CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
HYDERABAD

REGIONAL BENCH - COURT - I

Service Tax Appeal No. 385 of 2010

(arising out of order-in-Denovo No. 26/2009 dated 27.11.2009 passed by Commissioner of Central Excise, Customs & Service Tax, Guntur)

M/s Rama Mohana Rao & Co
Dhanekula Estates,
Ganguru Road,
Ganguru, Penamaluru Mandalam,
Krishna Distt

Appellant

Versus

The Commissioner of Customs Central Excise & Service Tax,
Central Revenue Building,
Kannavarithota
Guntur

Respondent

WITH

Service Tax Appeal No. 517 of 2010

(arising out of order-in-Denovo No. 26/2009 dated 27.11.2009 passed by Commissioner of Central Excise, Customs & Service Tax, Guntur)

The Commissioner of Customs Central Excise & Service Tax,
Central Revenue Building,
Kannavarithota
Guntur

Appellant

Versus

M/s Rama Mohana Rao & Co
Dhanekula Estates,
Ganguru Road,
Ganguru, Penamaluru Mandalam,
Krishna Distt

Respondent

<u>Appearance:</u>

Ms L. Maithili, Adv for the Assessee.

Mr V.R. Pavan Kumar, A.R. for the Respondent.

CORAM

HON'BLE Mr. P. Venkata Subba Rao, Member (Technical)
HON'BLE Mr. P. Dinesha, Member (Judicial)

FINAL ORDER No: 31013-31014 / 2019

Date of Hearing: 19/09/2019
Date of Decision:05/11/2019

[ORDER PER:P.VENKATA SUBBA RAO] .

Heard both sides and perused the records. Appeal No. ST/385/2010 is filed by the appellant while ST/517/2010 is filed by the department against the same impugned order. Hence both appeals are being disposed of together. The assessee appellant, M/s Ram Mohan Rao are clearing and forwarding agents for M/s Hindustan Lever Ltd (HLL) and are discharging service tax. Revenue has received intelligence that the appellant was not paying service tax on the entire consideration for the service received by them and accordingly summoned officials of the assessee as well as of M/s HLL, recorded statements, obtained information and arrived at a conclusion that they have not discharged full service tax. Accordingly show-cause notice dated 09.02.2007 covering the period 2001-02 to 2005-06 and show-cause notice dated 22.10.2007 covering the period April 2006 to March 2007 were issued.

2. Both the show-cause notices were adjudicated by the Commissioner by order-in-original No. 4/2008 dated 29.05.2008. On appeal by the assessee, Tribunal vide Final Order No. 314/2009 dated 25/03/2009 remanded the matter for *denovo* adjudication. The *denovo* adjudication order-in-original No. 26/2009 dated 27.11.2009 issued by the Commissioner confirmed the

demands raised in the aforesaid show-cause notices along with interest and imposed penalties. Aggrieved by this order, the present appeals are filed.

3. At the heart of the dispute lies the remuneration received by the appellant assessee under various heads as follows:

Sl No.	Heads of payment	Nature of payment
1.	Remuneration fixed	Remuneration for services of CFA
2.	PDP Remuneration	Remuneration paid to CFA based on achievement in r/o Company's dispatch plan to RSs
3.	Handling expenses	Primary handling: unloading at the depot Secondary handling: Loading into trucks from the depot
4.	Misc Expenses	Electricity, telephone, electrical maintenance depots, sweeping charges, stationery courier charges
5.	Re-stacking/reconditioning expenses	Temporary rearrangement of stocks in the, conditioning of the damaged ones
6.	EDP expenses	Computer stationery, cartridges, computer maintenance
7.	Bank charges	DD charges, messenger charges etc.
8.	CASM expenses	Temporary salesman expenses
9.	Primary freight	Factory to Depot & Inter Depots
10.	Secondary Freight	Depot to RSs across coastal Andhra Pradesh
11.	Service charges	Paid on per ton basis in r/o inter depot movement

