IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHENNAI

REGIONAL BENCH – COURT NO. III

Service Tax Appeal No. 42511 of 2017

(Arising out of Order-in-Appeal No. 435/2017 (CTA-I) dated 06.12.2017 passed by Commissioner of GST & Central Excise (Appeals–I), No. 26/1, Mahatma Gandhi Marg, Nungambakkam, Chennai – 600 034)

M/s. A.G.X. Logistics Private Limited **...Appellant**
New No. 66, Old No. 16,
Ground Floor,
4th North Beach Road,
Chennai – 600 001.

Versus

Commissioner of GST & Central Excise **...Respondent**
Chennai North Commissionerate,
No. 26/1, Mahatma Gandhi Marg,
Nungambakkam,
Chennai – 600 036.

With

Service Tax Appeal No. 40296 of 2018

(Arising out of Order-in-Appeal No. 430/2017 (CTA-I) dated 05.12.2017 passed by Commissioner of GST & Central Excise (Appeals–I), No. 26/1, Mahatma Gandhi Marg, Nungambakkam, Chennai – 600 034)

M/s. C.A. Logistics Private Limited **...Appellant**
Old No. 33, New No. 17,
Thambu Chetty Street,
Chennai – 600 001.

Versus

Commissioner of GST & Central Excise **...Respondent**
Chennai North Commissionerate,
No. 26/1, Mahatma Gandhi Marg,
Nungambakkam,
Chennai – 600 036.

And

Service Tax Appeal No. 41626 of 2019

(Arising out of Order-in-Appeal No. 260/2019 (CTA-I) dated 13.08.2019 passed by Commissioner of GST & Central Excise (Appeals–I), No. 26/1, Mahatma Gandhi Marg, Nungambakkam, Chennai – 600 034)

M/s. A.G.X. Logistics (I) Private Limited **...Appellant**
New No. 3, Old No. 73,
West Mada Church Road,
Royapuram,
Chennai – 600 001.

Versus

Commissioner of GST & Central Excise **...Respondent**
Chennai North Commissionerate,
No. 26/1, Mahatma Gandhi Marg,
Nungambakkam,
Chennai – 600 036.

APPEARANCE:

For the Appellant : Shri S. Sankara Vadivelu, Advocate

For the Respondent: Shri M. Ambe, Deputy Commissioner / A.R.

CORAM:

HON'BLE MS. SULEKHA BEEVI C.S., MEMBER (JUDICIAL)
HON'BLE MR. VASA SESHAGIRI RAO, MEMBER (TECHNICAL)

DATE OF HEARING : 30.11.2023
DATE OF DECISION : 12.12.2023

FINAL ORDER Nos. 41104-41106 / 2023

Order :- [Per Ms. SULEKHA BEEVI C.S.]

The issue involved in all these appeals being the same, they are heard together and are disposed of by this common order.

2.1 The appellant is rendering Clearing and Forwarding Agency Service (CFA), Cargo Handling Service and is registered with the Service Tax Commissionerate. During the course of verification of their records, it was found that the appellant in addition to providing Clearing and Forwarding agency service also arrange for transportation of export and import cargo through shipping agencies / airlines. The freight for the above, known as the ocean freight and air freight respectively, are fixed / agreed between the appellant and the shipping companies based on the destination and the size of the container. The export / import cargo may be either FCL (Full Container Load) or LCL (Less than Container Load).

2.2 The appellant receives booking orders from their customers for export / import of cargo through e-mail or through phone. In the case of FCL, the appellant books a container from the liners shipping companies and places the container in the CFS. The goods meant for export are received at the CFS and the export cargo is unloaded at the CFS. After Customs examination of the goods, the same is loaded into the said container and sealed by the Customs authorities. The container is then moved to the port and the shipping companies will make arrangements for the transhipment of the export cargo to the destination by ship. After sailing of the vessel, the appellant collects the Bill of Lading from the shipping companies by paying freight. In the case of LCL, the export goods are placed in the CFS after Customs formalities. Depending on the availability of the container and vessel, the goods will be loaded in the container and to the port and the same procedures mentioned in respect of FCL is followed.

2.3 Similarly, in the case of imports, the appellant books the containers and make arrangements with the shipping companies for the provision of international freight services for the transportation of cargo in the containers, to destinations located in India.

2.4 The appellant collects the negotiated and agreed amount from the customers, as Ocean Freight / Air Freight Charges both in the case of exports and imports. These charges vary from customer to customer, depending on the destination and size of the containers. However, on verification of invoices by the Department, it was noted that the amount collected as 'ocean freight charges' by the appellant from their customer is more than the ocean freight charges paid to the shipping companies.

