Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench At Ahmedabad

REGIONAL BENCH- COURT NO.3

Service Tax Appeal No.11908 of 2013
Service Tax Misc. Application (ORS) No. 10226 of 2022

(Arising out of OIO-STC/03-04/COMMR/AHD/2013 dated 25/02/2013 passed by Commissioner of Service Tax-SERVICE TAX – AHMEDABAD)

Messrs Freshtop Fruits Ltd **.....Appellant**
603, Shapath Iv,
Opp. Karnavati Club, S.G. Highway,
AHMEDABAD, GUJARAT

VERSUS

C.S.T.-Service Tax – Ahmedabad **.....Respondent**
7 Th Floor, Central Excise Bhawan, Nr. Polytechnic
CENTRAL EXCISE BHAVAN, AMBAWADI,
AHMEDABAD, GUJARAT-380015

APPEARANCE:
Shri Paresh M. Dave, Advocate for the Appellant
Shri Dinesh Prithiani, Assistant Commissioner (AR) for the Respondent

CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
HON'BLE MEMBER (TECHNICAL), MR. RAJU

Final Order No. A/ 11736 /2022

DATE OF HEARING: 08.08.2022
DATE OF DECISION: 23.11.2022

RAMESH NAIR

This is an Appeal against Order-in-Original No. STC/03 to 04/COMMR/AHD/2013 dated 25.02.2013 passed by Ld. Commissioner of Central Excise and Service Tax, Ahmedabad.

02. Brief facts of the case are that during the scrutiny of ST-3 returns and Income tax return it was noticed by the department that appellant had shown Foreign Selling Expense and Foreign Sea Freight in their books of account. The said expenses appeared taxable under Section 66A and Appellant has not paid the Service tax on foreign selling expenses and sea freight expense. After scrutiny of records and documents, show cause notice dated 07.10.2011 was issued to the Appellant proposing service tax demand of Rs. 4,10,38,988/- and imposition of penalties under the provisions of

Finance Act, 1994. While the aforesaid show cause notice was pending adjudication, another show cause notice dated 05.10.2012 for the subsequent period also came to be issued on the same issue by the department proposing to demand of Service tax of Rs. 47,05,066/- along with other proposal for interest and penalties under the Act. After following the due process *vide* impugned common Order the Learned Commissioner has confirmed the entire demand raised in both the SCNs along with interest and penalty. Aggrieved by the impugned order, the appellant filed the present appeal.

3. Shri Paresh M. Dave, learned counsel appearing for the appellant submits that the invoices are raised by the consignment agents when they sold and supplied the exported goods to buyer like super markets in Europe. After the goods were sold or deemed to have been sold by the Appellant, no one can render any service to the seller of such goods. If the appellant raised invoices in India and therefore the goods were sold or deemed to have sold in India and the title was also transferred in India, itself, then no question of tax on any services/ rendered by the C&F Agent would arise. If the goods were sold in India and the title also stood transferred to the buyers in India, then all subsequent activities and services were with regard to the goods already sold by the appellant ; and once the goods were sold or deemed to have been sold in India itself, then the appellant ceased to be the owner of the goods and consequently, services rendered in foreign countries for such goods were not taxable because the goods were already sold in India and title of goods stood transferred to the buyers. It is clear factual error by the Commissioner in concluding that the goods were sold or deemed to have been sold in India, because then the persons on whom the so called invoices were raised were the buyers and owners of the goods, and the appellant’s interest in the goods no longer subsisted.

3.1 He further submits that all the activities and services by the consignment agents have been performed after export of the goods when the goods landed in foreign countries. Therefore, the conclusion that a part services was provided by the appellant in India is ex-facie illegal because the appellant has not provided any services, whereas the revenue's case is that the Appellant has received services of C&F agent from the agent located in foreign countries.

3.2 He also submits that in the present case, the amount /value of expenses on which service tax is demanded are all for the activities and services beyond the territory of India; because all the heads of expense initially paid by the consignment agent are for the activities and services after the goods leave India. From the evidence on records including the statement of the Appellant's Senior Manager (Accounts), it is an admitted fact that the consignment agent have provided all the services in question after the goods left India, and after the goods were received at foreign Ports. Rule 3 of the Taxation of Service Rules, 2006 does not intend to tax services that were rendered in connection with business or commerce outside territory of India. When no service was rendered in India, liability of service tax would not arise. When any service is provided outside India and the role of the overseas entities commence upon the landing of the goods in foreign countries, then the role of the overseas entities commenced and ended beyond the border of India. Rule 3 of the Taxation of Service tax Rules 2006 is not attracted in such case. He placed reliance on the following decisions:-

- FIRST FLIGHT COURIERS LTD. – 2016(44)STR 474
- TOTAL OIL INDIA VS. COMM. 2017(5)GSTL 209
- OIL AND NATURAL GAS 2017(6)GSTL 537
- CROMPTON GREAVES 2016 (42) STR 306

