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

Service Tax Appeal No.42217 of 2017

(Arising out of Order-in-Appeal No. 31/2017 (CTA-I) dated 27.7.2017 passed by the Commissioner of Central Tax (Appeals – I), Chennai)

And

Service Tax Appeal No.41302 of 2019

(Arising out of Order-in-Appeal No. 127/2019 (CTA-I) dated 5.4.2019 passed by the Commissioner of GST & Central excise (Appeals – I), Chennai)

M/s. Progeon Global Forwarding Pvt. Ltd. **Appellant**
Zafarullah Tower, 6th Floor
257, Angappa Naicken Street
Chennai – 600 001.

Vs.

Commissioner of GST & Central Excise **Respondent**
Chennai North Commissionerate
26/1, Mahatma Gandhi Road
Nungambakkam, Chennai – 600 034.

APPEARANCE:

Shri S. Adithya, Chartered Accountant for the Appellant
Shri Rudra Pratap Singh, ADC (AR) for the Respondent

CORAM

Hon'ble Shri P. Dinesha, Member (Judicial)
Hon'ble Shri M. Ajit Kumar, Member (Technical)

Final Order Nos.40692 & 40693/2023

Date of Hearing : 12.07.2023
Date of Decision: 18.08.2023

Per M. Ajit Kumar,

These two appeals arise out of Order in Appeal No. 31/2017 (CTA-I) dated 27.7.2017 and Order in Appeal No. 127/2019 (CTA -I) dated 5.4.2019 passed by Commissioner (Appeals), Chennai.

2. Brief facts of the case are that during the course of audit of accounts of the appellant, it was noticed by the department that in addition to providing 'Business Auxiliary Service' and 'Business Support

Service', the appellant also arranges for the transportation of export and import cargo of their customers in containers by sea / air through the shipping lines / airlines. The appellant collected charges from their customers as Ocean Freight both in the case of imports and exports. On verification of invoices, it was noticed that the amount collected as 'Ocean Freight charges' by the appellant from their customers is more than the ocean freight charges paid to the shipping companies. Though the appellant bills their customers with various charges viz. freight charges, LCL charges, Delivery Order charges, documentation charges, BL fees, Terminal Handling charges etc. service tax is discharged by the appellant on all charges except freight charges. Therefore, two Show Cause Notices dated 18.9.2015 for the period April 2010 to March 2015 and 16.4.2018 for the period from April 2015 to June 2017 were issued to the appellant proposing to recover the service tax of Rs.30,74,829/- and Rs.39,23,054/- respectively along with appropriate interest and imposing equal penalty. After due process of law, the respondent vide orders impugned has confirmed the demand of service tax of Rs. 69,97,883/- (Rs.30,74,829/- + Rs.39,23,054/-) along with appropriate interest and imposed penalties under section 78 of the Finance Act, 1994.

3. No cross-objections were filed by the responden7t-department.

4. Shri S. Aditya the learned Chartered Accountant appearing for the appellant submitted that the appellant is a freight forwarder engaged in booking and sale of cargo space to exporters across the country. In this process, appellant earns a margin on the freight charges which is termed as freight margin in the industry. Appellant books the cargo space with the airline / shipping line of their choice

and the airlines / shipping line has only a contractual relationship with the freight forwarder. On the other hand, the customer (exporter) has no contractual relationship whatsoever with the airline / shipping line. They are only entering into a contractual relationship with the appellant who is entirely responsible for safe shipment of goods handed over by the exporter. During the process of booking cargo space, appellant negotiate the price for such cargo space and the appellant is free to add mark up to such freight as per prevailing market conditions. Hence it is clear that the appellant is acting on a principal-to-principal basis and therefore has to be treated on par with a transport of goods. The fact that the appellant has negotiated the freight charges with the airline / shipping and the fact that they have acted as a principal has not been disputed anywhere in the Order in Appeal or Order in Original. In fact, in para-No. 20 of the Order in Original, the adjudicating authority has provided a clear finding that the appellant is acting in the capacity of a principal and are squarely covered by Circular No. 197/7/2016-ST dated 12.8.2016. Having concluded that the appellant has acted in the capacity of a principal (as per para No. 20 of the Order in Original), department cannot seek to levy service tax by classifying it under Business Support Service. The Education Guide brought out by CBIC has pointed out that when a freight forwarder buys and sells cargo space, he acts in his own account and hence should be treated on par with transportation of goods for which place of provision of service is destination of goods as per Rule 10 of Place of Provision of Service Rules, 2012. Matter is no longer res integra in view of the following judgments.

