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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066

CUSTOMS APPEAL BRANCH

Appeal No. ST/637 & 652/2007 - CU[DB] Date **27/05/2011**

Assistant Registrar
C.E.S.T.A.T, New Delhi

To :
C.C.E. CHANDIGARH

C.R. BUILDING, PLOT NO. 19, SECTOR 17-C,
CHANDIGARH 160017

C.C.E. CHANDIGARH Appellant

Vs

M/S HARVEEN & CO Respondent

I am directed to transmit herewith a certified copy of **Final order No.ST/204-05 2011 CU[DB]** dated 24.05.11

passed by the Tribunal under **Section 129, (B) of the Customs Act,1962 & Financial Act 1994 relating to Service Tax**

Assistant Registrar
(Customs Appeal Branch)

Copy to :

1. Respondent
M/S HARVEEN & CO
181, INDUSTRIAL AREA, PHASE-1,
CHANDIGARH.

2. Adv. / Consult MR. AK BATRA, ADV
C/O RESPONDENT

3. C.D.R
4. Bar association, CESTAT, New Delhi
5. Director Publications, Customs, Excise. I.P. Estate, New Delhi
6. M/s Centax Publictions Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi -
7. Company Law Institute of India Pvt Ltd.,No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
8. Taxmann Allied Service Pvt Ltd., 59/32, New Rohtak Road, New Delhi - 110005
9. Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road, Ahmedabad-15
10. LAWCRUX Advisors Pvt Ltd, LAW House,1-8,Sector - 10, Faridabad 121003 (Haryana)
11. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor,Vasant Arcade,Nelson Mandela Road, Vasant Kunj, New Delhi - 110070
12. Office Copy
13. Guard file

Assistant Registrar
(Customs Appeal Branch)

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI
Court No.IV

ST/Appeal No.637/2007 & ST/Appeal No. 652/07

(Arising out of order in appeal No.292/CE/CHD/07 dated 7.8.07 passed by the Commissioner of Central Excise ,Chandigarh)

Date of Hearing: 13.4.2011
Pronounced on 25-5-11

For Approval and signature:

Hon'ble Ms Archana Wadhwa, Judicial Member
Hon'ble Mr.Mathew John, Technical Member

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1. Whether Press Reporters may be allowed to see The order for publication as per Rule 27 of the CESTAT(Procedure) Rules, 1982? — Yes

2. Whether it would be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for Publication in any authoritative report or not? — NO

3. Whether their lordships wish to see the fair copy of the order? — Seen

4. Whether order is to be circulated to the Departmental Authorities? — NO

ST/Appeal No. 637/2007

M/s Harveen & Co. — Appellant

Vs

CCE, Chandigarh — Respondent

ST/Appeal No. 652/07

CCE, Chandigarh — Appellant

Vs

M/s Harveen & Co. — Respondent

Appeared for the Appellant: Shri A.K. Batra, Advocate
Appeared for the Respondent: Shri K.K. Jaiswal, SDR

Coram: **Hon'ble Ms. Archana Wadhwa, Member (Judicial)**
Hon'ble Mr Mathew John, Member (Technical)

Final ORDER No. ST/ 204 -205/11

Per Mathew John:

The Appellant in Appeal No. ST-637/2007 was providing clearing and forwarding services to M/s Whirlpool India Ltd during the period April 2001 to September, 2005. The Appellant was receiving payment shown as commission/ service charges from M/s Whirlpool India Ltd. Apart from this the Appellant was also receiving amounts from M/s Whirlpool India Ltd under different heads like service charges for employees, freight for distribution/transportation of goods, loading/unloading of goods, phone expenses, postage and courier, repair and maintenance, printing and stationery, octroi, detention charge, electricity and water, pre-dispatch inspection charges, packing charges, conveyance charges, staff welfare charges, rent and other misc expenses. They were paying service tax only on accounts shown as commission/service charges received from M/s Whirlpool India Ltd.

2. The Appellant was responsible for forwarding of goods as per advice from M/s Whirlpool India. The Appellant was required to arrange transportation of goods. For this purpose, the appellant was paid fixed remuneration. Although as per agreement, this charge was called "freight charges", the same was not on actual basis. Therefore, the Revenue made out a case that remuneration received as freight charges is also remuneration for clearing and forwarding services. Further the

Revenue was also of the view that various expenses reimbursed by M/s Whirl Pool under various headings like loading and un-loading, infrastructure cost, telephone etc. are nothing but consideration for providing C&F services and therefore, such amounts should also be added to the value of commission declared to have been received by the appellants and service tax should have been paid on such gross receipts.

