

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
NEW DELHI

COURT NO. 1

Service Tax Appeal No. 51349 of 2016

(Arising out of Order-in-Original No. 7/COMMR/ST/2016 dated 25 January, 2016 passed by the Principal Commissioner, Customs, Central Excise and Service Tax, Bhopal (MP))

Awasthi Brothers

307/1/2/1,307/3/1,310/3/2.
Gram Manglia Sadak
Opp.OMaxe Citi-2, Main By-pass Road
Indore (MP)

APPELLANT

VS.

**The Principal Commissioner,
Customs, Central Excise & Service Tax,**
Manikbagh Palace, P.B.No.10,
Indore (MP)

RESPONDENT

Present for the Appellant: Ms. Vibha Narang, Advocate

Present for the Respondent: Shri A.Thapliyal, Authorised Representative

CORAM :

HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT

HON'BLE MR. C L MAHAR, MEMBER (TECHNICAL)

DATE OF HEARING/DECISION : 02/03/2020

DATE OF HEARING/DECISION : 14 /07/2020

FINAL ORDER NO. 50722/2020

PER C L MAHAR:

The brief facts are that the appellant is a partnership firm registered with the Service Tax department for the taxable service under the category of 'Clearing and Forwarding services'.

The appellant as Clearing and Forwarding agent has been undertaking the work of Clearing and Forwarding for various companies such as M/s. Hindustan Unilever Limited, M/s. Berger Paints India Ltd., M/s. L G Electronics India Pvt Ltd. And M/s. Moser Baer India Ltd. etc. The appellant has been discharging service tax liability on the commission / remuneration received by it towards 'Clearing and Forwarding service' received by it from the above mentioned companies.

2. The internal audit link of the Department conducted audit of statutory records of the appellant and formed a view that taxable value has not been declared truthfully by the appellant. The Department was of the view that appellant adopted a novel modus operandi by which it bifurcated the amount received by it from various service recipients under two different category of services i.e. 'Clearing and Forwarding services' and 'Goods and Transport Agency service'. The Department after detailed scrutiny of the financial ledgers and profit and loss account of the appellant for the period 2007-2008 to 2011-2012 reached a conclusion that the appellant had not declared the taxable value correctly as gross receipts as per section 67 of the Finance Act, 1994 for the purpose of payment of Service Tax. The Table below makes the entire allegations apparent by a simple glance at the same.

S. No	Year	Gross receipt as per P&L A/c	Taxable value under C & F agent service	Rate of tax	ST payable	ST paid	Difference service tax payable
1	2	3	4	5	6	7	8
1	2007-08	36893376	36670191	2.36%	4532436	918044	3614392
2	2008-09	39153653	37952490	12.36%	4690928	1102434	3588494
3	2009-10	46048128	44614925	10.30%	4595337	1140687	3454650
4	2010-11	55546770	54708449	10.30%	5634970	1650011	3984950
5	2011-12	68003049	67387746	10.30%	6940938	2455307	4485631
		245644976	241333801		26394609	7266483	19128126

3. Thus, the Department entertained a view that the appellant had short paid the service tax by an amount of Rs.1,91,28,126/- and accordingly a show cause notice dated 10 April, 2013 came to be issued to the appellant whereunder service tax amounting to Rs. 1,91,28,126/- has been demanded along with interest under the provisions of sections 73 and 75 of the Finance Act, 1994. The penal provisions as provided under section 76, section 77 and section 78 of the Finance Act, 1994 have also been invoked in the show cause notice.

4. The matter got adjudicated by the Commissioner vide Order-in-Original dated 25 January, 2016. The Adjudicating Authority accepted the contention of the appellant that an amount of Rs. 11,16,86,641/- was received by the appellant during the period 2007-2008 to 2011-2012 on account of freight paid by the appellant on behalf of his principal companies and the same was reimbursed to them by the service recipients.