4. Of the above, the assessee had discharged service tax at Sl No 1 & 2 above for the entire period. On the amount received at Sl No. 3 they have discharged service tax only from 01.04.2005 and not before. On the amount received under Sl Nos. 4 to 11 above, they have not paid any service tax. With respect to Sl No. 3, it is the contention of the appellant assessee that although they have discharged service tax for some period, handling charges cannot be charged to service tax under clearing & forwarding service as held in Shri Chatrpati SSK Ltd [2016(46) STR 410(Tri-Mum). With respect to Sl No.4 above, it is the case of the assessee that these expenses were incurred

by them on electricity, telephone, electrical maintenance, sweeping charges etc at the godowns belonging to M/s HLL. It is their contention that as per the CFA agreement they have with M/s HLL, they are not required to maintain any godowns, but are required to operate from the godowns owned by M/s HLL. Therefore the entire responsibility for the godown including the rent etc. rests on M/s HLL. However, since it is not practical for M/s HLL to pay the electricity bills etc. they pay these amounts and get the same reimbursed from M/s HLL. In terms of the judgement of the Hon'ble Apex Court in the case of Intercontinental Consultants and Technocrats Pvt Ltd [2018(10)GSTL 401 (SC)], no service tax can be levied on reimbursable expenses because they are not related to service provided and cannot form part of the gross amount received for such service. The demand on the amounts received under this head needs to fail for this reason alone. Similarly, with respect to restacking or reconditioning expenses (Sl No.5 of the table) it is their submission that these pertain to arrangement/rearrangement of the stock in the depot which is not part of their CFA activity and therefore the amounts paid under this head cannot be included in the taxable amount for CFA services. With regard to EDP expenses (Sl No. 6 of the table) it is their contention that the computer stationery, cartridges, maintenance of computers are all in the godown and the expenses incurred with respect to these by them are reimbursed by the principal M/s HLL cannot form part of the value of taxable service. Their contention with respect to the bank charges (Sl No. 7 of the table) is that they pertain to DD charges and messenger charges etc. and the temporary salesmen expenses (CAS expenses) (Sl No. 8 of the table) cannot be included in the value of taxable services rendered by them. In short they would urge that Sl No. 4 to 8 above are not includable in the taxable value as they are in the nature of reimbursable expenses incurred by them on behalf of M/s HLL and reimbursed by M/s HLL. As far as the Sl No 9 to 11 above, namely primary freight , secondary freight and service charges paid to them by M/s HLL are concerned, it is the contention of the assessee that in addition to the CFA agreement they also have an agreement for transportation of goods with M/s HLL and the aforesaid pertain to charges paid for transportation of the goods. Their agreement as CFA is quite distinct from their agreement as transporter. On these transportation charges M/s HLL, being the service recipient of the GTA services, has already discharged service tax. Therefore the same cannot be included in the assessable value for CFA services. Learned counsel for the appellant further submits that M/s HLL receives the said transportation services not only from the appellant assessee but also from several other transporters and discharges service tax on the total GTA services so received. In view of the above, the learned counsel submits that the entire demand needs to be set aside on the merits itself and consequently the interest and penalties also do not survive. However she also contests the demand on the question of limitation on the ground that the elements necessary for invoking extended period of limitation are absent.

5. Learned Departmental Representative on the other hand draws attention of the Bench to the role of the appellant assessee in the CFA agreement as it reads as follows:

> "4) The company shall consign from time to time its products to the godown manned by the C&F Agent by air, road or rail which the C&F Agents shall receive, stock and hold on behalf of the Company, at its godown/s situated at Vijayawada.
> 5) The C&F Agent shall service the market requirements in thefollowing enumerated areas:
> Nellore, Prakasam, Guntur, Krishna, West Godavari, Visakhapatnam, Srikakulam, East Godavari.
> However nothing said in this clause shall prejudice the right of the Company to directly effect supply in the area or cause other agencies to effect such supplies within the area earmarked to the C&FAgent.

