# IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL CHENNAI

REGIONAL BENCH – COURT NO. I

## Service Tax Appeal No. 42482 of 2013

(Arising out of Order-in-Original Nos. 104 & 105/2012 dated 30.08.2012 passed by the Commissioner of Service Tax, Newry Towers, No. 2054-I, 2nd Avenue, Anna Nagar, Chennai – 600 040)

**G. Masilamani** **: Appellant**
No. 11/6, 4th Floor, Krishna Koil Street,
Chennai – 600 001

**VERSUS**

**Commissioner of Service Tax** **: Respondent**
Newry Towers, No. 2054-I, 2nd Avenue, Anna Nagar,
Chennai – 600 040

**AND**

## Service Tax Appeal No. 42483 of 2013

(Arising out of Order-in-Original Nos. 104 & 105/2012 dated 30.08.2012 passed by the Commissioner of Service Tax, Newry Towers, No. 2054-I, 2nd Avenue, Anna Nagar, Chennai – 600 040)

**G. Masilamani** **: Appellant**
No. 11/6, 4th Floor, Krishna Koil Street,
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**VERSUS**

**Commissioner of Service Tax** **: Respondent**
Newry Towers, No. 2054-I, 2nd Avenue, Anna Nagar,
Chennai – 600 040

**APPEARANCE:**

Smt. J. Ragini, Advocate for the Appellant

Smt. Anandalakshmi Ganeshram, Asst. Commissioner for the Respondent

**CORAM:**

**HON'BLE MR. P. DINESHA, MEMBER (JUDICIAL)**
**HON'BLE MR. M. AJIT KUMAR, MEMBER (TECHNICAL)**

## FINAL ORDER NOs. 40005-40006 / 2024

DATE OF HEARING: 20.09.2023

DATE OF DECISION: 03.01.2024

**Order : [Per Bench]**

[Period of dispute: January 2005 to September 2009 and October 2009 to March 2010]

Brief facts as could be gathered from the impugned Order-in-Original, which are relevant, are that during the course of audit of the accounts of the assessee, the Department's audit team appears to have noticed that the assessee had not included various costs from the gross receipt for the purposes of taxable value. This made the Revenue to believe that the assessee had not paid appropriate Service Tax on various service charges collected and consequently, the issue was taken up by the Survey, Intelligence and Research (SIR) Branch of the Service Tax Commissionerate.

1.2 It is the case of the Revenue that a scrutiny of the invoices raised by the assessee revealed that the assessee had raised bills by splitting the amounts under various heads like service charges, loading and unloading charges, application charges, customs, examination charges, conveyance expenses, warehouse rent, CFS charge, PHO charges, shipping company charges, etc., but however, they had paid Service Tax only on the service charges. The exclusion of various operational expenses from the gross receipt appeared to be against the provisions of section 67 of the Finance Act 1994 read with Rule 5(1) & (2) of the Service Tax (Determination of Value) Rules, 2006. (Hereinafter referred to as 'Rules'). It appears, upon being pointed out, that the assessee remitted Service Tax of Rs.78,86,127/-, but however, did not provide supporting documents in respect of other charges, in order to satisfy the conditions of pure agent. The Revenue also appears to have noticed that the assessee had not filed its S.T.-3 Return for more than three years despite the fact of having collected Service Tax from their customers without even remitting the entire Service Tax collected.

2.1 The above resulted in issuance of a Show Cause Notice No. 171/2010 dated 13.04.2010 proposing to demand Service Tax of Rs.5,02,46,487/- for the period from January 2005 to September 2009 under proviso to Section 73(1) of the Finance Act, 1994 for the services of: (1) Custom House Agent Service, (2) GTA Service and (3) Business Auxiliary Service. It was also *inter alia* proposed to appropriate Rs.1,04,17,226/- paid by the appellant towards the above demand, along with a further proposal to charge interest under Section 75 *ibid.* and penalties under Sections 76, 77 and 78 of the Finance Act.

