

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI**

PRINCIPAL BENCH - COURT NO. 1

Service Tax Appeal No. 52935 of 2016

(Arising out of Order-in-Original No. DLI-SVTAX-003-COM-57-16-17 dated 10.08.2016 passed by Commissioner of Service Tax, Delhi-III Commissionerate Block-11, 7th Floor, CGO Complex, New Delhi-110003)

M/s Haiko Logistics India Pvt. Ltd.
A-133, Street No. 4, Mahipalpur Extn., Gurgaon
Road, New Delhi-110037

...Appellant

VERSUS

Commissioner of Service Tax- Delhi 3
Commissionerate Block-11, 7th Floor, CGO Complex,
New Delhi-110003

...Respondent

WITH

Service Tax Appeal No. 53001 of 2018

(Arising out of Order-in-Original No. 02/PP/Commr/CGST/Audit-II/2018-19 dated 22.05.2018 passed by Commissioner of CGST Audit II Commissionerate , 1st Floor, EIL Annexe Building, Bhikaji Cama Place, New Delhi-110066)

M/s Haiko Logistics India Pvt. Ltd.
A-133, Street No. 4, Mahipalpur Extn., Gurgaon
Road, New Delhi-110037

...Appellant

VERSUS

Commissioner of Central GST Audit-II
Commissionerate 1st Floor, EIL Annexe Building,
Bhikaji Cama Place, New Delhi-110066

...Respondent

APPEARANCE:

Shri B.L. Narasimhan & Shri Kunal Aggarwal, Advocate for the Appellant
Shri Rohit Issar, Authorized Representative for the Department

AND

Service Tax Appeal No. 53022 of 2018

(Arising out of Order-in-Original No. DLI-SVTAX-003-COM-57-16-17 dated 10.08.2016 passed by Commissioner of Service Tax, Delhi-III Commissionerate Block-11, 7th Floor, CGO Complex, New Delhi-110003)

Principal Commissioner, GST South
3rd Floor, EIL Annexe Building,
Bhikaji Cama Place, New Delhi-110066

...Appellant

VERSUS**M/s Haiko Logistics India Pvt.****...Respondent**A-133, Street No. 4, Mahipalpur Extn., Gurgaon
Road, New Delhi-110037**APPEARANCE:**Shri Rohit Issar, Authorized Representative for the Department
Shri B.L. Narasimhan & Shri Kunal Aggarwal , Advocate for the Respondent**CORAM:****HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT**
HON'BLE MS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)**Date of Hearing: 17.07.2023**
Date of Decision: 10.08.2023**FINAL ORDER NO. 51028-51030/2023****JUSTICE DILIP GUPTA:**

Service Tax Appeal No. 52935 of 2016 has been filed by M/s Haiko Logistics India Pvt. Ltd.¹ to assail the order dated 10.08.2016 passed by the Commissioner of Service Tax, New Delhi² adjudicating the show cause notices dated 10.10.2014 and 26.08.2015.

2. **Service Tax Appeal No. 53001 of 2018** has been filed by the appellant to assail the order dated 22.05.2018 passed by the Commissioner adjudicating the show cause notice dated 11.04.2016.

3. **Service Tax Appeal No. 53022 of 2018** has been filed by the Department to assail that part of the order dated 22.05.2018 by which the Commissioner has dropped the demand of Rs. 22,12,87,459/-.

4. The details of the aforesaid three appeals are as follows:-

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1. the appellant
 2. the Commissioner

Appeal No.	ST/52935/2016 (by the Appellant)	ST/53001/2018 (by the Appellant)	ST/53002/2018 (by the Department)
Order-in-Original	10.08.2016	22.05.2018	22.05.2018
Show cause notice	1. 10.10.2014 (for the period 2009-10 to 2012 -13) 2. 26.08.2015 (for the period 2013-2014)	11.04.2016 (for the period 2014-2015)	11.04.2016 (for the period 2014-2015)
Tax demand in dispute	For the period 2009-10 to 2012-13 is Rs. 15,34,338 (out of this Rs. 3,25,820, which was paid before issuance of show cause notice along with interest, has been appropriated) For the period 2013-2014 is Rs. 6,03,465/- [Total Demand= Rs. 21,37,803/-]	Rs. 10,60,782/-	Rs. 22,12,87,459/-

5. The appellant is a multi-modal transport operator under Multi-Modal Goods Transport Act, 1993 and is having a license/registration dated 08.03.2007 issued by Directorate General of Shipping. The appellant is inter-alia engaged in providing (i) customs clearance services (ii) freight forwarding services and (iii) transportation services.

