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**(2008) 02 P&H CK 0072**  
**In the Punjab And Haryana At Chandigarh**

Commissioner of C. Ex.

APPELLANT

Vs

United Plastomers

RESPONDENT

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**Date of Decision :** 20-02-2008

**Acts Referred:**

Central Excises and Salt Act, 1944 — Section 2  
Finance Act, 1994 — Section 35G, 65, 68

**Citation :** (2008) 217 CTR 129 : (2008) 10 STR 229 : (2007) 13 STT 67 :  
(2009) 19 VST 382

**Hon'ble Judges :** Satish Kumar Mittal, J; Rakesh Kumar Garg, J

**Bench :** Division Bench

**Final Decision :** Dismissed

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## Judgement

Rakesh Kumar Garg, J.—The revenue has filed the present appeal u/s 35G of the Central Excise Act, 1944 challenging the order dated 20-6-2005 passed by the Customs Excise and Service Tax Appellate Tribunal, New Delhi raising the following substantial questions of law:

(i) Whether the service provided by M/s. United Plastomers, Amritsar to M/s. IPCL as dealer/commission agent is covered under the "Clearing and Forwarding Agent Service" as defined u/s 65 of the Act as 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?

(ii) Whether the penalty is imposable when the party deposits the service tax before the issue of the show cause notice after department has caught them for non-payment of service tax?

2. The respondent-assessee is providing the services of consignment agents as defined u/s 65(23) of the Finance Act, 1944 as amended (hereinafter referred to as the "Act"). It was found that the respondent is not registered with the Department as required u/s 69 of the Act and has also not paid service tax as

required u/s 66 of the Act. It is alleged that the respondent received commission of Rs. 45,79,411/- for the period from August, 1999 to February, 2001 and Rs. 32,28,379/- for the period from March, 2001 to November, 2001. As such, the respondent was issued two show cause notices for the recovery of the service tax amounting to Rs. 2,28,971/- and Rs. 1,61,419/- respectively along with interest and imposition of penalty under Sections 76 and 77 of the Act. The assessee-respondent submitted reply dated 22-10-2003 as under:

They are consignment agents of Indian Petro Chemicals Corporation Ltd. (A Govt. of India Undertaking). M/s. IPCL Ltd. had been charging Service Tax from us and they were deducting the same from our commissions received from them. However, w.e.f. 1-9-99, with the amendment of Section 68(1) of the Finance Act, the responsibility for payment of Service Tax was cast upon the C & F agents. However we were under the bona fide belief that Service Tax was to be deducted and deposited by our principal only i.e. M/s. IPCL Ltd., since they had been doing the same since 1997.

2. The matter was pointed out to us by Service Tax branch of the Central Excise Department that w.e.f. 1-9-99 the responsibility of payment Service Tax was cast upon the C & F agents.

3. The present Show Cause Notice has invoked the extended period of the limitation in utter disregard to the substantive factum that they were under the bona fide belief that the Service Tax was to be charged by their principal i.e. M/s. IPCL Ltd. and that there was no wilful suppression or mala fide intention involved in the whole episode.

4. The present Show Cause Notice is based on wrong calculations leading to arbitrary demand, in so far as Service Tax has been demanded for the month of August, 1999, whereas the responsibility of payment of Service Tax was cast upon the C/F agents w.e.f 1-9-1999 vide amendment to Section 68(1) of Finance Act. Therefore, the demand of Service Tax for the month of August, 1999 being illegal, arbitrary, ultra virus the Constitution, may kindly be dropped in entirety.

5. That the Show Cause Notice has invoked extended period of limitation, in utter disregard to be substantive factum that department was in knowledge of the fact that we consignment agents M/s. IPCL Ltd. as we were registered with the Central Excise Department as registered dealers. Even otherwise we were under bona fide belief that Service Tax was to be deducted and deposited by our principal M/s. IPCL Ltd. since they had been doing the same since 1997. Therefore the demand of Service Tax beyond the normal period of limitation may kindly be dropped on this count.

