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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Jan-24-2006

Judge : R Abichandani, M T K.C.

Appellant : Medpro Pharma Ltd.

Respondent : Commissioner of Central Excise

Judgement :

1.In this appeal, a question has arisen as to whether the services provided by the appellant were in the nature of "clearing and forwarding agent" as contemplated by the relevant definition Clause 65(25) of the Finance Act defining "clearing and forwarding agent" which reads as follows: 65(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 manner to any other person and includes a consignment agent: 2. The authorities below have classified the services provided by the appellant to their principal under the category "clearing and forwarding agent" and confirmed the demand of Rs. 2,28,533/- of Service tax due to be paid for the period between July, 2001 and 15th August, 2002.

3. The learned Counsel appearing for the appellant has challenged the impugned order on the ground that the appellant was not providing "clearing and forwarding" services and was providing only forwarding services and, therefore, the appellant was not a "clearing and forwarding agent". He submitted that the word 'and' was used as a conjunctive in the expression "clearing and forwarding agent" and it

cannot be construed as 'or' and thereby be made disjunctive.

3.1 The learned Counsel submitted that the issue was fully covered against the revenue in two decisions of this Tribunal. He placed reliance on the decision of this Tribunal in Kulcip Medicines v. CCE, Delhi III unreported decided on 29.6.05, in which it was observed that there was no clearing done by the appellant and for that reason, the services rendered by the appellant did not satisfy the requirement of 'clearing and forwarding agent' Construing the CBEC Circular, reproduced in paragraph 5 of the judgment, the Tribunal observed in paragraph 6 that, the Circular made it clear that only when a C & F agent carries out both clearing and forwarding, the levy will be attracted. The relevant paragraph of the CBEC Circular No. 37B order No. 2/1/2002-ST dated 20.4.2002 from which this inference is drawn is reproduced hereunder: 10. The matter has been examined. Normally, a C & F agent receives goods from the factories or premises of the Principal or his agents, stores these goods, despatches these goods as per orders received from the Principal or owner, arranges transport, etc. for the purpose and prepares invoices on behalf of the Principal. For this service, the C&F agents receives commissions on the basis of agreed terms. Therefore, an essential characteristic of any services, to fall in the category of C & F agent, is that the relationship between the service provider and receiver should be in the nature of principal (owner) and agent. The C & F agent carries out all activities in respect of goods right from stage of their clearances from the premises of the principal to its storage and delivery to the customers.Vaman Pharma Private Ltd. v. CCE, Bangalore I reported in 2006 (130) ECR 0209 (Tri-Bangalore) in which the Tribunal held in paragraph 6 of the judgment, following the ratio of the decision in M/s. Kulcip Medicines (supra), that since the appellant therein was not carrying out the activity of clearing, they would not come within the purview of C & F agents for levy of Service Tax. Under that contract, the agent was receiving, storing and distributing the products of the principal to various stockist, distributors and other customers.

4. The learned authorised representative for the department submitted that the word "and" in the expression 'clearing and forwarding agent" is used for denoting the types of services which were provided by the service provider, and it is not necessary that such service provider should compulsorily provide all the types of

services that fall within the said clause to a particular customer. He submitted by way of an illustration that, if services of a person cooking food were provided by a person who cooks both vegetarian and non-vegetarian food, it cannot be said that he ceases to be a cook when he caterers only vegetarian food to vegetarian customers or non-vegetarian food to the non-vegetarian customers. He placed reliance on the following observations of Lord Hoftman in R.v. Oxfordshire County Council reported in 1999 (3) ALL ER 385 at page 396 (HL): As a matter of language I think that 'sports and pastime' is not two classes of activities but a single composite class which uses two words in order to avoid arguments over whether an activity is a sport or pastime. The law constantly uses pair of words in this way.

As long as the activity can properly be called a sport or a pastime, it falls within the composite class.

4.1 The learned Authorised Representative for the Department also relied upon the decision of Supreme Court in the case of Ishwar Singh Bindra and Ors. v. The State of U.P. In Stroud's Judicial Dictionary, 3rd Ed. it is stated at page 135 that "and" has generally a cumulative, sense, requiring, the fulfillment of all the conditions that it joins together, and herein it is the antithesis of "or". Sometimes, however, even in such a connection, it is, by force of a contents, read as "or". Similarly in Maxwell on Interpretation of Statutes, 11th Ed., it has been accepted that "to carry out the intention of the legislature it is occasionally found necessary to read the conjunctions 'or' and 'and' one for the other.