6) The goods shall be despatched by the Company directly to the C&F Agent freight paid, booked for delivery at the godown or to the nearest railway, shipyard, ferry airport or lorry service.

Expenses incurred by the C&F Agents towards freight inwards from such place of clearance, other than cases of delivery at the godown, shall be borne by the Company at actuals.

7) The goods received by the C&F Agents from the Company shall be stored by them in a godown or godowns separately and shall not be mixed with any other stocks. The godown shall display sign-board indicating that the goods belong to and are the property of the Company.

9) The C&F Agent shall be responsible for the safety of the goods entrusted by the Company from the time of receipt of the goods till such goods are issued out of the godown as per instructions of the Company. The C&F Agent shall be liable to make good any loss caused to the Company as a result of pilferage, theft, robbery or damage or destruction
of the goods excluding acts of God.

10) While receiving the goods for stocking, the C&F Agent shall verify that the goods are in good condition. If for any reason damage or injury to the goods is noticed the C&F Agent should promptly record itsassessment of the damage and obtain the signatures of the Carriers. A record in this regard shall be communicated promptly to the Company to enable the Company to take up follow up action. If the goods are received by rail, or any other mode of transport, the C&F Agent should take open delivery whenever loss or damage to the goods in transit is noticed or suspected. Steps should be taken by the C&F Agent for prompt preference of claim with Railways. The C&F Agent will remain liable to keep the Company indemnified against any loss or damage not detected at the time of clearance of the goods and/or not recorded by it with the carrier while taking delivery of the goods.

11) The C&F Agent shall promptly comply with invoicing/delivery/ despatch instructions of the Company and shall cause to be delivered to the authorised Transport Contractors of the Company the required quantity of the goods for movement to the "Company's" stockists, dealer or other godowns.

12) The C&F Agent shall while despatching the goods from the godowns, employ for transportation, the Company's printed standardised delivery challan/ proforma invoices, along with the statutory delivery note prescribed under local sales tax law. If any other document is used forthe purpose of transportation and issued to the Carriers, it shall be onlyin proforma approved by the Company.

13) The C&F Agent shall submit to the Company statements in Forms prescribed by the Company containing details of stock received, held and distributed. These statements shall be submitted at such time and such intervals as may be instructed by the Company.

14) The C&F Agent will be paid service charges on mutually agreed rates as may be communicated by exchange of letters between the parties hereto from time to time for services rendered under this Agreement."

He would draw a distinction between reimbursable expenses and expenses which are incurred by the appellant which are essential to perform their activity as a CFA. He would argue that as far as the handling expenses are concerned, the appellant themselves have started paying service tax from 01.04.2005 and there is no reason for them to not pay service tax for the period prior to this date. As far as miscellaneous expenses namely electricity, telephone, sweeping charges etc. are concerned he would urge that all these expenses are incurred in the depot where the assessee operates. Without incurring these expenses, it is impossible for the assessee to perform their functions as a CFA. Simply because these expenses are paid separately by M/s HLL they do not become reimbursable expenses but are part of the consideration for the services rendered by the appellant. Similarly restacking or reconditioning of the goods at the depot is an essential part of the functions of the CFA. Although the godown belongs to M/s HLL the goods therein are stacked, restacked, operated, dispatched by the appellant assessee. This being part of core of their CFA operations, amounts received under this head cannot be excluded from the assessable value for CFA services. Regarding the EDP expenses he would urge that computer stationery, cartridges, maintenance of computers are necessary for the assessee to perform one of their vital functions under the CFA agreement namely generation of invoices. For this purpose they incurred expenses which are paid by HLL to them. It is inconceivable that the CFA services can be rendered without incurring these essential services. He would also urge that bank charges CASM expenses are also similarly incurred by the assessee as part of their CFA activities.

