

Cce Vs. Chandan Chemicals

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Apr-24-2007

Reported in : (2007)10STJ43CESTATNew(Delhi)

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

Appellant : Cce

Respondent : Chandan Chemicals

Judgement :

1. The respondent sells Glycerin, Nickel catalyst, Aroma chemicals & Perfumery compound manufactured by Hindustan lever Ltd. at Varanasi.

The sale is under an agreement dated September 2001. The agreement describes the appellant as a "commission agent". The basic arrangement is that Hindustan Lever Ltd. would despatch the said products to the commission agent, he would clear the consignments, store them in his godown and sell them at prices indicated by M/s Hindustan Lever Ltd. The sale proceeds are remitted to Hindustan Lever Ltd on a weekly basis, after keeping the agents commission.

2. Under the impugned order, Commissioner (Appeals) set aside the service tax demand of about Rs. 19,000.00 made on the respondent agent.

The demand had been made by treating it as a "clearing and forwarding agent". The Commissioner set aside that finding and held that a commission agent came within the scope of "Business Auxiliary Services", another service subject to

service tax during the relevant period and that commission agents were exempt from duty during the relevant period.

3. The present appeal of the revenue, contends that in terms of the agreement between the parties, the respondent was a consignment agent and was liable to service, as such. It is also being contended that for an earlier period, the appellant had filed a refund application and the same had been rejected in adjudication and that order has become final.

The contention is that since the appellant had accepted the finding that it is liable to service tax as clearing and forwarding agent, (being a consignment agent) it was not open for it to challenge the present demand.

5. The submission of the learned SDR is that 'consignment agent' remains specifically included in the definition of clearing and forwarding agent and since the appellant was a consignment agent in receiving the consignments and selling them, it was liable to pay duty as clearing and forwarding agent. He would also point out that specific provisions existed in the agreement for clearing the consignments sent by the principal, storage of the consignments, keeping accounts for the sale etc. and these made the appellant a consignment agent. The appeal of the revenue specifically relies on Clauses 2, 6, 7, 8, 12, 13, 14, 16, 17 & 18 of the agreement to argue that the appellant's service is of clearing and forwarding. Reliance is also being placed by the learned SDR on the judgment of this Tribunal in the case of Super Poly Fabriks Ltd. v. CCE, Ludhiana as reported in 2006 (4) S.T.R. 595 (Tri.

- Del.).

6. The learned Counsel for the respondent would submit that revenue's contention cannot arise at all since "commission agent" remains specifically included in the definition of another service namely "Business Auxiliary Services". He would also point out that "commission agent" remains defined under "Business Auxiliary Services" as a person, inter-alia, 'dealing with goods'. It is his contention that mere receipt of the goods and storing it before sale would not convert a commission agent into a consignment agent or a clearing and forwarding agent. It is also being

pointed out that, to attract the provisions of clearing and forwarding agent, a consignment agent has to perform the function of clearing and forwarding the goods and a consignment sales agent would not fall in that category, while a consignment custody agent might fall in the category of clearing and forwarding agent.

Learned Counsel would also argue that the decision in the case of Super Poly Fabriks Ltd. would not be applicable to the present dispute, in as much as, it was found, as a matter of fact, that the party was concerned with the clearing of the goods from the factory onwards.

7. As already noted, the agreement between the parties specifically states that the appellant shall be a commission agent. Its remuneration is also a commission for the sales effected by it. Since the revenue is specifically relying on certain clauses, they may be noted. Clause 2 of the agreement states that the commission agent shall sell the products at prices not exceeding the maximum prices as may be indicated by the company from time to time. Clause 6 mentions that the agent shall arrange a full-fledged godown for storing the products. Clause 7 states that company will despatch products to the commission agent. Clause 8 states that the products consigned to the respondent shall be held by him as property belonging to the company. Clause 12 provides that the commission agent will despatch the products to destinations and he shall be responsible for any damage etc. Clause 13 cast responsibility on the commission agent to keep proper books of accounts, which will be open to the company's officials for inspection. Clause 14 is about submission of weekly returns by the agent. Clause 15 stipulates that the commission agent shall send the sale price to the company, on a weekly basis, after keeping its commission. Clause 17 states that the commission shall be on a ex-factory basis and Clause 18 permits the agent to make local delivery to his customers and to charge the cost of such despatches. The revenue's contention is that these clauses make the relationship one of clearing and forwarding agency. Learned SDR would emphasis Clause 12 in particular as it states that the agent will despatch the products to destinations either by rail or by steamer etc.

and he shall have responsibility for any damage defect or deterioration in the course of such transit. The contention of the learned SDR is that as Clause 7 provides that the agent shall clear the goods consigned to him and Clause 12 provides that he shall despatch the products to destinations, these clauses together make the relationship one of clearing and forwarding.

8. Upon a consideration of the various provisions of the agreement, we find that in substance the relationship of the respondent with its principal is that of a commission agent. Receiving the goods and storing them are only incidents, which would enable the appellant to sell the goods for a commission in the territory allotted to it. The provision in Clause 7 for clearing the goods into the appellant's godown is not the clearing contemplated in the relationship of clearing and forwarding agent. The provision in Clause 12 for despatch is also to be understood as limited to the goods, which it is not able to sell, and which it is duty bound to return to the principal. Similarly, the freedom to despatch the goods to customers is in the context of sale of the goods by the agent to its customers. These despatches are not the forwarding contemplated in clearing and forwarding by such an agent.

Even if the appellant is treated as a consignment agent, it is not a clearing and forwarding consignment agent. He is a consignment sales agent who gets a commission on the sales he makes. Thus, whatever be the terminology used the agreement, in substance, the relationship is that of a commission agent, earning a commission on sales.

9. The statutory definition of "Business Auxiliary Services", specifically mentions commission agent as covered by "Business Auxiliary Services". The definition also defined commission agent as "any person who acts on behalf of other persons and causes sale or purchase of goods (sic), for a consideration and include any person who, while acting on behalf of another person (i) deals with goods".

Thus, the definition of commission agent includes a person who "deals with goods", therefore, the contention of the learned SDR that a commission agent does not physically deal with goods, and upon dealing with the goods, he becomes a clearing and forwarding agent is contrary to the statutory provisions.

Commission agents were also exempt from service tax under Notification No. 13 of 2003 dated 20/06/03. That Notification defined a commission agent as under:
Explanation - For the purposes of this notification, "commission agent" means a person who causes sale or purchase of goods, on behalf of another person for a consideration which is based on the quantum of such sale or purchase.

2. This notification shall come into force on the 1st day of July, 2003.

10. The present respondent fits neatly into this definition in as much as it was causing sale of goods on behalf of another person for a consideration, which is based on the quantum of such sale.

11. We also find that the decision of this Tribunal in the case of Super Poly Fabriks Ltd. has no application to the present case in as much as that was a case where the agent was dealing with clearance of the goods from factory onwards.

12. In view of what is stated above, we hold that the finding of the learned Commissioner (Appeals) that the appellant's service did not attract tax under the category of clearing and forwarding agent is well founded and the challenge to that order is not sustainable.

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