

Mahavir Generics Vs. Cce

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Apr-27-2004

Reported in : (2004)(95)ECC54

Judge : K Usha, N T C.N.B.

Appellant : Mahavir Generics

Respondent : Cce

Judgement :

1. This is an appeal at the instance of the assessee challenging the order passed by Commissioner of Central Excise (Appeals) in the matter of liability to pay service tax.

2. Under an agreement dated 1.1.97 with M/s. Cipla Limited, manufacturer of pharmaceutical generic products, appellant had been functioning as their consignment agent for sale of their products throughout India. When service tax was introduced on Clearing and Forwarding agent service under Chapter 5 of Finance Act 1944 w.e.f.

16.7.97 the appellants got themselves registered with the Central Excise authorities and started paying service tax on the commission received by them from M/s. Cipla Limited as consignment agents. It is contended that later on realizing that the services rendered by them would not amount to a taxable service as one rendered by a Clearing and Forwarding agent the surrendered the

certificate of registration under letter dated 29.1.2001. The Assistant Commissioner of Central Excise, Service Tax Cell, Bangalore-I Commissionerate vide his order dated 31.12.2001 directed the appellant to continue their registration as Clearing and Forwarding agent and to comply with the provisions of Finance Act, 1994 and the rules thereunder. The appeal filed by the assessee was dismissed by the Commissioner (Appeals) under the order impugned. The issue that comes up for consideration in this appeal is whether the service rendered by the appellant in terms of its agreement with M/s. Cipla Limited would come within Section 65(105)(j) of the Finance Act, 1994, as amended.

3. The definition of the term "clearing agent" is found in clause (25) of Section 65 which reads as follows:- "(25) '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 matter to any other person and includes a consignment agent." Section 65 (105) defines 'taxable service. Sub-clause (j) is relevant for the purpose of this case.

(j) to a client, by a clearing and forwarding agent in relation to clearing and forwarding operation in any manner." Commissioner (Appeals) has taken the view that since the definition of the term 'clearing and forwarding agent' includes a consignment agent also, the duty performed by a consignment agent is also liable to be taxed. He placed reliance on CBEC's circular No. 39/2/2002 dated 20.2.2002 clarifying the scope of persons liable to pay service tax under the category of "clearing and forwarding agents". According to the Commissioner the appellants are providing service of receiving, storing and distributing the goods manufactured by M/s. Cipla Limited and therefore, they are covered by the definition of "clearing and forwarding agent and thus liable to pay service tax.

4. The learned counsel for the appellant took us through the terms of the agreement with M/s. Cipla Limited and contended that under the agreement they are not providing any service to a client in the nature of clearing and forwarding operation. Even if the consignment agents are brought under the definition of "clearing and forwarding agents" unless the service rendered by a consignment agent is made taxable by making it a taxable service under Section 65(105), there

will be no tax liability on the appellant. In support of their contention that the appellant is not doing any service as clearing and forwarding agent, the learned counsel referred to the meaning of the term "forwarding agent" under different dictionaries and Halsbury's Laws of England.

"A person or company whose business is to receive and ship goods for others - Also termed freight-forwarder-A freight forwarder who assembles less than-carload shipments (small shipments) into carload shipments, thus taking advantage of power freight rates." "Forwarding Agent-A GENERAL AGENT who specializes in moving goods from a factory or port of entry to their proper destination. Such an agent normally owns the transport necessary for this work and often arranges FREIGHT and customs formalities for the principal." "Freight forwarding company receiving goods from shippers, retaining them in warehouse, and then subletting carriage thereof to other carriers, held 'common carrier' within statute requiring certificate, and not mere 'forwarding agent'. A mere forwarding agent, who does not receive goods into his custody, but, as agent for shipper, merely contracts for their transportation by carriers, and who has no interest in the freight, but receives compensation from the shipper as his agent, is not a 'common carrier', but an alleged forwarding agent who receives goods for transit, issues bills of lading, makes contracts in his own name for carriage, is as to a person with whom he contracts for the delivery of goods, a 'common carrier'" "Forwarding agent - An agent who attends to the collection, forwarding and delivery of goods." In Halsbury's Laws of England Fourth Edition Volume 5 "Forwarding Agent" is dealt with as follows - "A forwarding agent is one who carries on the business of arranging for the carriage of goods for other people. It must be clearly understood that a forwarding agent is not, in general, a carrier; he does not obtain possession of the goods; and he does not undertake the delivery of them at the other end. All that the does is to act as agent for the owner of the goods to make arrangements with the people who do carry, such as shipowners, road hauliers, railway authorities and air carriers, and to make arrangements, so far as they are necessary, for the intermediate steps between the ship and the rail, the customs or anything else.

