

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

REGIONAL BENCH - COURT NO. I

Service Tax Appeal No. 86906 of 2019

(Arising out of Order-in-Original No. 19/PR. COMMR/CD/18-19 dated 05.04.2019 passed by the Principal Commissioner of Central GST & Service Tax, Thane Rural, Mumbai)

Total Transport Systems Limited

7th Floor, T Square, Opp Chandivali Petrol Pump
Chandivali Junction, Saki Vihar Road
Andheri East, Mumbai – 400072.

.....Appellants

VERSUS

Commissioner of CGST & Service Tax

Thane Rural, Utpad Shulk Bhavan
4th Floor, Banda Kurla Complex
Bandra East, Mumbai-400 051.

.....Respondent

Appearance:

Shri Rajeev Waglay, Advocate for the Appellant

Shri Adeeb Pathan, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)

HON'BLE MR. M.M. PARTHIBAN, MEMBER (TECHNICAL)

FINAL ORDER NO. A/85491/2024

Date of Hearing: 15.01.2024

Date of Decision: 14.05.2024

PER : M.M. PARTHIBAN

This appeal has been filed by M/s Total Transport Systems Limited (earlier known as Total Transport Systems Pvt. Limited), Mumbai (herein after, referred to as 'the appellants'), assailing Order-in-Original No. 19/PR.COMMR/CD/18-19 dated 05.04.2019 (herein after, referred to as 'the impugned order') passed by the Principal Commissioner of Central GST & Service Tax, Thane Rural, Mumbai.

2. Briefly stated, the facts of the case are that the appellants herein, *inter alia*, are engaged in business of booking space in ships for containers of export and import cargo from shipping companies on behalf of their clients i.e., Exporters/importers for transporting the goods through sea route. For this purpose they have taken certificate of registration with the jurisdictional Commissionerate for the purpose of payment of service tax under Section 69 of the Finance Act, 1994. During the course of verification of the records maintained by the appellants, ST-3 Returns etc. the Audit officers of the Department had found the appellants are not charging the exact amount billed by the shipping lines for transporting the goods, but are actually charging extra margin to the clients over and above the freight charges actually billed by the Shipping lines/Liner company. The Department interpreted that the amount charged by the shipping lines alone would constitute the exact amount of ocean freight; the charges mentioned in the invoice of the appellants towards freight to their clients with extra margin is not the ocean freight charges, and the difference amounted to 'service charges' for which the appellants are liable to pay service tax under the taxable category of 'Business Auxiliary Services' (BAS) in terms of Sections 65(19) and 65(105)(zzb) of the Finance Act, 1994. On completion of audit verification, the Department intimated the observation to the appellants on 07.04.2015 requesting them to pay the service tax along with interest. However, the appellants had contended that the extra margin on freight charges was profit made by them in trading of the space and no service was involved in such a transaction. Therefore, the Department had initiated show cause proceedings by issue of Show Cause Notice dated 21.10.2015 proposing for demand of service tax short paid during 2009-2010 to 2012-2013 along with interest by invoking extended period under proviso to Section 73(1) *ibid*, and for imposition of penalties under Sections 77, 78 *ibid* on the appellants. Further periodical demand was also issued for recovery of service tax short paid during 2014-2015 along with interest, penalty vide Statement of Demand (SoD) dated 03.02.2016. In adjudication of the above SCN dated 21.10.2015 and SoD dated 03.02.2016, the learned Principal Commissioner of Central GST & Service Tax, Thane Rural, Mumbai had confirmed the adjudged demands under Section 73(1) *ibid* along with penalties under Sections 76, 77 and 78 *ibid*, by issue of the impugned order dated 05.04.2019. The appellants being

aggrieved by the impugned order passed by the learned Commissioner, have filed this appeal before the Tribunal.

3.1. Learned Advocate appearing for appellants submits that the appellants are involved in purchases cargo/container space in bulk, that is available with a particular shipping line, in advance for an agreed price paid by them and subsequently sells such cargo/container space to different customers through appropriate marketing strategy and hence they have claimed that there is no service involved in the above transactions. Further, these transactions entered with the shipping line is on principal-to-principal basis. The actual transportation of goods during ocean voyage is undertaken by the shipping lines and the appellants are involved in buying and selling of cargo/container space for ocean voyage for transportation of export/import cargo. Further, the appellants are also registered as Multi-Modal Transport Operator (MMTO) with the Directorate General of Shipping under the Ministry of Shipping, holding Registration No. MTO/DGS/137/MAR/2016 being renewed from time to time, for compliance with Multimodal Transportation of Goods Act, 1993. Such registration is required for conduct of their business, as they service customers across various places whose goods have to be brought from their factory or place of storage to the seaport before its sent for export through ocean voyage. Thus, he claimed that levy of service tax is not applicable in their case and the confirmation of adjudged demands in the impugned order is improper.

