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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Sep-25-2006

Reported in : (2006)(112)ECC653

Judge : R Abichandani, S T T.V.

Appellant : Super Poly Fabriks Ltd.

Respondent : Cce

Judgement :

1. The appellant is registered with the Central Excise Department as a 'Clearing & Forwarding Agent', rendering services of consignment stockist on behalf of M/s Gas Authority of India Ltd. (hereinafter referred to as 'GAIL'). During the period 1.9.1999 to 31.7.2002, it neither paid Service Tax nor filed the half yearly ST-3 Return, though it had received Rs. 41,12,423/- as commission for the services rendered to GAIL. A show cause notice dated 20.10.2002 was, therefore, issued by the Department relying upon the relevant agreement, particularly paras 20.1 and 20.3 thereof, indicating that GAIL had appointed the appellant as its consignment stockist with following terms and conditions: (i) Service charges of Rs. 500/- PMT shall be paid by M/s GAIL to the consignment stockist (i.e. notice) for the quantity sold by them.

(ii) Rs. 400/- PMT shall be paid to the consignment stockist for getting/booking orders for the product of M/s GAIL.

(iii) Rs. 100/- PMT shall be paid to the consignment stockist for release/clearance of product locally from their stock on the orders booked by M/s GAIL directly.

In reply dated 08.01.2004 to the said show cause notice, the appellant contended as under: We refer to Show Cause Notice No. V(ST)21/D/LDH-II/9/03/8420 dated 20.10.2003 and case fixed for hearing on 08.01.2004 before you. We have deposited Rs. 25,000.00 vide Challan No. 01/SPL dated 10.01.2003 a photocopy of the same is enclosed herewith for your ready reference and records.

Sir, we hereby stated that due to financial crises, our all units are closed since February, 2003. On these adverse circumstances, we have to file our application with BIFR a copy of registration with BIFR is enclosed herewith for your ready reference.

Sir, we are not in position to deposit balance service tax in one instalment. Therefore, you are requested to please allow us for deposit balance service tax on instalments.

The learned Deputy Commissioner vide his order-in-original dated 17.03.2004 concluded that the appellant has been providing the taxable service, confirmed the demand of service, tax amounting to Rs. 2,05,621/-, and imposed penalty. Aggrieved by this order, the appellant approached the Commissioner (Appeals) who vide his order dated 15.02.2005 held that a sum of Rs. 1,95,830/- instead was due from it as the total amount received by the appellant from GAIL was to be treated as inclusive of Service Tax. He had also mentioned that during the course of proceedings, none appeared for personal hearing fixed on 12.07.2004 and 20.07.2004, and hence his decision was to be based on the evidence available on record.

2. Aggrieved by the said order of Commissioner (Appeals), the appellant has come to this forum.

3. In the appeal memo before us it is stated that, the appellant did not render service of a 'Clearing & Forwarding Agent' and that the Commissioner (Appeals) failed to understand that they did not undertake any activity in connection with

either clearing or forwarding operations. It was further stated that, as the appellant cannot be faulted with any deliberate defiance of law, no penalty can be imposed.

4. According to the learned Counsel for the appellant, the appellant was rendering a "composite service" of selling the goods on behalf of GAIL in which storage and other activities were only ancillary in nature. While taking delivery of the goods from GAIL, no service was rendered by it as a clearing agent and while selling the goods, no forwarding operations were carried out by them. Referring to the contract entered into by the appellant with GAIL, it was stated that the main objective was to sell the goods on behalf of GAIL as its agent and that no activity undertaken by it could fall within the meaning of "taxable service" of clearing and forwarding agent was undertaken by them.

5. In this context, the learned Counsel relied upon the Circular dated 24.04.2002 issued by the Central Board of Excise & Customs to drive home the point that "mere storage of goods" cannot make them liable to service tax. In this connection, the learned Counsel would rely upon the ratio of the decision made by the Court of Justice of the European Communities and also House of Lords in Card Protection Plan Ltd. Case reported respectively in (1999) STC 270 and (2001) STC 174. In the former case, (Case No. C-349/96), the Court of Justice held that a service must be regarded as ancillary to the principal service if it does not constitute for customers and aim in itself, but a means of better enjoying the principal service supplied.