a. Nilja shipping Pvt. Ltd. Vs. CCE – Final Order No. 4027 – 40274/2020

b. Pawan Cargo Forwards Pvt. Ltd. Vs. Principal Commissioner of Service Tax, Chennai – I – 2020 (34) GSTL 559 (Tri. Chennai)

c. Skylift Cargo Pvt. Ltd. Vs. Commissioner of Service Tax, Chennai – Final Order No. 42242 to 42243 of 2017

d. La Freight Vs. CCE & ST Final Order No. 40464 to 40467 of 2018

Under the above said facts and circumstances, appellant prays that the Tribunal may set aside the Orders in Appeal on merits owing to covered judgments passed by this Tribunal in the interest of justice.

5. Shri Rudra Pratap Singh, learned Additional Commissioner (AR) appearing for the respondent-department has made many preliminary objections to the appeal filed by the appellant, as below.

a) Although the appellant has introduced himself as Freight Forwarder they have not taken a registration under the said category but are registered under the Category of Business Auxiliary Services (BAS) and Business Support Services (BSS).

b) The appellant has not submitted a copy of Annexure – I and Annexure - B of the First Show Cause Notice (SCN) No. 32 / 2015 dated 18.09.2015. Annexure – I contains the root cause of the current legal dispute between the appellant and the department. Annexure B claimed to contain sample of SCN’s, which would help verify the fact that the Service Tax Authorities in Chennai, had issued SCNs only for the difference in freight and not the entire freight as alleged in the said Notice. The appellant did not provide a copy of the said document, to Revenue, as assured to the Hon’ble Tribunal.

c) Pages 18, 20, 22, 24, 26 & 28 of Order – in – Original (OIO) Number 29 / 2016 (ST–1), dated 21/03/2016, placed in the Appeal Book have been found missing, due to which he was forced to seek adjournment.

d) The appellant has not submitted copies of any of the Agreements, which were executed between their customers / clients (i.e. Exporters / Importers) and themselves, during any stage of the current Appeal proceedings.

e) At para 5 of the 'Ground of Appeal' of his Appeal Paper Book the appellant refers to an 'Education Guide' issued by CBEC and have stated to have reproduced verbatim the clarification provided. But the passage is found missing nor was a copy of the 'Guide' enclosed.

f) The appellant has not submitted invoices pertaining to the impugned periods, which were issued to the shipping lines / airlines as well as to their customers / clients (i.e. Exporters / Importers), in assertion of their stand, during the adjudication process and the current Appeal proceedings. Nor has the appellant submitted any set of "Two Paired Invoices" which would help verify the fact that they had first booked the cargo space with the shipping line / airlines and thereafter billed it to "their would be prospective customers / clients (i.e. Exporters / Importers)". i.e. a copy of Invoice for 'purchasing' (booking) of cargo space with the shipping lines / airlines containing the date of "X" and the corresponding copy of the 'selling' Invoice of Cargo Space to their would be prospective customer / client (i.e. Exporter / Importer) with the mentioning of the date of "X + 1"

day or further subsequent days", which could verify beyond doubt that they had been into the business of trading of cargo space in Shipping Lines / Airlines.

On merits he submitted that the major activities in the trade of Freight Forwarders as per trade parlance national as well as international market.

i. Arranging Negotiations: Bargaining with Carriers for Cost Efficient Shipping Rates.

ii. Consolidating the Freight.

iii. Cargo Space Scheduling.

iv. Loading and Unloading of Goods.

v. Warehousing.

vi. Documentation, etc.

vii. Customs Brokerage (Paying).

viii. Supplying Cargo Insurance to Client.

ix. Shipment Tracking.

He further stated that although the appellant has relied on para No.2.1 and 2.2 of Circular No. 197/7/2016 dated 12.8.2016, from para 3.0 of the circular it is clear that when the freight forwarder acts in the capacity of principal then he will not be liable to pay service tax, but in present case, the appellant had been acting in the capacity of principal with respect to "Business Support Service (BSS)", for which they were duly registered. No facts have been shown by the appellant to prove that they had been acting as principal by prebooking the cargo space with the shipping lines / airlines, and then subsequently selling the same cargo space to "their would be customers / clients (i.e. the

exporters / importers)". As per para 4.0 of the said circular, the field formations, were required to take a decision on the basis of four factors:

(i) *The Facts of the Case.*

(ii) *The Terms of Contract between the Entities Concerned.*

(iii) *The Provisions of the Finance Act, 1994.*

(iv) *The Provisions of the Place of Provision of Services (PoPS) Rules, 2012.*

In view of the conditions as mentioned at "ii" above, it is clear that perusal of agreements which have been executed between the assessee and their customers / clients (i.e. the exporters / importers), was required and without perusal of those agreements, nothing could be concluded with absolute certainty. But the appellant has not submitted any such agreements before both the learned lower Authorities or in front of this Tribunal in both their impugned Appeals. He prayed that the appeal may be rejected.

