CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
CHANDIGARH

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REGIONAL BENCH – COURT NO. 1

Service Tax Appeal No.60903 Of 2017

[Arising out of Order-in-OriginalNo.DZU/Adj//TSIYPL/70/2015 dated 03.08.2017 passed by the Additional Director General (Adjudication), New Delhi]

M/s TSI Yatra Pvt. Ltd. : **Appellant**
Plot No.272, 7th Floor, Gulf Adiba,
Phase II, Udyog Vihar, Gurugram,
Haryana, 122008

VERSUS

The Commissioner of Central Excise,
Goods and Service Tax, Gurugram : **Respondent**
Plot No.36-37, Sector-32, Gurugram-122001

APPEARANCE:
Shri Arjun Raghavendra, Advocate for the Appellant

Shri Siddharth Jaiswal, Shri Pawan Kumar, Shri Shivam Syal and Shri Gaurav Gupta, (I.O), Authorised Representatives for the Respondent

CORAM: HON'BLE Mr. S. S. GARG, MEMBER (JUDICIAL)
HON'BLE Mr. P. ANJANI KUMAR, MEMBER (TECHNICAL)

FINALORDER No.60689/2024

DATE OF HEARING: 21.08.2024
DATE OF DECISION: 20.12.2024

P. ANJANI KUMAR:

The appellants, M/s TSI Yatra Pvt. Ltd. assail the impugned order No. DZU/Adj./TSIYPL/70/2015 dated 03.08.2017, passed by Ld. Additional Director General (Adjudication), Directorate General of GST Intelligence (DGGI), vide which a demand of Service tax of INR 23,16,33,959, has been confirmed against the Appellant, for the period April 2010 to March 2014, under Section 73A (4) of the Finance
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Act, 1994 along with interest.

2. Brief facts of the case care that the appellants are a company established under the provisions of Companies Act, 2013; they are engaged, *inter alia,* in the business of booking of air tickets for various domestic and international airlines through their branch offices; branch offices and the head office of the Appellant were separately registered with the jurisdictional service tax Commissionerates; appellant obtained centralized registration number at its head office with effect from April 1, 2013. On the basis of information received and investigations conducted, the officers of DGGI entertained an opinion that the Appellants had illegally collected an amount representing as service tax where it was not required to be collected from the sub-agent/customer of the airline under section 73A of the Finance Act, 1994; accordingly various Show Cause Notices were issued to the different branches of the appellants; vide a common impugned order as above, the proposals were confirmed.

3. Shri Arjun Raghavendra, Learned Counsel for the appellants explains the transactions involved in the provision of the Air Travel Agents Services by the appellants and submits that the nature of transaction is misunderstood both in the impugned SCN and OIO. He submits that theoretically, for accounting purposes, there are three transactions as below.

(i). Transaction 1: This transaction is between the airline (service provider) and the customer (service recipient) for the Air travel service provided by the airlines; the consideration is the ticket priceplus Service Tax, if any, paid by airline and the sub-agent/Agents are only facilitating this transaction (pass through mechanism).

(ii). Transaction 2: this transaction is between airlines (service recipient) and the agent and sub-agent (collectively acting as service providers) for the services provided in relation to the booking; consideration is the commission, inclusive of Service Tax and is the gross revenue earned by the agent/sub-agent collectively for the services provided; the Service Tax is paid to exchequer by Appellant.

(iii). Transaction 3: This transaction is between the agent and sub-agent; Commission (inclusive of service tax) received is shared between them; no service provider and service recipient relationship and it is mere revenue sharing between the agent and sub-agent.

4. Learned Counsel explains the actual money flow and tax discharge, by giving an example of the invoice, No.AI/ 13-14/B2659006 dated 26.03.2014, relied upon in the OIO, issued by the appellants to sub-agent M/s Mahabir Travel & Tours; first amount, of Rs. 4782.60 and 616.00, shown in this invoice, was for booking two international air tickets from Dacca to Kolkata; the amounts are inclusive of service tax, on the air ticket, discharged by the airline; next amount mentioned, of Rs. 82.18 (IATA discount of Rs. 33.67 and Performance Linked Bonus of Rs. 48.51), was the commission that M/s Mahabir Travel & Tours (as sub-agent) was withholding; this amount is subtracted in the invoice; on this commission of Rs.82.18, Service Tax of Rs. 10 (@ 12,36%) stands paid by the appellant on receipt of the commission from the airline. He submits that theoretically, the sub-agent was to receive the share of their commission from the agent;

however, as per the industry practice, the sub-agent, who collects the money from Customers, withholds the amount that they were entitled to receive from the airlines. He submits that theoretically the amount was supposed to flow form the appellants to the subagent; it is to be noted that the sub-agent pays not only his portion of service Tax but TDS of Rs. 8.22 to the appellant; the portion of the Service Tax component sharable by the sub-agent by the agent is shown in the same invoice to account for the sharing of the tax too. Hence this amount is added in the invoice. He submits that the Service Tax shared between the agent and sub-agent gets shown on the invoice; no extra service tax is collected from sub-agent; there is no amount representing as service tax that is actually “collected and retained” by the appellants.

5. Learned Counsel submits that the invoice serves to capture two sets of transactions as a consolidated account adjustment document; one, the booking of the air ticket for which the entire booking amount (inclusive of service tax) is to be transferred from the sub-agent to the airline via the Appellant; two, the commission that the sub-agent is entitled for making this booking has to be retained since in effect the sub-agent has to receive such commission from the airline; the service tax indicated in this invoice is the service tax liability of the sub-agent for the services provided to the airline; as part of the contractual agreement, the liability to pay this ST to the exchequer is shifted to the Appellant; since the actual legal incidence is on the sub-agent, the accounting entry is made and adjusted so that the liability stands covered; mere mechanism of payment to the exchequer is

shifted to the Appellant; therefore, in practice only the actual commission (net of service tax) is withheld by the sub-agent and no service tax is actually collected by the Appellant; hence, the impugned order is erroneous on the question of facts and merits to be set aside in its entirety.

6. Learned Counsel takes us through the provisions of Section 73A and submits that the impugned order while confirming the demand under section 73A (4) holds that there is violation of section 73A (2) by the Appellant; any such violation can be alleged only if three questions i.e. (i). Whether any amount was collected as representing service tax that was not required to be collected? (ii). Whether such amount collected was retained? and (iii). If not retained, whether it was not deposited with the exchequer? can be answered in the affirmative. In respect of question No.(i), learned counsel submits that no amount was actually collected as representing service tax from the sub-agent that was not required to be collected; the amount shown as service tax in the invoice is to account for the sub-agent’s share of service tax. Learned counsel answers the second question stating that submits that no such amount was collected and hence there does not arise any question of retaining the same. As regards the third question, he submits that whatever is the amount of service tax that was collected from the airline, it was deposited in the exchequer; the accounting entry shown in the invoice also corresponds to such amount that was already paid into the exchequer and not any additional amount. He submits that the impugned order wrongly answers question (i) in the affirmative and ignores questions (ii) and

(iii). It confirms the demand basis its wrong conclusion in answering the question (i).

