CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD

REGIONAL BENCH - COURT NO.I

Service Tax Appeal No.70699 of 2019

(Arising out of Order-in-Appeal No.168/ST/Alld/2019 dated 17/06/2019 passed by Commissioner (Appeals) Central Excise & CGST, Allahabad)

M/s M.P. Biscuits Pvt. Ltd., ...Appellant
(B-18, Industrial Area, Ramnagar, Chandauli-221110)

VERSUS

Commissioner of Central Excise &

CGST, Varanasi ....Respondent

(9, Maqbool Alam Road, Varanasi-221002)

APPEARANCE:

Shri Mahir Chablani, Advocate for the Appellant
Shri Manish Raj, Authorised Representative for the Respondent

CORAM: HON'BLE MR. P.K. CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO.70673/2024

DATE OF HEARING : 01 August, 2024
DATE OF PRONOUNCEMENT : 23 October, 2024

SANJIV SRIVASTAVA:

This appeal is directed against Order-in-Appeal No.168/ST/Alld/2019 dated 17.06.2019 of the Commissioner (Appeal) CGST & Central Excise, Allahabad. By the impugned order, modifying the order in original No 01/ST/VNS/2019 dated 11.01.2019, following has been held:

"4.6 Thus I find that in this case, the appellant are required to pay Service Tax (including Cesses) of Rs.1,76,720/- alongwith interest. However, since the transactions were available in the specified records, I, thus, find that the penalty imposable under Section 78 of the Act, is Rs.96,975/- (50% of Service Tax (including Cesses) of

Rs.1,59,491 /- for 01.07.2012 to 31,03.2015 + 100% of Service Tax (including Cesses) of Rs.17,229/- for 01.04.2015 to 30.09.2015), in terms of the first proviso to Section 78(1) of the Act

5. The appeal filed by the appellant, is disposed off accordingly."

2.1 Appellant is engaged in the manufacture of biscuits and also registered, vide Service Tax Code AADCM8831DST001, for receiving transportation of goods by road service taxable under the Finance Act, 1994.

2.2 During the scrutiny/ audit of the records of the appellant it was noticed that they had short paid Service Tax (including Cess) to the tune of Rs.2,77,682/-, during the period June, 2011 to September, 2015, for receiving the transport of goods be road service on which they were required to pay Service Tax under the reverse charge mechanism

2.3 A show cause notice dated 29.06.2016, was issued to the appellant asking them to show cause as to why-

(a) *Service Tax amounting to Rs. 2,77,682/- (including Cesses) should not be demanded and recovered from them under proviso to sub-section (1) of Section 73 of the Finance Act, 1994,*

(b) *Interest at appropriate rate should not be charged and recovered from them under the provisions of Section 75 of the Finance Act, 1994, and*

(c) *Penalty should not be imposed upon them under Section 78 of the Finance Act, 1994, for the act of willful suppression*

2.4 The show cause notice was adjudicated as per the order in original referred in para 1 above, holding as follows:

"ORDER

(i) *I, hereby confirm the demand of Rs.2,77,682/-, upon the party M/s M. P. Biscuits Private Limited, B-18, Industrial Area Road, Patanava, Basant Nagar, Varanasi under the*

provisions of Section 73(2) of the Finance Act, 1994, as amended along-with due interest under Section 75 of the Act, ibid.

(ii) I also impose a penalty of Rs.2,77,682/- upon the party under the provisions of Section 78 of the Act. However, the party has the option to pay 25% of the penalty payable, provided they pay the service tax, interest and penalties imposed, within a period of 30 days of receipt of this order.

All the amounts may be paid forthwith.

2.5 Aggrieved appellant filed the appeal before the Commissioner (Appeal), which has been disposed off as per the impugned order.

2.6 Aggrieved appellant has filed this appeal.

3.1 We have heard Shri Mahir Chablani, Advocate for the appellant and Shri Manish Raj, Authorized Representative for the revenue.

3.2 Arguing for the appellant learned counsel submit that:

- There are certain computational errors in the calculating the value of the taxable services paid. The figures indicated in the ST-3 return have been wrongly depicted in the computation chart.
- Impugned order has mis-appreciated the scope of Rule 6 (1) (x) of the Valuation Rules.
- The prescription in Rule 6 (1) (x) is applicable only in cases where certain amounts have been realized by the service provider as demurrage. This fact has been clarified as per para 20 of the D O F No 334/1/2012-TRU dated 16.03.2012.
- GTA service provider has not realized or collected any additional amount from the appellant. In stark contrast the appellant has deducted a sum towards penalties from the freight payable to GTA’s.

