

IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi – 110 066.

Date of Hearing: 18.10.2016
Date of Pronouncement: 27.07.2017

Appeal No. ST/3616/2012 (DB)

(Arising out of Order-in-Appeal No. IND/CEX/000APP/238 & 239/12 dated 8.8.2012 passed by the Commissioner (Appeals), Customs, Central Excise & Service Tax, Indore)

For Approval & Signature :

Hon'ble Ms. Archana Wadhwa, Member (Judicial)
Hon'ble Mr. Ashok K. Arya, Member (Technical)

1.	Whether Press Reporter 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

M/s Adhikrut Jabti Evam Vasuli

Appellant

Vs.

CCE, Indore

Respondent

Appearance :

Shri Krishnan Garg, Consultant - for the Appellant

Shri Sanjai Jain, AR - for the Respondent

CORAM: **Hon'ble Ms. Archana Wadhwa, Member (Judicial)**
Hon'ble Mr. Ashok K. Arya, Member (Technical)

Interim Order No.18/2017
Final Order No. 55557/2017

Per Ashok K. Arya :

The appellant viz. M/s Adhikrut Jabti Evam Vasuli is in appeal against the Order-in-Appeal dated 8.8.2012 passed by Commissioner (Appeals).

2. The matter pertains to the liability of service tax on the reimbursable amounts which have been collected on the items like Security Guards, Videography Police, Escorts, DM/CMM charges etc. The appellant has been paying service tax only on the commission received and in some cases on enforcement charges also.

3. The appellant has been represented by Id. Consultant Shri Krishnan Garg and department has been represented by Id. AR Shri Sanjay Jain.

4. The Id. Advocate on behalf of the memorandum of appeal, inter alia submits as under:

(i) Service tax is wrongly confirmed on the amount realised for the services provided prior to 1.5.2006.

(ii) Credit has wrongly been not allowed of Rs.1,74,681/-.

(iii) Amount incurred and charged as Pure Agent is not chargeable to tax. These expenses are incurred on behalf of the client; they are reimbursed by the client and these are substantiated by documentary evidence. In support, the following cases are relied upon:

(a) *CCE, Belgaum Vs. Pratik Agencies* – 2008 (11) STR 117 (Tri.-Bang.)

(b) *Scott Wilson Kirkpatrick (I) P. Ltd. Vs. CST, Bangalore* – 2007 (5) STR 118 (Tri.-Bangalore).

(c) *Malabar Management Services P. Ltd. Vs. CST, Chennai* – 2008 (9) STR 483.

- (iv) Reimbursement of expenses charged on actual basis is not taxable under Rule 5(2) of Service Tax (Determination of Value Rules), 2006.
- (v) The extended period is not invocable. The appellant relies on the Apex Court's judgement in the case of *M/s Kushal Fabricators Pvt. Ltd. Vs. CCE* – 2009 (238) ELT 21 (SC). All the facts were known to the department regularly from the year 2006-2007.
- (vi) Looking to the bona fide belief, the appellant is eligible the benefit under Section 80. In support, appellant relies on following judgements:
 - (a) *Hindustan Steel Vs. State of Orissa* – 1978 (2) ELT 159 (SC).
 - (b) *Smita Shetty Vs. CCE* – 2003 (156) ELT 84 (Bang.-CESTAT).
 - (c) *Flying Man Air Courier Pvt. Ltd. Vs. CCE* – 2006 (3) STR (Tri.-Del.)
- (vii) No penalty is imposable under Section 78 since there is no suppression of facts.

