IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL CHENNAI

REGIONAL BENCH – COURT No. III

Service Tax Appeal No. 81 of 2005

(Arising out of Order-in-Appeal No. 24/2005 (M-ST) dated 30.05.2005 passed by Commissioner of Central Excise (Appeals), 26/1, Mahatma Gandhi Road, Chennai – 600 034)

M/s. International Clearing & Shipping Agency **...Appellant**
325, Linghi Chetty Street,
Chennai – 600 001.

Versus

Commissioner of GST and Central Excise **...Respondent**
Chennai I Commissionerate,
26/1, Mahatma Gandhi Road,
Chennai – 600 034.

With

Service Tax Appeal No. 82 of 2005

(Arising out of Order-in-Appeal No. 23/2005(M-ST) dated 30.05.2005 passed by Commissioner of Central Excise (Appeals), 26/1, Mahatma Gandhi Road, Chennai – 600 034)

M/s. International Clearing & Shipping Agency **...Appellant**
325, Linghi Chetty Street,
Chennai – 600 001.

Versus

Commissioner of GST and Central Excise **...Respondent**
Chennai I Commissionerate,
26/1, Mahatma Gandhi Road,
Chennai – 600 034.

With

Service Tax Appeal No. 108 of 2006

(Arising out of Order-in-Appeal No. 60/2005(M-ST) dated 30.12.2005 passed by Commissioner of Central Excise (Appeals), 26/1, Mahatma Gandhi Road, Chennai – 600 034)

M/s. International Clearing & Shipping Agency **...Appellant**
325, Linghi Chetty Street,
Chennai – 600 001.

Versus

Commissioner of GST and Central Excise **...Respondent**
Chennai I Commissionerate,
26/1, Mahatma Gandhi Road,
Chennai – 600 034.

With

Service Tax Appeal No. 109 of 2006

(Arising out of Order-in-Appeal No. 59/2005(M-ST) dated 30.12.2005 passed by Commissioner of Central Excise (Appeals), 26/1, Mahatma Gandhi Road, Chennai – 600 034)

M/s. International Clearing & Shipping Agency ...Appellant
325, Linghi Chetty Street,
Chennai – 600 001.

Versus

Commissioner of GST and Central Excise ...Respondent
Chennai I Commissionerate,
26/1, Mahatma Gandhi Road,
Chennai – 600 034.

With

Service Tax Appeal No. 212 of 2007

(Arising out of Order-in-Appeal No. 26/2007(M)(ST) dated 31.05.2007 passed by Commissioner of Central Excise (Appeals), 26/1, Mahatma Gandhi Road, Chennai – 600 034)

M/s. International Clearing & Shipping Agency ...Appellant
325, Linghi Chetty Street,
Chennai – 600 001.

Versus

Commissioner of GST and Central Excise ...Respondent
Chennai I Commissionerate,
26/1, Mahatma Gandhi Road,
Chennai – 600 034.

And

Service Tax Appeal No. 213 of 2007

(Arising out of Order-in-Appeal No. 27/2007(M)(ST) dated 31.05.2007 passed by Commissioner of Central Excise (Appeals), 26/1, Mahatma Gandhi Road, Chennai – 600 034)

M/s. International Clearing & Shipping Agency ...Appellant
325, Linghi Chetty Street,
Chennai – 600 001.

Versus

Commissioner of GST and Central Excise ...Respondent
Chennai I Commissionerate,
26/1, Mahatma Gandhi Road,
Chennai – 600 034.

APPEARANCE:

For the Appellant : Ms. Radhika Chandrasekar, Advocate

For the Respondent : O.M. Reena, Additional Commissioner / A.R.

CORAM:

HON'BLE MS. SULEKHA BEEVI C.S., MEMBER (JUDICIAL)
HON'BLE MR. VASA SESHAGIRI RAO, MEMBER (TECHNICAL)

DATE OF HEARING : 19.10.2023
DATE OF DECISION : 01.11.2023

FINAL ORDER Nos. 40974-40979 / 2023

Order : Per Ms. Sulekha Beevi C.S.

The issues involved in all these appeals being the same, they are heard together and disposed of by this common order.

