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C.M.A.No.951 of 2008 & 696 of 2010

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 01.11.2022

CORAM

THE HONOURABLE MR.JUSTICE S.VAIDYANATHAN

AND

THE HONOURABLE MR.JUSTICE C.SARAVANAN

C.M.A.No.951 of 2008 & 696 of 2010

and

M.P.No.1 of 2008

M/s.Lalit Enterprises,
10, ARK Colony, 1st Floor,
Eldams Road, Alwarpet,
Chennai – 600 018.

... Appellant
in both C.M.As.

Vs.

1.Customs, Excise & Service Tax
Appellate Tribunal,
South Zonal Bench, Chennai,
1st Floor, Shastri Bhavan,
26 Haddows Road, Chennai – 600 086.

2.The Commissioner of Central Excise
Service Tax Commissionerate,
Nandanam, Chennai – 600 035.

... Respondents
in C.M.A.No.951/08

3.Commissioner of Service Tax,
Chennai.

... Respondent
in C.M.A.No.696/10



C.M.A.No.951 of 2008 & 696 of 2010

Prayer in C.M.A.No.951 of 2008 : Civil Miscellaneous Appeal filed under Section 35G of the Central Excise Act, 1944 against the Final Order No.808/2005 dated 03.06.2005 in Appeal No.S/100/2004 passed by the first respondent, the Customs, Central Excise and Service Tax Appellate Tribunal, Chennai setting aside the order of the Commissioner of Central Excise (Appeals) Chennai, in Order-in-Appeal No.81/2004 (M-II)(ST) dated 03.08.2004.

Prayer in C.M.A.No.696 of 2010 : Civil Miscellaneous Appeal filed under Section 35G of the Central Excise Act, 1944 against the Final Order No.1296/2009 dated 09.09.2009 in Appeal No.S/253/2007 passed by the the Customs, Excise and Service Tax Appellate Tribunal, Chennai.

For Appellant in both C.M.As. : M/s.R.Hemalatha

For R2 in C.M.A.No.951/08 &

For Respondent

in C.M.A.No.696/10

: Mr.A.P.Srinivas

Senior Standing Counsel

COMMON JUDGMENT

S.VAIDYANATHAN, J.

AND

C.SARAVANAN, J.

By this common Judgment, both Civil Miscellaneous Appeals are being disposed of.



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2. In C.M.A.No.951 of 2008, the appellant has challenged the impugned Final Order No.808/2005 in Appeal No.S/100/2004 dated 03.06.2005 passed by the Customs, Excise and Service Tax Appellate Tribunal [hereinafter referred to as 'Appellate Tribunal'].

3. In C.M.A.No.696 of 2010, the appellant has challenged the impugned Final Order No.1296/2009 in Appeal No.S/253/2007 dated 09.09.2009 passed by Appellate Tribunal.

4. Both the orders of the Appellate Tribunal arise out of the same proceedings of the original authority namely, the Deputy Commissioner of Central Excise, Service Tax Cell vide Order-in-Original No.45/2003 dated 16.01.2004.

5. The dispute in these appeals pertains to the period between 1999-2000 and 2002-2003. The appellant was issued with a Show Cause Notice dated 07.07.2003 by the Deputy Commissioner (Service Tax Cell), Chennai II Commissionerate, to show cause as to why the service provided by the appellant to M/s.Grasim Industries Limited, White Cement, Division,



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Jodhpur should not be treated as taxable service of a clearing and forwarding agent as defined in Section 65(16) read with Section 65(72)(j) of the Finance Act, 1994 [Chapter V – Service Tax Act].

6. Section 65(16) of the Finance Act, 1994 [Chapter V – Service Tax Act] defined the expression ‘clearing and forwarding agent’. Section 65(72)(j) of the Finance Act, 1994 [Chapter V – Service Tax Act] defined the expression ‘taxable service’ of a clearing and forwarding agent.

7. Both Section 65(16) and Section 65(72)(j) of the Finance Act, 1994 [Chapter V – Service Tax Act] read as under:-

<i>Section 65(16) of the Chapter V of the Finance Act, 1994 (Service Tax Act)</i>	<i>Section 65(72)(j) of the Chapter V of the Finance Act, 1994 (Service Tax Act)</i>
65.Definitions:- (1) (16) “clearing and forwarding agent” means any person who is engaged in providing any service, either directly or indirectly, connected with the clearing and forwarding operations in any	65.Definitions:- (1) (72) “taxable service” means any service provided,___ (a) (j) to a client, by a clearing and forwarding agent in relation to



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manner to any other person and includes a consignment agent;	clearing and forwarding operations, in any manner;
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8. The specific case of the appellant was that the appellant was not providing any taxable service of a clearing and forwarding agent to M/s.Grasim Industries Ltd. as it was not physically dealing with the goods namely, cement on behalf of its client M/s.Grasim Industries Ltd. The case of the appellant is that it was maintaining the records, party ledger, credit / debit notes, reconciliation with factory records and attending to services in respect of insurance claim lodgment etc. for M/s.Grasim Industries Ltd.

