

**CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
MUMBAI**

WEST ZONAL BENCH

SERVICE TAX APPEAL NO: 87075 OF 2018

[Arising out of Order-in-Original No: PUN-CGST & CX-002-COM-026-17-18 dated 28th February 2018 passed by the Commissioner of CGST & CX, Pune – II.]

ATA Freightline (India) Pvt. Ltd.

Office no. 702, 7th Floor, Pentagon 3,
Magarpatta City Hardaspur, Pune – 411028

...Appellant

versus

Commissioner of CGST & CX– II

GST Bhavan, 41A, Sassoon Road
Opp Wadia College, Pune – 411001

...Respondent

APPEARANCE:

Shri Bharat K Raichandani, Advocate for the appellant
Shri Nitin Ranjan, Deputy Commissioner (AR) for the respondent

CORAM:

**HON'BLE MR JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)**

DATE OF HEARING: 16/03/2022
DATE OF DECISION: 19/05/2022

FINAL ORDER NO: A /85480 /2022

PER: C J MATHEW

M/s ATA Freightline (India) Pvt Ltd is in the business of integrated logistics and cargo transportation and, in conjunction with M/s ATA Freightline Ltd, New York, provides end-to-end delivery; the recompense from the overseas entity for the period between July 2012 and March 2015, to the extent attributable to carriage within India, was sought to be taxed by recourse to Place of Provision of

Service Rules, 2012. The span of the dispute lies entirely within scheme of levy under section 66B of Finance Act, 1994 imposed on all 'services', as defined in section 65B (44) of Finance Act, 1994, that were either not excluded by section 66D of Finance Act, 1994 (commonly known as 'negative list') or not exempted by notification issued under section 93 of Finance Act, 1994.

2. The genesis of the dispute, as well as the concluding of the proceedings, is founded upon the records maintained by the appellant which, inter alia, included receipts from the overseas entity that, in the accounts, was disaggregated to correspond with the stages involved. According to tax authorities, the value corresponding to the leg within the country, from out of the consolidated consideration, was, owing to service being performed on goods while on the soil of India, liable to tax and, not having been discharged, was recoverable under the authority of section 73 of Finance Act, 1994. Per contra, the appellant contends that the composite engagement to deliver goods outside the country, for which consideration was received from the recipient of services located outside India, is inextricably linked with export of goods and, therefore, performed outside the 'taxable territory' envisaged under Finance Act, 1994. Both sides claim coverage under different rules of the Place of Provision of Service Rules, 2012.

3. Learned Counsel for appellant asserts that the activity lies squarely beyond intendment of tax with the goods involved being physically exported as also is the service, evident from receipt of

'consideration' from an entity outside India in 'convertible foreign exchange', in conformity with rule 6A of Service Tax Rules, 1994. It is also argued that, in accordance with paragraph 5.4.1 of Revised Education Guide on Taxation of Services dated 20th June 2012, such service is rendered outside India. Reliance was placed on the decision of the Tribunal in **Commissioner of Central Excise, Pune v. Sai Life Sciences Ltd**¹ which was reiterated in **Commissioner of Central Excise, Pune v. Advinus Therapeutics Ltd**². Pointing out that 'export of service' had not undergone any significant change in the rollover to the 'negative list', Learned Counsel argued that the decision of the Tribunal in **Commissioner of Central Excise v. BA Research India Limited**³, having been upheld by the Hon'ble High Court of Bombay, did not leave any room for doubt on the 'tax exempt' status of such exports.

4. Narrating the activities of the appellant that came under scrutiny, it was averred by Learned Counsel that the contractual arrangement with the overseas entity was a composite assignment of 'jobs' for transportation of goods to destinations outside India for which payment was received in 'convertible currency' without any contractual engagement of theirs with the owner of the goods. It was argued that this composite activity could, if at all, be disaggregated only within the meaning of 'service' in section 65B (44) of Finance Act, 1994 and not by nomenclature assigned to taxable services in

1. 2016 (42) STR 82
2. 2017 (51) STR 298
3. 2010 (18) STR 439

the erstwhile regime; this exercise, according to him, would not be in accordance with law as the recipient of service, undeniably the source of 'consideration', was one. He further contended that, even if both rule 4 and rule 10 may be brought to bear on the activity, the more specific of the two, viz., transportation, should prevail.

