CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH : MUMBAI.

Service Tax Appeal No. 89785 of 2018 – SM (Mum.)

[Arising out of Order-in-Appeal No.IM/CGST A-I/MUM/259/18-19 dated 16.08.2018 passed by the Commissioner of Central Tax, Central Goods and Service Tax and Central Excise, Mumbai]

M/s.Arcadia Shipping Limited **Appellant**
222, Tulsiani Chambers
Nariman Point, Mumbai.

VERSUS

Commissioner of Central Goods and Service Tax & Central Excise **Respondent**
14th Floor, Air India Building, Nariman Point
Mumbai.

Appearance:

Shri Mahesh Raichandani, Advocate for the appellant
Shri Onil Shivadikar, Authorised Representative for the respondent

CORAM: HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)

FINAL ORDER NO. A/87158/2019

DATE OF HEARING: 07.05.2019
DATE OF DECISION: 18.11.2019

ANIL CHOUDHARY:

The appellants are M/s. Arcadia Shipping Ltd., which is engaged in providing shipping agents/liner operations, offshore services for which they were registered with the Department under the various categories. The appellants have been regularly paying service tax and filing periodical ST-3 Returns. The appellant also avails cenvat credit of service tax paid on input services. The appellant have entered into an agreement of services with M/s. Valentine Maritime Ltd., Abu Dhabi ('VML' in short). As per the terms of the agreement, the appellant is to provide support services to VML for which they receive fee /service charges. The said agreement entered w.e.f. 2.10.2014 in its various clauses, provides as follows:-

> "*WHEREAS, from time to time, VML and/or its subsidiary companies namely Valentine Maritime (Gulf) LLC – VMGL, Valentine Maritime (Mauritius) Ltd. – VMML enter into contract and agreements with various client (hereinafter called "Client") to perform marine construction work in West Coast of India (hereinafter called "Territory"); and*
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> *WHEREAS, VML and/or its subsidiary companies VMGL & VMML require the assistance of a qualified and experienced Indian Company to provide shipping and allied agency and support services (hereinafter called "Service") in order to discharge its obligation to its Client; and*
>
> *WHEREAS, ASL (appellant) is fully qualified, experienced and willing to supply such Service to VML on the terms and conditions set forth hereunder."*

2. The agreement further provides that the appellant shall provide VML with the following services, among others, pursuant to receipt of specific request and authorisation from VML:

"1.1 Meeting assistance as required for all designated personnel entering or leaving the territory;

1.2. Clearance assistance for all vessels and barges entering or departing the Territory;

1.3 Customs and immigration assistance. This shall include but not limited to, obtaining visa extensions and posting all bond and other documentation necessary to assure timely and efficient movement of VML personnel, cargo and other property through all ports of entry and departure, including seaport and airport, within the territory;

1.4 Clearance of crew proceeding to and returning from offshore site inclusive of but not limited to customs, immigration, and any other formalities that may be required.

1.5 Procurement of air tickets and/or arranging hotel accommodation for designated personnel.

1.6 Such other services that ASL is capable of providing and that VML shall so request and authorize."

3. In consideration of the proper performance of the services, VML shall pay the appellant in accordance with the schedule of rates and charges attached as Appendix "A", being part of the agreement. The said schedule of charges for the services provided for the retention fee, procured as well as separate charges for various works, for obtaining IEC Rs.35,000/- (for inclusion or removal of branch office from Services Rs.75,000/-), charges for forwarding in import/export returns – per return Rs.15,000/- etc. For some of the services with respect to import/export, charges for consignment requiring various functions like preparation of documents, filing of Form-N, Form-C, Form-CC, filing of Bill of Entry, payment of warehousing charges, etc. etc. It was pointed out that the appellant shall be entitled to 0.5% of CIF value, subject to minimum of Rs.15,000/- and maximum of Rs.1,25,000/- per shipping bill or per Airway bill. Further, for arrangement of some of the services, as Pure Agent, the appellant is entitled to, 3% on actual cost <u>for steve dooring and storage and warehousing,</u> etc. Similarly, the appellant was entitled to 5% service charges on actual, in respect of local transportation, etc.