5. The ld. AR reiterates the findings of the lower Revenue authorities.

6. We find that the impugned order passed by Commissioner (Appeals) *inter alia* on its pages 4 to 6 has observed as under :

"I have also gone through the provisions Rule 5(2) of Service Tax (Determination of Value) Rules, 2006 and the various decisions. In the instant case the appellant is acting as recovery agent for various Banks. The activity is to recover the amount of loan from defaulters. To perform and execute above work of recovery agent the appellants have made a notice of an advertise in the Newspaper, make travelling to the destination of defaulter to perform recovery and to ascertain the property so that it can be seized if required, take help of police escort, provide security of property seized etc. in other words these are essential requirements for providing the service that is to say for performing act of recovery agent, the appellant are bound to make such expenses. Without these appellant cannot provide service of recovery agent and their all activities without these performances are in vacuum. The matter whether reimbursement of expenses is includible in the taxable value was under consideration with Larger Bench of Tribunal in the case Sr. Bhagvathy Traders Vs. CCE – 2011 (33)STT) wherein Hon'ble Tribunal have held that 'service tax is payable on expenses like transportation charges, loading and unloading, rent salary of staff, electricity, telephone charges, stationery charges, courier charges etc. even if in vacuum. It was held that such reimbursement expenses can be excluded only when the person (service provider) actually paying was under no obligation to pay the amount and he pays the amount on behalf of the customer. What are costs for input services and inputs used for providing services cannot be treated as reimbursable cost'. In the instant cases various expenses made by the appellant, was essential input services in performing the act of recovery agent, therefore, even if such expenses are subsequently reimbursed by the Banks, are includible in the taxable value. This is also the view of Hon'ble Tribunal in number of cses out of which some are quoted below (a) CCE Vs. Team S&S -2011 (930) STT 30 and (b) Harveen & Co. Vs. CCE – 2011 (30) STT 111.

..... I further find that the appellant had made expenses towards Tractor seizing (Towing) charge and getting reimbursement of such expenses from the Bank. The investigation has brought on record that the appellant have charged service tax to banks on such amount. Annexure-V to the show cause notice are some invoices of the appellants which were retrieved from the seized computer, also shows that the service tax is also charged on the charged for out of pocket expenses. The appellant have disputed these invoices and its content. However, they have submitted that they have not charged service tax on reimbursed amount. The said argument of the appellant. In view of contrary evidence on record (Annex-X to the Show Cause Notice) cannot be accepted.

I also find that the appellant made expenses for security guard, advertisement, rent a cab etc. and got the amount reimbursed from the bank and at the same time availed credit of service tax paid against such input service. In view of this factual position, it cannot be argued that expenses incurred towards such input service (Reimbursable) cannot form the part of taxable value. In view of the above, I find that the circulars and decisions relied by the appellant are not relevant to the present case and the amount reimbursed by the bank is a part of taxable value. I hold accordingly.”

6.1 In addition to above observations in the impugned order, we find that the appellant has not been able to prove that the subject expenses do not pertain to the items/activities services which are not integrally linked with their main activity/service of recovery agent. Without the subject items/activities for which the appellant has taken reimbursement from the clients the activity of recovery agent cannot be performed by them. The fact of reimbursement of expenses for the subject items/activities by the clients cannot make any difference to the conclusion that the expenses incurred on various items like security guards, police escorts, videography charges and so on are integrally linked with the appellant’s service of recovery agent. This is also the fact that the appellant has been charging service tax from the service recipients against reimbursable amounts spent for the subject items.

6.2 After careful consideration of the facts and submissions of both the sides, we are in agreement with the findings given in the impugned order by the Commissioner (Appeals) quoted above.

7. **Denial of Cenvat credit** – The appellant submits that they paid service tax @ 8% of the value of the exempted services, whereas the demand of

service tax has been confirmed with full rate on the exempted income claimed by the appellant, thus provisions of Rule 8(3) of CCR, 2004 will become inapplicable in the case. The appellant, therefore, requests for allowing them Cenvat credit in the case of the items/services where payment of 8% was made under Rule 6(3) of CCR, 2004 and where the demand has been confirmed on such items of services with full rate as it would amount to double taxation.

7.1 The fact of double taxation on same collection charges needs verification at the level of original adjudicating authority. Wherever confirmation of service tax on certain expenses incurred on various items resulted in double taxation, the appellant would be entitled to claim the same back as Cenvat credit/refund. For this purpose, the matter is remanded back to the original adjudicating authority, who shall give the relief of Cenvat credit/refund on this after giving a personal hearing to the appellants and after necessary verification.