5. We note that the Board had issued a Circular No. B.43/7/97 -TRU dated 11.7.97 which indicates the job of clearing and forwarding agents as is reproduced below: Normally C & F agents do the job of clearing and forwarding. In a typical situation clearing and forwarding agents are appointed in outstation location by manufacturers or wholesale distributors so that they may clear the goods, store them and then forward the goods according to the instructions of the Principal owner. Thus the person concerned is an agent and an agent is an authorised representative of a named principal owner.

6. It appears that this Tribunal has in Kulcip Medicines Pvt. Ltd. (supra), the ratio of which was followed in Vaman Pharma Pvt. Ltd. (supra) has taken a view that only when a clearing and forwarding agent carries out both clearing and forwarding, the levy will be attracted.

We are unable to subscribe to this view for the reasons that follow.

7. The definition of 'clearing and forwarding agent' is meant to apply to a person who provides such type of services. The expression 'clearing and forwarding agent' would mean that the provider of service provides clearing as well as forwarding services but that does not mean that while providing either forwarding services or clearing services, a person who is engaged in providing clearing and forwarding services will come out of the ambit of the expression of "clearing and forwarding agent". It appears from the record that even the agreement under which the appellant was providing service indicates, in paragraph '1', that practice in the industry was to entrust the work to an outsider like a C & F agent. It was stated that: "Whereas, therefore, Cipla was on the lookout to identify a suitable agency to take up such activities, and, whereas Medpro, (i.e. the appellant), came forward to act as C & F agent, And whereas Medpro has offered to provide handling, clearing and forwarding services for the said products to Cipla's various stockists in Tamil Nadu region and also to various distribution centers all over the country.... And whereas Cipla desires to avail of the said facilities and services offered by Medpro..." the parties had entered into the agreement as narrated thereunder.

8. It would thus appear that the nature of services for which the contract was entered into fell within the ambit of what is known as 'clearing and forwarding agent'. The clearing and forwarding agent, in our prima facie view, would encompass a variety of services and the services provider will provide such services depending upon the needs of the customers. It is not necessary to provide compulsorily all the types of services to a customer who may want only some of the services which are normally provided by a 'clearing and forwarding agent'. The customers' particular requirements will not change the meaning of the expression 'clearing and forwarding agent' provided the services fell within the

category of services which are usually provided by "clearing and forwarding agents".

9. A forwarding agent is a freight forwarder. We have brought to the notice of the learned Counsel for the applicants as also the learned authorised representative for the department the fact that professional freight forwarders are popularly known as clearing and forwarding agents. The freight forwarding services would also normally include the clearance of the goods for export in the country of shipment and for import into the country of destination. (See, 'Unification of the Law of International Freight Forwarding', by Jan Ramberg, Professor of Law, Faculty of Law, University of Stockholm, Chairman of the FIATA Working Group for the Preparation of Model Rules for Freight Forwarding Services). Freight forwarders are often called clearing agents or act as a clearing agent when dealing with the imports (See GIA - Trading Dictionary of Foreign/International Trade Terms: "Freight Forwarder").

We, are therefore, unable to subscribe to a narrow construction of the expression 'clearing and forwarding agent' in the context of services provided by such agent, to the effect that a service provider would fall in that category only if he provides both clearing and forwarding services. It appears that a person providing services as clearing and forwarding agent may provide either or both of such services depending upon the requirement of customers which he may undertake to fulfil.

10. We, therefore, refer the following questions for the opinion of the Larger Bench: 1. Whether services provided by a person engaged in either clearing, or forwarding operations, or both, will all fall within the ambit of the definition of "clearing and forwarding agent" under Section 65(25) of the Finance Act, 1994, so as to attract the levy of service tax? 2. Whether only when the clearing and forwarding agent carries out both clearing and forwarding operations, the levy of service tax will be attracted and not otherwise, as held by the Tribunal in Kulcip Medicines P. Ltd. v. CCE, Delhi III Final Order No. 752/2005-Cus. dated 29.6.05 and Vaman Pharma Pvt. Ltd. v. CCE, Bangalore

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