CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH AT HYDERABAD

Regional Bench - Court No. – I

Excise Appeal No. 1270 of 2012
(Arising out of Order-in-Original No.14/2012 (ST) dt.28.03.2012 passed by Commissioner of Customs, Central Excise & Service Tax, Tirupati)

Commissioner of Central Tax
Tirupati – CGST **......Appellant**
9/86-A, Behind West Church Compound,
Amaravathi Nagar, MR Palli, AP – 517 502

VERSUS

PCR Warehousing Pvt Ltd
240, III Floor, Gandhi Road, Chittoor,
Tirupati, Andhra Pradesh – 517 501 **......Respondent**

with

Service Tax Appeal No. 1835 of 2012
(Arising out of Order-in-Original No.14/2012 (ST) dt.28.03.2012 passed by Commissioner of Customs, Central Excise & Service Tax, Tirupati)

PCR Warehousing Pvt Ltd
240, III Floor, Gandhi Road, Chittoor, **......Appellant**
Tirupati, Andhra Pradesh – 517 501

VERSUS

Commissioner of Central Tax
Tirupati – CGST
9/86-A, Behind West Church Compound, **......Respondent**
Amaravathi Nagar, MR Palli, AP – 517 502

and

Service Tax Appeal No. 1839 of 2012
(Arising out of Order-in-Original No.12/2012 (ST) dt.22.03.2012 passed by Commissioner of Customs, Central Excise & Service Tax, Tirupati)

PCR Warehousing Pvt Ltd
240, III Floor, Gandhi Road, Chittoor, **......Appellant**
Tirupati, Andhra Pradesh – 517 501

VERSUS

Commissioner of Central Tax
Tirupati – CGST
9/86-A, Behind West Church Compound, **......Respondent**
Amaravathi Nagar, MR Palli, AP – 517 502

Appearance:-

Shri Narendra Dave, Advocate for the Appellant/Assessee.
Shri M. Anukathir Surya, Authorized Representative for the Respondent/Revenue.

Coram: **HON'BLE MR. A.K. JYOTISHI, MEMBER (TECHNICAL)**
HON'BLE MR. ANGAD PRASAD, MEMBER (JUDICIAL)

FINAL ORDER No. A/30033-30035/2025

Date of Hearing: 15.01.2025
Date of Decision: 15.01.2025

[Order per: A.K. JYOTISHI]

M/s PCR Warehousing Pvt Ltd (hereinafter referred to as the appellant) are engaged in the activity of handling cargo at railway terminals, storage and warehousing of cargo and arranging transportation of cargo for various customers and having godowns at different locations. They were registered with the Service Tax Department under the category of 'Clearing and Forwarding Agent Service' and later on, in March, 2003, they took registration under 'Storage and Warehousing Services' (SWS).

2. Based on the verification of certain records like Profit & Loss accounts, ST3 returns, etc., the department felt that the appellants have not discharged proper Service Tax on the services relating to SWS, Goods Transport Agency service (GTA) and Renting of Immovable Property Service (RIS) and also recovery of certain amount collected as Service Tax but not paid to the Government. Thereafter, based on verification of records and statements recorded in this regard, the department issued two SCNs; one dt.31.05.2011, for the period 2006-07 to 2009-10 and another dt.19.10.2011, for the period 2010-2011, alleging, inter alia, that certain amount of Service Tax has been short paid towards SWS, RIS, GTA service and also for recovery of Rs.51,50,323/-, being Service Tax collected but not paid in view of provisions under Section 73A of the Finance Act, 1994. Both these SCNs were adjudicated vide OIO No. 12/2012 dt.22.03.2012 and OIO No. 14/2012 dt.28.03.2012 (impugned orders). On adjudication, barring a small relief of Rs.2,28,219/-, on account of demand being prior to 01.06.2007, the rest of the proposed demands were confirmed by the Adjudicating Authority. In addition, certain penalty and late fee were also imposed. The appellants are in appeal before this Tribunal in Appeal No. ST/1839/2012 against OIO dt.23.03.2012 and Appeal No. ST/1835/2012 against OIO dt.28.03.2012.

3. The department has also come in appeal vide Appeal No. E/1270/2012 against the OIO dt.28.03.2012, to the extent that the penalty was imposed @ Rs.100/day under Section 76 instead of Rs.200/day. Since all these appeals are interrelated and have common issues, we intend to take up all

the three appeals together for disposal. We also take up Appeal ST/1839/2012 as reference appeal for deciding the issues involved.