3.2 Learned Advocate further stated that the present case of the appellants is covered in the order of the Tribunal in the case of *EMU Lines Pvt. Ltd. Vs Commissioner of CGST & C.E., Belapur* – (2023) 72 G.S.T.L. 373 (TRI.-MUM.) wherein it has been held that the freight element or any profit on such freight element cannot be subjected to tax under 'Business Auxiliary Services' (BAS). He further stated that the said order has been upheld by the Hon'ble Supreme Court, and thus the ratio of the said case is squarely applicable to their present case and the impugned order is liable to be set aside on the above basis.

3.3 Furthermore, learned Advocate also stated that the extended period of limitation cannot be invoked as the issue involved herein is of interpretation of legal provisions and there is no mention of any grounds in the SCN for such a demand under proviso to Section 73(1) *ibid*. Thus,

he claimed that the SCN cannot be sustained as the grounds for revocation of extended period. Thus, learned Advocate prayed that on the ground of limitation also the impugned order cannot be sustainable and therefore prayed for setting aside the same and allow their appeal.

3.4 In support of their stand, learned Advocate had relied upon the following decisions of the Tribunal and the judgement of the Hon'ble Supreme Court, in the respective cases mentioned below:

(i) *Greenwich Meridian Logistics(I) Pvt. Ltd.Vs. Commissioner of Service Tax, Mumbai*– 2016 (43) S.T.R. 215 (Tri. – Mumbai)

(ii) *Phoenix International Freight Services Pvt. Ltd. Vs. Commissioner of Service Tax, Mumbai-II* – 2017 (47) S.T.R. 129(Tri. – Mumbai)

(iii) *Commissioner of CGST & C. Ex., Belapur Vs.EMU Line Pvt. Ltd.*– 2023(72)G.S.T.L. 443(S.C.)

4.1. Learned Authorised Representative (AR) for Revenue reiterates the findings made by the learned Commissioner and submitted that the issue of short payment of service tax with an intention to evade by non-disclosure of the correct amount received in respect of taxable service has been dealt in detail in the impugned order. Thus, learned AR claimed that the adjudged demands are sustainable and the appeal preferred by the appellants is liable to be dismissed.

5. The submissions advanced by the learned Advocate appearing for the appellants and the learned AR of the Department have been considered by us. We have also perused the records of the case and the additional written submissions given in the form of paper books.

6.1 In the Show Cause Notice dated 21.10.2015, the short payment of service tax along with interest was demanded and imposition of penalties were also proposed on the following basis. The specific paragraphs dealing with these in the SCN is extracted and given below:

"14. Thus, from the facts and evidences discussed above, M/s Total Transport Systems Pvt. Ltd. appears to have contravened the following provisions of this Act and/or Rules made thereunder with intent to evade payment of service tax:

- a. failed to classify the aforesaid services under Business Auxiliary Service while providing services to the clients as required under Section 65 (19) of the Finance Act, 1994;*
- b. failed to charge and pay the service tax at an appropriate rate under sections 66/66B of Finance Act, 1994;*

- c. failed to Determine the correct value of service tax payable under Section 67 of the Finance Act, 1994;
- d. failed to file true and correct half yearly returns by the due dates under Section 70 of the Finance Act, 1994;

15. Therefore, from the foregoing discussion and facts, it appears that the assessee deliberately and intentionally never shown the said income as taxable income the periodical ST-3 Returns. This act of assessee amounts to mis-declaration and suppression of facts with an intent to evade payment of service tax...

16. Now, therefore M/s Total Transport Systems Pvt. Ltd. situated at... are hereby required to show cause to the Commission of Service Tax-VII, Mumbai... as to why:

(i) the aforesaid services provided by them, should not be classified under category 'Business Auxiliary Services' as per Section 65 (19) under the taxable under Section 65(105)(zzb) of the Finance Act, 1994 and Section 66B (erstwhile section 66) of the Finance Act, 1994 and they should not be held liable for payment of Service Tax at appropriate rate on their aforesaid activities, during the years 2009-2010 to 2012-2013;

(ii) Service tax amounting to Rs.4,47,00,793/- (Rupees Four Crore Forty Seven Lakhs Seven Hundred and Ninety Three only) (inclusive of Education Cess and Secondary and Higher Education Cess) on the aforesaid 'Business Auxiliary Services', rendered during the years 2009-2010 to 2012-2013, as detailed above, should not be demanded and recovered from them under the Section 68 read with Proviso to Section 73 (1) read with Rule 6 of the Service Tax Rules, 1994;

(iii) the interest at the appropriate rate on the Service Tax demanded, as mentioned at clause (ii) above, should not be demanded and recovered from them under Section 75 of the Act;

(iv) penalty should not be imposed for not disclosing true and correct information in respect of the value of the aforesaid services on which no Service Tax was paid in the half yearly returns by the due dates under Section 77 of the Finance Act, 1994;

(v) penalty should not be imposed on them for suppressing the receipt of true value of taxable services and not paying the aforesaid Service Tax of Rs.4,47,00,793/- (Rupees Four Crore Forty Seven Lakhs Seven Hundred and Ninety Three only) with intent to evade payment of service tax as discussed above under Section 78 of the Finance Act, 1994..."

