IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH AT CHENNAI
[COURT III : Division Bench B1]

Appeal Nos.: ST/5 & 6/2011

Sl. No.	Appeal No.	Appellant	Respondent
1.	ST/5/2011	The Commissioner of G.S.T. & Central Excise, Chennai South	M/s. Sanco Trans Ltd., No. 46, Moore Street, Chennai
Arising out of Order-in-Original No. 41/2010 dated 29.09.2010 passed by the Commissioner of Service Tax, Chennai			
2.	ST/6/2011	M/s. Sanco Trans Ltd., No. 46, Moore Street, Chennai	The Commissioner of G.S.T. & Central Excise, Chennai South
Arising out of Order-in-Original No. 41/2010 dated 29.09.2010 passed by the Commissioner of Service Tax, Chennai			

Appearance:-
Shri. A. Cletus, ADC (AR)
for the Appellant

Shri. V.S. Manoj, Advocate
for the Respondent
(& vice versa)

CORAM:
Hon'ble Ms. Sulekha Beevi C.S., Member (Judicial)
Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)

Date of Hearing: 29.01.2019

Date of Pronouncement: 18.02.2019

Final Order Nos. 40311-40312 / 2019

Per Bench :

The issues involved in both these appeals being connected, they are heard together and disposed of by this common order. The parties are hereinafter referred to as 'assessee' and 'Department' for the sake of convenience.

2.1 Brief facts are that the assessee is engaged in providing Storage and Warehousing Service, Custom House Agent Service, Port Service, Clearing and Forwarding Service, etc., and are registered with the Department.

2.2 During the course of audit of accounts, the following observations were made :

a) Non-payment of service tax on reimbursable expenses in respect of CHA service for the period from 18.04.2006 to 31.03.2008;
b) Non-payment of service tax on Maintenance and Repair work of containers for the period from July 2003 to March 2008;
c) Short payment of service tax on Storage and Warehousing Service for the period from April 2003 to March 2007; and
d) Non-payment of service tax on Cargo Handling Service for the period from April 2003 to March 2008.

2.3 Hence, Show Cause Notice was issued to the assessee proposing to demand the service tax of Rs. 1,06,84,435/- in respect of various amounts realized by them for the period from April 2003 to March 2008. After due process of law, the Original Authority dropped part of the demand in respect of reimbursable expenses and dropped the entire demand in respect of Cargo Handling Services. The demands in respect of Maintenance and Repair Services as well as Storage and Warehousing Services were confirmed. Aggrieved by the above confirmation of demand, the assessee has filed these appeals before the Tribunal. The Department has also come in appeal, aggrieved by the dropping of demand in respect of reimbursable expenses.

3.1.1 On behalf of the assessee, Ld. Counsel Shri. V.S. Manoj appeared and argued the matter. He submitted that the assessee is providing Custom House Agent Services along with various services. They undertook repair and maintenance of containers. The assessee engaged contractors to perform Maintenance and Repair of empty containers. Materials like paint, etc., are procured by the contractor. The contractor raises invoices on monthly basis, indicating the material cost as well as the labour cost to the assessee. The contractor discharges service tax on the labour cost and also pays sales tax/VAT on the material cost. Basing upon such invoices raised by the contractor, the assessee bills the customer with margin both on the materials and service component. The demand of service tax is raised on the amount totally collected from the customers.

3.1.2 It is not the assessee, but the contractor who performs the service of Maintenance and Repair on the containers and also discharges the service tax on Maintenance and Repair Services. The assessee having not carried out any Maintenance and Repair Service, is not liable to pay service tax under this category. The amount that is billed by the assessee for Maintenance and Repair of the containers is only a margin, which is the profit made by the assessee. This is not a consideration for the service since the service of Maintenance and Repair is performed only by the contractor, who has discharged the service tax on the said activities.

3.1.3 He adverted to a sample invoice issued by M/s. Agalya Engineering, Chennai to the assessee wherein Rs. 92,730.88/- has been raised towards container repair charges for the month of 14.07.2007. This includes material cost as well as labour cost besides sales tax and service tax. On 14.08.2007, the assessee raised bill on M/s. Goodrich Maritime P. Ltd., Chennai, towards washing and repair of empty containers, which shows an amount of Rs. 1,32,488.46/-. It is explained by the Ld. Counsel that the amount so billed by the assessee is margin of profit and not the consideration for the service since the assessee has not performed any service. Alternatively, he argued that the said amount billed by the assessee includes not only the material cost, but also sales tax/VAT as well as service tax paid by contractor. Therefore, the demand of service tax raised on the entire amount collected by the assessee from customer cannot sustain at all.