2. Brief facts are that the appellant is a partnership firm and is holding certificate of registration from the Service Tax Commissionerate under CHA Services and Steamer Agency Services. They were filling returns and also discharging Service Tax under these heads. The officers of the internal audit attached to Chennai Commissionerate verified the accounts of the appellant. On scrutiny of the profit and loss account submitted for the financial years from 1997-2004, it revealed that the appellant has not discharged Service Tax on (i) operational surplus, (ii) service charges / tax exempted and (iii) freight and brokerage. A Show Cause Notice was issued proposing to demand the Service Tax on the above amounts alleging that these are in the nature of consideration received for CHA services as well as Steamer

agent services. Separate Show Cause Notices for the same period were issued in regard to CHA services / Steamer agency services. After due process of law, the original authority *vide* separate orders confirmed the demand, interest and imposed penalties. Aggrieved by such order, the appellant preferred appeals before the Commissioner (Appeals) who upheld the same. Hence, these appeals.

2.1.1 The Ld. Counsel Ms. Radhika Chandrasekar appeared and argued for the appellant. The Ld. Counsel adverted to paragraph 7.0 of the findings in appeal No. 212/2007 and submitted that the allegation of the Department is that the appellant has not paid Service Tax on the following heads.

a) Operational surplus.
b) Service charges / Tax exempted.
c) Freight and Brokerage, etc.,.

2.1.2 The Show Cause Notice dated 20.04.2005 was adverted to by the Ld. Counsel to submit that the Department has alleged that the appellant has collected various charges in the nature of expenses incurred by them for payment of statutory levies, pilotage and berth hire charges, Indian Coast light dues paid to the port authorities, cargo expenses paid to the port authorities, charges paid to transporters such as CONCOR/Railways/Private Transporters, Chartered Accountants Fee, Income Tax deductions, Brokerage paid to Export cargo, etc.,. It is alleged in the Show Cause Notice that apart from the amount that has been reimbursed by the client for meeting the costs for providing the services, the appellant has collected over and above actual charges and has reflected the same as Operational surplus in their financial statements. The demand has been raised based on such figures obtained from profit and loss account, balance sheet and income tax returns. It is explained by the Ld. counsel that such operational surplus are nothing but reimbursable

expenses and not subject to levy of Service Tax for the period prior to 2015. In the regular course of business as CHA on the request of clients, the appellant incurs certain additional expenses on behalf of these clients for activities such as loading and unloading, transport charges, etc.,. These expenses incurred on account of the exporter / importer are reimbursed by the client. As it is extremely cumbersome to maintain precise accounts of each of the expenses incurred separately, the appellant collect amounts from their client to cover these expenses. Since there is an element of approximation, the amount collected from the clients may be in excess of that is actually incurred. This difference is computed at the time of preparation of balance sheet and the excess amount is noted under the head "operational surplus". On the other hand, whenever there is a short fall in the amount collected as against the amount actually recovered, it results as "operation deficit". It is pointed out by the Ld. counsel that the operational surplus is not a payment received for any taxable service and is therefore outside the levy of Service Tax. The decision of the Hon'ble Supreme Court in the case of *Baroda Electric Meters Ltd. Vs. Commissioner of Central Excise [1997 (94) ELT 13 (SC)]* was relied by the Ld. counsel to argue that the profit made by a dealer on transportation by collecting equalized freight in excess of freight actually incurred was held to be not includable in the assessable value. The decision though rendered under excise law, the view taken by the Court is applicable to the present situation where the appellant makes a very small profit after equalisation of various expenses. The appellant had collected amounts from the clients to meet expenses of providing the CHA service and later some amount would arise as surplus after incurring the expenses. These amounts are reflected as operational surplus in the financial statements. Being expenses reimbursed, the Department cannot demand Service Tax.

2.1.3 The Ld. counsel relied upon the decision in the case of *Union of India Vs. Intercontinental Consultants and Technocrats Pvt. Ltd.[2018-TIOL-76-SC-ST]* to argue that the Hon'ble Apex Court has categorically held that Service Tax cannot be levied on reimbursable expenses.

2.1.4 The Trade Notice No. 39-CE/97 dated 11.06.1997 was relied by the Ld. counsel to explain that the Department has issued clarification with regard to the nature of expenses that is usually incurred by CHA / Steamer Agents etc., while discharging their services. It is clarified in the said circular that Service Tax is to be paid only on the agency commission and not on the expenses collected from the client. The Ld. counsel argued that the demand of Service Tax raised on operational surplus cannot sustain for these reasons and the same may be set aside.

