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

REGIONAL BENCH – COURT NO. 1

Service Tax Appeal No. 141 of 2012

(Arising out of Order-in-Original No. 55/Commr/ST/Kol/2011-12 dated 23.12.2011 passed by the Commissioner of Service Tax, Kendriya Utpad Shulk Bhawan (3rd Floor), 180 Shantipally, Rajdanga Main Road, Kolkata – 700 107)

M/s. TKM Global Logistics Limited **: Appellant**
"Harrington Mansion", Flat No. 18, 3rd Floor,
8, Ho-Chi Min Sarani, Kolkata – 700 071

VERSUS

Commissioner of Service Tax **: Respondent**
Kendriya Utpad Shulk Bhawan (3rd Floor),
180 Shantipally, Rajdanga Main Road, Kolkata – 700 107

APPEARANCE:

Shri B.L. Narasimhan, Advocate
Shri Deepro Sen, Advocate
Shri Shovit Betal, Advocate
for the Appellant

Shri Mihir Ranjan, Special Counsel
for the Respondent

CORAM:

HON'BLE SHRI ASHOK JINDAL, MEMBER (JUDICIAL)
HON'BLE SHRI K. ANPAZHAKAN, MEMBER (TECHNICAL)

FINAL ORDER NO. 75346 / 2024

DATE OF HEARING: 19.02.2024

DATE OF DECISION: 28.02.2024

Order : [Per Shri K. Anpazhakan]

The present appeal has been filed assailing the impugned Order-in-Original No. 55/Commr/ST/Kol/2011-12 dated 23.12.2011 passed by the Commissioner of Service Tax, wherein the Ld. Commissioner has confirmed the demand of service tax of Rs. 22,25,87,789/- along with interest. He also imposed penalties equivalent to the service tax confirmed under section 78 of the Finance Act,

1994 and also imposed penalties under sections 76 and 77 of the Finance Act, 1994.

2. The brief facts of the case are that the Appellant enters into contract with its clients to render services in relation to import of goods from abroad. The scope of such services *inter alia* covers the following activities:

i. Obtaining the goods from the foreign suppliers,
ii. Handling of imported cargo,
iii. Negotiating and finalizing the freight with the air/sea transporter,
iv. Carrying it to the load port from the place of the foreign supplier,
v. Storing it in a safe place abroad before the goods are loaded on the airline/ship,
vi. undertaking the customs clearance at the exporting country,
vii. clearance of the goods in India,
viii. Transportation of goods from port/airport to the factory of the customer in India.

2.1 Since the Appellant has no physical presence abroad, for the performance of the overseas part of the above-mentioned services, it has entered into contracts with various Overseas Logistics Service Providers (OLSPs). In terms of the said agreement, the OLSPs raise invoices on Appellants for handling the overseas part of the operations. The invoice raised by the Appellant to its clients comprises of 2 components:

a. Taxable component, and
b. Non-taxable component.

The Appellant claimed that they have duly discharged service tax on the amount shown as taxable component in the invoice raised on customers and not paid service tax on the component shown as non-taxable. The non-taxable component mainly comprises of freight and other charges charged by the OLSP's and the taxable component includes the services provided by the Appellant in India

3. A Show Cause Notice dated 21.10.2010 was issued to the Appellant demanding service tax of Rs. 22,25,87,789/- along with the proposal to demand interest under Section 75 and penalty under Sections 76, 77 and 78 of the Finance Act, 1994 for the period April 2005 to March 2010. The notice was adjudicated by the Commissioner of Service Tax vide the impugned order, wherein the demands raised in the Notice are confirmed along with interest and penalty. Aggrieved against the confirmations of such demands, the appellant has filed this appeal.

4. The appellant has made the following submissions:-

(i) The demand of service tax amounting to Rs. 2,11,90,438/- for the period April 2005 to 18.04.2006 is liable to be set aside as the same pertains to the period prior to insertion of Section 66A of the Finance Act, 1994. The Hon'ble Bombay High Court in ***Indian National Ship Owners Assn. vs. Union of India, 2009 (13) STR 235 (Bom)*** has held that the recipient in India is liable to service tax for the service received from abroad only from 18.4.2006 after enactment of Section 66A

of Finance Act, 1994. The SLP against the aforesaid ruling has been dismissed by the Hon'ble Supreme Court reported in ***2010 (17) STR J57 (SC)***. Accordingly, the demand of Rs. 2,11,90,438/- for the period April 2005 to 18.04.2006 i.e., prior to insertion of Section 66A of the Finance Act, 1994 is not sustainable.