2.2 Similarly, Show Cause Notice No. 139/2011 dated 06.04.2011 also came to be issued proposing *inter alia* to demand Service Tax of Rs.94,34,246/- for the period from October 2009 to March 2010 under proviso to Section 73(1) of the Finance Act, 1994 for Custom House Agent Service, along with the further proposals to charge interest under Section 75 and penalty under Section 76 *ibid.*

3. It appears that the assessee, upon receipt of the above Show Cause Notice dated 13.04.2010, filed a letter dated 20.05.2010 indicating that they had paid service tax of Rs.15,99,225/- towards Service Tax and interest of Rs.19,46,480/- between 01.04.2010 and 15.04.2010 which was required to be considered.

4.1 A further reply dated 19.08.2010 was also filed by them wherein the assessee appears to have explained that they were rendering the service of clearance of import and export cargo, that in addition to the service charges, they had incurred expenditures like (a) customs expenses (b) unloading and loading cooly (c) harbour sundry and delivery expenses (d) import permit (e) PHO and PQFS conveyance and (f) application charges, they had availed other services like (i) CFS charges (ii) Insurance charges (iii) PHO inspection charges (iv) PQFS charges (v) CCTL charges (vi) shipping and freight charges as pure agents of importers/exporters and the service providers furnished bills/receipts and most of them would collect service taxes as well, all the services rendered by other associated agencies were only in relation to the clearance of import/export cargo for them, i.e., the importers/exporters and not for the Customs House Agent (CHA); the CHA was neither the service provider nor the receiver with respect to any of the services alleged in the Show Cause Notice, who only collected the charges for their services and discharge Service Tax for other activities/services, the amount reimbursed by the importers/exporters were paid to the actual service providers, who are only liable to pay Service Tax.

4.2 It was further pleaded by the assessee that a CHA would mean a person licensed under regulations, either temporarily or otherwise, under Section 146(2) of the Customs Act, 1962 and that taxable service would mean any service provided to a client by a CHA in relation to entry or departure of conveyances or the import or export of goods; the associated service availed on behalf of the importer/exporter for completion of the clearance of import/export cargo could not be treated as a taxable service rendered by the CHA.

4.3 With regard to the valuation, it appears that the assessee contended that only the charges received by the CHA would amount to 'gross value' in terms of Section 67(1) of the Finance Act, 1994 and not the amount received by other service providers by the importers/exporters through the CHA and that Service Tax on other charges like CFS charges, Insurance charges, PHO inspection charges, PQFS charges, CCTL charges, shipping & freight charges and survey and fumigation charges were payable by the respective service providers and not by the CHA since the CHA was never the service provider or even the service recipient.

4.4 It was thus pleaded by the assessee that the cost or expenditure incurred by the CHA alone should be taken into account for payment of Service Tax and not the cost of allied services which had already suffered Service Tax, since the CHA would act as a pure agent of the importer/exporter within the meaning of Regulation 13(a) of the Customs House Agents Licensing Regulations, 2004; the CHA would act as a pure agent when they make payment to third-party by collecting and effecting payment on actual basis; the CHA would receive and use the goods or services in their capacity as pure agent of the recipient of services, they would arrange the availment of the associated services for clearance of the goods and hence, the recipient of services, namely, the importer/exporter, as the case may be, is the actual person liable to make payment to third-party as per Regulation 13(a) *(supra)* and reimburse those expenses.

5. The assessee also appears to have filed their reply dated 27.06.2011 to the Show Cause Notice dated 06.04.2011 wherein they have pleaded that their submissions vide the earlier reply dated 19.08.2010 may be treated as their submissions for the said proceedings as well, and the appellant has relied on the following orders: -

i. *M/s. Bax Global India Ltd. v. Commissioner of Service Tax, Bangalore [2008 (9) S.T.R. 412 (Tri. – Bang.)]*

ii. *GAC Shipping (India) Pvt. Ltd. v. Commissioner of C.Ex. and Cus., Cochin [2008 (9) S.T.R. 524 (Tri. – Bang.)]*

iii. *APCO Agencies v. Commissioner of Cus. and C.Ex., Calicut [2008 (10) S.T.R. 169 (Tri. – Bang.)]*