6. He would urge that merely because the charges are paid in various heads by the HLL they did not get excluded from the taxable value. He would rely upon the order of the Tribunal Ahmedabad in the case of Modern Business Solutions [2019(24)GSTL 353 (Tri-Ahmd)] in which on a similar case it has been held that "the claim for reimbursement towards rent for premises, telephone charges, stationery charges etc., amounts to a claim by the service provider that they can render such services in vacuum. What are costs for input services and inputs used in rendering services cannot be treated as reimbursable costs. There is no justification or legal authority to artificially split the cost towards providing services partly as cost of services

and the rest as reimbursable expenses" Thus holding, the Tribunal Ahmedabad had distinguished this case from the judgement of the Hon'ble Apex Court in the case of Intercontinental Consultants and Technocrafts (supra). Similarly in the case of Adarsh Agency [2017(96)GSTL 157 (Tri-Mum), it was held that for providing service minimum input services are required such as rent, postage and stationery, telephone charges etc. without which the services of C&F agent cannot be provided. Learned D.R. would therefore argue that the expenses are includible in the assessable value and it has been rightly done so.

7. In respect of freight charges incurred by the appellant, he would urge that HLL is responsible for payment of freight for goods dispatched from its premises to the assessee's godown. Further, M/s HLL is responsible for freight incurred by the assessee from such places of clearance other than godown. Except for these freight charges, all the freight charges are incurred by the appellant assessee in respect of provision of CFA services to M/s HLL and therefore they are liable to be included in the assessable value. Regarding the departmental appeal, he would submit that this is in respect of a demand of Rs 2805/- which was confirmed in the impugned order but the demand of interest therein has been missed out. Secondly, in the second show-cause notice which was issued for the normal period, though the service tax demand was confirmed in the impugned order, the adjudicating authority has failed to impose penalty under Section 76 which is a natural corrollary to the confirmed demand.

8. On the question of limitation, he would argue that appellant is registered under the service tax but has failed to reflect the total value of taxable services rendered. The under-valuation of the taxable services was

noticed only after detailed verification of records of the asessee. Show-cause notice is based on balance-sheets of the assessee and other books of accounts which were not available to the department in the normal course. The assessee being involved in a huge business activity cannot plead ignorance of law. If at all they had any doubt, they could have sought clarifications. All this shows that appellant had an intention to evade payment of service tax. They cannot wait for the department to come and knock at his door to discharge the service tax. Therefore he would pray that Revenue's appeal may be upheld and the assessee's appeal may be set aside.

9. We have considered the arguments of both sides and perused the records. The short point to be decided is whether the appellant is liable to pay service tax on various amounts enumerated at Sl No 3 to 11 in the table above on which they had not discharged service tax. It also needs to be determined whether extended period of limitation can be invoked and whether penalties can be imposed. We proceed to examine these various heads of payment.

(1) Handling expenses: This amount has been paid for primary handling namely unloading at the depot and secondary handling i.e. loading into the trucks from the depot. The job of a C&F Agent includes receiving, storing and dispatching the goods. Needless to say receiving and dispatching would involve unloading and loading of trucks for the purposes. It is not in doubt that these activities are undertaken at the depots which are the place of operation of the assessee appellant. We therefore have no doubt in our minds that these charges form part of the consideration for the C&F Agent

services. In fact, from 01.04.2005, the assessee themselves have been paying service tax on these charges. We find no reason for them to have not paid service tax for the period prior to this date. The case of Shri Chatrapati SSK Ltd (supra) relied upon by the appellant assessee is in a different context. In that case, Revenue wanted to treat mere loading of sugar in the factory and unloading it into railway wagons as clearing and forwarding agency service. In the present case, handling is done in course of CFA operations. The demand to this extent has to be confirmed and we do so.