6. In the later case, (2001 UKHL/4) the House of Lords had an occasion to examine fifteen types of services, namely, for example, Confidential Registration, Insurance Cover, Un-limited Protection, Immediate Loss Notification, Replacement Cards etc. etc.). rendered in what is "called Card Protection Plan" (CPP). It was observed that, an overall view should be taken and over-zealous dissecting and analysis of particular clauses should be avoided. The essential feature of the scheme or its dominant purpose was identified as the provision of insurance cover against the loss arising from misuse of credit card and which had to suffer tax.

7. Drawing a clue from this case, the learned Counsel argues that in the case before us, the appellant is engaged in storage and selling, and if at all some

activities of clearing and forwarding operations show their heads, only the overall context of storage and selling has to be taken into account, ignoring the incidental activities of clearing and forwarding. As these activities are inseparably and intricately connected, the "compositeness" of the activity needs to be appreciated in its proper perspective without taking recourse to artificial dissection. He would also rely upon yet another judgment of House of Lords in Customs and Excise Commissioners v. British Telecommunications plc, reported in (1999) STC 758, to drive home the point that the essential feature of a transaction might show that one supply was ancillary to another and that it was the latter that was to be treated as the supply for VAT purposes.

8. He also relied upon the Hon'ble Andhra Pradesh High Court's decision in the case of Commissioner of Income Tax v. Sundwiger Empg. & Co.

(2003) 262 ITR 0110, which had an occasion to examine two separate contracts for two prices for purchase of equipment and for getting technicians to supervise the installation of the equipment. The latter was held to be part of a single transaction for sale of equipment.

9. In yet another case brought before the Hon'ble Supreme Court in (Northern India Caterers (India) Ltd. v. Lt. Governor of Delhi. (1978) 4 Supreme Court Cases 36, it was held that meals served by a hotel in its restaurant to non-residents constituted a single contract for rendering service and that it was not permissible to artificially split the price between service and sale of foodstuffs. From this ratio, it was argued that in the task performed by the present appellant, sale was the primary purpose and that storage, clearing & forwarding operations etc. was incidental and ancillary for the same.

10. The learned Counsel would also rely upon the Apex Court judgment in Bharat Sanchar Nigam Ltd. and Anr. v. Union of India and Ors.

, in which it was held that, the nature of the transaction involved in providing the telephone connection could be a composite transaction of service and sale.

11. It was also argued that the contract did not require that the goods were to be delivered at the premises of the buyers as actually customers were taking delivery of the goods from the appellant's premises. The delivery from factory was to be taken by the customers only when orders were procured by the appellant. Emphasizing on the fact that selling operations were essential part of consignment stockist, the learned Counsel relied upon the definition of "consignment" as defined in Black's Law Dictionary: Consignment. The act or process of consigning goods; the transportation of goods consigned; an article or collection of goods sent to a factor; goods or property sent, by the aid of a common carrier, from one person in one place to another person in another place; something consigned and shipped. Entrusting of goods to another to sell for the consignor. A bailment for sale.

The term "consignment", used in a commercial sense, ordinarily implies an agency and denotes that property is committed to the consignee for care or sale. Parks v. Atlanta News Agency, Inc. 115 Ga.App.842, 156 S.E. 2d 137, 140.Mahavir Generics v. CCE. Bangalore , which happened to examine a similar agreement. It was held in para 8 of the said judgment that the agreement with specific reference to the clauses would show that the appellant was not acting as a clearing & forwarding agent. It was also recognized that the tax liability was attached to the taxable service alone, and so long as the appellant was not providing a taxable service, the appellant cannot be brought under the tax net.

13. The learned authorized representative of the Department refers to the show cause notice dated 20.10.2003 issued to the appellant and argued that the show cause notice would make it clear that the nature of service rendered by the appellant was taxable as "clearing & forwarding agent" as they were carrying on activities which are in the nature of "clearing & forwarding operations." He also pointed out that at no occasion any plea was raised by the appellant before the authorities below that they never rendered such services which were taxable, but, on the other hand, they never even bothered to file a reply to the show cause notice. In this context, he would heavily rely upon the ratio of the decision of the Hon'ble Supreme Court in the following cases CCE. Raipur v. Steel Authority of India Ltd. 2006 (76) RLT 6 (SC). "This finding of the Commissioner was not

challenged by the respondent before the Tribunal. In view of the fact that the findings of the Commissioner on the aforesaid point was not challenged by the respondent before the Tribunal, the respondent cannot be permitted to raise this argument now before us."Warner Hindustan Ltd. v. CCE. Hyderabad . "It is impermissible for the Tribunal to consider a case that is laid for the first time in appeal because the stage for setting out the factual matrix is before the authorities below.

