
(2014) 01 CESTAT CK 0013

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Service Tax Appeal No. 18 Of 2009

M/s. Clearchem Agencies

APPELLANT

Vs

CCE, Indore

RESPONDENT

Date of Decision : 30-01-2014

Acts Referred:

Finance Act, 1994 — Section 73(1), 78

Citation : (2014) 01 CESTAT CK 0013

Hon'ble Judges : G. Raghuram, J; Rakesh Kumar, Technical Member

Bench : Division Bench

Advocate : Manish Saharan, Devendra Singh

Final Decision : Disposed Of

Judgement

1. The appellant are a Clear & Forwarding Agent. The period of dispute in this case is from April, 2002 to September, 2006. During this period, they were providing C&F Agent services and also the services of the packaging to M/s. Tata Chemicals Ltd. Mumbai. There is no dispute in respect of the service tax on the packaging services. The dispute is only in respect of the value of the C&F Agent Services. The department's allegation is that during the period of dispute, the appellant were not paying service tax on payment received under following heads:-

- (1) Godown Rent Rs.48,000/- per month.
- (2) Charges for unloading from wagons & loading into trucks @30PMT.
- (3) Other misc. expenses @Rs.5/- per kg.
- (4) Charges for transportation from rail head to godown Rs.60/- PMT.
- (5) Unloading and stocking at godown @Rs.15/- per MT.
- (6) Loading for onward movement @Rs.20/- PMT.

According to the Department, the above amounts received by the Appellant

should be part of assessable value of the C&F Agents service being provided by them. It was also found that no service tax was being paid on the amount received for packaging service. On this basis after issue of show cause notice, the jurisdictional Addl. Commissioner vide order-in-original dated 11.11.2008 confirmed service tax demand of Rs.13,09,230/- in respect of C&F Agent services besides confirming demand of Rs.2,00,650/- in respect of providing services. Besides this, he also demanded interest on the service tax demand and also imposed penalty of equal amount on the appellant under Section 78 of the Finance Act, 1994. On appeal being filed to the Commissioner (Appeals) against the Addl. Commissioner's order, the same was dismissed vide order-in-appeal no.IND/1/153/08 dated 10.09.2008. Against this order of the Commissioner (Appeals), the present appeal has been file,

2. Heard both the sides.

3. Shri Manish Saharan, Advocate, Id. Counsel for the appellant, pleaded that the expenses incurred for providing C&F Agent's services which were being reimbursed to the appellant by their principals are not includible in the assessable value of the services, that in this regard he relies upon the judgements of the Tribunal in the case of Al-Baith Steel (P) Ltd. reported in 2008 (10)STR 554 (Tribunal-Bang.) and S &K Enterprises Vs. CCE, Calicut reported in 2008 (10) STR 171 (Tribunal-Bang.) and also the stay order passed by the Bombay Bench of the Tribunal in the case of Y.N. Warehousing Company Vs. CCE, Nagpur reported in 2013 (32) STR 251 (Tribunal-Mumbai), wherein the Tribunal in respect of the period prior to introduction of Service Tax (Determination of value) Rules, 2006, taking into account the Board's Circular No.341/11/98/TRU dated 23.08.98 had taken a prima facie view that only the commission received by the C&F Agent would be chargeable to service tax and had granted unconditional waiver and that in view of this, in respect of the present appeal, where the period of dispute is prior to 19.04.2006, the service tax would be chargeable only on the commission and not on the reimbursement of actual expenses and as such, the impugned order is not correct. He pleaded that the Tribunal's judgement in the case of Y.N. Warehousing Company (supra) though a stay I order is squarely applicable to the facts of this case. He also pleaded that the ' period of dispute in this case is from April, 2002 to September, 2006, while the show cause notice was issued only on 31.3.2007 by invoking the extended period that the extended period under proviso to Section 73(1) of the Finance Act is not invocable inasmuch as in view of the conflicting judgements on the issue involved in this case, it cannot be alleged that the appellant had deliberately contravened the provisions of Finance Act, 1994 and the Rules made thereunder with an intent to evade service tax and in this regard he relies upon the judgements of the Apex Court in the cases of Continental Foundation Joint Venture Vs. CCE, Chandigarh-I reported in 2007 (216) ELT 177 (SC) and Uniworth Textile Ltd. Vs. CCE, Raipur reported in 2013 (288) ELT 161 (SC). He, therefore, pleaded that bulk of duty demand is time barred and for the same reason penalty under Section 78 would not be imposable. As regards the service

tax on packaging service, he stated that the same is not being centered.

6. Shri Devendra Singh, Id. Joint CDR defended the order by reiterating the findings of the Commissioner and pleaded that when the issue involved in this case stands decided by the Larger Bench of this Tribunal in the case of Shri Bhagavathy Traders reported in 2011 (24) STR 290 (Tribunal-LB) wherein with regard to the C&F Agent services, the Larger Bench held that the reimbursement expenses are includible in the value of the C&F Agent services. He also pleaded that since the appellant did not show the value of the reimbursement in the ST-3 Returns, they have suppressed the relevant facts from the Department and hence, longer limitation period has been correctly invoked under Section 73(1) for demand of service tax and penalty under Section 78 of the Finance Act, 1994 has been correctly imposed. He, therefore, pleaded that there is no infirmity in the impugned order.

7. We have considered the submissions from both the sides and perused the records. The only point of dispute in this case is as to whether the expenses as mentioned above which were being reimbursed by the principals to the appellants are includible in the assessable value of the C&F Agent services for payment of service tax. Though during the period of dispute, there were conflicting decisions on this issue, the issue now stands decided in favour of the department by the Larger Bench of the Tribunal in the case of Sri Bhagavathy Traders (supra), wherein the Tribunal after considering the earlier judgements in the cases of Al-Baith Steel (P) Ltd. (supra), S & K Enterprises (supra) E.V. Mathai & Co. reported in 2006 (3)STR 116 and Rolex Logistics Pvt. Ltd. reported in 2009 (13)STR 147 (Tribunal) etc. has held that only when the service recipient is having obligation, legal or contractual to pay certain amount to any third party and the said amount is paid by the service provider on behalf of the service recipient, the reimbursement expenses received by the service provider from the service recipient would not be includible in the assessable value but in other cases, where there is no such obligation reimbursement expenses would be includible in the assessable value. In the present case, it is not the case of the appellant that the service recipient were reimbursing the expenses in question to them as per their legal obligations. In view of this, in terms of the judgement of the Larger Bench of the Tribunal in the case of Bhagavathy Traders (supra) the amount received by the appellant from their principals would be includible in the assessable value. However, we find that since during the period of dispute, there were conflicting decisions on the point of dispute in this case because of which the appellant could have entertained a bonafide doubt about inclusion of reimbursement expenses in the assessable value keeping in view the judgement of the Apex Court in the case of Continent Federation Joint Venture (supra) and Uniworth Textile Ltd. (supra), neither longer period for demand of short paid service tax can be invoked nor penalty under Section 78 of the Finance Act would be imposable. In view of this, we upheld the duty demand only for the normal limitation period, which would be quantified by the original adjudicating authority and would be recoverable from the appellant along with interest. However,

imposition of penalty on the appellant under Section 78 is set aside. The appeal stands disposed of as above. The impugned order with regard to service tax demand on packaging service, which has not been contested, remains undisturbed