7. Learned Counsel submits also that the adjudicating authority relied on the fact that two representative invoices, i.e. No. ZXJ8XF dated 17.09.2011 and No. AI/13-14/B2659006 dated 26.03.2014, include a service tax component, and concluded that the Appellant has deposited the service tax which they have collected from the airlines by considering the commission, received from the airlines, as inclusive of service tax and that the service tax was separately collected by the Appellant from the customer/sub-agent, and this was not deposited with the government. He submits that while the first conclusion is true the second conclusion is factually wrong; SCN issued due to a misunderstanding of the business model of the Appellant was confirmed by the Adjudicating Authority, who has also failed to appreciate the actual nature of the transaction involved.

8. Learned Counsel submits further that it is to be appreciated that both the Agent and sub-agent collectively provide the service to the airline and therefore the gross commission received from the airline is nothing but the revenue earned by them collectively and shared between them respectively, as mutually agreed upon; once this revenue is earned, they have the legal obligation to discharge service tax as service providers; this legal obligation is by virtue of section 68(1) of the Finance Act, 1994 which mandates payment of service tax by the service provider; however, there is nothing in the Act which says how the legal obligation to pay service tax shall be carried out if a service is collectively provided by more than one person, leaving the

service providers with two options i.e. either one of the service providers pays the service tax on the entire revenue to the exchequer and then internally share the revenue (inclusive of the service tax amount paid) or both the service providers pay service tax separately to the exchequer in proportion to the revenue that they share. Learned Counsel submits that in the instant matter, the Appellant pays the service tax on the entire commission to the exchequer and then internally the revenue is shared (inclusive of service tax which is already paid); the impugned order has failed to appreciate this revenue sharing mechanism, between the agent and the sub-agent, is inclusive of the service tax already paid to the exchequer; it is purely for accounting purposes, the agent and the sub-agent issue invoices to one another in which the service tax component that is part of the revenue sharing also stands reflected; the service tax component has been wrongly construed in the impugned order as collection of an amount representing as service tax. He submits that it is evident from the explanation above that there is no amount illegally collected as representing service tax as confirmed in the order from the sub-agent by the agent in so far as the sharing of commission between the two of them is concerned; there was no service tax liability as far as the revenue sharing is concerned and there is no tax collected on such sharing; therefore, the matter does not call for section 73A of the Finance Act, 1994 which is relevant only when an amount representing as service tax is collected where it was not required to be collected.

9. Learned Counsel submits moreover that in the instant matter, it is only the revenue sharing that is given effect by issuing the invoices; since the revenue is inclusive of service tax, for accounting clarity it is shown as "flight service tax" on the invoices; the same has been wrongly construed by the department as collection of service tax; the entire service tax liability on the commission received from the airline stands discharged. There is no double collection of service tax by the Air Travel Agent; it is just a question of paying service tax on behalf of the sub-agent; the cash flow between the Appellant and the sub-agent involves sharing of the consideration post the discharge of service tax; it does not involve any collection of service tax as alleged in the notice and upheld in the impugned order.

10. Learned Counsel submits in addition that it should also be noted that the impugned order or the notice at no point claim that the service tax liability discharged on the commission received by the airlines is less than the amount demanded in the order indicating clearly that the amount that is being demanded is actually part of the amount that is paid as service tax by the agent; however, the impugned order has failed to appreciate the nuance of these three transactions; learned Adjudicating Authority is of the wrong notion that service tax has been collected illegally by the Appellant from the sub-agent; there is no collection or non-deposit of service tax; the service tax has been paid by the Appellant and then the revenue sharing with the sub-agent has been affected through accounting adjustment in the invoices by the Appellant in line with the agreement between the Appellant and the sub-agent.

11. Learned Counsel submits that the impugned order fails to appreciate that though theoretically there are transactions where consideration flows from agents to airlines (for air ticket) and then from airline to agents (for commission), in practice the actual flow of money between the agent and the sub-agent is only in one direction since only the net value flows to the agent from the sub-agent; the impugned order fails to appreciate that the actual revenue sharing between the agent and the sub-agent does not happen by the agent transferring the share of the commission to the sub-agent; but it happens by the sub-agent withholding their share of the commission and passing only net of the value of air ticket price to the agent; therefore, the invoice between the agent and the sub-agent comprises both transaction 1 (flow of air ticket price) and transaction 3 (sharing of revenue between the agent and sub-agent) given the understanding that transaction 2 has occurred between the airline and the agent.

12. Learned Counsel submits that in the instant case, the Appellant has discharged the ST liability on the commission received before sharing the commission with the sub-agents; this position of one service provider paying the entire service tax liability when there are more than one service providers collectively providing a service is not in violation of any provisions of the Finance Act, 1994; in the case of Rashtriya Ispat Nigam Ltd. vs. Dewan Chand Ram Saran 2012 (26) S.T.R. 289 (S.C.) the Hon’ble Apex Court has upheld that liability in indirect tax can be transferred. Further, this ratio of the Apex Court has been approvingly adopted – Delhi Transport Corporation vs

Commissioner of Service Tax [2015 (38) STR 673 (Del)] which was further maintained by the Hon'ble Supreme Court [2016 (45) S.T.R. J53 (S.C.)] and Jitendra Singh Bagga vs Chhattisgarh State Civil Supplies Corporation Ltd [2015 (40) STR 69 (Chhattisgarh)].

13. Learned counsel further submits that the notice clearly communicates the fact that the service tax has been paid by the Appellant on the entire commission received by them from the airlines by treating such commission as cum-duty; the only allegation in the notice is that the Appellant has collected and retained service tax from the sub-agent also in addition to the tax component which was anyway collected from the airlines; the impugned order goes beyond the scope of the notice to suggest that though the Service Tax was paid on the commission by treating it as cum-duty, if the value was not to be treated as cum-duty, then the liability would have been higher. He submits that this observation that the commission is not to be treated as inclusive of Service Tax is a wrong observation because nowhere in the notice has it been contended that the value is not cum-duty; notwithstanding that fact, even if it be assumed for a moment that the value of commission is not cum-duty, in that case, the demand for duty, if any that was short paid, had to be made under section 73 or 74 of the Finance Act, 1994 as applicable and subjecting the cum-duty value to tax on the entire cum-duty value is equivalent to imposing tax on tax.

14. Learned counsel submits further that the Service Tax liability has already been discharged in the instant matter by the Appellant before

the commission earned is shared with the sub-agents; Therefore, to again demand service tax on the same transaction is improper and amounts to asking for payment of Service Tax twice; the Appellant as a service provider has collected the tax from the airline who is the service recipient and has deposited such tax to the Department; however, while transferring the share of the commission to the sub-agents, the Appellant has transferred their share post tax since the tax stands paid by the Appellant; therefore, the Appellant has not collected any tax whatsoever from the sub-agents. He submits that there is no demand under Section 73A in the instant matter; the service tax collected from the airline as part of the commission is legally proper since the airline is the service recipient; the Appellant and its sub-agents are the service providers; once such service tax is collected, it has to be deposited with the exchequer which has been complied by the Appellant; since the service tax deposited by the Appellant included the service tax share of the sub-agent, the accounting entries in the invoice indicate the sharing of the amount equivalent to the service tax portion to the sub-agent; therefore, section 73A is not applicable. He submits that when the demand itself is unsustainable, the demand of interest does not stand.

