

**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL, KOLKATA**

EASTERN ZONAL BENCH: KOLKATA

Appeal No. ST/120/2009, CO-53/2009

Arising out of Order-in-Original No.49/Commr/ST/Kol/2008-09 dt.
30/01/2009 passed by the Commissioner of Service Tax, Kolkata.

Commissioner of Service Tax, Kolkata

Kendriya Utpad Shulk Bhawan (3rd Floor)
180, Santipally, Rajdanga Main Road,
Kolkata-700107

Appellant (s)

VERSUS

P. D. Prasad & Sons (P) Ltd.

N. C. Dutta Sarani, Kol-01

Respondent (s)

APPEARANCE :

Shri Kartik Kurmi & Rajesh Sharma, Advocates for the Appellant
Shri K. Chowdhary, Suptd. (A. R.) for the Respondent

CORAM:

HON'BLE MR. P. K. CHOUDHARY, MEMBER (JUDICIAL)

HON'BLE MR. V. PADMANABHAN, MEMBER (TECHNICAL)

ORDER NO. FO/77332/2018

Date of Hearing : 04.12.2018

PER P. K. CHOUDHARY :

The facts of the case in brief are that the Respondent-Assessee M/s. P. D. Prasad and Sons (P) Ltd. are engaged in providing Custom House Agent Service (CHA Service). During the period from 2002-03, to 2005-06, they realized a sum of Rs.51,03,93,329/- for providing such service. The respondent paid Service Tax of Rs.2,05,11,753/- after deducting the values realized towards Statutory Expenses such as Cess, Customs Duties, Port Duties, etc and also values realized towards general charges, labour charges, transportation, miscellaneous charges, sea and air freight charges, drawback claim, go-down rent, service charges etc. (collectively the other charges), incurred by them on such reimbursement. They were also the recipient of Good Transport Agency Service.

Show Cause Notice dated 16/10/2007 was issued alleging short payment of Service Tax during the period from 2002-03 to 2005-06 under the category of "CHA Service", short payment of Service Tax @ 8% instead of 10.2% for the period from 10/09/2004 to 15/09/2004 on the taxable value of Rs.56,118/- and non-payment of Service Tax on the GTA

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Service under the "Reverse Charge Mechanism" with effect from 01/01/2005 to 31/03/2006. The Adjudicating Authority passed the following Order:-

- (i) Demand of Service Tax Rs.5,612/- and Education Cess Rs.112/- totaling Rs.5,724/-is hereby confirmed against M/s. P. D. Prasad & Son's Pvt. Ltd. 2, N. C. Dutta Sarani, 2nd floor, Kolkata-700001 under Section 73(1) of the said Act. The amount confirmed along with interest has already been paid vide TR-6 No.1A/2007-2008 on 16.05.2007.
- (ii) Demand of Service Tax Rs.5,77,73,801/- and Education Cess Rs.8,31,557/-is hereby dropped.
- (iii) M/s. P. D. Prasad & Sons's Pvt. Ltd., is hereby directed to pay interest of Rs.4,015/- as per Section 75 of the said Act for delayed payment of Service Tax for the month of November' 03.
- (iv) Penalty of Rs.5,724/- is imposed upon M/s. P. D. Prasad & Son's Pvt. Ltd., in terms of Section 76 of the said Act.

Being aggrieved, the Department has filed the present appeal before the Tribunal on the following grounds:-

(i) The definition of taxable service as per Section 65(105)(h) of the Finance Act, 1994 is very wide and inclusive one. By inclusive definition the CHA services have brought in its fold a wide gamut of services incidental and ancillary to and inseparable connected to CHA services.

(ii) A detailed clarification has been issued by CBEC under Circular No F. No.B43/1/97-TRU dated 06.06.1997 in relation to the service rendered by a CHA and the computation of service tax thereof.

(iii) The amounts reimbursed by the clients of the respondent against various other expenses are not actual amounts of the expenses incurred by the respondent. The expenses incurred are debited to the Profit & Loss amount and therefore should be treated as the assessee's expenses for running his business and the amount realized on profit basis should be treated as value received for providing taxable services.

2. The Respondent assessee has filed Cross Objection being CO No.53/2009 against this appeal.

3. The Ld. DR appearing on behalf of the appellant Department reiterates the grounds of appeal and submits that the Adjudicating Authority has erred in not confirming the Service Tax and Education Cess involved in the reimbursable amounts realized by the assessee against various expenses towards CHA services other than the actual amount of Statutory Expenses.