6. That alternatively (this is without prejudice to our defence pleas in preceding paras), our bona fide intention is bolstered from the fact that of immediate knowledge of the fact that Service Tax was to be paid by us, was deposited the entire amount of Service Tax due, well before the issue of Show Cause Notice. It is a settled legal proposition by now that when the tax amount is deposited

before the issue of show cause notice, the imposition of penalty is not warranted. In this connection the noticee beg leave to refer to a whole catena of judgment which have ordained in unequivocal terms that when the duty is deposited prior to the issue of show cause notice, the imposition of penalty notice is not warranted:

1. 2003 (156) ELT 753

2. 2003 (157) ELT 193

3. Dhampur Sugar Mills Ltd. 1990 (46) E.L.T. 400

4 2001 (96) ECR 323

5. Arun Prestressed Concrete Products Pvt. Ltd. v. CCE, Bangalore 2002 (150) E.L.T 542 (Tribunal) : 2002 (51) R.L.T. 949

6. O.K. Steels , (CBE) Ltd. v. CCS, Coimbatore 2002 (53) R.L.T. 1065.

7. 2003 (161) ELT 285

7. That from the facts referred to supra it is amply clearly borne out that the whole matter is of an innocuous technical lapse with no mala fide involved. We were under the bona fide belief that the Service Tax was to be deducted and deposited by our principal M/s. IPCL Ltd. who had been doing the same since 1997. Further on being pointed out by the Central Excise department of the changed law that the responsibility of the payment of Service Tax was cast upon by C & F agents w.e.f. 1-9-99, the whole amount of Service Tax due to the department was deposited well before the issue of show cause notice which goes to establish our bona fide intention. The no-ticee begs leave to refer to a whole catena of judgments which ordain that Establishment of Mens Rea is Sine Qua Non for imposition of penalty:

2000 (115) ELT 98

Elmagsol Engg. Works v. CCE, Pune 1994 (114) E.L.T. 475 (Tribunal)

1999 (108) ELT 462

2000 (118) ELT 683

1999 (83) ECR 643

Besides requiring Mens Rea as an essential ingredient for penalty, in the citations referred to supra, the finding of the Hon"ble Tribunal were in the direction that penalty is not imposable for the sake of levy. It is not a source of revenue and in initiating penal action, the facts and circumstances of each case are relevant, whether penal action was justified or not and if so to what extent. In other words the quantum of penalty depends upon the gravity of the offence committed. Also the Apex Court in the case of Pratibha Processors and others Vs. Union of India and others, was eloquent enough to hold that the penalty is ordinarily levied for

some contumacious conduct or for deliberate violation of statute. Your honour will kindly appreciate that in our case there is neither any contumacious conduct nor any deliberate violation of the statute, what to speak of Mens Rea. Further the Hon"ble, Supreme Court in the case of Hindustan Steel Ltd. v. The State of Orissa 1997 (25) S.T.C. 211 (S.C) has ordained "Penalty will not be imposable merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute.

Thus there are to be certain guiding, factors for invoking penalty action going by the ratio of the citation referred above. Considering the facts of our case, no case at all is made out for taking penalty action.

3. The Assistant Commissioner vide Order-in-Original dated 31-10-2003 confirmed the demand of aforesaid Service Tax amount along with interest and penalties for the amount equivalent to the Service Tax of Rs. 2,28,971/- and Rs. 1,61,419/-.

4. Being aggrieved against the said order, the assessee filed an appeal before the Commissioner (Appeals) wherein the assessee contested that the amount deposited by it was in excess of the amount payable by it. It was also submitted that the assessee was acting as commission agent of M/s. IPCL and also as consignment agent and was receiving commission as C & F agent (Consignment Agent) and commission as commission agent and service tax was leviable only on the commission received as C & F agents and not the commission received as commission agents. The Commissioner (Appeals) vide his order dated 30-9-2004 upheld the order-in-original confirming the demand of service tax on the commission received by the assessee as distributor under the category of C & F agent (consignment agent).

5. However, in the second part of the order-in-original relating to the confirmation of service tax on commission received by the assessee as commission agent under the category of C & F agent, he held that the service tax does not appear to be leviable on such service but he did not pass any order on the count as this issue was not a matter of dispute in the show cause notice nor it was taken up before the adjudicating Authority for his consideration. However, it was held that penalty was leviable only with respect of service tax leviable on the commission earned as consignment agent and thus, the Commissioner (Appeals) reduced the penalty of Rs. 2,28,971/- to Rs. 1,43,022/-and from Rs. 1,61,419/- to Rs. 1,38,203/-. He also set aside penalties of Rs. 500/- each imposed u/s 77 of the Act and confirmed interest on the actual amount of service tax u/s 75 of the Act.

