Service Tex of Rs. 12,72,72,085/- (Rs. Twelve Crores, Seventy Two Lakhs, Seventy Two Thousand and Eighty Five only) including Education Cess and Secondary & Higher Education Cess payable during the period Oct'09 to Sep '10 under the provisions of Section 73(2) of the Finance Act, 1994 *read with the provisions of Section 73 (1) of the Finance Act, 1994.*

ii. *I also order payment/ recovery of interest at appropriate rate under Section 75 of the Finance Act, 1994 on the service tax demanded at (i) above, from the due date of payment till the date of actual payment.*

iii. *I impose penalty of Rs. 1,27,27,2094- (Rs. One Crore, Twenty Seven Lakhs, Twenty Seven Thousand, Two Hundred and Nine only) under Section 76 of the said Act, on the assessed for non-payment of service tax, The amount of penalty shall however be reduced to 25% of the service tax determined, if the service tax and interest determined is paid along with the reduced penalty within 30 days from the date of receipt of this order in lens of proviso to Section 76 of the Finance Act, 1994; and*

iv. *I also impose a penalty of Rs. 5,000/- or Rs. 200 for every day during which such failure continues, whichever is higher, starting with the first day after the due date, till the date of actual compliance under Section 77 of the Finance Act, 1994.*

II Show Cause Notice bearing F. No: ST/DN-V/Gr. IV/TGL/109/2011/4501 dated 17.04.2012.:

i. *I confirm the demand of Service Tax of Rs. 12,11,00,548/- (Rs. Twelve Crores, Eleven Lakhs, Five Hundred And Forty Eight only) including Education Cess and Secondary & Higher Education Cess payable during the period Oct'10 to Sep'11) under the provisions of Section 73(2) of the Finance Act, 1994 read with the provisions of Section 73 (1) of the Finance Act, 1994.*

ii. *I also order payment/recovery of interest at appropriate rate under Section 75 of the Finance Act, 1994 on the service tax amounts demanded from the assessee at (i) above, from the due date of payment till the date of actual payment.*

iii. *I impose a penalty of Rs. 1,71, 10,055/- (Rs. One Crore, Seventy One Lakhs, Ten Thousand and Fifty Five only) under Section 76 of the said Act, on them for non-payment of service tax. The amount of penalty shall* *however be reduced to 25% of the service tax determined, if the service tax and interest determined is paid along with the reduced penalty within 30 days from the date of receipt of this order in terms of proviso to Section 76 of the finance Act, 1994;*

iv. *I also impose a penalty of Rs. 10,000/- or Rs. 200 for every day during which such failure continues, whichever is higher, starting with the first pay after the due date, till the date of actual compliance under Section 77 of the Finance Act, 1994."*

2.1 Appellants are providing service relating to export and import cargo. The Service Tax registration is obtained for Business Support Services, Business Auxiliary Services, Cargo Handling Services & Transport of goods by Road.

2.2 During the course of EA -2000 audits conducted on the records of one of the branch offices of the appellant, by the officer of Service Tax Commissionerate Chennai, it was noticed that they had collected, service charges on account of documentation, de-stuffing. transportation, and issue of delivery order etc, in respect of import cargo and terminal handling charges and documentation charges in respect of export cargo and had paid service tax due thereon. However, during the tally of the financial accounts with the value of taxable services declared in the ST-3 return filed by them during the year 2006-07 to 2008-09, it was noticed that there was additional income shown in those account, under the bead of operating income', which had not been declared in the ST-3 returns.

2.3 Since the said branch office was registered at Chennai two SCNs with SCN No. 118/2010 dated 07/04/2010 amounting to Rs 2,44,32,896/- for 2006-07 to 2008-09 (upto Jan,) and SCN No. 209/2010 dated 16/04/2010 amounting to Rs. 23,64,547/- for Feb, 2009 to Sep, 2009 were issued by the Commissioner, Service Tex; Chennai. Subsequently appellant has opted for centralized registration at Mumbai, with effect from October 2009. Therefore subsequent show cause notice bearing F. No. ST/DN-V/GRIV/LG/71/2011 dated 20/04/2011 amounting to Rs. 14,03,81,110/- for October, 2009 to September, 2010 and F. No. ST/DN-V/GRIV/TLG/109/2011 dated 17/04/2012 amounting to Rs. 13,35,73,905/- for October, 2010 to September, 2011 was issued by the Commissioner, Service Tax- II, Mumbai.

2.4 These show cause notice were adjudicated as per the impugned order referred in para 1, supra.

2.5 Aggrieved appellants have filed this appeal.

2.6 Revenue has filed cross objections to the appeal.

3.1 We have heard Shri Bharat Raichandani, Advocate for the appellant and Shri Nitin Tagade, Joint Commissioner, Authorized Representative for the revenue.

