IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH: KOLKATA

Service Tax Appeal No. 76501 of 2018

(Arising out of Order-in-Original No. 46/COMMR/ST-II/KOL/2017-18 dated 31.01.2018 passed by Commissioner of CGST & Central Excise, Kolkata South.)

Commissioner of CGST & Central Excise, Kolkata South.
GST Bhawan, 180, Shanti Pally, Rajdanga, Main Road,
Kolkata-700107.

...Appellant (s)

VERSUS

M/s Tierra Logistics Pvt. Ltd.,
2nd Floor, Room No. 2, 8, Camac Street, Kolkata-700017.

. ..**Respondent(s)**

With

Service Tax Appeal No. 76548 of 2018

(Arising out of Order-in-Original No. 46/COMMR/ST-II/KOL/2017-18 dated 31.01.2018 passed by Commissioner of CGST & Central Excise, Kolkata South.)

M/s Tierra Logistics Pvt. Ltd.,
2nd Floor, Room No. 2, 8, Camac Street, Kolkata-700017.

...Appellant (s)

VERSUS

Commissioner of CGST & Central Excise, Kolkata South.
GST Bhawan, 180, Shanti Pally, Rajdanga,
Main Road, Kolkata-700107.

. ..**Respondent(s)**

APPERANCE :
Dr. S. Chakraborty, Sr. Advocate & Ms. Bhavna Singh, Chartered Accountant for the Appellant
Shri J. Chattopadhyay, Authorized Representative for the Respondent

CORAM:
HON'BLE MR. ASHOK JINDAL, MEMBER (JUDICIAL)
HON'BLE MR. K. ANPAZHAKAN MEMBER (TECHNICAL)

FINAL ORDER No...76774-76775/2023

DATE OF HEARING : 15.09.2023

DATE OF PRONOUNCEMENT: 25.09.2023

PER K. ANPAZHAKAN :

Briefly stated facts of the case are that the Appellant, M/s Thierra Logistics Pvt. Ltd., Kolkata, are engaged in the business of providing Clearing & Forwarding Agent Services, including freight services to exporters. The Additional Director General, DGGSTI, Kolkata, initiated an investigation against the Appellant on the allegation that they were not discharging their service tax liability properly by not disclosing the actual value of service in their ST-3 returns. As a result of the investigation, a show cause notice dated 25.08.2017 was issued to the Appellant demanding Service Tax of Rs.11,33,76,015/- including Education Cess, along with interest and penalty. The Notice was adjudicated by Commissioner of CGST & CX, Kolkata vide Order-in-Original dated 31.01.2018, wherein service tax of Rs.10,56,05,986/- was confirmed along with interest. Penalty equal to the service tax confirmed was imposed under Section 78 of the Finance Act, 1994. Penalty of Rs.10,000/- was imposed under Section 77 of the said Act. Rs.3,00,000/- already paid vide Challan dated 27.02.2017 was appropriated against the demand confirmed. Service Tax demand of Rs.77,70,029/-was dropped. Aggrieved against the impugned order, the Appellant has filed the present appeal. Department has filed appeal against dropping the demand.

2. In the impugned order, the demand has been confirmed in respect of the following activities rendered by the Appellant:

(i) Service Tax on income arising from providing service of information and tracking of delivery schedule - Rs.10,21,87,062/-

(ii) Service tax on Commission/Brokerage income - Rs.17.54,528/-

(iii) Service Tax on Miscellaneous income like Amendment Charges, Container Detention charges etc. not shown in ST-3 return - Rs.16,64,393/-

3. In respect of demand of Service Tax on income arising from providing service of information and tracking of delivery schedule, the Appellant stated that this income is pertaining to Ocean Freight, which is derived from transportation of containerized goods through international ocean water outside the jurisdiction of India. Such services

of transportation of containerized goods outside the territorial water of the country is bought by the Appellant company in a bulk deal/agreement and thereafter sold to other companies on principal to principal basis, which results in trading margin over and above the cost incurred by them on such bulk purchase. Since this transaction is entirely conducted on principal-to-principal basis and not on Principal - to - Agent basis, the income derived would not fall within the ambit of Business Support Service, as confirmed in the impugned order.

