IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL
SOUTH ZONAL BENCH AT CHENNAI
Court : DB- B1

Appeal No. ST/753/2010

(Arising out of Order-in-Original No. 3/2010 (Commr.) dated 27.10.2010 passed by the Commissioner of Customs and Central Excise, Salem).

M/s. Erode Milk Consumer Co-operative Society Limited : Appellant

Vs.

CCE & ST, Salem : Respondent

Appearance

Shri S. Rajesh, Advocate
for the Appellant

Ms. T. Ushadevi, DC (AR)
for the Respondent

CORAM :

Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)
Hon'ble Shri P. Dinesha, Member (Judicial)

Date of Hearing/Decision: 08.01.2019

FINAL ORDER No. **40245/2019**

Per P. Dinesha

The appellant is registered under the Tamilnadu Co-operative Society Act, 1983 and one of its object is to act as an agent of the District Milk Producers Co-operative Union for sale of milk and milk products and other allied products.

2. Entertaining a doubt that during the period 2004-05 to 2007-08, the appellant had received commission from the union on which the income tax was deducted at source for which even a TDS certificate in Form-16A was issued, the appellant's society had received commission from the union which was for the services provided to them, a show cause notice dated 16.10.2009 was issued. The specific averment in the show cause notice (SCN) reads as under:-

> "3.2. In this case the commission received by the society for the service provided by them was for 'Promoting or marketing or sale of Milk and Milk products' produced by M/s. Erode District Co-operative Milk Producers' Union (EDCMPU in short) as discussed above and the said service is squarely covered under the definition of "Business Auxiliary Service".

In view of the above, it was proposed in the SCN that the appellant society had acted as a commission agent, they are liable to pay service tax on the commission received and the appellant having not paid the service tax, the same was demanded in terms of Section 73 (1) of the Finance Act, 1994. The Revenue had also given reasons for invoking the extended period, in the SCN. Not convinced with the reply and explanations given by the appellant society, the Commissioner of Central Excise, Salem, passed the impugned Order-in-Original dated 27.10.2010, wherein he confirmed the demands as proposed in the SCN. The appellant is therefore assailing the same by this appeal. The Commissioner has held interalia that the Bylaws of the society authorised the society to act as an Agent of the Union; that though the union raises its invoices in the name of the society, the amount which is billed is the same at which the milk is sold to the ultimate buyer; the issuance of Form-16A by the union which is shown as 'Agent's Commission' is in conformity with the above clause of the bylaws; that based on the above the relationship between the union and the society is 'Principal to agent' etc.

3. Heard Shri S. Rajesh, Ld. Advocate appeared for the assessee and Ms. T. Ushadevi, DC(AR) appeared for the Revenue.

4. We have carefully considered the documents placed on record and also gone through various decisions referred to during the course of the arguments. It is undisputed that the invoices raised by the union on the appellant society carries the word 'Agency' and it is also undisputed that the Union, while making the payment to the society, has deducted tax at source and issued Form-16A which is the typical characteristic of commission. Perusal of the invoices shows that the indicated quantity of milk and allied products was sold to the appellant society by the union. Other undisputed fact is that each of

these invoices the final amount due to be paid is arrived at after mentioning what the revenue areas as commission, or a trade discount, as per the appellant society. These invoices when read in juxtra position with the trading account of the appellant, the purchase of milk stands established and so also a subsequent sale of milk. Our attention was also drawn to the Balance sheet as on 31.03.2004 placed in the paper compilation and specifically to Item No. 16, to contend that even the spoiled milk is accounted without being passed on to the sellers, since, the appellant has purchased the milk. Our attention was also drawn to the Balance sheet similar to the above for all the other financial years involved.

5. On the other hand, Ld. DR supported the findings of the lower authority but however, submitted that the lower authority did not have the benefit of the Balance sheets which are placed before the Tribunal for the first time. Admittedly, there is no findings or any discussion or any reference to the Balance sheets in the impugned order since, admittedly, same were not filed before the lower authority. Balance sheet is a very important piece of document which is also signed by a special officer and we are of the considered opinion and the same should have been filed before the lower authority, who should have the benefit of the same before passing the order and hence we are constrained to remand the matter back to the file of the adjudicating authority who shall pass a fresh denovo

adjudication order, after considering these vital documents, before passing the final order.

6. It is also of equal importance to refer to the decision of the Hon'ble Supreme Court in the case of The *Bhopal Sugar Industries Ltd. Vs. Sales Tax Officer, Bhopal* – 1977 (40) STC 42 (SC), wherein, the Hon'ble Supreme Court while interpreting the terms of the agreement therein has held that what is to be looked into is the substance and not the form of it and the relevant observations reads as under:-

"………… from the fact that the word 'agent' or 'agency' is used or words 'buyer' and 'seller' are used to describe the status of the parties concerned is not sufficient to lead to the irresistible inference that the parties did in fact intend that the status would be conferred. Thus, the mere formal description of a person as an agent or buyer is not conclusive, unless the context shows that the parties clearly intended to treat a buyer as a buyer and not as an agent…………………" "The essence of agency to sell is the delivery of the goods to a person who use to sell them not as his own property but as the property; of the Principal who continues to be the owner of the goods…………………". "It is clear from the observations made by this Court that the true relationship of the parties in such a case has to be gathered from the entry of the contract, its terms and conditions, and the demurrage used by the parties is not decisive of the said leniency………………" "It is well known that in certain trades the word 'agent' is used without any reference to the law of principal and agent. Trade otherwise an obvious example, where persons described as agents are not agents in respect of any 'Principal', but rather purchasers who by from the manufacturers and sell them independently………."

7. From the above ruling, it is clear that the substance or the true relationship between the milk union and the appellant is what is to be looked into and not the way it appears. We are therefore, persuaded to direct the adjudicating authority to keep in mind the above decision of the Hon'ble Apex Court while passing the impugned order.

8. In view of the above, the impugned order is set aside and the matter is remanded back to the file of the adjudicating authority, who shall pass a denovo order in accordance with law, after offering reasonable opportunities to the appellant, all the contentions are left open and we refrain from expressing any view on merits.

9. Appeal is treated as allowed by way of remand.

(Order pronounced in the open Court on _______________)

(P.DINESHA) MEMBER (JUDICIAL)	(MADHU MOHAN DAMODHAR) MEMBER (TECHNICAL)

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