3.2 Arguing for the appellant learned counsel submits that

- issue in respect of various services provided by them is no longer res-integra and have been decided by the decisions as follows:
    - Greenwich Meridian Logistics (I) Pvt Ltd. [2016 (43) STR 215 (T-Mum)]
    - Phoenix International Freight Services Pvt Ltd. {2017 (47) STR 129 (T-Mum)]
    - DHFL Logistics Pvt Ltd [2017 (6) GSTL 85 (T-Mum)]
    - Gudwin Logistics [2012 (26) STR 443 (T-Ahmd)]
    - LCL Logistics (India) Pvt Ltd {2015-TIOL-1441-CESTAT-Bang]
    - Global Transport Services Ltd [2016-TIOL-20-ARA-ST]
    - Sea Master Shipping and Logistics {2019 (25) GSTL 458 (T-Hyd)]
    - Marinetrans India Pvt Ltd [2020 (33) GSTL 241 (T-Hyd)]
    - Satkar Logistics Pvt Ltd {Final order No 53621/2018 dated 21.08.2018 & 51754-51735/2021 dated 10.08.2021]
- The issue in respect of the reimbursable expenses has been settled by the Hon’ble Apex Court for the period in dispute in the case Intercontinental Consultants and Technocrats Pvt Ltd [2018 (10) GSTL 401 (SC)]
- The appeal be allowed in view of the above decisions.

3.3 Arguing for revenue learned authorized representative while reiterating the findings submits that:

- undisputedly as submitted by the counsel for the appellant various services referred by him have been held to be not taxable or exempted as per the various decisions referred to by the counsel;

- it is also undisputed that appellant was registered with Service Tax and was paying service tax under the category of Business Auxiliary Service, Business Support Service, Cargo Handling Service and Transport of Goods by Road Service
- however by referring to para 17 of the order, it is also undisputed that appellant has throughout the investigation not given the break up differential income shown in their book of accounts even after being asked for, therefore Commissioner has held the entire differential income to be taxable under the category of business support services.

4.1 We have considered the impugned order along with the submissions made in appeal and during the course of hearing.

4.2 The appellant is providing services relating to handling of import/ export cargo and were paying service tax under category of Business Auxiliary Service, Business Support Service, Cargo Handling Service and Transport of Goods by Road Service. They received cargo, issued House Bill of Lading. While billing charges to the customers, they were showing the amounts towards freight apart from various other charges being recovered by them. On freight recovered they were not paying any service tax. On scrutiny of the records of appellant it was observed that the net operating income as per their financial records did not tally with the value of taxable service on which the applicant had paid service tax. No suitable explanation came forth neither appellants provided the revenue the nature of transactions which resulted in this difference between the financial records and ST-3 return. Revenue was of the view that appellant should have paid service tax on the entire receipts as seen in the financial statement of the applicant.

4.3 In the impugned order, Commissioner has in para 13 and 17 recorded as follows:

"13. The assessee is in the business of freight forwarding as a Multi Modal Transport Operator. The MTOs worlds over in common parlance are also known as freight consolidators or freight forwarders. The assessee issues its own carrier house bills of landing and is responsible for cargo undertaken by it. The

master bill of loading is always issued by the shipping line and on the basis of this document, the assessee further issues its house bill of lading in favour of their customers it, shippers. The assessed buys cargo space in any vessel operated by Any shipping line and in turn sells the same as a whole (i.e. container space) or in fragments known as activity of consolidation of various exporters/importers (shippers). The purchase or booking of space is made from the shipping lines of the world and the sale is made to clients at price higher than the purchase price. Thus on this count, there is a margin income On account of freight.

It is the margin income which is the bone of contention between the assesses and the department. However since the invoice raised by the assessee to their customers comprises the gross freight value which represent the value of the freight forwarding Services, freight margin income becomes consequential as per the parameters of valuation laid down by Section 67 of the Service Tax (Determination of Value) Rules, 2006. On other incidental services provided by the assessee like THC, Documentation charges, endorsement charges, delivery order fees etc the assessee is paying service tax.

17. In the SCNs, the Freight services provided by the Assessee have not been classified. The department alleges that Assessee was asked to explain the reason for nonpayment of service tax on differential income and to give the breakup of gross income under various heads so that the exact nature of services rendered by them, on account of which the said differential operating income had been earned during this period, could be determined and classified appropriately to demand service tax vide letters dated 01-04-2011 and dated 15-04-2011 issued by the office of Assistant Commissioner, Div-V of erstwhile Service Tax-II Commissionerate However Assessee did not provide the details sought. On perusal of the Memorandum and Article of Association dated 07-14-2005 of the Assessee's company, it appears that they are engaged in providing certain services such as Shipping Agents, Clearing Agents, Ship Owners, Ship Brokers, Freight Forwarders, Consolidators, Freight Contractor, IATA agents, Non vessel Owning Common Carriers, Logistic Service providers, Multi Modal Transport operators, General Sales