2.5 The Department was of view that the appellant has arranged for the transportation of cargo of their customer and do not themselves provide the international freight service. The appellant had only made arrangements with the shipping

companies for the provision of international freight service for the transportation of the goods on their own account. The activity of the appellant in arranging transportation of the cargo amounts to 'service' provided to the exporter for arranging the international freight services. Though the appellant collects amounts in the name of freight charges, the amount is inclusive of mark-up, of the difference of actual freight charges paid to the shipping line and freight charges collected. The Department was of the view that the activity rendered by the appellant would be covered under the definition of service in Section 65B(44) of the Finance Act, 1994 with effect from 01.07.2012.

2.6 The appellant had not discharged Service Tax liability on the freight charges including the mark-up received by them from the customers and paid to the shipping lines. The Show Cause Notice was issued for different periods proposing to demand Service Tax on the ocean freight and air freight and the mark-up along with interest and for imposing penalties. After due process, the original authority confirmed the demand, interest and imposed penalties. Aggrieved by such order, the appellant is now before the Tribunal.

3.1 The Ld. counsel Shri S. Sankara Vadivelu appeared and argued for the appellant. The appellant is registered as Clearing and Forwarding agent and for providing Cargo Handling Services. It is submitted that ocean freight in respect of both export and import does not attract Service Tax for the disputed period. Under Section 66D(p)(i) of the Finance Act, 1994, (prior to 01.06.2016) services by way of transportation of goods by an aircraft or vessel from a place outside India up to the customs station of clearance in India falls under negative list and hence the same falls outside the ambit of Service Tax. Further, in terms of Rule 10 of the Place of Provision of Services Rules, 2012, the place of provision of service of transportation of goods shall be the destination of the goods. In case of export shipments, as the destination is outside India, the place of provision of service is outside India and hence no Service Tax is payable.

3.2 The said Section 66D(p)(i) of the Finance Act, 1994, was omitted from the negative list with effect from 01.06.2016 and hence made taxable. In the present case, the demand is for the period from April 2015 to March 2017. In appeal Nos. ST/42511/2017 and ST/41626/2019, the demand is on ocean freight for both export and import whereas in the case of appeal No. ST/40296/2018, the demand of Service Tax is on the air freight as well as mark-up received while paying the freight charges to the liners. The Ld. counsel submitted that the activity does not involve rendering of service and it is mere buying and selling of cargo space for the purpose of transport of goods by ocean / air on principal-to-principal basis. Ocean freight and air freight is not subject to levy of Service Tax. With effect from 2016, though freight charges for transportation of goods by way of air is subject to levy a Service Tax, the liability to pay Service Tax is on the air liners. The demand raised on the appellant is against the provisions of law.

3.3 The Ld. counsel submitted that the issue stands covered by various decisions. In the case of *M/s. Tiger Logistics (India) Ltd., Vs. Commissioner of Service Tax-II, Delhi [2022 (63) GSTL 337 (Tri. Del.)],* the very same issue was considered, the demand was set aside on the ground that the activity is mere trading of cargo space and not rendering of service. In the case of *EMU Lines Pvt. Ltd. Vs. Commissioner of CGST & Central Excise, Belapur [2023 (4) CENTAX 122 (Tri.-Bom.)],* the very same issue was considered and the period involved is from 2009 to 2014, the demand was made under the category of Business Auxiliary Services (BAS). The Tribunal set aside the demand holding that it is mere purchase and sale of cargo space and there is no rendering of service by the appellant to shippers or shipping lines. The said decision has been upheld by the Hon'ble Supreme Court in the case as reported in *[2023 (72) GSTL 443 (SC)]*. The Ld. counsel prayed that the appeals may be allowed.

4. The Ld. Authorised Representative Shri M. Ambe supported the findings in the impugned order.

5. Heard both sides.

6.1 On perusal of the Annexure to the Show Cause Notice, it is seen that the demand is raised not only on the mark-up but also on the ocean freight and air freight. These charges are not subject to levy of Service Tax during the disputed period. The mark-up received by the appellant on the freight charges is due to the difference in the freight charges collected from the shipper and paid to the shipping / airliners. The issue is no longer *res integra*, the Tribunal in the case of Tiger Logistics *(supra)* held that the activity is trading of cargo space and there is no rendering of service. The demand of Service Tax on mark-up / differential of ocean freight was set aside. The relevant Paragraphs reads as under:-

