

**IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL, CHENNAI**

Service Tax Appeal No.674 of 2012

(Arising out of Order-in-Original No. 05/ST/COMMR/2012-12 dated 24.8.2012 passed by the Commissioner of Central Excise, Tirunelveli)

M/s. Aspinwall and Company Ltd.

11-A, World Trade Avenue
Harbour Estate
Tuticorin – 628 004.

Appellant

Vs.

Commissioner of GST & Central Excise

Central Revenue Building
Tractor Road, NGO A Colony,
Tirunelveli – 627 007.

Respondent

APPEARANCE:

Shri Harish Bindhumadhavan, Advocate for the Appellant
Shri M. Ambe, DC (AR) for the Respondent

CORAM

Hon'ble Shri P. Dinesha, Member (Judicial)

Hon'ble Shri M. Ajit Kumar, Member (Technical)

Final Order No. **40122 / 2023**

Date of Hearing: 23.02.2023

Date of Decision: 07.03.2023

Per M. Ajit Kumar,

This appeal is filed by M/s. Aspinwall & Company Ltd. (ASPIN) against Order-in-Original No.05/ST/COMMR/2012–13 dated 24.8.2012 passed by the Commissioner of Central Excise, Tirunelveli.

2. The facts of the case are that ASPIN, a public limited company, was registered under the categories of 'Customs House Agency Service' (CHA), 'Steamer Agency Services', 'Technical Inspection, Analysis and Certification Services', 'Cargo Handling Services', 'Port Services' and 'Transport of Goods by Road Services' as per the provisions of the Finance Act, 1994 (Act).

3. A case was registered against them by Headquarters Preventive Unit of the Commissioner of Central Excise, Tirunelveli for failure of the assessee to correctly pay service tax on taxable value as per Section 67 of the Finance Act, 1994 resulting in a short-payment of Service Tax and Education Cess totally amounting to Rs.1,40,87,194/- for the periods 2004-05, 2005-06 & 2006-07. It was alleged in the Show Cause Notice, dated 20/10/2009, issued to the appellant that they have not classified the services rendered by them under the appropriate categories. They had allegedly suppressed their income from 'Clearing and Forwarding Services' and from 'Cargo Handling Services' and shown only a portion of the CHA service income in the ST-3 returns while availing ineligible abatements, exemptions and deductions from the assessable value. The lower authority vide the impugned order has confirmed duty along with interest and also imposed penalties under various Sections of the Act.

4. The Learned Counsel for the appellant, Shri Harish Bindhumadhavan has stated at the outset that the impugned order is based on a Show Cause Notice which is barred by limitation. The Show Cause Notice for the period April 2004 to March 2007, was issued after a lapse of one year in a case where there was no fraud or collusion or willful misstatement or suppression of fact etc. on their part and during which period, they have been regularly filing periodical returns. He further stated that the services rendered by the appellant are appropriately classifiable under the category of 'Customs House Agency Service' as declared by them. He then referred to Central Board of Excise and Customs (CBEC) Circular F. No. B43/1/97/TRU dated 06.06.1997 to state that since the consideration received by them was a lumpsum amount from their clients towards CHA services and also

towards reimbursement of expenses like statutory levies, they were liable to pay service tax on 15% of the lumpsum amount received (other than expenses which were reimbursed). Merely because they had accounted for transactions under various heads in their financial statement it would not justify vivisection of a composite service. He further submitted that they have correctly paid service tax on 15% of the total consideration received on the turnkey projects which is in fact more than the amount payable if the actual agency commission alone was to be taken into consideration for payment of tax. He stated that the Bangalore Bench of the Hon'ble Tribunal in the appellant's own case i.e. Aspinwall & Co. Ltd. Vs. CCE, Mangalore reported in 2011 (21) STR 257 (Tri. Bang.) and again in Aspinwall & Co. Ltd. Vs. CCE, Cochin reported in 2017 (5) TMI 149 (CESTAT Bang.) held that services rendered as turnkey contracts by them are not classifiable under 'port services' and Service Tax paid under Custom House Agents Service was upheld. He informed supra, that the second judgment with reference to their Cochin establishment was upheld by the Hon'ble Supreme Court in Civil Appeal No. 10763/2017 dated 11/01/2023. Further in the case of their sub-contractors, the value of services provided by the sub-contractors has been included in the bills prepared by ASPIN on their clients and had suffered service tax. Hence there is no suppression / short-payment of Service Tax in this regard. The appellant was of the opinion that since there was no short-levy, the demand and interest confirmed in the impugned order had to be dropped, whereby imposition of penalty was also not sustainable.