Similarly, a Statement of Demand was also issued for the year 2014-2015.

6.2 In the impugned order dated 27.03.2019 at paragraph 29, the learned Commissioner had recorded that the issue to be decided by him is as below:

"(i) whether freight margin recovered by the noticee from their customers would cover as an intermediary service in terms of Rule 9(c) of Place of Provision Rules, 2012? and

(ii) whether their service is a taxable service under Section 65 (19) of the Finance Act, 1994 as Business Auxiliary Service?"

7. We find that the issue for consideration before us is to decide whether confirmation of adjudged demands under the taxable category of Business Auxiliary Services' (BAS) in the impugned order dated 27.03.2019 by invoking extended period of limitation is sustainable. We find that the disputed period of the transactions is from 2009-2010 to 2012-2013 and 2014-2015, i.e., both pre Negative List period, prior to 01.07.2012 and post Negative List regime, after 01.07.2012.

8.1 In order to address the above issue, we would like to refer the relevant legal provisions contained in Chapter V of the Finance Act, 1994 as it existed during the disputed period in respect of the taxable service under dispute.

"Definitions.

Section 65. *In this Chapter, unless the context otherwise requires,—*

(19) "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

(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;

(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.

XX

XX

XX

XX

XX

(b) "excisable goods" has the meaning assigned to it in clause (d) of section 2 of the Central Excise Act, 1944 (1 of 1944);

(c) "manufacture" has the meaning assigned to it in clause (f) of section 2 of the Central Excise Act, 1944 (1 of 1944).

Section 65(105). "taxable service" means any service provided or to be provided,—

(zzb) to a client, by ¹[any person] in relation to business auxiliary service;

¹ Substituted for "a commercial concern" by the Finance Act, 2006, w.e.f. 1-5-2006.

Valuation of taxable services for charging service tax.—

67. (1) Subject to the provisions of this Chapter, where service tax is chargeable on any taxable service with reference to its value, then such value shall,—

- (i) in a case where the provision of service is for a consideration in money, be the gross amount charged by the service provider for such service provided or to be provided by him;
- (ii) in a case where the provision of service is for a consideration not wholly or partly consisting of money, be such amount in money as, with the addition of service tax charged, is equivalent to the consideration;
- (iii) in a case where the provision of service is for a consideration which is not ascertainable, be the amount as may be determined in the prescribed manner....

(2) Where the gross amount charged by a service provider, for the service provided or to be provided is inclusive of service tax payable, the value of such taxable service shall be such amount as, with the addition of tax payable, is equal to the gross amount charged.

(3) The gross amount charged for the taxable service shall include any amount received towards the taxable service before, during or after provision of such service....

78. Penalty for suppressing, etc., of value of taxable services.—(1)

Where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, by reason of—

- (a) fraud; or
- (b) collusion; or
- (c) wilful mis-statement; or
- (d) suppression of facts; or
- (e) contravention of any of the provisions of this Chapter or of the rules made thereunder with the intent to evade payment of service tax,

the person, liable to pay such service tax or erroneous refund, as determined under sub-section (2) of section 73, shall also be liable to pay a penalty, in addition to such service tax and interest thereon, if any, payable by him, which shall be equal to the amount of service tax so not levied or paid or short-levied or short-paid or erroneously refunded:...."

Classification of taxable services.

Section 65A. (1) For the purposes of this Chapter, classification of taxable services shall be determined according to the terms of the sub-clauses of clause (105) of section 65.

(2) When for any reason, a taxable service is, prima facie, classifiable under two or more sub-clauses of clause (105) of section 65, classification shall be effected as follows:—

- (a) the sub-clause which provides the most specific description shall be preferred to sub-clauses providing a more general description;
- (b) composite services consisting of a combination of different services which cannot be classified in the manner specified in clause (a), shall be classified as if they consisted of a service which gives them their essential character, insofar as this criterion is applicable;
- (c) when a service cannot be classified in the manner specified in clause (a) or clause (b), it shall be classified under the sub-clause which occurs first among the sub-clauses which equally merit consideration.

Post Negative List regime(w.e.f. 01.07.2012):

65B(44) "**service**" means any activity carried out by a person for another for consideration, and includes a declared service, but shall not include—

- (a) an activity which constitutes merely,—
 - (i) a transfer of title in goods or immovable property, by way of sale, gift or in any other manner; or
 - (ii) such transfer, delivery or supply of any goods which is deemed to be a sale within the meaning of clause (29A) of article 366 of the Constitution; or
 - (iii) a transaction in money or actionable claim;
- (b) a provision of service by an employee to the employer in the course of or in relation to his employment;
- (c) fees taken in any Court or tribunal established under any law for the time being in force.