6. The adjudicating authority, namely, the Commissioner, during adjudication proceedings, appears to have considered the explanation of the assessee and vide common Order-in-Original Nos. 104 & 105/2012 dated 30.08.2012 has, however,

confirmed the demands proposed in the Show Cause Notices. He has held that as per the provisions of Rule 5(2), read with the C.B.E.C. Circular No. 119/13/2009-ST dated 21.12.2009, reimbursed charges are eligible for exclusion subject to satisfaction of all the eight conditions, more particularly the three main conditions viz. (i) the liability for payment of expenses to the third party shall primarily be on the exporter/importer and not on the assessee (ii) the expenses shall be supported with documentary evidence and (iii) there is no mark up or margin and thus, the question as to whether a particular reimbursement of expense qualifies for exclusion has to be decided based on the facts and circumstances of each case and the statute does not provide for any blanket exclusion of all reimbursed expenses, as claimed by the assessee. It has also been emphasized by the adjudicating authority at paragraph 7.7 of the impugned order that even if any one of the conditions specified under Rule 5(2) *ibid.* is not satisfied, then the assessee ceases to be a pure agent and in the present case, the assessee did not furnish any supporting documents to prove their case.

7. It is against this order and the demands raised against the assessee that the present appeals have been filed before this forum.

8. Heard Smt. J. Ragini, Ld. Advocate for the appellant and Smt. Anandalakshmi Ganeshram, Ld. Assistant Commissioner for the Revenue.

9.1 The Ld. Advocate would contend at the outset that the entire demands proposed and confirmed in the Order-in-Original were based on the audit objections and hence, extended period of limitation could not be invoked. She would also contend that the appellant is a CHA, had rendered services of clearance of import and export cargo, in addition to which the appellant would also incur customs expenses, unloading charges, loading, coolly, harbour sundry and delivery expenses, import permit, PHO and PQFS conveyance, application charges etc., and the services were availed for the clearance of import/export cargo for the importers/exporters, as pure agents; in no case would the service provider issue any bill/receipt and the appellant had always discharged the Service Tax.

9.2 Moreover, it is their contention that it is the clear position of law that the reimbursable expenses were not exigible to Service Tax and relied on the judgement of the Hon'ble High Court of Delhi in *Intercontinental Consultants and Technocrats Pvt.*

*Ltd. vs. U.O.I. & Anr. [2013 (29) S.T.R. 9 (Del.) / 2012-TIOL-966- HC-Del-ST].*

9.3 With regard to GTA Services, she would submit that the appellant had paid Service Tax of Rs.25,31,099/- along with interest of Rs.4,58,032/- and hence, the demand again would not survive.

9.4 With regard to the Service Tax demand on business auxiliary services, it is submitted that the appellant did not collect any Service Tax from the liners, but however, the Service Tax demanded was computed on cum-tax basis, on which the appellant had also remitted interest of Rs.1,93,388/- which was not liable to be taxed since the same was not received for providing any service to the shipping lines, but received as an incentive.

9.5 She further invited our attention to the Circular No. 119/13/2009 dated 21.12.2009 issued by the Central Board of Excise and Customs, New Delhi wherein the Service Tax valuation in the respect of CHAs has been specified and that the Commissioner had not considered the proper method for determination of taxable value and had also not considered the various charges received as reimbursement by the appellant which were clearly beyond the scope of taxability under CHA services.

9.6 She would urge that the Commissioner had seriously fell in error in ignoring the binding Board Circular which was brought to his notice and hence, the taxable value as determined by him was not in accordance with law; the Commissioner, by refusing to even grant the benefit of cum-tax valuation on the incentive received by the appellant from the shipping lines, had gone beyond the mandate of the law; moreover, the Commissioner did not even bother to consider or look into any of the documents placed before him or even before the SIR while passing the impugned order and hence, the impugned order suffers from grave miscarriage of justice.