7.2 **Extended period not invocable** - The appellant's submission that there is no wilful suppression of facts or mis-statement with intent to evade payment of tax cannot be accepted as the facts on record indicate that the appellant did not disclose required information to the department. The appellant disregarded the summons issued to them and they tried to avoid joining investigation. Revenue makes the case only after seizure of documents and after retrieval of information from seized computer belonging to the appellant. Therefore, the Commissioner's conclusion that appellant

made deliberate mis-declaration and suppression of fact cannot be questioned.

8. In the light of above discussions, the appeal is not allowed except on the issue of 'denial of Cenvat credit' for which the case is remanded back to the original adjudicating authority, who shall decide in terms of the findings given in para 7.1 above within three months of receipt of order after giving an opportunity of personal hearing and that of production of documents to the appellant.

9. The appeal decided in above terms.

(Pronounced in Court on.....)

(Archana Wadhwa)
Member (Judicial)

(Ashok K. Arya)
Member (Technical)

RM

Per Archana Wadhwa:

10. After having gone through the order proposed by my Ld. Brother I proceed to record separate findings.

11. As already observed in the proposed order, appellants are engaged in the business of providing services of recovery agent to various Nationalised Banks since 1988. The service of recovery agents were brought under the service tax net w.e.f. 01.05.2006, for which purpose the appellant procured registration from their Jurisdictional Service Tax Department.

12. During providing services the appellant incurred certain expenditures like Parking charges, arrangement of security guards, Insurance premium, videography, police escorts, paper publication etc. According to the appellant they have entered into an agreement with their bank for reimbursement of such expenses, on actual basis.

13. Issue involved is as to whether such expenses incurred by the appellant and reimbursed by their clients would form part of the assessable value of the services or not. The appellants have claimed that in terms of Rule 5(2) of the Provisions of Service Tax (Determination of Value) Rules 2006, expenditure or cost incurred by the service provider as a pure agent of the recipient of the services is excludable from the value of the taxable services subject to certain conditions. As appellant has satisfied all such conditions they are within their right to exclude such reimbursable expenses from the value of the services.

14. The adjudicating authority, for holding against the appellant has relied upon the Larger Bench decision of the Tribunal in the case of ***Shri Bhagvathy Traders Vs. CCE 2011 (33) STT***. However, I find that the said decision observed that such reimbursable expenses can be excluded only when the service provider actually paying was under no obligation to pay the amount and he pays the amount on behalf of the customer. As such the question which arises is as to whether the various expenses incurred like transportation, air expenses, video recording,

parking charges, etc. are the obligation of the appellant who is a mere recovery agent on behalf of the Banks.

15. The Hon'ble High Court of Delhi in the case of ***Intercontinental Consultants & Technocrats Pvt. Ltd. Vs. UOI 2013 (29) STR 9 (Delhi)*** have considered the service tax (Determination of Value) Rules 2006 and have held that Rule 5 (1) of the said Rules as *ultra vires* in as much as the same travels beyond the scope of section 66 and 67 of the Finance Act 1994. The Hon'ble High Court observed that value of taxable services has to be in consonance with section 66 which levies tax only on taxable services and nothing else. Section 67 of the Finance Act clearly stipulates that the value of the taxable service is gross amount charged by service provider "for such service". Accordingly, the Hon'ble High Court has held that the expenditure / cost such as air travel / hotel stay / transportation etc. incurred by service provider in course of providing taxable services cannot be considered to be the amount charged by service provider "for such service" provided by him. The said decision of the Hon'ble High Court of Delhi is fully applicable to the facts of the present case. The appellants are providing the services of recovery agents and for carrying out "such services", for which they are being paid by the bankers or the other financial institutions. They have to undertake the other expenses for which the banks have agreed to re-pay the same. In other words, it can be observed that instead of the appellant making the travel arrangements or arranging the police escorts or the security guards, etc. the same could have been provided by the banks itself, in which case, the appellant would be under no obligation to incur expenses and to seek reimbursement. As such, as far as the legal issue is concerned, I am of the view that the said decision of the Delhi High Court which seems to have escaped the attention of my Ld. Brother Shri Ashok K. Arya while passing the order, squarely covers the issue in favour of the appellant.

