CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No.2, R. K. Puram, New Delhi.

Date of hearing: 24.09.2018
Date of pronouncement: 10.12. 2018

S. T. Appeal No. 55694 of 2013
(Arising out of Order-in-Appeal No. 294/ST/DLH/2012 dated 29.10.2012 passed by the Commissioner of Central Excise (Appeals), Delhi-I)

M/s Kassa Finvest Pvt. Limited Appellant

Vs.

CST, New Delhi Respondent

Appearance:

Sh. Puneet Agarwal, Sh Bharat Agarwal & Sh. Gaurav Gupta, Advocates for the appellant

Sh. G. R. Singh, AR for the Respondent

Coram:

Hon'ble Mr. C. L. Mahar, Member (Technical)
Hon'ble Ms. Rachna Gupta, Member (Judicial)

Final Order No. 53407/2018

Per: **Rachna Gupta**:

The present appeal has been preferred against the Order-in-Appeal of Commissioner of Central Excise (Appeals), Delhi-I bearing No. 294/ST/DLH/2012 dated 29.10.2012.

2. Facts in brief are that the appellant M/s Kassa Finvest Pvt. Limited are engaged in providing Stock Broking Services and are

accordingly registered with the Service tax Department. While conducting audit of the appellant, it was noticed that the appellant have been recovering from their customers brokerage as well as transaction charges. However, the service tax has not been paid on the gross value in terms of Sections 67 and 68 of the Finance Act, 1994 (hereinafter referred to as Act), it was found that the appellant was paying service tax on brokerage charges but not paying service tax on the transaction charges received by them from their customers. Resultantly, show cause notice No. 19419 dated 24.08.2009 for the period 2004-05 to 15.05.2008 was served upon the appellant proposing a demand of Rs. 12,02,792/- as a service tax *qua* the transaction charges as received. The interest at the appropriate rate was also demanded. Simultaneously, alleging the wilful mis-statement suppression of facts and contravention of the provisions of the Act the penalty was also proposed. The said demand in toto was confirmed by the original adjudication authority vide its order dated 05.10.2010 except that penalty under Section 76 was not imposed. Being aggrieved, the appeal was filed. The Commissioner (Appeals) vide the order under challenge has upheld the order of original adjudicating authority thereby rejecting the appeal. Being aggrieved is the present appeal before this Tribunal.

3. We have heard Shri Puneet Agarwal, ld. Advocate for the appellant and Sh. G. R. Singh, ld. AR for the Department.

4. It is submitted on behalf of the appellant that the transaction charges on which the service tax is demanded do not form part of the value of stock broking services as such cannot be included under the gross value for calculating the service tax liability. Otherwise also the transaction charges as collected prior to 19.04.2006 are in the nature of reimburseable expenses and are also incurred as pure agent. It is also submitted that the stock exchange service became taxable w.e.f. 16.05.2008 i.e. after the period in dispute. Seen from that angel also the demand is not sustainable. With respect to allegations of mis-representation / suppression of facts, it is submitted that the appellant have been filing their ST-3 returns regularly. The amount of transaction value was not mentioned due to the bonafide belief for it not to be part the part of the gross value i.e. the part of the taxable value in addition the balance sheets and other financial statements depicting all the facts clearly have been regularly filed by the appellant. Hence, no question of alleged mis-statement and suppression till arises. The Department is alleged to have wrongly invoked the extended period of limitation. Penalty has also been wrongly imposed. The order under challenge is prayed to be set aside and appeal is prayed to be allowed.

5. Per contra ld. AR submitted that the demand has been proposed and confirmed invoking the Rule 5 of Determination of Taxable Value Rules, 2006 (The Rules hereinafter Rule 5(1)(a)]. The said provision

mentions that all expenditure or cost incurred by the service provider in course of providing the taxable services has to be treated as consideration for the taxable service and has to be included in the value for the purpose of charging service tax. It is impressed upon that the said charges therefore are very much the part of gross amount as mentioned in Section 67 of the Act. It is impressed upon that the adjudicating authorities have not committed any error while appreciating the said provision in the light of the definition of stock broker under Section 65(101) of the Act and in the light of taxable service of a stock broker as defined under Section 65(105)(a) of the Act. Finally, submitting that the payment of transaction charges to the exchange is still the obligation of appellant as a stock broker and not as a pure agent, order is accordingly prayed to be upheld appeal is prayed to be dismissed.

