

Medpro Pharma Pvt. Ltd. Vs. Cce

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Jun-22-2006

Reported in : (2006)(110)ECC652

Judge : R Abichandani, S Kang, Vice-, S T T.V.

Appellant : Medpro Pharma Pvt. Ltd.

Respondent : Cce

Judgement :

1. In this appeal before the Larger Bench, the following questions stand referred to us by the Division Bench vide its Misc. Order No.M/32/06-ST dated 24.04.2006: 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(23) 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 29.06.2005) and Vaman Pharma Pvt. Ltd. v. CC, Bangalore (23) 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.

3. As per Section 65(90), any service provided to a client by a clearing and forwarding agent in relation to clearing and forwarding operations in any manner would amount to a taxable service.

4. In this context, in the agreement as entered into by the appellant with Cipla Limited on 1.6.1999, the following passage appears: Whereas, therefore, CIPLA was on the look out to identify a suitable agency to take up such activities, and whereas MEDPRO came forward to act as C&F agents....

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 centres all over the country....

Cipla hereby appoints MEDPRO as its agent to receive, store and distribute stocks of the products including the promotional material...and forward them in such lots and in such manner to parties and destinations within the country as may be directed by Cipla from time to time....

5. It emerges from the above that the appellant had made an offer to provide "handling, clearing & forwarding services" to their principal.

6. The learned Counsel for the appellant vehemently argues that though the agreement might acknowledge that the appellant had offered to provide "C&F Services", what was actually provided by them were not in the nature of "C&F Services". It was repeatedly emphasized that the service provided by the appellants was not "clearing and forwarding".

Even if it is considered as forwarding, it was argued that mere 'forwarding services' would not amount to providing the services of "C&F Agent". The learned Counsel emphasized on the prominence of the word "and" to drive home the point that the meaning of "and" is conjunctive in the phrase 'C&F Agent' and unless both these activities are performed by the service provider, his service does not become taxable.

7. In this context, the learned Counsel places heavy reliance on the ratio of the decision of this Tribunal in the case of Kulcip Medicines Pvt. Ltd. v. CCE, Delhi-III

(supra), which hold that when the consignments of medicines are cleared from the factory by the manufacturer and delivered to the appellant at his premises, it cannot be said that service rendered by the appellant satisfies the requirement of clearing and forwarding. It was observed that since there was no 'clearing' done by the appellant, the services rendered did not satisfy the requirement of the definition 'C&F Agent'. In this case, the Tribunal took note of a CBEC Order (No. 2/1/2002-ST dated 24.4.2002) which had acknowledged that C&F Agent "carries out all activities in respect of goods right from the stage of their clearances from the premises of the principal to its storage and delivery to the customers".

8. Further, it was submitted by the learned Counsel that the terms 'clearing' and 'forwarding' have not been defined in the Finance Act, 1994. Dissecting Section 65(23) (which lays down a definition for 'C&F Agent') and Section 65(90) (which contains the definition for 'Taxable Service'), it was argued that, while the Legislature had intended a wider coverage for the definition of 'C&F Agent' under Section 65(23), it had been rather restrictive while defining 'Taxable Services' under Section 65(90). To support his contention, the learned Counsel seizes the ratio of the decision in the case of Mahavir Generics, Bangalore Order ST F.No. 12/04-NB(A) dated 27.04.2004, reported in 2004 (178) ELT 78 (T), wherein it was held that when products of principal were supplied to the appellant on consignment basis and sold by appellant to the customers, such activity cannot be taxed under 'C&F Agent'.

9. The learned Counsel further argues that as in the same year, the Legislature introduced three new categories, viz., customs clearing agent, steamer agent; and goods transport operators for levying service tax; by bringing all these three "ancillary" services, the Legislature had clearly intended to have a very restrictive scope definition for 'C&F Agents'.

10. During the course of hearing, the Bench had an occasion to observe that the Legislature had preferred the use of word "operations" while defining the taxable service, and not "activities". It was observed that the expression "clearing and forwarding operations" would have a meaning quite different from what can be derived from "clearing and forwarding activities". It was also observed that the

word 'operation' is more extensive and all-pervading than the word "activities". The Concise Oxford Dictionary, 9th Edition, word define "Operation" in the following manner : "1a. the action or process or method of working or operating. b. the state of being active or functioning (not yet in operation) c. the scope or range of effectiveness of a thing's activities. 2. an activity process; a discharge of function (the operation of breathing)". Thus, one can perceive that operation involves a "state of functioning" a momentum involved in activities, which can be inter-connected or even over-lapping. The learned Counsel, however, vehemently argued that the two activities, viz., clearing and forwarding are distinct and separate which are not complementary to each other. It was contended that by performing any one of these, it cannot be held that they become "clearing and forwarding agent" as such.

