CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
New Delhi

PRINCIPAL BENCH – COURT NO. 4

Service Tax Appeal No. 52882 Of 2018

[Arising out of Order-in-Appeal No. 90/Central Tax/Appl-II/Delhi/2017 dated 29.12.2017 passed by the Commissioner (Appeals) of Central Tax, Delhi South Commissionerate]

Commissioner of Central Goods,Service Tax and Central Excise, Delhi : **Appellant**
17-B, I.A.E.A. House, M.G.Road, I.P Estate, New Delhi

Vs

Pristine Logistics and Infra Projects Private Limited : **Respondent**
3rd Floor, Wing-B, Commercial Plaza
Radisson Hotel, NH-8, Mahipalpur
New Delhi

APPEARANCE:
Shri Anand Narain, Authorized Representative for the Appellant
Shri Manjeet Kumar and Shri Rakesh Kumar Gupta, Chartered Accountant for the Respondent

CORAM :

HON'BLE DR. RACHNA GUPTA, MEMBER (JUDICIAL)
HON'BLE MS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)

FINAL ORDER No. 55831/2024

Date of Hearing:22.03.2024

Date of Decision:30.05.2024

HEMAMBIKA R. PRIYA

The present appeal has been filed by the Department against Order-in-Appeal No. 90/Central Tax/Appl-II/Delhi/2017 dated 29.12.2017passed by the Commissioner (Appeals) of Central Tax, Delhi wherein the Commissioner (Appeals) had dropped the demand.

2. The brief facts of the case are that the respondent is registered with Service Tax Department for providing various taxable services. During the audit of records of the respondent by the appellant, it was observed that the respondent had failed to pay the Service Tax on (a) Corporate Guarantee extended for their associate enterprises and (b) margin retained by them for booking the space of cargo in the Airlines/ Ships for their importer/exporter. Accordingly, a show cause notice was issued to the respondent, and vide order-in-original, the adjudicating authority held that the activity provided by the appellant i.e. provision of Corporate Guarantee falls under Banking & Other Financial Services and the consideration received in lieu of providing Corporate Guarantee is taxable. On appeal, the demand was set-aside by the Commissioner(Appeals). The department is in appeal against the dropped demand.

2.1 The Learned Authorized Representative appearing for the Department submitted that the legality, propriety and correctness of the Order-in-Appeal dated 29.12.2017 was examined by the Committee of Principal Commissioners/Commissioner, and noted that the impugned order was not legal and proper. As regards the issue on Corporate Guarantee, he submitted that the Commissioner (Appeals) had noted that the appellant had provided corporate guarantee on behalf of their Associate Enterprises but had not charged any consideration. Consequently, when no consideration had been charged by the appellant, the question of invocation of Section 67 of Finance Act, 1994 or Rule 3 (b) of Service Tax (Determination of value) Rules, 2006 does not arise as these provisions are attracted only when some consideration has been received against the provision of service.

However, the ld AR contended that such corporate guarantee are given by parties purely on the consideration vested or implied. The service recipient and providers are legally independent persons and all transactions are at arm's length. No company would like to take unnecessary risks, as to the credibility of another company, whose guarantee has been taken unless there are proportionate consideration. It was emphasised that the respondent is required to maintain registers/records as per Section 370 of the Companies Act, 1956, which the respondent had failed to maintain. The respondent also did not provide any document in support of the execution of Corporate Guarantee. Therefore, the dropping of the demand by the impugned order was not legal.

2.2 As regard the booking of space, the impugned order observed that the nature of the service is clearly distinguishable from the nature of the activity of an agent. The ld AR submitted that the service provided by the respondent by way of arranging services of ship liners for transportation of cargo of their customers in addition to other services, is nothing but arrangement of transport of goods and the respondent had acted as an agent to get space in the ships for the cargo of their clients. The make-up was in the nature of the commission earned by the respondent for working as middleman to arrange supply of transport services and therefore is squarely covered under Business Auxiliary Service as defined under Section 65(19) of the Finance Act 1994. Consequently, Learned Authorized Representative submitted that the Commissioner (Appeals) had erred in setting aside the demand.

3. The Learned Chartered Accountant for the Respondent submitted that the allegations made by department are purely on assumption basis and not backed by any rule. There are various instances where corporate guarantee is given by parties without consideration. He relied on the CESTAT judgement Mumbai in the case of **UltraTech Cement Ltd. Vs Commissioner of CGST & CX (CESTAT Mumbai).** The Tribunal had noted that there was no consideration in the form of a commission or fees received by UltraTech Cement Ltd. for providing corporate guarantees. They emphasized that for a service to be taxable under the Finance Act, 1994, there should be both a "provider" and the flow of "consideration" for the service. Since there was no consideration in this case, the Tribunal in the case of **UltraTech Cement Ltd.** had concluded that the same should not be held liable for service tax. Similarly, the ld CA submitted that issue on taxability of service tax on profit/mark up is no more res integra and relied on the decision of Tiger Logistics India Ltd vs Commissioner of Service Tax, Delhi- II [**2022(2)TMI 455-CESTAT NEW DELHI]**

4. We have heard the learned Authorised Representative for the Department and the Learned Counsel for the respondent. The two issues which are before us for consideration are (i) whether provision of corporate guarantee without consideration is taxable and (ii) whether the profit/markup is liable to service tax.