4. In the impugned order, it has been held that the Appellant has realized income in the form of margin arising out of difference between the ocean freight income and ocean freight expenses as indicated in their trial balance sheet. It has been held that the excess realization effected during the course of providing or arranging freight facility to the customers would fall within the purview of 'Business Support Service' in terms with Section 65 (105) (zzzq) of the Act, which are applicable when goods, materials or papers are sent through ships or trucks or courier service. Therefore, it has been held that the activity of procuring of space from the shipping lines and subsequent provision of the said service for the purpose of export/import of their cargo is a service provided under the category of 'Business Support Service'.

5. In this regard, the Appellant submits that the principal to principal transactions of buying the services of transportation of containerized goods outside the territorial water of the country and selling the same to the other entities involves the Appellant taking the risk of making commitment for canvassing cargo for allotment of space as a principal. The same is evident from the invoices raised by the vendors on the Appellant as well as the invoices raised by them on their customers. As per the definition of Business Support Service, any activity rendered on behalf of another person i.e. on principal-to-agent relationship only liable to service tax. In the instant case undisputedly, they were buying the services of transportation of containerized goods outside the territorial water of the country and selling the same to their clients in their own capacity and is not obligated to work on principal-to-agent relationship. The issue stands completely settled by several decisions of

this Tribunal, which have all attained finality. Some of the latest decisions of different Benches of this Tribunal are as under:-

(i) **Direct Logistics India Pvt. Ltd.** Vs. **Commissioner of S.T. 2021(55)GSTL 344(T)**

(ii) **Tiger Logistics (India) Ltd.** Vs. **Commissioner of Service Tax 2022(63)GSTL 169(T) [C/p 12-19]**

(iii) **Console Shipping Services India Ltd.** Vs. **Commissioner of Service Tax 223(5)TMI 192 CESTAT, New Delhi [C/p 20-23]**

(iv) **Balmer Lawrie & Company Ltd.** Vs. **Commissioner of Service Tax 223(5)TMI 100 CESTAT, NEW DELHI [C/p 28-31]**

(v) **Marinetrans India Pvt. Ltd.** Vs. **CST, Hyderabad 2020(33)GSTL 241(T) [C/p 32-34]**

6. Accordingly, they contended that the activity of arranging ocean transportation of containerized goods through international ocean waters is outside the jurisdiction of service tax and hence the demand of service tax confirmed on this count in the impugned order is not sustainable.

7. Regarding the demand of service tax of Rs.17.54,528 on Commission/Brokerage income received by the Appellant, they stated that this income pertains to the discount received from the Shipping Lines on bulk purchase of space and it does not pertain to any services rendered to such Shipping Lines in the capacity of agent. The Appellant stated that they themselves were buying the space for transportation of containerized goods outside the territorial water of the country from Shipping Lines and selling the same to their clients in their own capacity. Hence, the relationship with the Shipping Lines as well as the customers is on principal-to-principal relationship. The Appellant obtained discounts from the Shipping Lines on account of bulk purchase

of space in the ships. Such discount provided on account of purchase is outside the ambit of service tax.

8. The Appellant stated that this incentive was paid as they were instrumental in providing business in bulk quantities to the shipping lines. This discount amount is thus, connected with the act of bulk purchase of space in the ships and is received for selling of space outside the country in the course of shipment of cargo. It is an undisputed fact that the discount was billed as well as received in foreign currency. Therefore, it satisfies the main part of Rule 10 of the POP Rules which provides that the place of provision of services shall be the place of destination of the goods, which is outside India.

9. Further, in the instant case the requirement of the "Export of Services Rules", contained in Rule 6A of the Service Tax Rules, 1994 also stands duly satisfied. Since export of services is outside the purview of service tax under the Act, demand of service tax of Rs.17,54,528/-in the impugned order is not sustainable.