4. Learned Advocate for the appellant has, inter alia, argued as follows:-

For the sake of clarity, the arguments for inclusion of wharfage and demurrage income in the gross value and leviability of Service Tax on the SWS services are discussed below:-

4.1. <u>Storage & Warehousing Services</u>:-

i) He has relied on the appointment letter dt.24.10.2007 in respect of clearing agent service at Goa (Pg.32 of Vol-I attached to appeal memorandum for stay in appeal No. ST/1839/2012) to support his contention that these wharfage and demurrage charges are on reimbursement basis and they were required to pay first, as per the agreement and thereafter, claim the same on actual basis from the cement companies i.e., Grasim Industries & Ultratech. Further, he has shown representative invoices raised by them on the cement companies. He has shown copies of demurrage charges bills raised by the Railways on various cement companies as well as invoices raised by the appellant on cement companies for recovery of the same on actual basis. These documents have been produced, which are appended to the Appeal memorandum from Pg.128 to 225 of Vol-I. He has also relied on the judgment of Hon'ble Supreme Court in the case of UOI Vs Intercontinental Consultants & Technocrats Pvt Ltd [2018 (10) GSTL 401 (SC)] in this regard.

ii) By way of an alternative argument, he has submitted that demurrage and wharfage are in the nature of penal charges and it is settled position that no Service Tax can be charged as these charges cannot be considered in the nature of services.

iii) Thirdly, they have also argued that even denying them being a pure agent is not correct, in the facts of the case, as they have amply demonstrated that they are pure agent and meeting all conditions stipulated under Rule 5(2).

4.2. <u>GTA Service</u>:-

i) He submits that they are providing transportation from railway terminal to their godown at the request of the cement companies and also to their customers/distributors directly from railway side and where they are initially incurring the expenses but reflecting the same as income on receipt of payment from the cement companies in their books of account.

ii) In this regard, he also submits that since they are acting as GTA, in support of which he has shown detailed challans raised by them on cement companies and therefore, in terms of provisions under Rule 2(1)(d) of Service Tax Rules, 1994, the person liable to pay the Service Tax in this case would be the cement companies and not them. In fact, the cement companies have informed them (referred at Pg.354 of Vol-II), that they have discharged the applicable Service Tax liability on reverse charge basis on such transportation charges.

iii) He further informs that they have not undertaken any transportation, ex-godown or ex-railway station directly to customer/distributor, etc., and the same is being arranged by the customers themselves. Therefore, there is no question of any income flowing on that account in their P&L account. Department has demanded the Service Tax under wrong category.

iv) Further, department, even if they want to charge Service Tax, it should have been charged under GTA service and not under SWS, as has been done by the Adjudicating Authority by adding this value also to the gross value for determining the Service Tax liability under SWS.

4.3. <u>Section 73A</u>:-

i) Learned Advocate informs that demand has been made on the basis that they had collected Rs.51,50,323/- and the same has not been deposited with the Government and therefore, on this count, demand has been upheld. Whereas, as is evident from the P&L extract (referred at Pg 73 of Vol-I) that the amount of Rs.38,36,413/- has already been paid to the Government along with interest and therefore, to that extent Section 73A demand will not survive. Even for the remaining amount, they are arguing that that amount has been paid, though they have no credible evidence to support the same.

4.4. <u>Penalty</u>:-

i) Learned Counsel also contests the imposition of penalty in respect of RIS on the grounds that the amendment by way of substitution came in Finance Act, 2012, which makes the transaction from 2007-2010 taxable and relying on Section 80(2), wherein after amendment, it reads that "notwithstanding anything contained in the provisions of section 76 or section 77 or section 78, no penalty shall be imposable for failure to pay service tax payable, as on the 6^{th} day of March, 2012, on the taxable service referred to in sub-clause (zzzz) of clause (105) of section 65, subject to the condition that the amount of service tax along with interest is paid in full within a period of six months from the date on which the Finance Bill, 2012 receives the assent of the President." In this case, it is an admitted position that Service Tax was paid along with interest in 2011 itself. He also submits that penalty cannot be imposed simultaneously under Section 76 & Section 78 of the Finance Act. Further, he informs that while the penalty has been imposed on the full amount of Rs.2.3 crores, whereas, the actual amount which was not paid was only Rs.1.1 crores and at best, the penalty could have been imposed equal to this amount. They have also argued on the grounds of limitation that in the facts of the case, extended period of limitation is not applicable.

