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

REGIONAL BENCH : COURT NO. 3

SERVICE TAX Appeal No. 10057 of 2019-DB

[Arising out of Order-in-Original/Appeal No CCESA-SRT-APPEALS-PS-558-2017-18 dated 05.02.2018 passed by Commissioner (Appeals) Commissioner of Central Excise, Customs and Service Tax-SURAT-I]

Archna Traders **Appellant**

Basement Parijat Apartments, Opp. St Xavier School, Ghod Dod Road,
Surat, Gujarat

VERSUS

C.C.E. & S.T.-Surat-i **Respondent**

New building...opp. Gandhi baug,
chowk bazar,
surat, gujarat-395001

Appearance:
Present for the Appellant : Shri S J VYAS, Advocate
Present for the Respondent: Shri Anoop Kumar Mudvel, Superintendent (AR)

CORAM:
HON'BLE MR. RAMESH NAIR, MEMBER (JUDICIAL)
HON'BLE MR. C. L. MAHAR, MEMBER (TECHNICAL)

Final Order No. 11957/2024

DATE OF HEARING: **07.08.2024**
DATE OF DECISION: **09.09.2024**

C. L. MAHAR

Brief facts of the matter are that the appellant are engaged in providing clearing and forwarding agency service to Ms. Pepsico India Holdings Pvt Ltd and M/s. Adani Willmar Limited under separate contracts entered between the appellant and the service recipient. The department has started certain investigation against the appellant on the suspicion that in addition to clearing and forwarding services the appellant had also recovered certain expenditures from their service recipient and the amount collected by the appellant from their service recipient have not been included under the taxable value for the purpose of payment of Service Tax.

1.1. The show cause notice dated 10.04.2014 came to be issued demanding Service Tax Rs. 8,60,866/- for the period April 2008 to March 2013 under Section 73 of the Finance Act, 1994 by invoking the extended period of limitation as per the provisions of sub Section 1 of Section 73. The show cause notice have also invoked provision with regard to the interest and penalties as provided under Section 75, 77 and 78 of the Finance Act, 1984, respectively. The matter had been adjudicated vide impugned Order-In-Original dated 24th October, 2015 where under all the charges as invoked in the show cause notice have been confirmed by the Adjudicating Authority. The appellant have approached the office of Commissioner (Appeals), however, there also they did not succeed and the learned Commissioner (Appeal) vide impugned Order-In-Appeal dated 5th February, 2018 has decided the appeal against them. The appellant is before us against the above mentioned impugned order in appeal dated 5th February, 2018.

2. The learned Advocate appearing for the appellant have submitted that the Service Tax has been demanded from the appellant in respect of amount collected by them as reimbursement charges in respect of transportation of the goods undertaken by them on behalf of their principles namely M/s. Adani Willmar Limited. The learned Advocate has submitted that the transportation activity is separately taxable under 'Goods Transport Agency Service' and the person availability GTA service is liable to pay Service Tax on reverse charge basis.

2.1. The learned Advocate has contended that the appellant has only made payments for good transport service on behalf of his principle client as an agent of the principles and therefore the principles were liable to discharge the Service Tax liability on reverse charge basis for Goods Transport Service Agency payments which have been made by them.

2.2. The learned Advocate has relied upon various case laws which are as mentioned below :-

- 2019 (25) G.S.T.L. 107 (Tri.-Mad) TOLL INDIA LOGISTICS PVT. LTD. Vs. CCE, PUDUCHERRY
- 2003 (5) TIM 1- CESTAT, BANGLORE- EV MATHAI & CO. VS. CCE, COCHIN
- 2020 (1) TMI 1232- CESTAT MUMBAI- M/S. COSMOS CLEARING AGENCIES VS. CCE, NAGPUR-II
- 2003 (5) TMI 1 – CESTAT, BANGLORE- EV MATHAI & CO. VS. CCE, COCHIN

3. Having heard both the sides, we are of the view that appellant have recovered certain reimbursement expenditure which have been made by them for transport of goods on behalf of their principals namely M/s. Adani Willmar Limited.

3.1. It is also matter of record that the charges with regard to the C and F agent service received by the appellant have already been declared by them in their ST-3 returns and on the same due amount of the Service Tax had already been paid.

