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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NO.26,Sashtri Bhavan Annexe Building,Haddows Road,Chennai-600006

Order Forwarding Letter

Final Order No. 40153-40164 / 2018

Appeal No. : ST/296/2009-DB, ST/610/2009-DB, ST/313/2009-DB, ST/311/2009-DB, ST/312/2009-DB, ST/314/2009-DB, ST/565/2010-DB, ST/40350/2015-DB, ST/40434/2015-DB, ST/42139/2017-DB, ST/42608/2014-DB, ST/24/2010-DB

Appellant :

Forbes And Co
Contemporary Tea Auctioneer Pvt Limited
J Thomas And Company Pvt Ltd
Global Tea Brokers
Paramount Tea Marketing Si Pvt Limited

Respondent :

Commissioner of Customs,Central Excise and Service Tax Salem

I am directed to send herewith a certified copy of the **Final Order No. 40153-40164 / 2018** dated **22/01/2018** ,passed by the Tribunal under Section 129 B of the Customs Act 1962/Section 35C of the Central Excise Act 1944/Section 86 (7) of the Finance Act 1994.

Dated: 24/01/18

for Assistant Registrar
CESTAT - Chennai

To:

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11) Guard file.

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

Appeal No.	Appellant	Respondent	Arising out of Order-in-Appeal
ST/296/2009	Forbes & Co.	CCE, Salem	No. 36/2009 dt. 26.2.2009 passed by CCE (Appeals), Salem
ST/311/2009	Global Tea Brokers	CCE, Salem	No. 30/2007 dt. 26.2.2006 passed by CCE (Appeals), Salem
ST/312/2009	Paramount Tea Marketing	CCE, Salem	No. 31/2007 dt. 26.2.2006 passed by CCE (Appeals), Salem
ST/313/2009	J. Thomas & Company Pvt. Ltd.	CCE, Salem	No. 34/2007 dt. 26.2.2006 passed by CCE (Appeals), Salem
ST/314/2009	Contemporary Tea Auctioneers Pvt. Ltd.	CCE, Salem	No. 35/2007 dt. 26.2.2006 passed by CCE (Appeals), Salem
ST/610/2009	Contemporary Tea Auctioneers Pvt. Ltd.	CCE, Salem	No.157/2009 dt. 9.10.2009 passed by CCE (Appeals), Salem
ST/24/2010	Global Tea Brokers	CCE, Salem	No.155/2009 dt. 9.10.2009 passed by CCE (Appeals), Salem
ST/565/2010	Paramount Tea Marketing	CCE, Salem	No. 87/2010 dt. 30.6.2010 passed by CCE (Appeals), Salem
ST/42608/2014	J Thomas & Company Pvt. Ltd.	CCE, Salem	No. 186/2014 dt. 3.9.2014 passed by CCE (Appeals), Salem
ST/40434/2015	Contemporary Tea Auctioneers Pvt. Ltd.	CCE, Salem	No. 231/2014 dt. 20.11.2014 passed by CCE (Appeals), Salem
ST/40350/2015	J Thomas & Company Pvt. Ltd.	CCE, Salem	No.232/2014 dt. 20.11.2014 passed by CCE (Appeals), Salem
ST/42139/2017	J Thomas & Company Pvt. Ltd.	CCE, Salem	No. 164/2017 dt. 19.7.2017 passed by CCE (Appeals), Salem

Appearance

Shri Parthasarathy and
Shri Rabeen Jayaram, Advocates for the Appellants

Shri K. Veerabhadra Reddy, JC (AR) and
Shri R. Subramanian, AC (AR) for the Respondents

CORAM

Hon'ble Ms. Sulekha Beevi C.S., Member (Judicial)
Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)

Date of Hearing : **09.01.2018**
Date of Pronouncement: 22.01.2018

Final Order Nos. 40153-40164/2018

Per Bench

All these appeals since relate to identical dispute, they were taken up for common hearing and are disposed by this common order.

2. The facts of the case in all these appeals are that the appellants are Brokers and Auctioneers operating pursuant to licence issued under Tea (Marketing) Control Order, 2003 (herein after referred to as Control Order, 2003) and in accordance with the Coonnoor Tea Trade Association Rules. It appeared to the department that appellants are providing services of "Promotion or Marketing or Sale of Goods" produced or provided by or belonging to various clients, i.e. tea factories in the auctions conducted at Coonoor, which fall under taxable service of "Business Auxiliary Service" (BAS). It further appeared to the department that the BAS so provided were not under the category of "Commission Agent" but under section 65(19)(i) of the Finance Act, 1994, namely, production or sale or marketing or sale of goods produced or provided by or belonging to the client.

