

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI**

PRINCIPAL BENCH

SERVICE TAX APPEAL NO. 52112 OF 2014

(Arising out of Order-in-Original No. 190/GB/2013 dated 05.12.2013 passed by Commissioner, Service Tax, Commissionerate, New Delhi)

Commissioner of Service Tax

...Appellant

versus

M/s. Sidh Designers Pvt. Ltd.

886A/46, Ward No. 6, Mehrauli,
New Delhi-110030

...Respondent

WITH

SERVICE TAX APPEAL NO. 52113 OF 2014

(Arising out of Order-in-Original No. 191/GB/2013 dated 05.12.2013 passed by Commissioner, Service Tax, Commissionerate, New Delhi)

Commissioner, Service Tax

New Delhi

...Appellant

versus

M/s. Konark Exim Pvt. Ltd.,

6/846, Mehrauli,
New Delhi-110030

...Respondent

WITH

SERVICE TAX APPEAL NO. 52114 OF 2014

(Arising out of Order-in-Original No. 192/GB/2013 dated 05.12.2013 passed by Commissioner, Service Tax, Commissionerate, New Delhi)

Commissioner, Service Tax

New Delhi

...Appellant

versus

M/s. G.D. Mangalam Exim Pvt. Ltd.,

6/843, Main Bazar, Mehrauli,
New Delhi-110030

...Respondent

WITH

SERVICE TAX APPEAL NO. 52142 OF 2014

(Arising out of Order-in-Original No. 194/GB/2013 dated 05.12.2013 passed by Commissioner, Service Tax, Commissionerate, New Delhi)

Commissioner of Service Tax**...Appellant**

versus

M/s. DSM International,
1043/2, Ward No. 8,
Flat No. UGF 1, Mehrauli,
New Delhi-110030

...Respondent**AND****SERVICE TAX APPEAL NO. 52143 OF 2014**

(Arising out of Order-in-Original No. 193/GB/2013 dated 05.12.2013 passed by Commissioner, Service Tax, Commissionerate, New Delhi)

Commissioner, Service Tax
New Delhi

...Appellant

versus

M/s. Yogmaya Traders Private Limited,
886A/47, Ward No. 6, Mehrauli,
New Delhi-110030

...Respondent**APPEARANCE:**

Shri Radhe Tallo, Authorized Representative for the Appellant
Shri G.K. Sarkar, Shri P. Srivastava and Shri Prakash Shah, Advocates for the Respondent

CORAM:

HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)

Date of Hearing: 21.03.2023
Date of Decision: 03.07.2023

FINAL ORDER NO'S. 50814-50818/2023**JUSTICE DILIP GUPTA:**

These five appeals seek to assail the orders passed by the Commissioner dropping the proceedings initiated through show cause notices issued to the respondents.

2. The issue involved in all the appeals is as to whether the amount paid by the respondents to overseas companies situated in Dubai and shown as "commission" in the shipping documents in relation to export of readymade garments by the respondents is liable to be taxed under "business auxiliary service"¹, as defined under section 65(19) of the Finance Act, 1994².

3. The show cause notices alleged that the respondents, who are engaged in the business of export of readymade garments, had availed the services of foreign based commission agents in Dubai who procured orders for the respondents and ensured payments after deducting their commissions @ 12.5%, which is also reflected in the export invoices and shipping bills. The said services, it was alleged in the show cause notices provided by the foreign commission agents to the respondents, would be classifiable under BAS.

4. The respondents filed a reply to the show cause notices stating therein that the overseas parties were not commission agents but were buyers which fact would also clearly emerge from the terms of the contract executed between them. It was further stated that the buyers performed some activities with regard to the export of goods in the foreign country in terms of the agreement entered into between the parties and the expenses incurred by the said buyers were reimbursed by the respondents, which expenses have been incorrectly termed as 'commission' in the show cause notices. The Commissioner dropped the demand proposed in the show cause notices and all the orders are based on the same reasoning. In this connection, it would be useful to reproduce the relevant portions of

1. **BAS**
2. **the Finance Act**

the order dated 05.12.2013 passed by the Commissioner in the matter of M/s. Sidh Designers Pvt. Ltd.:

"37. **Now, in order to arrive at the classification of the activities undertaken by the alleged "overseas commission agents", it is necessary to go through the relevant contracts.** It is on record that the assessee with their defence reply has also submitted copies of contracts dated entered into "SUPER ALMAS TRADING LLC. DUBAI, U.A.E."