(2) Miscellaneous expenses towards electricity, telephone, electrical maintenance etc. of the depots:- We find that as per the C&F Agent agreement in this case, the responsibility of the assessee does not extend to keeping and managing their godowns. The godowns are provided by HLL. Since they are their godowns meant for their own use, no rent is being paid by or to M/s HLL on such godowns. The service rendered by the appellant is only the operation of such godowns. Electricity, electrical maintenance sweeping etc. of the godowns are directly relatable to the maintenance of such premises which belong to M/s HLL. Instead of M/s HLL undertaking these activities, the appellant is doing these jobs and claiming reimbursement from M/s HLL. In our considered view, these cannot form part of the taxable services rendered by the appellant in this factual matrix. Therefore, the demand on this account must fail.

(3) Restacking, reconditioning expenses: These pertain to arrangement and rearrangement of the goods in the depot which lie at the heart of the C&F Agent's activity and do not pertain to maintenance of

the premises belonging to M/s HLL although this amount is paid separately to HLL. In our considered view this forms part of the assessable value for the CFA services.

(4) EDP expenses:- The computer stationery, cartridges and computer maintenance are used in the godown as is evident from the agreement for the given activities of the appellant as C&F Agent such as generation of invoices. Hence, in our considered view these charges are essentially input expenses towards rendering of the C&F agent services. Therefore the same are includible in the assessable value.

(5) Bank charges and CASM expenses: It is not clear as to what these charges specifically pertain to from the records. Therefore, we do not find sufficient evidence on record to say that these are input services for rendering of C&F agent services by the appellant.

(6) Primary freight secondary freight and service charges:- We find from the C&F Agent agreement that it does not include transportation of the goods as part of the service to be rendered. It is the case of assessee that they have a separate agreement with M/s HLL for transportation of goods which is not part of the CFA agreement. This can only be considered as Goods Transport Agency service. If amounts have been received for GTA services rendered by the appellant, the liability for discharging service tax on such services rests with the service recipient namely M/s HLL as per Section 68(2) of the Finance Act 1994. Learned counsel for the appellant assessee submits that M/s HLL have already discharged service tax under reverse charge mechanism on these GTA services. We do not find any evidence to the contrary. At any

rate, if these are GTA services no service tax can be demanded from the service provider as the liability for paying service tax rests on the service recipient in terms of Section 68(2) of the Finance Act, 1994, read with Rule 2(d) of the Service Tax Rules, 1994. Hence the demand on this count must fail.

10. As far as the question of limitation is concerned it is not in dispute that the assessee has not disclosed all these facts to the department and they have come to light only on investigation/audit/ enquiries by the department. It is true that the assessee had filed service tax returns but these did not reflect the full and true value of the amounts received by them for rendering the services. The show-cause notice dated 09/02/2007 covering the period April 2001 to March 2006 states in para 12 as follows:

> ”12. It appears that the assessee has suppressed the gross receipts under various accounts, from the knowledge of the department, knowingly and consciously, with an intention to evade the above said Service Tax and Education Cess together amounting to Rs 1,71,09,408/-. In view of the above, it appears that the extended period of Five (05) years, as provided in Section 73 of the Finance Act, 1994 is invokable in the instant case to recover the above said Service Tax and Education Cess together amounting to Rs 1,71,09,408/- from the assessee”

However, we do not find anything in the show-cause notice to justify the allegation of suppression “knowingly and consciously with an intent to evade” as above. Hence we do not find sufficient grounds to invoke extended period of limitation. As far as the imposition of penalties are concerned, we find that during the period, Section 80 was in vogue and hence invoking this provision, we set aside the penalties. In conclusion, the demand on handling expenses, restacking/reconditioning expenses, EDP expenses within the normal period of limitation made in the impugned order are upheld and the remaining demands are set aside. All penalties are set aside invoking Section 80. The matter is remanded to the original authority only for the purpose of calculation.

(Order pronounced in open court on 05/11/2019)

(P. Venkata Subba Rao)
Member (Technical)

(P. Dinesha)
Member(Judicial)

Neela reddy