2.2.1 The second issue is with regard to the demand on service charges / tax exempted. It is submitted by the Ld. counsel that the appellant had rendered services as a sub-contracting CHA to other main CHA. During the relevant period, the Trade Notice referred above had categorically stated that the sub-contracting CHA is not required to pay the Service Tax on the bills raised by him on the main CHA. The said Trade Notice was withdrawn in 2007 only. Basing upon this circular, the appellant had not discharged the Service Tax as a sub-contracting CHA and was of the view that these services are exempted.

2.2.2 The Ld. counsel was fair enough to submit that in the case of *Commissioner of Service Tax, New Delhi Vs. Melange Developers Private Limited [2020 (33) GSTL 116 (Tri. –LB)]*, the Larger Bench of the Tribunal had occasion to examine the issue whether the sub-contractor is liable to pay Service Tax even though the main contractor has discharged the Service Tax. The issue was answered in the affirmative and against the assessee (sub-contractor). It is

submitted by the Ld. counsel that the period involved in these appeals is prior to 2007 when the Trade Notice issued by the Department was in vogue and therefore the appellant had not discharged the Service Tax on the *bona fide* belief that they are not liable to pay the same.

2.3 The third issue is with regard to the Freight and Brokerage Charges. It is submitted that the appellant received brokerage / rebate from the shipping lines as a CHA on the ocean freight that they have to pay. It is in the form of a discount or an incentive paid to the CHA and it is not for providing any CHA service. It is explained that the appellant does not provide any CHA service to the shipping line and therefore the discount / incentive received by the appellant from the shipping line cannot be treated as a consideration received for CHA service / Steamer Agent service. Further, these amounts are not received from their clients but from the shipping lines and therefore Service Tax cannot be demanded by the Department alleging that they fall under CHA services / Steamer Agent services. The decisions in the cases of *Commissioner of Service Tax Vs. AVR Cargo [2018-TIOL-2097], Commissioner of Service Tax Vs. Karam Freight Movers [2017 (4) GSTL 215], Commissioner of Service Tax Vs. Continental Carriers [2017-TIOL-3964]* and *Greenwich Meridian Logistics (I) Pvt. Ltd. Vs. Commissioner of Service Tax, Mumbai [2016 (43) STR 215]* was relied by the Ld. counsel to argue that the demand of Service Tax on such freight brokerage received from the shipping lines is not subject to levy of Service Tax under CHA services / Steamer Agent services.

2.4 The Ld. counsel submitted that the entire demand has been raised by taking the figures in the profit and loss account and comparing the same with the ST-3 returns filed by the appellant. The decision of the Hon'ble High Court of Madras in the case of *Firm Foundations & Housing Pvt. Ltd. Vs. P.R. CST [2018 (16) GSTL 209] W.P. No. 21799/2017*

and W.M.P No. 22810/217 decided on *06.04.2018* was relied by the Ld. counsel to submit that the income reported and reflected in the profit and loss account is irrelevant for the purposes of determination of taxable value. The Hon'ble High Court had remanded the matter to strictly adhere to the provisions of Rule 3 of Point of Taxation Rules, 2011 in order to raise proper demand. The decision in the case of *Reynolds Petro Chem Vs. Commissioner of Service Tax [2023 (68) GSTL 292]* was relied by the Ld. counsel to argue that the Service Tax demand cannot be based on TDS/26 AS statement.

2.5.1 The Ld. counsel argued on the ground of limitation also. It is submitted that the first Show Cause Notice dated 08.01.2003 covers the period 09.09.1997 to 31.03.2002, in respect of Custom House Agent services as well as Steamer Agent Services. Part of the demand in this Show Cause Notice falls within the normal period.

2.5.2 The second Show Cause Notice dated 14.07.2004 has been issued for the period 01.04.2002 to 31.03.2003 for Steamer Agent Service and Custom House Agent services. The said Show Cause Notices are within the normal period.

2.5.3 The third Show Cause Notice dated 14.07.2004 covers the period 01.04.2003 to 31.03.2004 for the respective services *viz.,* Steamer Agent Service and Custom House Agent services. These Show Cause Notices are dated 20.04.2005 and 23.12.2005. Part of the demand in these Show Cause Notices would be beyond the normal period. The Ld. counsel submitted that the appellant has not discharged the Service Tax on operational surplus on the *bona fide* belief that these are reimbursable expenses and not being consideration received for CHA service and Steamer Agent services. Further, the entire amount has been accounted by them properly and reflected in the financial statements. The figures have been collected by the

Department from such financial statements which itself would prove that there is no suppression of facts on the part of the appellant. There is no positive act of suppression alleged by the Department in the Show Cause Notice apart from bare averment that the appellant has suppressed facts with intent to evade payment of Service Tax.