4. We find that the learned Commissioner (Appeals) while rejecting the appeal of the appellants in the impugned Order-In-Appeal dated 05.02.2018 has held follows :-

> *"5.3. I have also gone through the details submitted in the ST-3 returns during the period from 2008- 09 to 2012-13. It was noticed that the appellant had not declared the amount charged as pure agent in the return so filed at the prescribed place. The appellant has also provided the clearing and forwarding agency service to its principals which is taxable service and the appellant was required to discharge the liability in respect of the services so provided The appellant has contended that they have acted as pure agent and has followed the practice as per the agreement so entered by them But, the various documentary evidences and calculation arrived at clearly points out towards the other way. On the basis of the account head wise receipt and expenditure from the documents collected in respect of the appellant during the year 2008-09 to 2012-13 it was forthcoming that the appellant had received more amount than the actual expenditure incurred towards labour charges (loading/unloading charges) and transport charges.*

5.4. It is also relevant to mention that according to the Rule 5 of the Service Tax (Determination of Value) Rules, 2006 as amended, the appellant. M/s Archna Traders cannot be termed as the pure agents and hence are liable to pay Service Tax on entire gross amount charged and recovered by them under different heads and hence all such expenditure received as reimbursement by M/s Archana Traders shall be treated as consideration for the taxable service provided and shall be included in the value for the purpose of charging Service Tax. The appellant has received extra amount than the amount from their clients towards providing of various services and hence cannot be termed as pure agent as per Rule 5 of the Service Tax (Determination of Value) Rules, 2006 and hence all such value are required to be included in the value for the purpose of charging service Tax on the said services and hence is required to discharge the Service Tax liability accordingly. I also find that according to the Rule 3 of the valuation of Service Tax (Determination of Value) Rules, 2006, the consideration received by the appellant has to be included in the gross value for determining the Service Tax liability, but the appellant has not followed the stipulated provisions for determination of true service Tax liability. The documentary evidences are sufficient to prove the wrong practice adopted by the appellant of non-inclusion of such consideration and consequent evasion of Service Tax by them in this regard my view has been buttressed by the Judgement in case of M/s Jaihind Projects Ltd. reported at 2010(18) STR 650(Tri. Ahmd.)

5.5. Further the appellant had provided the services related to clearing and forwarding agency and has accepted the fact in their various statements. It is quite clear that the clearing and forwarding agency service is chargeable to service Tax as per provisions of Finance Act, 1994 and the appellant has to discharge the Service Tax liability pertaining to the services provided by them.

6. In light of the provisions and the facts discussed above, I am of the view that the appellant was required to include such value as determined by the adjudicating authority while arriving at the taxable value for discharging their Service Tax liability. The appellant has also contravened the provisions of Section 68 of Finance Act, 1994 read with Rule 6 of Service Tax Rules, 1994 in as much. as they failed to make the Service Tax payment and section 70 Finance Act, 1994 read with Rule 7 of Service Tax Rules, 1994 in as much as they failed correctly file their half yearly returns Further all the above acts of contravention as discussed above is sufficient to established that the appellant have suppressed the material facts and have also failed to discharge their liability towards the payment of Service for providing the taxable service. Hence, I find that the adjudicating authority has rightly ordered to recover the amount of Rs.8,60,866/- (Rupees Eight Lakhs Sixty Thousand Eight Hundred Sixty Six only) by invoking extended period of limitation along with applicable interest and penalty under section 76 of the Finance Act, 1994 upto 09.05.2008. Further penalty under section 76 of the Finance Act, 1994 after 09.05.2008 is liable to be

dropped as decided by the adjudicating authority. I further find that the imposition of penalty under section77 & 78 of the Finance Act, 1994 is justified and I do not find any reason to interfere with the order-in-original of adjudicating authority."

4.1. We find that the logic adopted by the learned Commissioner (Appeal) in his above mentioned findings is legally not sustainable as the Hon'ble Delhi High Court in the case of Intercontinental Consultants and Technocrats Pvt. Ltd. In its order dated 30.04.2012 have held that Rule 5 (1) of the Service Tax Valuation Rules is contrary to the provision of Section 67 of the Finance Act, 1994 and thus has been declared Rule 5(1) as ultra virus. Since, the matter has already been decided at the higher form as well as by this tribunal in case of M/s. Cosmos Clearing Agencies Vs. Commissioner Of Central Excise ,Nagpur-II reported under 2020(1) TMI 1232 - CESTAT Mumbai Where under this Tribunal has held as follows :-

"5. In the case in hand, the appellant had entered into the agreement dated 01.04.2007 with the principal M/s HUL for warehousing the goods in the godown, belonging to them. Freight for inward movement of goods to the godown was borne by such principal and in case, any expenses were required to be incurred by the appellant in connection with movement of goods and meting other expenses, then the same was reimbursed by the principal to the appellant. The agreement also provides the scope of work to be performed by the appellant. Under the said agreement, the appellant was responsible for the safety of goods dispatched to it by the principal M/s. HUL from the time of receipt thereof by it, until the goods are loaded to the road transport carriers for onward dispatch as per the instruction of principal. The consideration of services rendered by the appellant is contained in Clause 26 in the said agreement. The service charges/remuneration was received by the appellant for inward and outward handling, in accordance with the rates specified in the said agreement. Except the amount agreed upon towards service charges from time to time, the appellant was not entitled to any remuneration, reimbursement or any other monetary benefit for any service provided under the said agreement.

