IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI
PRINCIPAL BENCH, COURT NO. IV

Service Tax Appeal No. 55604 & 55072 of 2014

[Arising out of the Order-in-Appeal No. IND/CEX/000/ APP/ 140/2014 dated 16.07.2014, passed by Commissioner (Appeals), Customs, Central Excise and Service Tax, Indore]

M/s. Vipul Agencies **Appellants**

Vs.

CCE & ST, Indore **Respondent**
& vice versa

Appearance:

Shri Abhishek Jaju, Advocate for the Appellants
Shri G R Singh, AR for the Respondent

CORAM:

Hon'ble Mr. Anil Choudhary, Member (Judicial)
Hon'ble Mr. C L Mahar, Member (Technical)

Date of Hearing/ Decision: 25.05. 2018

FINAL ORDER No. 52086-52087 /2018

Per: Anil Choudhary:

The issue in this appeal is whether the appellant-assessee, Clearing and Forwarding agent have been rightly subjected to demand of additional Service Tax as short paid.

2. Brief facts as per the show cause notice are that the appellant is engaged in providing services under the classification 'Clearing and Forwarding agent' service and is registered with the Department. It appeared to Revenue that the appellant have short paid Service Tax. Information was called from the principal i.e. M/s. Jaypee Bela Plant (unit of Jaiprakash Associates Ltd.) Rewa MP. who in reply informed that since 01/04/2001 under the contract signed with the appellant, they have made gross payment of Rs.1,01,27,231/- for providing the 'C & F' services on which it appeared that Service Tax of Rs.9,01,863/- was payable whereas the appellant had paid service tax of Rs.49,530/- only. Hence, it appeared that the appellant have short paid Service Tax of Rs.8,52,333/- for the period April, 2002 to September, 2006.

3. This is the second round of litigation before this Tribunal. Earlier this matter had come to this Tribunal and vide Final Order No. ST/A/93/2012 dated 08.02.2012, the appeal was allowed by way of remand to the Adjudicated Authority wherein this Tribunal took notice of the undertaking of the counsel for the appellant that they will collect show cause notice from the Adjudicating Authority by making application for the same and thereafter on receipt of reply, the Adjudicating Authority shall hear the matter and pass appropriate order. All the pleadings were kept open, except the pleading of non-receipt of show cause notice which are resolved by the Tribunal.

Thereafter, denovo Order-in-original dated 20/02/2013 was passed on contest and the proposed demand as per the show cause notice Rs.8,52,333/- was confirmed allowing benefit of appropriation of Rs.5 lakh pre-paid as per earlier directions of this Tribunal along with equal amount of penalty under section 78 and further penalty of Rs.5000/- and penalty of Rs. 200/- per day for delay in furnishing of each return from the due date till the date of furnishing of the same. Penalty was also imposed under section 76.

4. Being aggrieved, the appellant preferred appeal before learned Commissioner (Appeals) who under the impugned order has been pleased to confirm the demand, denying the deductions being claimed by the appellant, being amounts received by them as pure agent, by way of reimbursement. However, the learned Commissioner was pleased to set aside the penalty under section 76.

5. Being aggrieved the appellant is before this Tribunal. The learned counsel for the appellant states that service tax is not payable on amounts received by the appellant / service provider which are received as a pure agent as have been held by Hon'ble Delhi High Court in the case of Intercontinental Consultants And Technocrats Private Ltd., which judgment have been confirmed by Hon’ble Supreme Court as reported in 2018 (10) GSTL 401 (SC). In the said judgment, it has been held that Rule 5(1) of Service Tax

(Determination of Value) Rules, 2006 is ultra virus section 67 of the Finance Act. It has been further held that the amounts received by the service provider as the pure agent, by way of reimbursement, is not leviable to levy of service tax.

6. The learned counsel have demonstrated from the copy of agreement on record particularly Para 10 which reads that - the agent shall pay the rent, electricity, water charges and munipal taxes in respect of the said godown on behalf of the company. The agent will be reimbursed as per actual. Further para-11 reads that - the agent, at his own cost and expenses shall obtain and maintain all necessary permission, sanction and approvals of all government and other local authorities and other registration and license on behalf of the company. Wherever the agent needs the Company's help in obtaining the licenses, the Company shall do so at its discretion. Further para 22 of the agreement reads that - the agent will be paid a commission/ remuneration of 5% of all the payment made by the agent on behalf of the company.

7. Thus, the learned counsel states that it is apparent and crystal clear that what the agent has received as remuneration is only 5%, as provided in the agreement over and above the amount of expenditure actually incurred on behalf of the company. Further, the learned counsel points out from the impugned order that the learned Commissioner denied the benefit of the amounts received as

reimbursement on the ground that the appellant did not furnish the required details to the adjudicating authority as per the bifurcations of the amounts received. Further, the court below have placed reliance on Rule 6(8) of Service Tax Rules, 1994 substituted with effect from 16/10/1998 vide Service Tax Amendment Rules 1998 which provides – the value of 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.

8. We find that subsequent to passing of the impugned order, the Hon'ble Delhi High Court and Hon'ble Supreme Court have clarified this aspect, and made clear that whatever the service provider received by way of reimbursement as the pure agent, no service tax is payable on the same.

9. In this view of the above position of present law as interpreted by Hon’ble Supreme Court, we hold that the appellant is not liable to service tax on the ground that the payments they have received on the pure agent basis by way of reimbursement of expenses incurred on behalf of the principal. We also hold that the appellant is liable to pay service tax on the amount of remuneration/commission received from the Principal for the services provided, which will also include

the amount of 5% given by the Principal on the expenses as pure agent.

10. Accordingly, we allow this appeal and remand it to the adjudicating authority for the limited purpose of recalculation of tax payable as per our directions and findings hereinabove. The appellant is also directed to appear before the adjudicating authority within 60 days from the date of receipt of this order, copy of this order along with the detailed explanation and supporting documents etc. in favour of the amount they claim as received by way of 'pure agent'.

11. Revenue's appeal No. 55072/2014for deletion of penalty under section 76 also stand dismissed in the facts and circumstances of the case. In other words, we uphold the dropping of penalty under section 76.

12. In the result, both the appeals are disposed of.

(Dictated and pronounced in the open Court)

(C L Mahar)
Member (Technical)

(Anil Choudhary)
Member (Judicial)

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