10. Regarding the demand of Service Tax of Rs.16,64,393/- on Miscellaneous income like Amendment Charges, Container Detention charges etc. not shown in ST-3 return, the Appellant stated that they have collected consideration towards Amendment Charges, Container Detention Charges, Customer Administrative Charges, DTHC Charges, Handling Fees, Seal Charges and other charges in foreign currency from foreign customers with respect to onward movement of goods from India. Such charges were incurred by them during the course of providing Clearing & Forwarding Agency Services for onward movement of goods from India to foreign destination. As per Rule 10 of the Place of Provision of Services Rules 2012, 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. In this case also, the requirement of Rule 6A of the Service Tax, 1994, as amended, stands duly satisfied. Consequently these charges are within

the purview of the Export of Service Rules and hence outside the service tax net.

11. The Appellant further submitted that they have been paying service tax for the considerations received as Amendment Charges, Container Detention Charges, Customer Administrative Charges, DTHC Charges, Handling Fees, Seal Charges and other charges when charged on Indian customers in Indian Currency. Accordingly, they submitted that the demand confirmed in the impugned order on this count is not sustainable.

12. The appellant stated that the demand is barred by limitation. In the instant case, the extended period of limitation cannot be invoked as there was no suppression of facts with an intention to evade payment of tax exists. It is a settled principle that in order to invoke the extended period of limitation, it is necessary to establish that there has been intent to evade payment of duty which has occasioned through fraud, collusion etc. These ingredients postulate a positive act of fraud or collusion or willful misstatement or suppression of facts. However, in the instant case, there was no suppression of the material fact and allegation of the department is not enough to invoke the extended period of limitation. The entire facts and figure relevant to the instant case were duly disclosed in the Annual Accounts of the Company as well as the Service Tax Returns and the Appellant, as a bona-fide and law abiding assessee, has duly co-operated with the Service Tax Audit team. Hence the show cause notice and the impugned order are barred by limitation. Accordingly, the demands confirmed in the impugned order are not sustainable on the ground of limitation also. For the same reason penalty imposed under Section 77 and 78 of the Finance Act, 1994, is also liable to be set aside.

13. The Ld. A.R. reiterated the findings in the impugned order.

14. Heard both sides and perused the appeal records.

15. We observe that in the impugned order, the demand of service tax of Rs.10,56,05,986/- has been confirmed along with equal amount of tax as penalty under Section 78 of the Finance Act, 1994. The demand

confirmed has been broadly categorized into the following three categories.

(i) Service Tax on income arising from providing service of information and tracking of delivery schedule - Rs.10,21,87,062/-

(ii) Service tax on Commission/Brokerage income - Rs.17.54,528/-

(iii) Service Tax on Miscellaneous income like Amendment Charges, Container Detention charges etc. not shown in ST-3 return - Rs.16,64,393/-

16. Now, we will discuss the liability of service tax on each of the above category.

Service Tax on income arising from providing service of information and tracking of delivery schedule - Rs.10,21,87,062/-

17. In their submissions, the Appellant claimed that this income is pertaining to Ocean Freight, which is derived from transportation of containerized goods through international ocean water outside the jurisdiction of India. We observe that the space for transportation of containerized goods outside the territorial water of the country has been bought by the Appellant company in a bulk and thereafter sold to other companies on principal to principal basis. In this sale they earn a margin of profit over the cost incurred by them on such bulk purchase. Since this transaction is entirely conducted on principal-to-principal basis and not on Principal - to - Agent basis, we hold that the income derived would not fall within the ambit of Business Support Service. In the impugned order, it has been held that the Appellant has realized income in the form of margin arising out of difference between the ocean freight income and ocean freight expenses as indicated in their trial balance. It has been held that the excess realization effected during the course of providing or arranging freight facility to the customer would fall within the purview of 'Business Support Service' in terms with Section 65 (105) (zzzq) of the Finance Act 1994. In this regard, we observe that the principal to principal transactions of buying space for transportation of containerized goods outside the territorial water of the country and selling the same to the other entities involves the Appellant taking the risk of making commitment for canvassing

