CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH
BANGALORE

Appeal(s) Involved:

ST/408/2009-DB

[Arising out of Order-in-Appeal No. 2/2009-ST dated 15/01/2009 passed by Commissioner of Central Excise, Customs & Service Tax, Cochin]

M/s Calicut Cement Agencies
Chirakkal Buildings, Wayanad Road,
Calicut
Kerala
673011

Appellant(s)

Versus

C.C.,C.E.& S.T-Calicut
CENTRAL REVENUE BUILDING,
MANANCHIRA, CALICUT,
KOZHIKODE,
KERALA
673001

Respondent(s)

Appearance:

Mr. M.S.Nagaraja, Advocate
VKS AIYER & CO
MECHERI MANOR', NO.2, S.R.IYER LAYOUT,
NEAR ALL INDIA RADIO, TRICHY ROAD,
COIMBATORE 641045

For the Appellant

Dr. J.Harish, Joint Commissioner (AR)

For the Respondent

Date of Hearing: 16/05/2019
Date of Decision:12/09/2019

CORAM:

HON'BLE MR. S.S GARG, JUDICIAL MEMBER
HON'BLE MR. P. ANJANI KUMAR, TECHNICAL MEMBER

Final Order No.20711/2019

Per : S.S GARG

The present appeal is directed against the impugned order dated 15.01.2009 passed by the Commissioner (Appeals) whereby the

Commissioner (Appeals) has allowed the appeal of the appellant with some modification.

2. Briefly the facts of the present case are that the appellant is a C&F Agent for M/s Associated Cement Companies Ltd. and also act as Transportation Agent under separate contracts for transportation of cement from the factory at Madukkarai to various destinations in Kerala. The appellants have obtained Service Tax registration and discharging the Service Tax on C&F Agent Service and filing ST-3 Returns periodically with the Department. A SCN dated 26.09.2005 was issued to the appellant demanding an amount of Rs.34,29,009/- being the Service Tax not paid for the period 01.04.2000 to 31.08.2004 along with interest and also proposed penalties under Section 76 & 78. After following the due process, Additional Commissioner vide Order-in-Original dated 31.12.2006 dropped bulk of the demand of Service Tax on transport charges received under separate contract, salary and DA paid to the employees and other miscellaneous expenses incurred. The adjudicating authority confirmed the demand of Service Tax of Rs.3,37,882/- on TDS, reimbursement of Godown Rent, damage allowances on account of damage of cement bags, Loading charges, Demurrage charges by ACC Ltd. Aggrieved by the said order, the appellant filed appeal before the Commissioner who vide the impugned order set aside the demand of Service Tax on TDS and on reimbursement of certain expenditure but the Learned Commissioner has, however, not recorded the finding on the specific submissions dated 25.09.2008 for exclusion of reimbursement of expenses towards Godown Rent of Rs.13,83,944/-, Damage allowance of Rs.4,68,408/- and loading/demurrage charges of Rs.89,774/- in the value of C&F Agent Service for levy of Service Tax. Hence, the present appeal.

3. Heard both the parties and perused the records.

4. Learned Counsel for the appellant submitted that the impugned order is not sustainable in law as the same has been passed without giving any specific finding on each of the reimbursable expenses. He further submitted that the only question in this appeal is whether the expenses viz.