6. The clients (importers/exporters) approach the appellant for transportation of their goods from overseas or to overseas and the appellant in turn approaches various shipping lines/airlines and books cargo space on such ships/planes as per requirements of the clients on agreed price and transports the goods thereafter. The amount paid towards freight by the appellant to the shipping lines/airlines can be less than what the appellant receives from the selling of space to clients or more than that or it can be the same. Thus, there can be

profit or loss or no profit no loss to the appellant while buying and selling cargo space.

7. There are also certain payments towards customs duty, air freight, ocean freight and surcharges which are made by the appellant on behalf of the clients and thereafter recovered from the clients without any mark-up. The appellant claims that since the payment made by the client towards the said charges are in the nature of reimbursements, the same are recorded by the appellant as non-taxable in the books of accounts.

8. The issues involved in the three appeals are as follows:-

Appeal No.	ST/52935/2016 (by the Appellant)	ST/53001/2018 (by the Appellant)	ST/53002/2018 (by the Department)
Issues involved	<p>1. Demand of service tax on the profit/markup of ocean freight during buying and selling of shipping space [Rs. 11,48,091 (2009-10 to 2012-13) + Rs. 6,02,213 (2013-14) = Rs. 17,50,304]</p> <p>2. Demand of service tax on commission income from shipping lines [Rs. 60,427 (2009-10 to 2012-13)+ Rs. 1,252 (2013-14)= Rs. 61,679]</p> <p>3. Demand of service tax on legal expenses and on difference in reconciliation of ST-3 [Rs. 30,954 + Rs. 2,94,866=Rs.3,25,820 (2009-10 to 2012-13)]. This amount was paid with interest before issuance of the show cause notice and payment has been appropriated.</p>	<p>1. Demand of service tax on the profit/markup of ocean freight during buying and selling of shipping space. [Rs. 10,60,782]</p>	<p>1. Demand of service tax under category of business support services on the amount of custom duty, overseas ocean & air freight and other charges [Rs. 14,99,54,386]</p> <p>2. Demand of service tax on difference between the figures in Form 26AS and ST-3 returns [Rs. 7,13,33,073]</p>

9. The two show cause notices dated 10.10.2014 and 11.04.2016 were adjudicated by a common order dated 10.08.2016, whereby

demand of Rs. 21,37,803 with respect to certain issues was confirmed and rest of the proposed demand was dropped.

10. The third show cause notice dated 11.04.2016 was adjudicated by an order dated 22.05.2018, whereby demand of Rs. 10,60,782/- was confirmed and demand of Rs. 22,12,87,459/- was dropped.

11. The department has filed an appeal against the findings recorded by the Commissioner for dropping the aforesaid demand.

12. Shri B.L. Narasimhan, learned counsel for the appellant and Shri Rohit Issar learned authorised representative of the department made submissions on the following issues:

- (i)** Non-payment of service tax on mark-up in freight income (ocean freight) confirmed in both the orders and assailed in the two appeals filed by the appellant;
- (ii)** Non-payment of service tax on commission income under category of BAS confirmed in the order dated 10.08.2016 and assailed in Service Tax Appeal No. 52935 of 2016 appeal filed by the appellant;
- (iii)** Non-payment of service tax on legal expenses and on difference in figures in ST-3 confirmed in order dated 10.08.2016 and assailed in Service Tax Appeal No. 52935 of 2016 filed by the appellant;
- (iv)** Non-payment of service tax on the value shown as non-taxable in the financial data summary sheet which is taxable under BSS assailed in the appeal filed by the department; and

- (v)** Non-payment of service tax on difference in value in Form 26AS and ST-3 returns assailed in the appeal filed by the department.