38. **I find that in the aforesaid contract M/S "SUPER ALMAS TRADING LLC. DUBAI, U.A.E. has been referred as "Buyer" and not as "Commission agent". Further, under clause "Subject of contract" Seller and Buyer both have been required to sell & buy goods on C&F terms with the condition that ownership of the goods will remain with the seller till the same are delivered to the buyer/consignee after Customs clearance at the destination.** The prices for the goods delivered have been fixed in US dollars inclusive of cost of packing, tare and marking. As per clause "terms of payment" the "buyer" has been required to do following post clearance activities in relation to the goods exported by the assessee:-

39. I find from the aforesaid contract that the assessee is an Seller (export) of goods who had sold the goods to their buyers situated at Dubai, on fixed C&F prices terms where ownership of the goods remain with the seller till the same are delivered to the buyer/consignee after Custom clearance at the destination. **Therefore, all the post shipment expenditures incurred for the activities carried out by their overseas buyer after Custom Clearance at the destination, till delivery of goods as stated above, are to be borne by the seller. However, since as per terms of the contract, the buyer has been required to perform such post shipment activities, then the expenses incurred by the buyer on this account have been required**

to be deducted from the value of the consignment taking into account lump sum reimbursement at the rate of 12.5% and so the buyer had been making payment of the goods to the assessee after deduction 12.5% of the value towards reimbursement of the expense incurred by them for rendering above mentioned services as per terms of the contracts.

40. I find that it is a fact that in the shipping documents i.e. shipping bills/invoices as well as balance sheets of the assessee, the term 'Commission' has been used therein but these are actually lump sum reimbursement which had to be paid by the assessee to the overseas buyer for rendering the services of post shipment activities till the point of destination.

43. **In view of abovementioned facts it is clear in its pristine form that the alleged overseas 'Commission Agents' are in fact the 'Buyers' of the assessee and not commission agent acting on behalf of the assessee and have worked on principal to principal basis and not on principal to agent basis and the actual relation between them is that of 'Buyer and Seller' not of 'Principal and Agent'.** The post shipment Services like monitoring the shipments, handling the goods etc., have been rendered by the Overseas Buyers in terms of the contracts for which the assessee has reimbursed them for actual expenses incurred and services rendered by them. It is a well settled legal position that an activity is taxable if it is specifically covered under the taxable entry and the tax cannot be levied on assumption and presumptions."

(emphasis supplied)

5. It transpires from the records that earlier the respondents had filed Writ Petitions in the Delhi High Court after the Commissioner decided the matter infavour of the respondent, for refund of the amount deposited by the respondents under protest. The refund applications were rejected as being barred by limitation under section

11B of the Central Excise Act, 1944³. The Writ Petitions were allowed by the Delhi High Court for the reason that the amount, of which refund was sought, had been deposited under protest during adjudicating proceedings and was required to be refunded as the duty was illegally collected. The relevant portion of the order passed by the Delhi High Court is reproduced below:

"2. The petitioner claims a direction to the respondents for refund and for quashing of an order dated 15.09.2014 rejecting its refund applications.

3. The brief facts are that the petitioners engage in readymade garment export and allied business and are duly registered under the provisions of Service Tax. On 21.06.2012, the search proceedings were conducted based upon an allegation that they had evaded duty and did not pay the duty in respect of commission paid to overseas agents. This search resulted in show cause notice dated 19.10.2012. The petitioners apparently deposited certain amounts on 11.8.2012, 16.8.2012, 21.3.2013.

11. This Court is of the opinion that the facts of the present case clearly point to the petitioner's claim falling within the second proviso to Section 11B of the Act. **Concededly, even during the pendency of the adjudication, the petitioner's letter indicating deposits were made (in unequivocal terms) under protest.** The adjudication order took note of the earlier statement, which was retracted at the beginning of the adjudication proceedings and found that the retraction was genuine. The adjudication order is an exhaustive one and categorically rules that against all transactions which were stated to be taxed could not have fallen within the ambit of Service Tax.