11. It was also submitted that it is a well established principle of interpretation that taxing statutes are to be construed strictly. He referred to the case of A.V. Fernandez v. State of Kerala 1957 SCR 837: AIR 1957 SC 657;(1957) 8 STC 561, in which the Hon'ble Supreme Court had laid down a principle that while construing fiscal statutes and in determining the liability of a subject to tax, one must have regard to the strict letter of the law and not merely to the spirit of the statute or the substance of the law.

12. During the course of hearing, the Bench had an occasion to observe on the contents of the synopsis handed over by the learned Counsel himself on 10.05.2006, which seems to blur the distinction of the two services, as sought to be made before us: 8.B.6 The term 'Clearing and Forwarding' refer to specific service of obtaining clearance of goods from certain authorities such as, port, railways, etc., and arranging their despatch to the owners of the goods or to other people as per owner's instructions. The clearing agent has to furnish the necessary documents on behalf of his principal in obtaining the clearance of goods.

13. However, the learned Counsel preferred to maintain the distinction as according to him, "clearing" cannot include "forwarding", as "forwarding" is not "clearing". He relied upon the definition of "forwarding agent" as defined in the

Penguin Business Dictionary, where the word "clearing" is missing: 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.

14. The learned Counsel also spent considerable time in anatomizing the word 'or' by referring to various 'sub-clauses under Clause (90) of Section 65 of the Act wherein the Legislature had specifically opted for this word. As a part of this wheeze, he referred to Sub-clauses (a); (g); (h); (i); and (q), all of which have employed the word "or" and not "and", arguing all through that the Legislature could have chosen "or", had it intended to tax either "clearing" or "forwarding" activity.

15. The learned authorized representative (SDR) of the Department submits that there are instances where the word "and" which is normally conjunctive could be used as disjunctive to derive the right sense of meaning. In this context, he relies upon the ratio of decisions in *R.S. Nayak v. A.R. Antulay* and *M. Satyanarayana v. State of Karnataka*, submitting that normally C&F Agent is not precluded from offering either of the services which either alone or in combination can fall within the scope of 'C&F Operations'. He states that the referral order passed by the Tribunal has rightly focused its attention on the agreement under which the appellants had offered their services to its principal. He draws our attention to the very first Paragraph of the said agreement, which refers to the various tasks to be performed. A perusal of this para would reveal the true colours of the appellant as they were engaged in several activities and not just "forwarding" as being claimed now. The para reads thus: Cipla hereby appoints MEDPRO as its agent to receive, store and distribute stocks of the products including promotional materials in the premises at TS-131/132, Thiru-Vi-Ka Industrial Estate, Ekkatuthangal, Chennai - 600 097 and forward them in such lots and in such manner to parties and destination within the country as may be directed by Cipla from time to time.

16. He further contends that activities like receiving the goods/storing, distributing and forwarding them all form part of the action, process or momentum involved in

"C&F operations". According to him "forwarding" cannot be distinguished from "clearing", as there is an inherent momentum in such events. To support his contention, he relies upon the observations of the Hon'ble Supreme Court in the case of Inayat Ali Khan v. State of UP , as contained in para 5, which had held that it is impossible to read the word "and" as "or", when a sub-clause especially mentioned two types of specialized forms, namely, those devoted to poultry farming and dairying.

17. Relying upon the above ratio, he contends that the context in which the word "and" occurs is all the more important than the very word itself, as usage of this word out of context would result in grave anomaly. It was also contended that "clearing" and "forwarding" are the two events in an activity, namely, "clearing" and "forwarding".

18. At this juncture, the learned Counsel for the appellant, states that the Hon'ble Supreme Court in the case of Ape Belliss India Ltd. v.UOI , had an occasion to examine a Tariff Public Notice for the information of the Importers, Customs House Agents and all other concerned that alloy steel which is known as stainless steel in the trade and having more than 11% chromium will be continued to be considered as stainless steel for the purposes of classification under the Customs Tariff Act, 1975.

19. While deciding this issue, the Hon'ble Court made the following observations: 6... A plain reading of the Section (sic Tariff Public Notice) clearly shows, as contended by Mr Bhatt, that for an alloy steel to be considered as stainless steel, it will have to satisfy two conditions i.e the alloy steel should be known in the trade as stainless steel and further, it should contain 11% chromium as a component of the alloy steel. This is clear from the use of the word "and". If the intention of the trade notice was to treat the two types of alloy steels as stainless steel, then it would have been made clear by using the word "or" instead of the word "and".