9.7 She would thus request for setting aside of the impugned order and the demands confirmed therein.

10.1 On the other hand, the Ld. Assistant Commissioner relied on the findings of the Commissioner. She would also contend that the appellant did not file its S.T.-3 Returns for various periods, it also did not respond to many letters issued by the Department; in terms of Rule 5(1), if any expenditure or cost is incurred by the service provider in the course of providing taxable service, all such cost/expenditure shall be treated as consideration for the taxable service provided or to be provided and shall be included in the value for the purpose of charging Service Tax and hence, the Commissioner was very much correct in determining the taxable value.

10.2 She would further rely on the judgement of the Hon'ble Supreme Court in the case of *Commissioner of Central Excise v. M/s. Mahindra & Mahindra Ltd. [2005 (179) E.L.T. 21 (S.C.)],* the order of CESTAT, Chennai in the case of *M/s. Pioneer Services v. Commissioner of Service Tax, Chennai [2012-TIOL-949-CESTAT-MAD] (Final Order Nos. 277-278 of 2012 dated 20.03.2012 in Service Tax Appeal No. 768 of 2010 & anor.)* and the order of CESTAT, New Delhi in the case of *M/s. Sai Shipping Services v. Commissioner of Central Excise, Jaipur [2011-TIOL-278-CESTAT-DEL] (Final Order Nos. ST/12-13/2011 dated 18.01.2011 in Service Tax Appeal No. 43 of 2007 and anor.)* in her support.

11. After hearing the rival contentions, we find that the following issues emerge for our consideration: -

(1) Whether the appellant is liable to pay Service Tax in respect of Custom House Agent (CHA) Service?

(2) Whether the demand of Service Tax under Goods Transport Agency (GTA) Service is in order?

(3) Whether the appellant is liable to pay Service Tax in respect of Business Auxiliary Service? and

(4) Whether the invocation of extended period of limitation under proviso to Section 73(1) of the Finance Act, 1994 is justified?

12. The scope of these appeals revolves around the appellants contention that the Order-in-Original relied upon Rule 5 which was not tenable as per the judgement of the Hon'ble High Court of Delhi in *Intercontinental Consultants and Technocrats Pvt. Ltd. (supra)* holding Rule 5(1) to be *ultra vires* the parent Act, and that as per C.B.E.C. Circular No. 119/13/2009-ST dated 21.12.2009, reimbursed charges are eligible for exclusion. That the charges were paid to service providers who do not issue any bills/receipts, accordingly they had correctly discharged their service tax burden.

13. There is no doubt that the appellant is a CHA; for the years under challenge, they had incurred certain expenditure, which according to them were reimbursable, are for the services rendered by a third

party, for which the appellant was to make the payment initially. It is thus the case of the appellant that they had rendered the above services as a pure agent within the meaning of Rule 5(2).

13.1 We find that this dispute relates to the period January 2005 to September 2009 and October 2009 to March 2010. The Hon'ble High Court of Delhi in *Intercontinental Consultants and Technocrats Pvt. Ltd. (supra)* dated 30-11-2012, examined the contention of the petitioner that Rule 5(1), in as much as it provides that all expenditure or costs incurred by the service provider in the course of providing the taxable service shall be treated as consideration for the taxable service and shall be included in the value for the purpose of charging service tax goes beyond the mandate of Section 67 merits acceptance. The Hon'ble High Court had no hesitation in ruling that Rule 5(1) which provides for inclusion of the expenditure or costs incurred by the service provider in the course of providing the taxable service in the value for the purpose of charging service tax *is ultra vires* Sections 66 and 67 and travels much beyond the scope of those sections. To that extent it has to be struck down as bad in law. Rule 5(2) of the Service Tax (Determination of Value) Rules, 2006 did not come up for consideration and was not quashed.