12. ***** In the present case, **the entire proceedings seeking recovery of amounts were without jurisdiction and the amounts, which were**

3. the Excise Act

collected under ostensible authority of law, could not have been collected because the transactions were not subject to levy at all. In these circumstances, the collection of duties was per se illegal. This Court, consequently holds on both, on that count as well as on the facts that the petitioners had lodged their protest during the pendency of the proceedings and before the adjudication order was made, the second proviso to Section 11 B of the Act clearly apply.

13. For the above reasons, the impugned order is hereby set aside. **The concerned authorities are hereby directed to process the petitioner's refund claim and ensure that the amounts are remitted to it with applicable interest, in eight weeks."**

(emphasis supplied)

6. When the present appeals, filed by the Department to assail the orders passed by the Commissioner, earlier came up for hearing before the Tribunal on 02.03.2017, the appeals were dismissed holding that the Delhi High Court on merits had upheld the order passed by the Commissioner dropping the show cause notices. The relevant portion of the order passed by the Tribunal on 13.12.2013 is reproduced below:

"4. After hearing both the sides and on perusal of the record, it appears that when the demand was set aside by the impugned order, the appellant has filed writ petition No. 4861, 4973, 5502, 7175, 7837/2015 dated 21.12.2016 before the High Court of Delhi for refund. **Vide its order dated 21.12.2016, Hon'ble High Court has directed that the refund may be allowed to the appellant within eight weeks along with interest. Further, the Hon'ble High Court observed that "the adjudication order is an exhaustive one and categorically rules that against all transactions which were stated to be taxed could not have fallen within the ambit of service tax".** Thus, it is evident that Hon'ble Delhi

High Court upholds the impugned order on merit.

When it is so, then we find no reason to interfere with the impugned order.

5. By following the ratio laid down by the Hon'ble Delhi High Court, we decline to interfere with the impugned order. The same is hereby sustained along with the reasons mentioned therein.

6. In the result, all the appeals filed by the department are dismissed. Cross-objections are also disposed of."

(emphasis supplied)

7. The Department filed an appeal before the Supreme Court against the order of the Tribunal and the Supreme Court by judgment and order dated 26.07.2019 allowed the Civil Appeals filed by the Department. The matter was remitted to the Tribunal for reconsideration of the appeals on merits and in accordance with law, uninfluenced by any of the observation made by the High Court. The relevant portion of the order passed by the Supreme Court is reproduced below:

"These appeals take exception to the judgment and order dated 02.03.2017 passed by the Customs Excise and Service Tax Appellate Tribunal in Appeal Nos.ST/52112-52114 & 52142- 52143/2014 with ST/CO/50455/2013-DB, whereby the appeals preferred by the department came to be dismissed the specious ground that the issues raised in the appeals have already been adjudicated by the High Court in its decision dated 21.12.2016 in W.P. (C) No.4861 of 2015 and connected cases.

After considering the rival submissions, we have no hesitation in taking the view that the subject matter before the High Court of Delhi in the aforesaid Writ Petition, which was filed by the assessee, was limited to the claim of refund which was rejected by the department. The observations made in the judgment of the High Court, therefore, will have to be understood only

in that context; and not as having adjudicated the correctness of the order passed by the adjudicating authority, which was the subject matter of appeals before the Appellate Tribunal at the instance of the department.

In the circumstances, the impugned order deserves to be set aside and parties relegated before the Appellate Tribunal for reconsideration of the appeals on its own merits and in accordance with law, uninfluenced by any observation made by the High Court.

We, however, make it clear that we are not expressing any opinion either way on the contentions available to the parties in the remanded appeals. All questions therein are left open.

The Civil Appeals are disposed of in the above terms. Pending applications, if any, stand disposed of."