2.6 The Ld. counsel also argued that the penalty imposed under various Sections may be set aside invoking Section 80 of the Finance Act, 1994, as it stood during the relevant period. The appellant did not discharge Service Tax under operational surplus for the reason that these are reimbursable expenses. The appellant did not discharge Service Tax under exempted service (sub-contracting CHA) for the reason that the Trade circular had clarified that the sub-contracting CHA is not required to pay Service Tax. The appellant did not discharge Service Tax on the brokerage for the reason that these are incentives / discount received from the shipping line and is not consideration for providing CHA services / Steamer Agent services. The Ld. counsel prayed that the appeals may be allowed.

3.1 The Ld. Authorised Representative O.M. Reena appeared and argued for the Department. The Ld. AR submitted that from the Show Cause Notice itself it can be seen that reimbursable expenses have been excluded for raising the demand. Only the actual amounts which have been received by the appellant from the client for the expenses incurred have been included for raising the demand. The appellant has mentioned 'operational surplus' in their financial statements. This is the amount collected from the client over and above the actual expenses incurred by them. For this reason, the said operational surplus is subject to levy of Service Tax and cannot be excluded in the nature of reimbursable expenses.

3.2 The second issue is with regard to the demand of Service Tax under 'exempted service' (sub-contracting CHA). The appellant has provided services on behalf of other CHA and has collected consideration for the same. The appellant has not discharged Service Tax on such consideration and is liable to pay the Service Tax as demanded in the Show Cause Notice. The decision of the Larger Bench of the Tribunal in the case of *Melange Developers Private Limited (supra)* was relied by the Ld. AR. It is also pointed out that after the earlier Trade Notice, the master Circular No. 96/7/2007-ST dated 23.08.2007 was issued by the Department superceeding all the earlier circulars and clarifications. In this circular, it was clarified that a sub-contractor is liable to discharge Service Tax even though the main contractor has paid Service Tax on the very same services.

3.3 The third issue is with regard to the freight brokerage which has been received by the appellant from the shipping lines. It is submitted by the Ld. AR that no documentary evidence has been adduced by the appellant to show that these are incentives received from the shipping lines.

3.4 The appellant has suppressed these figures from the Department and therefore the invocation of extended period is also legal and proper. The Ld. AR adverted to paragraphs 7.11 to 7.13 of the Order-in-Original No. 2/2005 dated 23.12.2005 to argue that the demands confirmed are legal and proper. It is prayed that the appeals may be dismissed.

4. Heard both sides.

5. The issues:-

(i) whether the demand of Service Tax confirmed *vide* impugned order along with interest and the penalties imposed is sustainable or not.

(ii) whether the invocation of extended period in raising the demand is sustainable or not.

6.1 On perusal of the Show Cause Notice, it is seen that on the basis of the financial statements, the Department has raised the demand on three heads *viz.,* (i) operational surplus, (ii) service charges / tax exempted and (iii) freight and brokerage. It is stated in the Show Cause Notice that on intimation the appellant had submitted the complete set of balance sheet, profit and loss account for the financial year 2003-2004, sample copies of invoices raised during the aforesaid period and statement of operating surplus under various heads for the aforesaid financial year. After scrutiny of the balance sheet with schedules and the breakup details for operational surplus furnished by the assessee, the department was of the view that the appellant though has discharged Service Tax on Agency commission / Service charges they have not paid Service Tax on 'operational surplus'. The Show Cause Notices have been issued separately on CHA services and Steamer Agent services on these amounts. The details of the Show Cause Notice and the period involved is furnished by the appellant as below:-