6. However, the Ld. Adjudicating Authority at paragraph 22 has observed that transportation of goods for M/s. HUL was being done by the appellant as a part and parcel of C&F service and thus, the remuneration received towards freight and other expensed incurred by it are includible in the value of such taxable service as per the provisions of Rule 5 (1) ibid. Valuation provisions for the purpose of

charging service tax are contained in Section 67 ibid. The said statutory provisions mandate that in case, where the provision of service is for a consideration in money, then the gross amount charged for providing such service shall be considered as taxable service for the purpose of payment of service tax. It is an undisputed fact on record that over and above the amount agreed upon towards service charges, the appellant did not obtain any monitory benefit for providing any taxable service and that the amount of reimbursement towards the expenses received by the appellant towards different charges was not in connection with provision of the service under the taxable category of C&F Agent service. Thus, such reimbursable amount should not be included in the gross value for the payment of service tax.

7. The constitutional validity of Rule 6 ibid, to the extent it includes reimbursement of expenses in the value of taxable service was challenged before the Hon'ble Delhi High Court in the case of Intercontinental Consultants and Technocrafts Pvt. Ltd. The Hon'ble High Court by order dated 30.11.2012 have held that Rule 5(1) ibid runs contrary to the provisions of Section 67 ibid and accordingly, declared such Rule as ultra vires. The relevant paragraph in the said judgment is extracted herein below:

18. Section 66 levies service tax at a particular rate on the value of taxable services. Section 67 (1) makes the provisions of the section subject to the provisions of Chapter V, which includes Section 66. This is a clear mandate that the value of taxable services for charging service tax has to be in consonance with Section 66 which levies a tax only on the taxable service and nothing else. There is thus in built mechanism to ensure that only the taxable service shall be evaluated under the provisions of 67. Clause (i) of sub-section (1) of Section 67 provides that the value of the taxable service shall be the gross amount charged by the service provider "for such service". Reading Section 66 and Section 67 (1) (i) together and harmoniously, it seems clear to us that in the valuation of the taxable service, nothing more and nothing less than the consideration paid as quid pro quo for the service can be brought to charge. Sub-section (4) of Section 67 which enables the determination of the value of the taxable service "in such manner as may be prescribed" is expressly made subject to the provisions of sub-section (1). The thread which runs through Sections 66, 67 and Section 94, which empowers the Central Government to make rules for carrying out the provisions of Chapter V of the Act is manifest, in the sense that only the service actually provided by the service provider can be valued and assessed to service tax. We are, therefore, undoubtedly of the opinion that Rule 5 (1) of the Rules runs counter and is repugnant to Sections 66 and 67 of the Act and to that extent it is ultra vires. It

purports to tax not what is due from the service provider under the charging Section, but it seeks to extract something more from him by including in the valuation of the taxable service the other expenditure and costs which are incurred by the service provider "in the course of providing taxable service". What is brought to charge under the relevant Sections is only the consideration for the taxable service. By including the expenditure and costs, Rule 5(1) goes far beyond the charging provisions and cannot be upheld. It is no answer to say that under sub-section (4) of Section 94 of the Act, every rule framed by the Central Government shall be laid before each House of Parliament and that the House has the power to modify the rule. As pointed out by the Supreme Court in Hukam Chand v. Union of India, AIR 1972 SC 2427: -

"The fact that the rules framed under the Act have to be laid before each House of Parliament would not confer validity on a rule if it is made not in conformity with Section 40 of the Act."

Thus Section 94 (4) does not add any greater force to the Rules than what they ordinarily have as species of subordinate legislation."

8. It is also an admitted fact on record that the principal M/s. HUL has arranged for the transportation of goods and also paid the charges thereon to the transporter. As a corporate entity, the said principal has paid service tax under reverse charge mechanism in terms of Rule 2 (1) (d) of the Service Tax Rules, 1994. In this context, the CBEC has clarified that if service tax due on transportation of a consignment has been paid or is payable by a person liable to pay service tax (recipient of service), then service tax should not be charged for the same amount from any other person, to avoid double taxation. The views expressed by the Board are in conformity with the statutory provisions and hence, amount reimbursed by M/s. HUL to the appellant as per the contractual norms should not be included in the gross value for determination of the service tax liability.

9. In view of above discussions, we do not find any merits in the impugned order, in so far as it has confirmed the adjudged demands on the appellant. Accordingly, by setting aside the impugned order, we allow the appeal in favour of the appellant."

4.2. We are of view that transportation charges reimbursed to the appellant by their principals are on actual basis of the amount incurred by them on transportation of goods on behalf of their principals as pure agent and same are not includable in the taxable value of services for the appellant. We also follow the above cited decisions of this Tribunal as well as the decision of

Hon'ble Delhi High Court in the case of Intercontinental Consultants and Techno crafts Pvt. Ltd. and hold that the impugned Order-In-Appeal is without any merit, we set aside the same.

5. The Appeal is accordingly allowed.

(Pronounced in the open court on **09.09.2024** *)*

(RAMESH NAIR)
MEMBER (JUDICIAL)

(C L MAHAR)
MEMBER (TECHNICAL)

AD