IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH : KOLKATA

REGIONAL BENCH - COURT NO.1

Service Tax Appeal No.16 of 2009

(Arising out of Order-in-Original No.COMMR/BBSR-I/ST-16/2008 dated 30.10.2008 passed by Commissioner, Central Excise, Customs & Service Tax, Bhubaneswar-I.)

M/s. MMTC Limited
(Alok Bharati Complex, (7th Floor), Saheed Nagar, Bhubaneswar-751007.)
...Appellant

VERSUS

Commissioner of Central Excise & Service Tax, Bhubaneswar-I
.....Respondent
(C.R. Building, Rajaswa Vihar, Bhubaneswar-751007.)

WITH

Service Tax Appeal No.53 of 2010

(Arising out of Order-in-Original No.COMMR/BBSR-I/ST-10/2009 dated 30.11.2008 passed by Commissioner, Central Excise, Customs & Service Tax, Bhubaneswar-I.)

M/s. MMTC Limited
(Alok Bharati Complex, (7th Floor), Saheed Nagar, Bhubaneswar-751007.)
...Appellant

VERSUS

Commissioner of Central Excise & Service Tax, Bhubaneswar-I
.....Respondent
(C.R. Building, Rajaswa Vihar, Bhubaneswar-751007.)

AND

Service Tax Appeal No.142 of 2011

(Arising out of Order-in-Original No.COMMR/BBSR-I/ST-02-03/2011 dated 31.01.2011 passed by Commissioner, Central Excise, Customs & Service Tax, Bhubaneswar-I.)

M/s. MMTC Limited
(Alok Bharati Complex, (7th Floor), Saheed Nagar, Bhubaneswar-751007.)
...Appellant

VERSUS

Commissioner of Central Excise & Service Tax, Bhubaneswar-I
.....Respondent
(C.R. Building, Rajaswa Vihar, Bhubaneswar-751007.)

APPEARANCE

Dr. Samir Chakraborty, Senior Advocate & Shri Suman Bhowmik, Advocate for the Appellant (s)
Shri A.Roy, Authorized representative for the Revenue

CORAM: HON'BLE SHRI ASHOK JINDAL, MEMBER(JUDICIAL)
HON'BLE SHRI RAJEEV TANDON, MEMBER(TECHNICAL)

FINAL ORDER NO. 75218-75220/2023

DATE OF HEARING : 10 April 2023
DATE OF DECISION : 13.04.2023

Per : ASHOK JINDAL :

These Appeals have been filed by the Appellant against the impugned orders wherein the Revenue sought to include reimbursable expenses reimbursed to the Appellant to be included in the assessable value.

2. The facts of the case are that the Appellant has been appointed as a sole selling agent of M/s. Nilachal Ispat Nigam Ltd. (NINL) for selling the product of M/s. NINL. For rendering the said services, the Appellant was receiving a fee @ 3% of the gross sale value from M/s.NINL. The Appellant discharged Service Tax thereon. Further during the course of rendering the said services, the Appellant incurred various expenses on behalf of M/s. NINL which were reimbursed to them. The Revenue is of the view that the reimbursable expenses are includible in gross taxable value of service by invoking Rule 5(1) of Service Tax Valuation Rules, 2006. Therefore, various Show Cause Notices were issued to the Appellant proposing that the reimbursable expenses were includible in the gross taxable services and Service Tax was demanded thereon. The matters were adjudicated and demands of Services Tax was confirmed against the Appellant. Various penalties were also imposed. Against the said orders, the Appellant is before us.

3. The Ld.Counsel for the Appellant submits that Rule 5(1) has been struck down by the Hon'ble Delhi High Court in the case of Intercontinental Consultants and Technocrats Pvt.Ltd. vs. Union of India [2013 (29) STR 9 (Delhi.)], which has been affirmed by the Hon'ble

Apex Court reported in 2018 (10) GSTL 401 (SC). Therefore the issue is no more res integra. In view of this, the impugned orders are to be set aside.

4. On the other hand, the Ld.Authorized Representative for the Department submits that the larger Bench of this Tribunal in the case of Sri Bhagavathy Traders vs. CCE, Cochin [2011 (24) STR 290 (Tr.-LB)] has defined what are the reimbursements and as same is required to be included in the assessable value. He further submitted that the Appellant paid Service Tax on these services and taken CENVAT Credit thereof. Therefore these reimbursable expenses are none other part of the service provided of the Appellant. Therefore Service Tax is rightly demanded by the Appellant.

5. Heard the parties and considered the submissions.

6. On hearing both the sides, we find that the short issue emerges to be decided by us is whether the re-imbursable expenses are to be includible in the gross value of the service provided by the Appellant in terms of Rule 5(1) of Service Tax (Determination of Value) rules, 2006 or not.

7. We find that the said issue came up before the Hon'ble Delhi High Court in the case of Intercontinental Consultants and Technocrats Pvt.Ltd. (supra), wherein the Hon'ble High Court has observed as under:-

> ***"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 inbuilt 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."

Wherein the Hon'ble High Court has declared Rule 5(1) of the said Rules is ultra vires. The said order has been affirmed by the Hon'ble Apex Court cited (supra).

8. In view of this, we hold that the issue is no more res integra and we hold that re-imbursable expenses are not includible in the assessable value in terms of Rule 5(1) of Service Tax (Determination of Value) Rules, 2006.

9. The arguments advanced by the Ld.Authorized Representative for the Department that the Appellant has taken CENVAT Credit on the services tax of paid reimbursable expenses. Therefore, the same is to be includible in the assessable value. We find that the said argument is not of any help to the Ld.Authorized Representative for the Department as it is not a case of the Department that the appellant was availing inadmissible CENVAT Credit. Therefore, the said argument is turned down.

In view of the above discussion, we hold that the reimbursable expenses are not includible in the taxable value of the service provided by the Appellant. Therefore, the impugned orders are set aside.

In the result, the Appeals are allowed with consequential relief, if any.

(Order pronounced in the open court on 13.04.2023.)

Sd/
(ASHOK JINDAL)
MEMBER (JUDICIAL)

Sd/
(RAJEEV TANDON)
MEMBER (TECHNICAL)

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