CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, WEST ZONAL BENCH : AHMEDABAD

REGIONAL BENCH - COURT NO. 3

SERVICE TAX Appeal No. 10867 of 2017-DB

[Arising out of Order-in-Original/Appeal No RAJ-EXCUS-000-APP-144-16-17 dated 20.01.2017 passed by Commissioner (Appeals) Commissioner of Central Excise, Customs and Service Tax-RAJKOT (Appeal)]

Vishal Tansukhbhai Gohel .... **Appellant**
Proprietor of **M/s Inext Freight Forwarders**, Shree Ram, 78, Aaradhana Society, Airport Road, RAJKOT GUJARAT -360007

VERSUS

Commissioner of Central Excise & ST, Rajkot .... **Respondent**
Central Excise Bhavan, Race Course Ring Road, Income Tax Office, Rajkot, Gujarat -360001

APPEARANCE :

Shri Vishal T. Gohel, Proprietor of the Appellant
Shri Ajay Kumar Samota, Superintendent (AR), for the Respondent

CORAM: HON'BLE MR. SOMESH ARORA, MEMBER (JUDICIAL)
HON'BLE MR. C.L. MAHAR, MEMBER (TECHNICAL)

DATE OF HEARING : 14.03.2024
DATE OF DECISION: 14.05.2024

FINAL ORDER NO. 11027/2024

C.L. MAHAR :

The facts in brief are that the appellant firm being a proprietory concern, is registered for the service tax under the category of 'Clearing and Forwarding Agent Service' and have been complying with the provisions of service tax law prevalent at the relevant time. During the course of enquiry of the financial record of the appellant, the department observed that freight income as being expenses incurred towards freight expenses were less than freight charged by the appellant from their customers. There was some positive difference in expenses which has been incurred by the appellant. This income as per the department is nothing but excess amount charged by the appellant from their customers towards ocean freight. The department

after verification of the accounts, issued a show cause notice to the appellant demanding service tax of Rs. 3,93,172/- under Section 73(1) of the Finance Act, 1994. The interest and penal provisions were also invoked as per the provisions of Finance Act, 1994. The department has demanded service tax under the category of Business Auxiliary Service stating that differential amount of freight retained by them is nothing but commission received towards provision of service. The matter got adjudicated and the original adjudicating authority vide its order dated 13.01.2016 confirmed all the charges. The appellant filed appeal before the Commissioner (Appeals) but did not succeed therefore the appellant is before us against the impugned order-in-appeal.

2. It has been the contention of the appellant that since very beginning as per Board Circular no service tax is payable on ocean freight and they have not collected any service tax from their clients or customers as there was common belief in the trade that no service tax is payable on the ocean freight. The proprietor of the firm appearing during the course of hearing stated that for the pre negative period there was no specific taxable category for ocean transportation of goods by a vessel/ ship. For the post negative list, it is stated by the appellant that all services except the service specified in the negative list has been brought under the category of taxability and therefore ocean freight is also classified as a service. However for classifying under a taxable service category, the place of provision of service and destination of the goods shall be the matter of importance for determination of levy of service tax. Since in the case of export cargo, the place of provision of service is outside taxable territory of India therefore ocean freight for the export cargo becomes non-taxable. The appellant has

taken us through an extract form of educational guide issued in June 2012 and submitted as follows:-

"An extract form "Taxation of services; an Educational Guide, June 20,2012 by CREC" (page no. 67 to 69) (post-negative list regime).

Illustration : A freight forwarder arranges for export and import shipments. There could be two possible situations here one when he acts on his own account, and the other, when he acts as an intermediary.