Explanation 1.— For the removal of doubts, it is hereby declared that nothing contained in this clause shall apply to,—

(A) the functions performed by the Members of Parliament, Members of State Legislative, Members of Panchayats, Members of Municipalities and Members of other local authorities who receive any consideration in performing the functions of that office as such member; or

(B) the duties performed by any person who holds any post in pursuance of the provisions of the Constitution in that capacity; or

(C) the duties performed by any person as a Chairperson or a Member or a Director in a body established by the Central Government or State Governments or local authority and who is not deemed as an employee before the commencement of this section..."

PLACE OF PROVISION OF SERVICES RULES, 2012

"Place of provision generally .

3 . The place of provision of a service shall be the location of the recipient of service:

Provided that in case of services other than online information and database access or retrieval services, where the location of the service receiver is not available in the ordinary course of business, the place of provision shall be the location of the provider of service.

Place of provision of services where provider and recipient are located in taxable territory.

8. Place of provision of a service, where the location of the provider of service as well as that of the recipient of service is in the taxable territory, shall be the location of the recipient of service.

Place of provision of goods transportation services.

10. The place of provision of services of transportation of goods, other than by way of mail or courier, shall be the place of destination of the goods:

Provided that the place of provision of services of goods transportation agency shall be the location of the person liable to pay tax.

Order of application of rules.

14. Notwithstanding anything stated in any rule, where the provision of a service is, *prima facie*, determinable in terms of more than one rule, it shall be determined in accordance with the rule that occurs later among the rules that merit equal consideration."

8.2 From the plain reading of above legal provisions, for the period prior to 01.07.2012, it transpires that in order to categorize a particular activity as a 'service' and to charge service tax thereon, it should be covered under the specific category of taxable services as per defined scope of coverage under tax net, inasmuch as each of the taxable services are defined separately under clause (105) of Section 65 of the Finance Act, 1994. The definition of taxable services under the category of 'Business Auxiliary Services' (BAS) covered specifically under the taxable clause (zzb) of Section 65(105) *ibid* include any service provided to a client in relation to BAS. Thus, the definition provided for the phrase 'Business Auxiliary Services' under Section 65(19) *ibid* holds the determining test to see, whether the activity of purchase of cargo/container space in bulk, which is available with a particular shipping line, in advance for an agreed price paid by appellants and subsequently selling the same to different customers is covered under the scope of such definition so as to make it liable to be tax under the service tax net as per Section 65(105)(zzb) *ibid*. From the nature of transactions entered into by the appellants with the shipping line, it is found to be on principal-to-principal basis. Though the actual transportation of goods during ocean voyage is undertaken by the shipping lines, the appellants are not marketing or acting as agents for the shipping lines, but are engaged in sale of such space of container/cargo in ship's ocean voyage. The definition of business

support service provide list of activities which are divided into two parts i.e. the "means" part and the "includes" part. The "means" part covers any service in relation to business or commerce within its sweep, but the same should have been rendered as 'commission agent'. However, the "includes" part of the definition specifies services such as promotion, marketing, sale of goods; promotion or marketing of services; customer care services; procurement or distribution services; production or processing of goods etc. Further, services incidental or ancillary to the above services were also included in the scope of such definition. We find, that the sale of cargo/container space adopted by the appellants is not specifically mentioned in the above definition. The documents placed on record, indicate that the appellants are issuing separate invoice for the sale of space either as Full Container Load (FCL) or Less-than full Container Load (LCL) to their customers as well as Bill of Lading for the ocean voyage or combined freight charge in case of Multi-modal transport document. The shipping lines are charging separately on the appellants for the cargo space/container space of the ship booked by them. Hence, we find the transaction of the appellants is on principal-to-principal basis has been clearly brought out with supporting evidence. Further, it is also evident from these records that the appellants are neither agents of the shipping line nor they are promoting, marketing the services of the shipping line. In view of the above, we are of the considered view that the activities undertaken by the appellants in sale of cargo/container space as explained above does not get covered under the definition of Section 65(19) *ibid* as Business Auxiliary Services' (BAS).

