IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
CENTRAL EXCISE APPEAL NO. 18 OF 2022

The Commissioner of Service Tax Mumbai-VII, Mumbai	Appellant
Versus	
M/s. Phoenix International Freight Service Pvt. Ltd.	Respondent

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Ms. Maya Majumdar, for Appellant.
Ms. Arya Anil I.by Mr. Sriram Sridharan, for Respondent.

CORAM : DHIRAJ SINGH THAKUR &
VALMIKI SA MENEZES, JJ.

Dated : 7th DECEMBER 2022.

PER:- (VALMIKI SA MENEZES, J).

1. This appeal under section 83 of the Finance Act, 1994 read with section 35(G) of the Central Excise Act, 1944, (hereinafter referred to as “the Act”), challenges order dated 27th July 2016, passed by the Customs, Excise and Service Tax, Appellate Tribunal (CESTAT), West Zonal Bench at Mumbai in Appeal Nos. ST/217 and 235/2012, partly allowing the appeal of the respondents, holding that the appellant was not rendering any service either to any shipping lines or to it’s customers as a Business Auxiliary Service (BAS). The CESTAT has set aside the orders in original nos. 12/ST/SB/2011-12 dated 13/01/2012

and 18/ST/SB/2011-12 dated 31/01/2012 passed by the Commissioner (TAR), Central Excise, Mumbai, to the extent of holding that no service was provided by the respondent.

2. Ms. Maya Majumdar, learned counsel for the appellant, Commissioner of Service Tax, Mumbai (VII), has urged the following re-framed substantial questions of law for our consideration:-

1. Whether the assessee is a multi modal transport agency and whether the decision of CESTAT passed in Greenwich Meridian Logistics India Pvt. Ltd. 2016-TIOL-869-CESTAT-Mum. is applicable to the present case?

2. Whether the CESTAT is right in setting aside the impugned orders against the appellant?

3. Whether CESTAT was right in setting aside demand on ground of limitation?

4. Whether CESTAT is right in setting aside demand towards penalty on ground of limitation?

3. The respondent is registered under the Finance Act, 1994 providing taxable services of 1) Clearing and forwarding agency, 2)Storage and Warehousing, 3) Business Auxiliary Service, 4) Business Support Service and 5) Transport of Goods by road, having service tax registration No. AABCE0443RST005. The respondent is a 'Business Auxiliary Service' as defined under section 65(19) of the Act and is paying service tax thereon.

The respondent claims that it enters into contracts with various shipping companies for booking Cargo. It is their case before the

Tribunal that they book freight space in advance, on shipping lines, and as per the requirements of the Customers, it sells freight space to the customers at a premium or profit. It is further their case, that additional amount earned from sale of this pre- booked space at a premium or at additional amount is recorded by it as profit in trading and selling of the space. In contrast to this contention, it was the appellants case before the Tribunal, that the activity of the respondent of earning profit in that manner is for the services rendered to its clients and is chargeable as a 'Business Auxiliary Service'. Clearly therefore the issue that arose for consideration before the Tribunal was whether the premium charged to its customers as its profit by sale of pre-booked Cargo space being the additional consideration received in relation to the services rendered by the respondent to its clients under the head of Business Auxiliary Service as defined under section 65(19) of the Act, was chargeable to service tax.

4. The Tribunal came to a specific finding that the additional consideration received by the respondent from its customers, over and above the price already paid by it for pre-booking cargo space, was not in the nature of rendering any service either to the shipping lines or its customers and therefore, not a Business Auxiliary Service. The Tribunal relied upon its own judgment in the case of ***Greenwich Meridian Logistics (India) Pvt. Ltd. V. Commissioner of Service Tax, Mumbai*** [1] where such a view, on the same facts, has been taken by it.

5. The issue, therefore, that arises for our consideration is essentially within the realm of valuation of services rendered by the

1 (2016) TIOL-869-CESTAT-MUM

respondent in booking Cargo on a commission basis under the head 'Business Auxiliary Services". The issue is thus of valuation and the remedy in terms of Section 83 of the Finance Act, 1944 read with Section 35 (G)(1) and Section 35 (L)(1)(b) of the Act, would not lie before this Court, but would be by way of an appeal before the Hon'ble Supreme court.

We are fortified, in taking this view by a judgment of this Court rendered in ***Commissioner of S.T. Mumbai-VII v. Greenwich Meridian Logistics (I) Pvt. Ltd.***[2] which holds that the remedy in a matter concerning the issue of valuation is by way of filing an appeal in terms of the above provisions of law before the Hon'ble Supreme Court. The appeal before us is therefore not maintainable. The appeal is dismissed for want of maintainability. Ordered accordingly.

(VALMIKI SA MENEZES, J) **(DHIRAJ SINGH THAKUR, J)**

2 2019 (28) G.S.T.L. 591 (Bom.)