(ii) The activities of collecting cargo from the customer's place, arranging for storage in foreign land, undertaking customs clearance in abroad, booking space in the aircraft/ship and handing over the cargo to the airline/shipping line for landing in the territory of India amounts to undertaking of clearance and forwarding operations. The above activities undertaken by the Appellant would fall under the category of ' Clearing and Forwarding gency Service' as held by the larger bench of this Tribunal in ***Larsen & Toubro Ltd. vs. Commissioner of Central Excise, Chennai, 2006 (3) STR 321 (Tri. -LB)*** The aforesaid ruling has also been approved by Hon'ble Supreme Court in ***Coal Handlers Pvt Ltd vs. Commissioner of C.Ex., Range, Kolkata-I, 2015 (38) STR 897 (SC).***

(iii) The Ld. Commissioner, in the paragraph 5.1.2 of the impugned order has held that since there is no principal to agent relationship between the OLSPs and the Appellant and no commissions is paid to the OLSPs, the services received by the Appellant cannot be classified as clearing and forwarding services. In this regard, the Appellant submits that Section 65(25) does not require principal and agent

relationship between the parties since it uses the phrase "any person" who is engaged in providing any service connected with the clearing and forwarding operations and not "any agent". Accordingly, they contended that the services received by the Appellant from the OLSPs are in the nature of clearing and forwarding agent service. They further submitted that since the services provided by the Appellant to its customers are in the nature of clearing and forwarding services, services provided by the OLSPs to the appellant are also classifiable as C&F services. Accordingly, they contended that the services provided by the OLSPs to the Appellant cannot be classified as 'Business Auxiliary Services'.

(iv) As per Rule 3(ii) of the Taxation of Services (Provided from outside India and received in India) Rules, 2006, clearing and forwarding agent service is only taxable under Section 66A of the Finance Act, 1994 if services are performed in the India. In the present case, the entire service has been performed outside India and this fact has been acknowledged in the SCN as well as at para 14.1.5 of the impugned order. Accordingly, they contended that no service tax is leviable on services received by the Appellant from OLSPs.

(v)The Ld. Commissioner has classified the services rendered by the appellant under Clause (vi) of Section 65(19) of the Finance Act, 1994, so as to bring it under the category of 'Business Auxiliary Service'. The Appellant submits that the services provided by the

OLSPs will only be taxable under clause (vi) if the same is provided on behalf of the Appellant to the customers of the Appellant. In the present case the OLSPs are not acting as agent of the Appellant while handling the cargo of the customers of the Appellant. The OLSPs books space on various shipping lines/airlines for the purpose of transportation of the goods from abroad to India. The contract is with the shipping line/airline and OLSPs. The shipping line /airline issues invoice in the name of the OLSPs. In case of defect, the shipping line/airline can sue only OLSPs. OLSPs in turn enter into contract with Appellant. OLSPs charge agreed fixed charges from Appellant. There is no contract between OLSPs and the customers of the Appellant. Accordingly, they submits that the services provided by OLSPs cannot be taxed under clause (vi) of the business of auxiliary service as there is no contract between the OLSPs and customers of the Appellant.

(vi) The Appellant submits that the expression *"on behalf of the client"* in clause (vi) presupposes existence of three parties. The services should be provided as an agent of the principal to the customers of the principal. If the services are provided by the agent to the principal, that will be not covered in the scope of clause (vi). In support of this contention, the Appellant relied on the following decisions:

- ***CCE, Jaipur vs. Galaxy Data Processing Center, 2011 (23) STR 375 (Tri-Del) –*** the assessee was given one order by RSEB for

computerizationof energy billing and related MIS, relevant formats and information. For carrying this order, the assessee developed and designed software, fed data into computer and processed such input data with help of own developed software and generated reports including energy bills and other ad hoc reports as required by RSEB. In such context the Hon'ble CESTAT held that the assessee has not undertaken any service on behalf of client as they do not have any contact with the customers of their client and are not issuing the bills directly to the customers of their client.