9.1 Learned Advocate for the appellants had submitted that the adjudged demands cannot be sustained on the point of limitation, as the SCN has not made out any case for invocation of extended period. In this regard, we find that the SCN nowhere had given any specific ground for invoking the extended period for demand of service tax for the period April, 2003 to March, 2007, except mention that the 'assessee deliberately and intentionally never shown the said income as taxable income in their periodical ST-3 Returns'. We find that the issue with respect to invocation of extended period in respect of fraud, collusion, willful mis-statement or suppression of facts under tax demands is no more open to dispute, as the Hon'ble Supreme Court in the case of

Uniworth Textiles Ltd., Vs. Commissioner of Central Excise, Raipur – 2013 (288) E.L.T. 161 (S.C.) had held that the onus is on the Revenue to prove the presence of such specific grounds. The relevant paragraph of the above judgements is extracted below:

"24. Further, we are not convinced with the finding of the Tribunal which placed the onus of providing evidence in support of bona fide conduct, by observing that "the appellants had not brought anything on record" to prove their claim of bona fide conduct, on the appellant. It is a cardinal postulate of law that the burden of proving any form of mala fide lies on the shoulders of the one alleging it. This Court observed in *Union of India v. Ashok Kumar & Ors.* - (2005) 8 SCC 760 that "it cannot be overlooked that burden of establishing mala fides is very heavy on the person who alleges it. The allegations of mala fides are often more easily made than proved, and the very seriousness of such allegations demand proof of a high order of credibility."

25. Moreover, this Court, through a catena of decisions, has held that the proviso to Section 28 of the Act finds application only when specific and explicit averments challenging the fides of the conduct of the assessee are made in the show cause notice, a requirement that the show cause notice in the present case fails to meet. In *Aban Loyd Chiles Offshore Limited and Ors.* (supra), this Court made the following observations :

'21. This Court while interpreting Section 11-A of the Central Excise Act in *Collector of Central Excise v. H.M.M. Ltd.* (supra) has observed that in order to attract the proviso to Section 11-A(1) it must be shown that the excise duty escaped by reason of fraud, collusion or willful misstatement or suppression of fact with intent to evade the payment of duty. It has been observed :

'...Therefore, in order to attract the proviso to Section 11-A(1) it must be alleged in the show-cause notice that the duty of excise had not been levied or paid by reason of fraud, collusion or willful misstatement or suppression of fact on the part of the assessee or by reason of contravention of any of the provisions of the Act or of the Rules made thereunder with intent to evade payment of duties by such person or his agent. There is no such averment to be found in the show cause notice. There is no averment that the duty of excise had been intentionally evaded or that fraud or collusion had been practiced or that the assessee was guilty of wilful misstatement or suppression of fact. In the absence of any such averments in the show-cause notice it is difficult to understand how the Revenue could sustain the notice under the proviso to Section 11-A(1) of the Act.'

It was held that the show cause notice must put the assessee to notice which of the various omissions or commissions stated in the proviso is committed to extend the period from six months to five years. That unless the assessee is put to notice the assessee would have no opportunity to meet the case of the Department. It was held :

'...There is considerable force in this contention. If the department proposes to invoke the proviso to Section 11-A(1), the show-cause notice must put the assessee to notice which of the various commissions or omissions stated in the proviso is committed to extend the period from six months to 5 years. Unless the assessee is put to notice, the assessee would have no opportunity to meet the case of the department. The defaults enumerated in the proviso to the said sub-section are more than one and if the Excise Department places reliance on the proviso it must be specifically stated in the show-cause notice which is the allegation against the assessee falling within the four corners of the said proviso....'

(Emphasis supplied)

26. Hence, on account of the fact that the burden of proof of proving mala fide conduct under the proviso to Section 28 of the Act

lies with the Revenue; that in furtherance of the same, no specific averments find a mention in the show cause notice which is a mandatory requirement for commencement of action under the said proviso; and that nothing on record displays a wilful default on the part of the appellant, we hold that the extended period of limitation under the said provision could not be invoked against the appellant."

On the basis of above judgement of the Hon'ble Supreme Court and on the facts of the case, we find that there is no specific grounds invoked for suppression of facts or willful mis-statement on the part of the appellants, particularly when the entire records of the appellants including periodical returns filed were available with the department. Thus, we are of the considered view that no effective case was made out in the SCN and in the impugned order for invocation of extended period, and thus such order confirming the adjudged demands for extended period is patently illegal and therefore not sustainable, on the grounds of limitation.

9.2. On perusal of the records of the case, it is seen that the appellants had been registered with the Directorate General of Shipping, Ministry of Shipping in terms of Section 3 of the Multimodal Transportation of Goods Act, 1993. The relevant provisions of the said Act of 1993 is extracted and given below:

Multimodal Transportation of Goods Act, 1993

"3. No person to carry on business without registration.—No person shall carry on or commence the business of multimodal transportation unless he is registered under this Act:...