5. The Adjudicating Authority, after detailed examination, confirmed service tax amounting to Rs.59,32,070/- and the balance demand of Rs.1,31,96,056/- was dropped on the ground that same pertains to freight reimbursement on which Service Tax stands paid. The below mentioned Table taken from the impugned Order-in-Original makes it apparent as to how the above decision was reached by the Adjudicating Authority :

Service Tax Calculation Chart

Amount (in Rs.)

Year	Gross Receipt	Freight paid & Reimbursement received as per P&L account	Net receipt	Receipts against C&F service on which tax already paid	Amount on which tax short paid	Rate of tax (including Cess)	Short paid tax
2007-08	3,65,09,597	1,32,94,555	2,32,15,042	83,45,584	1,48,69,457	12.36%	18,37,865
2008-09	3,70,45,863	2,06,07,078	1,64,38,785	1,00,21,803	64,16,982	12.36%	7,93,139
2009-10	4,45,57,935	2,44,04,670	2,01,53,265	1,22,15,318	79,37,947	10.30%	8,17.60-9
2010-11	5,43,30,051	2,51,72,099	2,91,57,952	1,76,69,535	1,14,88,417	10.30%	11,83,307

2011-12	6,71,24,301	2,82,08,239	3,89,16,062	2,62,93,239	1,26,22,823	10.30%	13,00,151
	23,95,67,747	11,16,86,641	12,78,81,106	7,45,45,480	5,33,35,626		59,32,070

6. The learned advocate appearing for the appellant has contended that amount of Rs.5,33,35,626/- as per above table on which it has been alleged that no service tax had been paid are primarily receipts on account of following two items:

(i) The appellant received an amount of Rs.93,96,803/- from principal companies, who are the service recipients, towards the reimbursable expenses made by the appellant in the nature of depot expenses, weighing of machine charges, empty cartons charges, diesel expenses, house keeping expenses etc. It has been contended by the learned advocate that the reimbursement of expenses in the course of providing clearing and forwarding service are not subject to levy of Service Tax as has been held by various Courts. The learned advocate has referred to following judgements in this regard.

1. **Union of India vs. M/s. Intercontinental Consultants and Technocrats Pvt Ltd. [2018(10) GSTL 401(SC);**
2. **M/s. Sharma Cement Clearing Agency vs. CCE & ST, Ghaziabad [2018-TIOL-718-CESTAT-All.]**
3. **Pharmalinks Agency (I) Pvt. Ltd. vs. CCE, Pune III [2015 (37) STR (Tri-Mumbai) dated 19 August, 2014.]**

Thus, he contended that from the entire demand confirmed by the Adjudicating Authority under the impugned Order-in-Original, an amount of Rs.10,81,313/- needs to be dropped as same is purely reimbursable expenses received by it as pure agent from principal companies.

(ii) Regarding the balance amount of receipt of Rs.4,39,38,823/- on which service tax of Rs.48,50,757/- has

been confirmed in the Order-in-Original, the learned advocate contended that this amount of service tax has been calculated on the transportation charges received by the appellant from his principal companies for using its own trucks for transportation of goods in the local areas. It has vehemently been contended by the learned advocate that service tax is not payable on the charges received by the appellant for using its own truck. It has further been mentioned that profit and loss account of the appellant mentioned it very categorically that the above mentioned amount was received by it again as reimbursement of the expenses incurred by it for providing 'Goods Transport Agency service' using its own vehicle. It has been contended by the learned advocate that the principal companies namely, M/s. Hindustan Unilever Limited, M/s. Berger Paints India Ltd., M/s. L G Electronics India Pvt. Ltd. and M/s. Moser Baer India Ltd. have discharged their service tax liability upon this amount also under 'Goods Transport Agency service'. The learned advocate has taken us through the certificate issued by M/s. Hindustan Unilever Limited on 05 May, 2016 where the details of freight charges and service tax amount have been indicated. The certificate indicates that the service recipient namely, M/s Hindustan Unilever Limited has discharged the service tax liability for freight charges paid to the appellant. Similarly, in a letter addressed to the appellant by M/s L.G. Electronics, it has been confirmed that they have discharged the service tax liability on the charges paid to the appellant for transportation service. On the basis of these letters learned advocate claimed that as per CBEC instructions dated 24 April, 2002 if the service tax due on transportation of consignment has been paid or is payable by a person liable to pay service tax, the service tax should be not charged for the same amount from any other person to avoid double taxation. Since the entire service tax has been paid by the service recipient on the Goods and Transport Service

provided by the appellant to the principal companies, no service tax liability arises on the appellant.

