(2010) 03 KAR CK 0095

In the Karnataka High Court

Case No : C.E.A. No. 26 of 2005

Commissioner of Service Tax APPELLANT

Vs

Sreenidhi Polymers (P) Ltd. RESPONDENT

Date of Decision : 05-03-2010

Acts Referred:
Finance Act, 1994 — Section 65 (25)

Citation : (2010) 27 STT 253 : (2010) 30 VST 468

Hon'ble Judges : K.L. Manjunath, J;B.V. Nagarathna, J

Bench : Division Bench

Advocate : M.V. Chandrashekara Reddy, for the Appellant; K.S. Ravishankar, for the Respondent

Final Decision : Dismissed

Judgement

K.L. Manjunath, J.—Though the matter is listed for admission, by consent of parties the appeal is heard on the merits.

2. The Revenue has come up in this appeal challenging the legality and correctness of the order passed by the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Branch, Bangalore in Final Order No. 388/2005 dated February 25, 2005.

3. The facts leading to this case are as hereunder:

The respondent-assessee company is an agent for M/s. IPCL. The respondent-assessee contended that it is acting as an agent for IPCL as a del credere agent and not clearing and forwarding agent in order to pay the service tax. The case of the assessee for the period March 1, 2003 to October 11, 2003 was not accepted. The Assistant Commissioner passed an order calling upon the assessee to pay the service tax and he also levied the penalty. Being aggrieved by the order passed by the Assistant Commissioner, the assessee filed an appeal before the Commissioner (Appeals), which appeal came to be allowed in part, whereunder the Commissioner (Appeals) set aside the levy of penalty and confirmed the order of the Assistant Commissioner of Central Excise, in regard to payment of service tax. Being aggrieved by the same, the assessee filed an appeal before the Tribunal. The Tribunal examining the agreement entered into between the respondent-assessee and IPCL came to the conclusion that the service rendered by the assessee cannot be considered as clearing and forwarding agent and the service rendered by the assessee falls under the category del credere agent. Therefore, the assessee is not liable to pay the service tax. Accordingly, the appeal came to be allowed. Being aggrieved by the same, the present appeal is filed by the Revenue.

4. After hearing the learned Counsel for the parties, we are of the opinion that the following substantial question of law has to be considered in this appeal:

Whether, on the facts and in the circumstances of the case, the service rendered by the assessee has to be classified as the clearing and forwarding agent or as a del credere agent. If the case of the assessee falls under the category of del credere agent, whether the Revenue is entitled to levy tax under the Service Tax Act?

5. The Counsel for the appellant contends that the act of the service rendered by the respondent to the IPCL has to be considered as "clearing and forwarding agent" as defined under the Finance Act, 1994. Therefore, he contends that the Assistant Commissioner was justified in levying the service tax on the assessee.

6. Per contra, the learned Counsel for the assessee, taking us through the agreement entered into between IPCL and the assessee contends that the service rendered by the assessee falls under the category of del credere agent and therefore the assessee is not liable to pay the tax. He further contends that an amendment to the Finance Act was brought in the year 2005 which has come into force with effect from June 16, 2005, wherein the service rendered by a del credere agent has also been included under business auxiliary service. In view of the amendment which has come into force with effect from June 16, 2005 holding a del credere agent is liable to be taxed under the Service Tax Act. Therefore, taking us through the definition of "del credere agent" and amendment brought into the Finance Act, in the year 2005, contends that in view of the inclusion of the service of a del credere agent as an auxiliary service, it goes without saying that the del credere agent was excluded from the payment of service tax prior to the amendment. He further contends that the service rendered by the assessee to the IPCL is more in the nature of an indemnifier as the assessee has to indemnify to the value of the goods sold by the IPCL to its customers and that the assessee shall ensure the proper repayment of the value of the goods sold by the IPCL to its customers. Therefore, he contends that the act of the respondent cannot be treated as a clearing and forwarding agent. In the circumstances he requests the court to dismiss the appeal.

7. Having heard the Counsel for the parties, we have to look into the meaning of del credere agent. In Black''s Law Dictionary, 6th Edition, del credere agent

means an agreement by which a factor, when he sells goods on credit for an additional commission (called a "del credere commission") guarantees the solvency of the purchaser and his performance of the contract. Such a factor is called a "del credere agent". He is a mere surety, liable to his principal only in case the purchaser makes default. Agent who is obligated to indemnify his principal in event of loss to principal as result of credit extended by agent to third party.

8. In order to appreciate the actual facts of this case, it would be appropriate for us to quote the definition of "clearing and forwarding agent". Under the Finance Act, 1994, Section 65(25) deals with the definition of "clearing and forwarding agent" 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.

9. It would also be relevant to note the amendment brought into effect from June 16, 2005 as Section 65(25). Under the amended provision of 2005 Clause (19) deals with the "business auxiliary service" which includes commission agent:

(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; or

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

(vii) a service incidental or auxiliary to any activity specified in Sub-clauses (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 services, management or supervision,

and includes services as a commission agent, but does not include any information technology service and any activity that amount to ''manufacture'' within the meaning of Clause (f) of Section 2 of the Central Excise Act, 1944 (1 of 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, or provision or receipt of services, for a consideration, and includes any person who, while acting on behalf of another person,-

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

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

whereunder the service rendered by a del credere agent has been brought into service tax.

10. A combined reading of the definition of "clearing and forwarding agent" under the Finance Act u/s 65(25) and the meaning of del credere agent and the amendment brought in the year 2005, whereunder del credere agent is also included would clearly establish that prior to the amendment, the service rendered by a del credere agent had been excluded from service tax. Therefore, we are of the view that since the respondent-assessee was not a clearing and forwarding agent for IPCL as it was a del credere agent the respondent-assessee is not liable to pay service tax as ordered by the Assistant Commissioner of Central Excise.

11. Accordingly, we are of the view that a similar mistake has also been committed by the Commissioner (Appeals) and further we are of the view that the Tribunal is justified in distinguishing the definitions of "clearing and forwarding agent" and "del credere agent" and in granting relief to the respondent-assessee. In view of the agreement entered into between IPCL and the respondent-assessee and the nature of service rendered to IPCL by the respondent, we are of the view that the assessee is not liable for payment of service tax.

12. Accordingly, the question of law framed in this appeal is answered against the Revenue and in favour of the assessee. Accordingly, the appeal is dismissed.