2. Definitions.—In this Act, unless the context otherwise requires,—

(j) "mode of transport" means carriage of goods by road, air, rail inland waterways or sea;

(k) "multimodal transportation" means carriage of goods, by at least two different modes of transport under a multimodal transport contract, from the place of acceptance of the goods in India to a place of delivery of the goods outside India;

(l) "multimodal transport contract" means a contract under which a multimodal transport operator undertakes to perform or procure the performance of multimodal transportation against payment of freight;

(m) "multimodal transport operator" means any person who—

(i) concludes a multimodal transport contract on his own behalf or through another person acting on his behalf;

(ii) acts as principal, and not as an agent either of the consignor, or consignee or of the carrier participating in the multimodal transportation, and who assumes responsibility for the performance of the said contract; and

(iii) is registered under sub-section (3) of section 4;"

The above legal provisions and the require Multimodal Transport Operator (MTO) registration taken by the appellants under the said Act and Rules made thereunder, makes it clear that the appellants are operating on principal to principal basis and are not acting as an agent for the shipping line. Further, in the sample invoice No.8527-51185012791 dated 23.11.2015 produced by the appellants, the amount of freight charges for transportation of goods through sea voyage from the port of origin at Gateway terminal of Nhava Sheva port in India to the port of destination Yangon, Myanmar is specifically mentioned. Besides the above freight charges, the break-up details of the amount of terminal handling charges, documentation charges and material handling charges have also been mentioned separately in the said invoice and the service tax paid at the appropriate rate has also been duly indicated thereon. Further, the appellants had also issued the Bill of Lading for the sea voyage of the goods. Thus, the transactions undertaken by the appellants in respect of cargo/ container space is not covered under the scope of taxable category of 'Business Auxiliary Service' as it only involve multimodal transport of export goods for ocean voyage. Thus, we find that the demand of short payment of service tax without firstly determining the grounds or legal basis on which such short payment was liable to be recovered were made out in the impugned order and therefore, on this ground itself the impugned order is not sustainable.

10.1 From plain reading of the legal provisions relating to 'Place of Provision of Services Rules, 2012' it clearly transpires that the place of provision of service in general has been specified under Rule 3 *ibid*, and in specific situations such as place of provision of performance-based services, provision of services relating to immovable property, provision of services relating to events, services provided at more than one location, services where provider and recipient are located in the taxable territory, provision of certain specified services have been specifically categorized and the place of provision in such cases have been given in the respective Rules 4, 5, 6, 7, 8 and 9 *ibid* respectively. As regards the place of provision for goods transportation services, other than by way of mail or courier, it is specifically stated as the 'place of destination of the goods' under Rule 10 *ibid*. Considering the above legal provisions, in the present case, we find that since the services are provided in respect of transportation of export goods, on the ocean voyage for delivery at

the port of destination abroad, which is out of 'taxable territory', the services provided by the appellant cannot be covered under the service tax net, in the post negative list regime after 01.07.2012 also in terms of Section 66B *ibid*.

10.2 Further, the findings given in the impugned order for rejecting application of Rule 10 *ibid* is on the ground that Rule 8 shall apply in the present case, as both service provider and recipient of the service are located in the taxable territory. In this regard we find that, Rule 14 *ibid* specifically state that notwithstanding anything stated in any rule, where the provision of a service is, *prima facie*, determinable in terms of more than one rule, it shall be determined in accordance with the rule that occurs later among the rules that merit equal consideration. Thus, we find that in terms of *non-obstante* clause which grants superimposing authority to Rule 14 *ibid* over the provisions of other rules, in terms of the rule that occurs later would be applied and accordingly Rule 10 *ibid* is the correct one to be applied in the present case. Thus, we are of the considered view that the findings given by the learned Commissioner in the impugned order on this ground is also not sustainable.

11.1 We also find that the issue of service tax liability in respect of freight charges of cargo/container space has already been dealt in elaborately by the Tribunal in the case of *Greenwich Meridian Logistics (I) Ltd.* (*supra*) holding that the service tax is not applicable on such freight element. The relevant paragraphs of the said order are extracted and given below:

6. *We notice that the appellant has admitted to receiving commission from shipping lines on account of freight and discharge of tax liability on the same. However, we find no justification for fastening the same liability on all other receipts of the appellant. In Bax Global India Ltd. v. Commissioner of Service Tax, Bangalore [2008 (9) S.T.R. 412 (Tri.-Bang.)], the Tribunal held.*

'9 Summing up, we find that the appellants had already discharged the duty liability in respect of the Customs House Agent activities undertaken by him. As regards all the other activities, we find that they do not relate to customs house agent activities. Even if any profit has been made in respect of those activities, they cannot be subjected to service tax in view of the Apex Court decision in the Baroda Electricity Meters Ltd. case ...'

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.*

10. *The original authority has proceeded on the assumption that there is only one payment and, that too, for freight charged by the shipping line. He has rejected the possibility of trading in space or slots on vessels by holding that trading in space or slots is a figment and freight is all that is transacted. This is a patent misconstruing of the usage of that expression. Freight, though used colloquially to describe all manner of carriage, is the nomenclature assigned to the consideration for space provided on a vessel for a particular voyage. Freight is charged by the entity that is in possession of space on a vessel from an entity that requires the space for carriage of cargo.*

11. *Slots may be contracted for by the shipper or its agent with the shipping line through the steamer agent. Implicit is a uni-directional flow of consideration because the space belongs to the shipping line. Steamer agent or agent of shipper may earn commission in such a transaction. Leaving that situation aside, the contention of the appellant is that it is a 'multi-modal transport operator' which entails a statutorily assigned role in cross-border logistics. According to Section 2 of the Multi-modal Transportation of Goods Act, 1993.*

