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

REGIONAL BENCH – COURT NO. 1

Service Tax Appeal No. 71272 of 2013

(Arising out of Order-in-Appeal No. 63/ST/B-I/2013 dated 15.07.2013 passed by the Commissioner (Appeals), Central Excise, Customs and Service Tax, Central Revenue Building, Rajaswa Vihar, Bhubaneswar – 751 007, Odisha)

M/s. DRB Forwardings : **Appellant**
AT: - Shri Krishna Nilayam,
Jhunjhunwalla Garden,Near Mater Canteen,
Bhubaneswar (Odisha)

VERSUS

Commissioner of Central Excise, Customs and Service Tax : **Respondent**
Bhubaneswar-I Commissionerate
Central Revenue Building, Rajaswa Vihar,
Bhubaneswar – 751 007 (Odisha)

APPEARANCE:

Shri Bhagban Panda, Advocate for the Appellant
Assisted by Shri Pradyumna Kumar Sahu, Advocate

Shri J. Chattopadhyay, Authorized Representative for the Respondent

CORAM:

HON'BLE SHRI ASHOK JINDAL, MEMBER (JUDICIAL)
HON'BLE SHRI K. ANPAZHAKAN, MEMBER (TECHNICAL)

FINAL ORDER NO. 75882 / 2024

DATE OF HEARING: 02.05.2024
DATE OF DECISION: 09.05.2024

Order :[PER SHRI K. ANPAZHAKAN]

The present appeal has been filed against the impugned Order-in-Appeal No. 63/ST/B-I/2013 dated 15.07.2013 passed by the Commissioner (Appeals), Bhubaneswar wherein the Ld. Commissioner (Appeals) has upheld the demands confirmed in the Order-in-Original No. AC/BBSR DIVN/BBSR-IV/ST/53/2011 dated 31.03.2011.

2. The facts of the case are that the appellant was appointed as a clearing and forwarding (C&F) agent by M/s. Larsen and Toubro Ltd. (hereinafter referred to as 'L&T') since 1994. As per the agreement, the appellant raised bills under three different heads, which are as follows: -

(i) C&F (Unloading of Cement from Wagon to Platform, Loading of Cement from Platform to Trucks and local transport from railway siding to godown);

(ii) S&D (Unloading of Cement at godown and Loading of Cement from godown to truck for delivery); and

(iii) Remuneration and Commission (Commission @Rs.8/- per M.T.) and Godown Service Charges at fixed amount towards expenses incurred for telephone, furniture, account personnel, etc., on behalf of the principal, being reimbursed on a monthly basis)

3. However, it was noticed by the Revenue that the appellant had neither taken Service Tax registration nor discharged Service Tax liability on the charges received from M/s. L&T.

4. A Show Cause Notice dated 28.09.2004 was issued to the appellant demanding Service Tax of Rs.4,91,324/- for the period from September 1999 to March 2001 and September 2003 to March 2004.

5. The Notice was adjudicated by the Ld. Assistant Commissioner vide Order-in-Original dated 31.03.2011 wherein he confirmed the Service Tax

demand of Rs.4,91,324/- along with interest and appropriated an amount of Rs.1,17,862/- deposited by the appellant before adjudication of the case. He also imposed a penalty of Rs.3,73,462/- under Section 78 of the Finance Act, 1994 and Rs.5,000/-under Section 77 of the Act.

6. On appeal, the Ld. Commissioner (Appeals) vide the impugned order upheld the demands confirmed in the Order-in-Original dated 31.03.2011.

7. Aggrieved against the confirmation of demands in the impugned order, the appellant has filed the present appeal.

8. In their submissions, the appellant stated that they were not aware of the Service Tax liability on C&F agent service rendered by them; that they had no intention to evade payment of Service Tax. It is submitted that upon realizing that they were liable to pay Service Tax, they had immediately paid the Service Tax on the commission received by them and filed returns for the period from September 1999 to March 2001 and September 2003 to March 2004; the returns have been acknowledged by the jurisdictional Range Superintendent on 28.10.2004 and no objection had been raised on the matter of valuation for the period covered in the Show Cause Notice.

8.1. The appellant further submits that as per the provisions of law existed during the relevant period of time, C&F agents were liable to pay Service Tax on the gross amount of remuneration or commission received from the principal; the Rule does not speak about payment of tax on any reimbursable expenses received from the principal. They submit that incidental expenses like loading expenses, godown charges, freight, etc., are not includable in the gross value for the purpose of determination of tax liability in respect of the C&F agent services. In this regard, the appellant relied on the decision of the CESTAT in the case of *M/s. Sangamitra Service Agency v. Commissioner of Central Excise [2006 (5) STT 85]* wherein it has been held that Service Tax on C&F agent services is payable only on the commission and not on the incidental expenses. It is submitted that the above view was also held in the case of *M/s. Sri Sastha Agencies Pvt. Ltd. v. Assistant Commissioner [2007 (6) S.T.R. 185]*.

