

Binlas Duplux Ltd. Vs. C.C.E.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Feb-05-2007

Reported in : (2007)11STJ8CESTATNew(Delhi)

Judge : N T C.N.B., M Ravindran

Appellant : Binlas Duplux Ltd.

Respondent : C.C.E.

Judgement :

1. The appeal is directed against the demand of service tax of over Rs. 48 lakhs and imposition of equal amount of penalty on the appellant.

The first finding is that the appellant is a clearing and forwarding agent and is liable to discharge service tax on that service. The second is that the appellant rendered service as a real estate agent.

The duty demand on this count is about Rs. 4.5 lakhs.

3. The contention of the appellant was that it was a mere commission agent and it rendered no service in relation to clearing and forwarding of goods. This contention was made before the lower authority and it was held in the impugned order that the services of attending tender, procurement of order etc. would fall in the category of clearing and forwarding agent. While passing that order, the Commissioner was going by an order of this Tribunal in the case of Prabhat Zarda Factory . In regard to real estate agency, the submission was that the appellant

had only taken the commission by obtaining contract for a period and it did not function as a real estate agent in relation to sale, purchase, hiring etc. The impugned order further held that the appellant has rendered service in relation to maintenance of the real estate and therefore, the service came in the category of real estate agent.

4. Ld. Counsel for the appellant points out that first issue is no more open in-as-much as the Larger Bench of this Tribunal has over-ruled the Division Bench decision in the case of Prabhat Zarda L&T Ltd. 2006 (3) STR. 321. It is also being pointed out that the Commissioner (Appeals) has allowed relief to the appellant in Appeal No. 137 dt. 17.8.06 in the light of the Larger Bench decision of the Tribunal. The submission is that the appeal is required to be allowed in view of the Larger Bench decision as well as the later order of Commissioner (Appeals).

5. Ld. DR would submit that the demand is for the period of over three years. In this connection, he would also refer to a contract between the appellant and Sarwan Kumar dt.25.3.99. The scope of the contract included "arrangement and execution of orders". The contention of the Ld. DR is that execution of orders would involve handling of goods also. He would also refer the appellant's appeal before the Commissioner (Appeals) wherein it is stated as under: That so far as the appellant is concerned, he has only assisted parties in procuring orders and in stray instances the procurement of orders is linked to supply against tenders, inspection of goods and collection of payments. The contract of the appellant has generally concluded even before appropriation of goods to the contract i.e. it was generally the duty of the contractee concerned to deal with the departments on their own after the orders had materialized. They were themselves concerned with supply against tenders, inspections of goods, collection of payments and warehousing/transportation of goods. Therefore, the appellant was neither directly or indirectly concerned with handling of goods. The contract of the appellant with the contractee was a divisible contract and the same materialized and concluded even before goods came into existence after their appropriation. Therefore, directly or indirectly (apart from stray instances, the appellants were not at all concerned with goods, but were only concerned with procurement of orders. It is also emphatically stated that the appellant had to do nothing with goods and the

appellant was nowhere concerned with acceptance or rejection of goods and their commission was only linked to procurement of orders.

Ld. DR would point out that, according to the appellant itself, tax would be attracted atleast in some cases.

6. The finding which justified imposition of penalty is that the appellant had not disclosed the nature of the service rendered and paid service tax in time. This finding was recorded on the appellants' submission that it was under the bonafide belief that its service as a commission agent did not fall within the scope of the services in question (clearing and forwarding) and that was the reason for non-payment of tax and non-filing of returns.

7. SCN dt. 16.1.04 whereunder the proceedings were initiated summarizes the service contract from year to year. It is to be seen that the service is described as "supply and collection of electromechanical meters to various Govt. parties" "arranged sales of chemical" "arranged customers for supply of soda ash" etc. Thus, according to the notice, the revenue's case was that arranging customers, suppliers and collection of orders etc. were the service rendered and those services were in the category of clearing and forwarding. We do not find any mention in these contracts or on the record that the appellant was concerned on engaged for clearing and forwarding goods. It is well settled (Larger Bench judgment) that unless the clearing and forwarding of goods is involved, levy of service tax as clearing and forwarding agent would not be attracted. Since the record does not disclose such involvement in any case, we are of the opinion that the appeal is to be allowed on this issue. We also do not consider it necessary to remand the case for fresh proceedings in-as-much as even the contract referred to by the Ld. DR speaks of only "execution of orders". Execution of orders is an entirely different activity from the clearing and forwarding of goods. The statement in para 3 in the appeal also does not seem to warrant the conducting of a fresh proceeding. A careful reading of that para shows that the appellant's contention confirms that the appellants was not at all concerned with the clearance of the goods but was concerned with the procurement of goods only.

In regard to tax demand as real estate agent, it is to be seen that no service like purchase/hiring of real estate is rendered. Therefore, the appellant was not acting as a real estate agent. That demand is also clearly erroneous.

8. This brings us to the question whether the extended period of payment is justified. The appellants' position was that, it was under the bonafide belief that no tax was attracted on the appellants' service. We have already noted that the services mentioned in the contracts cannot be classified as clearing and forwarding service. The provision of law which enables the issuance of SCN stipulates that the period of five years is attracted when Central Excise Officers/Dy.

Commissioner has reason to believe that omission or failure on the part of the assessee to make a return or to disclose material facts is involved.

9. In the present case, the appellant's belief that tax is not attracted on commission agency remains upheld by the Larger Bench of this Tribunal. In such a situation, there is no reason to hold that the appellant had omitted to file return or to disclose material.

Therefore, the extended period is not attracted.

10. It is well settled that in the absence of tax demand, penalty would not be attracted.

11. In the result, the impugned order is set aside and the appeal is allowed with consequential relief to the appellant.

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