> ***"7.*** *We have considered the arguments on both sides and perused the records. For a service tax to be leviable :*
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> *(a) a service must have been rendered;*
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> *(b) the service so rendered must be a taxable service within the meaning of Section 65(105) of Chapter V of the Finance Act, 1994; and*
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> *(c) a consideration must have been paid for that service;*
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> ***8.*** *If a service is not rendered at all, no service tax can be levied regardless of the fact that an amount has been received. Similarly, if the service so rendered does not squarely fall within the definition of 'taxable service' under Section 65(105), no service tax can be levied. Even if it is doubtful whether the service is taxable or not, the benefit of doubt in respect of the charging section goes in favour of the assessee and against the revenue. The third important element is the consideration for the service. Any amount received must be for the service and it cannot be for some other purpose. For instance, if any amount is received towards any compensation, such amount cannot be taxed.*
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> ***9.*** *As far as the differential in ocean freight is concerned, the appellant buys space on ships from the Shipping Line and the Shipping Line issues a Master Bill of Lading in favour of the appellant. In turn, it sells the space to its customers and issues a House Bill of Lading to each of them. The first leg is the contract between the Shipping line and the appellant. The second leg is the contract between the appellant and its customers. Evidently, anyone who trades in any merchandise or service buys low and sells high and the margin is his profit. To earn this profit, he also takes the risk of being unable to sell. In the appellant's case, if the space on the ships which it bought cannot be sold to its customers fully, or due to market*

conditions, or is compelled to sell at lower than purchase price, the appellant incurs loss. In a contrary situation, it gains profits. This activity is a business in itself on account of the appellant and cannot be called a service at all. Neither can the profit earned from such business be termed consideration for service. Respectfully following Satkar Logistics, Nilja Shipping Pvt. Ltd., Surya Shipping and ITC Freight Services, we hold that the appellant is not liable to pay service tax.

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18. *We find that the only allegation of these elements held against the appellant in the impugned order is that of 'suppression of facts' and the reason for this is that they have not disclosed the full value of the taxable services in their ST-3 returns. It is also accepted in the impugned order that these services were all duly recorded by the appellant. It is now well established legal principle that 'suppression of facts' is not mere omission. It must be a deliberate act with mens rea to suppress and thereby evade. The facts brought out in the impugned order do not demonstrate the mens rea. On the other hand, they show that the appellant had recorded all the transactions in its records and when called for during investigation, provided full facts to the department based on which the SCN was issued. Insofar as the appellant did not dispute the demands of service tax, it paid the same along with interest even before the SCN was issued. In our considered view, this case is covered squarely by Section 73(3) and no SCN should have been issued to that extent.*

19. *The appellant disputed service tax on mark up which it received from trading space on ships and the reimbursements of the container detention charges and the toll taxes which it paid on behalf of its clients and got reimbursed. We have already found above that no service tax is leviable on these receipts."*

6.2 In the case of *Direct Logistics India Pvt. Ltd. Vs. Commissioner of Service Tax, Bangalore [2021 (55) GSTL 344 (Tri.-Bang.)]*, the demand was raised on the mark-up received on the difference between the freight charges collected and paid to the shipping liners. The relevant Paragraphs reads 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' requirements 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 would, 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 being 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.*

16. *The second question which we have framed is whether in Service Tax Appeal No. 263 of 2008, the appellant is liable to discharge service tax on the amounts which it received from the agents of the Shipping Line for booking cargos under the head 'Steamer Agency Service' or not. It is undisputed that the appellant received the amounts not from the shipping line but from its brokers. Charge of service tax under Section 65(105)(i) is leviable on a service rendered 'to a shipping line, by a steamer agent in relation to a ship's husbandry or dispatch or any administrative work related thereto as well as the booking, advertising or canvassing of cargo, including container feeder services. There is nothing on record to prove either that the appellant was a steamer agent or that the appellant rendered service to a shipping line. The service, if any, is rendered by the appellant, it is to the broker and not to the shipping line. Therefore, no service tax can be charged on the disputed amount under the category of Steamer Agent Service on the amounts paid by the brokers to the appellant."*

6.3 The Tribunal in the case of EMU Lines Pvt. Ltd. *(supra)* had considered the very same issue where the demand of

Service Tax was raised under Business Auxiliary Services. It was held by the Tribunal that the activity does not amount to rendering of service and it is merely trading of cargo space. The said decision was upheld by the Apex Court as reported at *[2023 (72) GSTL 443 (SC)]*.

7. After appreciating the facts and following the decisions cited *supra*, we are of the considered opinion that the demand of Service Tax on ocean freight / air freight or the mark-up on the above received by the appellant cannot be subject to levy of Service Tax.

8. The impugned orders are set aside. The appeals are allowed with consequential relief, if any, as per law.

(Order pronounced in open court on 12.12.2023)

Sd/-
(VASA SESHAGIRI RAO)
MEMBER (TECHNICAL)

Sd/-
(SULEKHA BEEVI C.S.)
MEMBER (JUDICIAL)

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