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4. The Ld. Counsel appearing on behalf of the Respondent Assessee submits that the appeal made by the Appellant Department badly suffers from mis-appreciation/correct appreciation of facts. He further submits that no additional grounds of appeal have been submitted other than as alleged in the Show Cause Notice. It is his submission that there can be no Service Tax on reimbursable expenses for the period 2002-03 under CHA and accordingly, the appeal should be rejected.

5. Heard both sides and perused the appeal records and the cross objection.

6. We observe that the dispute in the present appeal is whether the amount reimbursed by the clients of the Respondent is liable to Service Tax.

Extracts of Relevant Statutory Provisions [as applicable during the material period]

6.1 Section 65 : Definition

(35) "**Customs House Agent**" means a person licensed, temporarily or otherwise, under the regulations made under sub-section (2) of section 146 of the Customs Act, 1962 (52 of 1962);

(105) "**taxable service**" means **any service** provided or to be provided-

(h) to any person, by a custom house agent in relation to the entry or departure of conveyances or the import or export of goods.

6.2 Section 66: Charge of Service Tax

There shall be levied a tax at the rate of twelve percent of the value of taxable services referred to in sub-clauses (a), (d), (e), (f), (g), (h), (i),.....(zzzzv) and (zzzzw) of clause (105) of section 65 and collected in such manner as may be prescribed.

6.3 Section 67: Valuation of taxable services for charging service tax

For the purposes of this Chapter, the value of any taxable service shall be the gross amount charged by the service provider for such service provided or to be provided by him.

Explanation 1.-For the removal of doubts, it is hereby declared that the value of a taxable service, as the case may be, includes,-

- a) The aggregate of commission or brokerage charged by a broker.....;
- b) The adjustments made by the telegraph authority....;
- c) The amount of premium.....;
- d) The commission received by the air travel agent from the airline;

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- e) The commission, fee or any other sum received by an actuary.....;
- f) The reimbursement received by the authorized service station.....; and
- g) The commission or any amount received by the rail travel agent.....

But does not include

- i. Initial deposit.....;
- ii. The cost of unexposed photography film,.....;
- iii. The cost of parts or accessories,.....;
- iv. The airfare.....;
- v. The rail fare.....;
- vi. The cost of parts.....;
- vii. The cost of parts or other material,.....; and
- viii. Interest on loans.

Explanation2.- Where the gross amount charged by a service provider is inclusive of service tax payable, the value of taxable service shall be such amount as with the addition of tax payable, is equal to the gross amount charged.

Explanation 3.- For the removal of doubts, it is hereby declared that the gross amount charged for the taxable service shall include any amount received towards the taxable service before, during or after provision of such service."

6.4 Circular No: F. No. B/43/1/97-TRU, dated 06.06.1997

"2.4 It is clarified that in relation to Custom House Agent, the service tax is to be computed only on the gross service charges, by whatever head/nomenclature, billed by the Custom House Agent to the client. It is informed that the practice obtaining is to show the charges for services as "agency commission", "charges", "agency and attendance charges", "agency charges" and some similar descriptions. The service tax will be computed only with reference to such charges. In other words, payments made by CHA on behalf of the client, such as statutory levies (cess, Customs duties, port dues, etc.) and various other reimbursable expenses incurred are not to be included for computing the service tax."

6.5 Meaning of "consideration": The term 'consideration' was not used in the valuation provision, during the material period. The term was defined for the first time in 2006 in Explanation (a) of Section 67 in the following manner-

As applicable w.e.f 18.04.2006 till 13.05.2015-

"(a) "consideration" includes any amount that is payable for the taxable services provided or to be provided."

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As applicable w.e.f 14.05.2016 [Substituted vide The Finance Act, 2015]-

- (a) "consideration" includes
- (i) Any amount that is payable for the taxable services provided or to be provided.
- (ii) Any reimbursable expenditure or cost incurred by the service provider and charged, in the course of providing or agreeing to provide a taxable service, except in such circumstances, and subject to such conditions, as may be prescribed;
- (iii)

7. It is the case of the respondents that reimbursable expenditure can included in the value of taxable services only w.e.f. 14-05-2015. We observe that the dispute in the present case is squarely covered by the following decisions:-

(i) Excel India Pvt. Ltd. Vs. Commissioner of Service Tax, Bangalore [2007 (7) S.T. R. 542 (Tri.-Bang.)]

