CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

WEST ZONAL BENCH

Service Tax Appeal No. 87630 of 2016

(Arising out of Order-in-Original No. 82/ST/COMMR/2015 dated 28.03.2016 passed by the Commissioner of Central Excise, Customs & Service Tax, Aurangabad)

M/s. Auto Cars **…..Appellant**
Adalat Road,
Near Kranti Chowk
Aurangabad

Vs.

Commissioner of Central Excise & Service Tax, Aurangabad **…..Respondent**
N-5, Town Centre
CIDCO, Aurangabad

With

Service Tax Appeal No. 85895 of 2017

(Arising out of Order-in-Original No. 29/ST/COMMR/2016 dated 20.12.2016 passed by the Commissioner of Central Excise, Customs & Service Tax, Aurangabad)

M/s. Auto Cars **…..Appellant**
Adalat Road,
Near Kranti Chowk
Aurangabad

Vs.

Commissioner of Central Excise & Service Tax, Aurangabad **…..Respondent**
N-5, Town Centre
CIDCO, Aurangabad

APPEARANCE:

Shri Gajendra Jain, Advocate for the appellant
Shri Shambhoo Nath, Principal Commissioner (AR) for the respondent

CORAM: **Hon'ble Mr C J Mathew, Member (Technical)**
Hon'ble Ajay Sharma, Member (Judicial)

FINAL ORDER No: A/85886-85887/2022

DATE OF HEARING : 31.03.2022
DATE OF DECISION : 16.09.2022

PER: C J MATHEW

Impugned before us are order-in-original no. 82/ST/COMMR/2015 dated 28th March 2016 and no. 29/ST/COMMR/2016 dated 20th December 2016 of Commissioner of Central Excise & Customs, Aurangabad in which the appellant, M/s Auto Cars, has been subjected to detrimental consequences of late payment of tax to the extent of ₹ 1,34,37,061 by penalty imposed under section 76 of Finance Act, 1994 and recovery of undischarged tax liability of ₹ 31,83,62,007 as provider of 'clearing and forwarding agent' service, taxable under section 65 (105) (j) of Finance Act, 1994, for April 2009 to January 2014, along with interest thereon, besides imposition of penalty under section 77 and under section 78 of Finance Act, 1994 as well as recovery of ₹ 2,89,99,396 as tax dues for period thereafter ending March 2015.

2. The essence of the allegation for both periods against the appellant herein, according to the first of the impugned orders, is

> *'2…..Providing services falling under the taxable category of 'Clearing & Forwarding Agent Services' but not registered under the said category of service. They appears to have vivisected the services so provided to their clients and thereby indulged in evasion of service tax on the consideration received, reflected as 'transportation income' in their books of accounts claiming to be the consideration received on account of 'GTA Services' so provided to their clients wherein the responsibility to meet the service tax liability lies with clients under reverse charge with 75% abatement.'*

3. The argument of Learned Counsel for applicant is that the legislative disbarment of levy of tax on 'goods transport agency' service in the hands of the provider has been sought to be overcome by inclusion of the value thereof in 'support service of business and commerce' on which liability has been discharged by them by contriving the scope of 'clearing and forwarding agency service' in breach of law as enacted and as judicially interpreted.

4. Narrating the backdrop, Learned Counsel submitted that the appellant had been providing 'goods transport agency' service to several recipients who, as corporate entities, were liable to discharge tax dues on the freight under 'reverse charge mechanism' after availing permissible abatement and that it was from April 2007 that they had expanded the scope of their business activities with offer of storage and warehousing, as well as ancillary facilitation, under

separate agreements with some of these customer in return for fixed monthly remuneration on which tax liability under Finance Act, 1994 was being duly discharged. He informed that, with effect from 1st April 2011, secondary transportation was also undertaken for delivery of goods at destinations as pre-determined by their customers and the value thereof was included in the same taxable service for discharge of liability till 31st May 2015 when the activity reverted at the pre-April 2007 scheme of 'goods transport agency' service with no liability thereafter under Finance Act, 1994.

5. It was contended by him that the first of the impugned orders had, in contravention of section 73 of Finance Act, 1994, charged them with non-payment of ₹1,34,37,061 even as these dues had been discharged, though belatedly owing to financial hurdles by 18th March 2013 to the extent of ₹1,23,96,758 for the period from October 2012 to December 2012 and of ₹10,40,303 for the period from January 2013 to March 2013 and interest thereon deposited well before the show cause notice was issued to them on 21st July 2014. We find that this was not only explained but dues discharged in full with interest and that the impugned order revived the spectre merely for imposition of penalty, albeit at the curtailed rate, under section 76 of Finance Act, 1994. There was no requirement to appropriate dues discharged by self-assessment even if belatedly complied with. Consequently, that confirmation of demand, along with attendant penalty, is set aside.

6. According to Learned Counsel, there is no provision in law, including section 65A of Finance Act, 1994 relied upon in the impugned order, which mandates the merger of two separate, and distinct, services within a third taxable service merely for overcoming a statutory segregation and with intent to extract levy that is not authorised by law. He contends that the factual convergence of the same provider and same recipient does not, either by logic or in accordance with law, justify such aggregation. He submits that expansion of scope of business does not alter the nature, and flexibility, of the existing operations which, admittedly, had not been proposed by service tax authorities as taxable in the hands of the appellant until after the additional engagement with the existing recipients fructified.