6. The assessee as well as the Department filed Appeals before the Tribunal. The Tribunal decided both the appeals vide his final order dated 20-6-2005. The appeal of the Department for enhancement of penalty which was reduced by the Commissioner (Appeals) on the ground that the commission received for services rendered as commission agent was not liable for service tax under the category of C & F agent, was rejected. The Tribunal also set aside the penalty levied on the service tax amount on the ground that the service tax amount was deposited by the assessee before the issue of the show cause notice.

7. In the appeal before us, counsel for the appellant has vehemently argued that the Tribunal has erred while holding that the services rendered by the assessee dealer/commission agent of M/s. IPCL can not come within the purview of C & F operation. The assessee has entered into two agreement with M/s. IPCL, namely (i) Del Credre Agent Agreement and (ii) Distributor Agreement. Both the said agreements are complimentary and therefore, the assessee is liable to pay service tax on the services rendered by him as commission agent of M/s. IPCL under both the agreements. Counsel for the appellant has placed reliance on the language of Section 65(23) of the Finance Act, 1994 which defines the "Clearing and Forwarding Agent" as under:

Clearing the Forwarding Agent means any person who is engaged in providing any service, either directly or indirectly, connected with clearing and forwarding operations in any manner to any other person and includes a consignment agent.

8. On the basis of the above provisions of the Act it has been argued that the use of the words "either directly or indirectly, connected with clearing and forwarding operations in any manner" is indicative of the fact that the scope of the services to be provided by the clearing and forwarding agent is all encompassing in that. It covers not only the person directly dealing with the goods but it would also include indirect services which are connected with the clearing and forwarding operations.

9. In the instant case, the party was admittedly facilitating and promoting the sale of goods from the factory, warehouse and other outlets owned by the principle and the avowed aim to the Del Credre Agent Agreement is "to maximize market penetration and effective use the distribution networks and channels". For the purpose, vide Clause 6 of the Del Credre Agent Agreement, Clauses 5 to 8, 10 to 15, 17 to 29 and 31 of the Distributor, Agreement have been made applicable matutis (sic) (mutandis) to the Del Credre Agent Agreement. The party, who is also the Distributor, is entrusted with the task of timely collection of payments, realization of dues from the buyers and making timely payments to the principal, attending to the satisfaction of the customers, and by virtue of Clause 6 also to the promotion of sale of the goods, dealing with the matters connected with sales tax, Octroi, local taxes, and so on. These activities being indirectly related for the activity of clearing and forwarding operations are clearly covered within the ambit of the definition of "clearing and forwarding agent".

10. Counsel for the appellant has also argued that while passing the impugned order the Tribunal has placed reliance upon its earlier decision in the case of 2005 (122) ECR 94 in setting aside the service tax liability on service rendered as dealer/commission agent and the said decision has not been accepted by the Department and an appeal has been filed in the Karnataka High Court. It has also been argued that the penalty imposed upon the assessee has been wrongly deleted by the Tribunal.

11. On the other hand, counsel for the respondent-assessee has argued that the "Clearing and Forwarding Agents Services" were brought under service tax net w.e.f. 16-7-1997 vide Notification No. 26/97-S.T., dated 11-7-1997 is the same till date. The assessee did not obtain registration on the belief that M/s. IPCL had to pay service tax as per above Notification and Govt. circular. The CBEC vide Circular No. 341/11/98-TRU, dated 23-8-1999 clarified as under:

That Section 68(2) of Finance Act, 1994 inter alia provides for payment of service tax by a person other than the person providing taxable service. In respect of services rendered by clearing and forwarding agent, the service tax was made payable by the person engaging such agent. The Hon'ble Supreme Court in the case of Laghu Udyog Bharati and Another Vs. Union of India and Others, has held aid provision ultra vires. It has been decided now, to do away with above method of service tax by an alternate person other than the person providing the taxable services in respect of clearing and forwarding agent.

12. It is further the contention of the respondent that the assessee came to know about its liability to pay service tax after the decision of the Hon'ble Apex Court in the case of Laghu Udyog Bharati (supra) and the respondent-assessee voluntarily deposited service tax of Rs. 2,28,971/- for the period from August, 1999 to February, 2001 and Rs. 1,61,419/- for the period from March, 2001 to November, 2001 i.e. before issuance of show cause notice and respondent has deposited the service tax on the entire commission received from M/s. IPCL under the bona fide belief in spite of the fact that the service tax on commission received as commission agent for providing Del Credre Services was not leviable as the said commission was exempt under the category of "Business Auxiliary Service". It is the case of the respondent that the "commission agents" have been brought under the category of "Business Auxiliary Service" w.e.f. 1-7-2003. The definition of the "Business Auxiliary Services" reads as under:

The definition of business auxiliary service has been given under Clause (19) of Section 65. That is:

business auxiliary service means any service in relation to-

(i) promotion or marketing or sale of goods produced or provided by or belonging to the client; or

(ii) promotion or marketing of service provided by the client; or

(iii) any customer care service provided on behalf of the client; or

(iv) any incidental or auxiliary support service such as billing, collection or recovery of cheque"s, accounts and remittance, evaluation of prospective customer and public relations services

and includes services as a commission agent, but does not include any information technology service.

