2016 (4) TMI 547 - CESTAT MUMBAI

Greenwich Meridian Logistics (India) Pvt. Ltd. Versus Commissioner of Service Tax Mumbai

No.- Appeal No.ST/49 & 96/2012, Cross-objection Nos.ST/CO-51 & 58/2012

Dated.- April 7, 2016

M V Ravindran, Member (J) And C J Mathew, Member (T)

For the Petitioner : Shri Rajeev Wagley, Adv

For the Respondent : Shri A K Goswami, Addl Commissioner (AR)

ORDER

Per C J Mathew

1. M/s Greenwich Meridian Logistics (I) Pvt Ltd is in appeal against order-in-original no. 9/ST/SB/2011-12 dated 10 th January 2012 and order-in-original no. 19/ST/SB/2011-12 dated 31 st January 2012 which have confirmed tax demand of ₹ 2,27,02,697/- for the period 2005-06 to 2009-10 and ₹ 48,43,493/- for 2010-11 respectively with interest thereon as provider of 'business auxiliary service.' The adjudicating authority has also imposed penalty under section 76, 77 and 78 of Finance Act, 1994 in the former and under section 76 and 77 of Finance Act, 1994 in the latter. As the issue in dispute in the two appeals is identical we dispose both by this common order.

2. The appellant handles the logistics of exporters for delivery to the consignee and is registered as 'multi-modal transport operator' with the Director General of Shipping. Their responsibilities and liabilities are codified in the Multimodal Transportation of Goods Act, 1993. In that capacity, the appellant assumes responsibility for safe custody of the cargo as 'common carrier' under the Carriers Act,1865 besides entering into contracts with shipping lines, through steamer agents, for carriage of the cargo by sea. At times, cargo space is booked in accordance with instructions of the exporters for which the appellant receives a commission on which service tax liability is discharged. Space, in this context, are the container slots on a vessel for a specified voyage. The payment made to the steamer agent acting on behalf of the shipping line is the ocean freight.

3. In the course of audit of the appellant in 2009, income under the head 'ocean freight surplus' came under scrutiny which was explained as the profits arising from purchase and sale of space or slots for ocean transport of containers. Not impressed with this explanation, notices were issued to the appellant for demand of tax on the ground that this amount was

commission received from shipping lines and, hence, was consideration liable to be taxed as ‘business auxiliary service'.

4. The impugned order appears to have concluded that the allegation of this surplus being commission was correct as the appellant was also separately in receipt of commission from shipping lines for slots that were booked on ships according to instructions from exporters. Convinced of this, and further taking note of the accounting entries at various stages before booking it as profit, the original authority recorded the inference that the appellant had carried out activities that were intended to promote the marketing of the services of the client which was taxable as ‘business auxiliary service'. Consequently, it was held that surplus of ₹ 21,95,34,602/- was liable to tax.

5. We have heard both sides and given due consideration to various submissions canvassed on behalf of the disputants. Learned Counsel for appellant contends that this amount is a profit from trading, that Finance Act, 1994 taxes certain services and not profits, that this purchase and sale is in relation to international trade transactions, that the taxable service in section 65(105)(zzb) of Finance Act, 1994 are those rendered for or to a client, that client has not been defined in the statute, that they do not receive payment from shipping lines, that they are not agents but intermediaries akin to ship brokers as held by the Tribunal in Interocean Shipping Co vs Commissioner of Service Tax [2013 (30) STR 244 (Tri-Delhi)], that even if the surplus were to be deemed as a discount the decision of the Tribunal in Group M Media P Ltd. vs. Commissioner of Central Excise- 2012-TIOL-804-CESTAT-MUM would render this to be non-taxable, than a registered multi-modal transport operator is not an agent of either the shipper or the carrier. Learned Authorized Representative reiterated the findings in the impugned order and drew attention to the receipt of commission by the appellant from shipping lines.