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3. Accordingly, show cause notices were issued to these appellants which culminated in adjudication orders confirming the demands of service tax proposed in the show cause notice with interest thereon as also imposition of penalties under various provisions of law. On appeal, the Commissioner (Appeals) confirmed the adjudication orders. Hence these appeals.

4. Today, when the matter came up for hearing ld. counsel Shri R. Parthasarathy assisted by Shri Rabeen Jayaram submitted the details of various appeals filed, period of dispute, impugned order and tax in dispute, which are reproduced below:-

Appeal No.	Period of Dispute	Arising out of Order-in-Appeal	TAX IN DISPUTE
ST/296/2009	01.04.2006 to 28.02.2007	No. 36/2009 dt. 26.2.2009 passed by CCE (Appeals), Salem	Service tax of Rs.2,04,044/-
ST/311/2009	01.07.2003 to 31.03.2006	No. 30/2007 dt. 26.2.2006 passed by CCE (Appeals), Salem	Service tax of Rs.8,40,473/-
ST/312/2009	01.07.2003 to 31.03.2006 and 01.04.2006 to 28.02.2007.	No. 31/2007 dt. 26.2.2006 passed by CCE (Appeals), Salem	Service tax of Rs.19,32,558/-
ST/313/2009.	01.07.2003 to 28.02.2007	No. 34/2007 dt. 26.2.2006 passed by CCE (Appeals), Salem	Service tax of Rs.15,18,131/-.
ST/314/2009	01.07.2003 to 31.03.2006	No. 35/2007 dt. 26.2.2006 passed by CCE (Appeals), Salem	Service tax of Rs.5,62,376/-
ST/610/2009	April 2006 to February 2007	No.157/2009 dt. 9.10.2009 passed by CCE (Appeals), Salem	Service tax of Rs.3,14,568/-
ST/24/2010	01.04.2006 to 28.02.2007	No.155/2009 dt. 9.10.2009 passed by CCE (Appeals), Salem	Service Tax of Rs.2,66,610/-
ST/565/2010	01.05.2006 to 31.03.2009	No. 87/2010 dt. 30.6.2010 passed by CCE (Appeals), Salem	Service Tax Rs.96,881/-.
ST/42608/2014	01.04.2008 to 31.03.2012	No. 186/2014 dt. 3.9.2014 passed by CCE (Appeals), Salem	Service Tax of Rs. 8,13,575/-
ST/40434/2015	2008-09 to	No. 231/2014 dt.	Service tax of

	2011-12.	20.11.2014 passed by CCE (Appeals), Salem	Rs.2,75,486/-
ST/40350/2015	01.04.2012 to 31.03.2013	No.232/2014 dt. 20.11.2014 passed by CCE (Appeals), Salem	Service Tax of Rs.2,41,904/-
ST/42139/2017	01-04-2013 to 31-03-2014 & 01-04-2014 to 31-03-2015	No. 164/2017 dt. 19.7.2017 passed by CCE (Appeals), Salem	Service Tax of Rs.3,14,727/- (01-04-2013 to 31-03-2014) & Service Tax of Rs.3,02,585/- (01-04-2014 to 31-03-2015)

5.1 Ld. Advocate further made oral and written submissions which can be briefly summarized as under:-

5.2 The appellants have acted as commission agents and therefore are eligible for exemption from payment of service tax. The definition of commission agent means a person who causes sale or purchase of goods. It cannot be denied that the Appellants have "caused" the sale of tea. The Appellants therefore had the status of a "Commission Agent". The Notification No.13/2003 granted exemption to the "Business Auxiliary Services" provided by a "Commission Agent". The authorities below have found that the Appellants have provided "Business Auxiliary Services". That being the case, the case of the Appellants fell within the plain meaning of the exemption under Notification. The following judgments will support the stand of the Appellants.

a. 2015 (40) STR 986 (Tri-Del) Brindco Sales Ltd., Vs Commissioner of Service Tax, Delhi

b. 2016(43) STR 193 Tri-Mumbai) - Chahabria Marketing Ltd., Vs. Commissioner of Service Tax. Mumbai

5.3 With effect from 16.6.2005, the Explanation introduced to Section 65(19) which defined "Commission Agent" contained also an inclusive part. The various activities of the Appellants clearly fell within the plain terms of that inclusive part and in particular sub-clause (iv) of Clause (a) of the Explanation which defined a "Commission Agent".