4. The appellant raised bill for service charges for various services given by them to VML and has paid paid service tax on the bill amount as per applicable rate.

5. Apart from the above services, the appellants also incurred incidental expenses for VML, viz. crane hire charges, stevedoring/handling charges, warehousing charges, transportation charges, etc. The appellant charged their service charges at the agreed

percentage i.e. 5% or 10% as hereinabove stated on such incidental expenses procured as Pure Agent. In respect of such transaction, the appellant has paid service tax, on the service charges collected by them. With respect to such services procured from the other service providers, evidently, the providers of such services have charged service tax and they are registered with the Department. Further, the appellants received various input services like hotel service, Air Travel Services, Rent-a-Cab services etc., used by them for providing the output services to M/s. VML and others. In such cases, the invoice is in the name of the appellants. The appellants have paid service tax along with the charges to the service providers. Such amounts paid by the appellants, with respect to service procured for VML as Pure Agent, are reimbursed to the appellant. On such input services received by the appellants, the appellant availed cenvat credit benefit, as the same qualify as input services for them under Rule 2 (l) of CCR. The appellant has been of the belief that recovery of service tax by way of reimbursement from VML, would not have any bearing on the credit admissibility.

6. EA-2000 audit was conducted by the officers of the Service Tax Department of the records of the appellant company. During the course of audit, it was alleged that the appellants have availed ineligible cenvat credit in as much as the appellants have not paid service tax on the entire amount of incidental expenses recovered from VML. The audit report accepted that the service is an 'input service'. The appellants filed reply to the audit report denying the allegation leveled in the audit report.

7. Based on the audit, show cause notice No. Addl. Commr./ST-I/AUDIT-I/82/2015-16 dated 21.03.2016 came to be issued to the appellants. The show cause notice, *inter alia,* alleged as under:

> "1. *The appellants have paid service tax only on the service charges charged on incidental expenses recovered from VML and not on the entire amount of incidental expenses claiming benefit of pure agent under Rule 5(2) of the Service Tax (Determination of Value) Rules, 2006.*
>
> *2. The services procured by the appellants are input services for VML for whom the appellants are acting as a pure agent.*
>
> *3. The appellants are not the recipient of the 'input services' in as much as according to the show cause notice, the appellants have acted as a pure agent of VML.*
>
> *4. The show cause notice also proposed to demand interest and penalty."*

8. The show cause notice was adjudicated on contest and the entire proposed demand of Rs.47,60,042/- was confirmed under Rule 14 of the Cenvat Credit Rules read with proviso to Section 73(1) of the Finance Act, as the amount of irregular cenvat credit taken, along with interest and further penalty of equal amount was imposed under Rule 15(3) read with Section 78 of the Act, relating to the period 2010-2011 to 2014-2015. The Adjudicating Authority has held that the appellant was procuring certain input services for VML from third party and the payment was accordingly made by the appellant. For procuring such services, the appellant was entitled to only the prescribed percentage of service charges. The assessee raised invoices on the VML claiming re-imbursement of actual expenses plus their service charges as per the aggregate percentage. The appellant paid service tax only on the service charges and not on the entire billed amount, claiming the benefit as 'Pure Agent' under Rule 5 (2) of Service Tax (Determination of Value) Rules, 2006. Further, the service tax on such procured services was

discharged by the service providers, who had raised invoices on the appellant. The credit was availed on such invoices by the appellant. Objection of Revenue was that, the appellant was not entitled to cenvat credit of service tax paid, although the invoices were in their name but the services were procured as Pure Agent for VML. It was held that under the facts and circumstances, the appellant is not a 'Pure Agent' simplicitor but they are providing both output services on their own account and were also procuring services for VML as Pure Agent, wherein the appellants have incurred the cost and incidental expenses along with aggregate mark-up. It was also held that certain services provided by the appellant like restaurant, canteen, warehousing services, transportation services, etc., which are used by the appellant for rendering the output services, is not procured as Pure Agent on behalf of the VML. The issue framed is regarding the services on which the appellant have taken credit, are covered under the definition of "Input Services" as defined under Rule 2 (l) of CCR. It was held that the various services received by the appellant from other service providers like Air Travel Agent, rent-a-cab etc., where the invoices were raised on the appellant and the appellant have paid total amount including the service tax to the service providers. However, where the appellant gets reimbursement of the total amount including the tax from VML, it is evident that such services are procured for VML only. It was further held that since the appellant under the terms of contract has paid service tax (output tax) only on the service charges levied by them on the procured services, it is implied that the appellant has acted as Pure Agent, as provided under Rule 5 of Service Tax (Determination of Value)