6. We notice that the appellant has admitted to receiving commission from shipping lines on account of freight and discharge of tax liability on the same. However, we find no justification for fastening the same liability on all other receipts of the appellant. In Bax Global India Ltd v Commissioner of Service Tax Bangalore [2008 (9) STR 412 (Tri-Bang)], the Tribunal held -

> *"9…….. Summing up, we find that the appellants had already discharged the duty liability in respect of the Customs House Agent activities undertaken by him. As regards all the other activities, we find that they do not relate to customs house agent activities. Even if any profit has been made in respect of those activities, they cannot be subjected to service tax in view of those activities, they cannot be subjected to service tax in view of the Apex Court decision in the Baroda Electricity Meters Ltd. case…."*

7. Each source of income must, therefore, be looked at independently. A service provider is not necessarily a specialist in rendering one service; the earnings of a service entity may accrue from one or more services - some of which may be taxable. Finance Act, 1994 does not envisage determination of taxability from accounting entries. The manner or mode of booking the profit in the accounts of a commercial organization has no bearing on the application of section 65(105) to a taxable activity. The nomenclature in the accounts that appears to have weighed heavily with the original authority is not material to classification of the service when the taxable entry specifies the legislative intent.

8. The Hon'ble High Court of Gujarat in Sports Club of Gujarat Ltd vs Union of India [2010 (20) STR 17 (Guj)] has observed that

> *"9….Service Tax was introduced in India vide the Finance Act, 1994. It is legislated by the Parliament under the residuary entry, i.e. Entry 97 of List I of the Seventh Schedule of the Constitution of India. It is an indirect tax and is to be paid on all the services notified by the Union Government for the said purpose. The said tax is on the service and not the service provider."*

And, though in the context of dispute relating to 'mandap keeper', the judgment is particularly relevant here as it goes on to observe after drawing attention to section 68 and section 65 of Finance Act 1994 that

> *"12. A conjoint reading of the above provisions of the law goes to show that the services provided to a client,… falls under the category of taxable service"*

9. The description of the taxable service in section 65 (105) of Finance Act, 1994 as well as definition, if any, of the terms therein are the primary determinant for taxation of any service. From the observation of the Hon'ble High Court of Gujarat supra, it is clear that the provision of service is manifest by the existence of service provider performing an activity for which consideration is received from the recipient of the service. A finding on these aspects is distinctly absent in the impugned order.

10. The original authority has proceeded on the assumption that there is only one payment and, that too, for freight charged by the shipping line. He has rejected the possibility of trading in space or slots on vessels by holding that trading in space or slots is a figment and freight is all that is transacted. Freight, though used colloquially to describe all manner of carriage, is the nomenclature assigned to the consideration for space provided on a vessel for a particular voyage. Freight is charged by the entity that is in possession of space on a vessel from an entity that requires the space for carriage of cargo.

11. Slots may be contracted for by the shipper or its agent with the shipping line through the steamer agent. Implicit is a uni-directional flow of consideration because the space belongs

to the shipping line. Steamer agent or agent of shipper may earn commission in such a transaction. Leaving that situation aside, the contention of the appellant is that it is a 'multi-modal transport operator' which entails a statutorily assigned role in cross-order logistics. According to section 2 of the Multi-modal Transportation of Goods Act, 1993.

> *(m) "multimodal transport operator" means any person who-*
>
> *(i) concludes a multimodal transport contract on his own behalf or through another person acting on his behalf;*
>
> *(ii) acts as principal, and not as an agent either of the consignor, or consignee or of the carrier participating in the multimodal transportation, and who assumes responsibility for the performance of the said contract; and*
>
> *(iii) is registered under sub-section (3) of section 4;*
>
> *And*
>
> *(a) "carrier" means a person who performs or undertakes to perform for a hire, the carriage or part thereof, of goods by road, rail, inland waterways, sea or air;*

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 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 purchases 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.

(Pronounced in Court)