IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHENNAI

REGIONAL BENCH – COURT NO. III

Service Tax Appeal No. 157 of 2012

(Arising out of Order-in-Original Nos. 28 & 29/2011 dated 14.12.2011 passed by the Commissioner of Central Excise, Chennai-II Commissionerate, 692, M.H.U. Complex, Nandanam, Chennai – 600 035)

M/s. Geodis Overseas Private Limited **: Appellant**
No. 318/809, Poonamallee High Road,
2B & 2C, Ega Trade Centre,
Kilpauk, Chennai – 600 010

VERSUS

The Commissioner of Service Tax **: Respondent**
692, M.H.U. Complex, Anna Salai, Nandanam, Chennai – 600 035

WITH

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692, M.H.U. Complex, Anna Salai, Nandanam, Chennai – 600 035

APPEARANCE:

Shri Raghavan Ramabadran, Advocate for the Appellant

Smt. K. Komathi, Authorized Representative for the Respondent

CORAM:

HON'BLE MRS. SULEKHA BEEVI C.S., MEMBER (JUDICIAL)
HON'BLE MR. P. ANJANI KUMAR, MEMBER (TECHNICAL)

FINAL ORDER NOs. 40265-40266 / 2022

DATE OF HEARING: 10.06.2022

DATE OF DECISION: **24.06.2022**

Order : Per Hon'ble Mrs. Sulekha Beevi C.S.

The issue involved in both these appeals being the same, they are heard together and are disposed of by this common order.

2. Brief facts are that the appellant is a freight forwarder and is engaged in freight forwarding of import and export shipments. They provide various services and collect charges in the nature of LCL Charges, Bill of Lading fee, handling charges, etc., on which they pay Service Tax. They also collect ocean freight charges from their customers and pay the same to shipping lines/ shipping companies. The appellant did not discharge any Service Tax on the ocean freight charges.

3. The Department was of the view that the appellant is liable to pay Service Tax on the ocean freight charges collected by them as these fall under Business Support Services. Besides the demand of Service Tax on ocean freight charges in Service Tax Appeal No. 157 of 2012, it is alleged by the Department that the appellant, which is a SEZ unit, is not eligible for refund/credit in terms of Notification No. 04/2004 dated 31.03.2004 in respect of the input services for the reason that the services are not physically consumed within the SEZ unit. Show Cause Notices were issued to the appellant, proposing to demand Service Tax on these two issues.

4. After due process of law, the Original Authority vide order impugned herein confirmed the demand along with interest and imposed penalty. Aggrieved by such order, the appellant is now before the Tribunal.

5. Shri Raghavan Ramabadran, Learned Counsel, appeared and argued on behalf of the appellant.

5.1 He submitted that in Service Tax Appeal No. 157 of 2012, the demand has been confirmed on ocean freight

charges collected by the appellant alleging that the appellant has provided Business Support Services for the period from May 2006 to March 2009. Further, demand of Service Tax of Rs.53,93,244/- has ben confirmed alleging that the appellant has wrongly availed the benefit of Notification No. 04/2004 dated 31.03.2004 for the period from April 2006 to March 2009.

5.2 He submitted that in Service Tax Appeal No. 158 of 2012, the demand has been confirmed only on ocean freight charges collected by the appellant alleging that these fall under Business Support Services.

5.3.1 Learned Counsel for the appellant submitted that the issue as to whether ocean freight charges collected are subject to levy of Service Tax is no longer *res integra*. As per Section 67 of the Finance Act, 1994, the value of taxable service shall be the gross amount for providing such service. That ocean freight is not a charge incurred by the appellant in the course of providing freight forwarding service. He submitted that the appellant makes payment to the shipping liners for transportation of cargo of its clients and recovers the same from its clients; hence, ocean freight does not form part of the value of taxable service rendered by the appellant viz., freight forwarding service. He adverted to the decisions cited below to argue that ocean freight charges are not subject to levy of Service Tax:

(i) M/s. Bax Global India Ltd. v. C.S.T., Chennai [2017 (9) TMI 1264 – CESTAT, Chennai];