1. When the freight forwarder acts on his own account (say, for an export shipment)

A freight forwarder provides domestic transportation within taxable territory (say, from the exporter's factory located in Pune to Mumbai port) as well as international freight service (say, from Mumbai port to the international destination), under a single contract, on his own account **(i.e. he buys-in and sells fright transport as a principal), and charges a consolidated amount to the exporter**. This is a service of transportation of goods for which the place of supply is the destination of goods. Since the destination of goods is outside taxable territory, this service will not attract service tax. Here, it is presumed that ancillary freight services (e. services ancillary to transportation- loading, unloading, handling etc) are "bundled" with the principal service owing to a single contract or a single price (consideration).

On an import shipment with similar conditions, the place of supply will be in the taxable territory, and so the service tax will be attracted.

2. When the freight forwarder acts as an intermediary

Where the freight forwarder acts as an intermediary, the place of provision will be his location. Service tax will be payable on the services provided by him. However, when he provides a service to an exporter of goods, the exporter can claim refund of service tax paid under notification for this purpose.

The proprietor has also relied upon the decisions of this Tribunal in the following cases :-

(a) Gudwin Logistics vs. CCE, Vadodara – 2010 (18) STR 348 (Tri. Ahmd.)

(b) Euro RSCG Advertising Limited vs. CST, Bangalore – 2007 (7) STR 277 (Tri. Bang.)

(c) Kerala Publicity Bureau vs. CCE – 2008 (9) STR 101 (Tri. Bang.)

(d) Skylift Cargo Pvt. Limited vs. CST, Chennai – 2010 (17) STR 75 (Tri. Chennai)

(e) Baroda Electric Meters Limited vs. Collector of Central Excise – 1997 (94) ELT 13 (SC)

3. We have also heard Shri Ajay Kumar Samota, learned Departmental Representative who reiterated the findings as given in the impugned order-in-appeal.

4. Having heard both the sides, we take note of the fact that except for the brief period for November/ December, the majority of demand pertains to post negative period of service tax. In this regard, we take note of the CBEC Circular on the subject, which is reproduced as below:-

> "**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 air line/carrier/ocean liner, the service of transportation is provided by the air line/carrier/ocean-liner and the freight forwarder is merely an agent and the service of the freight forwarder will be subjected to tax while the service of actual transportation will not be liable for service tax under Rule 10 of POPS.
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> **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 risks 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."

5. We understand that in the case before us, the appellant would enter into an agreement with the carrier for transportation of cargo i.e. airline/shipping line. This service agreement would be on principal to principal basis and not as agent of said airline/shipping line. Therefore, applicant would be covered by the exclusion clause i.e. provides the main service- inbound and outbound shipment on his own account in terms of Rule 2(f) of POP Rules and thus not covered under Rule 9 (c) ibid as "intermediary" service. Therefore, place of provision of said service will not be location of service provider.

6. Revenue submits that the main service of transportation of goods is provided by the Airlines /Shipping Agency and not by the applicant. Therefore, Rule 10 of POP Rules will not be applicable in respect of the applicant. Applicant submits that said Rule 10 is wide to cover not only the actual transportation, but also a person who arranges for the transport, that this is expressly clear from the exclusion to mail or courier from Rule 10 of POP Rules; that proviso to Rule 10 suggests the place of provision of service in respect of goods transport agency (GTA); that but for said exclusion, courier or GTA would be covered by said Rule 10. We agree with the contention of the applicant that in the absence of specific exclusion, services provided by the applicant cannot be excluded from the scope of Rule 10 of POP Rules.

7. It is reiterated that place of provision of service of transportation of goods shall be the place of destination of the goods, as per Rule 10 of POP Rules. In the case of outbound shipment, both by aircraft and vessel, destination of goods shall be outside India. Therefore, place of provision of service of outbound shipment shall be outside India, hence there will be no Service Tax on freight margin recovered by the applicant from the customer.

8. In view of above, we hold that impugned order-in-appeal is without any merits. Accordingly, we set-aside the same and thus allow the appeal.

(Pronounced in the open court on 14.05.2024)

(Somesh Arora)
Member (Judicial)

(C L Mahar)
Member (Technical)

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