3.3 He also argued that Section 66A and Rule 3(ii) of Taxation of Services (Provided from Outside India and Received in India) Rules , 2006 are applicable only when any service was received in India, and only then reverse charge mechanism was attracted. It is a settled legal position that service tax could be charged only on the services received in India. Services received and consumed in a foreign country i.e. outside India, are not liable to service tax levy. In the present case all the services of the consignment agents are received and consumed in European countries where the goods exported by the appellant were received by the consignment agent and then sold and supplied to buyers like Super Market; and all the services starting with payment of Custom duty till delivery to the Super Market were thus in foreign countries. Services so rendered by a foreign service provider in relation to goods sold abroad cannot be covered by the legislative intent to Service tax. He placed reliance on following judgments:-

- SKIPPER ELECTRICALS 2017(52) STR 137
- K.G. DENIM LTD. 2015(37)STR 616
- POSITIVE PACKAGING 2015(39)STR 219
- HEIDELBERG INDIA PVT. LTD. 2013(29)STR 0620
- INTAS PHARMA 2009 (16) STR 748
- GENOM BIOTECH 2016(42)STR 918
- IPCA LABORATORIES 2019(21)GSTL 154
- WANBURY LTD. 2019(21)GSTL 154
- INFOSYS LTD. VS. CST, BANGALORE 2015(37)STR 862

3.4 He also submits that in the present case , the appellant has reimbursed the expenses for storage and warehousing, quality assurance charges, road freight, packing charges, distribution charges etc. to the consignment agents such reimbursable expenses are separately shown in the invoice of the consignment agents. The commission being the

remuneration of such agents is also separately shown in the same invoices. On the basis of the evidence like the consignment agent's invoices, the statement of the appellant's senior manager (account) and also the income tax returns etc. the revenue has accepted in this proceeding that over and above the commission agent, the consignment agent were charging the above referred expenses which were reimbursed by the appellant to them. It is now a settled legal position that reimbursable expenses cannot be considered to be a part of the gross value of the taxable service rendered by the service provider, and service tax cannot be charged on such reimbursable expenses. He placed reliance on the following decisions :-

- INTERCONTINENTAL CONSULTANTS AND TECHNOCRATS PVT. LTD. 2013(29)STR 9 (DEL.)
- INTERCONTINENTAL CONSULTANTS AND TECHNOCRATS PVT. LTD. 2018(010)GSTL 0401(SC)
- C.B.R.E. SOUTH ASIA PVT. LTD. 2021(51)GSTL 325
- TVS LOGISTICS SERVICES LTD. 2021 (5) GSTL 530
- INTERNATIONAL SEAPORT DREDGING LTD. 2018(12)GSTL 185

3.5 He also submits that had the appellant paid service tax on the reimbursable expenses incurred by the consignment agents, then refund of the entire amount of service tax by virtue of Rule 5 of the Cenvat Credit Rules was admissible, and the situation was revenue neutral.

04. Shri Dinesh Prithiani, learned Assistant Commissioner (AR) appearing for the Revenue on the other hand submits that as per the provisions of Section 66A of the Finance Act, 1994, the services received by the Indian entity would be leviable to Service Tax in India on reverse charge basis and, therefore, the demand of Service Tax is sustainable in law. Accordingly, he pleads for upholding the impugned order.

05. We have carefully considered the submissions made by both the sides. The issues to be decided in the present case are as to whether on the services provided by the foreign based consignment agent/ distributor appellant are required to discharge service tax liability in terms of Section 66A of the Finance Act, 1994 as amended from time to time under reverse charge mechanism. We find that Appellant are engaged in exporting of fruits and foreign based consignment agent/ distributer perform various function for Appellant in foreign countries. We have given careful consideration to the submissions which centred around Section 66A of the Finance Act, 1994. This provision of law, which was brought into force w.e.f. 18-4-2006, reads as follows :-

> ***SECTION 66A. Charge of service tax on services received from outside India -***
>
> *(1) Where any service specified in clause (105) of Section 65 is,-*
>
> *(a) provided or to be provided by a person who has established a business or has a fixed establishment from which the service is provided or to be provided or has his permanent address or usual place of residence, in a country other than India, and*
>
> *(b) received by a person (hereinafter referred to as the recipient) who has his place of business, fixed establishment permanent address or usual place of residence, in India.*
>
> *such service shall, for the purposes of this section, be taxable service, and such taxable service shall be treated as if the recipient had himself provided the service in India, and accordingly all the providing of this Chapter shall apply :*
>
> *Provided that where the recipient of the service is an individual and such service received by him is otherwise than for the purpose of use in any business or commerce, the provisions of this sub-section shall not apply :*
>
> *Provided further that where the provider of the service has his business establishment both in that country and elsewhere, the country, where the establishment of the provider of service directly concerned with the provision of service is located, shall be treated as the country from which the service is provided or to be provided.*
>
> *(2) Where a person is carrying on a business through a permanent establishment in India and through another permanent*

establishment in a country other than India, such permanent establishments shall be treated as separate persons for the purposes of this section.

Explanation 1. - A person carrying on a business through a branch or agency in any country shall be treated as having a business establishment in that country.