7. Pointing out that the activity undertaken by them does not conform to description of the taxable service in section 65(105)(j) of Finance Act, 1994 or to the definition of 'clearing and forwarding agent' in section 65 (25) of Finance Act, 1994 he submits that the decision of the Hon'ble Supreme Court in *Coal Handlers Pvt Ltd v. Commissioner of Central Excise, Range Kolkata-I [2015 (38) STR 897 (SC)]* on the imperative of fitment within the definition had been ignored by the adjudicating authority as also the legal intent of distinguishing 'clearing and forwarding' from 'goods transport agency' in the decisions of the Tribunal in *Toll India Logistics Pvt Ltd*

v. Commissioner of Central Excise, Puducherry [2018 (3) TMI 112-CESTAT CHENNAI] and *in Rama Mohana Rao & Co v. Commissioner of Customs, Central Excise & Service Tax [2019 (11) TMI 304-CESTAT HYDERABAD]*. He further contends that circular no. 104/7/2008-ST dated 6th August 2008 of Central Board of Excise & Customs (CBEC) elaborating upon the scope of legislative intent of 'goods transport agency' service and the specific condition of differential treatment, as laid down in paragraph 9.2 of Taxation of Services: CBEC's Education Guide which renders the consequence of 'bundling of services' amenable to section 66F of Finance Act, 1994 in the 'negative list' regime of service tax were ignored by the adjudicating authority.

8. Relying upon the definition of 'clearing and forwarding agent' in section 65(25) of Finance Act, 1994, Learned Authorised Representative submits that the activities of the appellant herein have been established as conforming thereto. He drew attention to the description of their business in 'tax audit report' and the nature of their activities, from the content of their website, as an accurate potrayal of the actual operations undertaken by them leaving no doubt that these comprise 'clearing and forwarding agent' service. According to him, the details contained in the 'business support services' agreement entered into with their customers elaborates upon the service rendered by them which, doubtlessly, extends beyond the

primary transportation. He relied upon the statements of the lorry drivers to contend that the role of the appellants in the entire process of removal from the factory of the customers leaves no room for doubt that they are not mere transportation agents.

9. He further contends that, being a composite service with 'transportation of goods' relegated to relative insignificance, the classification of the principal activity is the taxable head for the entirety and relied upon the decisions of the Tribunal *in Larsen & Toubro Ltd v. Commissioner of Central Excise, Chennai [2006 (3) STR 321 (Tri-LB)]* and in *Commissioner of Service Tax, Ahmedabad v. Viral Makers Ltd [2015 (40) STR 1023 (Tri-Ahmd)]*, of the Hon'ble High Court of Gujarat in *Commissioner of Central Excise, Ahmadabad v. Cadila Healthcare Ltd [2013 (30) STR 3 (Guj)]* and of the Hon'ble Supreme Court *in Coal Handlers Pvt Ltd v. Commissioner of Central Excise, Range Kolkata-I [2015 (38) STR 897 (SC)]*.

10. As it is the tax authorities who have sought to re-classify the service with the objective of enhancing the assessable value, it would be appropriate to ascertain the discharge of onus devolving on them before venturing upon the appropriateness of the entry within which the appellant herein has placed itself. It is common ground that the value excluded by tax, by separate charge on the two 'taxable

services', is that of freight on which, admittedly and but for the attempt at invoking of 65A of Finance Act, 1994 and section 66F of Finance Act, 1994, levy on provision of 'goods transport agency' service falls to the recipient in the those circumstances. There is no allegation, let alone a finding, that the tax arising therefrom has not been discharged by 'person liable to tax' and, in the absence of such, may well have the implication of tax administrators unwarrantedly enriching the exchequer. Else, the impugned order, by obliviating the abatement intended by statute to exclude the non-service component of freight, carries the stain of disobeying of the law.

11. The definitions, of provider *i.e.*,

> *'(25) "clearing and forwarding agent" means any person who is engaged in providing any service, either directly or indirectly, connected with clearing and forwarding operations in any manner to any other person and includes a consignment agent;'*

in section 65 of Finance Act, 1994 and, of 'taxable service'being that provided

> *'(j) to any person, by a clearing and forwarding agent in relation to clearing and forwarding operations, in any manner;'*

in section 65 (105) of Finance Act, 1994 do not, save by reference to 'clearing and forwarding operations' which remains undefined, offer much enlightenment on the boundaries of the activity intended to be taxed. It is also not the case of the tax authorities that some other

statute enables clear identification of the business of ‘clearing and forwarding’; hence, the legislative intent of the tax must be perceived as restricted to such persons who offer services in relation to ‘clearing and forwarding operations’ as is commonly understood in the industry.