15. Learned Authorized Representative for the Department reiterates the findings of the OIO and rebuts the submissions of the Learned Counsel for the appellants. On the appellant's contention that Section 73(A)(2) of the Finance Act, 1994 does not apply in the present case, he takes us through the provisions of Section 73A and submits that contention of the appellant, that since they are a registered service

tax and have been discharging Service Tax on the services rendered by them therefore, the proceedings against them can only be initiated under sub-section (1) of Section 73A and not under sub-section (2) of Section 73A, is not sustainable and reliance placed on Hon'ble CESTAT, Mumbai Final Order No. A/93128/16/STB dated 13.04.2016 in the case of HDFC Standard Life Insurance Company Limited, is not helpful; it is apparent that the sub-section (1) of Section 73(A), deals with the cases where the amount collected is in excess of the Service Tax assessed or determined and paid on any taxable service under the provisions of Finance Act, 1994; it covers those cases where an assessee collected an excess amount of Service Tax, to the amount which were required to be collected; on the other hand, sub-section (2) deals with those cases where the amount was not required to be collected but where it was illegally collected it from their customers, representing it Service Tax; the findings of the adjudicating authority are clear on the issue. He submits that reliance on the case of HDFC Standard Life Insurance Co. Ltd is misplaced as the case was about service tax paid under reverse charge mechanism on commission paid to the agents and recovered part of service tax from the agents who are actually the service providers in the case.

16. Learned Authorized Representative submits on the contention of the appellant that the proceedings are based on incorrect perception of the business of the appellant which was just cash flow adjustment/accounting and that the law does not debar for transferring/shifting tax incidence of tax liability basis the legally entered contractual terms, that during the period 2010-11 to 2011-12,

the appellants were discharging their Service Tax liability by exercising the option available under Rule 6(7) of the Service Tax Rules, 1994and with effect from 01.04.2012, they have been paying Service Tax under Commission Model.

16.1. He submits that all the airlines, to whom M/s TSIYPL were providing their services, were members of IATA who entered into an agreement titled "Passenger Sales Agency Agreement" with the appellants; in pursuance of the above agreement with airlines (IATA), the appellants were providing their services for the sale of air transportation services to be provided by the airlines; All monies received by the appellants from the customers on behalf of the airlines, including the commission due to them, were property of the airlines held by them in trust for the airlines as per Billing & Settlement Plan (BSP) of IATA; the appellants were not issuing any invoices to the airlines for the services, provided to them; the agents after retaining their consideration/commission, remit the balance amounts to the respective airlines; the commission received/retained by the appellants from the airlines was the full consideration for the services provided by the appellants to the airlines; Since, the commission received by the appellants from the airlines was inclusive of the applicable Service Tax, the appellants were discharging their Service Tax liability after calculating the assessable value of the services by reverse calculation from the gross consideration received by them; Shri Sandeep Garg, General Manager of the appellants, in his statement dated 12.10.2015said that the agreement also indicates that commission and incentives paid to M/s TSIYPL were inclusive of

Service Tax.

16.2. He submits that the majority of the air tickets booked by the appellants were booked through various sub travel agents, who were providing their services to the appellants in relation to the booking of tickets of the airlines and in lieu thereof, the appellants were paying them consideration in the form of commission at agreed percentage; the consideration received by the appellants from the airlines was inclusive of Service Tax; however, the appellants were also collecting an amount as representing Service Tax from the sub-agents & the other customers of the air transportation services of the airlines, but were not depositing the same to the credit of the Government.

16.3. He submits that the appellants were paying Service Tax under Basic Fare Model and Commission Model. Explaining with the help of sample invoices, he submits that while working under Basic Fare Model, the appellants collect an amount (as representing Service Tax) from the sub-agents/customers of airlines, which was equal to the amount of Service Tax (calculated on the Base Fare of the airfare) payable by them on the Air Travel Agent's services provided by them to airlines; the said amount was shown as Service Tax in the invoices issued by the appellants to the sub-agents/ customers for the tickets; for example in invoice No. ZXJ8XF dated 17.09.2011, issued by the New Delhi Branch Office of M/s TSIYPL, to the customer Mr. Alain Passagne, the appellants paid Service Tax of Rs. 342/-@ 1.236% on Rs. 27,630/- (Base Fare of the ticket) and they collected an equivalent amount from the customer.

16.4. He submits that the appellants, while working under the commission model, were to pay Service Tax at full rate on the commission received by them from the airlines; they paid the same by treating the commission received from the airlines as inclusive of Service Tax; the appellants also collected an amount as representing Service Tax from the sub-agents/customers, which was calculated at the applicable rate of Service Tax on the commission paid to the sub-agent or discount given to other customers and the amount so collected was also shown as Service Tax in the invoices issued by the appellants; for example, in Invoice No. Al/13-14/B2659006 dated 26.03.2014, issued, by the Head Office of the appellants, to M/s Mahabir Travel & Tours, the appellants paid Service Tax on the taxable value arrived at by reverse calculation, from the gross commission received by them from the airlines; the tickets were booked through the sub-agent M/s Mahabir Travel & Tours; the appellants were to pay commission of Rs. 82.18/- (Rs. 33.67/-+ Rs. 48.51/) to the sub-agent; the appellants deducted the commission amount of Rs. 82.18/- from the amount of Rs. 5405/- to be received by them from the sub-agent; in addition, they included Service Tax of Rs.10/- calculated @ 12.36% on Rs. 82.18/ and thus an amount of Rs. 5333/- was received by M/s TSIYPL from the above sub-agent.

16.5. He submits that Shri Sandeep Garg, General Manager of the appellants, in his statement dated 12.10.2015, explained that they had collected an amount as representing Service Tax from all customers/sub-agents at the rates specified in Rule 6(7) of the service

Tax Rules, 1994, up to the period 31.03.2012; thereafter, they collected the said amount at the prescribed rate of Service Tax on the value of commission passed on to sub-agents; the branches of the appellants were separately registered with the jurisdictional Service Tax authorities up to the period 31.03.2013; they had been collecting Service Tax from the sub-agents & customers. Learned AR submits that the appellants were providing services to the airlines and receiving consideration for the same from them in the form of commission/PLB; The commission/PLB received by them from the airlines was inclusive of Service Tax; the same was deposited, treating the net commission amount as inclusive of Service Tax, with the Government exchequer; they also collected an amount as representing Service Tax from the sub-agents/ clients; most of the customers of the appellants were travel agents, who further booked the air tickets provided to them by M/s TSIYPL; therefore, the contention of the appellant that proceedings are based upon an incorrect perception of the business model/ arrangement between Appellant and the other travel agents is only a cash flow adjustment/accounting method, does not hold good.

17. Learned Authorized Representative further submits that the appellants contention that there is no bar to recover such service tax contractually, is not sustainable; the intention of law is clear; Section 73A of the Act stipulates that any service tax collected in excess/or which is not required to be collected is recoverable; therefore, the adjudicating authority has correctly held so and distinguished the case law relied upon by the appellants; Hon'ble Supreme Court, in the case

of Dilip Kumar & Company, held that the Taxing Statute has to be interpreted strictly, without looking into its consequences. He submits that once statutory provisions are there, no tribunal can go beyond the statutory provisions, as held by Hon'ble Apex Court in the case of UOI Vs Willo wood Chemicals Pvt Ltd. -2022 (60) GSTL 3 (SC); Larger Bench of this Tribunal in case of Veer Overseas-2015 (18) GSTL 59 (Tr. LB) has also held that CESTAT being the creature of statute itself cannot go beyond the statutory provisions.