- ***Gandhi & Gandhi Chartered Accountant vs. CCE, Hyderabad, 2010 (17) STR 25 (Tri-Bang) affirmed by the Hon'ble Supreme Court; reported in 2011 (23)STR J94 (SC)–***assessee was rendering spot billing and data processing services to the Andhra Pradesh Central Power Distribution Company. While setting aside the demand under the category of "Business Auxiliary Service" the CESTAT held that Appellant here are directly rendering service to APCPDCL. They are not the agents of APCPDCL and doing any service on behalf of APCPDCL.

- ***Sai Computer Consultancy vs. Commissioner of C. Ex., Meerut-I, 2011 (24) STR 624 (Tri-Del)***
- ***M/S. Rohan Motors Limited Versus Commissioner Of Central Excise, Dehradun, 2021 (45) GSTL315 (Tri-Del)***
- ***Hindustan Petroleum Corporation Ltd vs. Commr. of C. Ex., Delhi-II, 2019 (24) GSTL 569 (Tri-Del)***

(vii) The Appellant submits that the SCN does not specifies under which clause of the definition of *"business auxiliary service"* the activity of the service provider falls. It is a settled position of law that the demand is not sustainable when the SCN does not specify the exact sub-heading under which service falls. In this regard, the Appellant placed their reliance on the decision in the case of ***Syniverse Mobile Solutions Pvt Ltd vs. Commissioner of Cus, CE & S.T, Hyderabad – IV, 2023 (6) TMI 463 – CESTAT HYDERABAD***.

(viii) Similar position of law has been laid down by the CESTAT in the following rulings:

- ***Joshi Auto Zone Pvt Ltd vs. Commissioner of Service Tax, Chandigarh (Vice-Versa), 2023 (12) TMI 1069 – CESTAT CHANDIGARH,***
- ***M/s. CoforgeSmartverse Limited vs. Commissioner of Service Tax, New Delhi, 2024 (1) TMI 826 – CESTAT CHANDIGARH,***
- ***Forward Resources (P.) Ltd vs. Commissioner of Central Excise &***

Service Tax, Surat – I, (2022) 1 Centax 54 (Tri-Ahm), and

- ***Kalpataru Power Transmission Ltd vs. Commissioner of C. Ex. & S.T., Ahmedabad -III, 2023 (69) GSTL 54 (Tri-Ahmd)***

(ix) Major part of the demand in the instant case is time barred. Show Cause Notice in the present case was issued on 21.10.2010 for the period April 2005 to March 2010. It is submitted that the ingredients of fraud or wilful misstatement/suppression are foundational facts which are required to be established in order to invoke 1st proviso to Section 73 of the Finance Act, 1994. As the above said ingredients are not present in this case, the demand pertaining to the period fromApril 2005 to September 2009 is time barred.

(x)The issue involved in the present case is purely one of interpretation of the statutory provisions. When the subject matter of the dispute is pertaining to interpretation of law, extended period is not invokable. In this regard, the appellant relied on the following decisions:

- ***MR Utility Products Pvt Ltd vs. Commissioner of C. Ex., Delhi-II, 2017 (7) GSTL 248 (Tri-Del),***
- ***Commissioner vs. Nizamsingh Chauhan, 2017 (6) GSTL J107 (MP)***

(xi) In view of the above, the Appellant prayed for setting aside the demands of duty, interest and penalties confirmed in the impugned order and allow their appeal.

5. The Ld. Departmental Representative submits that the activities undertaken by the appellant are covered within the ambit of Clause (vi) of Section 65(19) of the Finance Act, 1994. Accordingly, he supported the demands confirmed in the impugned order under the category of 'Business Auxiliary Service'.

6. Heard both sides and perused the appeal documents.

7. We observe that the Appellant enters into contract with its clients to render services in relation to import of goods from abroad. Since the Appellant has no physical presence abroad, they have entered into contracts with various OLSPs for performance of the activities abroad. The Appellant has not paid service tax on the part of the services rendered abroad by the OLSPs. The Department demanded service tax on these activities under the category of 'Business Auxiliary Services' and confirmed the demand of service tax of Rs. 22,25,87,789/- along with interest and penalty.