(ii) M/s. Greenwich Meridian Logistics (I) Pvt. Ltd. v. Commr. of S.T., Mumbai [2016 (43) S.T.R. 215 (Tri. – Mum.)];

(iii) M/s. PVGT Freight Forwarders & Logistics Pvt. Ltd. v. Commr. [2018 (9) TMI 1719 – CESTAT, Chennai]

(iv) M/s. C.H. Robinson Worldwide Freight India Pvt. Ltd. v. Commr. [2019 (3) TMI 1502 – CESTAT, Chennai];

(v) M/s. K. Steamship Agencies Pvt. Ltd. v. Commr. [2019 (1) TMI 440 – CESTAT, Chennai]

5.3.2 In regard to the allegation that the appellant is not eligible to avail the benefit of Notification No. 04/2004, it is submitted by the Learned Counsel for the appellant that the Department has confirmed the demand holding that in order to avail the benefit of the Notification, the services have to be consumed within the SEZ unit itself. He argued that the word 'consumption' ought not to be given a narrow interpretation to mean the physical location of the provider or provision of service, but ought to be construed as a service used by a SEZ unit. He relied upon the following decisions to argue that it is not necessary to consume the services within the SEZ itself to avail the benefit of Notification No. 04/2004:

(i) *M/s. Vision Pro Event Management v. Commr. of C.Ex. & S.T., Chennai [2019 (365) E.L.T. 555 (Tri. – Chennai)];*

(ii) *C.S.T. v. M/s. Southern Cyber Logistics Pvt. Ltd. [2018 (7) TMI 174 – CESTAT, Chennai];*

(iii) *M/s. Freight System (I) Pvt. Ltd. v. C.C.E. [2018 (7) TMI 333 – CESTAT, Chennai];*

(iv) *M/s. Maersk India Pvt. Ltd. v. C.S.T., Chennai [Final Order No. 40608/2018 dated 12.03.2018 – CESTAT, Chennai];*

(v) *M/s. Bharti Airtel v. Commr. of G.S.T. & C.Ex., Chennai South [2018-VIL-193-CESTAT-CHE-ST]*

5.3.3 Learned Counsel for the appellant also adverted to the decision in the case of *M/s. GMR Aerospace Engineering Ltd. v. Union of India* reported in *2019 (31) G.S.T.L. 596 (A.P.)* wherein the Hon'ble Andhra Pradesh High Court has held that Section 51 of the SEZ Act would have overriding effect over Service Tax Notifications. The said decision was followed by the Tribunal in the case of *M/s. TVS Logistics Pvt. Ltd. v. The Principal Commissioner of Service Tax, Chennai South* reported in *2021 (8) TMI 450 – CESTAT, Chennai*

5.4 He prayed that the appeals may be allowed.

6. Smt. K. Komathi, Learned Authorized Representative for the respondent, supported the findings in the impugned order.

7. Heard both sides.

8.1 The first issue is whether the charges collected by the appellant from its customers in the nature of ocean freight are subject to levy of Service Tax under Business Support Services.

8.2 This issue has been considered in various decisions of the Tribunal wherein the Tribunal has held that ocean freight charges are not subject to levy of Service Tax under Business Support Services or Business Auxiliary Services. The relevant discussion in the case of *M/s. Greenwich Meridian Logistics (I) Pvt. Ltd. (supra)* is reproduced as under:

> *"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. This is a patent misconstruing of the usage of that expression. 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.*
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> *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-border 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 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."

8.3 The same view has been taken by the Tribunal in the other decisions relied upon by the Learned Counsel for the appellant.

8.4 Following the same, we have no hesitation to hold that the demand of Service Tax on ocean freight charges cannot sustain and requires to be set aside, which we hereby do.

9.1 The second issue is with regard to the demand of Service Tax alleging that the benefit of exemption as per Notification No. 04/2004 dated 31.03.2004 is not eligible as the input services / approved services have not been consumed within the SEZ unit itself.