14. It was also brought to our notice that the appellant was granted personal hearing for five times before the order-in-original was passed and neither the noticee attended the personal hearing nor any extension was sought by him. It was also emphasized that at no stage during the proceedings the levy was ever challenged by the appellant. Even before the Commissioner (Appeals), the appellant had only sought for re-calculation of the amount of Service Tax demanded from them.

15. It was also argued that the scope of textile service as under Section 65(105)(j) of the Finance Act, 1994 has been made was vast and wide by the inclusion of terms, such as, "in relation to" and "in any manner".

16. It has been argued by the learned Counsel for the appellant that the appellant was rendering a composite service of selling the goods on behalf of GAIL in which storage and other activities were only ancillary in nature and the tax levy should be addressed only in respect of the principal service which is made taxable under the law.

17. It was also argued by the learned authorized representative of the Department that the very definition under Section 65(25) has created a legal fiction inasmuch as the consignment agent whether engaged in the activities of clearing and forwarding or not has to be included as rendering taxable service. On going through the Section 65(105)(j) of the Finance Act, 1994 which defines the 'Taxable Service' , which is reproduced below: Section 65(105)(j). to a client, by clearing and forwarding agent in relation to clearing and forwarding operations, in any manner; 18. Having heard both the sides for long and on going through the record, more particularly, an agreement titled as "Consignment Stockist Agreement" made

on the 12th January, 1999, particularly, Clause (4) of the said Agreement), it is apparent that the principal Company shall make available the product from its factory/warehouse for the consignment stockist. This would evidently mean that the appellant has to lift or make arrangements to lift the goods from the factory/warehouse for distribution/sale or storage at his cost. The Clause (5) of the said Agreement nails the responsibility of smooth movement of goods on the appellant in following terms: (5) The company shall not be liable for any short delivery of or damages to the said products or any part thereof after delivery of the said products is taken by the Consignment Stockists or for any delay in supply of the said products caused by any circumstances beyond its control. The Consignment Stockist, however, accepts full responsibility for any demurrage which may be incurred in respect of the Consignments of the said products dispatched by rail, road, air or water provided it is not due to the fault of the Company.

19. On going through the various clauses, such as, Clause (11), (14), (15) & (17) etc., it becomes clear that as a consignment stockist, the appellant is positively concerned with the movement of goods between the factory/warehouse of the Company for distribution, sale or storage.

It was also admitted that the goods are sold directly to the buyers on procuring the orders by the appellant and the agents lifted them from the factory of the principal for further distribution. In the case of Mahavir Generics v. CCE. Bangalore, supra, on whose ratio heavy reliance was placed by the appellant's side, it appears to us that it would hardly assist the appellant because the terms of the agreement in that case had clearly stipulated that it is the principal who will supply the product from any of its depots. It is the principal who undertook to deliver the products to the agent's godown at Bangalore at his cost in that case. The agent there was not at all concerned with the handling or movement of goods unlike in the present case where the consignment agent is required to lift the goods from the factory of the principal and distribute the same either directly to the buyers or bring them to his godown for future sale and delivery. From the agreement under our scanner, it also appears that the liability for delays in delivery in transit through the air, road or water ways solely rested on the appellant. There is a more explicit indication of the

fact that the appellant was required by his agency terms to lift the goods for delivery and arrange for distributing them to the buyers, by making necessary transit arrangements. Therefore, the activities of lifting, receiving, stocking and delivering the goods to the buyers, clearly make a clear chain of activities, involving clearing and forwarding operations. Clause 8(3) of the contract spells out such an arrangement in no unclear terms: 8.3 In case of any stock transfer consignment is received in damaged condition, consignment stockist shall record the same on the original lorry receipt indicating the number of damages bags and lodge the claim on transporter within five days under registered acknowledgement due and simultaneously send intimation to the company together with a copy of the claim.