9. On the other hand, it was the case of the Department that the appellant was indirectly providing clearing and forwarding operations and therefore, the appellant was liable to pay service tax. It was further stated that vide Notification No.7/99 (ST), dated 23.08.1999, with effect from 01.09.1999, service tax liability was notified on the service of clearing and forwarding agent and therefore the service tax was payable on the gross amount charged by the appellant for such clearing and forwarding operations. Thus, a sum of Rs.70,143/- was demanded from the appellant by invoking extended period of limitation under Section 73 of the Finance



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Act, 1994 [Chapter V – Service Tax Act].

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10. The Deputy Commissioner of Central Excise, Chennai II Commissionerate, Service Tax Cell confirmed the service tax liability on the appellant vide Order-in-Original No.45/2003 dated 16.01.2004 in the light of the decision of CEGAT, Easter Bench, Kolkata in **Prabhat Zarda Factory (India) Limited Vs. Commissioner of Central Excise, Patna**, 2002 (145) E.L.T. 222 (Tri-Kolkata) and in terms of the Clarifications of the Central Board of Excise and Custom dated 11.07.1997 bearing reference F.No.B.43/7/97-TRU.

11. The appellant filed an appeal in A.No.41/2004 (M-II) (ST) before the Commissioner of Central Excise (Appeals) [hereinafter referred to as “Appellate Commissioner”]. The Appellate Commissioner vide Order-in-Appeal No.81/2004 (M-II) (ST) dated 03.08.2004, allowed the appeal filed by the appellant by placing reliance of the decision of the Tribunal in **Mahavir Generics Vs. CCE, Bangalore**, 2004 (95) ECC 54 (T).

12. A review was filed by the revenue before the Commissioner of Service Tax. The Commissioner of Service Tax vide order dated



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09.11.2004 in C.No.IV/3/J4/2004-CFA, in exercise of powers vested under Section 86(2A) of the Finance Act, 1994 [Chapter V – Service Tax Act], directed the Deputy Commissioner of Service Tax, Chennai II Division, to file an appeal before the Customs, Excise and Service Tax Tribunal, Chennai [hereinafter referred to as “Appellate Tribunal”] under Section 86 of the Finance Act, 1994 [Chapter V - Service Tax Act] against the order dated 03.08.2004 of the Commissioner (Appeals) in Order-in-Appeal No.81/04 (M-II) (ST).

13. Thereafter, the Deputy Commissioner of Central Excise, Chennai II Commissionerate, Service Tax Cell filed an appeal in Appeal No.S/100/2004 before the Appellate Tribunal against the said order dated 03.08.2004 of the Commissioner (Appeals) in Order-in-Appeal No.81/04 (M-II) (ST).

14. The Appellate Tribunal vide its first mentioned Final Order No.808/2005 dated 03.06.2005, partly allowed and partly dismissed the appeal filed by the Department in Appeal No.S/100/2004 by holding that the decision of the Tribunal in **Prabhat Zarda Factory (India) Limited**



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case referred to *supra*, was not properly considered by the Appellate Commissioner and therefore, the Order-in-Original No.45/2003 dated 16.01.2004 was liable to be restored. Since the plea of limitation raised by the appellant and the benefit of Section 80 of the Finance Act, 1994 [Chapter V - Service Tax Act] and penalty imposed under Section 76 of the Finance Act, 1994 [Chapter V - Service Tax Act] were not considered, the case was remitted back to the Appellate Commissioner for passing a fresh order. Thus, the remand was for a limited purpose.

15. Aggrieved by the said Final Order No.808/2005 dated 03.06.2005 in Appeal No.S/100/2004, C.M.A.No.951 of 2008 has been filed.

16. In the remand proceedings, the Appellate Commissioner passed Order-in-Appeal No.38/2007 (M-ST) dated 31.07.2007. Aggrieved by the same, the appellant preferred an appeal in Appeal No.S/253/07 before the Appellate Tribunal. The Appellate Tribunal vide Final Order No.1296/09 dated 09.09.2009, partly allowed the appeal filed by the appellant in Appeal No.S/253/07 which has been impugned in C.M.A.No.696 of 2010.