Sl. No.	Appeal No.	Period	Classification of Service	SCN No.	Reimbursable Amount	Issue
1	S/81/2005	09.09.1997 to 31.03.2002	Custom House Agent Services	C.No. IV/16/653/02 dated 08.01.2003	Rs.7,46,872/-	
2	S/82/2005	09.09.1997 to 31.03.2002	Steamer Agency Services		Rs.31,27,201/-	
3	S/108/2006	01.04.2002	Steamer Agency	SCN No. 6/2004	Rs.5,28,088/-	Demand of Service Tax on operational

		to 31.03.2003	Services	Ref C.No. IV/16/653/02 STC dated 14.07.2004		surplus, service charges exempted and freight and rebate / brokerage. The demands are raised by comparing the ST-3 returns vis-à-vis the income reflected in the balance sheet
4	S/109/2006	01.04.2002 to 31.03.2003	Custom House Agent Services	SCN No. 7/2004 Ref C.No. IV/16/705/02 STC PT II dated 14.07.2004	Rs.3,78,981/-	
5	S/212/2007	01.04.2003 to 31.03.2004	Steamer Agency Services	SCN No. 7/2005 Ref C.No. IV/16/653/02 STC dated 20.04.2005	Rs.12,20,730/-	
6	S/123/2007	01.04.2003 to 31.03.2004	Custom House Agent Services	SCN No. 8/2005 Ref C.No. IV/16/653/2002 STC dated 23.12.2005	Rs.5,87,697/-	

6.2 It can be seen from the above table that for the period from 09.09.1997 to 31.03.2002 separate Show Cause Notices have been issued to appellant in regard to CHA services and Steamer Agent services. Similarly, for the period involved from 01.04.2002 to 31.03.2003 separate Show Cause Notices dated 08.01.2003 to 14.07.2004 has been issued for Steamer Agency service and CHA service. For the period from 01.04.2003 to 31.03.2004 Show Cause Notices dated 20.04.2005 has been issued for Steamer Agency services and another Show Cause Notice dated 23.12.2005 has been issued demanding Service Tax under CHA service.

7.1.1 The first issue is with regard to demand of Service Tax on the income earned under the head 'operational surplus'. It is not disputed that the appellant has discharged the Service Tax on the agency commission received by them as CHA services as well as Steamer Agent services. The Ld. counsel has explained that being a CHA, the appellant incurs expenses on behalf of the shipping line which are reimbursable in nature. Since, the actual quantum of the expenses cannot be determined in advance, the appellant collects an adhoc amount which is later approximated to the

expenses incurred and is accounted. The actual expenses incurred sometimes is higher than the amount collected and in such occasions it is accounted as 'operational deficit'. Sometimes the expenses actually incurred are lower than the amount collected and in such occasions it is accounted as 'operational surplus'. The demand of Service Tax is on this 'operational surplus'. The Ld. counsel has submitted that these amounts are nothing but reimbursable expenses and are not consideration received for providing CHA services. Form the totality of facts as seen from the records and also on the basis of the submissions made we are able to appreciate that while discharging the services as a CHA, the appellant collects certain charges in the nature of freight charges, port handling charges, statutory payment charges etc., from the client. So also charges in the nature of courier, fax, etc.,. The appellant not being able to quantify the expenses required in advance, has collected adhoc amount and later adjust these amounts towards the various expenses and charges incurred by them for providing the CHA services. This is in no way consideration received by the appellant from the client for providing the CHA service. In the invoices, the consideration for CHA service is mentioned as agency commission on which the appellant has discharged the Service Tax. The Department is of the view that since these amounts are over and above the expenses incurred, the appellant has to pay Service Tax and cannot be considered as reimbursed expenses. We are not able to agree with this view. In the course of providing CHA services there are several requirements to be met by the CHA for activity of import or export of goods. The charges incurred for transportation, courier, fax, communications, etc., may vary each time. The charges collected in some occasions may be in-sufficient to meet the expenses and the appellant then accounts it as operational deficit. The Department has proceeded to demand Service Tax only on the operational surplus. Again, it has to be stated that the figure as 'operational surplus' is taken from the financial statements

(profit and loss account) and not from the invoices raised by the appellant. This means it is the total operational surplus that has come into the hands of the appellant while incurring expenses and is not consideration received for services provided to a client(s).

7.1.2 The Department *vide* Trade Notice No. 39-CE/97 dated 11.06.1997 has clarified this situation with regard to the requirement of a CHA to collect ad hoc amounts from the client and to incur expenses for providing CHA services. In the said Trade Notice, it has been clarified that such charges collected for incurring expenses to provide CHA services is not subject to levy of Service Tax. The Department has clarified that, only the agency commission received by the CHA would be subject to levy of Service Tax under the category of CHA services. The various other reimbursable expenses incurred are not to be included for computing the taxable value. The relevant part of the Trade Notice reads as under:-