7. The learned advocate also contended that entire demand is also barred by limitation as no malafide intention, suppression of facts, wilful mis-statement or intent to evade the payment of service tax, is present in the present matter. It has further been added that it is purely a matter of interpretation and therefore, the proviso is not invocable in the present case. The appellant has relied on following judgements in support of this contention:

1. **Ispat Industries vs. CCE, Raigarh**
[2006 (199) ELT 509(Tri-Mum)];
2. **NRC Ltd. vs. CCE, Thane I**
[2007 (2009) ELT 22 (Tri-Mum)]

8. We have also heard the learned Departmental Representative who has vehemently supported the findings given in the Order-in-Original.

9. After considering the submissions made by both the sides and after perusal of record of the appeal, we find that so far as the issue pertaining to reimbursement of expenses incurred by the appellant on account of service recipient working as pure agent for his principals, the same is not includable in the assessable value for charging service tax. This view has been expressed by Supreme Court in **Union of India vs. Intercontinental Consultants and Technocrats Pvt Ltd.** reported in [2018 (10)GSTL 401 (SC)]. The relevant extract of the above decision is reproduced below:

24. In this hue, the expression 'such' occurring in Section 67 of the Act assumes importance. In other words, valuation of taxable services for charging service tax, the authorities are to find what is the gross amount charged for providing 'such' taxable services. As a fortiori, any other amount which is calculated not for providing such taxable service cannot a part of that valuation as that amount is not calculated

for providing such 'taxable service'. That according to us is the plain meaning which is to be attached to Section 67 (unamended, i.e., prior to May 1, 2006) or after its amendment, with effect from, May 1, 2006. Once this interpretation is to be given to Section 67, it hardly needs to be emphasised that Rule 5 of the Rules went much beyond the mandate of Section 67. We, therefore, find that High Court was right in interpreting Sections 66 and 67 to say that in the valuation of taxable service, the value of taxable service shall be the gross amount charged by the service provider 'for such service' and the valuation of tax service cannot be anything more or less than the consideration paid as *quid pro qua* for rendering such a service.

29. In the present case, the aforesaid view gets strengthened from the manner in which the Legislature itself acted. Realising that Section 67, dealing with valuation of taxable services, does not include reimbursable expenses for providing such service, the Legislature amended by Finance Act, 2015 with effect from May 14, 2015, whereby Clause (a) which deals with 'consideration' is suitably amended to include reimbursable expenditure or cost incurred by the service provider and charged, in the course of providing or agreeing to provide a taxable service. Thus, only with effect from May 14, 2015, by virtue of provisions of Section 67 itself, such reimbursable expenditure or cost would also form part of valuation of taxable services for charging service tax. Though, it was not argued by the Learned Counsel for the Department that Section 67 is a declaratory provision, nor could it be argued so, as we find that this is a substantive change brought about with the amendment to Section 67 and, therefore, has to be prospective in nature. On this aspect of the matter, we may usefully refer to the Constitution Bench judgment in the case of *Commissioner of Income Tax (Central)-I, New Delhi v. Vatika Township Private Limited* [(2015) 1 SCC 1] wherein it was observed as under :

A legislation, be it a statutory Act or a statutory rule or a "27. statutory notification, may physically consists of words printed on papers. However, conceptually it is a great deal more than an ordinary prose. There is a special peculiarity in the mode of verbal communication by a legislation. A legislation is not just a series of statements, such as one finds in a work of fiction/non-fiction or even in a judgment of a court of law. There is a technique required to draft a legislation as well as to understand a legislation. Former technique is known as legislative drafting and latter one is to be found in the various principles of "interpretation of statutes". Vis-a-vis ordinary prose, a legislation differs in its provenance, layout and features as also in the implication as to its meaning that arise by presumptions as to the intent of the maker thereof.