13. These issues are being considered separately.

The demand of service tax on mark-up in freight income

14. As regards non-payment of service tax on mark-up in freight income (ocean freight), the finding recorded by the Commissioner is as follows:

- (i)** For the period prior to 1.7.2012, the activity of procurement of space from shipping lines which are used/intended to be used by the exporters/importers for transportation of their goods is classifiable under BAS under clause (iv) to Section 65 (19) of the Finance Act. Thus, the markup, which is the consideration for provision of service of booking of cargo space, would be taxable under section 65 (105) (zzb) of the Finance Act. For the period post 1.7.2012, since BAS is not covered under section 66D of the Finance Act, markup value is susceptible to service tax;
- (ii)** The assessee failed to substantiate that is operating as a Multi-Modal Transport Operator. The submissions of the assessee that markup is a component of ocean freight and ocean freight is not taxable is not sustainable as same is inconsequential as markup is the consideration for provision of service of booking of cargo space and would be taxable; and
- (iii)** The demand was based on the sample data and on best judgement assessment. Since data has been provided which is duly supported by the CA certificate, demand has been re-computed with benefit of cum tax.

15. The demand was proposed and confirmed on the mark-up amount which arose as the amount of ocean freight paid by the appellant to the shipping lines was less than the amount collected from the clients towards ocean freight. According to the appellant, service tax is not leviable on this amount as it is only a case of

trading space on ships and the profit is earned. This issue has been decided by the Tribunal in number of cases and it has been held that the activity of buying and selling of cargo space is actually trading of cargo space and the amount received for such activity is a profit earned from sale, which cannot be attributed to be consideration for a service. Thus, as the activity is not a service, it cannot be subjected to levy of service tax.

16. In this connection, reference can be made to the decision of the Tribunal in **M/s. Tiger Logistics (India) Ltd. vs. Commissioner of Service Tax-II, Delhi³** and the relevant portion of the decision is reproduced below:

"7. We have considered the arguments on both sides and perused the records. For a service tax to be leviable:

- a) a service must have been rendered;
- 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
- c) a consideration must have been paid for that service.

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.”

17. The decision of the Tribunal in **Satkar Logistics vs. Commissioner of Service Tax, Delhi-III**⁴ also needs to be referred to and is reproduced below:

“8. The Division Bench accepted the contention advanced on behalf of the appellant in the earlier decision that the appellant was only trading in space and was not providing any service. The Division Bench also noted that the issue involved in the Appeal was covered by the decisions of the Tribunal in **Greenwich Meridian Logistics (India) Pvt. Ltd. V. Commissioner**⁵ and **Commissioner of Service Tax, New Delhi vs. Karam Freight Movers**⁶.

9. The post negative list w.e.f. 01.07.2012 was also involved in the Appeal that was decided.”

18. It also needs to be noted that a finding has been recorded by the Commissioner that the appellant failed to provide evidence that it is acting as a multi-modal transport operator. The appellant had provided a copy of license/registration No. MTO/DGS/586/2007 dated 08.03.2007 to the department which would establish that the appellant was acting as multi-modal transport operator and not as an agent. The finding recorded in the impugned order is, therefore, not correct.

19. The appellant also fulfilled all the conditions envisaged in paragraph 2.2 of the Circular dated 12.08.2016 to establish that the appellant was acting on a principal-to-principal basis. This would be clear from the following facts:-

4. 2021 (8) TMI 694 – CESTAT New Delhi
5. 2016 (43) S.T.R 215 (Tribunal)
6. 2017(4) G.S.T.L 215 (Tri.-Del)

Sl. No.	Condition in the Circular	Satisfaction by the appellant
1.	The freight forwarder separately negotiates the terms of freight with the airline/ carrier/ocean liner as well as with the exporter.	The appellant books the space with shipping lines in its own name and shipping line raises invoice on the appellant. Separate invoice is raised on the clients wherein different amount is charged, and this only resulted in mark-up.
2.	The invoice is raised by the freight forwarder on the exporter.	Invoices were raised on exporters.
3.	The freight forwarder is undertaking all the legal responsibility for transportation of the goods and undertakes all the attendant risks.	The appellant issued Bill of Lading in its own name and thus, all risk of transportation is borne by the appellant. Further, there may be a situation where cargo space is sold at lesser price. Thus, loss risk is borne by the appellant.

