

**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
KOLKATA
EASTERN ZONAL BENCH: KOLKATA**

Service Tax Appeal No. 76316 of 2017

(Arising out of Order-in-Original No. 48/Commr./ST/KOL/2008-09 dated 13.02.2009 passed by Commissioner of Service Tax, Kolkata.)

M/s Flyjack Logistics,

23 A, Royal Street, 1st Floor, Kolkata-700016.

...Appellant (s)

VERSUS

Commissioner of Service Tax, Kolkata.

180, Santipally, Rajdanga, Main Road, Kolkata-700107.

..Respondent(s)

With

Service Tax Appeal No. 169 of 2009

(Arising out of Order-in-Original No. 48/Commr./ST/KOL/2008-09 dated 13.02.2009 passed by Commissioner of Service Tax, Kolkata.)

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VERSUS

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..Respondent (s)

APPEARANCE :

Shri J. Chattopadhyay, Authorized Representative for the Appellant/Revenue
Shri Ms. Radhika Chandra Sekhar, Advocate for the Respondent/Assessee

CORAM:

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

HON'BLE MR. K. ANPAZHAKAN MEMBER (TECHNICAL)

FINAL ORDER No.75835 & 75839/2023

DATE OF HEARING : 09.05.2023

DATE OF PRONOUNCEMENT: 26th June, 2023

per :K. ANPAZHAKAN

The Appellant is engaged in providing Custom House Agent (CHA) and freight forwarding services. They are registered under service tax and discharging service tax on the service charges received. A Show Cause Notice dated 17.10.2007 was issued to the Appellant proposing to demand service

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tax on various receipts accounted in their books of account, but no service tax has been paid, for the period 2002-03 to 2006-07. The Notice was adjudicated vide Order-in-Original dated 30.01.2009, wherein the Adjudicating Authority has set aside the demands pertaining to some services namely (a) Pickup charges (b) Import consol air (c) Import consol sea (d) Export consol air and (e) Export consol sea and confirmed the levy of service tax in respect of some services such as Air freight commission, Sea freight commission, Service Charges, Documentation charges, airport/port truck charges, and other direct reimbursements GE India Industrial (P) Ltd. etc.

2. The Department filed appeal against the demands which were set aside demanding service tax in respect of services received from Overseas Commission Agent, under reverse charge. The Tribunal remanded the matter back to the adjudicating authority. The Appellant was directed specifically to furnish the details of amounts received, details of reimbursable expenses and nature of expenses, as below:

“5. As submitted by Ld. A.R., in the absence of invoice wise statement to be whether amount of reimbursable expenses are actually reimbursable or not gross value of service cannot be worked out. In view of the fact that the applicant had not worked out the gross value of the service invoice wise, it is proper that the appellants submit a worksheet showing invoice wise details of amounts received, details of reimbursable expense and the nature of expenses that are not included or the otherwise. This worksheet can be considered in detail by the Adjudicating Authority and the proper quantification and liability can be done.”

3. The adjudicating Authority passed the Denovo order dated 30.03.2017, confirming service tax to the extent of Rs 1,25,99,481/- along with interest and penalty. The present appeals are against this impugned order dated

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30.03.2017 passed by the Commissioner, both by the Appellant and the Department.

4. In the Denovo Order, the demand of service tax on air freight and sea freight commission were confirmed under BAS; reimbursements under CHA services; pickup charges and income from GE Industrial Ltd. are also confirmed under CHA services. The Denovo Order dropped the demand of service tax under CHA services with respect to duty and airport and seaport handling charges .

5. In their submissions, the Appellant stated that the Tribunal vide order dated 15.09.2011 remanded the matter with a specific direction to the Appellant to produce worksheet showing invoice wise details of amounts received, details of reimbursable expense and the nature of expenses. They have complied with the direction and produced the details with sample documents for each of the demands raised in the Notice. However, the adjudicating authority confirmed the demand on reimbursable expenses on the ground that the Appellant had only produced sample invoices and mere submission of worksheet is not enough for proper quantification of service tax liability. The impugned order also states that the Appellant has not produced any certificate from their statutory auditor.

6. The demand on Air Freight commission and Sea freight commission was confirmed on the ground that the Appellant had agreed to pay service tax and they have already paid the same and the demand is sustainable. The Appellant stated that this observation of the adjudicating authority in the impugned order is not correct as they have contested the levy and not agreed that there were liable to pay service tax on these charges.

7. The Ld. DR reiterated the findings of the adjudicating authority in the impugned order.

8. Heard both sides and perused the appeal records.

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9. We will now examine each of the demands confirmed and dropped on the basis of the submissions made by both sides.

10. Air Freight Commission:

10.1 The Appellant has undertaken booking of cargo space on various airlines. These were meant for export of goods. For this activity they received commission from the airlines. It is the contention of the Appellant that this service was rendered in connection with export of goods and therefore, no service tax will be leviable on such services.