> "2.1. The expression "custom house agent" has been defined to mean a person licensed, temporarily or otherwise, under the regulations made under sub-section (2) of section 146 of the Customs Act, 1962. A person is permitted to operate as a custom house agent, temporarily under regulation 8(1) and permanently under regulation 10 of the Customs House Agents Licensing Regulations, 1984.
>
> 2.2 As per the Finance Act, 1997, the taxable service rendered by a custom house agent means any service provided to a client by a custom house agent in relation to the entry or departure of conveyances of the import or export of goods. The value of the taxable service in relation to the service provided by a custom house agent to a client has been defined to constitute the gross amount charged by such agent from the client for services rendered in any manner in relation to import or export of goods. The service tax is chargeable at the rate of 5% on the value of the taxable service.
>
> 2.3 The service rendered by the custom house agent are not merely limited to the clearing of the import and export consignment. The CHA also renders the service of loading/unloading of import or export goods from/at the premises of the exporter/importer, the packing weighment, measurements of the export goods, the transportation of the

> export goods to the customs station or the import goods from the customs station to the importer's premises, carrying out of various statutory and other formalities such as payment of expenses on account of octroi, destuffing/pelletisation terminal handling, fumigation, drawback/DEEC processing, survey/amendment fees, dock fees, repairing and examination charges, landing and container charges, statutory labour charges, testing fees, drug control formalities, sorting/making/stamping/sealing on behalf of the exporter/importer. The Custom House Agent also incurs various other expenses such as crane/fork- lift charges, taxi charges, photostat and fax charges, bank collection charges, courier service charges, and miscellaneous other expenses on account of the exporter/importer. For all the above charges the CHA is ordinarily reimbursed by the importer/exporter for whom the above services are rendered. Apart from the above charges, the CHA also charges the client for his service under the head/nomenclature of agency and attendance charges or similar kind of heads which is purported to be his service charge in respect of the services rendered in relation to the import/export goods.
>
> 2.4 It is clarified that in relation to Custom House Agent the Service Tax is to be computed only on the gross service charges, by whatever head/nomenclature, billed by the custom house agent to the client. It is informed that the practice obtaining is to show the charges for service as "agency commission", "charges", "agency and attendance charges", "agency charges" and some similar descriptions. The service tax will be computed only with reference to such charges. In other words, payments made by CHA on behalf of the client, such as statutory levies (cess, customs duties, port dues etc.) and various other reimbursable expenses incurred are not to be included for computing the service tax."

7.1.3 The Hon'ble Apex Court in the case of *Union of India Vs. Intercontinental Consultants and Technocrats Pvt. Ltd.[2018-TIOL-76-SC-ST]* has considered the issue whether reimbursable expenses or cost incurred by the service provider and charged in the course of providing the taxable service is includable in the taxable value for payment of Service Tax. The issue has been answered in favor of the assessee whereby the Hon'ble Apex Court has held that such reimbursable expenditure or cost incurred by the service provider and charged is not to be included in the taxable value. In clause C of paragraph 20 of the judgment, the Hon'ble Apex Court has considered the issue with regard to CHA services. It is referred therein that the procedure of

raising separate sets of invoices for reimbursement of various expenses and for agency charges separately started after introduction of Service Tax on CHA w.e.f. 15.06.1997 in view of Circular dated 06.09.1997. Thus, two invoices are issued in respect of reimbursement of various expenses and in respect of the agency charges. The CHA has to discharge Service Tax only on the agency charges. The Hon'ble Apex Court held that the reimbursable expenses are not subject to levy of Service Tax.