3.1.4 Further, the said amount has been subject to levy of service tax at the hands of the contractor, who has performed the service. As per Notification No. 12/2003 dated 20.06.2003, an exemption from payment of service tax is provided on the value of goods and materials sold. Once sales tax/VAT is discharged, the very same amount cannot be subject to levy of service tax since both are mutually exclusive. Ld. Counsel submitted that this issue is squarely covered by the decision of the Hon'ble Apex Court in the case of ***M/s. Safety Retreading Co. (P) Ltd. Vs. Commissioner of C.Ex., Salem - 2017 (48) S.T.R. 97 (S.C.).***

3.1.5 The Maintenance and Repair contract is a composite contract involving transfer of property in goods and hence, the same cannot be vivisected for the purpose of levy of service tax. The assessee has discharged the service tax on the labour portion for the normal period i.e., from 01.04.2006 to 31.03.2007, even though they are not liable to pay service tax.

3.1.6 It was also argued by the Ld. Counsel that extended period is not invokable since the assessee was under a *bona fide* belief that service tax is not applicable as they have not actually performed any Maintenance and Repair Service. All the details have been taken from the assessee's Books of Accounts and therefore, there is no suppression of facts.

3.2 With regard to the demand under Storage and Warehousing Services, Ld. Counsel fairly conceded that the assessee is liable to pay service tax under this category along with interest.

3.3 With regard to reimbursable expenses, Ld. Counsel submitted that the Original Authority has confirmed an amount of Rs. 1,13,954/- under this category, which the assessee is not contesting. The Original Authority had dropped the demand of Rs. 33,28,912/- under this category for the reason that these are actual expenses reimbursed by the customers. He relied on the decision in the case of ***Union of India Vs. M/s. Intercontinental Consultants and Technocrats Pvt. Ltd. – 2018 (10) G.S.T.L. 401 (S.C.)*** to argue that the said issue whether service tax is leviable on reimbursable expenses is settled by the Hon'ble Apex Court in the said decision, where the issue is held in favour of assessee.

3.4 Ld. Counsel also prayed to set aside the penalties imposed.

4.1 Ld. AR Shri. A. Cletus appeared and argued the matter on behalf of the Department. He submitted that the containers are sent to the assessee's Container Freight Station (CFS) for de-stuffing. After de-stuffing the cargo, the assessee undertakes the repair work of those containers which are damaged and needs repair, as approved by Steamer Liner. After cleaning and repair, the containers are moved back to the steamers (liners). This process involves initial survey of the containers and also estimation as to the repair work to be done. After obtaining approval of the repair works by the liner, the repair works are done. After completion of these repair works, invoices are raised by the sub-contractors along with supporting documents for payment and the assessee, in turn, raises bills on the liners. It can be seen that the assessee engages contractors to perform the work of Maintenance and Repair of the containers. Margin on the material and labour component raised by the appellant is the payment towards the services. He therefore submitted that the assessee cannot contend that they have not performed any repairing activity and it is the assessee who is liable to pay service tax.

4.2 Ld. AR gave us an example of a building under construction and stated that the contractor may himself not be carrying cement and gravel on his head personally for the construction and that this would always only be done by labourers. It does not mean that the building contractor is not the service provider for construction of the building.

4.3 With regard to reimbursable expenses, Ld. AR reiterated the grounds stated in the appeal filed by the Department.

5. Heard both sides.

6.1 The first issue is with regard to demand of service tax on Maintenance and Repair Services on containers. Ld. Advocate has been at pains to contend that the said activity is related to washing and repair charges of containers; that the said service is performed not by them but by contractors; that sales tax/VAT is discharged by the contractors in the invoices raised by them and that service tax has also been paid up on the labour cost; that based on such invoices, the assessee has billed the customers after including their margin of profit. The total amount raised by the assessee includes the value of materials and sales tax/VAT also.