In this case, the appellants during the course of providing CHA service incurs various expenses on behalf of clients towards the delivery, priority handling, break bulk and courier charges. These expenses claimed as reimbursement on equalized basis, which results in excess or shortfall in recovery of expenses incurred.

The Adjudicating authority confirmed the demand on the surplus balance appearing in the "Expense Reimbursement Billing" account.

Impugned order not discussing reasons for coverage of expense reimbursement, billing, break up of bull fees, sea freight, airline commission, freight rebate and unallocated income under Customs house agent service – Order not speaking and bad in law - Section 33A of Central Excise Act, 1944 as applicable to Service Tax vide Section 83 of Finance Act, 1994.

The Income arising from reimbursable expenses when charged on a notional or equalized basis is not chargeable to service tax in the light of Board's Circular dated June 6, 1997 in the light of the following judicial decisions:-

- (a) **Baroda Electric Meters Ltd.**- 1997 (94) ELT 13 (SC);
- (b) **Indian Oxygen Ltd.**- 1988 (36) ELT 723 (SC)
- (ii) Bax Global India Ltd. Commissioner of Service Tax [2007 (10) TMI 132, CESTAT, Bangalore]**

In this case, the appellant was engaged in the business of customs house agent, freight forwarders and execution of

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shipments either by air imports or air exports. Certain services were provided by the third party and the appellant initially paid the amount for air exports, air imports, ocean imports, ocean exports, customs clearance, logistics etc to the third party on behalf of the clients and later collected the same from them.

Department sought to tax on all the amounts collected by the appellant from their clients.

These are actually reimbursable expenses and they do not relate to any CHA activities. In these cases, on going through the statement, we find that in certain cases the appellants had incurred less cost and in certain cases, they had incurred more cost. In any case, the profit or loss incurred in respect of activities which are not related to CHA activities should not be the concern of the Department for the purpose of collecting service tax.

Present Status: No appeal is preferred by the Revenue against the said order. This judgment is referred in Bax Global's another case on the same issue, vide Chennai Tribunal Order dated 18.09.17, reported in 2017 (9) TMI 1264. Matter decided in favour of the assessee [Para 5.5 of the Order refers]. Apart from that in other various cases this judgment has been referred.

(iii) **International Shippers & Traders Pvt. Ltd. vs. Customs and Service Tax, Visakhapatnam-I [2015 (11) TMI 906- CESTAT, Bangalore**

At the time of introduction of levy of service tax on services rendered by customs house agent, on the basis of Circular No. F. No. B43/1/97-TRU, dated 06.06.1997 Trade Note No.39/97 dated 11.6.1997 was issued by Delhi Commissionerate. It explained the role of CHA and also had laid down the procedures to be followed.

In another Circular No.119/13/2009-ST dated 21.12.2009, CBEC clarified the position further. In paragraph 3 of the Circular, it was observed and reported that Board had clarified on 06.06.1997 that service tax would be charged on the service charges only and statutory levy and other reimbursable charges would not be included in the taxable value

Present Status: Affirmed by Hon'ble SC vide Order dated 16.07.2018, reported in 2018 (7) TMI 1658 – SC on

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the basis of judgment of the Apex Court in the case of Intercontinental Consultants and Technocrats Pvt. Ltd.

(iv) **Union of India Vs. Intercontinental Consultants Technocrats Pvt. Ltd. and [2018 (3) TMI 357- SC**

In the above case, it has been held as under:-

Realizing that Section 67, dealing with valuation of taxable services, does not include reimbursable expenses for providing such service, the Legislature amended by Finance Act, 2015 with effect from May 14, 2015, whereby Clause (a) which deals with 'consideration' is suitably amended to include reimbursable expenditure or cost incurred by the service provider and charged, in the course of providing or agreeing to provide a taxable service. Thus, only with effect from May 14, 2015, by virtue of provisions of Section 67 itself, such reimbursable expenditure or cost would also form part of valuation of taxable services for charging service tax.

8. By taking note of the facts that this issue is settled and the dispute before us is decided, we find no infirmity in the impugned order and accordingly, the same is sustained. The appeal filed by the Department being devoid of merits is dismissed. Cross Objection also get disposed off.

(Operative part of the order was pronounced in the open court.)

**Sd/-
(P. K. CHOUDHARY)
MEMBER (JUDICIAL)**

**Sd/-
(V. PADMANABHAN)
MEMBER (TECHNICAL)**

Pooja