CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH-COURT NO. I

SERVICE TAX APPEAL NO. 52168 of 2016

[Arising out of Order-in-Original No. DLISVTAX-002-COM-006-1516 dated 31.12.2015 passed by the Commissioner of Service Tax, Delhi II]

M/s. Balmer Lawrie & Co. Ltd.
21, Netaji Subhas Bose Road,
Kolkata -700001. **APPELLANT**

VS.

The Commissioner of Service Tax
Delhi II Commissionerate
5th Floor, 14-15, Farm Bhawan
Nehru Place, New Delhi- 110019.

RESPONDENT

WITH

SERVICE TAX APPEAL NO. 51634 of 2016

[Arising out of Order-in-Original No. DLISVTAX-002-COM-006-1516 dated 31.12.2015 passed by the Commissioner of Service Tax, Delhi II]

The Commissioner of Service Tax
Delhi II Commissionerate **APPELLANT**
5th Floor, 14-15, Farm Bhawan
Nehru Place, New Delhi- 110019

VS.

M/s. Balmer Lawrie & Co. Ltd.
21, Netaji Subhas Bose Road, **RESPONDENT**
Kolkata -700001..

APPEARANCE:

Shri S Muthuvenkatraman, Advocate for the Respondent
Shri Mihir Ranjan, Speial Counsel for Department

CORAM:

HON'BLE MR.JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MS. HEMAMBIKA R PRIYA, MEMBER (TECHNICAL)

DATE OF HEARING : 14 March, 2023
DATE OF DECISION : 01 May, 2023

FINAL ORDER No. 50579-50580 /2023

PER HEMAMBIKA R PRIYA

The current appeals have been filed to assail the Order-in-Original dated 31.12.2015 wherein the Commissioner of Service Tax, Delhi-II confirmed the demand of ₹5,25,21,302/- under Section 65(105)(zr) of the Finance Act, 1994, and dropped the remaining demand. M/s Balmer Lawrie[1] are in appeal against the amount of service tax demand confirmed by the adjudicating authority whereas the department has filed an appeal against the dropping of some part of the demand.

2. The appellant was registered with the Service Tax Commissionerate, Kolkata for providing comprehensive range of logistics services to their clients. They had service tax registrations for the other branch offices from where they provided various taxable services. In order to provide services, the appellant entered into a contract with Indian customers for transporting and delivering the cargo at the desired destination within India. The activities undertaken by the appellants are in relation to loading, unloading, packing, unpacking of cargo, services provided to the Custom House agents for handling containers or import cargo, transshipment of import cargo from international carrier, etc. The responsibility of the appellants pertaining to import includes collection of consignments from the foreign line and ensuring delivery of the same to the importer located in India. The officers of Directorate General of Central Excise intelligence, Kolkata

1 the appellant

developed intelligence that the appellants were evading service tax duty on cargo handling service. They were not discharging duty liability on reverse charge basis as provided under section 66A of the Finance Act, 1994. Investigations revealed that the appellant provided cargo handling services both within and outside India. They undertake cargo handling operations under contract with the Principal who was also their client. They offered services including import consolidation by air, air and sea freight forwarding, Custom House Agency, project, cargo handling, multimodal, transportation, Chartering of aircrafts and vessels and door to door services. They entered into agency agreements with non-resident logistics service providers who handle cargo of the client of the appellant on behalf of the appellant. As per the terms of agreement, the parties, viz., appellant and their foreign associates, who provide auxiliary service to the appellant and vice versa, enjoy profit share on a 50:50 basis in each deal. The bill was divided into four parts, namely, freight, other charges origin, other charges, destination, and service tax. The appellant paid service tax only on the other charges destination. However, no service tax was paid on freight and other charges origin. On completion of investigation, a show cause notice dated 11.04.2014 was issued demanding service tax amounting to Rs.1,46,11,51,568/- for the period 01.10.2008 to 31.03.2013. The adjudicating authority vide order dated 31.12.2015 dropped the major portion of the demand and confirmed the demand of Rs.5,25,21,302/- along with interest and penalty on profit on ocean freight charges, treating it as integral part of cargo handling services in terms of section 65(105)(zero) of

the Finance Act, 1994. The appellant has filed the appeal to assail the demand confirmation by the adjudicating authority whereas the Department has filed the appeal against the dropping of the demand by the adjudicating authority.

3. The learned counsel submitted that the remittances made to the non-resident service providers were reimbursement of freight charges incurred in non-taxable jurisdiction, and therefore, was not liable for service tax. He submitted that they were invoicing to customers under the nomenclature freight charges, which reflected the freight, including fuel surcharge security, such as for transportation of consignments, other incidental local expenses, incurred by the associates in the country of origin, wherever applicable. Freight charges were billed to the customer based on the agreed rates, which were determined in advance, and could not exactly be matched with actual freight, which depended on many factors like demand and supply of transportation of cargo to a particular destination, at the relevant time, climatic condition, economic condition, price of fuel, etc. Any surplus or deficit remitted to the foreign associates, and that retained by them were entirely covered under this head. They limited the entire amount shown under charges of origin to the respective foreign associates, the profit and loss retained by them, and that remitted to the respective foreign associate was done in the same ratio of 50:50. He further submitted that as part of ocean freight or airfreight, the overseas agent also raises invoices towards the airline, fuel, surcharge, airline, security fee and agents, revenue share. Since