16. However, I find that though the appellants have stated in their memo of appeal about the agreement between them and the bankers as regards the reimbursement of such expenses, as also for scrutiny of the invoices the same is required to be examined by the lower authorities for which purpose the matter may be remanded.

17. In any case and in any view of the matter, I find that the entire demand is hit by the bar of limitation in as much as the show cause notice, for the period 01.05.2006 to March 2009, was issued on 08.10.2010. Apart from the fact that the issue in question was the subject matter of the Larger Bench decision and the Hon'ble High Court of Delhi judgment and as such they are not free from doubt, it is also seen that the appellant has taken a categorical stand that such reimbursable expenses were being disclosed by them in their returns and their books of accounts. It is only on verification of all the records and the books of accounts maintained by them, in the ordinary course of their business, that the demand was raised by the Revenue. If that be so, no malafide can be attributed to the assessee, in which case, the extended period of limitation would not be available to the Revenue. Otherwise also, I note that it is well settled law, that when the issue is not free from doubt and is referred to Larger Benches, an assessee cannot be held guilty of any malafide or suppression. Reference in this regard is made to the Hon'ble Supreme Courts decision in the case of ***Continental Foundation Joint Ventures Vs. CCE Chandigarh-I 2007 (16) ELT 177 (SC)***. As such I am of the view that the demand having been raised by invoking longer period of limitation is not sustainable. The same is accordingly set aside the appeal is allowed with consequential relief on the point of time bar.

18. As regards the remand of the matter relating to issue of denial of cenvat credit, I agree with the Ld. Member (Technical).

Difference of Opinion:

- i) Whether the demand has to be upheld by not excluding the reimbursable expenses from the value of the services as held by Ld. Member (Technical) or the same have to be excluded subject to verification of the agreement between the appellant and the banks and the invoices etc. as held by Ld. Member (Judicial).
- ii) Whether the extended period of limitation has been rightly invoked as held by Ld. Member (Technical) or the demand is barred by limitation as

held by Ld. Member (Judicial) and as such, the appeal is to be allowed in toto, on the said disputed issue.

[Pronounced in the open court on 16.02.2017}

(Ashok K. Arya)
Member (Technical)

(Archana Wadhwa)
Member (Judicial)

Bhanu

Interim Order No. 52/2017

Per B.Ravichandran:

The present appeal is referred to third Member in view of difference of opinion between the members in the Division Bench on certain aspects. The brief facts of the case are that the appellant is in the business of providing services as “Recovery Agent” to various nationalized banks for the past many years. The services rendered by them were subjected to service tax w.e.f. 1.5.2006. One of the disputes involved in the present appeal is relating to valuation of the taxable services provide by the appellant. The difference of opinion also is only with reference to such valuation and question of limitation.

2. During the course of providing services as “Recovery Agent” to the client banks, the appellants incurred certain expenditure like parking charges, arrangement of security guards, insurance premium, videography, police escorts, publication in newspaper, etc. The appellant claimed that in terms of the agreement with the banks, these are reimbursed on actual basis. Hence, these expenses are not to be included in the value for service tax purposes. The appellant claimed that in terms of Rule 5 (2) of Service Tax (Determination of Value) Rules, 2006, the expenditure incurred by the service provider as a ‘pure agent’ of the recipient of the services is excludible from the value for the tax purposes. It is further claimed that they have fulfilled all the conditions for being such ‘pure agent’.

3. On the confirmation of service tax liability including such expenditure, the appellant filed appeal before the Tribunal, which was heard and decided by the Division Bench. The Division Bench vide interim order no.18 of 2017 dated

16.02.2017 recorded the following difference of opinion, for resolution by the third member.:-

(i) Whether the demand has to be upheld by not excluding the reimbursable expenses from the value of the services as held by Ld. Member (Technical) or the same have to be excluded subject to verification of the agreement between the appellant and the banks and the invoices etc. as held by ld. Member (Judicial).

ii) Whether the extended period of limitation has been rightly invoked as held by ld. Member (Technical) or the demand is barred by limitation as held by ld. Member (Judicial) and as such, the appeal is to be allowed in toto, on the said disputed issue.