6. Heard the rival parties. We find that the appellant has subsequently provided a copy of the complete OIO. Annexures to the SCN were not provided. Copies of Agreements between the appellant and their customers and between them and the shipping lines / airlines have not been provided. The appellants have however clarified that they have not submitted the same as no such agreements existed. They have also filed a set of few invoices during the hearing after Revenue had pointed out the lack of the same to substantiate their assertions. However, while examining these invoices during the hearing, they were found to contain both types of invoices. (i) where

the space was pre booked from the shipping lines / airlines and (ii) where the requirements of clients were received first and then space booked with shipping lines / airlines. None of the invoices showed bulk booking of space with the shipping lines / airlines by the appellant which was then farmed out to needy customers. Considering that these were sanitised invoices chosen by the appellant and not randomly chosen invoices by Revenue, the invoices presented during the hearing did not reveal a clear or pre-dominant pattern of advance booking of cargo space.

Issue in Dispute

7. The six grounds of appeal taken up by the appellant are as under;

i) Clarification contained in the CBEC Circular dated 12/08/2016 applies to the appellant's case

ii) Case laws relied upon ignored

iii) Inter-continental Judgment of Delhi High Court ignored.

iv) Buying and selling of cargo space not liable to service tax

v) Clarification contained in Education Guide favours appellant

vi) Extended period not invokable

The main points for consideration are whether;

I) the booking of cargo space with Shipping Lines / Airlines by the appellant amounts to a sale which is excluded from the preview of service tax.

II) The appellant is undertaking the activity of transporting of goods as freight forwarders.

III) The appellant is providing Business Support Service on a principal-to-principal basis

IV) The value to be adopted for purposes of computing duty.

8. We find that the impugned order at para 15.0 has examined the issue in detail as to whether the activity is in the nature of buying and selling of cargo space to get excluded from the purview of Service Tax. The same is reproduced below:-

> "15.0 Whether the activity is in the nature of buying and selling of cargo space and gets excluded from the purview of service tax (for the period both prior to and afterwards 1.7.2012).
>
> 15.1 This ground is advocated by the assessee to state that service tax cannot be levied on a transaction of sale. Then, the question that would require answer is whether the present transaction qualifies to be a sale.
>
> Section 4 of the Sale of Goods Act, 1930 defines "Sale and Agreement to sell'. Said Section 4 reads as below:-
>
> > *Section 4: Sale and Agreement to sell: (1) a contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price. There may be a contract of sale between one part-owner and another.*
> >
> > *(2) A contract of sale may be absolute or conditional.*
> >
> > *(3) Where under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called a sale, but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell.*
> >
> > *Section 2(7) of the Sale of Goods Act, 1930 defines "goods" to mean:*
> > *"Goods means every kind of movable property other than actionable claims and money; and includes stock and shares, growing crops, grass and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale".*
>
> Similar such definitions are attributed to 'goods' under various Sales Tax Acts in India.
>
> Section 65(50) of the Finance Act, 1994 also defines the "Goods" as per the meaning assigned to in clause (7) of section 2 of the Sale of Goods Act, 1930.
>
> In view of the above statutory provisions, what requires to be ascertained is whether 'space on vessel to accommodate goods under export' which is claimed to be subject of sale – can be treated as goods?