Rules. Accordingly, it was held that the appellant is not entitled to take credit of services procured as Pure Agent for VML, for which they receive full reimbursement including the amount of tax from VML.

9. It was further held that, as Revenue came to know of such irregular credit only in the course of Audit, the appellant is liable for penalty under Section 78 and further the extended period of limitation has rightly been invoked.

10. Being aggrieved, the appellant preferred appeal before the Commissioner (Appeals), who was pleased to dismiss the appeal by the impugned order-in-appeal dated 16.08.2018. Being aggrieved, the appellant has preferred appeal before this Tribunal.

11. Ld. Counsel urges that Demand is bad in law in as much as the appellants have not violated any of the rules of the Cenvat Credit Rules, 2004. Hence, the impugned order must be set aside

12. First, in the instant case, the appellants have not violated any of the provisions relevant for availing credit. Rule 2(l) defines the term 'input service', inter alia, to mean "any service used for providing output service". In the instant case, the show cause notice accepts that the service received by the appellants qualifies as an 'input service'. See: Para 3 of the show cause notice. This fact is acknowledged and accepted in the Order-in-Original and the impugned order as well.

13. Second, be that as it may, in so far as nexus of the input services with output service of the appellants is concerned the appellants submit that the services have direct nexus with their output service. In other

words, all the service obtained/received by the appellants are used for providing its output service. Without prejudice, the definition of 'input service' was very wide during the period 01.04.2010 to 31.03.2011 and any service used for providing output service would get covered under Rule 2(l). Be that as it may, there is no mathematical co-relation / direct nexus required to be established for availment of credit. See: Badrika Motors-.

14. Third, without prejudice, merely because the charges incurred on procurement of input services have been recovered from VML shall not affect the eligibility of credit. This fact has got nothing to do with eligibility of credit.

15. Fourth, without prejudice, the invoice of the input service provider bears the name of the appellants, the appellants have reimbursed service charges plus service tax thereon to the input service providers, the tax has been paid to the credit of the Central Government. In such facts and circumstances, it is incorrect to suggest / state that VML is the services recipient. Once it is an admitted and undisputed factual position that the service qualifies as an 'input service' for the appellants, there is no question of violation of Rule 3 of the Cenvat Credit Rules, 2004.

16. Fifth, there is also no allegation / finding that the appellants have not reimbursed the service charges and service tax thereon to the service provider as required under Rule 4(7) of the Cenvat Credit Rule, 2004. There is no invocation of Rule 6 of the Cenvat Credit Rules, 2004 i.e. appellant is providing taxable as well as exempt services. Lastly, there is no allegation / finding that that appellants have violated the

provisions of Rule 9 of the Cenvat Credit Rules, 2004 i.e. have availed credit without valid documents or have not maintained records of receipt, consumption and use of input services. Once these are the facts on record which are undisputed, there is no question of invoking Rule 14 of the Cenvat Credit Rules, 2004.

On the above count alone, the impugned order must be set aside.

17. It is further urged that the fact that the appellant has collected service tax on which credit has been availed by the appellant, has no bearing on the eligibility of the credit. Hence, the impugned order is fit to be set aside.

