(2021) 09 CESTAT CK 0026

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Service Tax Appeal No. 40306, 40311 Of 2021

M/s. Seaport Lines India (P) Limited — APPELLANT

Vs

Commissioner Of G.S.T. And Central Excise — RESPONDENT

Date of Decision : 07-09-2021

Acts Referred:

Finance Act, 1994 — Section 65(104c), 67, 73(1), 75, 76, 77, 78
Service Tax (Determination of Value) Rules, 2006 — Rule 5(1)

Citation : (2021) 09 CESTAT CK 0026

Hon'ble Judges : P. Dinesha, J

Bench : Single Bench

Advocate : S. Janakiraman, Vikas Jhajharia

Final Decision : Allowed

Judgement

1. Brief facts, as could be gathered from the common Order-in-Original as well as the Show Cause Notices, inter alia, are that during the course of verification of records of the assessee by the audit wing of the Department, it was noticed that the assessee had hired containers from different liners like Maersk, Hapag Lloyd, etc., and sell the containers to their customers; that the nature of activity included coordinating with importers / exporters from the time of picking containers till delivery at the destination port and till the consignees take delivery of cargo; that while arranging container for shippers, the assessee collected ocean freight and local charges like terminal handling charges, documentation charges; that they also avail CENVAT Credit on such charges and pay Service Tax on the invoice amount raised on the customers; that it was noticed that the assessee collected ocean freight charges higher than the actual amounts charged by the shipping lines / steamer agents; however, they did not include the ocean freight charges collected in the taxable value for the purpose of payment of Service Tax; that the services provided by the assessee were classifiable under "Support Services of Business or Commerce" as defined under Section 65(104c) of the Finance Act, 1994; that it appeared that the freight charges collected by

the assessee with mark-up value was nothing but the consideration received for the services rendered and had to be taken as the gross amount for the purpose of arriving at the taxable value as per Section 66 read with Section 67 of the Finance Act, 1994 and Rule 5(1) of the Service Tax (Determination of Value) Rules, 2006; that Show Cause Notice No. 306/2012 dated 15.10.2012 was issued to the assessee for recovery of Service Tax of Rs.1,26,17,955/- for the period from 2007-08 to 2010-11 under proviso to Section 73(1) of the Act ibid., along with interest under Section 75 of the Act ibid; that the Notice also proposed penalty under Sections 76 and 78 of the Act; that for the subsequent period 2011-12 and 2012-13, one more Show Cause Notice No. 359/2013 dated 31.10.2013 was issued to the assessee for recovery of Service Tax of Rs.1,79,09,270/- by invoking extended period of limitation provided under proviso to Section 73(1) of the Act ibid., along with interest under Section 75 of the Act ibid.; that penalty under Sections 76, 77 and 78 of the Act was also proposed in the Notice; that vide common Order-in-Original Nos. 76 & 77/2020 CH.N (JC/ADC) dated 27.10.2020, the said proposals were confirmed, but however, the Service Tax liabilities were reduced; that thereafter, the appellant pursued by way of appeals before the First Appellate Authority, which came to be rejected vide impugned Orders-in-Appeal No. 33 & 34/2021 (CTA-I) (CN) dated 23.03.2021 and hence, the present appeals have been filed before this forum.

3. Heard Shri S. Janakiraman, Learned Advocate appearing for the assessee and Shri Vikas Jhajharia, Learned Assistant Commissioner (Authorized Representative) appearing for the Revenue.

