CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH – COURT NO. III

Service Tax Appeal No. 50177 of 2019

(Arising out of Order-in-Original No. 08-Commr./CGST Audit-I/2018 dated 31.08.2018 passed by the Commissioner of Central Goods and Service Tax, New Delhi-110109)

Wig Air Freight Pvt. Ltd. **Appellant**
B-191, Naraina Industrial Area, Phase-1,
New Delhi-110028.

VERSUS

The Commissioner of Central Goods and Service Tax, New Delhi **Respondent**
Audit-I, C.R. Building, I.P. Estate,
New Delhi-110109.

Appearance

Shri A.K. Prasad, Advocate – for the Appellant.

Shri Harshvardhan, Authorized Representative – for the Respondent

AND
Service Tax Appeal No. 50345 of 2019

(Arising out of Order-in-Original No. 08-Commr./CGST Audit-I/2018 dated 31.08.2018 passed by the Commissioner, CGST, Audit-I, New Delhi)

Commissioner, CGST South Commissionerate, **Appellant**
2nd & 3rd Floor, EIL Annexe Building
Bhikaji Cama Place,
New Delhi-110 066.

VERSUS

M/s Wig Air Freight Pvt. Ltd. **Respondent**
B-191, Naraina Industrial Area, Phase-1,
New Delhi-110028.

Appearance

Shri Harshvardhan, Authorized Representative – for the Appellant

Shri A.K. Prasad, Advocate – for the Respondent

CORAM :

HON'BLE MS. BINU TAMTA, MEMBER (JUDICIAL)
HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)

Date of Hearing: 31.01.2024
Date of Decision : 13.03.2024

Final Order Nos. 55138-55139/2024

Binu Tamta

Order-in-Appeal No. 08-Commr./CGST Audit-I/2018 dated 31.08.2018 has been challenged by the assessee against the imposition of service tax on 'incentives' received from the airline companies under the category of "Business Auxiliary Service". The department has filed the cross appeal on the bifurcation of the income under the category as 'Commission' and 'Incentive' and further the bifurcation of incentives to 'incentive', 'discount' and 'market price adjustments' on which demand has been dropped.

2. Show cause notice dated 13.10.2015 was issued as the department compared the ST-3 returns, 26AS statements and the balance sheets of the appellant and concluded that they had under reported their taxable values and paid less service tax on the various services under the category of "Clearing and Forwarding Agent" (CFA) and "Business, Auxiliary Service" (BAS). Accordingly, demand towards differential amount of service tax of Rs. 9,44,87,513/- along with interest and penalty was raised by invoking the extended period of limitation. The relevant Chart is set out below :

Year	**Remaining taxable amount of C&F Agent Service on which Service Tax is payable Rs.**	**Remaining taxable against Business Auxiliary Service on which Service Tax payable Rs.**	**Rate of Service Tax**	**Service Tax payable on Clearing and Forwarding Agent Service Rs.**	**Service Tax payable on Business Auxiliary Service Rs.**	**Total amount of Service Tax short paid Rs.**
2010-11	131846660	17695636	10.3%	13580206	1822651	15402856
2011-12	108325728	23556443	10.3%	11157550	2426314	13583864
2012-13	109241931	28040668	12.36%	13502303	3465827	16968129
2013-14	161920947	47596355	12.36%	20013429	5882909	25896339
2014-15	153934879	29206908	12.36%	19026351	3609974	22636325
TOTAL	**665270145**	**146096010**		**77279839**	**17207674**	**94487513**

