CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI

REGIONAL BENCH - COURT NO. I

Service Tax Appeal No. 85783 of 2017

(Arising out of Order-in-Original No. 73-76/Service Tax-VII/CD/2016 dated 02.01.2017 passed by the Commissioner of Service Tax-VII, Mumbai.)

M/s Modern Cargo Services Pvt. Ltd .... **Appellant**
Plot No.14, 3rd Floor, Bapa House,Samhita Warehousing Complex, Off Andheri Kurla Road, Saki Naka, Mumbai-400072

Versus

Commissioner of Service Tax-VI Mumbai ....**Respondent**
16th Floor, Satra Plaza, Sector 19D, Palm Beach Road, Vashi, Navi Mumbai- 400705.

Appearance:

Shri Sunil Gabhawalla, Chartered Accountant for the Appellant
Shri S. B. Sinha, Auth. Representative for the Respondent

CORAM:

HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)
HON'BLE MR. C J MATHEW, MEMBER (TECHNICAL)

FINAL ORDER NO. A/86321/2022

Date of Hearing: 28.11.2022

Date of Decision: 28.11.2022

Per: S.K. MOHANTY

Briefly stated, the facts of the case are that the appellant is a Licensed Customs House Agent and discharges appropriate service tax liability on the fees received by it for the clearance services rendered to the customers. During the course of providing output services, the appellant had incurred certain expenditure viz. Custom Duty, Octroi Duty, Warehousing Charges, etc., on behalf of its customers. Such expenditure is incurred under express instructions from the customers and is recovered on actual basis by way of reimbursement from the customers. Since, the appellant did not pay service tax on such reimbursable expenses incurred by them, the department-initiated show cause proceedings, seeking recovery of the service tax amount along with interest and for imposition of penalties. The matter arising out of the show cause notices was adjudicated upon by the learned Commissioner of Service Tax, Mumbai – VII vide the impugned order dated 02.01.2017, wherein the proposed demands in respect of service tax liability along with interest were confirmed and penalties were also imposed on the appellant. Feeling aggrieved with the impugned order, the appellant has preferred this appeal before the Tribunal.

2. Heard both sides and perused the records.

3. The provisions relating to valuation of taxable services for the purpose of charging of service tax are contained in Section 67 of the Finance Act, 1994. Sub-section (1) of Section 67 *ibid*, relevant for consideration of the present dispute, provides that where service tax is chargeable on any taxable service with reference to its value, then such value shall, in the case where the provision of service is for a consideration in money, be the gross amount charged by the service provider for such service provided or to be provided by him. In exercise of the powers conferred by clause (aa) of sub-section (2) of Section 94 of the Finance Act, 1994 the Central Government has made the Service Tax (Determination of Value) Rules, 2006 vide Notification No. 12/2006-ST, dated 19.04.2006, as amended. Rule 5 in the said rules has provided for inclusion in or exclusion from value of certain expenditure or costs. Sub-rule (1) in the said rule has provided that where any expenditure or costs are incurred by the service provider in the course of providing taxable service, all such expenditure or costs shall be treated as consideration for the taxable service provided or to be provided and shall be included in the value for the purpose of charging service tax on the said service. Sub-rule

(2) of Rule 5 *ibid* has provided that the expenditure or costs incurred by the service provider as a pure agent of the recipient of the service, shall be excluded from the value of the taxable service, upon fulfillment of the conditions itemized therein.

4. On perusal of the case records, we find that the learned adjudicating authority has included various costs and expenditure incurred by the appellant for provision of the taxable service, for the purpose of determination of the value of service and for payment of service tax thereon. At paragraph 14 in the impugned order, the learned adjudicating authority has held that the notice (appellant herein) does not qualify to be considered as 'pure agent' for the purpose of the aforesaid Rule 5(2) *ibid* and hence, the recoveries made by it from the clients towards the expenditure/costs shall not be excluded from the value of taxable service.

5. Challenging the vires of sub-rule (1) of Rule 5 i*bid,* M/s. Inter-Continental Consultants and Technocrats Pvt. Ltd. has filed the Writ Petition being No. 6370/2008 before the Hon'ble Delhi High Court, which was disposed off vide judgment dated 30.11.2012, in declaring such Rule 5 as *ultra vires*. It has been ruled by the Hon'ble High Court that both under the un-amended and amended provisions of Section 67 *ibid,* the charge of service tax under Section 66 *ibid* has to be on the value of taxable service i.e., the value of service rendered by the assessee and nothing more. The Hon'ble High Court further observed in the said judgment that the expenditure or cost incurred by the service provider in the course of providing the taxable service can never be considered as the gross amount charged by the service provider 'for such service' provided by him. Civil Appeal filed by the

Union of India against the judgment dated 30.11.2012 (supra) was dismissed by the Hon'ble Supreme Court vide judgment dated 07.03.2018, in upholding the views expressed by the Hon'ble Delhi Court. With regard to the Custom House Agent covered under the taxable head "Clearing and Forwarding Agent", the Hon'ble Supreme Court have ruled that even though the CHA issues two sets of invoices for reimbursement of various expenses and for service/agency charges separately, the invoice issued for service/agency charges alone is to be used for payment of service tax.

6. We find that relying upon the aforementioned judgments delivered by the Hon'ble Delhi High Court and Hon'ble Supreme Court, the department in appellant's own case has dropped the proposed demands made in the show cause notices for the subsequent period. Thus, under the facts and circumstances of the case, we do not find any reason to uphold the impugned order passed by the learned adjudicating authority.

7. Therefore, we do not find any merits in the impugned order, insofar as it has confirmed the adjudged demands on the appellant. Accordingly, the impugned order is set aside and the appeal is allowed in favour of the appellant.

(Operative portion of the order pronounced in open court)

(C J Mathew)
Member (Technical)

(S.K. Mohanty)
Member (Judicial)