IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL
SOUTH ZONAL BENCH AT CHENNAI

Court : DB- B1

Appeal No. ST/644/2010

(Arising out of Order-in-Original No. 14/2010 dated 16.06.2010 passed by the Commissioner of Central Excise, Chennai –II Commissionerate, Chennai).

M/s. MMTC Limited : Appellant

Vs.

CCE & ST, Chennai : Respondent

Appearance

Ms. S. Vishnupriya, Advocate
for the Appellant

Shri A. Cletus, ADC (AR)
for the Respondent

CORAM :

Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)

Hon'ble Shri P. Dinesha, Member (Judicial)

Date of Hearing: **14.12.2018**
Date of Pronouncement: **26.04.2019**

FINAL ORDER No**.** **40680/2019**

Per P. Dinesha

A Show cause Notice (SCN) dated 23.03.2009 was issued to the assessee-appellant on the grounds that they are not paying service tax on the administrative charges and supervision charges collected over and above the selling price from their customers. The SCN is the result of investigation and scrutiny of documents by the Department Officers acting on specific intelligence. The allegations interalia made out in the SCN are that the appellants are procuring 'Steaming Coal' of Chinese origin on behalf of Tamilnadu Electricity Board (TNEB in short); that after receipt of indent the appellant calls for a global tender; that after identifying the overseas supplier, a tripartite agreement is entered into; that during the period involved in the present appeal the appellant had entered into a tripartite agreement with M/s. Adani Global Private Ltd., Singapore (AGPL in short) and M/s. Adani Exports Ltd., Mumbai (AEL in short) for supply of 5,00,000 MTs of steaming coal at USD 73.00 PMT CNF FO Ennore Port, India; that apart from the selling price the appellant is collecting other charges under the head Suppliers Administrative charges of Rs. 100/- PMT from TNEB; that in respect of supply of bulk Urea, prilled Urea etc., to M/s. Madras Fertilizers Ltd., Chennai (MFL in short), the appellant is required to identify the overseas suppliers and negotiate the prices with them; that bulk urea is imported by the appellant and thereafter supplied to MFL; that in respect of both the above imports, the appellant enters into a High Sea Sale (HSS) agreement; in the case of MFL, MFL arranges for the clearance of goods from Customs, the clearing expenses like Customs duties, clearing charges, port-cess, demurrages etc. are borne by

MFL which are paid directly to the Customs/C&F agents; full payment towards cost of documents comprising FOB value, LC opening charges are paid by MFL; that, apart from the FOB value, the appellant also charges 50 cents PMT as its margin; etc. There is also an allegation as to the payment of agency commission in foreign currency by the appellant with reference to the appellant's Balance Sheet and that out of Rs. 100/- PMT received from TNEB as administrative charges, Rs. 55/- was paid to AEL as agency commission.

2. In the light of the above, a SCN was issued to the assessee by treating the appellant as only representing the Indian buyers and that the administrative charges received by the appellant was in the nature of charges for procurement of services since the agreement entered into by the appellant with the foreign supplier and its agent was for supply of coal exclusively to TNEB. This, according to the Revenue, fell under the category of "Business Auxiliary Service" (BAS) and procurement of goods or services which are inputs for the clients under Section 65(19) (iv) of the Finance Act, 1994, and accordingly liable for service tax w.e.f. 10.09.2004. In respect of the agency commission, the Revenue was of the view that the foreign agents are paid as commission agents and services rendered by commission agents are liable to service tax under BAS w.e.f. 09.07.2004 and therefore, the appellant is also liable to pay service tax on the commission paid to the foreign agents as per Rule 2 (1) (d) (iv) of Service Tax Rules, 1994

(STR), read with Section 66A of the Finance Act, 1994. Finally, the SCN proposed to demand service tax of Rs.69,34,998/- under proviso 2 to Section 73 (1) of the Finance Act, 1994, along with applicable interest under Section 75 ibid, and penalties under Sections 76,77 and 78 ibid.

3. Ld. Commissioner of Central Excise, Chennai took up the adjudication proceedings thereafter and vide the impugned order dated 16.06.2010 passed a detailed order, considering various submissions/explanations and documents furnished by the assessee, wherein, he has confirmed the demand under Section 75 ibid and confirmed the penalty under Section 78 of the Act ibid but, however, reduced the same to 25% subject to the appellants paying the demand with interest and the reduced rate of penalty within 30 days from the date of receipt of this order by the assessee. Aggrieved by the impugned demand, the assessee has filed the present appeal.