20. In terms of paragraph 3 of the Circular dated 12.08.2016, the demand is liable to be set aside as the destination of goods are outside India in terms of rule 10 of the Place of Provision of Service Rules, 2012. For imports, the transaction would be non-taxable in terms of section 66D (ii)(p) of the Finance Act.

Demand of service tax on Commission income under BAS

21. As regards non-payment of service tax on commission income under category of business auxiliary services⁷, the finding recorded by the Commissioner is as follows:

- (i) The assessee is acting on behalf of the shipping lines and is selling cargo space of such shipping lines in lieu of which amount is also collected by the assessee from the client. Thus, the assessee is a commission agent as defined under Explanation to section 65 (19) of the Finance Act and BAS is rendered in terms clause (vii) to section 65 (19) of the Finance Act to the shipping lines for a commission, which is susceptible to service tax under section 65 (105) (zzb) of the Finance Act. For the period post 1.7.2012, since BAS is not covered under

7. BAS

section 66D of the Finance Act, commission is susceptible to service tax.

22. This demand was proposed under category of BAS as defined under section 65(19) of the Finance Act but the show cause notice does not mention any of the sub-sections of 65(19) of the Finance Act. It needs to be noted the appellant was not acting as an agent on behalf of the shipping lines as it bought and sold space on its own account. Thus, it cannot be said that the appellant was acting as a commission agent and thereby, covered under the definition of BAS.

Legal expenses and difference in figures in ST-3 returns

23. As regards non-payment of service tax on legal expenses and on difference in figures in ST-3, the finding recorded by the Commissioner is as follows:

- (i) There was short payment of service tax. However, since the amount was paid along with interest prior to the issuance of the show cause notice, no penalty is imposable in terms of Explanation (2) to section 73 (3) of the Finance Act.

24. During the audit, an objection was raised with respect to non-payment of service tax on legal expenses and on difference in figures in ST-3 returns. The said payments were made by the appellant with interest before the issuance of the show cause notice. Thus, the appellant was entitled to the benefit of section 73(3) of the Finance Act. The demand could not, therefore, have been confirmed.

Demand on income shown as non-taxable in summary sheet (Department Appeal)

25. With regard to non-payment of service tax on the value shown as non-taxable in the financial data summary sheet, which is taxable

under business support service⁸, the finding recorded by the Commissioner is as follows:

- (i) As per the breakup provided by the appellant, the non-taxable income includes components like custom duty, overseas ocean & air freight and other charges. Ocean freight and air freight is per se not taxable, though markup is taxable. Further, markup on air freight is not taxable as same do not form part of demand in show cause notice dated 10.10.2014;
- (ii) Custom duty is a statutory levy and further, same is just a reimbursement from client. Thus, it is not taxable;
- (iii) Components like BAF and CAF are part of ocean freight and are merely paid to the shipping lines which are later reimbursed from the client. Thus, they cannot be taxed; and
- (iv) A Chartered Accountant certificate has been provided by the appellant supporting that the aforesaid amount has been recovered from clients without any value addition. Thus, the assessee would be eligible for benefit of pure agent under rule 5 of the Service Tax (Determination of Value) Rules, 2006. Further, no facts have been changed since issuance of the first show cause notice. Such amounts are also in nature of reimbursements and thus, not taxable.