3. The adjudicating authority by the impugned order observed that the extended period of limitation cannot be invoked in so far as inclusion of freight in the value of clearing and forwarding agent service was concerned as on same facts the department has already issued the show cause notice dated 22.10.2013. On merits, it was held that freight is not taxable under the provisions of the Act as it is charged and recovered by the assessee from its clients/exporters for booking of space for transportation of goods which is paid by the assessee to the airlines and hence cannot be attributed to the services of Clearing and Forwarding Agent and therefore, dropped the demand of Rs. 7,72,79,839/- on this account. On the second aspect of "Business Auxiliary Service", which is the subject matter of dispute both by the appellant and the Revenue, the adjudicating authority considered the two elements as "commission" and "incentive" separately but as the appellant had paid the service tax on "commission", there was no dispute. The liability of service tax on "incentive", was considered by the adjudicating authority taking into account the different terminology used in the Cargo Sales Report (CSR) Sheets i.e., 'incentive', 'discount' and 'market price adjustments' and held the latter to be non-taxable as they have direct linkage with the freight charged by the airlines. The demand of Rs. 11,47,957/- for service tax on 'incentive' was confirmed for the normal period from October 2013 to March 2015.

4. We have heard Shri A.K. Prasad, Advocate for the appellant and Shri Harshvardhan, Authorised Representative for the Revenue and have perused the records of the case.

5. The learned counsel for the appellant submitted that there is no difference between 'incentive', 'discount' and 'market price adjustment' and the same have been used in the CSR Sheets for the same category of income and therefore should have been treated alike. He further clarified that 'incentive', 'discount' or 'market price adjustment' relates to the activity of booking of space in airlines by the appellants for the exporters in which no service element is involved. The learned counsel explained by giving an example that they buy the space from the airlines at, say Rs. 80 per sq. ft. and send it to their client/exporter at, say Rs. 100/- per sq. ft. and thereby make a profit of Rs. 20 per sq. ft. in the bargain and hence the activity is nothing but a trading activity which is not taxable.

6. The learned Authorised Representative for the Revenue argued that the activity of booking of space of airlines by the appellant is service provided by them to the airlines and therefore the amount received by them towards incentive are very much in the nature of payment for services rendered in promoting such business and are therefore taxable. In support of the appeal filed by the revenue, it has been submitted that bifurcation of 'incentives' and holding the value of 'discount' and 'market price adjustment' as not taxable is not legally tenable and the entire amount towards 'Commission' and 'Incentive' are taxable.

7. Before proceeding further, it is necessary to examine the provisions of section 65(19) defining the category of service under "Business Auxiliary Service" (BAS) and the "taxable service" under section 65(105)(zzb) :

> **"65(19)** -**"Business Auxiliary Service"** means any service in relation to, -
>
> (i) promotion or marketing or sale of goods produced or provided by or belonging to the client; or
>
> (ii) promotion or marketing of service provided by the client; or
>
> (iii) any customer care service provided on behalf of the client; or
>
> (iv) procurement of goods or services, which are inputs for the client; or
>
> [**Explanation** - For the removal of doubts, it is hereby declared that for the purposes of this sub-clause, "inputs" means all goods or services intended for use by the client;]
>
> (v) production or processing of goods for, or on behalf of the client; or
>
> (vi) provision of service on behalf of the client; or
>
> (vii) a service incidental or auxiliary to any activity specified in sub-clauses (i) to (vi), such as billing, issue or collection or recovery of cheques, payments, maintenance of accounts and remittance, inventory management, evaluation or development of prospective customer or vendor, public relation services, management or supervision, and includes services as a commission agent, but does not include any activity that amounts to "manufacture" of excisable goods.
>
> **"65(105)(zzb)**- **"taxable service**" means any service provided or to be provided to a client, by any person in relation to business auxiliary service."

8. For classifying a service under the category of BAS it is necessary that the appellant provides services for promoting or marketing the business of the airline company. In similar circumstances, the Larger Bench in **Kafila Hospitality & Travels Pvt. Ltd. – 2021 (47) GSTL 140 (Tri.-LB)** observed that for an activity to be considered as promotional, it is necessary that a service provider must "promote" or "endorse" the service of the client and since the appellant / travel agent was merely providing the options to the passengers it was held that the appellant travel

agent was not promoting the services of any airline, maybe incidentally the airlines benefit by the purchase of more tickets but that would not mean that the travel agent is providing a service for promoting the airlines. The same analogy would apply in the present case as the appellant negotiates with the airlines for booking of space or slots in their aircrafts on behalf of their client/exporters for shipment of their consignments and for which they charge 'Commission' from the airlines on which they have regularly discharged the service tax liability.