20. Further, relying upon the Apex Court's decision in the case of Central India Spg. Wvg. & Mfg. Co. Ltd. v. Municipal Committee 1958 SCR 1102 : AIR 1858 SC 341, it was contended by the learned Counsel that, in accordance with the principle of construction of taxing statutes, the statutes must be strictly construed

and in case of doubt, they must be construed against the Taxing Authorities and doubts resolved in favour of the tax-payer." (At this juncture, the learned SDR, intervenes to state that no doubt is being harboured by the respondent).

21. The learned Counsel for the appellants also relied upon the definitions of 'Clearing Agent' from P. Ramanatha Aiyar's Advanced Law Lexicon, Volume 1, A-C 2005: "Clearing agent. A person or company acting as an intermediary in a securities transaction or providing facilities for comparing data with respect to securities transactions. The term includes a custodian of securities in connection with the central handling of securities. Securities Exchange Act Section 3(a)(23)(A)(15 USCA Section 78c(a)(23)(a)).

(Incidentally, the Bench also observed that the following definition also occurs in the same Lexicon: 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.") 22. The learned SDR resumed his arguments stating that in the trade parlance, the term 'Clearing & Forwarding' is a well known, well accepted and well-understood term. The term includes not only "clearing" and "forwarding", but also a spectrum of tasks performed by 'C&F Agent'. According to him, clearing has to be viewed as incidental and ancillary to forwarding. It cannot be interpreted as a stand-alone activity, as it is a type of activity covered by the expression, "C&F Operations".

23. The learned SDR refers to the definition of "Freight Forwarder" as defined in GIA - Trading Dictionary of Foreign/International Trade Terms: F to emphasize upon the inter-connected nature of "forwarding" and "clearing": Freight Forwarder - ...Freight forwarders handle many of the formalities involved in importing such shipments.

A forwarder will also advise on suitable packing for the particular journey or commodity. He can prepare the various documents required for the different countries, giving advice on those, which the exporter must by law prepare himself. Freight forwarders are often called clearing agents or act as a clearing agent when dealing in imports.

24. He submitted that in view of this definition, 'Freight Forwarders' evidently end up performing the functions of a clearing agents or act as 'Clearing Agents', and hence a forwarding agent cannot extricate himself from being branded as a clearing agent, due to the inter-connection or inter-dependence that exists between these two activities.

25. He also refers to a Website Publication called 'Trade point Tanzania - Dar Es Salaam', which acknowledges that "professional forwarders (popularly known as 'Clearing Agents') are to process documentation and other procedures for clearing goods". Further, FIATA an International Association of 'Freight Forwarders' situated in Switzerland have also adopted an official description of 'Freight Forwarding and Logistics Services', which can be tailored to meet the flexible application of the services provided: Freight Forwarding and Logistic Services" means services of any kind relating to the carriage (performed by single mode of multimodal transport means), consolidation, storage, handling, packing or distribution of the Goods as well as ancillary and advisory services in connection therewith, including but not limited to customs and fiscal matters, declaring the Goods for official purposes, procuring insurance of the Goods and collecting or procuring payment or documents relating to the Goods. Freight forwarding Services also include logistical services with modern information and communication technology in connection with the carriage, handling or storage of the Goods, and de facto total supply chain management.

These services can be tailored to meet the flexible application of the services provided.

26. Referring to a Bombay Customs House Agent Association's objectives, the learned SDR focuses on their largesse to include "individuals, firms, institutions, companies, corporations engaged or connected with "clearing, forwarding and shipping of goods" in the port of Bombay." 27. The learned SDR further contends that even the appellants' understanding of the term 'C&F Agent' as revealed in their agreement is as understood commonly - and correctly - by the trade and industry. In their agreement, the appellants had correctly though naively acknowledged that they are none other than 'C&F Agents'. This fact, according to

him, cannot be overlooked now.

28. According to the learned SDR, while defining "Taxable Service" Section 65(19) includes "any service" provided to a client by a 'C&F Agent' in relation to the "clearing and forwarding operations" "in any manner. This would mean that any service concerning "clearing and forwarding operations" has to suffer the tax. As the word "operations" involves a dynamic process, rather than a pointed task, the operation of forwarding should owe its allegiance to clearing.

