
(2012) 06 GUJ CK 0070
In the Gujarat High Court
Case No : Tax Appeal No. 477 of 2006

Commissioner of Central Excise and Customs

APPELLANT

Vs

Trade Tek Corporation

RESPONDENT

Date of Decision : 14-06-2012

Acts Referred:

Central Excises and Salt Act, 1944 — Section 2(aaa)
Finance Act, 1994 — Section 65, 65(105), 65(105)(j), 65(25), 76

Citation : (2013) 29 STR 23

Hon'ble Judges : Harsha Devani, J; Akil Abdul Hamid Kureshi, J

Bench : Division Bench

Advocate : Y.N. Ravani, for the Appellant;

Final Decision : Dismissed

Judgement

Akil Kureshi, J.—This appeal by the Revenue is directed against the judgment of CESTAT, dated 1-3-2005 2005 (122) ECR 284 While admitting the appeal following substantial question of law was framed :

Whether on the facts and in the circumstances of the case, the Tribunal was right in holding that the respondent-assessee was not providing taxable service as Clearing and Forwarding Agent of BALCO?.

We may notice the facts in brief Respondent M/s. Trade Tek Corporation had entered into an agreement dated 28-7-1999 with M/s. Bharat Aluminium Co. Ltd. ("M/s. BALCO" for short) stating that the respondent was appointed as a consignment agent for a further period between 1-4-1999 to 31-3-2000 The departmental authorities hold a belief that the services rendered by the respondent under such agreement amounted to clearing and forwarding services for and on behalf of BALCO and that therefore, the respondent was liable to pay service tax as a Clearing and Forwarding Agent ("C & F Agent" for short) Respondent not having registered himself as such agent and not having paid the service tax, a show cause notice dated 27-3-2003 came to be issued calling upon

him why service tax of Rs. 1,11,585/- should not be recovered from him with interest calculated at Rs. 29,821/- and further, why penalty under Sections 76, 77 and 78 of Chapter-V of the Finance Act, 1994 be not imposed.

2. The respondent replied to the show cause notice and denied any liability either to pay tax or be subjected to penalty. The Adjudicating Officer i.e. Deputy Commissioner, Central Excise, Customs and Service Tax, Vadodara however, by his order dated 31-5-2004 held that the respondent was a C & F Agent within the meaning of Section 65(25) of the Finance Act, 1994. He therefore confirmed the duty and interest demand. He also imposed matching penalties under Sections 76, 77 and 78 of the Finance Act, 1994. The Adjudicating Authority was of the opinion that looking to the agreement between the respondent and M/s. BALCO and the purpose for which the respondent was appointed under such agreement, the activity undertaken can be stated to be that of a C & F Agent only. The Adjudicating Authority referred to various terms of the agreement to come to such a conclusion.

3. Aggrieved by the order of Adjudicating Authority, respondent preferred appeal before the Commissioner. The Appellate Commissioner vide his order dated 23-8-2004 allowed the appeal and reversed the order passed by the original authority making following observations :

From the above, it is clear that the appellants is neither clearing any goods, nor forwarding any goods Rather they purchase goods from BALCO and sell it to the customers on their own invoices Further, it is admitted fact that they were receiving/they have received quantity discount and not commission. Such an activity would not come within the scope of services of clearing and forwarding agents and as mentioned in Mumbai Commissionerate above trade notice. Unless their services can be treated as one to a client by clearing and forwarding agent in relation to clearing and forwarding operation, in any manner the services cannot be taxed Merely because the word consignment agent has been used in agreement they cannot be compelled to pay service tax.

In this context, I find that the Hon''ble CESTAT, New Delhi in case of 2004 (95) ECC 54 held that Service tax - Clearing and forwarding operations-Products of principal supplied to appellant on consignment basis and sold by appellant to customers. Activity not comes within services provided to client by clearing and forwarding agent in relation to clearing and forwarding operations. Service tax not leviable.

4. The department challenged the order of the Appellate Commissioner before the CESTAT. The Tribunal by impugned order dated 1-3-2005 rejected the Revenue's appeal. The Tribunal relied on its earlier decision in case of 2004 (95) ECC 54 and concluded as under :

3 We find that in identical circumstances, where terms and conditions between M/ s. Cipla Ltd. and Mahavir Generics were similar to the terms and conditions between BALCO and the present respondents, the Tribunal has held that Mahavir

Generics was not acting only as consignment agent. It was held that since Mahavir Generics was not providing taxable service as clearing and forwarding agent, the demand of service tax was not sustainable. Ld. SDR has not been able to distinguish the above judgment with reference to the clause of the agreement between BALCO Trade Tek Corporation. Therefore, ratio of the Mahavir Generics order is applicable on all fours to this case. Following the ratio thereof we uphold the impugned order and reject the appeal.