15.2 The Constitutional Bench of the Hon'ble Supreme Court in the case of Tata Consultancy Services vs. State of Andhra Pradesh – 2004 (178) ELT 22 (SC) was examining the case as to whether canned software was 'goods under the provisions of the Andhra Pradesh General Sales Tax Act, 1975 and held as below-

> *"73. The software marketed by the Appellants herein indisputably is canned software and, thus, as would appear from the discussions made hereinbefore, would be exigible to sales tax.*
>
> *74. It is not in dispute that when a programme is created it is necessary to encode it, upload the same and thereafter unloaded. Indian law, as noticed by my learned Brother, Variava, J., does not make any distinction between tangible property and intangible property. A 'goods' may be a tangible property or an intangible one. It would become goods provided it has the attributes thereof having regard to (a) its utility; (b) capable of being bought and sold; and (c) capable of transmitted, transferred, delivered, stored and possessed. If a software whether customized or non-customized satisfies these attributes, the same would be goods. Unlike the American Courts, Supreme Court of India have also not gone into the question of severability."*

While laying down the law as above, the Hon'ble Supreme Court considered when an intangible property like 'software' can be considered as goods and it was stated

> *"24. In our view, the term "goods" as used in Article 366(12) of the Constitution of India and as defined under the said Act are very wide and include all types of movable properties, whether those properties be tangible or intangible. We are in complete agreement with the observations made by this Court in Associated Cement Companies Ltd. (supra). A software programme may consist of various commands which enable the computer to perform a designated task. The copyright in that programme may remain with the originator of the programme. But the moment copies are made and marketed, it becomes goods, which are susceptible to sales tax. Even intellectual property, once it is put on to a media, whether it be in the form of books or canvas (in case of painting) or computer discs or cassettes, and marketed would become "goods".*

Thus, an intangible property like 'software' could pass the test prescribed in para extracted above only when it is in canned form.

In the present case, there is no conceivable form for space on vessel – like software being canned – that could be transmitting, transferred, delivered, stored and possessed and accordingly be bought and sold.

15.3 Subsequently, a three Judge Bench of the Hon'ble Supreme Court in the case of Bharat Sanchar Nigam Ltd. Vs. UOI – 2006 (2) STR 161 (SC), while examining the levy of service tax on provision of telephone line, held as below-

> *"53. This view was adopted in Tata Consultancy Services v. State of Andhra Pradesh (supra) for the purposes of levy of sales tax on computer software. It was held :-*
>
> *"A "goods" may be a tangible property or an intangible one. It would become goods provided it has the attributes thereof having regard to (a) its utility; (b) capable of being bought and sold; and (c) capable of being transmitted, transferred, delivered, stored and possessed. If a software whether customized or non-customised satisfies these attributes, the same would be goods".*
>
> *This in our opinion, is the correct approach to the question as to what are "goods" for the purposes of sales tax. We respectfully adopt the same.*
>
> *48. What are the "goods" in a sales transaction, therefore, remains primarily a matter of contract and intention. The seller and such purchaser would have to be ad idem as to the subject matter of sale or purchase. The Court would have to arrive at the conclusion as to what the parties had intended when they entered into a particular transaction of sale, as being the subject matter of sale or purchase. In arriving at a conclusion the Court would have to approach the matter from the point of view of a reasonable person of average intelligence."*

We find that the above discussion in the impugned order correctly concludes that there is no sale involved in terms of Section 4 of the Sale of Goods Act, 1930. The appellant has not relied on any documents showing payment of VAT/ sales tax towards this activity. The invoices produced by the appellant also do not disclose the payment of VAT/ sales taxes. Space is not capable of being transmitted, transferred, delivered and stored. We are handicapped in understanding whether there is even a limited transfer of title or right to use space in the vessel/ aircraft or its merely an agreement to carry the cargo/ container, due to a lack of a contract / agreement before us on this crucial aspect. Again, whether the space booked is a designated area of the cargo hold that is negotiated by the appellant or merely an agreement of carriage i.e. to carry on board the cargo/ container brought by the appellant to its destination, is not forth coming. The

physical space remains with the Shipping Lines / Airlines. It is hence akin to rent, and is a service provided and not a sale. The trade nomenclature of 'buying and selling of cargo space' mentioned by the appellant does not, in this case, take away the substance of provision of the service. As held by the Apex Court in ***Commr. of Customs, Central Excise and Service Tax*** **v.** ***Northern Operating Systems (P) Ltd.*** **[Civil Appeal No. 2289-2293 OF 2021/ 2022 SCC Online SC 658]** the substance and not the form is material in determining the nature of transaction.

9. We now take up both the issues relating to the classification of the service provided by the appellant i.e. as a activity of transporting of goods as Freight Forwarders or as stated by Revenue of providing Business Support Service, together. It is to be stated that this exercise has to be conducted with a critical gap in documents submitted by the appellant as pointed out by Revenue and discussed at para 5 above. We hence depend upon a description of the appellants activities as at para 5.8 of the OIO dated 21/03/2016.