4.1 I find that the Learned Hyderabad Bench of the CESTAT has decided an almost identical case, in the case of M/s. Marinetrans India Pvt. Ltd. v. C.S.T., Hyderabad-ST reported in 2020 (33) G.S.T.L. 241 (Tri. - Hyd.), which is relied upon by the Learned Advocate for the appellant. The relevant portion of the order of the Hyderabad Bench reads as under:

"6. We have considered the arguments on both sides and perused the records. It is not in dispute that the appellant herein is purchasing the space from the shipping lines and then is selling the same to exporters. It is the case of the Revenue that this amounts to acting as an intermediary for helping the business of the shipping lines and therefore they are liable to pay service tax on business auxiliary services on the profit which they receive. It is the case of the appellant that this is a deal on principal to principal basis between them and the shipping lines and again between the exporters and them. They are not acting as an agent. They could purchase the space for a lower price and sell it at a higher price and thereby earn profit. On the other hand, if they failed to sell the space to exporters, after purchasing from the shipping lines, they may incur a loss. They are not receiving any commission whatsoever from the shipping line or from the exporters. We have considered the Circular of the C.B.E. & C. cited by the Learned Departmental Representative at Para 2.1-3 which are as follows :

"2.1 The freight forwarders may deal with the exporters as an agent of an airline/

carrier/ocean liner, as one who merely acts as a sort of booking agent with no responsibility for the actual transportation. It must be noted that in such cases the freight forwarder bears no liability with respect to transportation and any legal proceedings will have to be instituted by the exporters, against the airline/ carrier/ocean liner. The freight forwarder merely charges the rate prescribed by the airline/carrier/ocean liner and cannot vary it unless authorized by them. In such cases the freight forwarder may be considered to be an intermediary under rule 2(f) read with rule 9 of POPS, since he is merely facilitating the provision of the service of transportation but not providing it on his own account. When the freight forwarder acts as an agent of an airline/carrier/ocean liner, the service of transportation is provided by the airline/carrier/ocean-liner and the freight forwarder is merely an agent and the service of actual transportation will not be liable for service tax under Rule 10 of POPS.

2.2 The freight forwarders may also act as a principal who is providing the service of transportation of goods, where the destination is outside India. In such cases the freight forwarders are negotiating the terms of freight with the airline/ carrier/ocean liner as well as the actual rate with the exporter. The invoice is raised by the freight forwarder on the exporter. In such cases where the freight forwarder is undertaking all the legal responsibility for the transportation of the goods and undertakes all the attendant risks, he is providing the service of transportation of goods, from a place in India to a place outside India. He is bearing all the risk and liability for transportation. In such cases they are not covered under the category of intermediary, which by definition excludes a person who provides a service on his account.

3. It follows therefore that a freight forwarder, when acting as a principal, will not be liable to pay service tax when the destination of the goods is from a place in India to a place outside India."

7. It is evident from the C.B.E. & C. circular also that the Revenue was also of the view that service tax is payable when one acts as an intermediary and not as a trader dealing on principal to principal basis on their own account which is undisputedly the case here. We, further, find that in an identical case, in the case of Phoenix International Freight Service Pvt. Ltd. (supra) the Tribunal has held that buying and selling space on ships does not amount to rendering a service and any profit or income earned through such transactions is not leviable to service tax. We find no reason to deviate from this view taken by the Tribunal which view is also supported by the C.B.E. & C. circular cited above. In conclusion, the demand of service tax, interest and penalties are liable to be set aside and we do so.

8. The impugned order is set aside and the appeal is allowed."

4.2 The above view of the Hyderabad Bench of the CESTAT has been reiterated by the Chennai Bench also in the following cases:

(i) M/s. TVS Dynamic Global Freight Services Ltd. v. Commr. of G.S.T. & C.Ex., Chennai in Service Tax Appeal Nos. 42355 to 42358 of 2015 & ors. [Final Order Nos. 40684 to 40690 of 2020 dated 04.03.2020 - CESTAT, Chennai];

(ii) M/s. Nilja Shipping Pvt. Ltd. v. The Commissioner of Central Excise, Chennai-II in Service Tax Appeal No. 362 of 2012 & anor. [Final Order Nos.40273 to 40274 of 2020 dated 10.02.2020 - CESTAT, Chennai].

5. In view of the above, the lis appears to be no more res integra and therefore, the impugned orders cannot be sustained.

6. The appeals are allowed with consequential benefits, if any, as per law.

(Order pronounced in the open court on 07.09.2021)