cargo for allotment of space as a principal. As per the definition of Business Support Service, any activity which is rendered on behalf of another person ie, when the relationship is in the nature of principal-to-agent, then only such activity is liable to service tax under the category of Business Support Service. In the instant case, the Appellant were buying the space for transportation of containerized goods outside the territorial water of the country and selling the same to their clients in their own capacity and is not obligated to work on principal-to-agent relationship. Accordingly, we hold that the income received by the Appellant is not liable to service tax under the category of 'Business Support Service' as confirmed in the impugned order.

18. We observe that the issue stands settled by several decisions of this Tribunals cited by the Appellant. In the case of Direct Logistics India Pvt. Ltd. Vs. **Commissioner of S.T. 2021(55)GSTL 344(T)** this Tribunal observed has held as under :

> *"..... .....*
>
> *14. It is undisputed that the appellant is registered with service tax department for "Clearing and Forwarding Agent Service" and has been paying service tax on the service charges. What is exigible to service tax under Section 65(105)(j) is any service provided or to be provided to a client by a Clearing and Forwarding Agent in relation to clearing and forwarding operations in any manner. Transport of goods is distinct from clearing and forwarding operations. In this case, the appellant is not only providing clearing and forwarding service but is also providing transport on its own account to its clients by purchasing freight space on the ships from the shipping lines. In some cases, they buy the space on the ship specifically to meet the requirement of the client and in other cases, the appellant buys space on the ship in anticipation of the clients' requirement and then sells the space to the clients.*

Trading in Ocean Freight is not a service being rendered to the client and no amount is being paid by the client to the appellant as per the records towards trading of cargo space. Evidently as any prudent business world, the appellant is buying space on the cargo ship at a lower price and selling it to its client at a higher price. The difference is its profit. It would have been a different case, if the appellant is organizing space on the ship for their clients and the client is paying shipping line directly and the service of organizing or arranging the space on the ship, the appellant gets paid service charge by the client. In such an arrangement, the amount bheing received would be a consideration for the service. The present arrangement is an arrangement of the trader who buys cargo space at a lower price and sells it at a higher price and enjoys the margin as profit.

15. The nature of the transaction is also clear from the fact that there are cases on record where the appellant had booked the space for higher amount on the ship but due to market conditions, had to sell the space to its customers at a lower price incurring loss. Therefore, in our considered view, the profits gained by the appellant by buying space on ships at lower price and selling at a higher price to the customers cannot by any stretch of imagination be called "Clearing and Forwarding Agent Service". No service tax can be charged on this amount. On an identical question, in the case of Seamax Logistics Ltd. v. Commissioner of Central Excise and Service Tax, Tirunelveli, reported in 2018(7) TMI 262-CESTAT Chennai has held that no service tax is chargeable on the difference between the ocean freight collected from the clients and the ocean freight paid to the shipping lines.

....."

19. In view of the above discussions and by following the decisions of the Tribunals cited by the Appellant refereed above, we hold that the demands

confirmed in the impugned order on this count is not sustainable and accordingly, we set aside the same.