5.4 The manufacture and marketing of Tea is regulated by the Tea (Marketing) Control Order. That Control Order makes a distinction between "tea leaf" on the one hand (paragraph 2(n) of the Control Order and Manufactured tea (paragraph 2(i)) made from the leaves of the Plant Camellia Sinensis (L) O.Kuntz. The Control Order issued by the Central Government in exercise of its powers under the Tea Act, 1953 thus recognizes that "Tea leaf" by itself is not marketed. It is only "manufactured tea" which is marketed. Consequently, the fact that the Appellants did not cause the sales of Tea leaf could not have been treated as relevant.

5.5 As tea leaf is very much agricultural produce for the purposes of Notification No. 13/2003-ST as amended by Notification No. 8/2004-ST, hence being a commission agent in relation to sale or purchase of tea, they would be exempted from any service tax liability as per the said definitions.

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5.6 It was only with effect from 01.05.2006 that services provided in relation to Auction of property was brought to tax for the first time by Sections 65 (7a) read with 65(105)(zzzr) of the Act. However, the existing category of "Business Auxiliary Service" as defined by Section 65(19) stood unamended. Consequently, the introduction of a separate category of service i.e. Auction Services as aforesaid having not been carved out of existing Business Auxiliary Service meant that the said activity was not covered by the category of "Business Auxiliary Service". Appellants are in fact discharging tax liability under Auction Services with effect from 1.5.2006 on the very same activities. As a result, the appellants could not be exposed to any liability prior to 1.5.2006 in respect of Business Auxiliary Service. The principles laid down in the following judgments will support this stand of the Appellants.

a. *19 STR 222 (Tri-Mumbai) – Commissioner of Central Excise, Pune – III Vs Shankar Ram Chandra Auctioneers*

b. *21 STR 229 (Tri-Ahmd) Needwise Advertising Pvt. Ltd., Vs. Commissioner of Service, Ahmedabad*

5.7 The invocation of the extended period of limitation in appeals vide ST/311/2009, ST/312/2009, ST/313/2009, ST/314/2009 & ST/610/2009 was unjustified. The authorities below have only relied upon the alleged omissions of the Appellants. Reference is made to paragraph 4 of the Order-in-Original dated 30.11.2007 passed in the case of TCPL. That is clearly inadequate for invoking the extended period of limitation. Besides, as the dispute in the present appeal involves question of interpretation of the Act and the Notification, extended period of limitation could not have been invoked. The following judgments will support this position:

a. 260 ELT 17 (SC) -Commissioner of Central Excise, Aurangabad Vs. Bajaj Auto Limited

b. 27 VST 406 (CESTAT , New Delhi) Singh Brothers Vs. Commissioner of Customs & Central Excise, Indore

<u>Submissions relating to private sales (1.3.2007 to 30.6.2012):-</u>

5.8 The modus operandi of the Appellants remained the same. The only difference was that instead of causing the sales of Tea in the Auctions, the Appellants had caused private sales of the Tea. In fact, the Order in original No. 25/2014 JC(ST) dated 30.4.2014 passed in the case of M/s. TCPL, the Appellant in ST 42608 of 2014, the Adjudicating authority has found in paragraph 10.7 that the Assessee in that case fell under the definition of "Commission Agent". However, the benefit of the Notification was denied on the ground that the Tea caused to be sold by the Appellant was not an "agricultural produce". The authorities below could not therefore have denied the benefit of the Exemption Notification.

5.9 The Appellant in Appeal Nos. ST/40350 of 2014 (M/s. TCPL) also claimed the benefit of non-liability in terms of Section 66 D (d) (vii) of the Act (Negative list). That benefit has been denied on the ground that the Tea sold by the

Appellant was not "agricultural produce". It is submitted that the definition of "agricultural produce" found in Section 65B(5) of the Act was clearly wide enough to take within its ambit the tea caused to be sold by the Appellant in the private sales. The nature of tea sold by appellant is the tea after the first stage of processing. It very much fell within the meaning of agricultural produce.

5.10 As the present appeals involve interpretation of the Act and Notification imposition of any penalties is not warranted under any provisions of the Act. The benefit of Section 80 of the Act should have been in any view extended to the Appellants.

6.1 On the other hand, ld. AR Shri K. Veerabhadra Reddy supports the impugned orders. He submits that Commission Agent as per the definition means any person who acts on behalf of another person for a consideration which is based on the quantum of such sale or purchase. However, appellants perform wider range and scope of activities compared to a commission agent. The entire procedure culminating in sale of the products is managed and controlled by the appellants and the actual seller simply hands over the goods and gets the sale proceeds net of charges of the appellants.

6.2 Ld. AR submits that the appellants are also engaged in activity of tea tasting, valuation of teas, and auxiliary services like billing, collection of sale proceeds on behalf of the clients.