> "In the instant case, the assessee transports the cargo of the customers from the customer's premises to the ports and vice versa. The assessee makes arrangements for the provision of international freight service for the transportation of the goods on their principal account. For arranging the international freight service, the assessee bill their customers with freight charges, which is more than the amount paid to the shipping agencies. The customers do not know the exact freight charges incurred by the assessee, as the freight charges are not negotiated by the assessee with the express knowledge of the customers. Though, the assessee bills their customers with various charges viz. freight charges, LCL charges, delivery order charges, documentation charges, BL fees, Terminal Handling charges etc. service tax is discharged by the assessee on all charges except freight charges (Ocean / air freight)."

9.1 We find that this is a case in which the appellant has taken registration under the Category of Business Auxiliary Services (BAS)

and Business Support Services (BSS), they have not taken a registration under the category of Freight Forwarder until they were issued a SCN by the department. It is the general rule in legal proceedings, that he who asserts must prove. From the above description of the appellant's activities it is seen that there are two independent services rendered, as the appellant is not a pure agent acting on behalf of the shipping lines/ airlines. The first is between the appellant and the shipping line/ airline and the second between the appellant and their customer/ importer/ exporter. To differentiate whether the appellant is providing the service of transporting of goods and negotiating space requirements with the shipping lines / airlines on a principal-to-principal basis, it is necessary for the appellant to demonstrate that they negotiate the booking of space or slots in vessels in advance anticipating demand and that they are also into the transport of goods as distinct business activities. The invoices provided by the appellant and mentioned at para 5 above do not disclose the advance booking of space as a distinct business activity. Further they also agree that transportation of goods is not their distinct business activity and the same is outsourced. Their claim to being transporter of goods rests only on their claim that they act on a principle-to-principle basis while negotiating the booking of space from the Shipping Lines / Airlines. The appellant bills their customers with various charges viz. freight charges, LCL charges, Delivery Order charges, documentation charges, BL fees, Terminal Handling charges etc. which are for services pertaining to Business Support Service. Another important responsibility is undertaking all the legal responsibility for the transportation of the goods along with its

attendant risks, while providing the service of transportation of goods, from a place in India to a place outside India. Generally, transportation of the goods are done based on 'adhesion contracts' otherwise called 'standard-form contracts'. These contracts are prepared by the dominant party i.e. in this case the Freight Forwarder to be signed by the party in a weaker position, usually the customer, who has little choice about the terms. In such agreements which are preprinted on the back of the invoice or otherwise and entered into, the Freight Forwarder assumes legal responsibility for the transportation of the goods, howsoever one sided and in his favour it may be. Even this agreement is missing in the present dispute as stated by the appellant. Hence in the absence of a contract/ agreement, this responsibility can be conveniently avoided by the appellant. In case of any breach of responsibility the customer may find it a legal up-hill task to fix responsibility on the appellant who could shift it on to the shipping lines / airlines. Satisfactory proof of having undertaken such responsibility has also not been produced at any stage of the proceeding. This being so the appellant has not been able to establish their case as a Freight Forwarder based on documentary evidence.

9.2 At para 5 above Revenue has submitted nine major activities undertaken by Freight Forwarders as per trade parlance. However, in the absence of documentary evidence and demonstrable facts the appellant has not listed out the activities undertaken by them, which could be compared with the trade practice. They have mainly based their arguments on Boards Circular No. 197/7/2016 – ST, dated 12/08/2016, issued from F. No. 137/54/2016-Service Tax-Part-I. They have also referred to an 'Educational Guide' of CBEC but no copy or

extract of the same was provided. In any case Boards Circular's / Guide's are not binding on the Tribunal. However, the relevant part of the circular dated 12/08/2016 which was provided by the appellant, is extracted below.

> "2.0 It may be noted that in terms of rule 10 of the Place of Provision of Services Rules 2012, (herein after 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.
>
> 3.0 It follows therefore that a freight forwarder, when acting as a principal, will not be liable to pay service tax when the destination of the goods is from a place in India to a place outside India.
>
> 4.0 Keeping this in mind, field formations may deal with cases purely on the basis of the facts of the case, the terms of contract between the entities concerned, the provisions of the Finance Act, 1994, the POPS Rules 2012 and other rules."

