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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/43 & 657 /2007 - CU[DB] Date **24/01/2011**

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

To :
M/S SAI SHIPPING SERVICES
W/4-5, NEAR ICD RAJSICO, PHASE-II, BASNI,
JODHPUR

M/S SAI SHIPPING SERVICES Appellant

Vs

C.C.E.JAIPUR Respondent

I am directed to transmit herewith a certified copy of **Final order No. ST/12-13/ 2011 CU[DB]** dated 18.01.11 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
C.C.E.JAIPUR
NCRB, STATUE CIRCLE, C-SCHEME, JAIPUR.
2. Adv. / Consult
MR.V. LAXMIKUMARAN
B-6/10, SAFDARJUNG ENCLAVE,
NEW DELHI-110029
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. M/s. Deeparchie Publications, M-93, Marg. 46, Saket, New Delhi 110017
9. Taxmann Allied Service Pvt Ltd., 59/32, New Rohtak Road, New Delhi - 110005
10. Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road, Ahmedabad-15
11. LAWCRUX Advisors Pvt Ltd, LAW House,1-8,Sector - 10, Faridabad 121003 (Haryana)
12. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor,Vasant Arcade,Nelson Mandela Road, Vasant Kunj, New Delhi - 110070
13. Office Copy
14. Guard file

Assistant Registrar
(Customs Appeal Branch)

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

ST/Appeal Nos.43 & 657/2007

(Arising out of order in appeal No.576/HKS/sT/JPR.II/06 dated 7.11.06 and order in revision No. 5/JP.II/07 dated 10.8.07 both passed by the Commissioner of Central Excise, Jaipur)

Date of Hearing: 18.1.2011

For Approval and signature:

Hon'ble Ms Archana Wadhwa, Judicial Member
Hon'ble Mr. M. Veeraiyan, 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? No

2. Whether it would be released under Rule 27 of the cESTAT (Procedure) rules, 1982 for publication in any authoritative report or not? Yes

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

4. Whether order is to be circulated to the Department Authorities? Yes

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M/s Sai Shipping Services — Appellants

Vs

CCE, Jaipur — Respondent

Appeared for the Appellant: Shri B.L. Narasimhan, Advocate
Appeared for the Respondent: Shri B.L. Soni, DR

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

Final ORDER No. 59/12-13/11

Per Archana Wadhwa:

The Appellant is a registered service tax provider under the category of Customs House Agent. The dispute in the present appeal relates to the value of their services to be taxed during the period 2000 to 2005. A show cause notice dated 6.10.05 was issued to them proposing to confirmed the demand of Rs. 36,20,863/- on the ground that the service tax is to be levied on the entire gross value charged by the appellants from their customers without giving deduction on account of re-imbursable expenses incurred by the CHA. However, as during adjudication, the appellant could produce evidence showing the actual expenses undertake by them on behalf of their client, the adjudicating authority, granted the relief to that extent. As the documentary evidence for the balance years could not be produced by the appellants, having been lost by them, the demand to the tune of Rs. 24,18,925/- was confirmed alongwith confirmation of interest and imposition of penalty of rs 10 lakhs under Section 78 of the Finance Act, 1994. In addition, penalty at the rate of Rs.100/- per day under Section 76 of the Act was also imposed. The said order of the Assistant Commissioner was impugned by the appellants before the Commissioner (Appeals).

2. In a parallel set of proceedings, the Commissioner reviewed the order of the Assistant Commissioner and issued a show cause notice for enhancing of the penalty under Section 78. The said show cause notice culminated into an order passed by the Commissioner enhancing the penalty from Rs. 10 lakhs to Rs. 24,28,925/-. The said order of the Commissioner is also impugned before us.

3. As the issue in both the appeals is interlinked, they are taken up together for disposal. The main issue to be decided is as to whether the service tax to be confirmed on the gross value charged by the CHA without giving any benefit of demand on actual expenses undertaken by them on behalf of their customers. The appellate

authority has observed that as the appellants have not been able to prove the reimbursable expenses undertaken by them, the onus to prove is upon them. The benefit cannot be extended. Accordingly, he has confirmed the demand on the entire value.