The meaning of the term "consignment sale" is given in Black's Law Dictionary seventh Edition as- "Consignment sale - A sale of an owner's property such as clothing or furniture by a third party entrusted to make the sale." 5. The appellant, therefore, submits that its duty under the agreement is not comparable to a service rendered to a client by a clearing and forwarding agent in relation to clearing and forwarding operations but strictly that of a consignment agent and therefore no liability can be imposed on it.

6. The learned SDR, on the other hand, would contend that by way of inclusive definition a consignment agent has been put on a par with clearing and forwarding agent. Therefore, the services rendered by the appellant as a consignment agent should be treated as taxable service under Section 65(105)(j). She also placed reliance on a decision of Kolkata Bench of the Tribunal in Prabhat Zarda Factory (India) Ltd. Vs.

CCE Patna 2002(145) ELT 222(Tri-Kolkata). She submitted that the contention raised by the appellant therein that they are not providing any service as clearing and forwarding agent was not accepted by the Tribunal. It was held that even when services are indirect but the same are connected with the clearing and forwarding operations in any manner of the other persons, it would be covered by the definition of clearing and forwarding agent.

7. On going through the terms of the agreement between M/s. Cipla Limited and the appellant we notice the following clauses as relevant : 1. AND WHEREAS the Principal has agreed to appoint the AGENT as its Consignment Agent for the sale of the Product throughout India on the following terms and conditions:- 2. The principal will supply the Product from any of its depots and loan licence (as per Annexure 1) to the Agent on a consignment basis through a Stock Transfer Note for sale by him as the Agent of the Principal. The Principal undertakes to deliver the Products to the Agent's godown at Bangalore at his cost.

5. The Agent will sell the Products as Consignment Agent of the Principal and the prices at which the Products can be sold shall be fixed by the Principal from time to time after mutual consultation, between the Agent and the Principal considering market conditions.

6. The Agent will register himself as a Dealer under the Local Sales Tax Act and the General Sales Tax Act and will furnish the Sales Tax Registration numbers to the Principal before the first despatch of the product commences.

15. The Agent shall be responsible for collecting and remitting the Principal value of all the sales of the Principal's Products done by him.

16. Collection being the responsibility of the Agent, the risk of any non-collection will be to the Agent's Account.

17. For the efforts put in by the Agent he will be compensated as follow:- (a) The Agent will be entitled to a commission of 5% on net price (excluding commission and sales tax) on all Products excluding liquid preparations. The commission so calculated shall be paid to him directly on the previous month's sales.

(b) The Agent will be entitled to a commission of 9% on net price (excluding commission and sales tax) on liquid preparations. The commission so calculated shall be paid to him directly on the previous month's sales.

8. The agreement, with specific reference to the clauses quoted above, would Show that the appellant was not acting as a clearing and forwarding agent. Unless its service can be treated as one to a client by a clearing and forwarding agent in relation to clearing and forwarding operations in any manner, the service cannot be taxed even if the consignment agent is brought under the definition of clearing and forwarding agent. Under the scheme of the Finance Act 1994 with relation to service tax, the tax liability is attached to the taxable service. So long as the appellant is not providing a taxable service, the appellant cannot be brought under the net of service tax.

9. On going through the facts of Prabhat Zarda Factory (India) Ltd. the decision relied on by the learned SDR we find that under the terms of the agreement the agent M/s. Ratna Zarda Company (RZC) had no authority to sell the goods belonging to Principal as in the present case. The agent's responsibility was only to procure orders and to act for improving the market conditions. It was under these circumstances, the Tribunal took the view that they were rendering the

services in the nature of clearing and forwarding agent.

10. In the facts of the present case it is clear that the appellants are neither clearing any goods nor forwarding any goods. Products of the principal are supplied to the appellant on consignment basis and the appellant sells the products to the customers. Such an activity would not come within the service provided to a client by clearing and forwarding agent in relation to clearing and forwarding operation.

Merely because the appellant had once got registered as a clearing and Forwarding agent for the purpose of Service Tax under a misunderstanding of the correct legal position they cannot be compelled to continue such registration if they under law are not liable. In the light of the above, we set aside the order impugned and allow the appeal.

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