5. Learned Authorized Representative submitted that the demand is restricted to the 'consideration' for 'ex works' and 'pre-shipment' component of the activity as reflected in the books of accounts of the appellant. According to him, the activity undertaken by appellant pertained to goods which, even if exported, were handled from the premises of the client and, therefore, the 'ex-works' was nothing but activity undertaken on goods in India which is covered by rule 4 of Place of Provision of Service Rules, 2012. He also pointed out that the adjudicating authority had arrived at this conclusion after detailed scrutiny of the 'Logistics Service Partnership Agreement' of February 2011 in which it was noticed that the contract intended totality of 'cargo handling' in their respective territories only and sufficed to hold that 'service' of the appellant was rendered in India with the activities at the destination being the responsibility of the overseas entity.

6. The impugned order has confirmed tax liability of ₹2,25,42,181 under section 73 of Finance Act, 1994, along with applicable interest under section 75 of Finance Act, 1994, besides imposing penalty under section 77 and 78 of Finance Act, 1994. The appellant does not dispute that they provide 'service', within the meaning of section 65B (44) of Finance Act, 1944, comprising, as it does, of activity carried

out by them for another but controverts the findings in the impugned order inasmuch as the 'other' is the overseas entity from whom 'consideration' is received for 'transportation' and, therefore, 'export' within the ambit of rule 6A of Service Tax Rules, 1994.

7. The regime of tax that came into force on 1st July 2012, in supersession of the scheme of impost on enumerated 'taxable services', becomes operable on occurrence of 'taxable event', viz. 'activity carried out by a person for another for consideration' to the extent of

'.....the value of all services, other than those specified in the negative list, provided or agreed to be provided in the taxable territory by one person to another...'

in section 66B of Finance Act, 1994 and the limiting constraint therein necessitated machinery for ascertainment of place of provision of service. As a largely 'destination based consumption tax leviable on services provided within the country', in the words of the Hon'ble Supreme Court in **All India Federation of Tax Practitioners v. Union of India**⁴, manifested only in satisfaction of the recipient for which recompense is made over to the provider, the generalized definition of the 'taxable event', unlike the flexibility of the erstwhile enumerated 'taxable services', was amenable to determination of export or import only by a conceptual framework offering a reference point for these two outliers; the Place of Provision of Service Rules,

4. 2007 (7) STR 625

2012 specifies the default principle in rule 3 and the circumstantial deviations therefrom in broad classifications. Despite, or probably because of, that, we have the contrarian positions before us – with the appellant claiming the special provision of rule 10 of Place of Provision of Service Rules, 2012 as appropriate to the commercial operation offered by them and with the respondent-Commissioner of CGST & CX, Pune – II, vide order-in-original no. PUN-CGST & CX-002-COM-026-17-18 dated 28th February 2018 and by placing emphasis on the significance of location of the goods in respect of service for which goods are required to be made available, invoking rule 4 of Place of Provision of Service Rules, 2012. Doubtlessly, de hors goods or living beings, 'transportation' is not an economic activity; and yet, rule 10 of Place of Provision of Service Rules, 2012 was incorporated - separate and distinct from rule 4. It is on the primacy of one over the other that the resolution of the present dispute is predicated.

8. Until 30th June 2012, such 'taxable services', as enumerated in section 65(105) of Finance Act, 1994 that conformed to one of the three categorizations in Export of Service Rules, 2005 was excluded from tax under the authority of section 93 of Finance Act, 1994. As a general rule, tax was exempted on all transactions in which the 'recipient' was located outside India. This, however, was not applicable to transactions in which immovable property or moveable goods belonging to, or provided by, 'recipient' was intrinsic to rendering of 'taxable services' and, in such situations, exemption was

extended if immoveable property was located outside India or if moveable goods were worked upon outside India.