(emphasis supplied)

8. This is how the present appeals have come up for hearing.
9. Shri Radhe Tallo, learned authorized representative appearing for the Department made the following submissions:
 - (i) The Commissioner gravely erred in placing reliance on a single contract furnished with the defence reply without verifying whether the said agreement was furnished during the course of investigation or not;
 - (ii) The Commissioner, while placing reliance on the aforesaid contract, failed to appreciate that in all the export documents such as export invoices, shipping bills and bank reconciliation certificate, it was mentioned that the amount of commission was part of FOB value of the exported goods and the same could not have been said to have been incurred on post shipment activities;

- (iii)** The Commissioner gravely erred in holding that since the statement dated 24.09.2012 of Sahdev Gupta had been retracted on 25.09.2012 by means of an affidavit, a copy of which had also been submitted to the investigating agency on the very next day i.e. 25.09.2012, the said statement dated 24.09.2012 had no evidentiary value;
- (iv)** The Commissioner failed to appreciate that the statement dated 24.09.2012 of Sahdev Gupta was duly corroborated by sufficient documentary evidence and that the retraction was a mere afterthought to avoid due discharge of service tax liability and consequential penal provisions; and
- (v)** The Commissioner failed to appreciate that the respondent company had itself accepted its service tax liability as a commission agent under reserve charge mechanism in writing on 01.08.2012.

10. Shri G.K. Sarkar and Shri Prakash Shah, learned counsel appearing for the respondents, however, supported the orders passed by the Commissioner and submitted that they do not call for any interference. Learned counsel submitted that doubts raised by the Department to the authenticity of the contracts submitted by the respondents before the adjudicating authority are based merely on presumptions and the said contracts cannot be ignored merely because they were not produced during the investigation. Learned counsel also pointed out that the Commissioner committed no illegality in placing reliance upon the retraction made by Sahdev Gupta on 25.09.2012 immediately on the next day the statement was recorded. Learned counsel for the respondents also placed reliance

upon the following decisions to support the contention that the buyers were not commission agents:

- (i) **Moped India Limited vs. Assistant Collector of C. Ex., Nellore and Others⁴;**
- (ii) **Duflon Industries Pvt. Ltd. vs. Commissioner of Central Excise, Raigad⁵;**
- (iii) **Laxmi Exports and Others vs. Commissioner of Central Excise & ST, Surat⁶;** and
- (iv) **Aquamarine Exports vs. C.C.E. & ST, Surat-I⁷.**

11. The submissions advanced by the learned authorized representative appearing for the Department and the learned counsel for the respondents have been considered.

12. To appreciate whether the respondents had paid commission to the agents situated in Dubai, on which service tax has been levied on a reverse charge mechanism under BAS, it would be necessary to examine the contract that was executed between the respondent "M/s. Sidh Designers Pvt. Ltd." (described as the 'seller' in the contract) and Super Almas Trading LLC., Dubai (described as the 'buyer' in the contract). The relevant clauses of the contract are reproduced below:

"CONTRACT NO. SAT-2095-07-, 14th APR 2007

Dated: 15.04.2007

SUPER ALMAS TRADING LLC., DUBAI, hereinafter referred as the "Buyer" on the one part and SIDH DESIGNERS PVT. LTD., hereinafter referred to as the "Seller" on the other part, have concluded the present contract of the following:

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- 4. **1986 (23) E.L.T. 8 (S.C.)**
 - 5. **2017 (47) STR 335 (Tri. Mumbai)**
 - 6. **2021 (44) GSTL 284 (Tri. Ahmd.)**
 - 7. **2022 (2) TMI 361 – CESTAT Ahmedabad**

SUBJECT OF THE CONTRACT: -The Buyer has bought and the Seller has sold the Goods on the terms that the ownership of the Goods will remain with the Seller till the same are delivered to the Buyer/Consignee after Customs Clearance at the destination. The quantity and prices of the Goods are stated in Addendum No. 1 to the present contract which is its integral part.

PRICE AND TOTAL VALUE OF THE CONTRACT: Prices for the goods to be delivered under the present contract are fixed in U.S. Dollars and include Port dues, Terminal Handling Charges, Line D.O Charges, Demurrage, Legalization expenses and Government Dues etc. Total value of the Contract is in U.S. Dollars US\$ & is according to Addendums.

TERMS OF PAYMENT:-

Payments for the goods to be delivered under the present contract will be made by the Buyer in USD through Bank, after deduction commission for service/expenses incurred by the Buyer on account of:-

1. Port dues, Terminal Handling Charges, Line D.O. Charges, Demurrage, Legalization Expenses Government Dues (excluding Customs Duty, if any) etc.
2. Charges paid to local service providers from whom Buyers will be procuring services in respect of CHA, Clearing and Forwarding services, monitoring of shipments and other related expenses.

However, the above said expenses as per costing of the Buyer will remain between 12-14%. Therefore, it is agreed that the buyer can reduce the total Invoice value by 12.5%.

