

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,
REGIONAL BENCH : ALLAHABAD**

ST/70133/2015-CU[DB]

(Arising out of Order-in-Original No.KNP-EXCUS-000-007-15-16 dated 28.08.2015 passed by Commissioner, Customs, Central Excise & Service Tax, Kanpur.)

M/s. Super House Limited Shoe Div

...APPELLANT(S)

VERSUS

Commissioner of Central Excise & Service Tax, Kanpur

RESPONDENT (S)

APPEARANCE

Shri Dharmendra Srivastava (C.A.) for the Appellant (s)

Shri Sandeep Kumar Singh (Supdt.) (A.R.) for the Revenue

CORAM:

MRS. ARCHANA WADHWA, HON'BLE MEMBER(JUDICIAL)

SHRI ANIL G. SHAKKARWAR, HON'BLE MEMBER(TECHNICAL)

DATE OF HEARING : 04.12.2018

DATE OF PRONOUNCEMENT: 18.02.2019

FINAL ORDER NO.70293/2019

Per Mrs.Archana Wadhwa :

As per facts on record the appellant is engaged in the manufacture and export of footwear and parts of footwear falling under chapter 64 of the schedule to the Central Excise Tariff Act, 1985. The appellant is also registered with the Service Tax department under the category of "Transport of Goods by Road Services" and "Business Auxiliary Services".

2. For the purposes of exports and to procure the export order the appellant has established four fully owned subsidiaries in foreign

countries. The said subsidiaries of the appellant are working as over-seas commission agents and are procuring export orders for the appellant. Inasmuch as the appellant is availing the said commission agent services from the companies located outside India, they are liable to pay Service Tax in respect of the commission paid to them, on reverse charge basis, in terms of Clause (iv) of Rule 2(1)(d) of Service Tax Rules, 1994.

3. However, Notification No.18/2009-ST dated 07.07.2009 exempts the said services used by the exporters for export of their goods subject to certain conditions. The dispute in the present appeal relates to one of such conditions enumerated in the said Notification.

4. For the sake of ready reference to the said Notification, the relevant part of the same is reproduced below:-

Notification No.18/2009-ST dated 07.07.2009

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2.	(zzb)	Service provided by a commission agent located outside India and engaged under a contract or agreement or any other document by the exporter in India, to act on behalf of the exporter, to cause sale of goods exported by him	1)The exporter shall declare the amount of commission paid or payable to the commission agent in the shipping bill of export, as the case may be. 2)The exemption shall be limited to one per cent of the free on board value of export goods for which the said service has been used. 3) The exemption shall not be available on the export of canalized item, project export, or export financed under lines of credit extended by Government of India or EXIM

			Bank, or <u>export made by Indian partner in a company with equity participation in an overseas joint venture or wholly owned subsidiary.</u> 4) The exporter shall submit with the half yearly return after certification of the same as specified in clause (g) of the proviso – (i)The original documents showing actual payment of commission to the commission agent; and (ii)a copy of the agreement or contract entered into between the commission agent located outside India and the exporter in relation to sale of export goods, outside India:
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The dispute relates to condition 3 of the Notification, which is to the effect that such exemption shall not be available on the export of the goods if export is made by an Indian partner in a company with equity participation in a overseas joint venture or wholly owned subsidiary. The Revenue has interpreted the said condition to the effect that inasmuch as the overseas commission agents were subsidiary companies of the exporters and the commission paid by them is to its wholly owned subsidiaries in respect of the export orders, the services are not exempted from payment of Service Tax. The Commissioner in his impugned order has concluded that the appellants are not entitled to avail the benefit of the said Notification inasmuch as they have paid commission on export of goods procured through the wholly owned subsidiaries. Accordingly the proceedings initiated against them by way

of issuance of show cause notice invoking the extended period stand culminate^{3d} into the impugned order vide which demand of Service Tax to the tune of Rs.5,92,72,806/-(Rupees Five Crore Ninety Two Lakhs Seventy Two Thousand Eight Hundred and Six only) stands confirmed along with imposition of penalty of identical amount under section 78 of the Finance Act, 1994 and of Rs.10,000/-(Rupees Ten Thousand only) under section 77(2) of the Finance Act, 1994. The said order of the Commissioner is impugned before us.

5. Shri Dharmendra Srivastava, learned C.A. appearing on behalf of the appellant has drawn our attention to the said condition and have strongly contended that the same stands mis-interpreted by the Revenue. He submits that a plain reading of the said condition leads to the inevitable conclusion that the debarring condition relates to the exports made by an Indian partner to the overseas joint venture companies or wholly owned subsidiaries, whereas in the present case it is not the Revenue's case that the appellant have made exports to its foreign based wholly owned subsidiaries. The exports were made by the appellant to independent foreign buyers and there is no allegation that the export was between the appellant and its wholly owned subsidiaries. The services of the appellant's subsidiaries in a foreign company were procured only for getting the export orders from other independent persons located in foreign country. They have paid only commission to their foreign based wholly owned subsidiaries in which case they would be entitled to the benefit of the Notification in question. He submits that condition 3 of the Notification denies the

exemption only when export is made by a Indian partner to a overseas joint venture or wholly owned subsidiaries. The interpretation given by the adjudicating authority that even if the export orders are procured through the wholly owned subsidiaries, the benefit of the exemption would not be available to the exporter in India is fully erroneous and mis-interpreted. The Notification nowhere denies exemption on the ground that the export orders were procured **through** the foreign agents, who happened to be exporter's own subsidiaries.

