(2013) 10 DEL CK 0242

In the Delhi High Court

Case No : Central Excise Appeal No. 50 of 2013

Olam Agro India Ltd. APPELLANT

Vs

Commissioner of Central Excise RESPONDENT

Date of Decision : 29-10-2013

Acts Referred:

Citation : (2014) 33 STR 234

Hon'ble Judges : Sanjiv Khanna, J;Sanjeev Sachdev, J

Bench : Division Bench

Advocate : M.P. Devnath, Bhuvnesh and Aditya Bhattacharya, for the Appellant; Satish Kumar, Senior Standing Counsel with Harsh Makhija, for the Respondent

Judgement

1. Having heard learned counsel for the parties, we frame the following substantial question of law:-

Whether Customs, Excise and Service tax Appellate Tribunal was correct in directing the appellant to deposit entire service tax along with

proportionate interest within six weeks from the date of the order in spite of the findings recorded in the earlier paragraphs?

With the consent of the parties, as limited issue arises for consideration, we take up the appeal for final hearing and disposal today itself. As the

impugned order is a common order passed in the two appeals, we are also disposing of the two appeals by this singular order.

2. The appellant herein had filed applications seeking waiver of pre-deposit for hearing of their appeal on merits against the adjudication orders

dated 31st January, 2013 and 6th March, 2013. The appellant is a 100% subsidiary of Olam International Ltd., a company incorporated in

Singapore. The first issue, on which service tax has been raised, relates to agency commission remitted by the appellant to its parent company in foreign currency for facilitating export of cotton, rice, cashew and sesame. The said commodities were claimed to be agricultural produce by the

appellant but the said claim was contested by the Revenue. On the said aspect, the Tribunal referred to and relied upon two exemption

notifications being Notification No. 8/2004-S.T., dated 9th July, 2004 and Notification No. 13/2003-S.T., dated 20th June, 2003 and has formed

the following prima facie opinion:--

Prima facie we are satisfied that the adjudication order is in error to the extent benefits of exemption under Notification No. 8/2004-S.T., for the

agency commission paid by the petitioner was denied. The total tax assessed in this respect is Rs. 8,47,605/-. The petitioner, inter alia exported

rice, sesame seeds, cashew nuts etc. Admittedly, processing of these commodities was not done by the cultivator of these agricultural produce but

by third party agencies. Whether in the circumstances, the benefit of Notification No. 8/2004-S.T. would apply is the issue. The adjudicating

authority thought not. We are prima facie satisfied that the exemption Notification applies. By Notification No. 13/2003-S.T., dated 20-6-2003

the Central Government exempted Business Auxiliary Service provided by commission agents from the liability to service tax leviable thereon. The

Explanation"" to this Notification defined ""Commission Agent"" meaning, a person who causes sale or purchase of goods, on behalf of another

person for a consideration which is based on the quantum of such sale or purchase. The overseas agents who facilitate sale of the petitioner''s

export of agricultural commodities fall within the scope of commission agent defined under Notification No. 13/2003-S.T. This is not in dispute.

Notification No. 8/2004 amended several earlier exemption Notifications including Notifications No. 13/2003-S.T. Under this Notification, inter

alia, Notification No. 13/2003-S.T., was amended to introduce an additional clause in the Explanation to the earlier Notification No. 13/2003-

S.T. The scope of the primary exemption granted was also restricted. Under the earlier Notification No. 13/2003-S.T., business auxiliary service

provided by commission agents was exempted from the liability to tax. By Notification No. 8/2004-S.T., the exemption was restricted to business

auxiliary service provided by commission agents in relation to sale or purchase of agricultural produce. Clause (ii) appended to the existing

Explanation (added by the amendment) defines ''agricultural produce'' as meaning: ""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, sugarcane,

jiggery, 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. A TRU clarification issued in Circular No.

143/12/2011-ST., dated 26-5-2011 clarified that where commission agents stationed abroad provide business auxiliary service to promote export

of rice, said business auxiliary service is covered by Notification No. 13/2003-S.T. (as amended) because, ''rice'' is mentioned under the

Explanation to the term ''agricultural produce'' in the inclusive portion along with other items like cereals, pulses, etc. The petitioner also relied on

this clarification to support its claim for the benefit of exemption from liability to tax which did not find favour with the adjudicating authority.

7. On true and fair construction of the provisions of Notification No. 8/2004-S.T., it is clear that all agricultural products enumerated in the

inclusive part of the definition such as cereals, pulses, fruits, nuts, rice, etc. per se are agricultural produce. The further clause in the definition of

''agricultural produce'' which brings agricultural produce processed by the cultivator also into the ambit of agricultural products is not applicable nor

operates to define products enumerated in the inclusive portion of the definition.

8. On the above prima facie construction, the conclusion by the adjudicating authority that commission paid by the petitioner to its overseas agents

for facilitating export of rice, sesame seeds, cashew nuts etc. is not entitled to the benefit of exemption Notification No. 8/2004-S.T., is

unsustainable.

Thus, the prima facie opinion is in favour of the appellant. Therefore, exemption/ waiver of pre-deposit was granted.

3. The second issue raised by the Revenue pertains to corporate guarantee commission paid by the appellant to the foreign principal Olam

International Ltd., Singapore. On the said aspect, the Tribunal has stated that the said commission payment prima facie could be treated as a

service provided by the Singapore entity to the appellant for facilitating its business for procurement of indigenous agricultural produce etc. for the

purpose of export and is other financial services but would not be a bank guarantee as defined in Section 65(12) of the Finance Act, 1994.

However, after forming the prima facie view, the Tribunal in paragraph 11 referred to an earlier interim order passed in the case of 2011 (22)

S.T.R. 220 and has recorded as under:--

11. Counsel for the petitioners refers to interim orders passed by this Tribunal granting complete waiver of pre-deposit where service tax apart

from interest and penalties were assessed in respect of corporate guarantees provided by the appellant therein to a nationalized bank for loans

availed by another entity. Revenue had assessed liability to ""Business Support Services"" (BSS) during 1-5-06 to 31-12-07 in view of the interim

order in 2011 (22) S.T.R. 220 , this Tribunal found considerable merit in the submission of the appellant therein that corporate guarantee provided

to a bank for loans taken by another entity falls within Section 65(12) of the Act and not under BSS as defined in Section 65(104c). We are

persuaded to follow this interim order for the reason that provision of corporate guarantee clearly falls outside banking or financial services.

(emphasis supplied)

4. Thus, it is clear that the Tribunal has observed that they were persuaded to follow the interim order passed in the case of Kaveri Agri Care Pvt.

Ltd.

5. In spite of the said observations and findings, the Tribunal in the last paragraph i.e. paragraph 12 has stated as under:--

On the aforesaid analyses, we grant waiver of pre-deposit and stay all further proceedings pursuant to the adjudication orders impugned in these

two appeals; on condition that the petitioner remits Rs. 2,83,04,550/- plus proportionate interest on this amount in S.T. Appeal No. 57100/2013;

and the petitioner in S.T. Appeal No. 57667/2013 shall remit Rs. 66,77,289/- along with proportionate interest therein, within six weeks from

today and report compliance by 5-11-2013. In default, the appeals shall stand dismissed for failure of pre-deposits.

6. In view of the findings recorded by the Tribunal reproduced above, we feel

that the appellant is entitled to complete waiver of pre-deposit. The question of law is accordingly answered. The appeal is disposed of. No costs.