9.3 The appellant bases his whole arguments as per para 2.2 of the above circular. They state that when the Freight Forwarder provides service of transportation of goods to a place outside India then they have acted in the capacity of a principal and Rule 10 of the Place of Provision of Service Rules 2012 would be applicable. We find that these issues relate to questions of fact. Merely billing customers for booking of space does not make one a Freight Forwarder. It is seen from the paras above that the appellant has not demonstrated that he acts in the capacity of a principal while booking space. His argument is that he is not a 'pure agent' as he charges a markup over and above the payment made for booking space with the shipping lines / airlines. They have to pay the shipping lines / airlines for the cargo space booked irrespective of

a. Whether the space booked is sold or not

b Whether they are sold at a profit or loss

c Whether the appellant is able to recover the freight amount from the customer or not

Hence, they are Freight Forwarders. It is a known fact in business that intermediaries providing support service try to earn a profit in an oligopolistic market, where business is dominated by few shipping lines/ airlines, the customer has imperfect knowledge about the routes,

booking charges of cargo etc. Traders who look for ease of doing business approach any service provider in the trade who can make arrangements that will help ship his cargo and thereby assist his business activities. Entities who are not pure agents of shipping lines / airlines also provide support service to traders due to profits that can be made. They do so by getting an order from a customer, paying the booking charges offered by shipping lines/ airlines and then charge it on the customer after adding a markup. There are no protracted negotiations with the shipping lines/ airlines since this happens only when bulk space is pre-booked. Bulk booking of space gives leverage for negotiations which does not appear to be the case here as no proof has been shown of the same. Mostly the booking is of containers belonging to the shipping line itself. They also offer a range of business activities to the customer, within the taxable territory, without assuming responsibility for the delivery of the cargo at destination. The chances of making a loss are minimal as payments are taken from customers after ascertaining the availability of space and charges from the shipping lines/ airlines. No such proof of actual loss suffered was tabulated for any period of time and produced before the original authority. As stated by Revenue, such entities cannot be treated as Freight Forwarders, whose distinct business activities does not include space booking in advance and transportation along with responsibility for the cargo, but only to provide service in a market where customers have limited knowledge of market conditions. Having not being able to establish their activities in terms of the requirements of para 4.0 of the circular, it cannot be said that they act as a principal in terms of para

2.2 ibid. An activity built only on the foundation of words and statements is a poor substitute for documented proof.

9.4 We find that the impugned order has examined the activities of the appellant as a Business Support Service. Para 6 and 7 of the impugned order is reproduced below;

> "6. In the connection, in order to arrive at a conclusion as to whether the said activities are covered under Business Support Service, it is necessary to go through the definition of "Business Support Service" as defined at Section 65(104c) of the Act which is extracted as under:-
>
> ""Support Services of business or commerce" means services provided in relation to business or commerce and includes evaluation of prospective customers, telemarketing, processing of purchase orders and fulfillment services, information and tracking of delivery schedules, managing distribution and logistics, customer relationship management services, accounting and processing of transactions, operational or administrative assistance in any manner, formulation of customer service and pricing policies, infrastructural support services and other transaction processing.
>
> 7. In the instant case, it is on record that the appellant has carried out the activities in relation to export / import such as booking of containers, arrange for the transportation of export and import cargo of their customers, in containers, by sea / air through the shipping lines / airlines like M/s. NYK Line (India) Ltd., M/s. Maersk Line India Pvt. Ltd. Evergreen Shipping Lines Pvt. Ltd. etc. moving of goods to Harbour in case of export and moving out the goods after getting discharge certificate from the Customs / CFS in case of import etc. Thus the appellant manages the distribution and transportation of cargos to various destinations. All these activities are carried out by them on behalf of their customers and the same are carried out as on operational assistance in relation to business or commerce. These activities are therefore squarely covered by 'operational or administrative assistance in any manner' which is an inclusive part of the definition of Business Support Service. Accordingly, the respondent has correctly held that the above activities carried out by the appellant are rightly classifiable under Business Support Service. Hence, the appellant contention that their service cannot be classified under Business Support Service is not acceptable."

The appellant whose activity has failed to establish his credential as a Freight Forwarder is found to satisfy the classification of Business Support Service. We approve of the same.