26. The demand has been rightly dropped in the order dated 22.05.2018. By letters dated 01.01.2016 and 15.01.2016, the appellant was asked to provide details of the value shown as non-taxable under financial data summary sheet earned for activities covered under BSS. In the third show cause notice dated 11.04.2016, which was issued for period 2014-15 the demand was proposed on the amount under the category of BSS only. There is no mention of section 65B(44) of the Finance Act. Thus, the demand was proposed under BSS which was not even in existence during the period in

8. BSS

dispute from 2014-15. This specific submission was made by the appellant when it submitted data by letter dated 29.1.2016, but the show cause notice dated 11.04.2016 did not advert to this issue. The demand cannot, therefore, be sustained as it is based on obsolete provisions and under a category which ceased to exist. In this connection reliance can be placed on the decisions of the Tribunal in **M/s. Kusum Healthcare Pvt. Ltd. vs. Commissioner of Central Excise & Service Tax, Alwar (Raj.)**⁹ and **Commissioner of Service Tax, Bangalore vs. M/s. The Peoples Choice**¹⁰.

27. The non-taxable amount includes amounts like customs duty, BAF & CAF charges, ocean freight and air freight. All these amount are paid by the appellant on behalf of the client and later on are reimbursed. Thus, same cannot be taxed as they are in nature of reimbursements.

**Demand of service tax on difference in figure in ST-3 and Form 26AS
(Department Appeal)**

28. With regard to non-payment of service tax on the difference in value in Form 26AS and ST-3 returns, the finding recorded by the Commissioner is as follows:

- (i) A certificate from an independent Chartered Accountant has been submitted wherein it has been certified that the entire income and TDS, as reflected in Form 26AS, has been duly considered as part of audited financial year 2014-15 prepared by the appellant and that the income reflected in form 26AS forms part of the revenue figure of Profit & Loss account and has duly been recorded in the books of account. Since demand has been raised on the basis of the differences in balance sheet and ST-3 (gross income vis-à-vis the

9. 2023 (3) TMI 173 – CESTAT New Delhi
10. 2014-TIOL-431-HC-KAR-ST

income on which service tax paid in ST-3 returns), the second demand on the basis of the reconciliation of the same with ST- 3 Returns filed by the appellant shall not be proper and correct as it would be superfluous and would lead to duplication of demand. Thus, demand is not sustainable.

29. The department has challenged the dropping of demand contending that the failed to appreciate the importance of Form 26AS in assessing the service tax liability. It has been repeatedly held that no demand can sustain merely on the basis of the difference in figures in ST-3 and Form 26AS as there is difference in the methodology in preparing both the records and Form No. 26AS is not a statutory document for determining the taxable turnover under the service tax provision. In this connection reliance can be placed on the decisions of the Tribunal in **Quest Engineers & Consultant Pvt. Ltd. vs. Commissioner, Central Goods & Service Tax and Central Excise**¹¹ and **Krishna Construction Co. vs. C.C.E. & S.T.-Bhavnagar**¹².

30. Regarding the extended period of limitation, the Commissioner observed that the infractions came to the knowledge of the department only during scrutiny and under self-assessment regime it was necessary for the appellant to make full disclosure in the ST-3 returns. Thus, failing to file the ST-3 returns properly infers mala fide intent to evade tax and so the extended period of limitation would be invokable and interest would be recoverable, and penalty imposable under section 78 of the Finance Act. In view of the aforesaid discussion, it would not be necessary to examine whether the

11. 2021 (10) TMI 96- CESTAT Allahabad

12. 2022 (8) TMI 644- CESTAT Ahmedabad

extended period of limitation could be invoked in regard to the first show cause notice dated 10.10.2014.

31. Thus, Service Tax Appeal No. 52935 of 2016 and Service Tax Appeal No. 53001 of 2018 filed by the appellant deserve to be allowed and are allowed. The impugned orders to the extent they have been assailed in these two appeals are set aside. Service Tax Appeal No. 53022 of 2018 filed by the department deserves to be dismissed and is dismissed.

(Order pronounced on **10.08.2023**)

(JUSTICE DILIP GUPTA)
PRESIDENT

(HEMAMBIKA R. PRIYA)
MEMBER (TECHNICAL)

Rekha, Jyoti