Service tax on Commission/Brokerage income - Rs.17.54,528/-

20. The Appellant stated that this income pertains to the discount received from the Shipping Lines on bulk purchase of space and it does not pertain to any services rendered to such Shipping Lines in the capacity of agent. We observe that the Appellant buy space for transportation of containerized goods outside the territorial waters of the country from Shipping Lines and selling the same to their clients in their own capacity. Hence, the relationship with the Shipping Lines as well as the customers is on principal-to-principal relationship. They obtained discounts from the Shipping Lines on account of bulk purchase of space in the ships. Such discount provided on account of purchase is outside the ambit of service tax. We observe that the Appellant was instrumental in providing business in bulk quantities to the shipping lines. This discount amount is, thus, connected with the act of bulk purchase of space in the ships and is received for selling of space outside the country in course of shipment of cargo. We also observe that the discount was billed as well as received in foreign currency. Therefore, it satisfies the main part of Rule 10 of the POP Rules which provides that the place of provision of services shall be the place of destination of the goods, which is outside India. Further, we observe that in the instant case, the requirement of the "Export of Services Rules", contained in Rule 6A of the Service Tax Rules, 1994 also duly satisfied. For the sake of ready reference the conditions stipulated in Rule 6A(1) are reproduced below:

> 6A.(1) The provision of any service provided or agreed to be provided shall be treated as export of service when,-
>
> (a) the provider of service is located in the taxable territory,
>
> (b) the recipient of service is located outside India,
>
> (c) the service is not a service specified in section 66D of the Act,
>
> (d) the place of provision of the service is outside India,
>
> (e) the payment for such service has been received by the provider of service in convertible foreign exchange, and

(f) the provider of service and recipient of service are not merely establishments of a distinct person in accordance with item (b) of Explanation 3 of clause (44) of section 65B of the Act. ”

21. In the instant case the facts on record conclusively establish that each of the applicable clauses of Rule 6A(1) stands duly satisfied . Since export of services is outside the purview of service tax under the Act, we hold that the demand of service tax of Rs.17,54,528/-in the impugned order is not sustainable and accordingly, we set aside the same.

Service Tax on Miscellaneous income like Amendment Charges, Container Detention charges etc. not shown in ST-3 return - Rs.16,64,393/-

22. Regarding the demand of Service Tax of Rs.16,64,393/- on Miscellaneous income like Amendment Charges, Container Detention charges etc. not shown in ST-3 return, the Appellant stated that they have collected consideration towards Amendment Charges, Container Detention Charges, Customer Administrative Charges, DTHC Charges, Handling Fees, Seal Charges and other charges in foreign currency from foreign customers with respect to onward movement of goods from India. We observe that such charges were incurred by them during the course of providing Clearing & Forwarding Agency Services for onward movement of goods from India to foreign destination. As per Rule 10 of the Place of Provision of Services Rules 2012, 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. In this case also, the requirement of Rule 6A of the Service Tax, 1994, as amended, stands duly satisfied. Accordingly, we hold that these charges are within the purview of the Export of Service Rules and hence outside the service tax net. Further, we observe that the Appellant have been paying service tax for the considerations received as Amendment Charges, Container Detention Charges, Customer Administrative Charges, DTHC Charges, Handling Fees, Seal Charges and other charges when charged on Indian customers in Indian

Currency. In view of the above findings, we hold that the demand confirmed in the impugned order on this count is not sustainable and accordingly, we set aside the same.

23. Regarding the department's appeal, we find that the adjudicating authority has given a clear finding in the Order-in-Original for dropping the demand and we agree with the same.

24. The appellant also stated that the demand is barred by limitation. We observe that in this case there was no evidence brought on record to establish suppression of facts with an intention to evade payment of tax. It is a settled principle that in order to invoke the extended period of limitation, it is necessary to establish that there has been intent to evade payment of the tax by means of fraud, collusion etc. These ingredients postulate a positive act of fraud or collusion or willful misstatement or suppression of facts, which are absent in this case. Accordingly, we hold that the demands confirmed in the impugned order are not sustainable on the ground of limitation also. For the same reason, we hold that penalty imposed under Section 77 and 78 of the Finance Act, 1994, is also liable to be set aside.

25. In view of the above discussion, we set aside the demands confirmed in the impugned order and allow the appeal filed by the Appellant. The appeal filed by the department is rejected.

(Pronounced in the open court on……25.09.2023…)

Sd/-
(Ashok Jindal)
Member (Judicial)

Sd/-
(K. Anpazhakan)
Member (Technical)

Tushar Kr.