Explanation 2. - Usual place of residence, in relation to a body corporate, means the place where it is incorporated or otherwise legally constituted.

The general scheme of levy of service tax is that service tax is leviable on the value of taxable services from the service providers within the territory of India. Section 66A of the Act embodies an exception to this general scheme. It is an independent charging provision which provides for levy of service tax in India on services provided or to be provided by a person located outside India and received by a person located in India. Section 66A lays down that such services (specified in clause (105) of Section 65 of the Act) shall be treated as having been provided in India by the recipient. This deeming provision of Section 66A makes the Indian recipient liable to pay service tax on the services provided by the foreign service provider. This exception to the general scheme of levy of service tax is also called 'reverse charge mechanism'.

5.1 The Taxation of Services (Provided from Outside India) Rules, 2006 were made by the Central Government to give effect to the provisions of Section 66A of the Act. Rule 3 of these rules, shorn of inapplicable portions, reads as under :-

"3. Taxable services provided from outside India and received in India :

Subject to Section 66A of the Act, the taxable services provided from outside India and received in India shall, in relation to taxable services -

i. … … …

ii. … … …

iii. specified in clause (105) of Section 65 of the Act, but excluding -

(a) … … …

(b) … … …

(c) … … …

be <u>such services as are received by a recipient located in India</u> for use in relation to business or commerce."

5.2 Assuming that Foreign Agents services are covered by the definition of "Clearing and Forwarding Agent" as per revenue, we have to consider the basic question which was in the focus of the rival submissions made by the learned counsel and the learned representative of department. This is the question whether the services provided by said agents were received by Appellant in India. It has been argued on behalf of the Appellant on the strength of provisions of law as well as certain decisions/judgments that there can be no levy of service tax on Appellant under Section 66A of the Act unless the service provided by Foreign agents abroad is shown to have been received in India by the Appellant. It has been argued that those services were wholly performed in abroad and not received in India and therefore the assessee is not liable to pay service tax on those services. Section 66A of the Act does not explicitly require the receipt of service in India; it rather refers to receipt of service *"by a person who has his place of business, fixed establishment, permanent address or usual place of residence in India"*. To our mind, there is a discernible difference between this underlined clause and "*receipt of service in India by a person who has … …*". We have, of course, also noted that Rule3 of the Taxation of Services (Provided from Outside India) Rules, 2006 is captioned in such a way that (for purposes of Section 66A) taxable services provided from outside India should be received in India. However, it is pertinent to note that Rule 3, in its body, refers to "*such services as are received by a recipient located in India* for use in relation to business or commerce". The phrase "*received by a recipient located in India*" found in the text of Rule 3 matches the phrase "*received by a person who has his place of business, fixed establishment, permanent*

address or usual place of residence in India", found in the text of Section 66A of the Act. It is, indeed, a debatable question as to whether any requirement of "receipt of taxable service in India" should be read into Section 66A and Rule 3 or whether, for a demand of service tax in the reverse charge mechanism, receipt of taxable service, whether in or outside India, by a person resident or located in India is enough. The question" can be rephrased - whether, under Section 66A, a recipient, located in India, of a taxable service provided by a person located outside the country can be deemed to have provided the service in India. This fundamental issue was not framed or examined by the adjudicating authority in this case. In our view, the issue requires to be addressed in *de novo* proceedings.

5.3 It is not in dispute in the present matter that the services provided by Foreign Agents were received by Appellant. The limited case of Appellant is that the services were not received in India. They claim to have received the services outside India. Had they have any office or establishment in said Foreign Countries or elsewhere outside India to receive Foreign Agents services outside India? We are of the view that, for the ends of justice, the appellant should get an opportunity to discharge their burden of proof in fresh proceedings.

5.4 Both sides have relied on case laws on the substantive issue. The learned Commissioner in impugned order has relied on the Hon'ble High Court's decision in *Indian National Shipowners' Association* case (supra). But, in that case, the question whether the service provided by a person located outside India should be received in India by a person located in India for attracting the levy under Section 66A did not arise for consideration. In this scenario, one has to fall back upon the fundamental question as to whether it is a mandatory requirement of Section 66A that the service provided by a person located outside India should be received in India by a person located in India. The learned Commissioner has not attempted to

answer this question with reference to the ingredients of the charging provision.

5.5 In the instant case, it has also been contended by the assessee that the services provided by Foreign Agents do not fall within the scope of definition of C&F Agent Service and classified under Business Auxiliary Service and services of a commission agent in relation to agricultural produce were exempt under Notification No. 13/2003-ST dated 20.06.2003. But what appears from the impugned order is that this aspect was also not properly examined by the learned Commissioner. This is another reason for *de novo* adjudication of the case.

06. For all the reasons stated hereinbefore, we are of the considered view that this matter needs to be remanded for denovo adjudication on all the issues. Needless to say that the assessee be given a reasonable opportunity of being heard. Accordingly the impugned order is set aside. The appeal is allowed by way of remand to the Adjudicating Authority. MA also stands disposed of.

(Pronounced in the open court on 23/11/2022)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

Geeta