> "*29) In the present case, the aforesaid view gets strengthened from the manner in which the Legislature itself acted. Realising that Section 67, dealing with valuation of taxable services, does not include reimbursable expenses for providing such service, the Legislature amended by Finance Act, 2015 with effect from May 14, 2015, whereby Clause (a) which deals with 'consideration' is suitably amended to include reimbursable expenditure or cost incurred by the service provider and charged, in the course of providing or agreeing to provide a taxable service. Thus, only with effect from May 14, 2015, by virtue of provisions of Section 67 itself, such reimbursable expenditure or cost would also form part of valuation of taxable services for charging service tax. Though, it was not argued by the learned counsel for the Department that Section 67 is a declaratory provision, nor could it be argued so, as we find that this is a substantive change brought about with the amendment to Section 67 and, therefore, has to be prospective in nature. On this aspect of the matter, we may usefully refer to the Constitution Bench judgment in the case of Commissioner of Income Tax (Central)-I, New Delhi v. Vatika Township Private Limited8 wherein it was observed as under:*
>
> *"27. A legislation, be it a statutory Act or a statutory rule or a statutory notification, may physically consists of words printed on papers. However, conceptually it is a great deal more than an ordinary prose. There is a special peculiarity in the mode of verbal communication by a legislation. A legislation is not just a series of statements, such as one finds in a work of fiction/non-fiction or even in a judgment of a court of law. There is a technique required to draft a legislation as well as to understand a legislation. Former technique is known as legislative drafting and latter one is to be found in the various principles of "interpretation of statutes". Vis-à-vis ordinary prose, a legislation differs in its provenance, layout and features as also in the implication as to its meaning that arise by presumptions as to the intent of the maker thereof.*
>
> *28. Of the various rules guiding how a legislation has to be interpreted, one established rule is that unless a contrary intention appears, a legislation is presumed not to be intended to have a retrospective operation. The idea behind the rule is that a current law should govern current activities. Law*

passed today cannot apply to the events of the past. If we do something today, we do it keeping in view the law of today and in force and not tomorrow's backward adjustment of it. Our belief in the nature of the law is founded on the bedrock that every human being is entitled to arrange his affairs by relying on the existing law and should not find that his plans have been retrospectively upset. This principle of law is known as lex prospicit non respicit: law looks forward not backward. As was observed in Phillips v. Eyre [(1870) LR 6 QB 1] , a retrospective legislation is contrary to the general principle that legislation by which the conduct of mankind is to be regulated when introduced for the first time to deal with future acts ought not to change the character of past transactions carried on upon the faith of the then existing law.

29. The obvious basis of the principle against retrospectivity is the principle of "fairness", which must be the basis of every legal rule as was observed in L'Office Cherifien des Phosphates v. Yamashita-Shinnihon Steamship Co. Ltd. Thus, legislations which modified accrued rights or impose obligations or impose new duties or attach a new disability have to be treated as prospective unless the legislative intent is clearly to give the enactment a retrospective effect; unless the legislation is for purpose of supplying an obvious omission in a former legislation or to explain a former legislation. We need not note the cornucopia of case law available on the subject because aforesaid legal position clearly emerges from the various decisions and this legal position was conceded by the counsel for the parties. In any case, we shall refer to few judgments containing this dicta, a little later."

7.1.4 After appreciation of the facts, the clarification issued by the Board as per the Trade Notice and the decision of the Hon'ble Apex Court in the case of Intercontinental Consultants and Technocrats Pvt. *(supra)*, we are of the opinion that the demand of Service Tax on operational surplus cannot sustain and requires to be set aside. Ordered accordingly.

7.2.1 The second issue is with regard to service charges / tax exempted. The Ld. Counsel submitted that the appellant has provided services as sub-contracting CHA to other CHAs. The understanding of the appellant was that they are not liable to pay Service Tax on the charges received from the main CHA as the main CHA is discharging Service Tax liability. The very same Trade Notice was referred to by the Ld. Counsel to argue that even the Department had clarified that no Service Tax is to be paid by the sub-contracting

CHA. The relevant paragraph of the said Trade Notice reads as under:-

> *"2.6 Sometimes CHAs sub-contract their work to CHAs located in other station. In such cases, it is possible that the sub-contracting CHA raises the bill on the main CHA who in turn raises the bill to the client. It has been decided that tin such cases the sub-contracting CHA will not be required to pay service tax on the bills raised by him on the main CHA. The service tax will be payable by the CHA who provides the actual service to the client and raised the bill to the client."*

7.2.2 The said Trade Notice was in vogue till 2007. The period of dispute in these appeals is from 01.04.2003 to 31.03.2004. The said Trade Notice is therefore binding on the Department. However, the Ld. Counsel has been fair enough to submit that the said circular was superseded by Master Circular No. 96/7/2007-ST dated 23.08.2007 wherein it was clarified by the Department that services provided by sub-contractors is taxable even though the main contractor is discharging the tax liability. The Larger Bench of the Tribunal in the case of *Commissioner of Service Tax, New Delhi Vs. Melange Developers Private Limited [2020 (33) GSTL 116 (Tri. – LB)* had an occasion to consider the said issue as to whether the sub-contractor is liable to pay Service Tax even though the main contractor has discharged the Service Tax liability. The issue was answered in favor of Revue and against the assessee. However, in the said decision, the Larger Bench had noted that prior to 2007, the Trade Notices / Instructions and Circulars had been issued exempting the sub-contracting CHA form payment of Service Tax on the bills raised on the main CHA. The period of dispute in this appeal being prior to 2007, we are of the opinion that based on the Trade Notice which is binding upon the Department, the demand raised cannot sustain and requires to be set aside, which we hereby do.