4. I have heard ld. Counsels for the appellants and ld. AR for the Revenue and perused the appeal records.

5. Ld. Member (T) reproduced, at length, the findings of the ld. Commissioner (Appeals) in the impugned order. It is seen that the impugned order as well as the ld. Member (T) placed reliance on the decision of the Larger Bench in **Bhagvathy Traders – 2011-TIOL-1155-CESTAT-BANG.LB.** The said decision is not a ratio for disallowing reimbursable expenses for exclusion from the taxable service. In fact, the said decision only framed certain guidelines stating that reimbursable expenses can be excluded only when the service provider was not under any obligation to incur such expenses and the same is done on behalf of the service recipient. In other words, the excludability of any expenses claimed to be reimbursed depends on the facts and circumstances of each case and the terms of the agreement relevant to the said case. In the present appeal, the appellant categorically claimed that in terms of the agreement with client banks, they are incurring various expenses during the course of providing service as recovery

agent. These expenses were reimbursed to them on actual basis. This aspect can be verified in terms of the agreement, documents/invoices supporting the claim of the appellant.

6. I note that the decision of the Hon'ble Delhi High Court in **Intercontinental Consultants & Technocrafts Pvt. Ltd. - 2013 (29) STR 9 (Delhi)** has not been considered, before a decision is arrived at by the Id. Member (T). The Hon'ble Delhi High Court held that the rule 5 (1) of the Valuation Rules 2006 is ultra virus of the substantive legal provisions of Section 67 and 68 of Finance Act, 1994. The High Court was dealing with similar reimburseable expenditure regarding travel or accommodation. The facts of the present case along with connected documentary evidences are to be examined in line with the observation of the Tribunal in **Shree Bhagvathy Traders (supra)** and Hon'ble Delhi High Court in **Intercontinental Consultants & Technocrafts Pvt. Ltd. (supra)**. This can be done by the Original Authority for a fresh decision. As such, the findings of the Id. Member (J) with reference to remand of the matter to the Original Authority is correct.

7. Regarding the question of limitation, I note that the period involved is 1.5.2006 to 31.3.2009 and the notice was issued on 8.10.2010. Here, I note that the includibility or otherwise of expenditure incurred during the course of providing of service is an issue which was subject matter of various litigations including reference to Larger Bench of Tribunal and the decision of the Hon'ble Delhi High Court, mentioned above. It may not be incorrect to say that the whole issue has been subjected to multiple interpretation and also resulting in the Hon'ble Delhi High Court even striking down the provision of Rule 5(1) as ultra virus. Admittedly, the appellants maintained records of all the expenses and the present demand was based on such records. In such situation, I find that the demand cannot

be invoked by alleging willful misstatement, fraud and intention to evade payment of tax. Here, the extended period was invoked on the ground that the information was not disclosed to the Department. When there is a bonafide doubt based on the interpretation of the legal provisions, the question of suppression and willful misstatement cannot be sustained.

8. In view of the above discussion and analysis, reference made on different of opinion is answered as below:-

- (i) the amounts claimed to be re-imburseable expenses can be excluded from the assessable value subject to verification of the agreements between the appellant and the banks and the supporting documents like invoices, etc to be submitted by the appellant.
- (ii) The extended period of limitation cannot be sustained in the facts and circumstances of the present case.

(B. Ravichandran)
Member (Technical)

Ckp.

Pronounced/09.06.2017

Consequent on the findings by the 3rd Member on reference, in terms of majority view, the impugned order is set-aside and appeal is allowed with consequential relief on the point of time bar.

(Pronounced on 27.07.2017)

(Ashok K. Arya)
Member (Technical)

(Justice (Dr) Satish Chandra)
President

pcs