6. After hearing both the parties and perusing the entire record, we observe and held as follows:

The moot question to be adjudicated herein is as to whether the transaction charges received by a stock broker alongwith brokerage charges shall be included in the taxable value.

7. The adjudicating authorities below have decided the said question in affirmative relying upon Rule 5(1)(a) of the Rules which is about inclusion in or exclusion from value of certain expenditure or

costs. Perusal of the said Rules shows that it bring within its sweep the expenses which are incurred while rendering the service and are reimbursed i.e. for which the service receiver has made the payments to the assessee. As per this Rule these reimbursable expenses also form part of gross amount charged. It is, therefore, has to be seen as to whether Section 67 of the Act permits the said inclusion/ exclusion of expenditures/ costs in the taxable value as has been done by Rule 5. Section 66 of the Act is the charging section as it refers to service tax to be paid at such rate of the value of taxable services referred to in sub-clauses of Section 65 and collected in the manner as may be prescribed. Thus, according to the section, service tax is to the reference to the value of service i.e. the value actually received and the value whereof is to be ascertained for the purpose of calculating the service tax payable thereupon. For the purpose Section 67 of the Act needs to be looked into in accordance whereof the valuation of taxable services for charging service tax in case where provision of service is for a consideration of money, shall be the gross amount charged by the service provider for providing 'such' taxable services. It becomes clear that any amount which is collected not for providing 'such' taxable service, the same cannot form part of that valuation. Irrespective Section 67 has undergone amendment w.e.f. 01.05.2006 but, the interpretation of Section 67 is that the value of taxable service shall be the gross amount charged by the service provider 'for such service' and

the valuation of tax service cannot be nothing more or less then the consideration paid as *quidproquo* for rendering such a service. Once this is the interpretation it needs no further emphasis that the Rule 5 as relied upon by ld. AR in this case, has gone beyond the scope of Section 67. Otherwise also, the said rule has already been held ultra virus being a provision in conflict with a common enactment as per the decision of Hon'ble Supreme Court in ***Union of India vs. Intercontinental Consultants and Technocrats Pvt. Ltd. – 2018 (10) GSTL 401 (SC)***. Once the provision has been set aside and is held to have been not in existence any demand confirmed relying upon the said provision is no more sustainable.

8. The fact of the present case is that the appellants as a stock broker were admittedly providing services to the investors/ clients on their own behalf of the stock exchange and the transaction charges in addition to the brokerage charges are collected by the appellant from the clients irrespective of their own behalf or on behalf of the stock exchange. It is also apparent fact that at the relevant time no service tax was leviable on any services provided by the stock exchange and therefore tax liability arising out of the sale and purchase of securities for the purpose of service tax was to be discharged by the stock brokers only and moreover, these liabilities in any case could never has been discharged by the individual investors. In view of these apparent

service, the Service Tax Circular No. 20/14/96 dated 31.12.2006 acquires relevant which defines taxable service as;

a) Taxable service means any service provided to an investor by a stock broker in connection with the sale or purchase of securities listed at recognized stock exchange;

b) when the transaction is on principal to principal basis between brokers, no investor is involved and as such no taxable service is provided and therefore no service tax is chargeable.

c) where a broker enters into a transaction o his own account with an investor who is a non-member of the stock exchange the service provided will be taxable service and subject to service tax.

A conjoint reading of the facts in light of the circular makes it clear that it is only in case the transaction of giving stock broker service is on principal to principal basis that the service is not taxable, in rest of the cases the service is taxable. Similarly, the transaction among if the tax is collected as a pure agent it will not found the part of the gross value required for the assessment else the liability has to be discharged on the amount of transaction value also. From the record as well as the order under challenge, it is observed that though the Commissioner (Appeals) has appreciated that the appellant is not functioning as a pure agent but since it is an apparent fact that he is simultaneously acting as a pure agent (as discussed above). It was mandate for the authorities

below to verify the records to distinguish the cases where the appellant has provided services as pure agent on principal to principal basis from those where the appellant has provided stock brokerage services on its own behalf. Without this distinction, the correct assessment of the liability of appellant as stock broker cannot be ascertained. We are, therefore, of the opinion that the matter be remanded back to the adjudicating authority below (appropriate), matter to be decided in terms of the said verification. Appeals stands allowed by way of remand, however for the limited purpose as discussed.

(Pronounced on 10.12.2018).

(C. L. Mahar)
Member (Technical)

(Rachna Gupta)
Member (Judicial)

Pant