8.2. Accordingly, the appellant submits that they have already paid the applicable Service Tax on the commission received and no Service Tax is payable on the reimbursable expenses.

8.3. In view of the above, the appellant prayed for setting aside the demand confirmed in the impugned order.

9. The Ld. Authorized Representative for the respondent submits that the reimbursable expenses have been received in connection with the rendering of C&F agent services by the appellant. He submits that the activity of lifting, receiving, loading and unloading of goods as per the directives of the principal are covered within the ambit of C&F agent service. He contends that the remuneration or commission, by whatever name it is called, paid in connection with the clearing and forwarding operations, is includable in the gross value for the purpose of charging Service Tax. Accordingly, he supports the impugned order confirming the demands.

10. Heard both sides and perused the appeal documents.

11. We observe that the issue involved in the present appeal is the valuation for the purpose of demanding Service Tax on the C&F agent service. In the present case, we observe that the appellant has rendered the following chain of activities on behalf of their principal: -

(i) C&F: Unloading of cement from wagon to platform. Loading of cement from platform to trucks. Local transportation from railway siding to godown.

(ii) S&D: Unloading of cement at godown. Loading of cement from godown to the trucks for delivery.

11.1. From the above, it is clear that the appellant has been rendering the service of lifting, receiving, loading and unloading of goods as per the directives of the principal, which are all covered under the category of C&F agent service.

12. In their submissions, the appellant contended that the charges collected for activities like loading, unloading, etc., are not includable in the assessable value; they are liable to pay service tax only on the fixed commission received by them from the principal; all other receipts are expenses incurred and reimbursed on actual basis and hence not includable in the assessable value for the purpose of levying service tax.

12.1. We have perused the Work Order dated 1st April, 1999 issued by M/s. L&T to the appellant.

The "Scope of Work" and "Reimbursable Expenses on Actual Basis" as forthcoming from the said work order are reproduced hereunder: -

"B1. SCOPE OF WORK

You will receive cement bags consigned to our godown, unload and stack the same properly and effect deliveries therefrom as per our instructions and shall render incidental services as required by us from time to time. You will also be incharge of the stock of our cement in the godown and will render proper account of the same.

B2. REIMBURSABLE EXPENSES ON ACTUAL BASIS

For unloading cement at our godown, For loading cement bags into trucks from our godown for delivery	]	**Rs.28/- (Rupees Twenty eight only) per MT.**

…"

12.2. From the above, we observe that the appellant has been reimbursed the expenses at a specific pre-determined rate. If the reimbursement is on actual basis, it cannot be a fixed pre-determined amount. It would vary every month. We observe that the appellant has been paying Service Tax only on the fixed commission received by them. They were not paying Service Tax on the godown charges and/or other remuneration which are also fixed on a lumpsum basis per month. From this, it is evident that the remuneration claimed by the appellant is not on actual basis, but paid on a lumpsum basis every month. Thus, we hold that the expenses are not reimbursed to the appellant on actual basis as a 'pure agent'.

Accordingly, we hold that the expenses received are towards rendering of C&F service and the appellant is liable to pay service tax on these reimbursable expenses.

12.3. We find that the Larger Bench, CESTAT, Bangalore in the case of *M/s. Sri Bhagavathy Traders v. Commissioner of Central Excise, Cochin [2011 (24) S.T.R. 290 (Tri. – L.B.)]* held that reimbursable expenses received in connection with rendering of service in respect of C&F agent services are includable in the assessable value. The relevant part of the said decision reads as under: -

> *"6.1 Having analyzed the various decisions cited on behalf of the assessee and on behalf of the department, it would be appropriate to consider the scope of the term 'reimbursements" in the context of money realized by a service provider. A person selling the goods to another cannot treat cost of raw materials or the cost of labour or other cost components for inputs services, which went into the manufacture of the said goods as reimbursements. If the buyer enters into a contract for supply of raw materials after negotiating prices from the supplier for the raw materials and the raw materials are received by the manufacturer and the manufacturer pays the amounts to the supplier of raw materials and recovers the same from the buyer, it can certainly be considered as reimbursements. It is to be noted that in such a case, the manufacturer has no role about choosing the source of the materials procured or the price at which the materials procured and the manufacturer is not under any legal or contractual obligation to pay the amount to the supplier. However, if the manufacturer procures raw materials from a source of his choice at a price negotiated between him and supplier of the raw materials and uses the material for manufacture of the final products which he sells, the question of his collecting the cost of raw materials as reimbursement does not arise. The concept of reimbursement will arise only when the person actually paying was under no obligation to pay the amount and he pays the amount on behalf of the buyer of the goods and recovers the said amount from the buyer of the goods.*
>
> *6.2 Similar is the situation in the transaction between a service provider and the service recipient. Only when the service recipient has an obligation legal or contractual to pay certain amount to any third party and the said amount is paid by the service provider on behalf of the service recipient, the question of reimbursing the expenses incurred on behalf of the recipient shall arise. For example, when rent for premises is sought to be claimed as reimbursement, it has to be seen whether*