10. We next take up the case laws and judgments cited by the appellant in their favour. The judgments are listed below.

a) Union of India v. M/s. Intercontinental Consultants and Technocrats Pvt. Ltd. [Civil Appeal No. 2013 OF 2014/ 2018 (10) G.S.T.L. 401 (SC)]

b) Nilja shipping Pvt. Ltd. Vs. CCE – Final Order No. 4027 – 40274/2020

c) Pawan Cargo Forwards Pvt. Ltd. Vs. Principal Commissioner of Service Tax, Chennai – I – 2020 (34) GSTL 559 (Tri. Chennai)

d) Skylift Cargo Pvt. Ltd. Vs. Commissioner of Service Tax, Chennai – Final Order No. 42242 to 42243 of 2017

e) Marinetrans India Pvt Ltd Vs Commissioner of Servive Tax, Hyderabad – ST [2019-TIOL-1260-CESTAT-HYD]

f) La Freight Vs. CCE & ST Final Order No. 40464 to 40467 of 2018

g) Phoenix International Freight Services Pvt Ltd vs Commissioner of Service Tax, Mumbai – II [2016-TIOL-2353-CESTAT-Mum]

The appellant's averment during the hearing was that what they receive towards freight charges from the service recipients is a reimbursement of freight charges with a slight markup and subjecting it to tax would amount to double taxation. They have stated that the judgement of the Hon'ble High Court of Delhi in the case of 'Intercontinental Consultants', has now been affirmed by the Apex Court in 'Union of India v. M/s. Intercontinental Consultants' (supra), which settles the matter on reimbursements. We find that the Hon'ble High Court of Delhi, had declared Rule 5(1) of the Service Tax Valuation Rules as ultra vires of the erstwhile Section 66 and Section 67 of the Finance Act, 1994. The Apex Court while affirming the judgement of the Delhi High Court as per the statute then in force held that service tax is collected with reference to the value of service. As a necessary corollary, it is the value of the services which are actually rendered,

which is to be ascertained for the purpose of calculating the service tax payable thereupon. Any other amount which is calculated not for providing such taxable service cannot be a part of that valuation as that amount is not calculated for providing such 'taxable service'. Section 67 of the Finance Act 1994 was amended with effect from 14/05/2015 making reimbursable expenditure or cost as a part of valuation of taxable services for charging service tax. The period covered by the impugned order covers the period from 2010 to 2017 i.e. before and after the amendment to the section. Hence different treatment of reimbursable expenditure, if any, would be necessary during the two periods. The impugned order was passed before the Apex Court judgment supra brought finality to the matter and was not available for consideration by the learned Commissioner Appeals and before that by the Original Authority. We find that the issue is of importance and merits being examined afresh by the Original Authority based on facts, documentary evidence and the law as laid out by the Apex Court. To claim exclusion of any part of the consideration from the assessable value, prior to the amendment of section 67 ibid, the terms of agreement or understanding between parties should prima facie indicate that there was an obligation upon the service receiver to incur such expenditure which was incurred by the service provider and was later reimbursed by the service receiver to service provider. The appellant needs to be given an opportunity to provide data to demonstrate that reimbursement are in line with law and of actuals, supported by sufficient evidence.

10.1 Further in the context of the issue of double taxation raised by the appellant, a similar question of double taxation i.e. whether a sub-

contractor is liable to pay Service Tax even if the main contractor has discharged the Service Tax liability on the gross amount was placed before a Larger Bench of the Tribunal and the matter was decided in the case of **Commr. of S.T., New Delhi Vs Melange Developers Private Limited [2020 (33) G.S.T.L. 116 (Tri. - LB)].** The Larger Bench held;

> "15. It is not in dispute that a sub-contractor renders a taxable service to a main contractor. Section 68 of the Act provides that every person, which would include a sub-contractor, providing taxable service to any person shall pay Service Tax at the rate specified. Therefore, in the absence of any exemption granted, a sub-contractor has to discharge the tax liability. The service recipient i.e. the main contractor can, however, avail the benefit of the provisions of the Cenvat Rules. When such a mechanism has been provided under the Act and the Rules framed thereunder, there is no reason as to why a sub-contractor should not pay Service Tax merely because the main contractor has discharged the tax liability. As noticed above, there can be no possibility of double taxation because the Cenvat Rules allow a provider of output service to take credit of the Service Tax paid at the preceding stage." (emphasis added)

This later development in law also needs the consideration of the Original Authority.