10.2 The Appellant stated that the issue is squarely covered by the decision in the case of

* M/s Robinson Air Services Vs. CCE, Delhi Final Order No. 53632/2016 dated 16.09.2016;

*Airogo Travels and Cargo Pvt Ltd., Final Order No. 43487/2017 dated 19.09.2017.

10.3 We observe that the services rendered by the Appellant were related to export of goods and hence there is no liability of service tax on the commission received from the airlines in connection with the goods exported. We find that this view has been held in Robinson Air Services Vs. CCE, Delhi, Final Order No. 43487/2017 dated 19.09.2017 and Airogo Travels and Cargo Pvt Ltd., Final Order No. 43487/2017 dated 19.09.2017.

10.4. Hence, we hold that the demand confirmed in the impugned order on this count is not sustainable.

11. Service charges

11.1 This amount is related to charges received for issuance of delivery orders etc. The Appellant stated that these services have been availed on behalf of the clients. However, they have discharged service tax and produced ST-3 returns for the period 2003-04 to 2006-07 along with category-wise breakup of the amount paid.

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11.2 We observe that even though the Appellant has contested the issue earlier, they are not contesting it now and paid the service tax on these service charges collected. Hence, we uphold the demand confirmed in the impugned order on this count.

12. Documentation charges and handling charges; DO charges and other direct reimbursements:

12.1 These charges collectively include the following:

- Amounts paid for filing of Bill of Entry through EDI which the Appellant had paid to CMC Computers.
- Charges recovered for obtaining certificate of origin which includes the fee paid to the Chamber of Commerce,
- Air way Bill charges (AWB) which is paid to the airline or their agents when Appellant books cargo space.
- Delivery order charges and other direct reimbursements is the fee collected by the airline/shipping line for giving delivery order to enable the customer to clear the goods from the customs.

12.2 The Appellant claimed that these are all pure reimbursable expenses which they have incurred on behalf of the customer. As per the directions of the Tribunal in the remand order, they have given invoice wise details and statements to the adjudicating authority. Along with these details they have enclosed sample copies of invoices and supporting document for each of the reimbursable expense.

12.3 The Appellant stated that for DO charges and other direct reimbursements, as against 6813 entries shown in the statement, they have produced invoices with supporting documents for 40 entries. The adjudicating authority has dropped service tax of Rs.10,938/- pertaining to these 40 entries after verifying the invoices with supporting documents. It is their submission that having verified the sample invoices and being satisfied with the nature of

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reimbursements, the Adjudicating Authority ought to have dropped the service tax demand instead of confirming the balance demand of Rs.1,06,78,548/- under the said head on the ground that mere submission of worksheet or statement is not enough for proper quantification of service tax liability .

12.4 We observe that the Appellant had produced sample invoices and after verifying the same the adjudicating authority has accepted their contention in respect of those 40 entries in the order-in-original. The appellant stated that since the data is huge and bulky, from the year 2002-03 to 2006-07, they requested the Adjudicating Authority to depute an officer to the Appellant's premises to verify the remaining invoices, in case he has any doubt about the nature of reimbursements in respect of the remaining entries and submitted a worksheet containing all reimbursements. This fact has been recorded in the impugned order by the adjudicating authority . Therefore, it is not open to the Adjudicating Authority to confirm the demand on the ground that all invoices have not been produced.

12.5 We observe that the issue as to whether reimbursable expenses are liable to be taxed or not is settled by the decision of the Hon'ble Supreme Court in the case of UOI Vs. Intercontinental Consultants and Technocrats Pvt Ltd., (2018) TIOL 76-SC-ST wherein the Hon'ble Apex Court has affirmed the decision of the Delhi High Court striking down Rule 5(1) of the Valuation Rules, 2006, which provides for inclusion of expenditure or costs incurred by the service provider in the course of providing taxable service in the value, as ultra vires. The observation of the Hon'ble Supreme Court is reproduced below:-

.....” 21. Undoubtedly, Rule 5 of the Rules, 2006 brings within its sweep the expenses which are incurred while rendering the service and are reimbursed, that is for which the service receiver has made the payments to the assessee. As per these Rules, these reimbursable expenses also form part

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of 'gross amount charged'. Therefore, the core issue is as to whether Section 67 of the Act permits the subordinate legislation to be enacted in the said manner, as done by Rule 5. As noted above, prior to April 19, 2006, i.e., in the absence of any such rule, the valuation was to be done as per the provisions of Section 67 of the Act.

22. Section 66 of the Act is the charging Section which reads as under: "there shall be levy of tax (hereinafter referred to as the service tax) @ 12% of the value of table services referred to in sub-clauses ...of Section 65 and collected in such manner as may be prescribed."