5. Taking us through various terms and conditions contained in the agreement between respondent and M/s. BALCO, learned counsel Shri Ravani for the department vehemently contended that the Tribunal committed a grave error in confirming the decision of the Appellate Commissioner. He submitted that as per clause (j) of sub-section (105) of Section 65 of the Finance Act, 1994, any service provided to a client by a Clearing and Forwarding Agent in relation to clearing and forwarding operation in any manner is a taxable service. He submitted that looking to the nature of activities carried on by the respondent for and on behalf of M/s. BALCO, it should be held that he was acting as a Clearing and Forwarding Agent. He submitted that the language used in sub-section (25) of Section 65 is very wide and any person engaged in providing any service either directly or indirectly connected with the clearing and forwarding operation in any manner is treated as Clearing and Forwarding Agent and it also includes consignment agent.

5.1 Drawing our attention to the statement of one Ramesh Kumar Kejriwal, a representative of the respondent, counsel submitted that in such statement, Shri Kejriwal clearly admitted that respondent was acting as consignment agent for and on behalf of M/s. BALCO. He pointed out that even the agreement in question clearly refers to respondent as a consignment agent. Counsel would therefore, contend that the Tribunal committed an error in not treating the respondent as a C & F Agent.

5.2 In support of his contention, counsel relied on the decision of CESTAT in case of 2002 (81) ECC 736, in which the Tribunal on the basis of the nature of activities carried on by the appellant therein and adopting wider interpretation to the term Clearing and Forwarding Agent held that the activities would come within the purview of such definition.

6. Section 65(105)(j) makes services rendered by a Clearing and Forwarding Agent to a client in relation to clearing and forwarding operation, a taxable service. Sub-section (105)(j) thereof reads as under :

Section 65(105) "taxable service" means any service provided-

(j) to a client, by a clearing and forwarding agent in relation to clearing and forwarding operation in any manner

Term Clearing and Forwarding Agent has been defined in Section 65(25) as under :

(25) "Clearing and Forwarding Agent" means 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.

7. We may notice that the definition of Clearing and Forwarding Agent includes consignment agent Term "Consignment Agent" however, has not been defined. Question in the present case is whether looking to the nature of the activities performed by the respondent under the agreement dated 28-7-1999, the respondent can be stated to be a C & F Agent as defined in Section 65(25) of the Finance Act, 1944.

8. To be able to do so, we may notice relevant terms of such agreement. The agreement refers to the respondent as a consignment agent. Clause (11) which provided general conditions provided that the respondent will send to M/s. BALCO necessary requisition with clear dispatch instructions for sale of material on consignment transfer basis for the specific items so as to reach the office of M/s. BALCO by 7th of every month. It further provided that dispatches will be made subject to release of payment by the respondent within financial arrangements made.

? Clause (12) thereof reads as under :

(12) Material will be dispatched to you from our works as under :-

(a) Dispatch on credit basis On "freight pre paid" basis through Balco's nominated transporter

(b) Dispatch against advance payment Either "freight prepaid" basis or on "freight to pay" basis.

? Clause (15) essentially provided that all liabilities of sales tax would rest on the respondent

? Clause 6 of the agreement pertains to entitlement of charges. Relevant portion of clause (6.4) thereof reads as under :

6.4 You will raise the bill as per directions given above and/or issued from time to time and you will charge the amount from the customers as charged by the company in the CDA/Invoices at the time of clearance of goods from the factory for the stocks transferred. You will ensure to mention specifically in bold letters in your Invoices "Consignment Agents for Bharat Aluminium Co. Ltd." and the sale is Ex-Mumbai, Ahmedabad, Pune, Baroda, Nagpur, Silvassa etc. as the case may be. It will be obligatory on your part to charge the price from the customer as has been allowed and in no case any liability towards Excise duty on excess charges made applicable in the bills should come on Balco. All the invoices/bills will be subject to scrutiny by the Excise Authority and you will be required to keep the record for at least 5 years for verification whenever desired by the Excise Authority.

? Clause (9) pertains to payment terms Detailed provisions are made for the respondent to make payment for the goods received on credit within the specified time, failing which, to pay the same with interest.

? Clause (11) provided for discount Relevant portion thereof reads as under :

11 Discount You will be allowed Discount location wise on the basis of lifting of quantity per annum as under. The off-take of Korba and BBU will be clubbed together for arriving at total tonnage for entitlement of Discount Such Discount will be allowed on basic price of the product including alloy and temper charges as also packing charges For computation of Discount date of invoices shall be taken as reference date

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During the year 1999-2000, you are required to lift 700 rolled promotes & 60 T extrusions, and shall ensure to lift both the product i.e. extrusions and rolled products every month proportionately to the guaranteed off-take mentioned on annual basis and performance shall be reviewed every quarter. In case of any shortfall in performance either in fulfilling the required off-take or a submission of timely payments, sales tax forms, annexures we shall have the right to terminate the agency at any time within contracted period.