5. On the other hand, learned AR for the department, apart from reiterating the grounds taken by the Adjudicating Authority in the impugned order, inter alia, submits, as follows:-

a) That the appellants have not been able to prove that they are pure agent, in so far as, it related to payment of wharfage and demurrage charges & GTA service.
b) There was no evidence to suggest that it was paid on reimbursement basis.
c) That the argument now taken by the learned Advocate for the appellant regarding imposition of penalty of Rs.1.1 crores highlighting that the demand is only Rs.1.1 crores and not Rs.2.3 crores as being brought to the notice of this Bench for the first time. It was not explained before the Adjudicating Authority.

d) He supports the departmental appeal that there was provision for penalty @ Rs.200/day prior to 2011 amendment. Therefore, under the same provision, this being mandatory, the Commissioner could not have invoked penalty only @ Rs.100/day.

6. Heard both sides and perused the records.

7. The core issues to be decided is whether in the facts of the case, the demand levied on the appellant under section 73 under different categories viz., SWS, GTA and RIS as also under section 73A are sustainable or otherwise. The admitted fact is that they were having an agreement with various cement companies for undertaking certain activities, which, inter alia, are indicated as under:-

a) Collecting Railway Receipts from the Company/C&F Office.
b) Collecting information from Railway office regarding arrivals of rakes and take delivery of consignment from Railway.
c) Verifying the quantity received in the wagons with the challan/RR while unloading the material from wagons.
d) Obtaining certificate from Railway authorities in case damaged consignment is received or in case of shortage.
e) Ensuring safe storage of the material unloaded from rake.
f) Submitting the details of the rake cleared to the branch/C&F office.
g) Unloading material on wharf and loading to trucks directly or transferring the material from goods shed to godown and unloading at godown.
h) Following up with the Railway authorities for wagons which are in transit and keeping the C&F/company informed of the same.
i) Allowing loading of dealers own/hired trucks as per instructions of the company.
j) Arranging sufficient trucks for transportation and obtaining proper acknowledgement from the person to whom cement is delivered.

8. For these activities, they were getting certain payments at agreed rate for various items of work from the cement companies. It is an admitted fact that the entire case has been made out based on the income side reflected in their P&L account and its comparison with ST3 returns. It was observed by the department from the P&L account that certain income has not been

included in the gross value for discharging their Service Tax liability on the services of SWS. The department has relied on the provisions of Section 67 of the Finance Act, 1994 read with Rule 5 of Service Tax (Determination of Value) Rules, 2006. We have perused the documents submitted by the appellant and we find that there is clear evidence that demurrage and wharfage charges are in the nature of penal charges which are charged by the railways for delay in unloading or removing the goods, etc., from the platform, etc.

9. We have also perused the agreement dt.24.10.2007 between the appellant and Ultratech for appointment as rake clearing agent at Goa. There are two annexures to the said agreement. Annexure-A provides for payment of handling charges and Annexure-B provides for responsibilities and scope of work. Insofar as the scope of work is concerned, it is already reflected at Para 7 (supra). With regard to Annexure-A, we find that the rates have been prescribed for various activities covered within the ambit of rake handling contract and as per note 5, it was agreed that the appellant will pay wharfage and demurrage charges, if any, in time to Railways and inform the company for reimbursement. Therefore, we have perused these documents, which clearly show that it was agreed upon that initially the appellants would pay to railways the wharfage and demurrage charges and thereafter, claim the same on actual basis from cement companies. These documents support the submission of the appellant that they were merely paying on behalf of the cement companies and it was on reimbursement basis. The Adjudicating Authority has denied the exclusion of these charges primarily on the grounds that there is no evidence to suggest that this was being reimbursed on actual basis by the cement companies to the appellant, which, however, is not correct, in view of the representative documents submitted by the appellant. In any case, the department's stand is that in terms of Rule 5 of the Service Tax (Determination of Value) Rules, 2006, any amount received as reimbursement needs to be included in the gross value. However, in view of the judgment of Hon'ble High Court of Delhi, subsequently, upheld by Hon'ble Supreme Court, in the case of Intercontinental Consultants & Technocrats Pvt Ltd (supra), Rule 5(1) of Service Tax (Determination of Value) Rules, 2006 was held ultravires. It was only after amendment in Section 67 by the Finance Act, 2015, the reimbursement expenditure or costs were required to be included for

determination of gross value. Therefore, in view of this decision, any amount proposed to be included in the gross value on SWS, which has been received on reimbursement basis would not sustain and on this ground also, demand to the extent of non-inclusion of income on account of reimbursable wharfage and demurrage charges would not sustain.