18. Ld. Counsel also relies on the Board's Circular F. No. 137/85/2007-CX.4 and No.97/8/2007 dated 23.08.2007, extracts of which reads as under:-

> *"(b) Issue: Whether a consignee can take credit of the amount paid as service tax either by himself (as consignee) or by the consignor or by the Goods Transport Agency?*
>
> *Comments: As per Rule 3 of the Cenvat Rules, 2004, Cenvat credit of, inter alia, service tax leviable and paid on any 'input services' can be taken. The rule does not distinguish as to who (i.e. the GTA, the consignor or the consignee himself) has paid the aforesaid tax. The only condition required to be satisfied is that the consignee must be a manufacturer of excisable goods or a provider of taxable service and the service must be in the nature of 'input service' for such activity. In case of inward transportation of inputs or capital goods, such service (being specifically mentioned under the definition of 'input service') would qualify to be called as 'input service' and, thus, the service tax paid (by any of the persons mentioned above) on it would be eligible as credit to the receiver if he is either a manufacturer of excisable goods or a provider of taxable service*."

19. It is urged that the aforementioned circular clarifies that the payment of tax is irrelevant for taking credit, and what is of significance is that the consignee must be a manufacturer of excisable goods and the service must be in the nature of "input service" for such activity.

20. That reliance is also placed on the ruling of this Tribunal in the case of **Rucha Engineers Pvt. Ltd. Vs. CCE, Aurangabad - 2015 (39) STR 518,** wherein it is held that once the fact is that the service has suffered service tax, any payment towards duty or service tax is entitled for input credit and it is immaterial, who has paid service tax.

21. It is further urged that the appellant is the receiver of services provided by the appellant's service providers and not M/s VML. As per the terms of the agreement, the appellants are required to provide or meet assistance as required for all designated personnel entering or leaving the territory, clearance assistance for all vessels and barges entering or departing the territory, etc. Thus, the various services received like restaurant, canteen, rent-a-cab, services, etc., by no stretch of imagination, can be held that the such services are procured for or on behalf of VML. Such services are used by the appellant for providing their output services.

22. It is further urged that the appellant do not qualify as "Pure Agent", as held in the impugned order. It is further urged that the reliance placed on Rule 5 of the Service Tax (Determination of Value) Rules is bad, as the said Rules has been held to be ultra vires of Section 67 of the Finance Act, 1994 as held in the case of **Intercontinental Consultants and Technocrafts Pvt. Ltd. Vs. Union of India and Ors. -2012-TIOL-966-HC-DEL-ST.** The said ruling was further confirmed by the Hon'ble Supreme Court, wherein it was held that on the services or input procured as Pure Agent, for the principal, agent/service providers are not responsible or liable to pay the tax. It is

further urged that the issue being of interpretation, and the transaction duly recorded in the books of accounts along with vouchers maintained in the ordinary course of business, there is no element of fraud or suppression on the part of the appellant. Hence, the penalty imposed is fit to be set aside.

23. Ld. Authorised Representative for the Department opposing the appeal, relied on the findings in the impugned order-in-appeal.

24. Further, the relevant facts are that under the facts and circumstances, on the services procured by the appellant as "Pure Agent" for M/s.VML, the appellants have further added service charges, as per their contract, and they paid output tax on such service charges only. Thus, evidently, such services are procured as "Pure Agent" for the client. Accordingly, the appellant is not entitled for cenvat credit on the same.

25. Having considered the rival contentions, I find that it is an admitted fact that on certain services procured by the appellant for M/s. VML, where also the invoices were in the appellant's name, but they have claimed full reimbursement from M/s.VML by further adding their service charges. Admittedly, the appellants have paid service tax (output tax) only on the service charges/mark-up made by them or levied by them. Thus, it is held that such services will not form part of input services under Rule 2 (l) of Cenvat Credit Rules for the appellant. However, on other input services, where the appellant have not recovered the amount of service charges plus service tax by way of reimbursement, they shall be entitled to cenvat credit. In the

circumstances, I find that the issue is wholly interpretational in nature and there is no element of contumacious conduct or suppression of facts. Admittedly, all the transactions are duly recorded in the books of accounts ordinarily maintained. Further, the appellants were registered with the Department and have been regularly complying including filing periodical returns. Accordingly, the penalty imposed under Rule 15 of Cenvat Credit Rules read with Section 78 of the Finance Act is set aside. Thus, the appeal is allowed in part, as stated hereinabove. The appellant is entitled to consequential benefit, in accordance with law.

[Order pronounced on 18.11.2019]

(ANIL CHOUDHARY)
MEMBER (JUDICIAL)

Ckp.