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Operative portion of the said order reads as under:-

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3. However, as regards penalty, I accept the contention of the assessee that it requires to be set aside for the reason that the assessee is not physically handing the goods and that they are paid commission on the basis of the quantum of goods dispatched by M/s.Grasim Industries Ltd. for which the assessee is responsible upto the settlement of accounts and therefore they are not carrying out any clearing and forwarding operations in the light of the ratio of the judgment of the Hon'ble Punjab & Haryana High Court in the case of Commissioner Vs. Kulcip Medicines – 2009 (14) STR 608 (P&H) and therefore, although the liability to tax has been upheld by the Tribunal in its remand order, imposition of penalty is not sustainable. Accordingly, I set aside the penalty.

4. The appeal is thus partly allowed in the above terms.

17. These Civil Miscellaneous Appeals were admitted on 07.03.2008 and 17.03.2010 respectively on the following substantial question of law:

C.M.A.No.951 of 2008

- i. Whether the Tribunal, in the facts and circumstances of the case, was correct in going beyond the scope of the notice and the order of the original authority to make out an order in favour of



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the revenue by concluding that the appellant obviously maintained a depot as per the agreement and the same could be for no purpose other than dealing in the goods cleared to the service agent by their principal, inspite of the strong denial of the above fact by the appellant which denial is supported by the various documentary evidences on record including the clear finding of the original authority that they do not physically deal with the goods?

- ii. *Whether the Tribunal was correct in holding that the definition of 'Clearing and Forwarding Agent' was couched in a language which admitted wide meaning and scope placing reliance on the Tribunal's decision in Prabhat Zarda Factory which was delivered a day prior to the Board's Circular dated 20.02.02 wherein the Board has made it clear that the parameters of clearing and forwarding operations spelt out in their earlier circular dated 11.07.97 are exhaustive and not illustrative and without distinguishing the facts involved in the case of the appellant to that of the one involved in the above decision?*

C.M.A.No.696 of 2010



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- i. *Whether the appellate tribunal after admitting that the activities performed by the appellant did not fell within the ambit of the taxable service of clearing and forwarding agency within the meaning of the Act was right in restricting its finding only to the issue involving the question of imposition of the penalty on the appellant and not for the invocation of the extended period of time for the purpose of demand of the tax in terms of Section 73 of the Finance Act?*
- ii. *Whether the order of the appellate tribunal sustaining the demand under Section 73(1)(a) of the Finance Act, 1994, as existing at the material time was in accordance with the express provisions contained in the said provision in the facts and circumstances of the case?*

18. Appearing on behalf of the appellant, the learned counsel submits that in the remand proceedings while passing Final Order No.1296/09 dated 09.09.2009 in Appeal No.S/253/07 which has been impugned in C.M.A.No.696 of 2010, the Appellate Tribunal has categorically concluded that the appellant was not carrying any clearing and forwarding operations in the light of the ratio of the decision of the Punjab & Haryana High Court



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in the **Commissioner Vs. Kulcip Medicines**, 2009 (14) STR 608 (P&H)

and therefore, although the liability to tax has been upheld by the Tribunal in the remand order, imposition of penalty was not sustainable.

19. The above observation was made by the Tribunal while upholding that the appellant was not liable to pay penalty imposed by the original authority.

20. These appeals are contested by the revenue department. It is submitted that the liability to pay service tax stands concluded by the Tribunal in Final Order No.808/2005, dated 03.06.2005 in Appeal No.S/100/2004. The correctness of the aforesaid order as to whether the appellant was providing clearing and forwarding operations within the meaning of the Finance Act, 1994 [Chapter V – Service Tax Act] as it stood then cannot be tested before this Court under Section 35G of the Central Excise Act, 1944 as made applicable to appeals against the Final Order of the Tribunal in terms of Section 83 of the Finance Act, 1994 [Chapter V – Service Tax Act].



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21. It is submitted that only a statutory appeal before the Hon'ble Supreme Court was maintainable on such issues and therefore, appeals filed by the appellant in C.M.A.Nos.951 of 2008 & 696 of 2010 are liable to be dismissed. It is submitted that no statutory appeal has been filed by the revenue against the Final Order No.1296/09 dated 09.09.2009 in Appeal No.S/253/07.