Of the various rules guiding how a legislation has to be 28. interpreted, one established rule is that unless a contrary intention appears, a legislation is presumed not to be intended to have a retrospective operation. The idea behind the rule is that a current law should govern current activities. Law passed today cannot apply to the events of the past. If we do something today, we do it keeping in view the law of

today and in force and not tomorrow's backward adjustment of it. Our belief in the nature of the law is founded on the bedrock that every human being is entitled to arrange his affairs by relying on the existing law and should not find that his plans have been retrospectively upset. This principle of law is known as *lex prospicit non respicit* : law looks forward not backward. As was observed in *Phillips v. Eyre* [(1870) LR 6 QB 1] , a retrospective legislation is contrary to the general principle that legislation by which the conduct of mankind is to be regulated when introduced for the first time to deal with future acts ought not to change the character of past transactions carried on upon the faith of the then existing law.

The obvious basis of the principle against retrospectivity is the 29. principle of "fairness", which must be the basis of every legal rule as was observed in *L'Office Cherifien des Phosphates v. Yamashita-Shinnihon Steamship Co. Ltd.* Thus, legislations which modified accrued rights or which impose obligations or impose new duties or attach a new disability have to be treated as prospective unless the legislative intent is clearly to give the enactment a retrospective effect; unless the legislation is for purpose of supplying an obvious omission in a former legislation or to explain a former legislation. We need not note the cornucopia of case law available on the subject because aforesaid legal position clearly emerges from the various decisions and this legal position was conceded by the counsel for the parties. In any case, we shall refer to few judgments containing this dicta, a little later."

10. Thus, it is clear that expenses which have been reimbursed by the principals to the appellant working as a pure agent, cannot be included in the assessable value for charging the service tax. However, we find from the Order-in-Original that though it has been claimed by the appellant but such an exercise has not been done to determine how much amount was actually received as reimbursement of the expenses. As stated in the preceding paragraph, the learned advocate claimed that an amount of Rs. 93,96,803/- was received by the appellant as reimbursement of expenses made on behalf of service recipient on account of depot expenses, weighing machine expenses, empty cartons charges, diesel expenses, house keeping expenses etc.

11. We are of the opinion that expenses which have been received as reimbursement of expenses made on behalf of service recipient by the appellant cannot form part of the assessable value as held by the Supreme Court in **Union of India vs. M/s. Intercontinental Consultants and Technocrats Pvt. Ltd.** The Adjudicating Authority has to verify the claims made by the appellant from the financial and other records and decide the issue as per the principles laid down by the Supreme Court in **Union of India vs. M/s. Intercontinental Consultants and Technocrats Pvt. Ltd.**

12. The second issue pertains to the service tax demand on an amount of Rs.4,39,65,823/- received by the appellant for using its own truck for providing transportation service to the principal companies for which it was working as Clearing and Forwarding agent. It has been contended and claimed by the appellant that service tax due on such amount had already been discharged by the service recipient namely, the principal company of the appellant. The records indicate that the service recipients such as M/s. Hindustan Unilever Ltd. have confirmed payment of service tax on the transportation of goods service provided by the appellant. However, this needs to be verified after detailed examination of the books of accounts and service tax return filed by the service recipient. Thus, this factual position should be examined by the Adjudicating Authority on the basis of records.

13. In view of the above discussions, the matter is remanded to the original Adjudicating Authority for undertaking the verification of the facts stated in the preceding paragraphs. An order shall thereafter be passed.

14. Thus, the impugned Order-in Original is set aside and the matter is remanded to the Adjudicating Authority for fresh adjudication in terms of the directions mentioned above.

15. The appeal is accordingly, allowed by way of remand.

(Order pronounced in the open court on 14 July, 2020)

(JUSTICE DILIP GUPTA)
PRESIDENT

(C.L. MAHAR)
MEMBER (TECHNICAL)

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