5. We note that both the issues before us are no more *res integra*.

5.1 The issue of taxability of providing Corporate Guarantee without any consideration was dealt at length by this Tribunal in the case of Commissioner of CGST & Central Excise Vs Edelweiss Financial

Services Ltd wherein it was held that any activity must, for the purpose of taxability under Finance Act, 1994, not only, in relation to another, reveal a 'provider', but also the flow of 'consideration' for rendering of the service. In the absence of any of these two elements, taxability under section 66B of Finance Act, 1994 will not arise. It was held that there is no consideration insofar as 'corporate guarantee' issued by respondent on behalf of their subsidiary companies is concerned. This decision of the Tribunal was upheld by the Supreme Court. The relevant paras of the decision of the Supreme Court is reproduced hereinafter:

> "3. The challenge here is to the concurrent finding in favour of the assessee recorded by the Principal Commissioner GST which was upheld by the CEST Tribunal, through the impugned order on 16.02.2022. The learned counsel would submit that this case is similar to Civil Appeal No. 428/2020 @ Diary No.42703/2019 (Commissioner of Service Tax Audit II Delhi IV Vs. M/S DLF Cyber City2 Developers Ltd.). and therefore the matter should be admitted and tagged with the pending case.
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> 4. Responding to the above, Mr. Bharat Rai Chandani, learned counsel for the assessee on caveat would read Section 65 (12) of the Finance Act, 1994 to point out that issuance of corporate guarantee to a group company without consideration would not fall within banking and other financial services and is therefore not taxable service. He would also read Section 65B (44) of the Finance Act 1994 to point out that the definition of service would indicate that it relates to only such service which is rendered for valuable consideration.

5. The counsel would next advert to paragraph 3.1.12 of the Commissioner's order where the following was recorded:- "further, the consideration can be of two types viz., monetary consideration and non-monetary consideration. In the present case, the Assessee has argued that they have not received any consideration. In such case it's for the department to prove that the Assessee's claim is wrong. It is observed that nowhere in the Show Cause Notice, attempt has been made to prove that the Assessee received either monetary or nonmonetary consideration in any form. It is not alleged or proved in the Show Cause Notice as to how the Assessee got any benefit from their3 subsidiaries in monetary or non-monetary terms for the Corporate Guarantees issued. Missing this vital point, valuation of the consideration using provisions of Section 67(1) of the Finance Act, 1994 become a futile exercise."

6. Mr. Rai Chandani then read paragraphs 8 and 9 of the judgment of the Tribunal, which are extracted below:

> *"8. The criticality of 'consideration' for determination of service, as defined in section 65B(44) of Finance Act, 1994, for the disputed period after introduction of 'negative list' regime of taxation has been rightly construed by the adjudicating authority. Any activity must, for the purpose of taxability under Finance Act, 1994, not only, in relation to another, reveal a 'provider', but also the flow of 'consideration' for rendering of the service. In the absence of any of these two elements, taxability under Section 66B of Finance Act, 1994 will not arise. It is clear that there is no*

consideration insofar as 'corporate guarantee' issued by respondent on behalf of their subsidiary companies is concerned.

9. The reliance placed by Learned Authorised Representative on the 'non-monetary benefits' which may, if at all, be of relevance for determination of assessable value under section 67 of Finance Act, 1994 does not extend to ascertainment of 'service' as defined in section 65B(44) of Finance Act, 1994. 'Consideration' is the recompense for the 'contractual' undertaking that authorizes levy while 'assessable value' is4 a determination for computing the measure of the levy and the latter must follow the former."

7. The above would suggest that this was a case where the assessee had not received any consideration while providing corporate guarantee to its group companies. No effort was made on behalf of the Revenue to assail the above finding or to demonstrate that issuance of corporate guarantee to group companies without consideration would be a taxable service. In these circumstances, in view of such conclusive finding of both forums, we see no reason to admit this case basing upon the pending Civil Appeal No. 428 @ Diary No.42703/2019, particularly when it has not been demonstrated that the factual matrix of the pending case is identical to the present one.

8. In consequence, the Civil Appeal stands dismissed.

9. Pending application(s), if any, stand closed."

5.2 The issue on taxability of service tax on profit/mark up 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[1].** The relevant paras 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."

5.3 The Tribunal in an earlier decision in the case of **M/s Greenwich Meridian Logistics (India) Pvt. Ltd. Vs. Commissioner of Service Tax, Mumbai[2]**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 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

1 2022(2)TMI 455-CESTAT NEW DELHI
2 2016(4) TMI-547-CESTAT MUMBAI

> 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.
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> **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.
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> 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."

6. In view of the above settled legal position, we uphold the impugned order and dismiss the appeal.

(Order pronounced in the open Court on 30.05.2024)

(DR. RACHNA GUPTA)
MEMBER (JUDICIAL)

(HEMAMBIKA R. PRIYA)
MEMBER (TECHNICAL)

G.Y.