Payments will be effected by the Buyer's Bank against presentation by the Seller to the bank of the following documents:-

- Invoice - 3 Copies
- Full set of Multimodal transport document marked "shipped on board" on Airway Bill in the name of consignee.
- Packing list - 3 Copies

All the Banking Expenses are to be paid by the Seller

TERMS OF DELIVERY:-

The Goods specified in the enclosures no. to the present Contract are to be delivered by the seller within the 90 days.

The date of Delivery of the Goods is to be considered the date of Bill of Lading or Airway Bill.

Prior and Partial shipment and Transshipment are allowed.

SHIPPING NOTIFICATIONS: Within 6 working days after shipments of the goods, the Seller at his own expenses is to inform the Buyer by telex or fax or dispatched as well as to mail him details along with copy of shipping documents and invoices.

PACKING AND MARKING:- The goods are to be shipped in the packing agreed with the consignee and protecting the goods during their transportation to the place of destination under the present contract Tag Labels are to be attached to articles indicating the country of origin.

SELLAR: SIDH DESIGNERS PVT. LTD.

"334, 1/2, WARD No. 4, MEHRAULI, NEW DELHI-110030, INDIA

BUYER: SUPER ALMAS TRADING LLC.

P.O. BOX NO. 181639, DUBAI"

13. The appellants have also placed other agreements. These agreements contain similar clauses.

14. A bare perusal of the aforesaid contract dated 15.04.2007 clearly shows that M/s. Sidh Designers, which is a respondent, is the 'seller' and the foreign entity in Dubai i.e. Super Almas Trading is the 'buyer'. The goods have been sold on terms that the ownership of the goods shall remain with the seller till the goods are delivered to the buyer after customs clearance at the destination. The prices of the goods have been fixed in US Dollars and include Port Dues, Terminal Handling Charges, Line D.O. Charges, Demurrage, Legalization

Expenses and Government Dues. The terms of payment specifically provides that payment will be made by the buyers in US Dollars through a bank after deduction of 'commission' for service/expenses incurred by the buyer on the account of aforesaid charges but such expenses will remain between 12-14%. The contract further provides that the buyer will reduce the total invoice value by 12.5%. The aforesaid contract does not even remotely indicate that the foreign entity in Dubai, which has in fact been described in the contract as the buyer, is an agent and it appears that the use of the word "commission" in the "Terms of Payment" clause has caused confusion. A conjoint reading of all the clauses of the agreement leaves no manner of doubt that it is the overseas expenses incurred by the buyer that have to be deducted from the payment to be made by the buyer to the seller and this is limited to 12.5% of the invoice value. Wrong use of the word "commission" in the contract, particularly when the said amount has also been referred to as "expenses" in the same contract will not mean that 'commission' has been paid by the seller.

15. This is what was observed by the Supreme Court in **Moped India** and the relevant portion of the judgment is reproduced below:

"6. ***** **Now it is true that this amount allowed to the dealers has been referred to in the agreement as commission but the label given by the parties cannot be determinative because it is, for the court to decide whether the amount is trade discount or not, whatever be the name given to it.** If we look at the terms of the agreement, it is clear that the agreement was between the appellants and the dealers on principal to principal basis. **The clauses of the agreement which we have set out above clearly show beyond doubt that under the agreement, the mopeds were sold by the appellants to the dealers and the dealers did not act as agents of the appellants for the purpose of**

effecting sales on behalf of the appellants. It is clear from clause 5 (a) of the agreement that the bills in respect of the mopeds delivered to the dealers were to be sent by the appellants through their bankers and it was the responsibility of the dealers to retire the bills for the purpose of taking delivery of the mopeds. Clause 5 (b) of the agreement laid an obligation on the dealers to insure the mopeds against all risks, pilferage, non-delivery and SRCC including breakage from the time the mopeds left the factory or stockyard of the appellants until they arrived at the premises of the dealer and this again would show that the dealers acted as principal to principal in purchasing the mopeds from the appellants. The dealers were also liable under Clause 6 of the agreement to maintain adequate organisation for sale and service of the mopeds, including show rooms, service stations, repair shops, spare parts, salesmen etc. and the mechanics were also to be trained at the cost of the dealers. **The relationship between the appellants and the dealers was clearly on principal to principal basis and in** the circumstances it is difficult to see how the amount of Rs. 110/-, 145/- and 165/- allowed to the dealers in respect of different varieties of mopeds could be regarded as anything other than trade discount. The appellants charged to the dealers the price of the mopeds sold to them less the amount of Rs. 110/-, Rs. 145/- and Rs. 165/- in respect of different varieties of mopeds. These amounts allowed to the dealers were clearly trade discount liable to be deducted from the price charged to the dealers for the purpose of arriving at the excisable value of the mopeds"