3. A show cause notice dated 3.7.06 was issued demanding service tax amounting to Rs.36,97,509/- and education cess amounting to Rs.20,240/- payable for the period April, 2001 to September, 2005. Interest as applicable under Section 75 of the Finance Act, 1994 was also demanded. Further, there was a proposal for imposing penalty under Section 76 and 77 of the Finance Act, 1994. The show cause notice was adjudicated vide order dated 3.4.07 which confirmed the tax liabilities demanded under the show cause notice along with Section 75. Further penalties were imposed under Sections 76, 77 and 78 of the Finance Act, 1994.

4. Aggrieved by this order, the appellant filed an appeal before the Commissioner (Appeals). The Commissioner (Appeals) vide his order dated 3.7.07, set aside the demand of service tax on transportation charges, inward/outward charges, freight charges, godown rental charges and salary for clerks. On other items, the Commissioner (Appeals) confirmed the tax demanded. Further, he held that penalties imposed under

Sections 76, 77 and 78 are not justified and penalties were set aside.

5. The assessee as well as the department are aggrieved by the order of the Commissioner (Appeals). The assessee has filed Appeal No. 652/07 praying that the demands confirmed by the Commissioner (Appeals) should be set aside giving them the full relief. The Department has filed Appeal No. 637/07 and prayed that order in original should be restored.

6. The Advocate for the assessee made initial submission that the period involved is prior to Service Tax (Determination of Valuation Rules), 2006 were notified on 9.4.2006. He also made a submission that for the period 1.4.01 to 15.8.02, there was no mechanism for giving credit of tax paid on input services to be utilized for payment of tax on output services. The relevance of this argument is in the context of services like telephone services on which the service provider has already paid the service tax and it is argued that if serviced tax is again demanded on this part of the value, it would amount to double taxation on the same service.

7. During the relevant time, clearing and forwarding agent was defined under Section 65(25) of the Finance Act, 1994 which reads as under :-

> *"Section 65(25) 'clearing and forwarding agent' means any person who is engaged in providing any service, either directly or indirectly, connected with the clearing and*

forwarding operations in any manner to any other person and includes a consignment agent"

8. The provision regarding value on which tax was to be paid was contained was in 67 of Finance Act, 1994 which read as under:-

> *"For the purposes of this Chapter, the value of any taxable service shall be the gross amount charged by the service provider for such service rendered by him"*

Rule 6 (8) of Service tax Rules , 1994.

> *"The Value of the taxable service in relation to the services provided by a clearing and forwarding agent to a client for rendering services of clearing and forwarding operations in any manner shall be deemed to be the gross amount of remuneration or commission (by whatever name called) paid to such agent by the client engaging such agent."*

9. The Advocate for the assessee relies on various circulars of the Board stated to the effect that reimbursable expenses and out of pocket expenses will not form part of the value on which the service tax will have to be paid. The circular relied upon is reproduced below

"F.No. B.11/1/2001-TRU 9th July, 2001

> *5. A point has been raised that the service provider, namely, an actuary, an intermediary or insurance intermediary or an insurance agent is reimbursed certain out of pocket expenses such as traveling expenses, boarding and lodging charges on actual basis. These expenses are reimbursed in addition to the prescribed fee. Whether such reimbursements will be included in the taxable value? In this regard, it is clarified that the amount billed to the client on account of out of pocket*

expenses which are reimbursable on actual basis, such as traveling, boarding and lodging expenses, the same are not subject to service tax. In this respect, the assessee may be required to provide documentary evidence substantiating his claim."

10. Therefore, it is the contention of the advocate that the demand raised in the show cause notice is not maintainable at all. They also relied on the following case laws in support of their arguments:-

i) Nazir & Co Vs CCE Cochin-2008 TOIL 2384 CESTAT

ii) UM Thariath & Co Vs CCE Cochin-2007 (8) STR 161

iii) Reliance Industries Ltd Vs. CCE Rajkot-2008 (12) STR 345

iv) Order No. 1469/07 of CESTAT Bombay in Malabar Management Services Pvt Ltd Vs. CST

11. The learned DR on the other hand, argues that as per Section 67 of Finance Act 1994, the value of any taxable service was to be gross amount charged by the service provider for such service. He basically invites attention to Rule 6 (8) of Service Tax Rules, 1994 which made it very clear that value in relation to the services provided by clearing and forwarding agent to a client for clearing and forwarding operation in any manner shall be gross amount of commission by whatever name called, paid to such agent by the client engaging such agent.