4. Heard Ms. S. Vishnupriya, Ld. Advocate for the assessee and Shri A. Cletus, ADC (AR) for the Revenue.

5. The contentions of the Ld. Advocate during hearing could be broadly summarized as below:

- During the disputed period (from 10.09.2004 to 20.03.2007) the appellant had only indulged in trading transactions in respect of purchase and sale of coal to TNEB.

- TNEB floated tenders for supply of coal and these tenders were accepted by the appellant.
- The tripartite agreement dated 09.06.2005 signed between the appellant and AGPL (foreign vendor/seller) and AEL (foreign Vendor's agent) had only treated the appellant as the buyer. The very preamble to the agreement treated AGPL as the seller and the appellant as the buyer.
- Under Clause 9 to the agreement, AEL was to act as an agent of the foreign seller, AGPL. Their work was to co-ordinate with various agencies at the discharging port and ensure collection of the cargo value from TNEB.
- The "price for the sale of coal had been expressly contemplated under clause 8 of the tripartite agreement and it was only in the nature of "purchase and sale" and between two principals, ie. the buyer and the seller.
- The "administrative charges" mentioned in the invoices of the appellant were actually the trading margin earned by the appellant. Out of this margin, a sum of Rs. 55 PMT had been paid by the appellant to AEL, which was actually the commission earned by AEL. On this element, AEL had paid the service tax. The balance amount of Rs. 45/- PMT was actually the "trading margin" or the "profit margin" of the

appellant. It was not in any way commission earned by the appellant.

- Under the tripartite agreement, the appellant had not acted as agents for the purchase of coal. The fact that the coal was not meant for the use of the appellant does not mean that the appellant did not purchase and sell coal. The fact that the transaction was a trading transaction did not mean it any less one, simply because the appellant was not the end user.
- These are purely sale/purchase transactions in which the title of goods is transferred in the name of the appellant on receiving the documents through the banking channels as per the terms and conditions of the contract entered into between the overseas supplier and the appellant. Thus, the risks and rewards are that of the appellant as the buyer of goods. In any transaction which involves transfer of title of goods, price risk, currency risk and other risks and rewards on such transactions cannot be in the nature of services provided.
- The administrative charge is also included by the high seas buyer, viz., TNEB while discharging the duty of customs.
- The high sea sale agreement dated 27.07.2005 entered into by the appellant with MFL stated that high sea sale price was for the sale of fertilizers. The supervision charges are the expenses initially borne

by the appellant and subsequently reimbursed by MFL.

- Section 65 (105)(zzb) of the Finance Act, read with Section 65 (19)(iv) ibid have no applicability to the case of the appellant. Those provisions will apply only if there is a client and service provider relationship. In the instant case, the transaction is purely sale and purchase.
- The sales tax returns of the appellant would show the entire invoice price including administrative charges on which exemption for high sea sales has been claimed in sales tax/ VAT assessment. Also, Article 286 of the Indian Constitution has laid down that no tax can be imposed when the sale takes place in the course of import.
- The appellant had furnished all the information to the department on various dates including 30.03.2006 and 23.10.2007. Nevertheless, the SCN dated 23.03.2009 is beyond the normal period. Therefore, the department cannot plead lack of knowledge. Further, prerequisite for invoking extended period of limitation is fraud, suppression, evasion or wilful non-disclosure with an ill-intention to evade payment of service tax. Mere non-disclosure cannot result in invoking of extended period of limitation.
- The appellant also entered into a high sea sale agreement on 10.01.2006 with TNEB. Clause 7 of

that agreement mentions "sale price" of USD 62.97, wherein TNEB was referred as "purchaser" and the appellant as the "seller", etc. She also relied on many decisions of various for a.