12. Learned Authorized Representative relied upon

> *‘11. From the reading of the definition contained in the aforesaid provision, together with its dictionary meanings contained in Legal and Commercial dictionaries, it becomes apparent that in order to qualify as a C&F Agent, such a person is to be found to be engaged in providing any service connected with ‘clearing and forwarding operations’. Of course, once it is found that such a person is providing the services which are connected with the clearing and forwarding operations, then whether such services are provided directly or indirectly would be of no significance and such a person would be covered by the definition. Therefore, we have to see as to what would constitute clearing and forwarding operations. As is clear from the plain meaning of the aforesaid expression, it would cover those activities which pertain to clearing of the goods and thereafter forwarding those goods to a particular destination, at the instance and on the directions of the principal. In the context of these appeals, it would essentially include getting the coal cleared as an agent on behalf of the principal from the supplier of the coal (which would mean collieries in the present case) and thereafter dispatching/forwarding the said coal to different destinations as per the instructions of the principal. In the process, it may include warehousing of the goods so cleared, receiving dispatch orders from the principal, arranging dispatch of the goods as per the instructions of the principal by engaging*

> *transport on his own or through the transporters of the principal, maintaining records of the receipt and dispatch of the goods and the stock available on the warehouses and preparing invoices on behalf of the principal. The Larger Bench rightly enumerated these activities which the C&F Agent is supposed to perform.'*

in *re Coal Handlers Pvt Ltd* but, to us, it appears to highlight the essentiality of both clearing and forwarding be handled by the provider of service to qualify as such agency; delivery to a particular destination is, undoubtedly, effected by the appellant herein, but that is no less that of providing transporting and it is only with the addition of clearing that the transformation perceptibly occurs. Considering the complexities, as well as statutory responsibility devolving on a manufacturer under Central Excise Act, 1944, clearance by an external entity is not even in the realm of conjecture and, therefore, does not concern the appellant.

13. In *re Cadila Healthcare Ltd*, the issue before the Hon'ble High Court was the eligibility, in the context of definition of rule 2(l) of CENVAT Credit Rules, 2004 as it stood before 1st April 2008; of the respondent therein to avail credit of tax charged by provider of 'clearing and forwarding agent' service; it was not the admitted performance of 'clearing and forwarding operation' that was in dispute but the applicability of the test of post-clearance expenses for qualifying as 'input service' and for credit thereby. That decision does

not throw light on the appropriateness of merging 'goods transport' agency service in 'clearing and forwarding agent' service.

14. The decision of the Tribunal in *re Viral Makers Ltd* was rendered upon the specific finding that the assessee therein had entered into 'depot agreement' with delegated responsibility for clearing and, thus, conformed to both aspects of agency which in the dispute impugned before us has not been established. In *re Larsen & Toubro Ltd*, the issue placed before the Larger Bench of the Tribunal was the relevance of 'directly or indirectly' and 'in any manner' in the definitions and it was held that

> *10. It appears to us that the expressions "directly or indirectly" and "in any manner" occurring in the definition of "clearing and forwarding agent" cannot be isolated from the activity of clearing and forwarding operations. A person may undertake to provide service of procurement of orders as agent of the principal without agreeing to provide services of clearing and forwarding of the goods. Clearing and forwarding has a very specific connotation in the context of movement of goods from the supplier to their destination and agents undertaking clearing and forwarding operations may never have been concerned with procurement of orders for the goods which are cleared and forwarded. A person entrusted with the work of commission agent for procuring orders for the principal cannot insist on also providing services as clearing and forwarding agent in respect of those goods and it would be open for the principal to engage some other person for the purpose of forwarding such goods. In cases where the buyer is under an obligation to take delivery of the goods from*

> *the vendor's premises, there would not be even any need on the part of the vendor to engage any forwarding agent, nor can a person engaged for the purpose of clearing and forwarding operations, insist on procuring orders for the principal in the absence of any stipulation to that effect.*

affords no support for the stand adopted in the impugned order which, in any case, has not acknowledged the restricted scope thereto.

15. On the other hand, the two services sought to be amalgamated are not only independently taxable but differs in the mechanism of collection and should, intuitively, be immiscible. The provisions of section 65A of Finance Act, 1994 and section 66F of Finance Act, 1994 have not been appreciated in its context. The said statutory enablement is intended to be invoked when the nature of the service, and the consideration thereto, are not perceptibly divisible and differential treatment necessitates adoption of the appropriate rate of tax to the whole. In the present dispute, the rate of tax does not pose any difficulty; it is only the availability of abatement to isolate the 'service' component and the transference of responsibility to discharge liability that distinguishes.

16. Consequently, we have no doubt that the two services are rendered independently even if the transactions of the appellant are with the same recipient and, therefore, is not 'clearing and forwarding agency' service. The treatment of 'goods transport agency' provided after 1st July 2012 continues to remain unchanged and the substitution

of ‘support service of business and commerce’ or of ‘clearing and forwarding agent’ service with the omnibus ‘service’ has not altered the delineation to offer any support to the finding in the two impugned orders. Appeals are, accordingly, allowed and impugned orders set aside.

(Order pronounced in open court on 16.09.2022)

(Ajay Sharma)
Member (Judicial)

(C J Mathew)
Member (Technical)

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