IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, CHENNAI

REGIONAL BENCH - COURT NO. – DB-3

Service Tax Appeal No. 42079 of 2018-DB

(Arising out of Order-in-Appeal No. 375/2018 dated 27.07.2018 passed by the Commissioner of GST & Central Excise, Chennai).

M/s Broekman Logistics India) Pvt Ltd. **Appellant**
Jamal Chambers, 3rd Floor,
New No. 49 (Old No. 26)
Mount Road, Saidapet,
Chennai-600015.

Vs.

Commissioner of GST & CE **Respondent**
Newry Towers, 2054/1, II Avenue,
12th Main Road, Anna Nagar,
Chennai-600 040.

APPEARANCE:

Shri. D. Aravind, Consultant for the Appellant

Shri. Vikas Jhajharia, AC (AR) for the Respondent

CORAM

Hon'ble Ms. Sulekha Beevi C.S., Member (Judicial)
Hon'ble Shri ANIL G. SHAKKARWAR, Member (Technical)

FINAL ORDER No. 40356/2020

Date of Hearing: 30.01.2020
Date of Decision: 30.01.2020

Per: Sulekha Beevi

Brief facts are that the appellants are engaged in the business of logistics supply, chain management, clearing & forwarding, licensed CHA etc., and are rendering services at Free Trade Warehousing Zone (FTWZ), as per Authorized

operations of Letter of Approval (LOA) issued by the Development Commissioner for providing various logistic services. On the basis of investigation conducted by DGCEI, that appellant though rendered storage and warehousing services within the FTWZ to clients based abroad as well as Indian clients during the period July, 2012 to March, 2015 they did not discharge service tax on such services. They also did not discharge service tax on various other services accounted by them. SCN was issued proposing to demand service tax on the services provided by them from FTWZ zone exclusively to foreign based clients. After due process of law the original authority held that the services provided to foreign clients do not qualify as export of services and thus confirmed the demand, interest and imposed penalty. On appeal, the Commissioner (Appeals) upheld the same. Hence this appeal.

2.1 On behalf of the appellant, Learned Consultant Shri D. Aravind appeared and argued the matter. He submitted that the appellant is authorized to carry out the operations by setting up a unit in the FTWZ zone. They have been rendering Storage and Warehousing services predominantly to foreign customers. On the charges collected for services rendered to Indian customers, the appellants have discharged appropriate service tax. The demand in the present case is with respect to the services rendered to the foreign customers only. The department alleges that since the storage and warehousing services are provided in the FTWZ zone though it is rendered

to foreign customers, the same cannot be considered as export of services. He adverted to the definition of "services" and "export" as given in Section 2 (z) and 2 (m) of SEZ Act, 2005, which is as under:-

> **"Section 2(m) in The Special Economic Zones Act, 2005**
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> (z) "services" means such tradable services which,—
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> (i) are covered under the General Agreement on Trade in Services annexed as IB to the Agreement establishing the World Trade Organization concluded at Marrakesh on the 15th day of April, 1994;
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> (ii) may be prescribed by the Central Government for the purposes of this Act; and
>
> (iii) earn foreign exchange;
>
> (m) "export" means—
>
> (i) taking goods, or providing services, out of India, from a Special Economic Zone, by land, sea or air or by any other mode, whether physical or otherwise; or
>
> (ii) supplying goods, or providing services, from the Domestic Tariff Area to a Unit or Developer; or
>
> (iii) supplying goods, or providing services, from one Unit to another Unit or Developer, in the same or different Special Economic Zone;"

2.2 The appellant is located in FTWZ zone and has provided services which would meet the definitions as above. Further, the consideration was received in convertible foreign currency. The activity rendered by them has to be considered as export of services. As per Chapter 7A of FTP 2009-14, Free Trade Warehousing Zones are governed by SEZ Act and Rules made thereunder. As per FTP, a unit in Free Trade Warehousing zone shall be exempt from service tax for services exported.