5. Learned AR Shri M. Ambe representing Revenue, stated that on scrutiny of data available on ASPIN's computers and ST3 Returns for the years 2004-05 to 2006-07 it appeared that ASPIN had provided

various services to their clients and suppressed the taxable value by maintaining two accounts i.e. one private account accessible only to their employees and another for the department. It was also noticed that ASPIN apart from providing CHA services were also providing 'cargo handling services' and 'clearing and forwarding services' under the nomenclature of Customs Clearance Business. ASPIN had also not paid Service Tax on a lumpsum amount for services other than those entered into by them with their clients on a turnkey basis. Hence they had not classified the services rendered by them properly under the Act. As per Rule 5 of the Service Tax (Determination of Value Rules) 2006, the reimbursement, other than statutory levies, received by the appellants is includible in the assessable value. For this suppression of value and improper classification of services they were correctly ordered to pay duty and interest with suitable penalties in the impugned order. He has further reiterated the points made in the impugned order.

6. We find that the major issues for consideration are: -

(i) Whether the services provided by ASPIN has to be separately classified under 'Cargo Handling Service', 'Clearing and Forwarding Agency Service', 'Stevedoring Service' and 'Customs House Agency Service' with the value of the services calculated separately under the appropriate categories for levy of duty, or whether the services were classifiable under CHA service as claimed by the appellant for the services rendered on a turnkey basis under the CHA category, and the value of the taxable service determined in terms of C.B.E.C. Circular dated 06.06.1997.

(ii) Whether the Show Cause Notice issued was time-barred under the normal time period or whether it was correct to allege suppression

of fact etc. for issue the Show Cause Notice under the extended time limit

(iii) Whether the appellant is liable to pay interest and penalties as ordered.

7. We find that the clarification given by the C.B.E.C. vide circular F. No. B43/1/97-TRU dated 06/06/1997, which held the fort during the relevant period covered by the SCN, refers to the services provided by a licensed Custom House Agent in very broad way, to include any service provided to a client in relation to the entry or departure of conveyances or the import or export of goods. Para 2.2 of the circular is extracted below for reference:

“As per the Finance Act, 1997, the taxable service rendered by a Custom House Agent means any service provided to a client by a Custom House Agent in relation to the entry or departure of conveyances or the import or export of goods. The value of the taxable service in relation to the service provided by a Custom House Agent to a client has agent from the client for services rendered in any manner in relation to import or export of goods. The service tax is chargeable @ 5% on the value of the taxable service.”

The above clarification with reference to the CHA service covers a gamut of service activity which could when rendered individually be covered under other specific service categories. However, when the whole range of activity is performed by a CHA in relation to the entry or departure of conveyance or the import or export of goods, it will be covered under CHA Service and Service Tax is to be computed only on the gross service charges, by whatever head / nomenclature billed by the CHA to his client. This clarification is squarely applicable in the case of the CHA services provided by ASPIN to their clients, in relation to the entry or departure of conveyances or the import or export of goods. It has been further clarified at para 2.5 of the said circular that when a CHA undertakes 'turnkey' projects the value of taxable service shall be 15% of the lumpsum amount charged to the client. The CHA is

required to show the service charge as 15% of such lumpsum amount of the bills and Service Tax of 5% will be chargeable on the said 15%.