6. Per contra, Ld. DR Shri A. Cletus while supporting the findings of the Commissioner, also contended interalia that the procurement of steaming coal was always for and on behalf of TNEB; that the appellant acted as an agent/representative of TNEB and MFL right from the beginning; that the high sea sale agreement dated 16.06.2005 and 17.06.2005 points out that the purchase of coal in bulk by the appellant was for TNEB; that the same is the case while procuring urea for MFL; that the administrative charges for procurement of goods, for identifying the overseas sellers and for any negotiations with them including any commission to be payable to the agent of overseas supplier in India; that the appellant is the service provider and TNEB and MFL are the service recipients, etc. Ld. DR also relied on the order of the Delhi Bench of the Tribunal in the case of *Gupta Chemicals Ltd. Vs. CC, Jaipur* – 2002 (148) ELT 535 (Tri.-Del.), the decision of the Hon'ble Supreme Court in the case of *Imagic Creative Pvt. Ltd. Vs. CC Taxes* – 2008(9) STR 337 (S.C) and also the decisions relied on by the Commissioner in the impugned order.

7.1 We have heard the rival contentions, perused various documents placed on the record and also gone through the decisions referred to during the course of the arguments. The agreements have been entered into, in the first place, by the appellant with TNEB/MFL and later on, the appellant floated a Global Tender apparently on behalf of TNEB/MFL, for supply of goods. One of the Tripartite agreements dated 09.06.2005 placed in the paper book is between M/s. Adani Global Pvt. Ltd. as seller, MMTC Ltd (the appellant) as buyer and M/s. Adani Exports Ltd. as seller's agent, for selling/buying of 'Steaming Coal of Chinese Origin in bulk' of 500,000 MT and the price fixed for the same is US$ 73.00 PMT CNF FO Ennore Port. Clause 8 of the same agreement envisages 'Marine Insurance Premium' to be charged by the seller at actuals subject to maximum USD 0.09 PMT and clause 9 brings in TNEB, to say that the seller agent (AEL) who co-ordinates with various agencies, should discharge port charges for the successful execution of the purchase order issued by TNEB. Further, a sample of the commercial invoice dated 09.06.2005 placed in the paper book also carries 'notify address' as TNEB apart from the appellants, even the marine cargo policy No: 21178236 issued by IFFCO-TOKIO reflects in the schedule voyage from Qinhuangdao Port, China to Ennore Port and then to TNEB.

7.2 A copy of a High Seas Sale Agreement (HSS) dated 16.06.2005 between the appellant and TNEB is also placed on record and it is clear from the same that the appellant is charging Rs. 100/- PMT over and above the sale price of US$ 73,069 CIF which is shown in the proforma invoice as administrative charges. A combined takeaway from the above is that the appellant has not made any purchase for itself, but has only collected from TNEB/MFL the purchase price apart from administrative charges for procuring coal/urea for its clients and nothing beyond it. The HSS agreement samples placed on record also mentions that the appellant should 'procure coal' in bulk for TNEB and the same situation continues even in the case of MFL.

7.3 Section 65 (19) defines Business Auxiliary Service (BAS), which reads as under:-

> "Business Auxiliary Service" means any service in relation to—
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> (*i*) promotion or marketing or sale of goods produced or provided by or belonging to the client; or
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> (*ii*) promotion or marketing of service provided by the client; or
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> [20][***]
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> (*iii*) any customer care service provided on behalf of the client; or
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> (*iv*) procurement of goods or services, which are inputs for the client; or
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> [21][*Explanation*.—For the removal of doubts, it is hereby declared that for the purposes of this sub-clause, "inputs" means all goods or services intended for use by the client;]
>
> [22][(*v*) production or processing of goods for, or on behalf of, the client;]

(*vi*) provision of service on behalf of the client; or

(*vii*) a service incidental or auxiliary to any activity specified in sub-clauses (*i*) to (*vi*), such as billing, issue or collection or recovery of cheques, payments, maintenance of accounts and remittance, inventory management, evaluation or development of prospective customer or vendor, public relation services, management or supervision,

and includes services as a commission agent, [23][but does not include any activity that amounts to manufacture of excisable goods.]

[24][*Explanation*.—For the removal of doubts, it is hereby declared that for the purposes of this clause,—

(*a*) "commission agent" means any person who acts on behalf of another person and causes sale or purchase of goods, or provision or receipt of services, for a consideration, and includes any person who, while acting on behalf of another person—

(*i*) deals with goods or services or documents of title to such goods or services; or

(*ii*) collects payment of sale price of such goods or services; or

(*iii*) guarantees for collection or payment for such goods or services; or

(*iv*) undertakes any activities relating to such sale or purchase of such goods or services;

From the above definition, a service gets covered under BAS even for procurement of goods or services, which are inputs for the clients.

