

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH
BANGALORE**

Appeal(s) Involved:

ST/172/2008-DB, ST/469/2009-DB

[Arising out of Order-in-Appeal No. 28/2008 ST dated
18/02/2008 passed by the Commissioner of Central Excise,
Customs & Service Tax, Cochin]

[Arising out of Order-in-Revision No. 05/2009-ST dated
08/05/2009 passed by the Commissioner of Central Excise &
Customs, Cochin]

S. Gopal Kamath (Cochin)

39/330A, Arangath Cross Road,
Pullepady,
Cochin – 682 018
Kerala

Appellant(s)

Versus

C.C., C.E. & S.T-Cochin

C.R Building,
I.S Press Road,
Ernakulam,
Cochin – 682 018,
Kerala

Respondent(s)

Appearance:

Mr. P. Nagendran, Advocate
Sreepatham Krishnaswamy Road,
Cochin – 682 035

For the Appellant

Mr. K.B. Nanaiah, Assistant
Commissioner (AR)

For the Respondent

Date of Hearing: 12/12/2018

Date of Decision: 14/01/2019

CORAM:

HON'BLE SHRI. S.S GARG, JUDICIAL MEMBER

HON'BLE SHRI. P. ANJANI KUMAR, TECHNICAL MEMBER

Final Order Nos. 20076 - 20077 / 2019

Per: P. ANJANIKUMAR

Heard both sides and perused the records.

2. Briefly stated the issues involved in these appeals are as follows:
 - a. Whether the appellant is a Commission Agent or a Clearing and Forwarding Agent during the period 01.04.2001 to 09.07.2004? (Appeal No. ST/172/2008).
 - b. Whether the appellants are liable to pay cenvat credit availed and utilized in excess of 20% and as to whether the appellants are eligible to avail a cenvat credit on the service tax paid on Mobile Phone Charges under Section 73(2) of the Finance Act 1994 read with Rule 14 of Cenvat Credit Rules, 2004? (Appeal No. ST/469/2009)
- a. Coming to the first issue, the appellant submitted that they have obtained a registration certificate under the category of 'Clearing and Forwarding Agents' and have requested that the same be reclassified as Commission Agent which was turned on by the Commissioner of Central Excise, Service Tax and upheld by the Commissioner (Appeals) vide order 28/2008 dated 18.02.2008. The appellant submitted that they are consignment agent for four companies one M/s. Baerlocher India Additives (P) Ltd., Mumbai, ICI India Ltd., Chennai, DCW Ltd., Mumbai and Oriental Carbon and Chemicals Limited, Ghaziabad and M/s. Fine Organic Industries, Mumbai (till 2005). Learned counsel submitted that on going through the agreement it is clear that they have been functioning as consignment agent

for the sale of the products. The appellants have registered themselves as a 'Clearing and Forwarding Agent' under a mistaken notion and they requested for revision of the classification. He submitted that the meaning of the words "Clearing and Forwarding Agent" and "Commission Agent" was different. The agreement entered by the appellants would show that the appellant was not acting as Clearing and Forwarding Agent. Therefore, they cannot be held to be Clearing and Forwarding Agents under the Finance Act, 1994. The products of the principal are supplied to the appellant on consignment basis and the appellant sells the products to customers. On going through the agreement between the appellant and M/s. Fine Organic Industries, it is seen that the appellants are appointed as consignment agents. Similarly the agreement with M/s. Baerlocher India Additives (P) Ltd. and DCW Ltd. mention the appellants to be consignment agents. We find that learned Commissioner (Appeals) has found that the appellants have not contested the payment of service tax for the previous period. Therefore, there was no reason to change the existing classification as Clearing and Forwarding Agents. We find that as per the definition of 'Clearing and Forwarding Agents' in terms of Section 65(25) of the Finance Act 1994, the activities of Clearing and Forwarding Agents include that of Consignment Agent. Therefore, we find that the lower authority and the Commissioner (Appeals) have rightly upheld the classification under Clearing and Forwarding Agents. Moreover, looking into the submissions of the appellants that they did not dispute the payment of tax for the first period, we find that the appeal has no bearing on the tax liability of the appellant. Therefore, we dismiss the appeal.

b. Coming to Appeal No. ST/469/2009, we find that the original authority has dropped the demand of Rs. 7,952/- (Rupees Seven Thousand Nine Hundred and Fifty Two only) and Rs. 18,621/- (Rupees Eighteen Thousand Six Hundred and Twenty One only). On the issue of trading being an exempted service, the original authority has found that to become an exempted service, it must be a taxable service under the Finance Act, 1994. The allegation in the show-cause notice is that the assessee is utilizing the input service for providing output taxable service of Clearing and Forwarding Agent Service as well as for trading. The original authority held that trading activity is not a notified taxable activity under Finance Act 1994 it is a non-taxable service. Therefore, it cannot become an exempted service. Commissioner in Revision Order has opined that as per Rule 2(e) of Cenvat Credit Rules 2004 'exempted services' means taxable services which are exempt from the whole of the service tax leviable thereon and include services on which no service tax is leviable under Section 66 of the Finance Act. Therefore, service on which no service tax is leviable under Section 66 can be termed as 'exempted service'. We find that this is very curious and extended argument. To be an exempted service, the activity should be a service. Without any statute categorizing the trading as a service, it cannot be held that it is an 'exempted service'. We do not find any infirmity with the order of the original authority. Accordingly, we find that the impugned Order-in-Revision as far as this demand is concerned is not sustainable. Coming to the second issue of cenvat credit on Mobile Phone Bills availed by the appellant during 04/2004 to 12/2005, the original authority has held that out of Rs. 26,404/- (Rupees Twenty Six Thousand Four Hundred and Four only) credit taken by the appellant, credit of Rs. 7,783/- (Rupees Seven

Thousand Seven Hundred and Eighty Three only) was not admissible as the telephone was not installed in the business premises up to 10.09.2004 and he further held that the balance of Rs. 18,621/- (Rupees Eighteen Thousand Six Hundred and Twenty One only) availed after 10.09.2004 is applicable in view of the CESTAT decision in ***Indian Rayon & Industries Ltd. Vs. CCE, Bhavnagar reported in 2006 (4) S.T.R. 79 (Tri.-Mumbai)***. Commissioner in the Revision order has upheld this demand only on the ground that the said decision of CESTAT was appealed against in High Court of Gujarat. However, the learned Commissioner has not found if the same was stayed. Under these circumstances, the contentions in the Order-in-Appeal are not valid and upholding of demand is incorrect. In view of the case-law that as long as the input services are utilized for the purpose of providing the output services, credit is admissible. Therefore, the order on this ground is also liable to be set aside.

3. In view of the above, Appeal No. ST/172/2008 is dismissed and Appeal No. ST/469/2009 is allowed with consequential relief, if any.

(Order Pronounced in Open Court on **14 /01/2019**)

(P. ANJANI KUMAR)
TECHNICAL MEMBER

(S.S GARG)
JUDICIAL MEMBER

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