10.2 The judgments from 9(b) to (g) relate to different category service providers. What however is common is that the appellant in those cases received consideration for "full freight" from their customers / exporters and the difference between the amount paid by them to shipping lines / airlines and that collected from his customers / exporters etc. left a surplus that was retained by the appellant and no service tax paid on the 'full freight' and not even on the surplus. We have examined the said judgements. Each contract has to be understood in the terms set out therein. We find that the judgments are not based on common facts. Issue of classification in particular has not been questioned apparently nor is there any discussion as to the booking of cargo space from shipping lines / airlines where sales tax /

VAT is discharged. They basically deal with the issue of what part of the consideration if at all received by the service provider from the service receiver as freight will form a part of the taxable value. Since we have found that the issue of valuation needs to be examined afresh by the Original Authority keeping in mind the change in section 67 and its implication for the different periods covered by the impugned order and the judgment of the Apex Court in Union of India v. M/s. Intercontinental Consultants and Technocrats (supra), we do not feel it proper to go into the legal issue at this stage.

10.3 The final issue pending examination in this case is whether extended period for issue of SCN is invokable or not. The appellant avers that the extended period has been invoked only on the ground that they did not declare the taxable value and assess tax correctly with an intent to evade payment of duty. However the order does not discuss whether the failure to declare freight in the return was with an intent to evade duty and hence extended period cannot be evoked in the absence of any finding of willful suppression. They have relied on the following judgments in this regard:-

a. Easland Combines Vs. CCE, CBE – 2003 (152) ELT 39 (SC)

b. Pushpam Pharmaceuticals Co. Vs. CCE, Bombay – 1995 (78) ELT 401 (SC)

c. Cosmic Dye Chemicals Vs. CCE, Bombay – 1999 (75) ELT 721 (SC)

d. Padmini Products Vs. CCE – 1989 (43) ELT 195 (SC)

e. Tamilnadu Housing Board Vs. CCE, Madras – 1994 (74) ELT 9 (SC)

f. M/s. Gopal Zarda Udyog Vs. CCE, New Delhi – 2005-TIOL-123-SC-CX-LB

g. M/s. Anand Nishikawa Co. Ltd. Vs. CCE, Meerut – 2005-TIOL-119-SC—CX

We find that the treatment of the issue of time bar has been very cryptic in the OIO. There is nothing to show that there was suppression of fact or contravention of any of the provisions of the chapter or of the rules made thereunder with intent to evade payment of service tax. The order is non-speaking in this regard. The discussion is confined to a few lines at para 28.0 and 29.0 which is reproduced below:-

> "28. In view of the fact that the assessee did not declare said taxable value and for not assessing the same to the service tax correctly, invocation of extended period under proviso to section 73(1) of Finance Act, 1994 is justified.
>
> 29. In view of the above discussion, the proposal to demand service tax under present SCN by invoking proviso to section 73(1) supra requires confirmation along with confirmation of interest as applicable under section 75 supra.

We find that the impugned order passed by the learned Commissioner (Appeals) is also not very helpful in this matter and merely states that the appellant did not declare said taxable value and assessed the service tax correctly, hence extended period under proviso to section 73(1) of the act was rightly invoked. Relevant portion of OIA is reproduced below;

> "The appellant also put forward a plea on limitation. In the instant case, the facts came to light only upon audit of accounts by the Audit Group of the erstwhile Service Tax Commissionerate - I which otherwise would have gone unnoticed. As the appellant did not declare said taxable value and assessed the service tax correctly, extended period under the proviso to section 73(1) of the Act was rightly invoked to confirm the demand along with interest and the imposition of penalty under section 78 are justified. In this regard, I find support from the following decisions .....

The lack of discussion and finding that there was suppression of fact or contravention of any of the provisions of the chapter or of the rules made thereunder with intent to evade payment of service tax, is fatal

and hence we find that the evocation of the extended period has not been correctly done. In the circumstances the demand is to be restricted to the normal period only as the ingredients to evoke proviso to section 73(1) was not demonstrated to be present as per both the orders mentioned in this para above. Penalties imposed, which are consequential to evoking of the extended period, are also set aside.

11. In the facts and circumstances of the case, impugned orders are modified to the extent discussed above. The issue regarding the value of the taxable service for the normal period is remanded and shall be redetermined along with duty and interest by the Original Authority as stated at para 9.1 above. The two appeals arising out of Order in Appeal No. 31/2017 (CTA-I) dated 27.7.2017 and Order in Appeal No. 127/2019 (CTA -I) dated 5.4.2019 are disposed of on the above terms.

(Pronounced in open court on 18.08.2023)

(**M. AJIT KUMAR**)
Member (Technical)

(**P. DINESHA**)
Member (Judicial)

Rex