8. Our discussion above where we have observed that the procurement of goods in the case on hand by the appellant, be it coal or fertilizer, is not for self-consumption or usage by the appellant nor has it been canvassed in this fashion before us, but for the benefit of TNEB/MFL. This

being so, on going through the documents it is to be held that the appellant has only been acting on behalf of TNEB/MFL and thereby providing services in relation to procurement of goods or services for them.

9. Admittedly, Coal or Urea is not appellant's products nor can it be said that it has got complete control/title over the same. Apart from this, none of the other documents reflects anywhere the status of the appellant as an exclusive buyer. These facts only strengthen our view above and thereby supports the findings of the lower authority.

10. In view of the above facts, none of the case laws referred to by the Ld. Advocate helps the assessee. On the other hand, we find it useful to refer to the order of the Principal Bench of CESTAT, New Delhi, in the case of *Rajasthan State Beverages Corporation Ltd. Vs. CCE. Jaipur* – 2013 (32) STR 329 (Tri.-Del.)

> **12.** In the facts before us however and on analysis of the agreement between the appellant (RSBCL) and the manufacturers/distilleries, (illustrated by the agreement dated 31-3-2008 with M/s. Khasa Distillery Company, Prop. Bhagat Industrial Corporation Limited), the conclusion that the ownership/property in liquor continues with the distilleries and has not passed to the appellant, is inescapable and compelling. The several clauses of the agreement clearly demonstrate this variety. On analysis of the several clauses of the agreement (referred to above), it is clear that the appellant was never the owner of the liquor nor had title in the liquor supplied to it. It was merely acting as the consignee of the goods belonging to the

> supplier/distilleries. Within the framework of the agreements, considered in the context of the taxable BAS, as defined in Sections 65(19) read with 65(105)(zzb) of the Act, the conclusion is uncontestable that the appellant was rendering the taxable BAS since the appellant was clearly marketing and providing services in relation to sale of goods (IMFL, Beer etc.) produced/ belonging to the distilleries.

The situation of the appellant in the case on hand is more or less similar.

11. The alternative contention urged on behalf of the appellant is that the proceedings initiated by the Revenue are barred by limitation and consequently invocation of extended period of limitation was bad. We find it difficult to accept the above pleadings since, the appellant had never got ownership controls over the goods in question and the copies of sale invoices placed on record do not inspire us to even entertain a tiniest belief that the appellant did make sale to TNEB/MFL. Last but not the least, the appellant has also claimed that in its sales tax returns it had shown the entire invoice price including administrative charges and then has been offered to State tax but claimed as exemption. Sales Tax Assessment order issued by the State Revenue Authority placed on record has allowed appellant's claim for exemption but the same cannot be held as having been subjected to sales tax since it is a threshold exemption. Typically, HSS is neither liable to customs duty nor under sales tax and therefore just because the invoice price was offered to sales tax, claimed as exemption, would

not ipso facto justify that HSS was liable under sales tax in the first place and secondly, it is not our domain also to go into this issue.

12. The tax evasion came to the notice of the Revenue on specific intelligence following which they started investigating the activities of the appellant. We also note that apart from analysing the purchase orders, tripartite agreement, balance sheets etc., Revenue also examined the Dy. General Manager of MMTC on 17.03.2008 and after gathering pieces of evidence, a SCN dated 23.03.2009 came to be issued. In the totality of circumstances therefore, the conclusion by the Revenue that there was wilful intent to evade tax cannot be faulted nor considered inconsistent with statutory prescription that justify invocation of extended period of limitation. We therefore, hold that invocation of extended period of limitation and consequent assessment of the appellant to service tax is in order.

13. In view of the above, we find no error in the impugned adjudication order. The appeal being devoid of merits is liable to be dismissed and therefore, is dismissed.

(Order pronounced in the open Court on 26.04.2019)

(P.DINESHA)
MEMBER (JUDICIAL)

(MADHU MOHAN DAMODHAR)
MEMBER (TECHNICAL)

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