> *there is an agreement between the landlord of the premises and the service recipient and, therefore, the service recipient is under obligation for paying the rent to the landlord and that the service provider has paid the said amount on behalf of the recipient. The claim for reimbursement of salary to staff, similarly has to be considered as to whether the staff were actually employed by the service recipient at agreed wages and the service recipient was under obligation to pay the salary and it was out of expediency, the provider paid the same and sought reimbursement from the service recipient.*
>
> *6.3 The various Circulars of the Board relied upon by the learned Advocate for the assessee clearly referred to amounts payable on behalf of the service recipient. For example, the Customs House Agent paying the Customs duty to the Customs Department, paying the charges levied by the Port Trust to the Prot Trust, paying the fee for testing to the Testing Organization are clearly on behalf of the importer/exporter and the same are recoverable by the CHA as reimbursement, that too on actual basis. These Circulars cannot be held to be in support of the claim of the assessee that they can split part of the amount as reimbursable expenses and the rest as towards service charges."*

12.4. By relying on the decision cited above, we hold that these reimbursable expenses collected by the appellant are includable in the gross value for the purpose of charging service tax under the category of C&F agent service.

13. In their submission, the appellant has stated that they had no intention to evade the payment of Service Tax. The Show Cause Notice was issued for the period from September 1999 to March 2004 on 28.09.2004 by invoking the extended period of limitation. It is their submission that Service Tax under the category of C&F agent was a new levy and they were not aware of the liability to Service Tax; that immediately after the liability was brought to their notice, they took registration and paid Service Tax of Rs.1,17,862/- and also filed their returns for the period from September 1999 to March 2004.It is submitted by the appellant that the returns thus filed were duly acknowledged by the jurisdictional Range

Superintendent on 25.10.2004 and no objection was raised regarding the payment of Service Tax on reimbursable expenses at the time of filing the returns. Accordingly, the appellant contended that the extended period of limitation is not invokable in this case to demand Service Tax.

13.1. We observe that Service Tax on clearing and forwarding agent service was a new levy and there were confusions prevailing at that time regarding the value on which Service Tax was payable. We observe that the appellant have taken registration and paid Service Tax on the commission received by them and accordingly filed returns immediately upon being notified about their liability. The Show Cause Notice has not brought any evidence regarding *mens rea* on the part of the appellant to evade payment of Service Tax. The allegation of wilful mis-statement and suppression of facts with intent to evade payment of Service Tax needs to be established with positive evidence. However, it is observed that no such evidence is available on record to establish the intention on the part of the appellant to evade the payment of Service Tax. Thus, we hold that the Service Tax demanded by invoking the extended period of limitation is not sustainable in this case. Accordingly, the demand of Service Tax is restricted to the normal period of limitation.

13.2. We observe that the appellant has paid Service Tax of Rs.1,17,862/- for the period from September 1999 to March 2004. If the appellant has already paid some Service Tax during the normal period of limitation, then the same may be appropriated against their liability of Service Tax for the normal period of limitation.

14. Regarding penalty imposed on the appellant, we observe that there is no suppression of fact with intention to evade payment of tax established in this case. Since the demand is confirmed only for the normal period of limitation, no penalty is imposable on the appellant. Accordingly, we set aside the penalty imposed on the appellant in the impugned order.

15. In view of the above, we pass the following order: -

(i) The demand of Service Tax for the C&F agent service rendered by the appellant is confirmed for the normal period of limitation. The appellant is liable to pay Service Tax, if any, for the normal period, along with interest, after adjusting the Service Tax, if any, already paid by them for the normal period of limitation.

(ii) In the facts and circumstances of the case, no penalty is imposable on the appellant.

16. The appeal is disposed of on the above terms.

(Order pronounced in the open court on **09.05.2024**)

Sd/-
(ASHOK JINDAL)
MEMBER (JUDICIAL)

Sd/-
(K. ANPAZHAKAN)
MEMBER (TECHNICAL)

Sdd