23. Obviously, this Section refers to service tax, i.e., in respect of those services which are taxable and specifically referred to in various sub-clauses of Section 65. Further, it also specifically mentions that the service tax will be @ 12% of the 'value of taxable service'. Thus, service tax is reference to the value of service. As a necessary corollary, it is the value of the services which are actually rendered, the value whereof is to be ascertained for the purpose of calculating the service tax payable thereupon.

24. In this hue, the expression 'such' occurring in Section 67 of the Act assumes importance. In other words, valuation of taxable services for charging service tax, the authorities are to find what is the gross amount charged for providing 'such' taxable services. As a fortiori, any other amount which is calculated not for providing such taxable service cannot a part of that valuation as that amount is not calculated for providing such 'taxable service'. That according to us is the plain meaning which is to be attached to Section 67 (unlamented, i.e., prior to May 01, 2006) or after its amendment, with effect from, May 01, 2006. Once this interpretation is to be given to Section 67, it hardly needs to be emphasized that Rule 5 of the Rules went much beyond the mandate of Section 67. We, therefore, find that High Court was right in interpreting Sections 66 and 67 to say that in the valuation of taxable service,

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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 anything more or less than the consideration paid as quid pro qua for rendering such a service.

25. This position did not change even in the amended Section 67 which was inserted on May 01, 2006. Sub-Section (4) of Section 67 empowers the rule making authority to lay down the manner in which value of taxable service is to be determined. However, Section 67(4) is expressly made subject to the provisions of subsection (1). Mandate of sub-section (1) of Section 67 is manifest, as noted above, viz., the service tax is to be paid only on the services actually provided by the service provider.

As the issue has already been settled by the decision of the Hon,ble Apex Court cited above, we hold that the demand confirmed on the reimbursable expenses in the impugned order is not sustainable.

13. Pickup charges:

13.1 Under this head the Appellant has shown transportation charges and loading and unloading charges. The Appellant stated that on the transportation charges they have already discharged service tax by availing abatement of 75% under GTA services with effect from 01.01.2005 after the introduction of service tax on GTA services. As regards the loading and unloading charges, they claimed that they are pure reimbursements and hence not liable to service tax.

13.2 It is observed from the Show Cause Notice that the transportation charges and loading unloading charges were referred to as pick up charges in the Notice. In the earlier Order-in-Original dated 31.01.2009, the adjudicating authority has dropped the demand for the period prior to 01.01.2005 and has allowed abatement of 75% under GTA services. We observe that the demand of service tax on these charges have been made in the Notice under CHA

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service. There is no liability of service tax under CHA service on these charges. Accordingly, we hold that the demand confirmed in the impugned order is beyond the scope of the Notice and accordingly hold that the demand on this 4count is not sustainable.

1. Income from M/s GE Industrial Ltd.,

14.1 This amount represents the amounts recovered from GE Industrial Ltd., for clearing and forwarding. The Appellant has discharged service tax on the service charges received. However, the Appellant has also incurred certain expenses which have been reimbursed by M/s GE Industrial Ltd., on actual basis' The expenses reimbursed are rent for the warehouse, salary, telephone bills etc. The Appellant contended that these are reimbursements of expenditure and therefore, not liable to be taxed.

14.2 We observe that the Notice has proposed to levy service tax on these charges under the category of C&F agency services. The OIO has confirmed the levy under CHA services. Thus, we observe that the impugned order has travelled beyond the Show Cause Notice and hence the demand confirmed on this count is not sustainable.

15. On the issue of limitation, the Appellant contended that the Show Cause Notice was issued for the period 2002-03 to 2006-07. The Notice was issued on 17.10.2017, by invoking the extended period. As there was no suppression involved, the demands confirmed by invoking the extended period not sustainable. We observe that the Appellant has been discharging service tax with respect to the service charges received.

15.1 We observe that the dispute is with regard to non inclusion of reimbursable expenses as well as value of taxable services. The Appellant contended that they were under the bonafide belief that reimbursable expenses and the ocean freight / air freight are not includable in the taxable value. We observe that there were confusion regarding inclusion of

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reimbursable expenses in the taxable value. Finally, The Hon'ble Supreme Court has held that they are not includable in the case of Intercontinental Consultants and Technocrats Pvt Ltd case. Thus, we hold that there is no suppression involved in this case and hence extended period not invocable. Hence, the demands confirmed by invoking the extended period in the impugned order are not sustainable.

16. In view of the above discussion, we set aside the demands in the impugned order in respect of the demands mentioned at paras 10 to 15 supra. The demand wherever paid by the Appellant is confirmed. The department appeal is rejected. We modify the impugned order on the above terms.

(Pronounced in the open court on...26th June, 2023...)

Sd/-
(P. K. Choudhary)
Member (Judicial)

Sd/-
(K. Anpazhakan)
Member (Technical)

Tushar