(m) "multimodal transport operator" means any person who -

- (i) concludes a multimodal transport contract on his own behalf or through another person acting on his behalf;*
- (ii) acts as principal, and not as an agent either of the consignor, or consignee or of the carrier participating in the multimodal*

transportation, and who assumes responsibility for the performance of the said contract; and

(iii) is registered under sub-section (3) of section 4; and

(a) "carrier" means a person who performs or undertakes to perform for a hire, the carriage or part thereof, of goods by road, rail, inland waterways, sea or air;

12. *The appellant takes responsibility for safety of goods and issues a document of title which is a multi-modal bill of lading and commits to delivery at the consignee's end. To ensure such safe delivery, appellant contracts with carriers, by land, sea or air, without diluting its contractual responsibility to the consignor. Such contracting does not involve a transaction between the shipper and the carrier and the shipper is not privy to the minutiae of such contract for carriage. The appellant often, even in the absence of shippers, contract for space or slots in vessels in anticipation of demand and as a distinct business activity. Such a contract forecloses the allotment of such space by the shipping line or steamer agent with the risk of non-usage of the procured space devolving on the appellant. By no stretch is this assumption of risk within the scope of agency function. Ergo, it is nothing but a principal-to-principal transaction and the freight charges are consideration for space procured from shipping line. Correspondingly, allotment of procured space to shippers at negotiated rates within the total consideration in a multi-modal transportation contract with a consignor is another distinct principal-to-principal transaction. We, therefore, find that freight is paid to the shipping line and freight is collected from client-shippers in two independent transactions.*

13. *The notional surplus earned thereby arises from purchase and sale of space and not by acting for a client who has space or slot on a vessel. Section 65(19) of Finance Act, 1994 will not address these independent principal-to-principal transactions of the appellant and, with the space so purchased being allocable only by the appellant, the shipping line fails in description as client whose services are promoted or marketed.*

14. *We, therefore, find no justification for sustaining of the demand and, accordingly, set aside the impugned order. Demands, with interest thereon, and penalties in both orders are set aside. Cross-objections filed by the department are also disposed of."*

However, instead of properly appreciating the facts of the above case, the learned Commissioner in the impugned order has recorded in the above case the applicant acted as an agent of exporter which is not the case of in the present case, and hence he stated that the decision of the Tribunal is not relevant. We find that in the order of the Tribunal in the case of Greenwich Meridian Logistics (I) Ltd. (supra), there is no mention of the assessee being an agent of the exporter. Rather it specifically stated in that order "*that a registered multi-modal transport operator is not an agent of either the shipper or the carrier*". Thus, we find that the learned Commissioner has not properly brought out the

facts in ignoring the decision of the Tribunal, to come to the conclusion that it is not relevant.

11.2 We also find that the Tribunal in the case of *Karam Freight Movers* (supra) has held that mere sale and purchase of cargo space and earning profit in process is not taxable activity under service tax statute. The relevant paragraphs of the said order are extracted and given 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. It 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 Logistics (I) Pvt. Ltd. v. CST, Mumbai - 2016 (43) S.T.R. 215 (Tri.- Mumbai)*. 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 not by acting for client who has space or not on a vessel. It cannot be considered that the respondents are engaged in promoting or marketing the services of any "client".

12. In the present case it was recorded that the respondent was already paying service tax on commission received from airlines/shipping lines under business auxiliary service since 10-9-2004. The original authority recorded that the show cause notice did not specify as to who is the client to whom the respondent is providing service. Original authority considered both the scenario, airline/shipping lines as a client or exporter/shipper as a client. In case the respondent is acting on behalf of airlines/shipping lines as client, it was held that they are covered by tax liability under BAS. Further, examining the issue the original authority viewed that commission amount is necessarily to be obtained out of transaction which is to be provided by the respondent on behalf of the client, that is, the exporters. The facts of the case indicated that the mark-up value collected by the respondent from the exporter is an element of profit in the transaction. The respondent when acting as agent on behalf of airlines/shipping lines was discharging service tax w.e.f. 10-9-2004. However, with reference to amount collected from exporters/shippers the original authority clearly recorded that it is not the case that this amount is a commission earned by the respondent while acting on behalf of the exporter and said mark-up value is of freight charges and are not to be considered as commission. Based on these findings the demand was dropped. We do not find any impropriety in the said finding. The grounds of appeal did not bring any contrary evidence to change such findings. Accordingly, we find no merit in the appeal by Revenue. The appeal is dismissed."

