(2010) 07 KAR CK 0038

In the Karnataka High Court

Case No : Central Excise Appeal No. 157 of 2007

Commissioner of Service Tax — APPELLANT

Vs

N.K. Agencies Private Limited — RESPONDENT

Date of Decision : 30-07-2010

Acts Referred:

Finance Act, 1994 — Section 65 (19), 65 (25)

Citation : (2011) 38 VST 469

Hon'ble Judges : N. Kumar, J;B.V. Nagarathna, J

Bench : Division Bench

Advocate : M.R. Bhaskar, for the Appellant; K.S. Ravishankar, for the Respondent

Final Decision : Dismissed

Judgement

B.V. Nagarathna, J.—The revenue has preferred this appeal by challenging the order dated 18.06.2007, made in Appeal No. ST/61/2006 vide its final order No. 686/2007 by raising the following substantial questions of law:

i) Whether under the facts and circumstances of the case, the Tribunal is right in holding that the activity of the respondent cannot be brought within the scope of taxable service, viz., ''Clearing and Forwarding Agent Services'' as defined under Finance Act, 1994?

ii) Whether under the facts and circumstances of the case, the Tribunal is right in allowing the appeal relying on a judgment made in M/s. Rajrajeshwari international Polymers (Pvt.) Ltd. v. CCE reported in 2005 (1780) ELT 448, Inspite of the fact that it has not reached its finality and pending before this Hon''ble Court in C.E.A. No. 41/2006?

iii) Whether under the facts and circumstances of the case, the Tribunal is right in holding that the services rendered by the responded does not fall under the category of Clearing and Forwarding Agents inspite of the fact that Circular stales otherwise?

During the course of submission, learned Counsel on both sides have brought to our notice, the decision of the Division Bench of this Court in the case of Commissioner of Service Tax, Bangalore v. Sreenidhi Polymers (P) Limited, disposed of on 05.03.2010 and another decision of this Court in the case of C.S.T. Bangalore v. Raj Rajeshwari international Polymers (P) Limited, disposed of on 05.03.2010 and submit that the questions of law raised in this appeal may be answered against the revenue since the questions of law raised in this appeal are identical with the questions of law raised in the aforesaid matters and are arising out of identical facts. The said submission is placed on record.

2. It is seen that, in the instant case, that the respondents had entered into an agreement with M/s. Reliance Industries Limited (for short, M/s. RIL) on 31.03.2002 on certain terms and conditions. The respondent had obtained orders from the customers and passed them on to M/s RIL and goods were directly dispatched to the customers from the factory of M/s. RIL. The respondent had received commission for rendering the above services from 01.10.1999 to 30.10.2004 and according to the appellant the services rendered by the respondent was in the category of "clearing and forwarding agent services" and taxable under the provisions of Service Tax. Under the circumstances, the Department had issued a show-cause notice dated 19.04.2005 to the respondent and also corrigendum dated 25.10.2005 contending that service tax was liable in respect of the service rendered by the respondent. The respondent replied to the said notice by contending that, they were not liable to pay the service tax or interest and penalty. The said notice was adjudicated upon by the Joint Commissioner of Service Tax, Bangalore who by his order dated 21.11.2005 passed in Original No. 9/2005 confirmed the demand of service tax as well as the penalty imposed. As against the said order, the respondent being aggrieved, filed an appeal before the Appellate Authority Commissioner of Central Excise, (Appeals II), Bangalore, who set aside the order of the Original Authority. Aggrieved by the said order, the revenue went in appeal before the Tribunal. The Tribunal by its order dated 15.06.2007 rejected the appeal and it is as against the said order, that the present appeal has been preferred.

3. We have heard the learned Counsel for the revenue and the learned Counsel for the respondent and noted the submission made with regard to the earlier orders passed by the Division Bench of this Court on identical questions of law. It is seen that, under the Finance Act, 1994, Section 65(25) deals with the definition of "clearing the forwarding agent which reads as follows;

65(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.

The definition of business auxiliary service was brought into effect from 16.06.2005 and the definition of ''business auxiliary service'', which includes ''commission agent'' is also defined under the said Act. Business auxiliary service'' reads as follows:

(19) ''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

(v) production or processing of goods for, or on behalf of, the client; 4

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

(vii) a service Incidental or auxiliary to any activity shifted in Sub-clause (I) to (vi), such as billing issue or collection or recovery of cheques. payments, maintenance of accounts and remittance, inventory management, evaluation or development of prospective customer or vendor, public relation service, management or supervision,

and includes services as a commission agent, but does not include any information technology service and any activity that amount to ''manufacture1 within the meaning of clause(f) of Section 2 of the Central Excise Act, 1944.

4. On a combined reading of the definition ''Clearing and Forwarding Agent'' u/s 65(25) and the meaning of ''Del Credere Agent'' and the amendment brought about in the year 2005, whereby a del credere agent is included in the category of a business auxiliary service, the service rendered by a del credere agent prior to the said amendment could not have been brought within the scope of the definition of "clearing and forwarding agent" under the Finance Act

5. Therefore, we are of the view that, in the instant case, the respondent who rendered service was not a clearing and forwarding agent for M/s. Reliance industries Limited and that he was a del credere agent and he was not liable to pay any service tax as has been ordered by the Assistant Commissioner of Central Excise in the instant case. This is apparent from the following terms and conditions;

(a) The respondent has agreed to sell the products of their principal in the area as assigned.

(b) The respondent has agreed to organize, propagate and promote sale of the products in India to the best of their ability and salesmanship

(c) The respondent shall submit a report to their Principal every month containing Information about market survey, volume of competitor''s business, prospects of business and such other Information as may be required by their Principals in respect of products

(d) The respondent shall submit monthly estimates of likely purchases of the products by buyers prior to the commencement of each month including a report on buyer''s creditworthiness reputation and good-will in the market.

(e) The respondent shall procure Indent/order from the buyers and forward the same to their Principals for supply of goods.

(f) The respondent shall be responsible for ensuring that customers make timely payments of the sale consideration for the quantities of products sold to the Customers.

(g) The respondent shall indemnify their principal from all loss caused by the Customers failure to make payment of any sale products sold to the customers.

(h) The respondent would set a commission At the rate of Rs. 350/ - per Metric Tonne of the products sold by the respondent.

Conditions Nos. (a), (g) and (h) particularly establish that the respondent is a del credere agent which is covered under the nomenclature of "business auxiliary service" at Clause (19) of Section 65 of the Finance Act, 1994.

6. It is seen that the facts which arise in the aforementioned judgments are identical to the facts of the instant case as the period in question in this appeal is from 01.10.1999 to 30.09.2004 which is prior to the amendment of "business auxiliary service" which is with effect from 16.06.2005. Therefore, following the aforesaid decisions, we answer the substantial questions of law raised in this appeal against the revenue and in favour of the assessee. Accordingly, the appeal is dismissed.