Services provided by GTA not classified as 'Clearing and Forwarding Agency' service

The CESTAT, Mumbai in ***M/s. Auto Cars v. Commissioner of Central Excise and Service Tax, Aurangabad*** **[*Service Tax Appeal No. 87630 of 2016 and 85895 of 2017 dated September 16, 2022]*** set aside the recovery demand orders against the assessee. Held that, the activity carried on by the assessee for providing the services of 'Goods Transport Agency' ("**GTA**") does not fall within the category of 'Clearing and Forwarding Agent', provided to several recipients who were liable to discharge tax dues on freight under 'Reverse Charge Mechanism (**"RCM"**)' after availing permissible abatement.

Facts:

M/s Auto Cars ("**the Appellant**") had been providing GTA services to several recipients, who, as corporate entities, were liable to discharge tax dues on the freight under RCM after availing permissible abatement.

The Appellant, from April, 2007, had expanded the scope of their business activities with offer of storage and warehousing, as well as ancillary facilitation under separate agreements with some of the customers in return for fixed monthly remuneration on which tax liability under the Finance Act, 1994 (**"the Finance Act"**) was being duly discharged and thereafter secondary transportation was also undertaken for delivery of goods at destinations as pre-determined by their customers for which the tax liability has already been discharged.

This appeal has been filed by the Appellant against the Orders for recovery of tax dues, dated March 28, 2016 and December 20, 2016 (**"the Impugned Orders"**) for alleged late payment of tax, to the extent of INR 1,34,37,061/- by penalty imposed under Section 76 of the Finance Act, recovery of undischarged tax liability of INR 31,83,62,007/- as provider of 'clearing and forwarding agent' service taxable under Section 65(105)(j) of the Finance Act for the period

from April 2009 to January, 2014 along with interest thereon and recovery of INR 2,89,99,396 as tax dues for period ending in March, 2015 respectively.

The Appellant contended that, there are no provision in law, which mandates the merger of two separate, and distinct, services within a third taxable service merely for overcoming a statutory segregation and with intent to extract levy that is not authorised by law and expansion of scope of business does not alter the nature, and flexibility. Therefore, the Impugned Orders passed are disobeying the law.

Issue:

Whether the Impugned Orders for recovery of tax dues from the Appellant is liable to be set aside?

Held:

The CESTAT, Mumbai in ***Service Tax Appeal No. 87630 of 2016 and 85895 of 2017*** held as under:

- Noted that, the two services sought to be amalgamated are not only independently taxable but differs in the mechanism of collection and should, intuitively, be immiscible.
- Stated that, the statutory enablement is intended to be invoked when the nature of the service, and the consideration thereto, are not perceptibly divisible and differential treatment necessitates adoption of the appropriate rate of tax to the whole.
- Observed that, the rate of tax does not pose any difficulty and it is only the availability of abatement to isolate the 'service' component and the transference of responsibility to discharge liability that distinguishes.
- Further observed that, the two services are rendered independently even if the transactions of the Appellant are with the same recipient and, therefore, is not 'clearing and forwarding agency' service.

- Held that, the treatment of GTA services provided after July 1, 2012 continues to remain unchanged and the substitution of 'support service of business and commerce' or of 'clearing and forwarding agent' service with the omnibus 'service' has not altered the delineation to offer any support to the finding in the Impugned Orders.
- Set aside the Impugned Orders.

Our Comments:

It is pertinent to note that, in the above matter, an appeal has been filed by the Revenue Department before the Hon'ble Supreme Court vide ***Commissioner of Central Excise and Service Tax v. M/s Auto Cars [C.A. No. 000223 - 000224 / 2023]*** wherein, the Court has issued notice vide order dated January 4, 2023, returnable in 4 weeks.

Relevant Provisions:

Section 65(105)(j) of the Finance Act:

> *"Taxable service means any service provided or to be provided –*
>
> *(j) To any person, by a clearing and forwarding agent in relation to clearing and forwarding operations, in any manner"*

Section 76 of the Finance Act:

> *"Penalty for failure to pay service tax:*
>
> *(1) Where service tax has not been levied or paid, or has been short-levied or short-paid, or erroneously refunded, for any reason, other than the reason of fraud or collusion or wilful mis-statement or suppression of facts or contravention of any of the provisions of this Chapter or of the rules made thereunder with the intent to evade payment of service tax, the person who has been served notice under sub-section (1) of section 73 shall, in addition to the service tax and interest specified in the notice, be also liable to pay a penalty not exceeding ten per cent. of the amount of such service tax:*
>
> *Provided that where service tax and interest is paid within a period of thirty days of–*
>
> *(i) the date of service of notice under sub-section (1) of section 73, no penalty shall be payable and proceedings in respect of such service tax and interest shall be deemed to have been concluded;*

(ii) the date of receipt of the order of the Central Excise Officer determining the amount of service tax under sub-section (2) of section 73, the penalty payable shall be twenty-five per cent. of the penalty imposed in that order, only if such reduced penalty is also paid within such period.

(2) Where the amount of penalty is increased by the Commissioner (Appeals), the Appellate Tribunal or the court, as the case may be, over the above the amount as determined under sub-section (2) of section 73, the time within which the reduced penalty is payable under clause (ii) of the proviso to sub-section (1) in relation to such increased amount of penalty shall be counted from the date of the order of the Commissioner (Appeals), the Appellate Tribunal or the court, as the case may be."

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