You shall therefore be required to reach the minimum level for continuation of your agency.

? Clause (13) provided for qualifying criteria for renewal of agency and reads as under :

13 Qualifying criteria for renewal of agency. The consignment agency renewal will be dependent upon the performance in terms of committed off-take in both the products and release of payments on due dates and also timely submission of sales tax forms. The performance in this regard will be reviewed every quarter.

9. With the above terms and conditions in mind, if we revert back to the statutory provisions, we may recall that Section 65(105)(j) makes services rendered to a client by a C & F Agent in relation to clearing and forwarding agent in any manner a taxable service Term "Clearing and Forwarding Agent" is defined u/s 65(25) to mean any person who is engaged in providing any service either directly or indirectly connected with clearing and forwarding operation in any manner to any other person and includes a consignment agent. Thus though the definition of Clearing and Forwarding Agent is quite wide since it takes within its sweep any person who is engaged in providing services either directly or even indirectly which service is connected with clearing and forwarding operation in any manner, essentially what is a taxable service is a service rendered by a Clearing and Forwarding Agent to a client in relation to clearing and forwarding operation The essential question is whether looking to the terms noted above, respondent can be stated to be providing such services in relation to clearing and forwarding operations.

10. In para 22 of Trade Notice No. 87/97, dated 14-7-1997, it is provided that normally a clearing and forwarding agent undertakes the following task :

- (a) Receiving the goods from the factories or premises of the principal or his agents,
- (b) Warehousing these goods
- (c) Receiving dispatch orders from the principal
- (d) Arranging dispatch of goods as per the directions of the principal by engaging transport on his own or through the authorised transporters of the principal
- (e) Maintaining records of the receipt and dispatch of goods and the stock available at the warehouse
- (f) Preparing invoices on behalf of the principal.

11. In the present case, none of the above tasks were entrusted to the respondent. We have to see the effect of these factors cumulatively. Essentially under the agreement respondent was receiving the goods for sale outright to the customers that the respondent would get. It is of-course true that price thereof was pre-decided by the principal and respondent could not charge any higher or further rate. Nevertheless, sale was made by the respondent under its own invoice. For such purpose, respondent would receive a certain discount. Respondent would have to place the orders so as to reach the principal by 7th February of every month. In case of credit basis, same would be on freight pre-paid basis through BALCO's nominated transporter. On advance payment, however, the same would be either on freight pre-paid basis or on freight to pay basis. The respondent was liable to pay sales tax and other taxes. Respondent also had responsibility to reach a minimum prescribed turn over of such sales. Most importantly, the qualifying criteria for renewal of agency provided that consignment agent would be renewed depending upon the performance in terms of committed off-take in both the products and release of payment on due dates and timely submission of sales tax forms. Thus the renewal of agency depended on the performance of the respondent in fulfilling its minimum consignment commitment and regular payments. Thus the task cannot be equated with that to be performed by C & F Agent in connection with clearing and forwarding operations. To reiterate as per Revenue's own trade notice, a C & F Agent normally would perform tasks such as receiving the goods from factory or premises of the principal, warehousing these goods, receiving dispatch orders from the principal, arranging dispatch of goods as per the directions of the principal by engaging transport, maintaining records of the receipt and dispatch of goods and the stock available at the warehouse, preparing invoices on behalf of the principal. In the present case, the sale was made by the respondent under its own invoice to its own customers and not as directed by the principal. Thus in our view the respondent did not act as a C & F Agent. The respondent did not provide any service in relation to clearing and forwarding operations. Merely

because the respondent was referred to as a consignment agent in the agreement in question cannot by itself be sufficient to include the respondent within the definition of C & F Agent as provided in Section 65(25) of the Finance Act, 1994 since the respondent as per our interpretation of the terms of the agreement, did not provide any service to the principal in relation to clearing and forwarding of the goods. Whether the respondent acted as a C & F Agent must depend on the terms of the agreement and not a stray expression used therein.