- Demurrage has not been defined under the Finance Act, 1994 but the same has been defined by the Hon'ble Supreme Court in case of Sun Export Corpn [1998 (1) SCC 142]. Also from the dictionary meaning of the same, it is evident that service provider has not realized any amount from the service recipient but service recipient has deducted certain amounts from the amount billed as penalties.
- As the essential ingredient for invoking Rule 6(1) (x) are absent said Rule cannot be invoked in present case.
- Demand is barred by limitation. Reliance placed on the decision of tribunal in case of Khaira and Associates [2020 (34) GSTL 224 (T-Del)] and Computer Science Corporation India Pvt. Ltd. [Final Order No 70162/2024 dated 01.04.2024 in Service Tax Appeal No 52075 of 2015]

3.3 Arguing for the revenue learned authorized representative re-iterated the findings recorded in the impugned order.

4.1 We have considered the impugned order along with the submissions made in appeal and during the course of arguments.

4.2 Impugned order records findings as follows:

"4.1 I have gone through the facts of the case, the averments made at the time of the personal hearing and all other material/ documents available on record. It is observed that:

(i) The demand of Service Tax (including Cesses) of Rs.2,77,682/- is based on examination of the ST-3 returns of the appellant vis-à-vis the statements of freight details maintained by the appellant;

(ii) The appellant during the adjudication proceedings had submitted that freight paid for transportation of goods included certain penalties for damage to goods or late delivery of goods etc., and they had paid Service Tax on the net freight after deducting such penalties from

the freight, Thus, there was no short payment of Service Tax, on their part; and

(iii) The Adjudicating Authority, without verifying & disputing the submission of the appellant that short payment of Service Tax was on account of deduction of penalty from the freight, confirmed the demand of Service Tax, after relying on Section 67 of the Act and Rule 6(3) of the Service Tax Rules, 1994.

4.2 I find that Rule 6(3) of the Service Tax Rules, 1994 was substituted, w.e.f 01.04.2011 (i.e., after introduction of the Point of Taxation Rules, 2011, w.e.f 01.04.2011, the point of taxation of service in normal cases, was the earlier of the two events, i.e., the time of issue of invoice and the time of receiving the payment), and provided, as under:

> *<u>Rule 6(3):</u> Where an assessee has issued an invoice, or received any payment, against a service to be provided which is not so provided by him either wholly or partially for any reason, or where the amount of invoice is renegotiated due to deficient provision of service, or any terms contained in a contract the assessee may take the credit of such excess service tax paid by him, if the assessee*
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> *(a) has refunded the payment or part thereof, so received for the service provided to the person from whom it was received; or*
>
> *(b) as issued a credit note for the value of the service not so provided to the person to whom such an invoice had been issued*

4.2.1 However, as per Rule 7 of the Point of Taxation Rules, 2011, in cases where the recipient of service was required to pay Service Tax, in respect of services notified under Section 68(2) of the Act, the point of taxation was the date of making the payment. Thus, in such cases, Rule 6(3) of the Service Tax Rules, 1994 did not have any applicability Since in this case, the appellant were required to pay

Service Tax as recipient of service, I thus, find that reliance placed by the Adjudicating Authority on Rule 6(3) of the Service Tax Rules, 1994 is unjustified

4.3 I further find that clause (x) was inserted in Rule 6(1) of the Service Tax (Determination of Value) Rules, 2006, vide Notification No.24/2012-ST dated 06.06.2012, w.e.f. 01.07.2012, so as to provide, as under:

> *<u>Rule 6(1)(x):</u> Subject to the provisions of Section 67, the value of taxable services shall include the amount realized as demurrage or by any other name whatever called for the provision of a service beyond the period originally contracted or in any other manner relatable to the provision of service.*

4.3.1 Since the penalties deducted by the appellant, from the freight, was relatable to the provision of transport of goods by road service, I, thus, find that the same were required to-be included in the taxable value of this service, w.e.f, 01.07.2012 only and not prior to 01.07.2012. Thus, in this case, the Service Tax liability of the appellant, for 01.07.2012 to 30.09.2015, was Rs.1,76,720/-

4.4 It is further observed under the self-assessment procedure prescribed under the statute, the appellant were required to assess & pay their Service Tax liability correctly, whereas the non-payment of Service Tax could be detected only during scrutiny of the records of the appellant, Even, they suppressed the taxable value in the ST-3 returns, Thus, I find that there was suppression of facts with the intent to evade payment of Service Tax, on the part of the appellant and as such, the extended period of limitation has been rightly invoked in this case, for confirming the demand of Service Tax (including Cess) alongwith interest and for imposing penalty under Section 78 of the Act.