18. Learned Authorized Representative submits also that the appellant's contention that even if it is assumed that the appellant has collected service tax from sub agents/customers, still 73A(2) is not applicable as the entire amount stands paid to the Central Government, is not sustainable; the adjudicating authority rightly held that the appellant have deposited only that amount of Service Tax, which they have collected from the airlines by considering the commission, received from the airlines, as inclusive of Service Tax and not the service tax recovered from sub-agents; Learned Commissioner distinguished the case laws relied upon by the appellants.

19. Learned Authorized Representative submits in addition that the appellant has contention that merely because Service Tax has been discharged by them by treating the commission received from the airlines as inclusive of Service Tax does not mean that they have recovered Service Tax from the airlines; they were contractually

eligible to recover the Service Tax from the sub-agents; there was no double recovery of Service Tax in this case; there was no loss of revenue to the government as the entire Service Tax on the total commission received from the airlines has been deposited by them at the very first leg of the transaction is factually incorrect as rightly held by the Adjudicating Authority, who has also correctly distinguished the cases relied upon by them and has given elaborate findings.

20. Learned Authorized Representative submits in rebuttal to the contention that Service tax cannot be demanded twice on the same transaction that the case of Department is not demand of any service tax on the commission received by the sub agents but in respect of recovery made by them in the name of service tax from its sub agents/customers, under the provisions of Section 73 (A)(2) of the Finance Act; department has not demanded any Service Tax on the commission received by the sub-agents. He submits that the adjudicating authority held that the appellant were the agents of the airlines and received commission from them for booking of air ticket; they paid Service Tax on it by treating it as cum-tax; the amount of Service tax deposited by them was collected by them from the airlines. The appellant separately collected an amount representing as Service Tax from the sub-agents/customers on the commission they shared with sub-agents and retained it with them; such retention was illegal; the judgments relied upon by the appellant pertains to the double payment of Service tax on the same transaction, which is not the issue in the instant case; hence, are not relevant.

21. Learned Authorized Representative submits on the claim of revenue neutrality that as held by the Adjudicating Authority the said contention of the appellant is untenable as no demand has been made from the sub-agents and therefore, the argument on the availability of CENVAT credit is misplaced; Apex Court decision in the case of Northern Operating Systems Pvt. Ltd. that the incidence of taxation, is entirely removed from whether, when and to what extent, Parliament chooses to recover the amount; Larger Bench of the Tribunal also held in the case of Melange Developers Pvt. Ltd. that A sub-contractor has to discharge the Service Tax liability when he renders taxable service. The contractor can, as noticed above, take credit in the manner provided for in the CENVAT Credit Rules of 2004.

22. Rebutting the appellants plea that no interest is payable, Learned authorised Representative, takes us through the provisions of Section 73 B and submits that the provisions are very clear and unambiguous on the issue; the person liable to pay the amount determined under sub-section (4) of section 73A, shall also be liable to pay interest at applicable rate. Learned authorised Representative submits on the issue of time bar that Section 73A deals with cases where an amount representing as Service Tax has been collected and the where no such Service Tax was actually leviable under the Act; time limit is only applicable to demands under Section 73; the present issue is recovery of an amount representing as Service Tax under Section 73A; the machinery to recover the amount is provided in sub-section

3 of Section 73A and no time limit is specified for demanding the amount in Section 73A; Hon'ble Apex court in the case of Raghuvar (India) Ltd 2000 (118) ELT 311 (S.C.) held that time limit of 1 year is applicable only in respect of demand under Section 11A; same view was taken by Hon'ble CESTAT in the cases of Utkal Asbestos 2000 (120) ELT 235 (CEGAT) and Tisco v. CCE 2001 (132) ELT 198; further, CESTAT held in the case of Vimal Moulders (I) Ltd 2004 (164) ELT 302 (Tri. Del) that no time limit prescribed in Section 11D of Central Excise Act, 1994; Section 11D of Central Excise Act, 1994 is *parimateria* with Section 73A of the Finance Act,1994.

23. Heard both sides and perused the records of the case. Brief issue to be decided in the case is Whether the amount collected by the appellant from the sub-agents/customers, representing as Service Tax was illegal and is liable to deposit it to the credit of the Central Government under the provisions of Section 73A(2) of the Finance Act 1994 or not ?

24. We find that it would be beneficial to have a look at the provisions of Section 73A. It reads as under.

> SECTION [73A. Service tax collected from any person to be deposited with Central Government**.** —
>
> (1) Any person who is liable to pay service tax under the provisions of this Chapter or the rules made thereunder, and has collected any amount in excess of the service tax assessed or determined and paid on any taxable service under the provisions of this Chapter or the rules made thereunder from the recipient of taxable service in any manner as representing service tax, shall forthwith pay the amount so collected to the credit of the Central Government.

> **(2)** Where any person who has collected any amount, which is not required to be collected, from any other person, in any manner as representing service tax, such person shall forthwith pay the amount so collected to the credit of the Central Government.
>
> (3) Where any amount is required to be paid to the credit of the Central Government under sub-section (1) or sub-section (2) and the same has not been so paid, the Central Excise Officer shall serve, on the person liable to pay such amount, a notice requiring him to show cause why the said amount, as specified in the notice, should not be paid by him to the credit of the Central Government.
>
> (4) The Central Excise Officer shall, after considering the representation, if any, made by the person on whom the notice is served under sub-section (3), determine the amount due from such person, not being in excess of the amount specified in the notice, and thereupon such person shall pay the amount so determined.
>
> (5) The amount paid to the credit of the Central Government under sub-section (1) or sub-section (2) or sub-section (4), shall be adjusted against the service tax payable by the person on finalisation of assessment or any other proceeding for determination of service tax relating to the taxable service referred to in sub-section (1).
>
> (6) Where any surplus amount is left after the adjustment under sub-section (5), such amount shall either be credited to the Consumer Welfare Fund referred to in section 12C of the Central Excise Act, 1944 (1 of 1944) or, as the case may be, refunded to the person who has borne the incidence of such amount, in accordance with the provisions of section 11B of the said Act and such person may make an application under that section in such cases within six months from the date of the public notice to be issued by the Central Excise Officer for the refund of such surplus amount.]

25. The appellants are engaged in providing the Air Travel Agent's services to various airlines, who are members of IATA; on behalf of the member airlines, IATA had entered into an agreement titled "Passenger Sales Agency Agreement" with the appellants to act as