22. It is further submitted that issue having attained finality by the Tribunal in the first round vide Final Order No.808/2005 in Appeal No.S/100/2004 dated 03.06.2005 which has been impugned in C.M.A.No.951 of 2008, question of imposition of penalty further cannot be tested under Section 35G of the Central Excise Act, 1944 read with Section 83 of of the Finance Act, 1994 [Chapter V – Service Tax Act].

23. We have considered the arguments advanced by the learned counsel for the appellant and the learned counsel for the respondents. We have also perused the provisions of the Finance Act, 1944 [Chapter V – Service Tax Act] as it stood during the relevant period and Section 35-G of the Central Excise Act, 1944 as made applicable to the Section 83 of the



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Finance Act, 1944 [Chapter V – Service Tax Act].

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24. Before dealing with the substantial questions of law raised by the appellant, we would like to clarify as to the jurisdiction of the High Court under Section 35-G of the Central Excise Act, 1944 as made applicable to the provisions of the Finance Act, 1944 [Chapter V – Service Tax Act], particularly, to Section 83 of the Finance Act, 1944 [Chapter V – Service Tax Act].

25. Relevant Clause in Section 35-G of the Central Excise Act, 1944 as made applicable to Section 83 of the Finance Act, 1944 [Chapter V – Service Tax Act], under which, these appeals have been filed against the impugned orders passed of the Appellate Tribunal reads as under:

35-G. Appeal to High Court.

(1) An appeal shall lie to the High Court from every order passed in appeal by the Appellate Tribunal on or after the 1st day of July, 2003 (not being an order relating, among other things, to the determination of any question having a relation to the rate of duty of excise or to the value of goods for purposes of assessment), if the High Court is satisfied that the case involves a substantial question of law.



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26. Section 83 of the Finance Act, 1944 [Chapter V – Service Tax

Act] makes it clear that Sections enumerated therein from the provisions of the Central Excise Act, 1944, shall apply, insofar as may be, in relation to service tax as they apply in relation to a duty of excise, as in force. Section 83 of the Finance Act, 1944 [Chapter V – Service Tax Act] reads as under:-

83. Application of certain provisions of Act 1 of 1944.— *The provisions of the following sections of the Central Excise Act, 1944, as in force from time to time, shall apply, so far as may be, in relation to service tax as they apply in relation to a duty of excise:-*

sub-section (2A) of section 5A, sub-section(2) of section 9A, 9AA, 9B, 9C, 9D, 9E, 11B, 11BB, 11C, 12, 12A, 12B, 12C, 12D, 12E, 14, 15, 15A, 15B, 31, 32, 32A to 32P (both inclusive), 33A, 34A, 35EE, 35F, 35FF, to 35-O (both inclusive), 35Q, 35R, 36, 36A, 36B, 37A, 37B, 37C, 37D, 38A and 40.

27. Though 35-G of the Central Excise Act, 1944 was omitted by the National Tax Tribunal Act, 2005 with effect from 28.12.2005, it was not brought into force in view of the challenge to the provisions of the National Tax Tribunal Act, 2005 in **Union of India Vs. R.Gandhi, President, Madras Bar Association**, (2010) 11 SCC 1.



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28. In **R.Gandhi, President, Madras Bar Association** case referred to *supra*, the amendments brought out by the National Tax Tribunal Act, 2005 and the corresponding amendments to the provisions of the Central Excise Act, 1944, the Customs Act, 1962 and the Finance Act, 1944 [Chapter V – Service Tax Act] were not given effect to and therefore, the High Court continues to exercise its appeal late jurisdiction.

29. The expression used in 35-G(1) of the Central Excise Act, 1944 cannot be pressed into service in the manner in which it was argued by the learned counsel for the respondents as the service tax dispute regarding the taxability and leviability does not come within the purview of expression *“not being an order relating, among other things, to the determination of any question having a relation to the rate of duty of excise or to the value of goods for purposes of assessment”*.

30. There are no separate provisions for different rate of tax under the Finance Act, 1944 [Chapter V – Service Tax Act] during the period in dispute for same service. Service Tax was payable at uniform rate for all services under Section 65(72) of the Finance Act, 1944 [Chapter V –



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Service Tax Act] as it stood then and later under Section 65(105) of the Finance Act, 1944 [Chapter V – Service Tax Act].