4.5 It is also observed that though the appellant have relied upon a number of case laws in their appeal, they *have not given any justification as to how these decisions are applicable to the facts of their case, especially when circumstances, transactions, events of each case, are required to be considered, analyzed and weighed against the circumstances et al to be the same in the referred cases. I also find that the Hon'ble Supreme Court in the case of Punjab National Bank vs. R.L. Vaid 2004 (172) E.L.T. 24 (S.C.), has held at Para 5, as under:*

> *5. We find that the High Court has merely referred to the decision in R.K. Jain's case (supra) without even indicating as to applicability of the said decision and as to how it has any relevance to the facts of the case. It would have been proper for the High Court to indicate the reasons and also to spell out clearly as to the applicability of the decision to the facts of the case, There is always peril in treating the words of a judgment as though they are words in a Legislative enactment and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case. Circumstantial flexibility, one additional or different fact may make a difference between conclusions in two cases,.*

4.5.1 Similarly, the Hon'ble Supreme Court in the case of CCE, Bangalore vs. Srikumar Agencies 2008 (232) E.L.T, 577 (S.C.), inter alia, held, as under:

> *Precedents - Court decision not statute - Reliance thereon without discussion of facts - Decisions not to be relied upon without discussing similarity of facts - Judgments of courts not to be construed as statutes - Circumstantial flexibility, additional or different fact may make a world of difference between conclusions in two cases."*

4.3 The dispute in the present case on merits is with respect to determination of the taxable value for payment of service tax on reverse charge basis by the service recipient in respect of GTA Services. From the invoices raised by the service provider, the service recipient deducted certain amounts as penalty for the certain deficiencies noted in the services received. The dispute is then what shall be the value of the services received.

4.4 Section 67 of the Finance Act, 1994 as it existed during the relevant period read as follows:

SECTION 67.Valuation of taxable services for charging service tax.*—*

(1) Subject to the provisions of this Chapter, where service tax is chargeable on any taxable service with reference to its value, then such value shall,—

(i) in a case where the provision of service is for a consideration in money, be the gross amount charged by the service provider for such service provided or to be provided by him;

(ii) in a case where the provision of service is for a consideration not wholly or partly consisting of money, be such amount in money as, with the addition of service tax charged, is equivalent to the consideration;

(iii) in a case where the provision of service is for a consideration which is not ascertainable, be the amount as may be determined in the prescribed manner.

(2) Where the gross amount charged by a service provider, for the service provided or to be provided is inclusive of service tax payable, the value of such taxable service shall be such amount as, with the addition of tax payable, is equal to the gross amount charged.

(3) The gross amount charged for the taxable service shall include any amount received towards the taxable service before, during or after provision of such service.

(4) Subject to the provisions of sub-sections (1), (2) and (3), the value shall be determined in such manner as may be prescribed.

Explanation*.—For the purposes of this section, —*

(a) *"**consideration**" includes—*

(i) *any amount that is payable for the taxable services provided or to be provided;*

(ii) *any reimbursable expenditure or cost incurred by the service provider and charged, in the course of providing or agreeing to provide a taxable service, except in such circumstances, and subject to such conditions, as may be prescribed;*

(iii) *any amount retained by the lottery distributor or selling agent from gross sale amount of lottery ticket in addition to the fee or commission, if any, or, as the case may be, the discount received, that is to say, the difference in the face value of lottery ticket and the price at which the distributor or selling agent gets such ticket.*

(b) *[* * * *]*

(c) *"**gross amount charged**" includes payment by cheque, credit card, deduction from account and any form of payment by issue of credit notes or debit notes and book adjustment, and any amount credited or debited, as the case may be, to any account, whether called "Suspense account" or by any other name, in the books of account of a person liable to pay service tax, where the transaction of taxable service is with any associated enterprise.*

4.5 From the perusal of the above Section it is evident that the value of taxable service for the purpose of determination service tax payable, is the consideration received by the service recipient towards the provision of service. The word consideration has not been defined with reference to the invoice value but is defined in a inclusive manner by referring to the money value of the gross amount in any form paid by the service recipient to service provider for provision of service.