9.2 The very same issue was considered by the Tribunal in the case of *M/s. Vision Pro Event Management (supra)*. The discussion by the Tribunal in the said case reads as under:

"5.1 The issue is whether the appellants are eligible for the service tax exemption under the Notification No. 4/2004 for the services rendered to SEZ unit. For better appreciation, the relevant part of the notification is reproduced as under :-

".....the Central Govt. being satisfied that it is necessary in the public interest so to do, hereby exempts taxable service of any description as defined in clause (105) of Section 65 of the said Act provided to a developer of Special Economic Zone or a unit (including a unit under construction) of Special Economic Zone by any service provider for consumption of the services within such Special Economic Zone, from the whole of service tax leviable thereon under Section 66 of the said Act,....."

The doubt has arisen as the notification uses the words "consumption of services within Special Economic Zone". The period involved is February, 2008. SEZ Act, 2005

has come into force w.e.f. 10-2-2006. Section 26 of the Act provides for various exemptions and concessions to SEZ unit/developers. Section 51 lays down that the SEZ Act will have overriding effect over any other Act for the time being in force. The relevant section is reproduced as under :-

"51. Act to have overriding effect - The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act."

5.2 The intention of the notification as well as Section 26 of the SEZ Act, is to exempt the taxes/duties payable on goods and services provided to SEZ unit/developer, the supply of goods and services to SEZ being deemed exports. Therefore, taking into consideration the impact of Section 51 of the SEZ Act which provides for overriding effect over any other law, we are of the considered opinion that the benefit of tax exemption cannot be denied by giving a restrictive interpretation to Notification No. 4/2004. Our view is supported by the fact that the notification which superseded Notification No. 4/2004 has categorically stated that whether or not the taxable services are provided inside the SEZ the exemption is available. The relevant portion of the Notification No. 9/2009 is reproduced as under :-

"In exercise of the powers conferred by sub-section (1) of Section 93 of the Finance Act, 1994 (32 of 1994), and in supersession of the notification of the Govt. of India, Ministry of Finance (Department of Revenue), No. 4/2004-ST, dated 31-3-2004, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i) dated the 31-3-2004, vide G.S.R 248 (E), dated 31-3-2004, except as respects things done or omitted to be done before such supersession, the Central Govt., on being satisfied that it is necessary in the public interest so to do, hereby exempts the taxable services specified in clause (105) of Section 65 of the said Finance Act, which are provided in relation to the authorized operations in a Special Economic Zone and received by a developer or units of a special economic zone, ***whether or not the said taxable services are provided inside the special economic zone****, from the whole of the Service Tax leviable hereon under Section 66 of the said Finance Act."*

6. There may be services which are wholly consumed within the geographical location of SEZ or partially consumed in the SEZ. In the present case, the appellants provided event management services to the SEZ unit. The SEZ unit was a co-sponsor for the event which helped advertising of product of SEZ. The event

was held outside the SEZ unit. Even if the event is held outside, since the services were for advertisement of product of SEZ, the services provided is to be considered as consumed within SEZ. It also needs to be mentioned that for availing the services, the SEZ has to get these services approved by the Development Commissioner. The department then cannot contend that these services are not eligible for refund since these are not consumed within SEZ. From the above discussions, we are of the considered opinion that the denial of benefit is unjustified. The impugned order is set aside. The appeal is allowed with consequential benefits, if any, as per law."

9.3 Similar views have been taken by the Tribunal in the other cases relied upon by the Learned Counsel for the appellant.

9.4 From the above, it can be safely concluded that the demand of Service Tax alleging that the appellant has wrongly availed the benefit of Notification No. 04/2004 cannot sustain and requires to be set aside, which we hereby do.

10. Both the issues are found to be in favour of the assessee-appellant and against the Revenue.

11. The impugned order is set aside.

12. The appeals are allowed with consequential reliefs, if any, as per law.

(Order pronounced in the open court on **24.06.2022**)

Sd/-
(SULEKHA BEEVI C.S.)
MEMBER (JUDICIAL)

Sd/-
(P. ANJANI KUMAR)
MEMBER (TECHNICAL)

Sdd