these were associated components to the transporting of goods by air or ocean, they were not subject to service tax. However, on the other components of charges such as break bulk fee, charges collect fee etc., they had duly paid the service tax throughout the period including on transportation of goods by road. The learned counsel, placed reliance on the decision of the Tribunal in the following cases:

i. **Tiger Logistics India Ltd vs Commissioner of Service Tax, Delhi- II** [2022 (2) TMI 455 Cestat-New Delhi];

ii. **Greenwich Meridian Logistics, India Private Limited vs Commissioner of Service Tax, Mumbai** [2016 (43) STR 215 (Tri-Mumbai)];

iii. **Satkar Logistics vs Commissioner of Service Tax, Delhi** [2021 (8) TMI) 694 Cestat New Delhi];

iv. **Commissioner of Service Tax, New Delhi vs Karam freight movers** [2017 (4) GSTL 215 (Tr-Del)]; and

v. **Bhatia Shipping Private Limited vs Commissioner of Service Tax, Mumbai** [2022 (1) TMI 1175 Cestat Mumbai]

4. The departmental Special Counsel submitted that out of a total amount of Rs.821,34,94,756/- billed by the appellant in their invoices, the actual freight was only Rs.349,20,31,183/-. Therefore, the appellant should have paid service tax on the taxable value of the cargo handling services provided by the appellant to their clients. Further, since the foreign associate provided taxable services on behalf of the appellant and they were not residents in the taxable territory of India, the appellant was liable to pay service tax on the differential value of Rs.1,16,05,19,197/- as consideration for business auxiliary service

under reverse charge mechanism. He further submitted that the adjudicating authority had erred in holding that the entire ocean/air freight charged by the foreign associates of the appellant was being sought to be taxed twice as cargo handling service and business auxiliary service under reverse charge mechanism, in as much as the appellant had collected from their Indian customers, an amount over and above the actual amount remitted to their foreign associates. He further added that the adjudicating authority had failed to appreciate that the appellant had paid consideration for the actual freight other charges, origin and the profit share to their associates which was much higher than the actual freight. Therefore, the excess amount collected by the appellant was liable to be taxed.

5. We have heard the learned counsel and the departmental special counsel. We find that the disputed period is from 01.10.2008 to 31.3.2013. We also note that both the appeals are filed against the common order in original no. DLISVTAX002-Com-006-15-16 dated 31.12.2015. The appellant viz., M/s Balmer Lawrie & Co. Ltd. are in appeal against the confirmed demand of Rs.5,25,21,302/- along with interest payable thereon, and the equal penalty imposed on them. The Department has filed the appeal against the dropping of the demand of Rs. 1,40,86,30,266/- by the adjudicating authority along with interest thereon.

6. The primary issue for decision is the issue on taxability of service tax on ocean freight and the liability of tax on profit/mark up, which is no more *res integra* as the same has been decided in

catena of decisions, the latest being the judgment in the case of **M/s Tiger Logistics (India) Ltd. vs Commissioner of Service Tax-II, Delhi[2].** The relevant paragraphs of the aforesaid judgment is reproduced hereinafter:-

> "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."*

6.1 The Tribunal in an earlier decision the case of **M/s Greenwich Meridian Logistics (India) Pvt Ltd., vs Commissioner of Service Tax, Mumbai[3]** held as follows:

> *12. The appellant takes responsibility for safety of goods and issues a document of title which is a multi-modal bill of lading and commits to delivery at the consignee's end. To ensure*

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[2] 2022(2)TMI 455-CESTAT NEW DELHI
[3] 2016(4) TMI-547-CESTAT MUMBAI

such safe delivery, appellant contracts with carriers, by land, sea or air, without diluting its contractual responsibility to the consignor. Such contracting does not involve a transaction between the shipper and the carrier and the shipper is not privy to the minutiae of such contract for carriage. The appellant often, even in the absence of shippers, contract for space or slots in vessels in anticipation of demand and as a distinct business activity. Such a contract forecloses the allotment of such space by the shipping line or steamer agent with the risk of non-usage of the procured space devolving on the appellant. By no stretch is this assumption of risk within the scope of agency function. Ergo, it is nothing but a principal-to-principal transaction and the freight charges are consideration for space procured from shipping line. Correspondingly, allotment of procured space to shippers at negotiated rates within the total consideration in a multi-modal transportation contract with a consignor is another distinct principal-to-principal transaction. We, therefore, find that freight is paid to the shipping line and freight is collected from client-shippers in two independent transactions.

13. The notional surplus earned thereby arises from purchase and sale of space and not by acting for a client who has space or slot on a vessel. Section 65(19) of Finance Act, 1994 will not address these independent principal-to-principal transactions of the appellant and, with the space so purchased being allocable only by the appellant, the shipping line fails in description as client whose services are promoted or marketed.

14. We, therefore, find no justification for sustaining of the demand and, accordingly, set aside the impugned order. Demands, with interest thereon, and penalties in both orders are set aside. Cross-objections filed by the department are also disposed of."

7. Accordingly, we dismiss the departmental appeal ST/51634/2016 and allow the appeal no. ST/52168/2016, with consequential relief, if any.

(Pronounced in the open court on 01.05.2023)

(JUSTICE DILIP GUPTA)
PRESIDENT

(HEMAMBIKA R PRIYA)
MEMBER (TECHNICAL)

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