4.6 In terms of the agreement made between the service recipient and the service provider, following conditions are prescribed:

> *"34. The numbers of trucks as required on day to day basis will be made available by the Carrier within 24 hrs from the indent received for various destinations from units /factories/ Depot and shall be placed before 3 pm at the premises ,exception will be Vehicles for East which needs to be placed within 48 hrs . In the event of your failure to provide the vehicle for any reason whatsoever, you shall be bound and liable to pay and we shall be entitled to recover penalty Rs 800/- per day per truck, in case delay is beyond 1 day, then Rs 1000/- will be recovered at the time of clearing the bills from day One*
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> *37. You will be paid freight per trip on full truck load basis, for the material transported by you from one point to another . However for multi-point pick up / delivery, Parle shall pay Rs 400/- for each such additional delivery to Carrier, provided the distance between both the points are more than 5km*
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> *41. Carrier will be responsible to deliver the consignment in right quantity and sound condition within the stipulated transit day specified by Parle. For any delay Parle has right to deduct Rs 500/- per day for FTL [Taurus (10 tyre vehicle/24'ft container) and Rs-700 per day for containers > 28'FT as penalty and the same shall be recovered from Carrier's freight bill and also keep us informed regarding the status of the consignment the due date in such*
>
> *42. In the event , the due date of transit time falls on a Sunday / holiday at DC cases shall be deemed to be the next working day in that DC,*
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> *43. You shall ensure that all our consignments are delivered within the agreed transit time , in the event of any delay beyond 15(fifteen) days of the agreed transit time ,*

the same shall be presumed to have been lost in transit and the value of the consignment shall be recovered from you

46. In the event of delay in unloading the truck beyond one day from date of arrival at Parle's desired destination, Carrier will charge Rs 300/- per day (9 tons) & Rs 500/- per day (10 tyre/24"ft container), from Company as detention charges. In case delay is extended beyond 1 day from the date of arrival of truck (9 tons) at consignors destination, Carrier will charge Rs 500/- and for 10 tyre/24ft container @ Rs 700/- per day, For 28" Ft and 32" Ft Container Carrier will charge Rs 700/- per day and in case delay is extended beyond 1 day , Carrier will charge Rs 900/- from 2" day onwards only to the company Iln case trucks reaches the destination , after 5 pm on the said date, it will be unloaded on next day for which no detention charges will be paid or if vehicle reports after 5 pm and next day is a holiday or reports on any holiday , the vehicle shall deemed to have reported on the next working day and hence will not qualify for detention charges during the holiday

47 No Detention charges will be paid to Carrier., if vehicle reaches the destination after the prescribed transit days

48 Carrier agrees not to load any goods of other company & allergen materials in the same truck along with Parle's consignment during any part of the journey from factory/units/depot to the desired destination I at any time carier is found guilty, penalty of RS 10000/- will be a charged and recovered from Carrier. Carrier shall also be responsible for damages to stocks for any reason whatsoever In such events Parle's decision regarding penalty will be final and binding on Carrier

49 Carrier agrees to carry full truck load from Factory/Units /depot's to the desired destination of Parle intimated from time to time always by direct truck without any transshipment. of time Carrier is found doing transshipment *at any point a penalty of RS 10000/- will be recovered from Carrier's freight bill along with damages if any, occurred during such transshipment*

6. Deduction of Transit Claims

e. Transit damages up to Rs 2000/- or less per consignment will be deducted from your freight bill, above 2000/-, we will recover the value of goods to the extent of Rs 2000/- and on balance value ,deduction of transit damage claims wil be done for minimum 20% of the consignment value. Higher % of deduction will be based on no of incidences occurred and also liable for black listed which will always be at the discretion of Parle on case to case basis.

f. In cases of normal shortages, the Maximum Retail Price (MRP) of shortages in goods shall be deducted from carrier's bills the product for such

6. Payments

3. Carrier shall operate on freight paid' basis and will be paid on the basis of vehicle type freight trip for the material transported by Carrier from one point to another as mentioned in Schedule A. Carrier shall raise bills fortnightly and submit to Parle with all the relevant mandatory receipts/acknowledgments of the goods received at the destination of Parle

c) If the vehicle load is less than the minimum volume norms defined for type of vehicle. payment will be received in full only on getting Reason Certificate from concerned unit/ factory for loading less quantity

d) In case if Carrier fails to furnish the Certificate , then payment will be made for the actual volume norms loaded in the vehicle

11. Termination :

f. Parle is entitled to deduct from Carrier, pending payments, any amount due to Parle or to the destinations *place of Parle as per terms and conditions of this agreement.*

4.7 From the perusal of the above terms of the agreement it is evident that the consideration for the provision of the said service is not the invoice value but is amount determined by the service recipient in terms of the above agreement. In terms of this agreement for efficient provision of service the service provider is rewarded and for the deficiencies he is subjected to certain penalties which are deducted from the invoice value. Appellant takes the value of taxable service as equivalent to the actual amount paid to the service recipient after adjusting for the rewards and penalties, a fact not in dispute. We do not find anything in section 67 as per which the manner of determination of the taxable value can be questioned. As the value of taxable service has been determined on the basis of Section 67 of the Finance Act, 1994 we do not find any merits in enhancement of the value of the taxable service in manner as suggested by the impugned order.