7.3 Further, due to the reason that the Department had clarified that a sub-contracting CHA is not required to pay

Service Tax, the demand raised invoking the extended period is also not sustainable under this head. Ordered accordingly.

7.4.1 The third issue is the demand raised on freight and brokerage, etc.,. The Ld. Counsel submitted that the appellant receives a brokerage / rebate from the shipping line on the ocean freight that they have to pay to the shipping lines. It is in the form of the discounts or incentives paid to the CHA and such amount is not a consideration for providing any CHA services. In fact, the appellant does not provide any CHA service to the shipping line. They act as an agent on behalf of the importer / exporter. So the incentive or the discount received by the appellant from the shipping line cannot be treated as a consideration received for CHA services. In the case of *Commissioner of Service Tax, New Delhi Vs. Karam Freight Movers [2017 (4) GSTL 215 (Tri. Del.)]*, the Tribunal observed that the mark-up value collected by the assessee from the exporter is an element of profit in the transaction. The said amount is not a commission earned by the assessee and is not while acting as an agent of the exporter or shipping line and cannot be considered as a consideration. The assessee while acting as an agent on behalf of the shipping line was discharging the Service Tax as Steamer Agency services. The Tribunal took the view that the mark-up value collected by the assessee being an element of profit in the transaction cannot be subject to levy of Service Tax. Similar view was taken by the Tribunal in the case of *Commissioner of Service Tax, New Delhi Vs. M/s. Continental Carriers [2017-TIOL-3964-CESTAT-DEL]* and in the case of *Greenwich Meridian Logistics (I) Pvt. Ltd. vs. Commissioner of Service Tax, Mumbai [2016 (43) STR 215 (Tri. Mumbai)]*. In the present case also the Department does not have a case that the appellant has not discharged Service Tax on the agency commission received as a Steamer Agent or CHA. The demand is raised on the mark-up made which is

the profit out of the difference in value of ocean freight collected by the shipping line and paid by the exporter / client. The Tribunal in the case of Greenwich Meridian Logistics (I) Pvt. Ltd. *(supra)* held as under:-

> ***"13.*** *The notional surplus earned thereby arises from purchase and sale of space and not by acting for a client who has space or slot on a vessel. Section 65(19) of Finance Act, 1994 will not address these independent principal-to-principal transactions of the appellant and, with the space so purchased being allocable only by the appellant, the shipping line fails in description as client whose services are promoted or marketed.*
>
> ***14.*** *We, therefore, find no justification for sustaining of the demand and, accordingly, set aside the impugned order. Demands, with interest thereon, and penalties in both orders are set aside. Cross-objections filed by the department are also disposed of."*

7.4.2 Following these decisions, we are of the opinion that the demand of Service Tax on freight brokerage cannot sustain and requires to be set aside. Ordered accordingly.

7.5 The Ld. counsel for the appellant has argued on the ground of limitation also. Apart from a vague allegation in the Show Cause Notice that the appellant has suppressed facts with intent to evade payment of Service Tax, there is no positive act of suppression established against the appellant. Moreover, the entire figures which has been the basis for rasing the demand as per these Show Cause Notices has been collected from the financial statements of the appellant. This proves that the appellant has properly accounted all the transactions and amounts collected by them. They have discharged the Service Tax on the agency commission received as a Custom House Agent and Steamer Agent. The demands have been raised on reimbursable expenses in the nature of operational surplus and freight brokerage. As already stated, the Service Tax on the amount received as a sub-contracting CHA was not paid by them as during the relevant time the Board had clarified that

the activities of a sub-contracting CHA is not subject to levy of Service Tax. We therefore have to hold that there is no suppression of facts on the side of the appellant. The appellant succeeds on limitation also.

8. In the result, the impugned orders are set aside. The appeals are allowed with consequential relief.

(Order pronounced in open court on 01.11.2023)

Sd/-
(VASA SESHAGIRI RAO)
MEMBER (TECHNICAL)

Sd/-
(SULEKHA BEEVI C.S.)
MEMBER (JUDICIAL)

MK