9. The continuance of that privilege was reflected, by adaptation for the new paradigm of tax on 'services' in place of tax on 'enumerated services', through a mechanism for ascertaining of provision of service outside the 'taxable territory' to which the levy did not extend. In the successor 'negative list' regime that did away with the enumerated list of 'taxable services', such categorization was inoperable and rendering of 'service' within 'taxable territory', on the other hand, restricts leviability to such as conform to that condition. Unlike goods, cross-border transaction in services cannot be geographically pinpointed except by reference to recipient of the service which has been posited as the default in Place of Provision of Service Rules, 2012. For specific activities, such as transportation of goods, the rules provided for ascertainment within a complex transaction set.

10. In re **Advinus Therapeutics Ltd**, the Tribunal had occasion to examine the applicability of rule 4 of Place of Provision of Service Rules, 2012 and it was held that

'14. In this context, the legislative intent of incorporating a special and specific provision in Rule 4 may yield further insights. The special provision, which may be seen as an exception to the general Rule 3, deals with services in respect of goods as well as those provided to individuals. Not unnaturally, the services that require the physical presence of the person is taxed where the consumer receives the service and not at his location which as per Rule

2(i)(iv) would be his usual place of residence. In what can be considered as a most telling example of the scope of this portion of Rule 4, we could do a lot worse than refer to a decision of the Hon'ble High Court of Delhi that, in the course of dealing with other, more weighty matters in *Orient Crafts Ltd. v. Union of India* [2006-TIOL-271-HC-DEL-ST = 2006 (4) STR 81 (Del.)], took note of, and answered, one of the submissions thus -

'4. The contention of the learned Counsel for the petitioner, based on the interpretation of Section 66A of the Act, is that any service that is obtained by a person who has a fixed place of business in India is liable to tax for services availed by him in a foreign country. By way of an example, learned Counsel for the petitioner has cited that if such a person in India goes abroad, and has a haircut, he would be liable to pay service tax in India on the basis of Section 66A of the Act.

5. We are not at all convinced by this argument of learned Counsel for the petitioner. The rules that have been framed by the Central Government make it absolutely clear that taxable service provided from outside India is liable to service-tax. In the example given by the learned Counsel for the petitioner, there is no question on the service of haircut having been received in India.'

The intent in Rule 4 to remedy out some specific situations that would, otherwise, have enabled escapement from tax or leviability to tax where Rule 3 of Place of Provision of Services Rules, 2012 may not serve to confer jurisdiction becomes increasingly obvious.

15. Accordingly, we can infer that the location of performance of service in respect of goods is not an abstract, absolute expression for fastening tax liability on services that involve goods in some way; for that, Rule 3 would have sufficed. A contingency that is not amenable to Rule 3 has been foreseen and remedied by Rule 4

and in the process, the sovereign jurisdiction to tax is asserted. It is, therefore, not by the specific word or phrase in Rule 4(1) of Place of Provision of Services Rules, 2012 that the taxability is to be determined but from the mischief effect intended to be plugged. It is obviously not intended to tax any activity rendered on goods as to alter its form because that would be covered by excise on manufacture or be afforded privileges available to merchandise trade. The provision itself excludes goods imported temporarily for repairs but that does not, ipso facto, exempt goods imported temporarily for repairs from taxability which would, by default, be predicated by the intent in Rule 3. Consequently, a recipient in India would be liable to tax on such temporary imports for repairs while service to a recipient located abroad would not be taxable. This is in consonance with the privilege of exemption afforded to export of services. The special and distinct role of Rule 4 becomes clearer.'

in the context of goods having been worked upon which, though not similar to the present dispute, takes note of the objective of rule 4 of Place of Provision of Service Rules, 2012. That test of intent to preclude potential for escapement from tax does not have to be undertaken here owing to specific treatment afforded to transportation of goods in rule 10 of Place of Provision of Service Rules, 2012.