9. The amount received as 'Commission' is distinguishable from the amount received as 'Incentive' for the simple reason that 'Commission' has direct nexus to the service which the appellant is providing, i.e. booking of space with the airlines whereas 'Incentive' as explained by the appellant is the profit which they earn from the difference in the amount which they generally charge from their clients which is higher than the price they have negotiated with the airlines. Therefore, the amount received by way of incentive is not on account of rendering any services but on account of trading activity which is not taxable under the Act. Section 66 which is the charging section provides for levy of tax at the rate of 12% on the value of taxable services referred on therein. Therefore, what is relevant for levy of service tax is the rendering of services. The Larger Bench in **Kafila Hospitality**, (supra) dealt with the issue whether the incentives paid by the airlines to the travel agents or sub agents for achieving targets was for promoting and marketing the business of the airlines and were liable to service tax under the category of BAS and concluded that under Section 67 of the Act

Service tax is leviable on 'consideration' and incentives cannot be construed as consideration and therefore cannot be subjected to levy of service tax. We are guided by the observations of the Larger Bench that incentives are not to be construed as 'consideration' and applying the said logic, the inevitable conclusion is that no service tax can be levied on incentives received by the appellant, coupled with the fact that incentive in the present case is a form of profit earned by the appellant as a result of a trading activity. The findings of the adjudicating authority that 'incentive' received by the appellant is also another form of 'consideration' given by the airlines for providing the service for promotion of their business needs to be set aside in view of the decision of the Larger Bench, where it was specifically concluded that by booking air tickets the air travel agent is promoting its own business and is not promoting the business of the airlines.

10. The terms 'incentive', 'discount' or 'market price adjustment' used in the CSR has been considered differently by the adjudicating authority which has been challenged both by the assessee as well as by the revenue. We find that the appellant has explained their business model by referring to the CSR Sheets and the Certificate dated 18.05.2018 issued by the Chartered Accountant in the following manner:

> "Client approaches the Assessee for booking space with airlines on their behalf
>
> ↓
>
> The Assessee contacts the airlines through an interface (which is akin to various ticket booking websites like www.makemytrip.com: www.yatra.com etc.)
>
> Inter alia providing there-under, various options of flights, types of flights and rates for selling the space

↓

The said interface provides published rate for the consignment based on the place of origin, place of destination, quantity of cargo/consignment, availability of direct flights, nature of goods being exported etc.

↓

After selecting most suitable airline, the Assessee then negotiates rate with them seeking discount in the published rate which may or may not be given

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The discount offered by the airlines is termed as "incentive"

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CSR sheets are prepared by the airlines on a periodical basis containing details of transactions between the Assessee and the airlines for the said period including "incentive"

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The "incentive" is reflected in the CSR sheet as a deduction from the total amount of freight payable to the airlines by the assessee."

11. From the aforesaid description as well as the discussion in the light of the judicial pronouncement, we are of the considered opinion that no service tax can be levied on 'incentive'. In so far as the appeal filed by the revenue against the demand being dropped on 'discount' and 'market price adjustment' is concerned the same has been dropped as they are directly linked to freight which has been held to be non-taxable by the adjudicating authority and the same has not been challenged by the Revenue.

12. The learned Authorized Representative has relied on the decision in **APL Logistics India (Pvt.) Ltd. Vs. Commissioner of S.T., Chennai - 2018 (12) GSTL 84 (Tri. Chennai),** however we do not find any relevance of the same in the present context, though the Tribunal observed that there was no merit in the

Revenue's case that the appellant has provided Business Auxillary Service.

13. We are, therefore of the opinion that the impugned order deserves to be set aside in so far as they impose service tax on incentive and the consequent levy of interest and penalty. The appeal filed by the assessee is, accordingly allowed and the appeal filed by the Revenue is dismissed.

(Pronounced in open Court on 13th March, 2024)

(Binu Tamta*)*
Member (Judicial)

(P.V. Subba Rao)
Member (Technical)

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