

international Clearing and Vs. Cce

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Tamil Nadu

Decided On : Oct-10-2006

Reported in : (2007)8STJ388CESTAT(Chennai)

Judge : K T P.

Appellant : international Clearing and

Respondent : Cce

Judgement :

1. In the impugned Orders-in-Appeal No. 60/05 dated 30-12-2005 and 59/05 dated 30-12-2005, the Commissioner (Appeals) has sustained demand, respectively of Rs. 5,28,058/- and Rs. 3,74,981/-, along with interest, made by the original authority in terms of Section 73A of the Finance Act. 1994, as amended. These amounts were demanded from M/s.

International Clearing and Shipping Agency, Chennai being the service tax short paid for Steamer Agents' service and Customs House Agent's service rendered by the assessee. The orders relate to the period 1-4-2002 to 31-3-03. The tax amounts relate to various amounts decided to be collected by the assessee in its capacity as Steamer Agent and CMA and accounted for in its Balance Sheet for the relevant period as 'operational surplus'. Findings in both the impugned orders as regards liability of the assessee are similar and as in two such orders passed by the Commissioner for an earlier period, except that he has vacated penalties imposed by the original authority in the impugned orders.

2. It is seen that the operational surplus of the assessee as Steamer Agent comprised realisation in excess of actual expenses like lift/on/off/storage/transportation/survey/monitoring services etc., the rebate and brokerage incurred by the appellants on behalf of various shipping lines. The lower appellate authority has treated these surplus charges received by the assessee from various shipping lines as remuneration for services rendered in any manner in relation to ships' husbandry, dispatch or any administrative work related thereto as well as the booking, advertising or canvassing of cargo and container feeder services. According to him, all the above services rendered in any manner to a shipping line by a Steamer Agent were taxable services. The above charges were decided to be part of taxable value and accordingly, the demand was confirmed.

3. Similarly, the assessee, as a Customs House Agent, had received from their clients amounts in excess of actuals incurred on activities, such as loading, unloading, transportation, photocopying expenses, telephone charges, taxi charges, collection charges, commission charges, etc. in connection with the services provided as Custom House Agent. In the case of the appellant as CHA. the demand also covers commission received on exempted service. In both the orders, the lower appellate authority accepted the submission of the appellants that they were not liable to be penalised. He held that the short payment occurred due to disputed interpretation of legal provisions and that there was no mala fide in not paying the amounts demanded, by the assessee.

4. Ld. Counsel appearing for the appellants, argued that the surplus in both cases did not comprise the amounts collected towards service rendered as Steamer Agent or CHA. The amounts incurred on behalf of their clients on various items of work had been reimbursed to them. As the payments had been made upfront and on adhoc basis, there were excess realisations in certain cases. These amounts did not represent taxable value. Citing the decision of the Hon'ble Supreme Court in the case of Baroda Electric Meters [1997 (94) E.L.T. 13 (S.C.)], it was submitted that no tax was due on profit made by the assessee on any ancillary activity not being the activity liable to tax.

5. It was also submitted that in both the cases, larger period has been invoked by lower authorities for demanding the tax amounts and that the same was not in accordance with law. Similar orders had been passed for the period 1997-2002 earlier after perusing the Balance Sheet of the appellants. The Department was aware of the assessee collecting these charges and earning a margin, from their accounts. Therefore, larger period was incorrectly invoked by the Commissioner. It was prayed that pre-deposit may be waived and recovery of demands stayed pending decision on the appeals.

6. Ld. SDR argued that the amounts on which service tax has been demanded in both the cases represented taxable value of the respective services, as the taxable value is the gross amount billed by the assessee on their clients. She submitted that as per Section 73(a) as it existed at the material time, if an assessee failed to file return under Section 72 for any period or failed to disclose wholly or truly material facts necessary for assessment, the Central Excise Officer could serve notice on the assessee within a period of five years from the due date for filing the return and proceed to assess or reassess the value of the taxable service. In the subject cases, as observed by the original authority, the Department had to unearth the required information from the Balance Sheets of the assessee during the audit of the records of the assessee's firm. The appellants had failed to disclose all material facts necessary for assessment by the Department.

She also relied on the Stay orders No. 994 - 995/05 dated 22-12-2005 (Appeal No. S/81 & 82/05) 2006 (2) S.T.K. 139 (T) in the earlier cases, wherein this Tribunal had ordered pre-deposit of 25% of the amount of tax demanded. She prayed that similar orders may be passed in these cases also.

7. After hearing both sides and considering their submissions, I find that the amounts accumulated as surplus were the balance of the amounts collected in advance from the clients towards various activities and prima facie not remuneration for the respective services rendered to their clients. I also find considerable force in the argument that larger period cannot be invoked to demand differential tax for a subsequent period after having invoked the larger

period once in confirming the demand. From the wording of Section 73(a) it is apparent that the provisions of the sub-section can be invoked only in a case where the appellant has deliberately withheld the material facts relevant for assessment. In this case, the Commissioner has given a finding that the assessee had not paid the tax demanded owing to wrong perception of their liability and there was no mala fide. There is no dispute that the demand would be fully time barred, were it to be made In terms of Section 73(b) of the Finance Act, 94. The appellant has been able to make a prima facie case against the demand in both the cases. In the circumstances, it is ordered that there will be total waiver of pre-deposit of the amounts demanded and stay of recovery of the same during the pendency of the appeal. These appeals may be linked along with the appeal No. S/81 and 82/05 for final hearing in their turn.

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