Therefore, the conditions stated in the said Rule with respect to the expenditure or costs incurred by the service provider as a pure agent in relation to expenses reimbursed would be relevant. Rule 5(2) states as under:

> *"5. Inclusion in or exclusion from value of certain expenditure or costs. —*
>
> *...*
>
> *(2) Subject to the provisions of sub-rule (1), the expenditure or costs incurred by the service provider as a pure agent of the recipient of service, shall be excluded from the value of the taxable service if all the following conditions are satisfied, namely :-*
>
>> *(i) the service provider acts as a pure agent of the recipient of service when he makes payment to third party for the goods or services procured;*
>>
>> *(ii) the recipient of service receives and uses the goods or services so procured by the service provider in his capacity as pure agent of the recipient of service;*
>>
>> *(iii) the recipient of service is liable to make payment to the third party;*
>>
>> *(iv) the recipient of service authorises the service provider to make payment on his behalf;*
>>
>> *(v) the recipient of service knows that the goods and services for which payment has been made by the service provider shall be provided by the third party;*

*(vi) the payment made by the service provider on behalf of the recipient of service has been separately indicated in the invoice issued by the service provider to the recipient of service;*

*(vii) the service provider recovers from the recipient of service only such amount as has been paid by him to the third party; and*

*(viii) the goods or services procured by the service provider from the third party as a pure agent of the recipient of service are in addition to the services he provides on his own account.*

*Explanation 1. - For the purposes of sub-rule (2), "pure agent" means a person who -*

*(a) enters into a contractual agreement with the recipient of service to act as his pure agent to incur expenditure or costs in the course of providing taxable service;*

*(b) neither intends to hold nor holds any title to the goods or services so procured or provided as pure agent of the recipient of service;*

*(c) does not use such goods or services so procured; and*

*(d) receives only the actual amount incurred to procure such goods or services."*

It would hence be important for the appellant to clearly identify what the reimbursement being claimed are, since the nomenclature used by the Appellant is not decisive of its nature; to claim exclusion of expenses incurred as pure agent, they would have to satisfy the conditions mentioned in the Rule as listed above. Merely stating that the charges were paid by them to service providers who do not issue any bills/ receipts and accordingly they had correctly discharged their service tax burden, will not come to their help. The Hon'ble Supreme Court in **Khedut Sahakari Ginning and Pressing Society v. State of Gujarat** [(1971) 3 SCC 480] has placed emphasis on the need to closely scrutinize the documents between the parties. The judgment opined that:

> *"5. Whether a particular agreement is an agency agreement or an agreement of sale depends upon the terms of the agreement. For deciding that question, the terms of the agreement have got to be examined. <u>The true nature of a transaction evidenced by a written agreement has to be ascertained from the covenants and not merely from what the parties choose to call it</u>. The terms of the agreement must be carefully scrutinised in the light of the surrounding circumstances."*

(Emphasis added)

13.2 We find that the primary objection raised by the learned Commissioner in the impugned order is that the appellant did not furnish any supporting documents to prove their case and in the absence of any supporting document he was unable to accept the claim of the appellant that they fulfilled the stipulated conditions. Whereas it is the case of the appellant that all the documents and records were taken over by the Investigating Officers and hence, there was nothing left with the appellant to be furnished before the lower authority. In fact, the appellant has pleaded before us that he has all the documents to substantiate all his claims. In the circumstances we feel that the issue requires to be redetermined afresh to prevent a failure of justice.

14. In the light of the above discussions, we deem it appropriate to set aside the impugned order and remit the case back to the file of the adjudicating authority for *de novo* adjudication and the adjudicating authority shall consider our observations in the above paragraphs, afford reasonable opportunities to the appellant of being heard and then pass a *de novo* adjudication order, in accordance with law. All the contentions are left open.

15. The appeals are disposed of by way of remand.

(Order pronounced in the open court on **03.01.2024**)

Sd/-
**(M. AJIT KUMAR)**
MEMBER (TECHNICAL)

Sd/-
**(P. DINESHA)**
MEMBER (JUDICIAL)

Sdd