12. We are fortified in our view by few decisions of Tribunal and one of Punjab and Haryana High Court which we may presently refer to

? The decision of the Tribunal in case of Prabhat Zarda (supra) came up for consideration before the Larger Bench of the Tribunal in case of Larsen & Toubro Ltd. v. Commissioner of Central Excise, Chennai reported in 2006 (3) S.T.R. 321 (Tri.-LB) The Tribunal noted that the controversy arose over the proposition laid down in case of Prabhat Zarda (supra) to the effect that procuring orders by an agent from the dealers and passing on the same to the principal, from whom the agent received commission in lieu of services so provided, amounted to services definitely connected with clearing and forwarding agent of the product manufactured in the factory of the principal. The Tribunal referred to and relied on the Trade Notice No. 87/97 and interpreting the term "Clearing and Forwarding Agent", disapproved the view of the Division Bench in case of Prabhat Zarda (supra) Relevant observations of the Tribunal may be noted :

93 An agent engaged only for procuring purchase orders for the vendor on commission basis does not engage in any of the above activities, directly or indirectly Commission agent engaged to procure orders and not entrusted with the work of clearing and forwarding of the goods would be a person who, in the ordinary course of business, makes contracts for sale or purchase of goods for others. The definition of "commission agent" in Section 2(aaa) of the Central Excise Act 1944, would apply in relation to service tax as it applies in relation to duty of excise by virtue of sub-section (121) or Section 65 of the Act Services of Commission Agent are included in the definition of "Business Auxiliary Service" under sub-section (19) of section 65 with effect from 1-7-2003, which includes service of a commission agent As defined in explanation (a) to sub-section (19) of section 65 commission agent is a person who acts on behalf of another person and causes sale or purchase of goods, or provision or receipt of services, for consideration, and includes any person who, while acting on behalf of another person deals with goods or services or documents of title to such goods or services, or collects payment of sale price of such goods or services, or guarantees for collection or payment for such goods or services, or undertakes any activities relating to such sale or purchase of such goods or services. This clearly shows that the activities of mere procurement of purchase order for the principal on commission basis of a commission agent is treated separately by the Parliament from the activities of a Clearing and Forwarding Agent Activity of procuring orders is thus independent of clearing and forwarding operation. The

agents doing these activities can be different, Moreover clearing and forwarding operations do not flow directly or indirectly from mere procurement of order. There is no obligation on the person procuring orders as a commission agent for the principal, only by virtue of that agency, to carry out clearing and forwarding operation in respect of the goods which are to be supplied pursuant to the orders so procured.

10. It appears to us that the expression "directly or indirectly" and "in any manner" occurring in the definition of "clearing and forwarding agent" cannot be isolated from the activity of clearing and forwarding operations. A person may undertake to provide service of procurement of orders as an agent of the principal without agreeing to provide services of clearing and forwarding of the goods Clearing and Forwarding has a very specific connotation in the context of movement of goods from the suppliers to their destination and agent undertaking clearing and forwarding operation may never have been concerned with procurement of orders for the goods which are cleared and forwarded. A person entrusted with the work of commission agent for procuring orders for the principal cannot insist on also providing services as clearing and forwarding agent in respect of those goods and it would be open for the principal to engage some other person for the purpose of forwarding such goods. In cases, where the buyer is under an obligation to take delivery of the goods from the vendor's premises, there would not be even any need on the part of the vendor to engage any forwarding agent, nor can a person engage for the purpose of clearing and forwarding operation, insist on procuring orders for the principal in the absence of any stipulation to that effect.

? In case of 2006 (113) ECC 33 , the Tribunal once again referring to and relying upon the said Trade Notice No. 87/97 held that selling agent advertising product of principal, conducting market survey, reporting trends and tastes of customers, procuring orders from buyer and appointing authorised dealers with the approval of principal cannot be termed as Clearing and Forwarding Agent.

? Division Bench of Punjab and Haryana High Court in case of Commissioner of C. Ex. Vs. United Plastomers, , approved the decision of the Tribunal while rejecting the Revenue's appeal on the question whether the dealer or commission agent would be covered within the expression Clearing and Forwarding Agent and in the process made following observations.

13. We find no force in the argument 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 M/s. Raja Rajeshwari Intl Polymers Pvt. Ltd. (supra) wherein it has been observed that the dealer agent falls within the purview of Clearing and forwarding operation 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 Credere Agency Moreover, the said conclusion/observation stands settled by Larger Bench of the Tribunal in the case of Larsen & Toubro (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 not amount to providing services as "clearing and forwarding agent", within the meaning of definition of that expression u/s 65(25) of the Finance Act, 1994. 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 operation 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.

13. In Halsbury's Laws of England, it is explained that Forwarding Agent is one who undertakes the shipment or transmission of goods. There is a custom of the trade that a forwarding agent incurs personal liability for freight charges with the result that after paying cost of freight he can recover such payment even from a disclosed principle. His duties in relation to goods do not cease once the goods have been dispatched but he has a duty to facilitate, or at-least not to impede, their safe arrival.

In the present case, from the different clauses of agreement between the parties and nature of acts performed by the assessee, it cannot be stated to be a Clearing and Forwarding Agent of BALCO. He was selling the goods received from BALCO to his own customers and receiving a discount in the process.

In the result, we find that the Tribunal correctly disallowed the Revenue's appeal. We answer the question in the negative against the Revenue and in favour of the respondent Tax Appeal is dismissed.