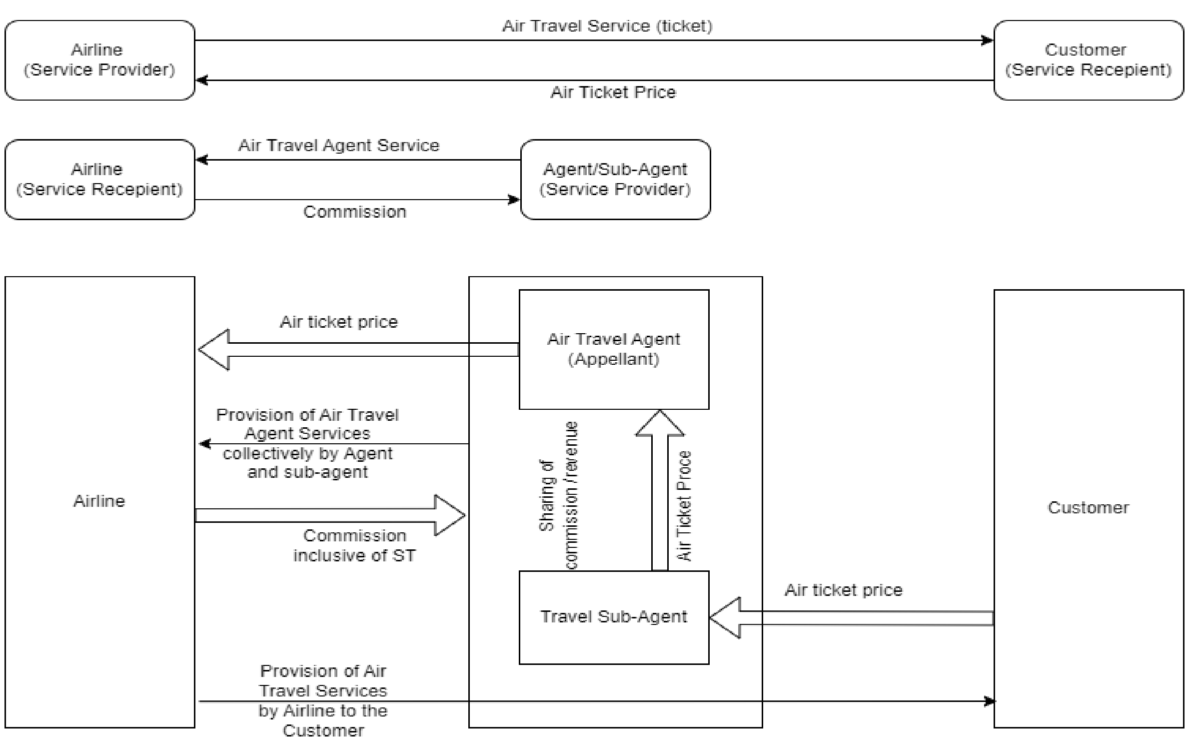
their agent to provide their services for the sale of air transportation services provided by the member airlines; passengers intending to book air tickets for their travel may approach the appellant (either directly or through their agents) for booking of the air ticket; depending on the requirement, the Appellant may advise the customers/other agents about the flight timings, seat availability etc; the Appellant also collect the gross air fare from the passengers either directly or through other agents and remits it to the airlines; as a consideration for services provided, the Appellant receives commission from the airlines and discharge their service tax liability under the category of "Air Travel Agent's" Services under Section 65(4) read with Section 65(105)(1) of the Finance Act 1994. The appellants had two options for the purposes of payment of service tax; During the period 2010-11 to 2011-12, the appellants were discharging their Service Tax liability by exercising the option available under Rule 6(7) of the Service Tax Rules, 1994 (i.e. Basic Fare Model) and with effect from 01.04.2012, they have been paying Service Tax under Commission Model.

26. In the normal course, the appellants would have received the payment from the customers and would have remitted to the Airlines who in turn would have paid commission to the appellants, who would have paid service Tax on the amount received as commission. As the appellants have availed the services of sub-agents, the appellants were required to pay a portion of the commission to the sub-agents. as per the industry practice, the sub-agent collects the money from

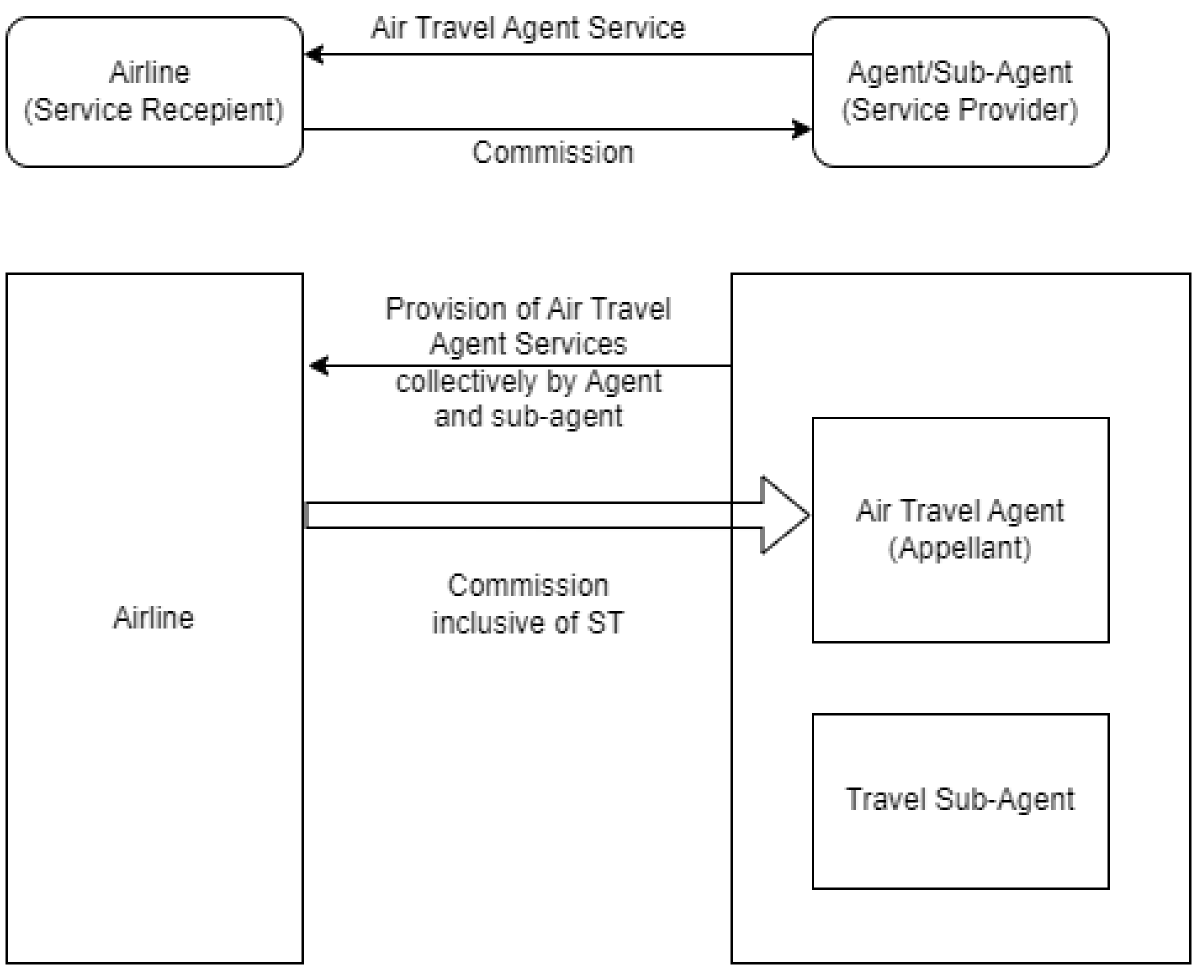
Customers, withholds the amount that they were entitled to receive, though theoretically the amount was supposed to flow from the appellants to the subagent. The appellants who discharge service tax on the entire commission received from airlines, shares the commission with his sub agents' part of their commission; Since the agent is sharing the commission with the sub-agent, they are also collecting the portion of the service tax that is payable by the sub-agent. Revenue wants to interpret this transaction to be the service tax collected by the appellants from the sub-agent and as the service tax stands already paid, on receipt of the commission from Airlines, the appellants are again collecting the same from the sub-agents and are not depositing the same with exchequer.

27. Learned counsel for the appellants presents thematic diagrams of the theoretical as well as practical transactions to make it understand in a better perspective as below.

Theoretical Transaction.