Godown rent, damage allowance, loading charges, demurrage charges are includable in the value of service of the C&F Agent. He further submitted that the appellants have received reimbursement of the rent of Rs.13,83,944/- for the Godown hired for storage of cement belonging to ACC and this is not a consideration for rendering C&F Agent Service. He further submitted that the damage allowance of Rs.4,68,408/- are the amounts reimbursed by ACC towards amounts paid on account of damage to the cement bags in the course of handing and delivery to the customers and also does not represent consideration received for C&F Agent Service. Similarly, the amount of Rs.89,163/- recorded under the head of "loading charges" and Rs.610/- under the head of "demurrage charges" were the amounts received towards provision of "transportation service" under a separate contract. He further submitted that the adjudicating authority has dropped the demand of Service Tax on transportation/freight charges received by the appellants as not liable to Service Tax but as not excluded the amount of loading charges and demurrage charges received in connection with the Cement Transportation Service. He further submitted that when transportation charges itself is not liable to Service Tax directly then the loading charges and demurrage charges cannot be subjected to levy of Service Tax. He further argues that it is a settled legal position that the expenses incurred by the service provider and reimbursed by the service receiver are not liable to be included in the value of taxable service. Therefore, the reimbursement of expenses like Godown rent for storage and cement belonging to ACC, damage allowance towards damage to the cement bags and handling and demurrage charges in connection with transportation of goods not being consideration for C&F Agent Service are not includable in the value of taxable service. He further argued that this issue is no more *res integra* and has been settled by the Hon'ble Apex Court in the case of *UOI Vs Intercontinental Consultants and Technologies Pvt. Ltd. [2018 (10) GSTL 401 (SC)]* wherein it has been held that the reimbursement of expenses are not includable in the value of taxable service. He further submitted that the SCN was issued on 26.09.2005 proposed to demand Service Tax for the period from 01.04.2000 to 31.08.2004 by invoking the extended period of limitation. He further argued that the appellant had a bona fide belief that the reimbursements of expenses were not liable to

Service Tax. Further, the issue relates to interpretation of law and the same stands settled in favour of the appellant by the Hon'ble Supreme Court in the case of Intercontinental Consultants (supra). Therefore, according to the Learned Counsel, there was no suppression of fact or malafide intention on the part of the appellant and therefore the entire demand is barred by limitation. For this submission, he relied upon the following decisions:

- *Sanjay Industrial Corporation Vs CCE, Mumbai, 2015 (318) ELT 15 (SC).*
- *Kiran Ispat Udyog Vs CCE, Rajkot, 2015 (321) ELT 182 (SC).*
- *Jaiprakash Industries Ltd. Vs CCE, Chandigarh, 2002 (146) ELT 481 (SC).*

4.1. Learned Counsel for the appellant further submitted that the adjudicating authority has invoked Section 80 and has not imposed penalty under Section 78 of the Finance Act. He also submitted that when there is reasonable cause for not paying Service Tax and the provisions of Section 80 are invoked then the same reasonable cause applies equally in respect of penalties imposable under Section 76, 77 & 78 of the Finance Act, 1994 and therefore the imposition of penalty under Section 76 is not sustainable in law.

5. On the other hand, Learned AR defended the impugned order.

6. After considering the submissions of both the parties and perusal of the material on record, we find that the only issue involved in the present case is whether the reimbursable expenses are to be included in the value of service of the C&F Agent. Further, we find that the Commissioner (Appeals) though has set aside the demand on TDS and on reimbursement of certain expenditure but he has not given any specific finding on each of the reimbursable expenses viz. Godown rent, damage allowance, loading charges and demurrage charges. Further, we find that all these expenses were reimbursed by the appellant for the various purposes incurred for carrying on the business of C&F Agent Service. Further, we find that issue involved is no more *res integra* in view of the judgment of the Hon'ble Apex Court cited supra wherein in Para 24 & 29 it has been observed as under:

> "**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.

29. *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 by 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. Though, it was not argued by the Learned Counsel for the Department that Section 67 is a declaratory provision, nor could it be argued so, as we find that this is a substantive change brought about with the amendment to Section 67 and, therefore, has to be prospective in nature."*

6.1. Since the issue is settled in favour of the assessee by the decision of the Hon'ble Apex Court cited supra therefore by following the ratio of the above said decision, we are of the considered view that the impugned order to the extent of Service Tax on reimbursement is liable to be set aside and we set aside the same by allowing the appeal of the appellant with consequential relief, if any.

(Order was pronounced
in Open Court on **12/09/2019**)

S.S GARG
JUDICIAL MEMBER

P. ANJANI KUMAR
TECHNICAL MEMBER

pk...