7.1 Regarding the demand of service tax amounting to Rs. 2,11,90,438/- for the period April 2005 to 18.04.2006, we observe that this demand pertains to the period prior to insertion of Section 66A of the Finance Act, 1994. The Hon'ble Bombay High Court in ***Indian National Ship Owners Assn. vs. Union of India, 2009 (13) STR 235 (Bom)*** has held that the recipient in India is liable to service tax for the service received from abroad only from 18.4.2006 after enactment of Section 66A of Finance Act, 1994. The SLP against the aforesaid ruling has been dismissed by the Hon'ble Supreme Court reported in

2010 (17) STR J57 (SC). Accordingly, we hold that the demand of service tax of Rs. 2,11,90,438/- for the period April 2005 to 18.04.2006 i.e., prior to insertion of Section 66A of the Finance Act, 1994 is not sustainable.

7.2. Regarding the remaining part of the demand confirmed in the impugned order, we observe that issues to be decided in the present appeal are as under:

(i) Whether service provided to the Appellant by the OLSPs taxable under the category of *"business auxiliary service"* under Section 65(19)(vi) and (vii) read with Section 65(105) (zzb) read with Section 66A of the Finance Act, 1994 and hence liable to service tax?

(ii) Whether demand in the instant case is sustainable when the Show Cause Notice fails to specify under which sub-clause of Section 65(19) the demand has been raised?

7.3 We observe that the OLSPs have undertaken the services such as collecting cargo from the customer's place of the Appellant, arranging for storage in foreign land, undertaking customs clearance in abroad, booking space in the aircraft/ship and handing over the cargo to the airline/shipping line for landing in the territory of India. The Appellant classified the said activities under the category of 'Clearing and Forwarding Agency Service' and contended that such services are not liable to service tax in view of Rule 3(ii) of

the Taxation of Services (Provided from Outside India and received in India) Rules, 2006. In our view, it is not required to examine whether the service rendered by the OLSPs to the Appellant are liable to service tax under the category of 'Clearing and Forwarding Agency Service'. The impugned order has demanded service tax on the services provided by the OLSPs to the Appellant under the category of *"business auxiliary service"* under Section 65(19)(vi) and (vii) read with Section 65(105)(zzb) read with Section 66A of the Finance Act, 1994. Hence, it is enough to examine whether the above said services rendered by the OLSPs to the Appellant would fall under any of the sub clauses of Section 65(19) of the Finance Act or not.

7.4 For the sake of ready reference the provisions of the Section 65(19) which defines "business auxiliary service" are reproduced below:-

- **Before 1-5-2006:**

"Business Auxiliary Service" means any service in relation to,—

(i) promotion or marketing or sale of goods produced or provided by or belonging to the client; or

(ii) promotion or marketing of service provided by the client; or

(iii)any customer care service provided on behalf of the client; or

(iv)any incidental or auxiliary support service such as billing, collection or recovery of cheques, accounts and remittance, evaluation of prospective customer and public relation services.

and include any information technology service.

Explanation — For the removal of doubts, it is hereby declared that for the purposes of this clause, "information technology service" means any service in relation to

designing, developing or maintaining of computer software, or computerized data processing or system networking, or any other service primarily in relation to operation of computer system.

- **w.e.f. 1-5-2006:**

"Business Auxiliary Service" means any service in relation to, —

(i) promotion or marketing or sale of goods produced or provided by or belonging to the client; or

(ii) promotion or marketing of service provided by the client; or

(iii)any customer care service provided on behalf of the client; or

(iv)procurement of goods or services, which are inputs for the client; or

[Explanation — For the removal of doubts, it is hereby declared that for the purposes of this sub-clause, "inputs" means all goods or services intended for use by the client;]

(v) production or processing of goods for, or on behalf of the client; or

(vi)provision of service on behalf of the client; or

(vii) a service incidental or auxiliary to any activity specified in sub-clauses (i) to (vi), such as billing, issue or collection or recovery of cheques, payments, maintenance of accounts and remittance, inventory management, evaluation or development of prospective customer or vendor, public relation services, management or supervision, and includes services as a commission agent, but does not include any information technology and any activity that amounts to "manufacture" within the meaning of clause (f) of section 2 of Central Excise Act, 1944.

…"

7.5 The Ld. Commissioner has classified the services rendered by the appellant under Clause (vi) of Section 65(19) of the Finance Act, 1994 mentioned above, so as to bring it under the category of 'Business Auxiliary Service'. We observe that the services provided by the OLSPs will be

taxable under clause (vi) of Section 65(19) mentioned above, only if the services are provided on behalf of the Appellant to the customers of the Appellant. In the present case, the OLSPs are not acting as 'agents' of the Appellant while handling the cargo of the customers of the Appellant. The OLSPs books space on various shipping lines/airlines for the purpose of transportation of the goods from abroad to India. The contract is with the shipping line/airline and OLSPs. The shipping line/airline issues invoice in the name of the OLSPs. In case of defect, the shipping line/airline can sue only OLSPs. OLSPs in turn enter into contract with Appellant. OLSPs charge agreed fixed charges from Appellant. There is no contract between OLSPs and the customers of the Appellant. Accordingly, we find that the OLSPs cannot be taxed under clause (vi) of the business of auxiliary service as there is no contract between the OLSPs and customers of the Appellant.