As per Section 26 of SEZ Act, 2005, exemption is available for any services provided from SEZ or from a unit to any place outside India. Section 51 of the SEZ Act, 2005 provides that the Act would have overriding effect to the extent of any inconsistency of SEZ Act with the other. The intention of these provisions is to exempt all duties and taxes on goods exported outside India as well as services rendered to service recipients outside India. It is, thus argued by the learned Consultant that the demand of service tax on the consideration received for storage and warehousing services cannot sustain.

2.3 The learned Consultant submitted that the demand has been raised on certain amounts in the nature of CFS charges, demurrage charges, and customs duty recoveries etc., which are reimbursable expenses for the period prior to 2015. As per the decision of the Hon'ble Supreme Court in the case of *UOI Vs. INTERCONTINENTAL CONSULTANTS AND TECHNOCRATS PVT. LTD*. - 2018 (10) G.S.T.L. 401 (S.C.), would be applicable and the demand cannot sustain. However, it is fairly stated by the learned Consultant that the appellants have not produced necessary documents before the adjudicating authority to establish that the amounts in respect of other services are reimbursable expenses. He requested for remand of the matter on this issue to produce necessary documents to establish their contention.

3.1 Learned AR, Shri Arul C. Durairaj, Superintendent, appeared for the department. Referring to the definition of 'export' as contained in Section 2 (m) of SEZ Act, 2005, he submitted that only when the services are provided out of India from a Special Economic Zone, the activity would be export. In the present case, the storage and warehousing is done in the FTWZ zone situated in India. Although the service recipient is placed abroad, since the place of provision of service is in India, the activity cannot be considered as export of service. Whether a service is to be treated as export or not was regulated under Export of Service Rules, 2005. As per these Rules, services mentioned in Rule 3 (ii) are performance based and even if such taxable services are provided outside India, it shall be treated as export of services and will be exempted from service tax. However, if such services are partly performed outside India, they will be treated as export of services. Place of Provision of Service Rules, 2012 were notified under the new Section 66 C of Finance Act, 1994, which provides for determination of place from where services are provided or deemed to be provided or deemed to have been agreed to be provided. After coming into effect of these Rules w.e.f. 01.07.2012, the Export of Service Rules, 2005 stands rescinded. He adverted to Rule 6 A of Service Tax Rules, 1994 and submitted that a service shall qualify for export when the following requirements are met:-

a) the service provider is located in taxable territory;

b) service recipient is located outside India;

c) service provided is a service other than those in the negative list;

d) the payment of service is received in convertible foreign exchange. (I) both service provider and service receiver are not merely establishments of distinct person as per Section 65B (44).

Rule 4 states about the place of provision of performance based services. It is stated therein that 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 shall be the location where the services are actually performed. In the present case, the services are performance based services and are actually performed in India. Therefore there is no export of service. The authorities below have rightly upheld the demand.

3.2. On the second issue with respect to reimbursable expenses, Ld. AR submitted that the appellant has not produced necessary documents to establish that the amounts collected are actual reimbursements by customers.

4. Heard both sides.

5.1 Detailed arguments were advanced by the Ld. Consultant only on demand confirmed under Storage and Warehousing services. It is not disputed that the storage and warehousing unit was inside the Free Trade Zone (SEZ). It is

also not disputed that the service recipient is situated abroad and also that the consideration received for these services is in convertible foreign currency. The department has proceeded to demand service tax alleging that there is no export of service since the place of provision of service is located in India. The definition of export as well as service as contained in SEZ has already been reproduced.