(emphasis supplied)

16. This is what was also observed by the Tribunal in **Duflon Industries** and the relevant portion of the decision is reproduced below:

"6. **The entire issue revolves around the fact whether clearances effected by appellant on goods which exported by them to DEL is of actual sale or sale based on commission basis.** If it is

direct sale to DEL then appellant has case and if it is held that it is not direct sale, but the sale based on commission basis then appellant has no case. **For this we have to examine the agreement dated 16-5-2001 entered between appellant and DEL. The agreement is enclosed to the appeal memorandum and on perusal of the same we find that the agreement sets out clauses about the sale of goods by appellant to DEL. The said agreement speaks of purchasing of various items from appellant by the said DEL and it also records that appellant shall allow flat deduction/commission of 8% on the invoice value to DEL.** We perused the invoice raised by appellant to DEL and find that the invoice is for the sale of the goods and 8% commission is indicated as has been given on the total invoice value. It is also seen invoice value has been reduced by 8% shown as commission, is against the sale of the goods to DEL. **We agree with the contentions raised by learned Counsel that the purchaser of the goods cannot be considered as a "commission agent" as the deduction/commission is for the goods sold. There is nothing on record to show that the said DEL was appointed as "commission agent" for the sale of the goods of the appellant to third parties.** It may be that DEL might purchase the goods from the appellant and sells the same in Europe. **The reliance placed by learned DR and adjudicating authority on the clause of agreement that "DEL shall increase the market share of appellant's products" to conclude that DEL was a commission agent, seems to be erratic reading of the clauses of agreement and this itself does not amount DEL has been appointed as "commission agent". The amount indicated on the invoice and recorded in the accounts as commission, in our view, will not attract tax under reverse charge mechanism.** We also find strong force in the contentions raised by learned Counsel that **in order to tax this account as a commission, there has to be necessarily three parties, seller, purchaser and a person who negotiates such transaction.** From the records it is very clear that DEL had not negotiated purchase or sale

on behalf of appellant or their customers; to our mind the deduction/commission is nothing but trade discount. In view of the factual position as ascertained from the records, we hold that the impugned orders demanding service tax under reverse charge mechanism from appellant are unsustainable and liable to be set aside."

(emphasis supplied)

17. This decision of the Tribunal was followed in **Laxmi Exports** and the relevant portion of the decision is reproduced below:

"7. **From the above invoice, Shipping Bill and Bank Certificate, it is seen that against the C&F value shown is sales value in the invoice, the amount equivalent to 11%-12.5% was shown as deduction under the head commission and therefore, the net invoice value is the value after deduction of said 11%-12.5%.** As per the invoice, 11%-12.5% commission was extended to the foreign buyer of the goods. Since there is transaction of sale and purchase between the appellant and buyer of the goods, whatever value shown in the invoice is a sale value and the deduction shown is nothing but discount given by the exporter to the foreign buyer. As per the bank realization certificate of exporter, in Appendix 22A (scanned above), the amount after deduction of 11%-12.5% which was shown in column 12. **The heading of column is 'commission/discount paid to foreign buyer, agent'. In the entire enquiry, the department has not brought any tip of evidence to show that there is a commission agent exists in this transaction and any amount of commission is paid to such person.** Admittedly, in the entire transaction only two persons are involved, one the appellant as exporter of the goods and second the buyer of the goods. In the sale of goods, in case of service of commission agent, if involved, there has to be third person as service provider to facilitate and promote the sale of exporter to a different foreign buyer. In the present case, there is absolutely no evidence that this 11% is paid to some third person as commission. There is no contract of commission agent service with any of the commission agent, there is no

person to whom payment of commission was made therefore, it is clear that no service provider *i.e.* foreign commission agent exists in the present case and no service was provided by any person to the appellant. In the absence of any provision of service, no service tax can be demanded. The trade discount even though in the name of commission agent was given by the appellant to the foreign buyer, by any stretch of imagination cannot be considered as commission paid towards commission agent service, hence cannot be taxable. *****”

