

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
BANGALORE**

REGIONAL BENCH - COURT NO. 1

Appeal(s) Involved:

ST/490/2010-DB

[Arising out of Order-in-Original No. 45-2009 dated
11/12/2009 passed by CCE&C, Cochin]

NATIONAL TRADES & AGENCIES

NTA CHAMBERS, HINA HOUSE, WILLINGDON
ISLAND, COHCIN.

Appellant(s)

VERSUS

**Commissioner of Central Excise,
Customs and Service Tax
COCHIN-CCE**

NULL C R BUILDING,
I S PRESS ROAD, ERNAKULAM,
COCHIN, - 682018
KERALA

Respondent(s)

Appearance:

**Shri S. Ramachandran, Advocate
SRI RAM & CO**

CONSULTANTS, NEW NO.24, YOGAMBAL
STREET, T.NAGAR, CHENNAI.
CHENNAI - 600017
TN

For the Appellant

Shri K. Murali, Superintendent(AR)

For the Respondent

CORAM:

HON'BLE MR. S.S GARG, JUDICIAL MEMBER

HON'BLE MR. V. PADMANABHAN, TECHNICAL MEMBER

Final Order No. 20355 / 2019

Date of Hearing: 02/04/2019

Date of Decision: 02/04/2019

Per : S.S GARG

The present appeal is directed against the impugned order
dt. 11/12/2009 passed by the Commissioner whereby the

Commissioner has confirmed the amount of Rs.82,20,813/- under Section 73(2) of the Finance Act, 1994 being service tax short paid by them during the period April 2006 to September 2007 and also appropriated an amount of Rs.25,72,676/- paid by the assessee during the course of investigation against the confirmed demand. The Commissioner also held that the assessee is liable for interest under Section 75 of the Finance Act, 1994 and also imposed penalties under Sections 76 and 78.

2. Briefly the facts of the present case are that the appellants are engaged in the activity of Customs House Clearing Agency based on a licence from the Customs department in respect of export and import of cargo at various sea ports, airports and inland container depot, container freight stations and the deemed ports like SEZ etc. they registered under the Custom House Agent which became taxable service w.e.f. 19/04/2006. The appellant along with CHA work also render other works for their clients in connection with the export and import i.e. port, customs, central excise, transporters, inspection agencies etc. at various stages of export and import. For undertaking those activities, appellants are paid service charges. Based on the request of the clients, appellant also undertook additional responsibility on behalf of the clients in relation to liaison work with 3rd party / agencies involved in the export / import clearance for specific services like loading, unloading, fumigation, inspection etc. and in such cases, appellant paid the charged claimed by such 3rd party service providers and get the same reimbursed from the clients. The appellant has duly documented all the charges that were paid to them ie. Their own service charges as well as the 3rd party charges and raised a consolidated bill accordingly to claim the same from the clients and has regularly filed returns to the Department and paid the service tax. While paying the service tax, appellant did not include the payments received as reimbursements from their clients for paying 3rd party service providers / agencies on a bona fide belief that they were

not required to do so, as per the existing provisions of the Service Tax law. Based on certain investigation, appellant was issued a show-cause notice dt. 07/08/2008 with proposal to demand Rs.82,20,813/- under Section 73(2) with interest under Section 75 and also proposed penalties under Sections 76 & 78 on the allegation that the appellant was liable for service tax in respect of certain amount received towards reimbursement expenses which were not supported by bills and amounts received from certain clients wherein the appellant has claimed ineligible exemption as service rendered to certain SEZ clients. After following due process, the Commissioner has confirmed the demand and hence the present appeal.

3. Heard both sides and perused records.

4.1. Learned counsel for the appellant submitted that the impugned order is not sustainable as the same has been passed without properly appreciating the facts and the law and the binding judicial decisions. He further submitted that the impugned order has been passed without justifying the includability and taxability of the reimbursable expenses to the extent disallowed in the show-cause notice. He further submitted that the Commissioner has failed to take cognizance of the manner of treatment of such reimbursable expenses in the books of accounts of the appellant and he has arbitrarily segregated the income (shown in the bills) as receipted or non-receipted whereas there was nothing in the bills to suggest so. He further submitted that the Commissioner has confirmed the demand on the ground that the income received towards loading or unloading cargo including customs sundries , house de-stuffing charges, sundry expenses at Port/CFS, telephone & miscellaneous expenses etc. were to be included as part of the CHA service and not eligible deductions under Rule 5(2) of Service Tax (Determination of Value) Rules, 2006. He further submitted that the appellants have separately shown such amounts in the bills raised on the clients and the clients also shown

that such payments were being made by them towards reimbursement to 3rd party service providers. He further submitted that this issue is no more res integra and has been settled by the Apex Court in the case of UOI & others Vs. Intercontinental consultants and Technocrats Pvt. Ltd. [2018-TIOL-76-SC-ST] wherein the Supreme Court has held as under:-

Service Tax - Valuation - inclusion of the expenditure or costs incurred by the service provider in the course of providing the taxable service - Rule 5(1) of the Service Tax (Determination of Value) Rules - only with effect from May 14, 2015, such reimbursable expenditure or cost would also form part of valuation of taxable services for charging service tax . : 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 assesseees. 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.

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. This position did not change even in the amended Section 67 which was inserted on May 01, 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 subsection (1). Mandate of sub-section (1) of Section 67 is manifest, viz., the service tax is to be paid only on the services actually provided by the service provider.

It is trite that rules cannot go beyond the statute : It is also well established principle that Rules are framed for achieving the purpose behind the provisions of the Act, as held in 'Taj Mahal Hotel': 'the Rules were meant only for

the purpose of carrying out the provisions of the Act and they could not take away what was conferred by the Act or whittle down its effect. *In the present case, the aforesaid view gets strengthened from the manner in which the Legislature itself acted. Realising that Section 67, dealing with valuation of taxable services, does not include reimbursable expenses for providing such service, the Legislature amended Finance Act, 2015 with effect from May 14, 2015, whereby Clause (a) which deals with 'consideration' is suitably amended to include reimbursable expenditure or cost incurred by the service provider and charged, in the course of providing or agreeing to provide a taxable service. Thus, only with effect from May 14, 2015, by virtue of provisions of Section 67 itself, such reimbursable expenditure or cost would also form part of valuation of taxable services for charging service tax.*

4.2. He further submitted that in the appellant's own case for the previous, this Tribunal has allowed the appeal of the appellant. The said decision is reported in 2018-TIOL-2415-CESTAT-BANG. Besides this, the appellant has also relied upon the following decisions:-

- i. GAC Shipping (India) Pvt. Ltd. [2008(9) STR 524 (Tri. Bang.)]
- ii. CCE, Indore Vs. Virmani Enterprises [2016-TIOL-2494-CESTAT-DEL]
- iii. Duttmenon Dunmorrisset Vs. UOI [2018-TIOL-1432-HC-DEL-ST]

4.3. On the other hand, the learned AR reiterates the findings in the impugned order.

5. After considering the submissions of both the parties and perusal of the law laid down by the Hon'ble Apex court in the case of Intercontinental Consultants & Technocrats Pvt. Ltd., we are of the considered view that this issue is no more res integra and has been settled by the Apex Court in the decision cited supra. The ratio of the said decision is very much applicable to the present case and by following the ratio of the Apex Court decision in the case cited supra, we hold that impugned order is not sustainable in law and consequently we set aside the same by allowing the appeal of the appellant with consequential relief, if any.

(Operative portion of the Order was pronounced
in Open Court on **02/04/2019**)

S.S GARG
JUDICIAL MEMBER

V. PADMANABHAN
TECHNICAL MEMBER

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