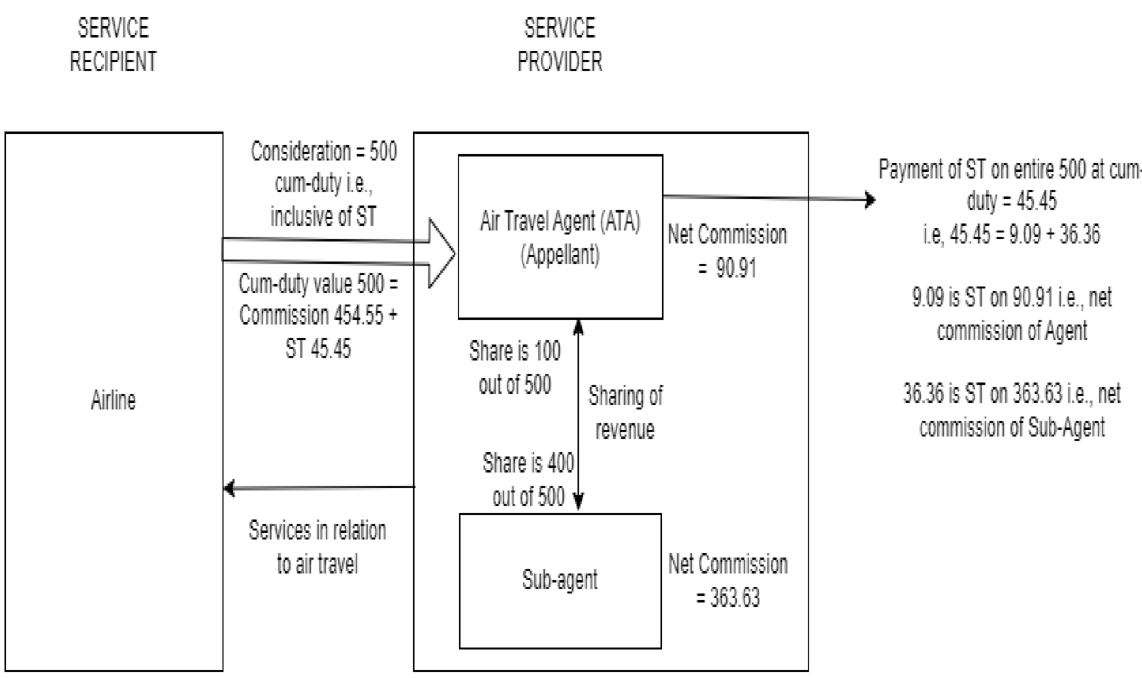


Actual Transaction



28. Learned Counsel submits that the transaction under question is the sharing of revenue between the Agent and the sub-agent after the agent has received the revenue (commission inclusive of service tax) from the airlines; such gross commission received is cum-duty i.e., it is inclusive of the service tax component. Learned counsel explains the revenue sharing, payment of Tax etc, assuming that such gross commission is Rs.500, in the following thematic diagram. He explains that if service tax payable, on cum-duty basis on the commission received from Airlines, Rs. 45.45, the appellant pays entire tax of Rs.

45.45 on the transaction and recovers Rs 36.36 representing the Tax payable by the sub agent; He submits that it should also be born in mind that though the appellant received Rs 500 from Airlines as Commission and paid Service tax of Rs 45.45 on the same, only Rs 9.09 is payable by them as they received only Rs 90.91 Rs as commission; Rs 363.63 being transferred to the sub-agent, Tax of Rs 36.06 is recovered from the sub-agent.



29. We find that learned Counsel, refers to an actual invoice, No.AI/ 13-14/B2659006 dated 26.03.2014, issued by the appellants to sub-agent M/s Mahabir Travel & Tours and submits that first amount, of Rs. 4782.60 and 616.00, shown in this invoice, was for booking two international air tickets from Dacca to Kolkata; the amounts are inclusive of service tax, on the air ticket, discharged by the airline; next amount mentioned, of Rs. 82.18 (IATA discount of Rs. 33.67 and Performance Linked Bonus of Rs. 48.51), was the commission that M/s

Mahabir Travel & Tours (as sub-agent) was withholding; this amount is subtracted in the invoice; on this commission of Rs.82.18, Service Tax of Rs. 10 (@ 12,36%) stands paid by the appellant on receipt of the commission from the airline. We find that the sub-agent pays not only his portion of service Tax but TDS of Rs. 8.22 to the appellant; the portion of the Service Tax component sharable by the sub-agent by the agent is shown in the same invoice to account for the sharing of the tax too. Hence this amount is added in the invoice.

30. We find that these examples given by the learned counsel for the appellants show that Service Tax liability is shared between the agent and sub-agent; the same is reflected on the invoice; no extra service tax is collected from sub-agent. It is apparent that the invoice serves to capture set of multiple transactions. **Firstly,** transaction is the amount payable by the customer to the airlines, including the service tax. **Secondly,** the payment of commission to the agent by airlines; **thirdly,** payment of service tax by the agent and/or sub-agent and **lastly,** the sharing of the commission by between the agent and sub-agent. It appears that instead of transferring the entire money received from the customers to the Airlines, the sub-agent transfers the money after retaining his part of the commission and transfers the balance money. Airlines, pay commission to the Appellant Agent; appellant pays service tax on the entire commission; issues invoice to the subagents showing the share of his commission already retained and the service tax portion which he has to bear for the same.

31. We find that in the entire transaction there is nothing to indicate that an amount representing as service tax that is collected and retained by the appellants. We find that due to an understanding between the appellant and the sub-agent, the liability of the the sub-agentto pay this Service Tax to the exchequer, is shifted to the Appellant and an accounting entry is made as the liability stands discharged at the hands of the Appellant. We find that effectively, the service tax on the portion of the amount of commission paid to the sub-agent is discharged first by the appellant and thereafter recovered. His portion of the commission (net of service tax) is already withheld by the sub-agent. Therefore, it cannot be said that the appellants have recovered service Tax from their agents and have not paid it. It can also be seen that the appellants have also recovered the TDS amount deducted by the Airlines, corresponding to the amount of commission payable to the sub-agent. It is not the case of the department that the Income Tax authorities have also viewed the transactions similarly and have issued a Notice to the appellants to recover the said TDS. The only plausible conclusion is that what was recovered was the service Tax already paid by the appellants on the commission actually retained by the sub-agent; no service tax is actually collected by the Appellant which is payable or recoverable under Section 73A.