4. The learned Advocate appearing on behalf of the appellants draws our attention to Board Circular No. B/43/1/97-TRU dated 6.6.1997. In terms of the said Circular, the service tax in relation to the Customs House Agent is required to be charged for the services provided by him and as the charges reflected in the invoice," Agency Commission, Charges, Agency and Attendance Charges, Agency Chagres and some similar other descriptions." It stands clarified in the Board Circular the service tax shall be computed only with reference to such charges. And the payment could not statutory levies made by the cHA on behalf of their claim and taxes at all reimbursable expenses incurred by them are not to be included for computing the service tax.

5. Learned Advocate submits that the Revenue agrees on the above legal issue and in fact extended the benefit for one year in respect of they could produce the documents. However, benefit has not been extended only in respect of that period for which the documents could not be produced. Drawing our attention, a sample invoice raised by the appellant CHA, he submits that all reimbursable expenses were shown separately and the agency charges, which was the payment for the services provided by them was being shown separately in all the invoices. As such, he submits that if the documents produced by them for one year has been accepted to be correct, the fact that the documents for the other years were lost by them, could not have made the different5, specially when agency

charges being reflected in the invoices were found to be correct for the earlier period. The charges below could have accepted the appellants contention to levy service tax only on the agency charges reflected in the invoice.

6. In the alternative, learned Advocate draws out attention to the same circular issued by the Board laying down that where there is no separate break up in respect of the expenses, the value of the taxable services shall be 15% of the lumpsum gross charged to the customers. He submits that the lumpsum amount charged from them from the client is available in the invoice in which case, the Revenue should have adopted the other course of action laid down in the Circular. He submits that if 15% of the lumpsum amount charged by them from their client is considered, the value of the taxable service and service tax is calculated on the same, the amount paid by the3m would be much higher.

7. Countering the arguments, learned DR submits that admittedly, the appellants have not been able to produce the supporting documentary evidences in respect of the various reimbursable expenses incurred by the appellants, in which case the authorities below were justified in rejecting the claim. As regards the alternative course of action suggested by the Board Circular relied upon by the appellants he submits that since the invoices were being raised showing the break up and not for a lumpsum amount, the second... amount would not be available.

8. After appreciating the submissions made by both sides, we reproduce paras 2.4 and 2.5 from the Board Circular No. D/43/1/97-TRU dated 6.6.1997:-

"It is clarified that in relation to Custom House Agent, the service tax is to be computed only on the gross service charges, by whatever head/nomenclature, billed by the Custom House Agent to the client. It is informed that the practice obtaining is to show the charges for services as 'agency commission;, charges, agency and attendance charges, agency charges and some similar descriptions. The service tax will be computed only with reference to such charges. In other words, payments made by CHA on behalf of the client, such as statutory levies (cess, customs duties, port dues, etc.) and various other reimbursable expenses incurred are not to be included for computing the service tax.

2.5 In many cases, the Customs House Agent undertakes 'turnkey' imports and exports where a lumpsum amount is charged from the client for undertaking various service. 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 Customs Hose Agents are require to show the service charges ast15% of such lumpsum amount of the bills and service tax of 5% will be chargeable on the above 15%."

9. In view of the admission by the appellants that they are not able to produce the documentary evidence support the various reimbursable expenses, we find that para 2.5 of the said circular would be applicable to them. The break up of the total charges taken by the appellants from their client having not been substantiated, the total gross value in the invoices is to be adopted as lumpsum amount and the taxable services are required to be taken as 15% of the lumpsum

amount. If that be so, service tax required to be paid by the assessee would be less than the total amount actually paid by the appellant, as per the claim made by the appellant. However, we find that there is nothing on record to substantiate the above claim, in which case we direct the authorities to calculate the tax in terms of para 2.5 of the Board Circular.

10. As regards the penalty, as we have already held that the failure on the part of the appellant to substantiate the reimbursable expenses claimed on account of loss of documents, cannot be held to be reflected on any malafide on their part and if the 15% of the exempted amount charged, resulting in less duty payment on them, there is no warrant in imposing penalty under Sections 76 and 78 of the Finance Act. As such, the impugned orders imposing penalties on them and enhancing the penalty upon them are set aside. Both the appeals are disposed of in the above terms.

(Order dictated and pronounced in the open Court.)

(ARCHANA WADHWA)
Judicial Member

(M. VEERAIYAN)
Technical Member

MPS*