The demand also stands assailed on the point of limitation by submitting that all the facts were in the knowledge of the Revenue and submits that during the period in question the appellant has been audited number of times wherein the records maintained by them were scrutinized. Further, they were disclosing each and every fact to the department by way of filing regular Form EXP-2. The disclosures made in the said EXP-2 were sufficient enough for the Revenue to be aware of all the facts. As such he submits that in the absence of any evidence to the contrary, the Revenue cannot invoke longer period of limitation. In any case and in any view of the matter, he submits that the applicability of Notification No.18/2009-ST dated 07.07.2009 involves a *bona fide* dispute of interpretation and cannot lead to any allegation of suppression or mis-statement on their behalf with intent to evade payment of duty. As such by relying upon various precedent decisions, he assails the impugned order on the point of limitation also and prays for setting aside the same.

6. Shri Sandeep Kumar Singh learned Supdt. (A.R.) appearing on behalf of the Revenue reiterates the findings of the adjudicating authority and submits that condition No.3 debars applicability of exemption if the exports are made by a Indian partner in a company with equity participation in a overseas joint ventures or wholly owned subsidiaries. He submits that inasmuch as the foreign commission agents are the appellant's fully owned subsidiaries, the benefit of the Notification in question cannot be extended inasmuch as the same is hit by the said condition. As such he prays for upholding the impugned orders.

7. After carefully considering the submissions made by both the sides and after going through the impugned order, we find that the phrase contained in condition 3 of para 2 of the Notification, which already stands reproduced by us, required to be interpreted in the present case is "**export made by Indian partner In a company with equity participation in a overseas joint venture or wholly owned subsidiaries**". The plain and simple meaning of the said phrase is that the exports are required to be made by an Indian partner to a company with equity participation in a overseas joint venture. The expression "In" appearing in the said phrase has to be read as "To", as if the exports are made by an Indian partner to a foreign subsidiary company. The meaning of the said phrase is that the benefit of the exemption in respect of commission paid to the foreign buyers would not be available if the exports are made to their own overseas joint ventures or wholly owned subsidiaries. There is no reference in the said

condition that to any export orders having been procured by an overseas joint ventures or wholly owned subsidiaries. The said condition simplicitor refers to the exports made by an Indian partner to its own overseas joint venture or wholly owned subsidiaries in which case no exemption would be available to the commission paid to the foreign based commission agents, whose services stand availed by an exporter. The interpretation given by the adjudicating authority that the Notification benefit cannot be extended inasmuch as the export orders have been procured through wholly owned subsidiaries are erroneous. It is well-settled law that a Notification has to be read and interpreted on the basis of the words used therein and it is not permissible to ignore or introduce any word in the language of the Notification. On reading the said clause of the condition of the Notification, it is seen that there is no reference therein to the orders procured by the wholly owned subsidiaries, acting as commission agents, from a foreign land.

Admittedly in the present case the appellant has not exported the goods to its own wholly owned subsidiaries or overseas joint ventures. The appellant has paid only commission to its foreign based commission agents, who happened to be their own subsidiary company and has not made any exports to them. We find that the legislative intent beyond the introduction of the above condition is that no exporter would take undue advantage of the exemption on overseas commission agents in respect of the exports made by them to their own companies inasmuch as the export to their own companies would not require the services of any commission agents etc.. In any case without going to the

legislative intent, the meaning of the expression used in the said condition leads us to the inevitable conclusion that the denial of the exemption is only in those cases where the exports stand made by the Indian exporter to its own joint ventures or wholly owned subsidiaries located in a foreign country. As such we are of the view that the benefit of the exemption Notification No.18/2009 is available to the appellant and the demand of Service Tax is unsustainable.

8. Even though we have held in favour of the assessee on merits, we also find favour with the appellant's contention that the demand is barred by limitation inasmuch as during the period in question audits have been conducted in the appellant's factory. Apart from that, appellant was also filing the returns in Form EXP-1 and EXP-2 and as such the entire facts were in the knowledge of the Revenue. Apart from that the issue involved is *bona fide* issue of interpretation, in which case no *mala fide* can be attributed to the appellant. Further, the Revenue has not produced any evidence to show that there was any suppression or mis-statement on behalf of the appellant with any *mala fide* intention so as to justifiably invoke the longer period of limitation. As such we find merits in the assessee's plea of demand being barred.

In view of the above, we set aside the impugned order and allow the appeal with consequential relief to the appellant.

(Pronounced in the open Court on 18.02.2019.)

SD/
(ANIL G. SHAKKARWAR)
MEMBER(TECHNICAL)

SD/
(ARCHANA WADHWA)
MEMBER (JUDICIAL)

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