11. It would appear that there is no demand for the pre - 'negative list' period and that it was only the inevitable passage of 'export goods' through India at commencement of outward journey till loading on 'foreign going' vessel/aircraft that was considered to be necessary and sufficient reason for invoking rule 4 of Place of

Provision of Service Rules, 2012. In this implied convergence of rule 4 and rule 10 of Place of Provision of Service Rules, 2012, the transaction between M/s ATA Freightline Ltd, New York and M/s ATA Freightline (India) Pvt Ltd was split – as one within India and one thereafter – by appropriating the accountal segregation adopted by the appellant. The finding of

'72.2 As per Rule 4(a) of Place of Provision of Service Rules, 2012, the goods are required to be made physically available by the recipient of service to the provider of service, or to a person acting on behalf of the provider of service, in order to provide the service. I find that in the instant case Industries John Deere SA, Mexico & Bennett Distribution USA, "the importer of the goods" from the exporter, M/s., John Deere India Pvt. Ltd. is the receiver of service and ATA, USA is the provider of service. ATA, USA had deployed the assessee to perform the activity of providing of logistics service/cargo handling services on behalf of them (ATA, USA), in this case the assessee was acting on behalf of the provider of services and goods were physically made available to the assessee at the factory of the exporter i.e in the taxable territory in India. Hence, I find that the provision of Rule 4(a) of Place of Provision of Service Rules, 2012, is applicable in this case and the place of provision is the taxable territory in India.

in the impugned order is not intriguing as the location of provider and recipient of 'service', identified by the original authority suffices, in the context of section 65B (44) and section 65B (51) of Finance Act, 1994, to place the activity outside 'taxable territory' insofar as the levy under Finance Act, 1994 is concerned, had to be discredited.

12. To overcome that obvious conclusion, the adjudicating authority

has complicated the transaction set by assigning the role of agent of M/s ATA Freightline Ltd, New York to the appellant entrusted with the charge of taking delivery of the related goods made available by the exporter for rendering service. Besides that artifice, it was further held that the 'ex works' service terminated at the port of export which, in the context of the statutory provision predicated on 'goods', is tantamount to erasure of existence of goods. Both these are presumptions of the adjudicating authority without any evidence to render these as acceptable conclusions and far removed from the reality of a composite transaction for carriage of goods from within India to a place outside India.

13. If such truncation of transaction at the port/airport of shipment was legally, and logically, tenable, there was no requirement to resort to any other than rule 3 of Place of Provision of Service Rules, 2004. Indeed, it was the visible absence of recipient at the port/airport of shipment that prompted the second contrivance of re-assigning a 'principal to principal' transaction as 'principal to agent' relation and, thereby, attempting to confer some legitimacy to deployment of rule 4 of Place of Provision of Service Rules, 2012 as it permits acceptance on behalf of 'provider'; that, even so, the conformity with a stray phrase does not obviate the necessity of fitment within the whole appears not to have troubled the adjudicating authority. The objective of separate treatment in rule 4 of Place of Provision of Service Rules, 2012 is not just about accepting responsibility for goods on behalf of 'provider' of service as is evident from the proviso

'4. Place of provision of performance based services.-
The place of provision of following services shall be the location where the services are actually performed, namely:-

'(a) services provided in respect of goods that are required to be made physically available by the recipient of service to the provider of service, or to a person acting on behalf of the provider of service, in order to provide the service:

Provided that when such services are provided from a remote location by way of electronic means the place of provision shall be the location where goods are situated at the time of provision of service: Provided further that this clause shall not apply in the case of a service provided in respect of goods that are temporarily imported into India for repairs and are exported after the repairs without being put to any use in the taxable territory, other than that which is required for such repair.

xxxx.'

therein, that goods concerned with the rendering of service is necessarily to be made available to the 'provider' or 'person acting on behalf of provider' by the 'recipient of service' for being put to use in the course of rendering service – an aspect that appears, and even conveniently, to have been passed over for scrutiny by the adjudicating authority. For so doing, the circular referred to by Learned Counsel would also have to be overcome.

14. For discarding the **circular⁵** of Central Board of Excise & Customs, which clarified that

5. **No. 197/7/2016-ST dated 12th August 2016**

'2.0 It may be noted that in terms of rule 10 of the Place of Provision of Services Rules 2012, (hereinafter referred to as 'POPS Rules, 2012', for brevity) the place of provision of the service of transportation of goods by air/sea, other than by mail or courier, is the destination of the goods. It follows that the place of provision of the service of transportation of goods by air/sea from a place in India to a place outside India, will be a place outside the taxable territory and hence not liable to service tax. The provisions of rule 9 of the POPS Rules, 2012, should also be kept in mind wherein the place of provision of intermediary services is the location of the service provider. An intermediary has been defined, inter alia, in rule 2(f) of the POPS Rules, 2012, as one who arranges or facilitates the provision of a service or a supply of goods between two or more persons, but does not include a person who provides the main service or supplies the goods on his own account. The contents of the succeeding paragraphs flow from the application of these two rules.

