

(2011) 01 MAD CK 0120

In the Madras High Court

Case No : Writ Petition No. 2671 of 2010

Container Tea and Commodities

APPELLANT

Vs

Commissioner of Service Tax

RESPONDENT

Date of Decision : 05-01-2011

Acts Referred:

Finance Act, 1994 — Section 65, 66

Citation : (2011) 22 STR 3

Hon'ble Judges : M. Jaichandren, J

Bench : Single Bench

Advocate : Pushya Sitaraman, for Arun Kurian Joseph, for the Appellant; D. Mahadevan, Additional Government Pleader, for the Respondent

Judgement

M. Jaichandren, J.—It is stated that the writ petition had been filed seeking to prohibit the Respondent from levying and collecting service

tax on the commission received by the Petitioner, for their activity of acting as agents for a number of south Indian Tea Estates in the marketing and

sale of their tea overseas, under the head "Business Auxiliary Services".

2. It had been further stated that the Petitioner is a small family run partnership firm. The Petitioner firm received 2.5% to 3% commission on sales.

As such, the Petitioner would fall within the category of "Commission Agent", under the head "Business Auxiliary Services". The Commission

Agents, in general, were exempt from the payment of service tax, under the head of "Business Auxiliary Services", during the period from July,

2003 to July, 2004, vide notification No. 13/2003. The said notification had been amended, on 9.7.2004, vide notification No. 8/2004, whereby

the exemption was restricted to the commission received by the Commission Agent, in relation to the sale or purchase of "Agricultural Produce",

from the service tax 3 leviable thereon, u/s 66 of the Finance Act, 1994.

3. It had been further stated that the said notification states that "Agricultural Produce" means any produce resulting from cultivation or plantation,

on which either no further processing is done or such processing is done by the cultivator, like tending, pruning, cutting, harvesting, drying, which

does not alter its essential characteristics, but makes it only marketable, and includes all cereals, pulses, fruits, nuts and vegetables, spices, copra,

sugar cane, jaggery, raw vegetable fibres, such as cotton, flax, jute, indigo, unmanufactured tobacco, betel leaves, tendu leaves, rice, coffee, and

tea, but does not include manufactured products such as sugar, edible oils, processed food and processed tobacco. Since, the notification has

clearly specified "tea", under the head of "Agricultural Produce", the authorities concerned would have no jurisdiction to insist that the Petitioner

should register itself and start paying the service tax on the commission so received.

4. It had been further stated that, in response to the queries raised by the Superintendent of Central Excise and 4 Service Tax, Conoor, the

Petitioner had written a letter, dated 22.6.2009, claiming exemption on the ground that the service rendered by the Petitioner firm relates to

"Agricultural Produce". The Superintendent of Central Excise and Service Tax, Conoor, vide letter, dated 13.8.2009, had misquoted the definition

found in the notification No. 8/2004, stating that it specified "unmanufactured tea" as in the case of unmanufactured tobacco. Therefore, it was

insisted that the Petitioner should give the details of the commission received by it, from 1.7.2003, till the date of the said communication.

5. The main contention of the learned senior counsel appearing for the Petitioner is that the Respondent does not have the authority or the power to

levy the service tax on the commission received by the Petitioner in connection with the export of "Agricultural Produce", such as tea. She had also

submitted that the Respondent had not passed a speaking order on the representation made by the Petitioner, dated 17.8.2009. The Respondent

and the other authorities concerned do not have the jurisdiction to levy serviced tax on the commission received by the Petitioner, in respect of the

export of tea, which has been exempted, vide notification No. 13/2003, as amended by notification 5 No. 8/2004. The definition of "Agricultural

Produce" in the concerned notification, specifically, includes tea, while excluding items, such as sugar, edible oils, processed food and processed tobacco. Since, the tea sold by the Petitioner's clients is merely dried and not processed further to be made into tea bags or flavoured tea, or masala tea or as tea powder, it would be exempted from the payment of service tax. However, the Respondent had issued the communication, dated 13.8.2009, without properly analysing the definition of "Agricultural Produce", as in the amended notification, dated 9.7.2004.

6. A counter affidavit had been filed on behalf of the Respondent denying the averments made in the affidavit filed in support of the writ petition. It

has been stated that, as per Section 65 of the Finance Act, 1994, "Business Auxiliary Service" includes services rendered as a commission agent,

but does not include any activity that amounts to manufacture of excisable goods. The Government had provided exemption from service tax for

"Business Auxiliary Service" provided by the commission agent, from 1.7.2003, to 8.7.2004, vide notification No. 13/2003-ST, dated 20.6.2003.

Subsequently, such exemption was restricted to commission agents, who were engaged in the 6 activity of sale or purchase of "Agricultural

Produce". The definition of "Agricultural Produce" included tea. However, it had been stated that it does not include manufactured product, such

as sugar, edible oils, processed food and processed tobacco.

7. The contention of the Petitioner is that the product tea is exempted from the payment of service tax, as it is not manufactured, cannot be

accepted, as the tea, which the Petitioner deals in is a manufactured product, which is subjected to a number of processes in the tea factories.

Since, the Petitioner provides the services in respect of black tea, which is a fully manufactured product, the exemption from service tax would not

be applicable to the Petitioner.

8. It had been further stated that the Petitioner has approached this Court by filing the present writ petition even before the Respondent had issued

a show cause notice to the Petitioner in respect of the service tax liable to be paid by it. Hence, the writ petition is premature in nature. and

therefore, it is liable to be dismissed.

9. At this stage of the hearing of the writ petition, the learned Counsel appearing for the Respondent had submitted that a notice would be issued to

the Petitioner asking the Petitioner to show cause as to how it would not be subjected to the payment of service tax. He had also submitted that an opportunity of hearing would also be given to the Petitioner before arriving at a final conclusion. He had also submitted that the Respondent would take into consideration the decision of the Supreme Court, reported in Commissioner of Sales Tax, Lucknow Vs. D.S. Bist and Sons, Nainital, , while deciding the issues arising for his consideration .

10. In view of such submissions made by the learned Counsel appearing for the Respondent, this Court finds it appropriate to direct the

Respondent to issue a show cause notice and to give an opportunity of hearing to the Petitioner before deciding the issues arising for his

consideration relating to the payment of service tax by the Petitioner. It would be open to the Petitioner to substantiate its claims, by producing the

necessary records. Thereafter, the Respondent may pass appropriate 8 orders on merits and in accordance with law, taking into consideration all

the relevant aspects, including the decisions of the supreme Court cited by the Petitioner, as expeditiously as possible.

The writ petition is ordered accordingly. No costs. Connected M.P.No.2 of 2010 is closed.