(emphasis supplied)

18. Recently in **Aquamarine Exports**, after placing reliance upon the decision of the Tribunal in **Laxmi Exports**, and other decisions, the Tribunal observed as follows:

“From the above judgments it can be seen that on the identical issue this tribunal has taken a consistent view that merely because in invoice commission is mentioned that alone is not sufficient to treat it as a commission but the same should be treated as discount only. Consequently no service exist hence no service tax can be demanded.”

19. It is apparent from a conjoint reading of the various clauses of the aforesaid contract dated 15.04.2007 executed between Super Almas Trading and M/s. Sidh Designers Pvt. Ltd. that M/s. Sidh Designers, as seller, had agreed to sell the goods to Super Almas Trading, which has been described as the buyer, after deduction of expenses incurred by the buyer. Mere use of the word ‘commission’ in the clause dealing with terms of payment would, in view of the aforesaid decisions, not mean that ‘commission’ was paid by the seller. There is no third person who can be said to be acting an agent and the goods were undoubtedly sold on a principal to principal basis. What was actually deducted from the payment to be made by the

buyer was the expenses incurred by the overseas buyer and not commission.

20. The Commissioner, therefore, committed no error in concluding that commission was not paid by the foreign entity to the respondents. What was necessary was an examination of the terms of the contract and it was immaterial whether the contract was placed by the respondents during the course of investigation or in the reply filed to the show cause notices, for nothing turns on this, unless it was established by the department that the contract did not exist at all.

21. The statement of Sahdev Gupta made on 24.09.2012 was immediately retracted on 25.09.2012 in the affidavit filed before the District Judge and the relevant portion of the retraction affidavit, which is contained in the order passed by the Commissioner, is reproduced below:

"The DGCEI officers summoned me on 3 occasions and pressurized me to make deposit against the case under investigation by them towards Service Tax in respect of exports made during 2007-08 to 2012. Because of immense pressure and threat, I tendered 10 cheques of Rs. 20,00,000/- each from the above said 5 Companies / Firms on 01.08.2012. The cheques were returned to me on dated 16.08.2012 by the department ONLY after pressurizing me to deposit the amount of Rs. 2,00,00,000/- online..

The DCCEI officers pressurized to make online payment and under pressure Rs. 2,00,00,000/- (40 Lakhs for each Company / Firms) have been deposited on 11.08.2012 and 16.08.2012. Thereafter my statement has been recorded by the officers of DGCEI on 24.09.2012 and I have been threatened with dire consequences if I do not write my statement according to them. Having no alternative I had to succumb to their pressure and give statement as dictated. I have

been made to write that I am liable to pay Service Tax against exports made during 2007-08 to 2012 being commission given to the buyers and also I have been forced to write that though in the documents it shows the overseas parties as my buyer but I was forced to write them as my commission agents. I reaffirm that all my export sales were principle to principle sales and there is no commission agent involve in our contract. It's a directly buyer-seller agreement so I am not liable to pay any service tax on my export sales commission paid to overseas buyers. This part of my statement was not allowed by the department to be mentioned in my statement recorded by them on 24.09.2012.

These statements are contrary to the facts and I reaffirm that all the documents like Shipping Bill, Invoices, Packing List and BRC are genuine. This statement which has been extracted by the officers from me on 24.09.2012 under threat and pressure is no correct being contrary to the facts and documents. The statement tendered by me on 24.09.2012 may be taken as retracted."

22. The Commissioner has placed reliance on this retraction and there is no good reason as to why it should be ignored. The contract required an examination and the statement made by M/s. Sidh Designers on 25.09.2012 is in conformity with the clauses of the contract.

23. Thus, for all the reasons stated above, the Commissioner was justified in dropping the demand proposed in the show cause notices. All the five appeals, therefore, deserve to be dismissed and are dismissed.

(Order pronounced on **03.07.2023**)

(JUSTICE DILIP GUPTA)
PRESIDENT

(HEMAMBIKA R. PRIYA)
MEMBER (TECHNICAL)