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 air line/carrier/ocean liner, the service of transportation is provided by the air line/carrier/ocean-liner and the freight forwarder is merely an agent and the service of the freight forwarder will be subjected to tax while 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 risks 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.'

the adjudicating authority has preferred to fall back on the accounting treatment of 'consideration' by the appellant in preference to the substantive exposition of 'transportation' and 'destination' therein. The insinuation of an aspect of the contract – 'consideration' – that the circular does not venture upon is tantamount to quashing of the circular which is beyond the scope of quasi-judicial proceedings before the adjudicating authority. Furthermore, accounting entries are no substitute for determination that the service rendered by the appellant was legally, and logically, amenable to such aggregation.

15. The question that arises, even assuming that the accounting treatment of 'consideration' is amenable to geographical segregation as markers of a series of activities that make up 'service', is the scope for disaggregation of 'service' without ascertainment of

conformity of each of the segments with

‘(44) any activity carried out by a person for another for consideration and includes’

in section 65B of Finance Act, 1994 which is a pre-requisite for separate taxability, and exemption, under the authority of section 66B of Finance Act, 1944. The crux of the determination of tax liability in the impugned order is the rendering of ‘service’ between the premises of exporter and loading on ‘foreign going’ vessel/aircraft which, according to the adjudicating authority, is implicit in the attribution of charges for that stage of transport. However, in terms of the definition, ‘service’ is not founded upon ‘consideration’ but is activity carried out by a person for another for consideration; impliedly, without the ‘another’ there can be no ‘service’ that is taxable. Unless the ‘another’ can be identified as ‘another’ other than the recipient outside the country, rendering of separate ‘service’ is not demonstrated.

16. It is abundantly clear from

‘SECTION 66C. Determination of place of provision of service.—

(1) The Central Government may, having regard to the nature and description of various services, by rules made in this regard, determine the place where such services are provided or deemed to have been provided or agreed to be provided or deemed to have been agreed to be provided.

- (2) Any rule made under sub-section (1) shall not be invalid merely on the ground that either the service provider or the service receiver or both are located at a place being outside the taxable territory'

enacted to complement section 66B of Finance Act, 1994 which places emphasis on service provided or agreed to be provided in the taxable territory as the 'taxable event' that the Rules so framed may encompass deeming of place of providing or agreed to be provided also. The general 'place of provision', viz. location of recipient of service, must first be established and it is only upon identification of recipient as not located inside India that the other provisions may be pressed into service for taxability in the specific circumstances envisaged in rule 4, 5, 6, 7, 10, 11 and 12 of Place of Provision of Service Rules, 2012. Indeed, that appears to be so.

17. Furthermore, the comprehensive clarification dated 12th August 2016 of the Central Board of Excise & Customs which was not available when audit scrutiny was taken up, and which appears to have been overlooked in show cause notice dated 1st September 2017, should have been considered in letter and spirit by the adjudicating authority as sufficing to drop proceedings.

18. Place of Provision of Service Rules, 2012 is not a provision for charging of tax; it is limited to determination of location of taxable entity as an adjunct to the charging provision in section 66 B of Finance Act, 1994. The impugned order has not evaluated the impugned activity from that perspective. In the context of identifiable

recipient of service located outside the taxable territory, and concomitant absence of 'goods provided by recipient of service' as well as the marked absence of recipient of service in the truncated segment of impugned activity and of the goods being put to use for rendering of service, rule 4 of Place of Provision of Service Rules, 2012 is not applicable. That the activity is transportation of goods is the foundation of the proceedings against the appellant, as is evident from the contrived segmentation of stages according to geography and from the unarguable existence of recipient outside India; rule 10 of Place of Provision of Service Rules, 2012 is unambiguously clear about the consequent non-taxability.

19. For the above reasons, the impugned order is set aside and appeal allowed.

(Order pronounced in the open court on **19/05/2022**)

(JUSTICE DILIP GUPTA)
President

(C J MATHEW)
Member (Technical)