7.6. We observe that the expression *"on behalf of the client"* in clause (vi) presupposes existence of three parties. The services should be provided as an agent of the principal to the customers of the principal. If the services are provided by the agent to the principal, that will be not covered in the scope of clause (vi).

7.7. In the case of ***Sai Computer Consultancy vs. Commissioner of C. Ex., Meerut-I [2011 (24) STR 624 (Tri-Del)]*** it has been held as under: -

> *"5.5 Once the appellant is a different entity for the purpose of imposition of service tax as found above, its obligation under the law calls for examination. The agreement between the appellant*

and UP Power Corporation Ltd. throws light on the scope of work executed by the appellant. This clearly indicates the nature of activity carried out by the appellant (appearing at page 27 of the appeal folder vide clause-1). Reading of scope of work throws light that the appellant's obligation was to be discharged to UP Power Corporation Ltd. only. There is no evidence on record to suggest that all these services were provided to the clients of UP Power Corporation Ltd. on its behalf. In absence of any contrary evidence, obligation of the appellant under contract can be held to have been discharged to the UP Power Corporation Ltd. only but not to the clients thereof. When the client of the appellant was UP Power Corporation Ltd., it cannot be held that the appellant served clients of that Corporation on its behalf. Therefore, the appellant goes out of the ambit of sub-clause (vi) of the term 'business auxiliary service' defined by law prevailing at the relevant time. …."

(emphasis added)

7.8. Accordingly, we hold that the services rendered by the OLSPs cannot be categorized under the category of 'Business Auxiliary Services'. Hence, the demand of service tax under the Category of 'Business Auxiliary Services' in the impugned order is not sustainable.

7.9. We also observe that the Show Cause Notice has not specified any specific sub-clause of Section 65(19) under which the activities under taken by the OLSPs would fall. In the impugned order, the Ld. Adjudicating authority only classified the activities undertaken by the OLSPs under the category of *"business auxiliary service"* under Section 65(19)(vi) and (vii) read with Section 65(105) (zzb) read with

Section 66A of the Finance Act, 1994. Such a categorization is not available in the notice while demanding service tax under the category of 'Business Auxiliary Service'. It is a settled law that the defect in the notice cannot be cured by the observations of the adjudicating authority. Accordingly, we hold that the demand of service tax along with interest and penalty confirmed in the impugned order is not sustainable as the Show Cause Notice fails to specify under which sub-clause of Section 65(19) the demand has been raised.

7.10. This view is supported by the decision in the case of ***Syniverse Mobile Solutions Pvt Ltd vs. Commissioner of Cus, CE & S.T, Hyderabad – IV, 2023 (6) TMI 463 – CESTAT HYDERABAD***. The CESTAT has held as under:

> *"11.* ***Coming to the very first preliminary objection raised by the Appellant that the Show Cause Notice has failed to correctly specify the clause under which the Appellant services will fall, on perusal of the Show Cause Notice it is seen that the entire portion of Section 65(19) pertaining to Business Auxiliary Services has been extracted at Para 2 of the Show Cause Notice without any reference whatsoever as to under which clause of the Section 65(19) the services referred by the Appellant would fall. On this issue it is seen that Tribunals have been consistently holding that it is essential for the Show Cause Notice issuing authority to clearly indicate the sub-clause under which the service tax in question would fall."***
>
> *(emphasis added)*

8. In view of the above discussions, we hold that the demand of service tax confirmed along with interest and penalty confirmed in the impugned order under the category of 'Business Auxiliary Service' is not sustainable and accordingly, we set aside the same. Accordingly, the appeal filed by the appellant is allowed.

(Order pronounced in the open court on **28.02.2024**)

Sd/-
(K. ANPAZHAKAN)
MEMBER (TECHNICAL)

Sd/-
(ASHOK JINDAL)
MEMBER (JUDICIAL)

Sdd