

(2012) 02 KL CK 0001
In the High Court Of Kerala
Case No : W.A. No. 1800 of 2011

Beena Pradeep

APPELLANT

Vs

Government of India

RESPONDENT

Date of Decision : 16-02-2012

Acts Referred:

Central Excises and Salt Act, 1944 — Section 2
Finance Act, 1994 — Section 65, 65(105)(zzzf), 65(23), 65(23)(b), 65(76b)

Citation : (2013) 19 GSTR 274 : (2012) 2 KLJ 809 : (2013) 29 STR 225 :
(2013) 59 VST 301

Hon'ble Judges : C.N. Ramachandran Nair, J; Babu Mathew P. Joseph, J

Bench : Division Bench

Advocate : V.B. Jinnah, T.M. Sunil and Smt. C. Chithra, for the Appellant;
Thomas Mathew Nellimoottil, SC, for the Respondent

Final Decision : Allowed

Judgement

C.N. Ramachandran Nair, J.—The appellant challenged adjudication order issued by the 2nd respondent determining service tax liability on palletizing as "packaging activity" falling u/s 65(76b) of Finance Act, 1994 in writ proceedings on the ground that order issued is without jurisdiction. The learned Single Judge however following the decision of the Honourable Supreme Court in Union of India v. Zaicon Electronics, reported in 2010 (255) E.L.T. 490, dismissed the WP(C) for the reason that adjudication order on facts and law has to be contested in statutory appeal and not in writ proceedings. It is against this judgment, this Writ Appeal is filed contending that there is no controversy on facts, and even on the admitted facts the adjudication is without jurisdiction.

2. We have heard Adv. Shri V.B. Jinnah appearing along with Adv. Smt. S. Chithra and learned Senior Standing Counsel Shri Thomas Mathew Nellimoottil appearing for the respondents.

3. The appellant is engaged in palletizing of cargo for export and the establishment is near the Port in Willington Island, wherefrom shipments take

place to foreign countries. The Service Tax Department conducted search operations in appellant's premises and recovered the invoices, which revealed that the appellant is engaged in palletizing of goods, which according to the Department, amounts to "packaging activity" as defined u/s 65(76b) of the Finance Act, 1994, which attracts service tax u/s 65(105)(zzzf) of the Act. The appellant objected the proposal for assessment of duty on the ground that the service is not "packaging activity" covered by sub-section (76b) but is "cargo handling" within the meaning of Section 65(23) but exempt from service tax under sub-clause (b) thereto as the said service is rendered in relation to export cargo. The only question therefore to be considered is whether the palletizing of export cargo amounts to "cargo handling service" within the meaning of Section 65(23) and if so, by virtue of the exemption available under sub-clause (b), the levy and demand of service tax is not sustainable? The contention raised by the learned Senior Standing Counsel for the respondents is that the appellant is engaged only in "packaging activity" as defined u/s 65(76b), and so much so the service rendered even in relation to export cargo is taxable u/s 65(105)(zzzf) of the Act. Learned Standing Counsel also resisted the maintainability of the Writ Petition for the reason that mixed questions of law and facts arise in adjudication, which could be reversed only in appeal by a statutory authority, who has to appraise findings on facts rendered by the adjudicating authority, apply the law and decide the appeal.

4. The first question to be considered is whether the learned Single Judge is right in rejecting the WP(C) at the threshold without going to the merits of the case on the ground that correctness of facts recorded by the adjudicating authority has to be gone into only by a statutory appellate authority. Learned counsel appearing for the appellant, submitted that facts are not in controversy inasmuch as there is no finding in the adjudication order that the cargo palletized by the appellant were not for export, and so much so, by virtue of exemption available for handling cargo for export, whether the adjudicating authority has jurisdiction to assess and demand service tax is the only question.

5. After hearing both sides and on going through the adjudication order, what we notice is that there is no controversy on facts inasmuch as the appellant was found engaged in palletizing cargo at the orders of shipping companies and the transaction is block packing of goods on wooden platform by strapping the cargo and covering it with polythene sheets. It is common knowledge that small consignments of goods to same destination are packed in groups and loaded in containers to prevent damage to the goods and to save time and cost in loading and unloading. This is exactly what is done by the appellant. If appellant's service falls within the exception clause of Section 65(23)(b) of the Act, then certainly there is no justification to make an adjudication demanding tax. On the other hand, if appellant is engaged in packaging activity falling u/s 65(76b) then adjudication has to be upheld. Since there is no controversy on facts and since it is only a matter of deciding as to which of the entries of the statute the appellant's service falls, we proceed to decide the case on merit. The relevant

sub-sections, namely (23) and (76b) of Section 65, are extracted hereunder for easy reference:

Section 65(23).- "cargo handling service" means loading, unloading, packing or unpacking of cargo and includes,-

(a) cargo handling services provided for freight in special containers or for non-containerised freight, services provided by a container freight terminal, or any other freight terminal, for all modes of transport, and cargo handling service incidental to freight; and

(b) service of packing together with transportation of cargo or goods, with or without one or more of other services like loading, unloading, unpacking, but does not include, handling of export cargo or passenger baggage or mere transportation of goods;)

Section 65(76b).- "packaging activity" means packaging of goods including pouch filling, bottling, labelling or imprinting of the package, but does not include any packaging activity that amounts to "manufacture" within the meaning of clause (f) of section 2 of the Central Excise Act, 1944 (1 of 1944);

6. As already stated palletizing is only packing of commodity on a wooden platform (pallet), which could be lifted and loaded to the container or in ship by using forklift, crane etc. The whole purpose of palletizing is for easy handling of goods such as loading, unloading, transport etc. When shipping companies accept small consignments of cargo from different persons for shipment to same destination, several such small consignments to same destination are palletized and loaded to same container and shipped. Palletizing of cargo is a routine practice followed by shipping companies and admittedly the appellant is engaged in the said activity in the Port area. The contention raised by the learned Standing Counsel for the respondents is that since the appellant is mainly engaged in packaging activity, the transaction falls under sub-entry (76b) above stated, which does not provide for any exemption even for cargo packed for export. However, the appellant's case is that appellant's activity squarely falls under sub-entry (23) above stated which takes in packing of cargo also. On going through the above two entries, we feel there is a subtle distinction between the packaging activity covered by both the entries. While sub-entry (76b) above talks about basic and first packing of goods by the manufacturer like pouch-filling, bottling, labelling or imprinting of the package, the activity carried on by the appellant is palletizing which is group packing of goods which includes goods already in packed form and the purpose is only to protect the goods in the course of loading, transport and unloading. Packaging in certain cases amount to manufacture and such packaging is excluded from the purview of sub-entry (76b) itself as the transaction attracts excise duty on manufacturer. So much so, the packaging activity covered by entry (76b) that attracts service tax are packing of manufactured goods, which may be by way of pouch filling, bottling, labelling etc. However, these types of packing covered by sub-section (76b) are

not done by the appellant, who is making only bulk packing in the form of palletizing which is only for loading, shipment and for transport.

7. In our view, in this case the controversy arose only because packing is covered by both sub-sections (23) and (76b) of Section 65. However, we find a distinction between the "packing" covered by sub-section (23) and the "packing" covered by sub-section (76b). In our view, the packing covered by sub-section (76b) is the basic packing of products either in the course of manufacturing or subsequent to manufacturing for marketing. This work is not done by the appellant because the appellant is not a manufacturer or packer for manufacturers of goods. On the other hand, the packing i.e. covered by the broad definition of "cargo handling service" under sub-section (23) is the group packing of cargo for easy handling. As already explained above, the packing done by the appellant is group packing in a rough form just for easy loading into containers or ships, of goods taken by shipping companies in loose form for transport to same destination. So much so, in our view, the packing done by the appellant forming part of "cargo handling service" is not the type of packing referred to in sub-section (76b).

8. Besides this, we have to keep in mind the object and purpose of granting service tax exemption on handling of export cargo, which is only to reduce the cost of exporters to send goods for sale in international markets at competitive rates. In fact all kinds of incentives such as tax and duty exemptions are allowed for export cargo to make the Indian goods competitive in international markets. If service tax is demanded at the last point packaging of goods for loading into containers or ships, the same will certainly lead to escalation of cost for export by way of freight increase, and that is the reason why service tax exemption is provided for handling of export cargo. We, therefore, feel the adjudication order defeats the very purpose of exemption covered by sub-section (23)(b) of Section 65.

9. For the reasons stated above, we allow the Writ Appeal by vacating the judgment of the learned Single Judge and allow the WP(C) by vacating the impugned adjudication order issued by the respondents demanding service tax on palletizing of cargo for export. However, we make it clear that since palletizing is also a form of packing answering the definition of "cargo handling service" under sub-section (23)(b) of Section 65, service tax could be levied on any cargo palletized if it is not for export. The Writ Appeal is allowed as above.