Para 2.5 of the circular is reproduced below:-

"In many cases, the Customs House Agent undertakes "turnkey" imports and exports where a lumpsum amount is charged from the client for undertaking various services. In these cases, the lumpsum amount covers not only the "agency commission" fee but also other expenses and no separate break-up is given in respect of these expenses. It has been decided that in such cases, the value of the taxable service shall be 15% of the lumpsum amount charged to the client. The Custom House Agents are required to show the service charges as 15% of such lumpsum amount of the bills and Service Tax of 5% will be chargeable on the above 15%."

This being so it would not be open to Revenue in this case to either reclassify the service or rework the value of the services rendered by ASPIN on a turnkey basis, individual service wise by vivisecting the contract.

8. We find that the issue has also been examined in detail in the appellants own case pertaining to their Cochin and Mangalore establishments by the coordinate Bench of the CESTAT at Bangalore. Paragraphs 15 and 16 of the Tribunal's judgement in Aspinwall & Co. Ltd. Vs. CCE, Cochin reported in 2017 (4) GSTL 48 (Tri. Bang.), which discusses the issue lucidly, is reproduced below.

"15. Service tax was imposed on "Custom House Agent Services" w.e.f. 15-6-1997. At the time of introduction of the service tax, Circular F. No. B43/1/97-TRU, dated 6-6-1997 was issued, in terms of which the "Custom House Agents", who received lumpsum amounts including the Agency Commission, will have the option of paying service tax by considering 15% of such lumpsum amount as service charges. The appellant has been paying service tax on such "Turnkey contracts" on 15% of the overall lumpsum amounts received. Revenue noticed in a few cases, that even though the contract with the clients were on lumpsum basis, the appellant was billing various items of charge individually in the invoices. Accordingly, Revenue has taken the view that the benefit of the 1997 Circular will not be allowable to the appellant, since, the appellant is showing the items separately. The claim of the appellant is that in a typical "Turnkey Contract", wherein the total amount received is to Rs. 388 per MT, the amount pertaining to agency Commission is only Rs. 3 PMT and the balance is towards reimbursement of other expenses incurred on behalf of the client. They have further submitted that the service tax already stands discharged on 15% of the total consideration received, which would amount to much more than that payable if only the Agency Commission is considered for payment of Service Tax."

16. The Service Tax payable on “Custom House Agent Service” is only on the agency commission charge for such services. Reimbursement of expenses incurred by the appellant on behalf of the clients cannot be included in the consideration for charging Service Tax. The 1997 Circular of the Board has been issued only to take care of difficulties faced by CHA’s in cases where the payment received is on lumpsum basis. It is not in dispute that the contracts of the appellant with their clients are on lumpsum basis and service tax already stands discharged on 15% of the consideration received in terms of the 1997 Circular. It also stands submitted that the Agency Commission actually attributable to the CHA services will be far lesser than the 15% already considered for payment of service tax. In view of the above, we find that the demand of service tax made by considering the entire amount received from the client is without basis and hence merits to be set aside.”

The said judgment was also upheld by the Hon’ble Supreme Court in Civil Appeal No. 10763/2017 dated 11/01/2023. We accordingly hold that the services rendered by ASPIN on turnkey basis during the period under appeal would fall under the category of CHA Services and the value of taxable service has to be computed in the manner stated at paragraph 2.5 of the C.B.E.C. Circular dated 06.06.1997 above.

9. Having decided the matter of classification and valuation on merits in favour of the appellant, the issues relating to interest and fines do not survive. We hence set aside the impugned order and allow the appeal with consequential relief, if any, as per law.

(Pronounced in court on 07.03.2023)

Sd/-
(P. DINESHA)
Member (Judicial)

Sd/-
(M. AJIT KUMAR)
Member (Technical)