4.8 Impugned order refers to Rule 6 (1) (x) of the Valuation Rules 2006 which was inserted with effect from 01.07.2012. The said rule is reproduced in the para 4.3 of the impugned order. As per the said rule any amounts received by the service provider from the service recipient towards the provision of service as demurrage or by any other name, shall be added to the invoice value for determination of the consideration and the value of taxable service. It should be noted that the said rule is referring to the payment received qua the service provider and not the payments made by the service recipient. The rule is applicable to make additions to the invoice value on account of the above payments received by the service provider. It is the submission of the appellant that where so ever any additional incentive was paid to the service provider the same was added while determining the value of taxable service. However in case of penalties deducted from the invoice value the taxable value is determined on the basis of the gross amount paid towards the provision of service. We do not find that Rule 6 (1) (x) provides for enhancement of the value of the taxable service in such cases. Said Rule will have no applicability to the present case. In any case Rule 6 (1) (x) cannot be read to be over-riding the provisions of Section 67 of the Finance Act, 1994. In case of Intercontinental Consultants and Technocrats Pvt. Ltd. [2018 (10) G.S.T.L. 401 (S.C.)] Hon'ble Supreme Court observed as follows:

> ***"21.****Undoubtedly, Rule 5 of the Rules, 2006 brings within its sweep the expenses which are incurred while rendering the service and are reimbursed, that is, for which the service receiver has made the payments to the assessees. As per these Rules, these reimbursable expenses also form part of 'gross amount charged'. Therefore, the core issue is as to whether Section 67 of the Act permits the subordinate legislation to be enacted in the said manner, as done by Rule 5. As noted above, prior to April 19, 2006, i.e., in the absence of any such Rule, the valuation was to be done as per the provisions of Section 67 of the Act.*
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> ***22.****Section 66 of the Act is the charging Section which reads as under:*
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> *"there shall be levy of tax (hereinafter referred to as the service tax) @ 12% of the value of taxable services referred to in sub-clauses of Section 65 and collected in such manner as may be prescribed."*
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> ***23.****Obviously, this Section refers to service tax, i.e., in respect of those services which are taxable and specifically referred to in various sub-clauses of Section 65. Further, it also specifically mentions that the service tax will be @ 12% of the 'value of taxable services'. Thus, service tax is reference to the value of service. As a necessary corollary, it is the value of the services which are actually rendered, the value whereof is to be ascertained for the purpose of calculating the service tax payable thereupon.*

> ***24.*** *In this hue, the expression 'such' occurring in Section 67 of the Act assumes importance. In other words, valuation of taxable services for charging service tax, the authorities are to find what is the gross amount charged for providing 'such' taxable services. As a fortiori, any other amount which is calculated not for providing such taxable service cannot a part of that valuation as that amount is not calculated for providing such 'taxable service'. That according to us is the plain meaning which is to be attached to Section 67 (unamended, i.e., prior to May 1, 2006) or after its amendment, with effect from, May 1, 2006. Once this interpretation is to be given to Section 67, it hardly needs to be emphasised that Rule 5 of the Rules went much beyond the mandate of Section 67. We, therefore, find that High Court was right in interpreting Sections 66 and 67 to say that in the valuation of taxable service, the value of taxable service shall be the gross amount charged by the service provider 'for such service' and the valuation of tax service cannot be anything more or less than the consideration paid as quid pro qua for rendering such a service.*
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> ***25.****This position did not change even in the amended Section 67 which was inserted on May 1, 2006. Sub-section (4) of Section 67 empowers the rule making authority to lay down the manner in which value of taxable service is to be determined. However, Section 67(4) is expressly made subject to the provisions of sub-section (1). Mandate of sub-section (1) of Section 67 is manifest, as noted above, viz., the service tax is to be paid only on the services actually provided by the service provider."*

4.9 Thus in view of the discussions as above we do not find any merits in the impugned order. As we have considered the issue and do not find any merits in the demand made we are not recording any findings on the other issues such as limitation and correctness of computation in the present proceedings.

5.1 Appeal is allowed.

(Order pronounced in open court on- 23 October, 2024)

(P.K. CHOUDHARY)
MEMBER (JUDICIAL)

(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

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