31. If the dispute pertained to claim or denial of benefit of exemptions under a Notification under Section 93 of the Finance Act, 1944 [Chapter V – Service Tax Act], it could be said that it pertained to a dispute relating to the rate of tax and therefore, this Court was barred under the exclusions in Section 35-G of the Central Excise Act, 1944. In such case, only the Hon'ble Supreme Court has the exclusive jurisdiction under Section 35L of the Central Excise Act, 1944 read with Section 83 of the Finance Act, 1944 [Chapter V – Service Tax Act]. In our view, the High Court has jurisdiction to entertain the appeal against an order of the Tribunal determining the taxability of a service under the provisions of the Finance Act, 1944 [Chapter V – Service Tax Act] as the dispute was not relevant to valuation or rate of tax.

32. Having answered the issue relating to the jurisdiction of this Court, we are of the view that the Tribunal is an ultimate fact finding authority. The Tribunal by its final order No.1296/2009 dated 09.09.2009



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impugned in C.M.A.No.696 of 2010, content of which has been extracted above, has categorically concluded that the activity carried out by the appellant was not that of the clearing and forwarding agent as the appellant was not physically handling the goods on behalf of its client namely, M/s.Grasim Industries Ltd.

33. In fact, the activity undertaken by the appellant would have come with the purview of “Business Auxiliary Service” as defined in Section 65(19) of the Finance Act, 1944 [Chapter V – Service Tax Act] with effect from 01.07.2003 which was later substituted by the Finance (No.2) Act, 2004, read with Section 65(105) of the Finance Act, 1944 [Chapter V – Service Tax Act].

34. The activity of the appellant would have come within the purview of any of the following Sub-Clauses as in Section 65(19) of the Finance Act, 1944 [Chapter V – Service Tax Act] as it stood then:-

65.Definitions:-

(1)

.....

(19. “business auxiliary service” means any service in relation to_

- i. promotion or marketing or sale of goods produced or provided by or belonging to the



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- client; or*
- ii. promotion or marketing of service provided by the client; or*
 - iii. any customer care service provided on behalf of the client; or*
 - iv. any incidental or auxiliary support service such as billing, collection or recovery of cheques, accounts and remittance, evaluation of prospective customer and public relation services,*

and includes services as a commission agent, but does not include any information technology service.

Explanation.- For the removal doubts, it is hereby declared that for the purpose of this clause “information technology service” means any service in relation to designing, developing or maintaining of computer software, or computerized data processing or system networking, or any other service primarily in relation to operation of computer systems;

35. The decision of this Court in **S. Senniappa Mudaliar V. The Government of Madras**, (1965) ILR 2 Mad 397 was followed by a Full Bench of the Kerala High Court in **M.Syed Alavi and Others Vs. State of Kerala**, (1981) 48 STC 150 (Ker). It held that an order of remand remanding a case back is to be held as an interlocutory order. The Court further held that while the authority passing order pursuant to remand order was bound by remand order, the Appellate Courts / Authorities are not bound by it.



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36. In particular, paragraph No.17 from the decision of the Full Bench of the Kerala High Court in **M.Syed Alavi** case referred to *supra* reads as under:-

17. In the instant case, it is true that no appeal was filed against the decision dated 12th April, 1976, of the Appellate Assistant Commissioner. The effect of non-filing of an appeal is that the finding is binding on the assessing authority when the case went back to that authority and also on the Appellate Assistant Commissioner while disposing of the appeal from the revised decision of the assessing authority. It is not binding on the Appellate Tribunal in the appeal filed under Section 9 against the decision of the Appellate Assistant Commissioner. The Appellate Tribunal was free to arrive at its own decision on the question of liability of the petitioners to assessment to sales tax.

37. Therefore, though the Tribunal had earlier concluded that the appellant was liable to pay the service tax as that of a clearing and forwarding agent vide Final Order No.808/2005 dated 03.06.2005 impugned in C.M.A.No.951 of 2008, nothing precluded the Tribunal from revisiting the issue afresh while passing the impugned Final Order No.1296/2009 dated 09.09.2000 which has been impugned in C.M.A.No.696 of 2010.



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38. In view of the above discussion, we answer the substantial questions of law in favour of the appellant. Accordingly, these Civil Miscellaneous Appeals stand allowed. No cost. Consequently, connected Miscellaneous Petition is closed.

S.V.N., J. C.S.N., J.
01.11.2022

Internet : Yes / No
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To

- 1.Customs, Excise & Service Tax
Appellate Tribunal,
South Zonal Bench, Chennai,
1st Floor, Shastri Bhavan,
26 Haddows Road, Chennai – 600 086.
- 2.The Commissioner of Central Excise
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- 3.Commissioner of Service Tax,
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