5.2 It is now necessary to look into Section 26 of the SEZ Act, 2005 which gives exemption to various duties and taxes as well as Section 51 which states that SEZ Act, 2005 shall have overriding effect. Section 26 of SEZ Act reads as under:-

> **"Exemptions, drawbacks and concessions to every Developer and entrepreneur**
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> **26.** (1) Subject to the provisions of sub-section (2), every Developer and the entrepreneur shall be entitled to the following exemptions, drawbacks and concessions, namely:
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> (a) exemption from any duty of customs, under the Customs Act, 1962 or the Custom Tariff Act, 1975 or any other law for the time being in force, on goods imported into, or service provided in, a Special Economic Zone or a Unit, to carry on the authorised operations by the Developer or entrepreneur;
>
> (b) exemption from any duty of customs, under the Customs Act, 1962 or the Customs Tariff Act, 1975 or any other law for the time being in force, on goods exported from, or services provided, from a Special Economic Zone or from a Unit, to any place outside India:
>
> (c) exemption from any duty of excise, under the Central Excise Act, 1944 or the Central Excise Tariff Act, 1985 or any other law for the time being in force, on goods brought from Domestic Tariff Area to a Special Economic Zone or Unit, to carry on the authorised operations by the Developer or entrepreneur;

(d) drawback or such other benefits as may be admissible from time to time on goods brought or services provided from the Domestic Tariff Area into a Special Economic Zone or Unit or services provided in a Special Economic Zone or Unit by the service providers located outside India to carry on the authorised operations by the Developer or entrepreneur;

(e) exemption from service tax under Chapter-V of the Finance Act, 1994 on taxable services provided to a Developer or Unit to carry on the authorised operations in a Special Economic Zone;

(f) exemption from the securities transaction tax leviable under section 98 of the Finance (No. 2) Act, 2004 in case the taxable securities transactions are entered into by a non-resident through the International Financial Services Centre;

(g) exemption from the levy of taxes on the sale or purchase of goods other than newspapers under the Central Sales Tax Act, 1956 if such goods are meant to carry on the authorised operations by the Developer or entrepreneur."

Section 51 of SEZ Act reads as under:-

"51. Act to have overriding effect.

The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other slaw for the time being in force or in any instrument having effect by virtue of any law other than this Act."

5.3 Section 26 thus provides for exemption of duties and taxes. Section 26, Clause (e) provides for exemption from service tax. Section 51 states that the Act will have overriding effect notwithstanding anything inconsistent in any other law. This Act thus will override the Finance Act, 1994, as well as the Rules framed thereunder to give effect to the exemption contained in Section 26. In such circumstances, the

department cannot press into application Service Tax Rules, Place of Provision of service or other Rules to hold that the appellant has not exported any services. The meaning of service and export contained in the special legislation of SEZ Act, 2005 by which SEZ or FTWZ has been created has to be given effect. The Service Tax Rules, 1994 cannot be pressed into application so as to defeat the intention and purpose of Section 26. When the intention of creating such FTWZ within India is to give exemption from levy of all duties and taxes, the department ought to have confined to the definitions contained in Section 2 (z) and 2 (m) of the said Act. Further, the consideration is received in foreign currency as well as the service recipient is a person placed outside India. The department cannot then contend that there is no export of services. The demand of service tax on consideration received by the appellant from the foreign service recipient under Storage and Warehousing services cannot be subject to levy of service tax under reverse charge mechanism. The first issue is found in favour of the appellant.

5.4 The second issue is with regard to the demand on amounts collected by appellant and confirmed under various services. Learned Consultant has submitted that they have not produced necessary documentary evidence before the adjudicating authority to establish the nature of these amounts. That these are actual reimbursements. We are of the considered view that the appellant has to be given a

further opportunity to furnish necessary documents in this regard. For this limited purpose of reconsideration of demand on such charges/services we remand the matter to the adjudicating authority.

6. From the foregoing discussions the demand of service tax on considerations received in respect of Storage and Warehousing services is set aside. The demands with respect to other services confirmed in the impugned order are remanded to the adjudicating authority for fresh consideration.

7. In the result, appeal is partly allowed with consequential reliefs, if any and partly remanded.

(Operative part of the order pronounced in the open court on 30.01.2020)

(**SULEKHA BEEVI C.S.**)
Member (Judicial)

(**ANIL G.SHAKKARWAR**)
Member (Technical)

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