Vide Finance Act, 2005 the definition of Business Auxiliary Service has been amended and reads as under:

Business Auxiliary Service" means any service in relation to:

(i) promotion or marketing or sale of goods produced or provided by or belonging to the client; or

(ii) promotion or marketing of service provided by the client; or

(iii) any customer care service provided on behalf of the client; or

(iv) procurement of goods or services, which are inputs for the client, or

Explanation:- For the removal of doubts it is hereby declared that for the purposes of this sub-clause, "inputs" means all goods or services intended for use by the client;

(v) production or processing of goods on behalf of the client; or

(vi) provision of Service on behalf of the client; or

(vii) a service incidental or auxiliary to any activity specified to Sub-clauses (i) to (vi), such as billing, issue or collection or recovery cheques, payments, maintenance of accounts and remittance, inventory management, evaluation or development of prospective customer or vendor, public relation services, management or supervision,

and includes services as a commission agent, but does not include any information technology service and any activity that amounts to "manufacture" within the meaning of Clause (f) of Section 2 of the Central Excise Act, 1944.

Explanation. - For the removal of doubts, it is hereby declared that for the purposes of this clause,

(a) "commission agent" means any person who acts on behalf of another person and causes sale or purchase of goods, provision or receipt of services, for a consideration, and includes any person who, while acting on behalf of another person-

(i) deals with the goods or services or documents of title to such goods or services; or

(ii) collects payment of sale price of such goods or service; or

(iii) guarantees for collection or payment for such goods or services, or

(iv) undertakes any activities relating to such sale or purchase of such goods or services;

(b) "information technology service" means any service in relation to designing, developing or maintaining of computer software, or computerized data processing or system networking, or any other service primarily in relation to operation to computer system.

13. In support of their contention, the respondent has further placed reliance upon the decision of the Special Bench/Larger Bench of the Tribunal in the case of Larsen & Toubro Ltd. v. Commissioner of Central Excise, Chennai 2006 (3) S.T.R. 321 (Tri.- LB) wherein it has been held that services of commission agent are included in the definition of "Business Auxiliary Service".

We have heard learned Counsel for the parties and perused the record.

14. We find no force in the arguments raised by the counsel for the appellant. While passing the impugned order, the Tribunal has concluded that the case of the respondent-assessee is clearly covered by the ratio of the decision in the case of Raja Rajeshwari Intl. Polymers Pvt. Ltd (supra) wherein it has been observed that the dealer agent falls within the purview of clearing and forwarding operations as the goods not directly or indirectly handled by him and no service tax is leviable on commission received by him on account of Del Credre Agency.

15. Moreover, the said conclusion/observation stands settled by a Larger Bench of the Tribunal in the case of Larsen & Toubro Ltd. (supra) wherein it has been held that services of commission agent are included in the definition of "business auxiliary service" from 1-7-2003 and mere procuring or having orders for the principal by an agent on payment of commission basis would net amount to providing services as "clearing and forwarding agent", within the meaning of the definition of that expression u/s 65(25) of the Finance Act, 1994.

16. While reaching to this conclusion the Tribunal has observed that the expression "directly or indirectly" and "in any manner" occurring in the definition of "clearing and forwarding agent" cannot be isolated or the activity of clearing and forwarding operations and an agent it engaged only for procuring purchase orders for the vendor on commission basis does not engage in any of the activities connected with clearing and forwarding operations directly or indirectly.

17. We have also been informed by Sh. Sanjiv Kaushik, Advocate counsel for the appellant that in view of Board's clarification and the various judicial pronouncements, the order of Larger Bench of the Tribunal Delhi in the case of Larsen & Toubro Ltd. (supra) has been accepted by the revenue. It is also not disputed that the second question of law as raised by the revenue has already been decided against the department by this Court in appeal.

18. In view of the above, no substantial question of law arises for determination of this Court. Hence, the appeal is dismissed.