12. The learned DR states that by calling the consideration received by different names, it cannot become a reimbursable expense. In the case of reimbursement under the heading

freight charges, he specifically argues that what is charged is not actual freight but some amount in the name of freight and in the circumstances, such charges cannot be excluded from the value of taxable services rendered. It is argued that without engaging clerks and utilizing telephones and having godowns for storing the goods and without paying the loading and unloading charges, the assessee could not have rendered the services at all. These are basic cost elements which have to be incurred for providing the service and therefore, there is no scope for any deduction in the gross consideration received from M/s Whirlpool India Ltd. He relies on the decisions of the CESTAT in the following cases:-

i) Met MC Vs CCE Jaipur-2001 (134) ELT 799

ii) Naresh Kumar & Co Pvt Ltd Vs CST Kolkata-2008(11) STR 578

In particular, DR invites attention to the observation of the Tribunal in para 6.10 in the case of Naresh Kumar Co Pvt Ltd observing that if an expenditure is indispensable and inevitably incurred to provide a service, such cost should essentially form part of cost of service itself and shall contribute to value of taxable service.

13. This is clearly a case where the Appellant is trying to reduce incidence of service tax by accounting his remuneration as a reimbursable expense. For this they rely on certain circulars issued by CBEC in relation to certain types of expenses in relation to other services and ignores provisions of rule 6(8) of the Service Tax Valuation Rules,1994. The provisions of Rules

should get precedence of clarifications issued by CBEC and that too in relation to other matters. The essential criteria to decide whether amounts received from a person availing service will be part of value of service should be the criteria laid down by this Tribunal in the case of Naresh Kumar and Company Ltd (Supra). The Appellant could not have provided the service of C&F agents without employing clerks or having a telephone in his office. Even if these expenses are separately billed to the client, the expenses will form part of the value of taxable service. However, cost of transportation is on a different footing. Transportation is a service provided by the person operating the vehicles. There is no proof adduced that the appellant had the responsibility to deliver the goods at the door step of the client. In the case of freight revenue also conceded that it can be considered as reimbursable expense so long as actual freight amounts are claimed. So it is ordered that the Appellant shall submit evidence of cost incurred as freight and such actual amounts of freight shall not form part of the value of service rendered by the Appellant.

14. The argument that if value of telephone charges are included it will amount to taxing the same value twice is not a valid argument because such was the position before extension of Cenvat Credit Scheme to service tax. Such argument could be raised for any type of taxation where credit of tax paid on inputs is not available. The service tax levy has evolved over a few years and presently credit of duty paid on input service is

available. In fact in the initial stages of such evolution such credit was allowed only in respect of input services which fell in the same category as the output service. The incidence of taxation at the relevant time is fixed taking into account such multi-level incidence. What is not provided by law cannot be extended by judicial interpretation.

15. The Appellant has a case in the matters relating to the pre-dispatch inspection, octroi and detention charges also. These expenses are not towards any activity that will constitute the service rendered by the Appellant. Abatement from gross receipts received shall be allowed for these expenses also subject to production of vouchers for such expenses.

16. In the case of godown rent, there can be a dispute because the godown might be actually hired by M/s Whirlpool and the Appellant is paying the rent as an agent present on the spot. However, if the godown is taken on rent by the Appellant for discharging his obligations under the contract, rent for godown will form part of the value even if it is reimbursed separately by the client.

17. To sum up the matters relating to transportation charges, pre-dispatch inspection charges, octroi and detention charges needs re-examination by the adjudicating authority. To enable such examination the M/s M/s Harveen & Co. has to produce the concerned vouchers before the adjudicating authority.

Consequently the matter of penalty to be imposed also needs to be re-examined. For these purpose the case is sent back to the adjudicating authority.

18. Accordingly the appeals filed by M/s M/s Harveen & Co.and by the department are disposed of.

(Archana Wadhwa)
Member (Judicial)

(Mathew John)
Member (Technical)