10. Coming to the issue of GTA service, on one hand, learned Advocate is insisting that they are covered within the definition of GTA and therefore, in the facts of the case, the Service Tax liability has to be made good by the cement companies on RCM basis and not by them, whereas, the department is also admitting that this amount of transportation charges from the railway station to their godown is not taken into account for the purpose of calculating gross value and short payment and only ex-godown has been taken into consideration. The other issue is whether department has relied on the income shown as local transportation charges, which has been subsequently reimbursed at agreed rate, as also any other charges, which could be on account of their having paid initially for transportation of goods from railway station or godown directly to the distributor premises and later recovered by them. Since these aspects are not clear from the facts of the case, this needs to be ascertained. However, in case they are found to be GTA, in the factual matrix, the Service Tax liability will be charged on specified categories in terms of Rule 2(1)(d) of Service Tax Rules, 1994 under reverse charge basis. Similarly, their assertion that they have not provided any transportation services for which they have either paid or received income from the distributor, ex railway station or ex godown, also needs to be verified. In fact, learned AR says that said amount has not been included at all while working out the liability under GTA service.

11. As far as allegation of Section 73A is concerned, we find that there is enough evidence to suggest that certain amount collected has already been paid and therefore, entire amount cannot be considered as recoverable. There is some dispute about actual amount of Service Tax paid from the amount collected, which has to be corroborated with the evidence. Therefore, this also needs to be ascertained.

12. As far as imposition of penalty on RIS is concerned, we find that penalty under Section 76, 77 & 78 would not survive if the payment including interest has already been made prior to 2012 itself. This also

needs to be re-ascertained and reconciled before imposing penalty for balance amount of Service Tax collected but not paid before 2012.

13. As far as departmental appeal is concerned, we find that learned AR has pointed out that during the relevant period, the penalty under Section 76 was @ Rs.200/day or 2% of the tax amount, whichever is higher and therefore, the imposition of penalty @ Rs.100/day is not legally tenable. However, there is no clarity as to from which date or up to which date these rates were applicable. This also needs to be ascertained, in view of the statutory provisions during the relevant material period, as also on account of tax demand surviving on merit in part or full.

14. As regards the ground of limitation, we find that the demand is based on P&L account and ST3 returns and it is an admitted position that this P&L account breakup and other things were not reflected in ST3 returns and in fact, we find that they have taken various grounds in defence of denying leviability of Service Tax on income reflected in P&L account including their being pure agent, etc. In the facts of the case, we find that ground of limitation has been rightly invoked. However, it is subject to demand getting sustained on merit itself in the denovo proceedings.

15. Therefore, to sum up, the demand on account of inclusion of demurrage and wharfage charges would not sustain and is set aside. Since demand itself is not sustained, the penalties will also not sustain to that extent. Further, as regards issue of GTA service, in view of the discussions supra, the Adjudicating Authority will be required to ascertain as to who shall be the person liable to pay the Service Tax in the factual matrix and their being a GTA. Moreover, it would also required to be seen that if cement companies are required to pay the Service Tax and they have actually paid the Service Tax, then no liability shall be on the appellant. However, this issue is left open, which will have to be re-adjudicated after going through the facts. As far as the issue of demand under Section 73A is concerned, as discussed in the foregoing paras, the amount of Service Tax actually paid out of the Service Tax amount actually collected, needs to be redetermined, as also the date of payment. In case, the entire amount collected was paid before the cut off date in 2012, there shall not be any penalty imposable on them, in view of the provisions in Finance Act, 2012. However, to the extent they have not paid and therefore, not being eligible in term of said

provisions under Finance Act, 2012, they shall be liable not only for demand but also for penalty. Insofar as other arguments are concerned regarding imposition of penalty under Section 76 as well as Section 78, it is a settled law that penalty cannot be imposed under both sections simultaneously and therefore, the Adjudicating Authority will redetermine the penal penalty subject to this position, as also the fact that sustainable demand has to be redetermined in terms of observations and directions of this Tribunal, discussed supra.

16. Insofar as the departmental appeal is concerned, there is argument and counter argument as regards correct date from which the penalty has been changed from Rs.100/day to Rs.200/day and it is the case of the department that it was earlier Rs.200/day which is reduced to Rs.100/day, whereas, just the reverse is the argument of the appellant. Therefore, this issue is also left open and is remanded back to the Original Adjudicating Authority to apply the actual cut off date to the demand period to determine whether the penalty/fine can be imposed @ Rs.100/day or Rs.200/day. With these directions, the order to the extent discussed above is remanded back to the Original Adjudicating Authority for redetermination of demand and penalty in the light of observations and directions.

17. Appeal Nos. ST/1839/2012 & ST/1835/2012 are partly allowed by way of remand. Appeal No. E/1270/2012 is allowed by way of remand.

(Dictated and pronounced in the Open Court)

(A.K. JYOTISHI)
MEMBER (TECHNICAL)

(ANGAD PRASAD)
MEMBER (JUDICIAL)

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