29. The learned SDR also presents a document titled - "Issues of Multimodal Transport Development in Africa" published by the United Nations Economic Commission for Africa, Ad-hoc Expert Group Meeting on Multimodal Transport, 14016 October, 2003, Addis Ababa, Ethiopia. In this document, para 37 reads as under: 37. There is no internationally accepted definition of the term "freight forwarder". Forwarders are known by different names in different countries, such as "customs house agent", "clearing agent", "customs broker", "shipping and forwarding agent" and in some cases acts as a "principal carrier", that is, the main carrier.

But one aspect of their activities which is common to all of them, whatever the name they use, is that they all sell their services only.

30. The learned SDR also relies upon the Principles of Statutory Interpretation by Guru Prasanna Singh, Ninth Edition, 2004 and draws our attention to the expression "sports" and "pastimes". In interpreting the said expression, Lord Hoffman said: "As a matter of language I think that 'sports and pastimes' 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. [R.v. Oxfordshire Country Council (1999) 3 All ER 385 p. 396 (HL)]. In the same way, it was submitted that 'C&F Operations' should belong to the same class of activities, though they could be misconstrued as belonging to different activities.

31. We have heard both sides and perused the record. On a fresh look at the whole issue and after taking into account the various newfangled arguments and nascent lines of thinking, upwrapping before us, as discussed in the fore-going

paragraphs, we find ourselves in a better position to appreciate the wisdom in the words of Jules Romain when he said : "What I say below represents only conclusions with which I would identify myself, if I were obliged to stop thinking today". The underlying wisdom in these words has greatly encouraged us in this inquest to appreciate the emerging facts and scenario in a proper perspective. Crucial key-word in the definition of taxable services, namely, "C&F Operations" needs to be viewed afresh in this scenario.

The whole "operations" involved in "C&F Operations" now remind us of an orchestra, performing a western classical symphony. It reminds us of a connoisseur's experience of harmony in western classical music. While listening to Mahler's 9th Symphony, one does not listen to an individual violin or a trumpet, but the harmony emanating from many different seemingly unrelated instruments. In the same way, a C&F Agent's functions consisting of seemingly unrelated tasks are well orchestrated. This view of ours is strengthened by various references including the Report of the United Nations Economic Commission for Africa referred to by us in the preceding paragraphs all revealing in no uncertain terms that the freight forwarders are known variously as clearing agent, shipping forwarding agent etc. We are, therefore, of the view that even if one segment of activities is not demonstrated to be performed, it cannot be held that the appellants were not engaged in taxable service. Due to their orchestrated nature of work, such isolated activity can also be covered under "C&F Operations". Merely, because the bassoon was not played in one of the movements of a symphony, it does not cease to be otherwise a part of the orchestra.

While forming this view, we have certainly not overlooked the fact that while music can be sometimes taxing, a tax can never be musical! 32. While arriving at this conclusion, we also go by the trade understanding based on sheer common sense, which is often uncommon.

Because a buyer buys only rice and not wheat in a grocery shop, which claims to sell "wheat and rice", the shop cannot cease to be a shop selling "wheat and rice". In the same way, rendering only "forwarding" service cannot make the appellant cease to be a "Clearing and Forwarding Agent", so as to save him from the tax.

Some customers may want only clearing operations, while some forwarding, and others both.

The expression "clearing and forwarding operations" is a compendious expression of nature of services offered, any of which will bring the service providers in the tax net of this category. Moreover, in the process of forwarding operations - clearance stages may arise such as at octroi posts or subsequent transits.

33. We, do agree that it is the context in which the word "and" is positioned, being sandwiched between the words "clearing" and "forwarding" has to be looked into, while interpreting the meaning.

Like the legendary Trishanku, the word "and" is dangling between "clearing" and "forwarding" - neither divorcing from the Heavens, nor from the earth. In such a positioning, it is not possible to segregate the holistic concept of "clearing and forwarding" into divisible activities, either or both of which can be provided for answering the customers' needs.

34. It has also been argued before us at length that whenever any ambiguity exists, the decision should be in favour of the assessee.

Thanks to the competent assistance available from the rival parties, the expression "C&F Operations" appears no longer esoteric. Hence, there is no case to extend any benefit of doubt to the assessee.

35. In view of the above discussion and findings, we hold that the "C&F Operations" cannot be dissected into "Clearing" and "Forwarding" as they fall in the common category and hence all or any of the services of that category will be services provided by a "C&F Agent", connected with "C&F Operations" and would attract levy of service tax under Section 65(23). Question No. 1 referred to us is accordingly answered in the affirmative and the question No. 2 in the negative.

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