32. We find that the appellants submitted a Chartered Accountant certificate, which was issued after verifying the amounts for the FY

2013-14, pertaining to the transactions in question, based on the Appellant's book of audited books of accounts, ST-3 returns, TDS returns. As per the certificate, as explained by the Counsel, total commission received by M/s TSI Yatra Pvt Ltd from various airlines during the FY 13-14, for the services collectively provided by M/s TSI Yatra Pvt Ltd and its sub-agents is **Rs 64,78,19,523/-;** Service tax liability, duly discharged by M/s TSI Yatra Pvt Ltd, jointly on behalf of themselves and the sub-agents on such the commission received was Rs **8,00,70,493 (12.36% of 64,78,19,523);** actual ST paid during the FY 13-14 amounts to 8,03,35,707 (since it includes ST on advances received) as evidenced from the Appellant's ST-3 Returns; Share of the commission accruing to M/s TSI Yatra Pvt Ltd out of the total commission received from the airlines**Rs 18,36,06,074** (out of total commission of Rs 64,78,19,523/-); Share of the commission accruing to various sub-agents of M/s TSI Yatra Pvt Ltd out of the total commission received from the airlines is **Rs 46,42,13,449** (out of Rs 64,78,19,523/-; Applicable TDS withheld by M/s TSI Yatra Pvt Ltd on (4) as evidenced from the TDS ledger is Rs 4,46,16,336/-; **Service tax liability of** the sub-agents **is Rs 5,73,76,782/- and amount actually recovered by the appellants** from sub-agents **is Rs 5,68,49,738**

33. We find that the learned Counsel for the appellants submits, in addition to the macro level findings as above, an analysis of a sample set of documents, precisely the invoice No. AI/13-14/B2659006 dated 26.03.2014, which the agent M/s TSIYPL, has issued to sub-agent M/s

Mahabir Travel & Tours, and the one which the impugned show cause notice refers to. We find that the Chartered Accountant certified the truthfulness of the transaction and the averments of the appellants, after going through the said invoice and corresponding sale & purchase vouchers. It is certified that the first transaction contained in this invoice is for booking two international air tickets from Dacca to Kolkata for total flight ticket prices of Rs. 4782.00 and 615.00 (totaling INR 5397 as per the Sales Voucher); the second transaction contained in this invoice is the commission that M/s Mahabir Travel & Tours (as sub-agent) is withholding i.e. Rs. 82.18 (IATA discount of Rs. 33.67 and PLB (Performance Linked Bonus) of Rs. 48.51); on this commission of Rs.82.18, ST @ 12,36% is Rs. 10 which stands paid by M/s TSIYPL to the govt (on behalf of the sub-agent) upon receiving the commission from the airlines; this Service Tax component paid on behalf of the sub-agent by the agent is now shown in the same invoice to account for the sharing of the tax component; hence this amount is added in the invoice.

34. We find that the Service tax shared between the agent and sub-agent gets shown on the invoice; it is not actually extra service tax that is collected from sub-agent; as such, there is no amount representing as service tax that is collected and retainedby the Appellant. We are of the considered opinion that the Service Tax component is shown on the invoice for the sake of clarity in accounting between the agent and sub-agent. The actual tax liability is

already paid by the agent when it receives the commission from the airline.

35. Learned counsel for the appellants submits that the impugned order travels beyond the points alleged in the Show Cause Notice. On going through the impugned Show Cause Notice and the orders, we find that the Revenue is not clear as to their allegations. Show Cause notice asserts that the commission received by the appellants from the Airlines is Cum-Duty in nature.

> 12. --------M/s TSIYPL discharged their Service Tax liability on the consideration received by them from airlines, after computing the assessable value by reverse calculation method, i.e., by treating the consideration as inclusive of Service Tax.
> 18. ----------The commission/PLB received by M/s TSIYPL from the airlines was inclusive of all taxes and M/s TSIYPL also treated the commission or transaction fee received by them from the airlines as inclusive of Service Tax and paid Service Tax on the same by arriving at the taxable value by reverse calculation method.

36. Learned Commissioner However, finds that though the Service Tax was paid on the commission by treating it as cum-duty, if the value was not to be treated as cum-duty, then the liability would have been higher.

> A-4(ii) The notice have contended that merely because Service Tax has been discharged by them by treating the commission received from the airlines as inclusive of Service Tax does not mean that they have recovered Service Tax from the airlines. I find that the argument put forth by the Noticee is irrelevant as they have discharged their liability by treating the commission as inclusive of Service Tax. Had they not treated the commission as inclusive of Service Tax then their liability would have increased.

37. We find that the Show Cause Notice alleges that the *appellants also illegally collected an amount as representing Service Tax from the sub-agents by wrongly impressing upon them that they (M/s TSIYPL) were providing services to the sub-agents and therefore, they (M/s TSIYPL) were entitled to collect Service Tax from them; M/s TSIYPL did not deposit the amount collected by them as representing Service Tax, with the Government exchequer. During investigations, M/s TSIYPL failed to provide any legal justifications/statutory authority under which Service Tax was collected by them from their sub-agents/customers of the airlines.* We do not any evidence in the Notice to allege that the appellants impressed upon their sub-agents that they were providing certain services and therefore, are eligible to collect some service tax from them.

38. However, the impugned Show Cause Notice alleges and the OIO affirms that that the appellants have collected Service Tax from their sub-agents and have not deposited to the exchequer and therefore, such amount representing the service tax is recoverable under the provisions of Section 73A; Both the impugned order and the OIO do not specify as to what service was being rendered by the appellants to their sub-agents. In view of our discussion above and the Chartered Accountants Certificate, it is clear that the appellants have not collected any Service Tax form the sub-agents over and above the Service Tax they have paid on receipt of the commission from the Airlines. As the sub-agents have already deducted the

commission due to them, it was necessary to them to share the tax burden too. This is a purely revenue sharing and tax burden sharing mechanism. Demanding payment of service tax from the appellants on the portion of the commission shared by them with the sub-agents, would amount to double taxation, as the Service tax on the total Commission stands discharged by the appellants as explained above.

39. It is not the case of the department that the incidence of Service Tax cannot be passed on or shared. in the case of Rashtriya Ispat Nigam Ltd Vs Dewan Chand Ram Saran 2012 (26) STR 289 (SC), the Hon’ble Apex Court held that liability in indirect tax can be transferred. Hon’ble Supreme Court held that:

> **26.** As far as the submission of shifting of tax liability is concerned, as observed in paragraph 9 of *Laghu Udyog Bharati* (supra), service tax is an indirect tax, and it is possible that it may be passed on. Therefore, an assessee can certainly enter into a contract to shift its liability of service tax. Though the appellant became the assessee due to amendment of 2000, his position is exactly the same as in respect of Sales Tax, where the seller is the assessee, and is liable to pay Sales Tax to the tax authorities, but it is open to the seller, under his contract with the buyer, to recover the Sales Tax from the buyer, and to pass on the tax burden to him. Therefore, though there is no difficulty in accepting that after the amendment of 2000 the liability to pay the service tax is on the appellant as the assessee, the liability arose out of the services rendered by the respondent to the appellant, and that too prior to this amendment when the liability was on the service provider. The provisions concerning service tax are relevant only as between the appellant as an assessee under the statute and the tax authorities. This

> statutory provision can be of no relevance to determine the rights and liabilities between the appellant and the respondent as agreed in the contract between two of them. There was nothing in law to prevent the appellant from entering into an agreement with the respondent handling contractor that the burden of any tax arising out of obligations of the respondent under the contract would be borne by the respondent.

40. Hon'ble Delhi High Court followed the above principle in Delhi Transport Corporation Vs CST 2015 (38) STR 673 (Del) upheld by 2016 (45) STR J53 (SC) and held that:

> 18. The service tax liability in Rashtriya Ispat Nigam Limited (supra) arose out of contract given out for transportation of goods. The contractor engaged had undertaken to "bear and pay all taxes, duties and other liabilities in connection with discharge of his obligation". The contractor had invoked the arbitration clause for raising a dispute as to its liability to pay service tax. The claim petition was dismissed by the arbitrator which award was challenged by a petition under Section 34 of Arbitration and Conciliation Act before a Single Judge of Bombay High Court. The Learned Judge held that insofar as the service liability is concerned, the appellant (RashtriyaIspat Nigam Limited) which had given the contract was the assessee and liable to tax. The appeal preferred against the said order on the petition was dismissed by the Division Bench of the High Court.
>
> 19. Against the backdrop of the above-noted facts in civil appeal carried to Supreme Court, it was observed as under: -
>
> "37. As far as the submission of shifting of tax liability is concerned, as observed in para 9 of Laghu Udyog Bharati v. Union of India, (1999) 6 SCC 418, service tax is an indirect tax, and it is possible that it may be passed on. Therefore, an

assessee can certainly enter into a contract to shift its liability of service tax.