20. The argument made on behalf of the appellant that para 8.3 of the said agreement makes it clear that they only received the goods and based on this, the contention that their case was akin to the case of Mahavir Generics. supra, appears to us rather misconceived in view of the fact that the other terms & conditions of contract required them to work towards distribution, stocking or delivery from the factory/warehouse of the principal.

21. The argument that the activities undertaken by the appellant was of composite nature and it was necessary that the essential characteristics of their activities viz. selling, which has to be appreciated and not ancillary and incidental activities (like the consignment stockist or clearing and forwarding agent) should not be taken importance is not tenable. Sub-section (1) of Section 65(A) makes it clear that, taxable services shall be determined according to the terms of the said clauses of Clause (105) of Section 65 and when for any reason a taxable service becomes classifiable under two or more sub-clauses, then only resort to Sub-section (2)(b) could be taken. It appears from the record that it was never the case of the appellant that the services were classifiable under two or more different heads of taxable services. Further the provisions of Section 65(A) have come into effect w.e.f. 14.05.2003 much after the period of transactions in this case.

22. A perusal of the agreement indicates to us a smooth, well-orchestrated movement of goods from the premises of the principal to its final destination and

with a pro-active role played by the appellant. In terms of the reasoning taken by this Tribunal in Mahavir Generics, supra, such activities as carried out by the appellant in our opinion, would come under the purview of "Clearing and Forwarding Operations".Larsen & Toubro Ltd. v. Commissioner of Central Excise. Chennai 2006 (3) SIR 321 (T-LB), is quite distinguishable. It was observed in this judgment that, clearing & forwarding operations did not flow directly or indirectly from mere procurement of orders and that there was no obligation on the person procuring orders as a Commission Agent for the principal carrying out clearing & forwarding operations in respect of the goods which were to be supplied pursuant to the orders so procured.

The facts of the present case are different as we have observed herein before scanning their contracts para 31 of the Larger Bench's judgment in Medpro Pharma Pvt. Ltd. v. CCE. Chennai. 2006 (3) STR 355 (T-LB).

would 31 ...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.

24. The Circular dated 11th July, 1997 issued by the Central Board of Excise & Customs acknowledges the following activities "normally" undertaken by a Clearing & Forwarding Agent: (a) Receiving the goods from the factories or premises of the principal or his agents; (d) Arranging dispatch of goods as per the directions of the principal by engaging transport on his own or through the authorized transporters of the principal; (e) Maintaining records of the receipt and dispatch of goods and the stock available at the warehouse; In our opinion, each and every one of these need not be carried out in a clinical precision in order to make one a clearing & forwarding agent.

25. Further, a plain reading of Section 65(25) of the Finance Act, 1994 which defines "Clearing & Forwarding Agents" would show that a "consignment agent" has been drawn into its quicksands: 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.

26. The legal fiction created by stamping the services of "consignment agent" as "clearing & forwarding agent" has its stamp of approval of the Apex Court as emerging in the following citations relied upon by the Revenue:Builders Association of India and Ors. v. Union of India and Ors.

fiction should be carried to its logical end. There should not be any hesitation in giving full effect to it."Union of India v. Jalyan Udyog . "It is well settled that where a fiction is created by a provision of law, the court must give full effect to the fiction, and as is often said, it should not allow its imagination to be boggled by any other considerations. Fiction must be given its due play; there is to be no half-way stop. According to this notification, therefore, the date relevant for determining the value and rate of the customs duty chargeable in the case of two ships concerned in Jalyan Udyog is the date on which they were broken-up.

27. In this context, a plain reading of Section 65(105)(j) would reveal that 'Taxable Service' should mean any service provided to a client by a clearing and forwarding agent including a consignment agent (Emphasis Supplied) in relation to clearing and forwarding operations, in any manner. In the present case, the appellant is admittedly a consignment stockist, who is actively involved in "Clearing & Forwarding Operation" by taking responsibilities for the movement of goods right from the factory/warehouse of the principal upto the stage of delivery to the buyers in one or many ways. There is, therefore, no doubt, that the appellant is fully covered within the tax framework, being a "Clearing & Forwarding Agent" engaged in relation to "Clearing & Forwarding Operations".

28. For the foregoing reasons, we do not find any frailty in the impugned order. The appeal is, therefore, dismissed.