11.3 We further find that the Tribunal in the case of *EMU Lines Ltd.* (supra) by relying on the earlier referred decisions of the Tribunal in the

case of Greenwich Meridian Logistics (I) Ltd., Karam Freight Movers, Bax Global India Ltd. has held that said activity of sale of cargo/container space is not taxable for payment of service tax. The relevant paragraphs of the said order are extracted and given below:

"4.5 After consideration of the submissions made, Tribunal has observed as follows:-

"6. We note that similar issues came up for decision before the Tribunal. The Tribunal after examining the facts held that in the arrangement relating to shipment of cargo provided by the shippers, the freight element or any profit on such freight cannot be subjected to tax under BAS. A reference can be made to a recent decision of the Tribunal in Bax Global India Ltd. v. CST, Chennai vide final order No. 42113 of 2017 dated 18/09/2017 and in Greenwich Meridian Logistics (I) Pvt. Ltd. v. CST, Mumbai - 2016 (43) S.T.R. 215 (Tri. - Mumbai) = 2016-TIOL-869-CESTAT-MUM and final order No. 52258 of 2017 dated 07/03/2017 in Karam Freight Movers. In all these decisions, the Tribunal examined the tax liability of the appellants with reference to considerations received as freight or mark up on freight. The service tax liability was held to be not applicable in such arrangement."

4.6 In the case of Greenwich Meridian Logistics (I) Pvt. Ltd. [2016 (43) STR 215 (Tri.-Mumbai)/[2016] 69 taxmann.com 100 (Mum. - CESTAT)/[2016] 55 GST 635 (Mum. - CESTAT), the Tribunal has specifically observed as follows:-

"11. Slots may be contracted for by the shipper or its agent with the shipping line through the steamer agent. Implicit is a uni-directional flow of consideration because the space belongs to the shipping line. Steamer agent or agent of shipper may earn commission in such a transaction. Leaving that situation aside, the contention of the appellant is that it is a 'multi-modal transport operator' which entails a statutorily assigned role in cross-order logistics. According to section 2 of the Multi-modal Transportation of Goods Act, 1993....

12. The appellant takes responsibility for safety of goods and issues a document of title which is a multi-modal bill of lading and commits to delivery at the consignee's end. To ensure such safe delivery, appellant contracts with carriers, by land, sea or air, without diluting its contractual responsibility to the consignor. Such contracting does not involve a transaction between the shipper and the carrier and the shipper is not privy to the minutiae of such contract for carriage. The appellant often, even in the absence of shippers, contract for space or slots in vessels in anticipation of demand and as a distinct business activity. Such a contract forecloses the allotment of such space by the shipping line or steamer agent with the risk of non-usage of the procured space devolving on the appellant. By no stretch is this assumption of risk within the scope of agency function. Ergo, it is nothing but a principal-to-principal transaction and the freight charges are consideration for space procured from shipping line. Correspondingly, allotment of procured space to shippers at negotiated rates within the total consideration in a multi-modal transportation contract with a consignor is another distinct principal-to-principal transaction. We, therefore, find that freight is paid to the shipping line and freight is collected from client-shippers in two independent transactions.

13. The notional surplus earned thereby arises from purchases and sale of space and not by acting for a client who has space or slot on a vessel. Section 65(19) of Finance Act, 1994 will not address these independent principal-to-principal transactions of the appellant and, with the space so purchased being allocable only by the appellant, the shipping line fails in description as client whose services are promoted or marketed."

5.1 As we find the issue is squarely covered by the above two decisions, we do not find merit in the impugned order.

5.2 The impugned order is set aside and the appeal allowed.”

11.4 Furthermore, we also find that the issue of service tax liability in respect of the activity of sale of cargo/container space as held by the Tribunal in the case of EMU Lines Ltd. (supra) was upheld by the Hon’ble Supreme Court in Civil Appeal No.1479 of 2023 by dismissing the appeal filed by the department. The said order of the Hon’ble Apex Court is extracted below:

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NO. 1479 OF 2023
(Arising out of C.A. Dy. No. 6706 of 2023)

COMMISSIONER OF CGST AND CE BELAPUR

.....Appellant(s)

Vs.

M/S EMU LINE PVT. LTD.

.....Respondent(s)

O R D E R

Delay condoned.

This Court is of the opinion that the order impugned does not call for interference. The appeal is, accordingly, dismissed.

All Pending applications are disposed of.

.....J.
(S. RAVINDRA BHAT)

.....J.
(DIPANKAR DATTA)

New Delhi;
February 27, 2023.

12. In view of the above analysis of the legal provisions and on the basis of the orders passed by the Tribunal and the judgement of the Hon'ble Supreme Court, we find that the impugned order dated 05.04.2019 with regard to confirmation of adjudged service tax demands along with interest and penalties are not sustainable.

13. In the result, by setting aside the impugned order dated 05.04.2019, the appeal is allowed in favour of the appellants.

(Order pronounced in open court on 14.05.2024)

(S.K. Mohanty)
Member (Judicial)

(M.M. Parthiban)
Member (Technical)

Sinha