38. Though the appellant became the assessee due to amendment of 2000, his position is exactly the same as in respect of Sales Tax, where the seller is the assessee, and is liable to pay Sales Tax to the tax authorities, but it is open to the seller, under his contract with the buyer, to recover the Sales Tax from the buyer, and to pass on the tax burden to him. Therefore, though there is no difficulty in accepting that after the amendment of 2000 the liability to pay the service tax is on the appellant as the assessee, the liability arose out of the services rendered by the respondent to the appellant, and that too prior to this amendment when the liability was on the service provider.

39. The provisions concerning service tax are relevant only as between the appellant as an assessee under the statute and the tax authorities. This statutory provision can be of no relevance to determine the rights and liabilities between the appellant and the respondent as agreed in the contract between two of them. There was nothing in law to prevent the appellant from entering into an agreement with the respondent handling contractor that the burden of any tax arising out of obligations of the respondent under the contract would be borne by the respondent. "

20. The above ruling of Supreme Court in the case of RashtriyaIspat Nigam Limited (supra), however, cannot detract from the fact that in terms of the statutory provisions it is the appellant which is to discharge the liability towards the Revenue on account of service tax. Undoubtedly, the service tax burden can be transferred by contractual arrangement to the other party. But, on account of such contractual arrangement, the assessee cannot ask the Revenue to recover the tax dues from a third party or wait for discharge of the liability by the assessee till it has recovered the amount from its contractors.

41. The ratio of above cases was adopted in Jitendra Singh Bagga Vs Chhattisgarh State Civil Supplies Corporation Ltd 2015 (40) STR 69 (Chhattisgarh). The unmissable take away from the ratio of the above cases is that if there is a contract between the parties, the tax burden can be shifted or shared between parties. The appellants and their sub-agents were following this pattern for years and therefore, it has to be interpreted that there was a contract between the Appellant and their sub-agents for such an arrangement. The contract could be written or oral or it can be an understanding. As long as there is no dispute raised by either of the parties, it can be implied that there is a contract. If it was the case of the Revenue that the appellants have rendered some service to their sub-agents and have received some consideration and hence are liable to pay service Tax, department was free to raise a demand on them under the other provisions and not certainly under Section 73A.

42. It is to be borne in mind that the appellants are not rendering any service to their sub-agents.it is incorrect to allege that the appellants are rendering some service to their sub agents; they are collecting service Tax from them and are not depositing the same with the exchequer. It is apparent that though the show Cause Notice stated that the appellants are rendering some service to the and they can collect service tax from the agents and the same must have been deposited with the exchequer. When the Show cause Notice could not go any further on such allegation, it has taken recourse to the provisions of Section 73A. Both the appellants and their sub-agents are rendering the 'Air Travel Agent' Service' together. It is pertinent to

note here that the legislature recognises the fact that there would be a chain of agents in the business of 'Air Travel Agency' and therefore, the law gives the option to the agents to pay service Tax on the basis of Base fare or the commission, in the pre and post negative list era. If the agents had chosen to pay Service Tax on the basis of Basic Fare, it would have entailed in payment of service tax on the basis fare by the number of agents in the chain, which does not seem to be the intent of the legislature.

43. Therefore, it has to be construed that appellants and their sub-agents are rendering the 'Air Travel Agent service. As a natural corollary, they share the commission and so, the tax burden. While alleging that the appellants have collected an amount representing service Tax form their sub-agents, Revenue has conveniently ignored the fact that the commission was also shared. It is not the case of the Revenue that tax burden cannot be shared more so, when remuneration is shared. There is no law forbidding such sharing of the tax burden when Revenue is shared. We are of the considered opinion that Revenue cannot enrich itself on the strength of procedural variations and accounting practices of the appellant.

44. We find that Principal Bench of the Tribunal in the case of Jaipuria Infrastructure Developers Pvt. Ltd. – 2014 (36) STR 696 (Tri. Del.) held that reimbursement of service tax already paid is permissible. The Bench held that:

> 9.----
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>
> As is seen from the above, the Revenue's contention is that the appellant, who has collected the amount, was required to deposit the same himself with the Revenue. We find no justification for the above stand of the department. Admittedly, the appellant is the owner of the flats, who is selling the same to its customers. The value of said flat is being recovered by the appellant from the buyer and all the taxes payable to the Government are to be collected by him from their buyers along with the cost of the flats. Whether such Service Tax collected by them from the buyers is deposited directly with the department by themselves or is deposited with the Revenue by the contractor being the job worker for the appellant is immaterial as long as Service Tax so collected is deposited. The Revenue cannot be allowed to receive Service Tax twice in respect of same construction activities, once from the contractor and the second time from the person who has collected the same. As such, we do not agree with the adjudicating authority that the appellant was required to deposit the Service Tax collected by him from his customers, once again in terms of provisions of Section 73A, even though the same stand already deposited with the Revenue, through the contractors.

45. We find that the impugned order confirms the duty demanded under the provisions of Section 73A (2). In order to conclude that there was a violation of Section 73A (2), three questions have to be satisfied i.e. (i). Whether any amount was collected as representing service tax that was not required to be collected? (ii). Whether such amount collected was retained? And (iii). If not retained, whether it was not deposited with the exchequer? We find, in view of the above discussion that no amount was actually collected as representing service tax from the sub-agent that was not required to be collected.

What the appellants collected from their sub-agents was the portion of the service Tax which was payable by the sub-agents but was paid by the appellants on receipt of the commission from Airlines. Since, the appellants have shared the Commission received from Airlines with the sub-agents, they have also shared the tax burden. There is no provision in the statute barring such sharing of tax burden. Revenue conveniently ignored the fact of sharing of remuneration, given by the Airlines, by the appellant and their sub-agents. Therefore, it was wrong to seek tax again on the sharing of Tax burden. Tax on the total remuneration was discharged. Demanding service tax again on the portion of sub-agent's commission would amount to double taxation. There was no amount, which was actually collected as representing service tax from the sub-agent that was not required to be collected. Revenue cannot enrich itself on the strength of procedural variations and accounting practices of the appellant. The amount shown as service tax in the invoice issued by the appellants is to account for the sub-agent's share of service tax. No case is made by revenue for invocation of the provisions of Section 73A.

46. We find that the Principal Bench of the Tribunal decided a case involving identical facts, in the case of M/s. Riya Travel & Tours vide Final Order NO's. 58616-58642/2024 dated25.09.2024 holding that the appellant was justified in charging service tax from the sub-agents and this service tax had been deposited by the appellant with the government. Thus, the provisions of section 73A (2) of the Finance Act would not be applicable. The case of Riya Travel and Tours was also

investigated by the Directorate General of Central Excise Intelligence, who investigated the case which culminated in the issue of impugned order against the appellants.

47. In the result, the appeal is allowed, with consequential relief, if any, as per law.

(Order pronounced in the open Court on 20/12/2024)

(S. S. GARG)
MEMBER (JUDICIAL)

(P. ANJANI KUMAR)
MEMBER (TECHNICAL)

PK