Agents, Passenger Sales Agents or Cargo Sales Agents, Carrier by land, Air and water transport haulage Merchants Stevedores, Salvers. All of these services appear to be taxable services being covered under Section 65 of the Finance Act, 1994. Accordingly, the amount of income difference observed between the gross receipts declared in the ST 3 returns and the gross income reflected in the balance sheet is to be treated as income earned on account of providing taxable services only and service tax classifiable under Business Auxiliary Services. In the instant case, non-cooperation of the Assessee and DOD-production of the relevant records called for during the process of enquiry appears to have led to the inability of the department to propose appropriate classification the services in the SCNs. It is well settled law that when information is not provided by the Assessee, the department is free to adopt the best judgment method The stand taken by the department is not classifying the service in the SCN appears understandable in the given circumstances. Post negative list, this question does not arise. The judgments quoted are not relevant to the fact of the case as in all these cases it was not an issue of non-submission of documents/information during the course of enquiry. Post 01-07-2012, the services are aptly classified under "Business Auxiliary Services."

The reliance made by the assessee on Para 5.9.6 of the CBEC Education Guide, 2012 does not further their arguments regarding non-taxability of freight forwarding services in any manner. An analysis of the above makes it clear that the freight forwarding activity is indeed a service and is leviable to service tax. As an intermediary, such transaction of buying space from shipping lines/airlines and selling the same to Z shippers both for import and export cargo attracts service tax. Similarly, in case of import consignment on principal to principal basis, there is also service tax op such transaction."

4.4 In case of Greenwich Meridian Logistics referred to by the counsel for appellant, co-ordinate bench has observed-

"7. Each source of income must, therefore, be looked at independently. A service provider is not necessarily a specialist in rendering one service; the earnings of a service entity may accrue from one or more services - some of which may be

taxable. Finance Act, 1994 does not envisage determination of taxability from accounting entries. The manner or mode of booking the profit in the accounts of a commercial organization has no bearing on the application of Section 65(105) to a taxable activity. The nomenclature in the accounts that appears to have weighed heavily with the original authority is not material to classification of the service when the taxable entry specifies the legislative intent.

8. The Hon'ble High Court of Gujarat in Sports Club of Gujarat Ltd. v. Union of India [2010 (20) S.T.R. 17 (Guj.)] has observed that -

'9 ….. Service Tax was introduced in India vide the Finance Act, 1994. It is legislated by the Parliament under the residuary entry, i.e. Entry 97 of List I of the Seventh Schedule of the Constitution of India. It is an indirect tax and is to be paid on all the services notified by the Union Government for the said purpose. The said tax is on the service and not the service provider.'

and, though in the context of dispute relating to 'mandap keeper', the judgment is particularly relevant here as it goes on to observe after drawing attention to Section 68 and Section 65 of Finance Act, 1994 that.

12. A conjoint reading of the above provisions of the law goes to show that the services provided to a client, … … , falls under the category of taxable service'

9. The description of the taxable service in Section 65(105) of Finance Act, 1994 as well as the definition, if any, of the terms therein are the primary determinant for taxation of any service. From the observation of the Hon'ble High Court of Gujarat supra, it is clear that the provision of service is manifest by the existence of service provider performing an activity for which consideration is received from the recipient of the service. A finding on these aspects is distinctly absent in the impugned order."

4.5 In view of the observations made as above by the Tribunal, which have been re-iterated in most of the decisions referred to by the learned counsel the impugned order cannot be sustained. Further in absence of any breakup of the differential income shown in the book of accounts, we are also not in position to determine whether any portion/ part of the differential income would be attributable to any service provided under the taxable category being provided by the appellant. However we observe that the those portion of incomes which are held to be non taxable/ exempted as per the decisions referred by the counsel and the reimbursable expenses cannot be subjected to any service tax, in the manner as has been proposed in the impugned order to 01.07.2012 when the service tax was levied by defining the category of taxable services.

4.6 Accordingly in our view, the matter needs to be remanded back to the original authority, for redetermination of amount that can be subjected to service tax on the basis of the information that needs to be provided by the appellant in respect of the breakup of differential income between their financial records and ST-3 returns. Appellant should cooperate by providing the relevant information to the adjudicating authority for making such determination.

5.1 Impugned order is set aside and the appeal allowed by way of remand to the original authority.

5.2 The cross objections filed by the Revenue are disposed of.

5.3 Needless to say since the issue is in respect of October 2009 to September 2011, adjudicating authority in remand proceedings should dispose of the matter, in the manner as indicated in para 4.6 above within three months of receipt of this order.

(Order pronounced in the open court)

(Sanjiv Srivastava)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

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