6.2 In our view, the maintenance and repair work has been taken up under an agreement with the service recipient by the assessee themselves. They have merely outsourced such work to contractors appointed by them, for eg. M/s. Agalya Engineering, Chennai, possibly because they themselves did not have the wherewithal or facilities. Such contractor may well have paid up the service tax on the labour cost after paying VAT on the value of the materials, etc. It is not the case that the invoice has been raised to the customer of the assessee directly by such contractor.

6.3 Merely because the assessee has outsourced the activity of washing and repair of containers to another, it cannot be said that they have not provided any services. The document issued by the assessee to the customer shows that the bills are raised for washing and repairing of containers. We hold that the assessee is liable to pay service tax under this category.

6.4.1 However, from the document, it appears that the assessee has billed a consolidated sum to the customer, which includes material costs as well as taxes paid by the contractor. The quantification of demand under this category is therefore incorrect and requires to be revised. For the limited purpose of requantification, the matter is remanded to the adjudicating authority, who shall give an opportunity to the assessee to furnish necessary documents for requantification of the demand under this category i.e., Maintenance and Repair of containers. In such *de novo* proceedings, the adjudicating authority is directed to take into account the ratio laid down by the Hon'ble Apex Court in the case of *M/s. Safety Retreading Co. (P) Ltd. (supra)* relied upon by the Ld. Advocate.

6.4.2 The assessee has alternatively argued in regard to the penalties imposed. We note even from the reply of the assessee dated 14.11.2008 to the Show Cause Notice that they have taken shelter under a misinterpretation of the definition of "Maintenance and Repair Service" in Section 65(64) of the Finance Act, 1994, and in particular, the amendment caused with effect from 15.06.2005. This being so, we also hold that no penalty is imposable in respect of any final tax liability that may be arrived on this score.

7. Ld. Counsel for the assessee has conceded that they are liable to pay service tax under Storage and Warehousing Services. The demand under this category is therefore upheld.

8. The adjudicating authority has dropped a demand of Rs. 33,28,912/- under the category of reimbursable expenses. An amount

of Rs. 1,13,954/- has been confirmed under this category. Ld. Counsel has submitted that the assessee is not contesting the amount confirmed under this category and therefore, the same is upheld.

9. With regard to the appeal filed by the Department against the dropping of demand on reimbursable expenses, we have to say that since the same are actual expenses, they are not includible in the taxable value. The issue stands covered by the decision in the case *M/s. Intercontinental Consultants and Technocrats Pvt. Ltd. (supra)*. The Department's Appeal is therefore devoid of merits and liable to be dismissed, which we hereby do.

10. Ld. Counsel has also argued to set aside the penalties. We find that the issue whether reimbursable expenses are includible in the taxable value was under litigation for a long time. Therefore, being an interpretational issue, the penalty imposed under this category is set aside. In fact, it is seen from the Order-in-Original that the Commissioner has imposed a composite penalty of Rs. 46,00,000/- under Section 78 for the various services. We do not find any basis for imposing such a composite penalty when there are different categories of services. The assessee has submitted that with respect

to Storage and Warehousing Services, the non-payment of service tax was due to omission to take into account the invoices issued by the CFS Division to the CHA Division. Taking all these aspects into consideration, we are of the opinion that the assessee has put forward reasonable cause for non-payment of service tax under this category and therefore, the penalty under Section 78 requires to be set aside by invoking Section 80 of the Finance Act, 1994.

11. From the discussions made hereinabove, we hold that :

(i) The demand of service tax under reimbursable expenses to the tune of Rs. 1,13,954/- is upheld; however, the penalty in this regard is set aside;

(ii) The dropping of the demand of service tax of Rs. 33,28,912/- under reimbursable expenses is upheld;

(iii) The demand of service tax under Maintenance and Repair Services to the tune of Rs. 36,33,781/- is remanded to the adjudicating authority for reconsideration; no penalty however shall be imposable on this score;

(iv) The demand of service tax under Storage and Warehousing Services to the tune of Rs. 8,28,045/- is upheld; however, the penalty in this regard is set aside;

12. In view of the above :

I. The assessee's appeal is partly allowed;

II. The Department appeal is dismissed.

(Pronounced in open court on ***<u>18.02.2019</u>****)*

(Madhu Mohan Damodhar) Member (Technical)

(Sulekha Beevi C.S.) Member (Judicial)

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