The lot money and service charges are collected by the appellants not only from their clients but also from the buyers. They are also engaged in providing collection and payment of sales tax on behalf of the clients for which they collected one paise per kg. as service charges. All these services go much beyond the scope of commission agent and are more justifiably covered under section 65(19)(i) of the Finance Act. Since appellants cannot be considered to commission agent, they will automatically go out of the ambit of exemption Notification No. 13/2003 which provides exemption for BAS provided by commission agent, in relation to agricultural produce.

6.3 The ld. AR further contended that the tea which is sold in auction by appellants is processed and manufactured tea and will therefore not fall within the definition of agricultural produce for the purpose of Notification No. 13/2003.

6.4 The ld. AR reiterated the reliance of the Commissioner (Appeals) on the judgment of the Hon'ble Supreme Court in the case of Commissioner of Sales Tax Vs. D.S. Bist to emphasize that the appellants themselves are being assessed to sales tax in respect of sales on behalf of the principal under section 2(g) of the Tea and GST Act since sales tax was suffered at the time of auction / sale by the appellants, the impugned tea cannot be considered as an agricultural produce.

6.5 The ld. AR also placed reliance on the decision of the Tribunal in the case of Container Tea and Commodities Vs.

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Commissioner of Central Excise, Salem - 2016 (42) STR 400 (Tri. Chennai). In the said decision, the appellants therein, was acting as an agent for a number of tea estates in the marketing and sale of their tea overseas and are professional tea tasters. The Tribunal held that the appellant's activities were not only restricted to sale but includes host of other activities and hence the activities fell under BAS and not under commission agent service. The AR contends that the ratio of this decision is squarely applicable to the facts of the present appeals also.

7. Heard both sides and have gone into the records.

8.1 To understand the issue better, it would be useful to reproduce the legal provisions concerning BAS. The definition of BAS prior to 16.6.2005 is reproduced as under:-

> *Business auxiliary service" means any service in relation to,-*
>
> *(i) promotion or marketing or sale of goods produced or provided by or belonging to the client; or*
>
> *(ii) promotion or marketing of service provided by the client; or*
>
> *(iii) any customer care service provided on behalf of the client; or*
>
> *(iv) any incidental or auxiliary support service such as billing, collection or recovery of cheques, accounts and remittance, evaluation of prospective customer and public relation services.*
>
> *and includes services as a commission agent, but does not include any information technology service.*
>
> *Explanation. - For the removal of doubts, it is hereby declared that for the purposes of this clause "information technology service" means any service in relation to designing, developing or maintaining of computer*

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software, or computerized data processing or system networking, or any other service primarily in relation to operation of computer systems"

8.2 However, the definition of Commission Agent was earlier incorporated only in the Notification No. 13/2003-ST which also exempted such persons from the ambit of Business Auxiliary Service as follows:-

> *"In exercise of the powers conferred by section 93 of the Finance Act, 1994 (32 or 1994), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts the business auxiliary services provided by a commission agent from the service tax leviable thereon under sub-section (2) of section 66 of the said Act.*
>
> *Explanation.- For the purposes of this notification, "commission agent" means 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.*
>
> *This notification shall come into force on the 1st day of July,2003.*

8.3 Notification No. 13/2003-ST was amended with effect from 9.7.2004 vide Notification No. 8/2004-ST specifically to expand exemption to commission agent services in relation to sale and purchase of agricultural produce. The relevant portion of the exemption is as follows:-

> *In the said notification,-*
>
> *(i) in the preamble, for the words "commission agent from the service tax leviable thereon under sub-section (2) of section 66 of the said Act", the words "commission agent in relation to sale or purchase of agricultural produce from the service tax leviable thereon under section 66 of the said Act" shall be substituted;*
>
> *(ii) for the Explanation, the following shall be substituted, namely:-*

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" Explanation.- For the purposes of this notification,-

(i) "commission agent" means 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.

(ii) "agricultural produce" means 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, sugar cane, jaggery, 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."

8.4 Vide Notification No. 19/2005-ST dated 7.6.2005, the clause (i) to Explanation to Notification No.13/2003-ST which gave the definition of "Commission Agent" was omitted.

8.5 Simultaneously, the definition of Commission Agent was amplified as part of amended definition of "Business Auxiliary Service" in section 65(19) of the Finance Act, 1994. The amended definition along with newly incorporated definition of commission agent read as under:-

"business auxiliary service" means any service in relation to-

(i) Promotion or marketing of sale of goods produced or provided by or belonging to the client; or
(ii) Promotion or marketing of service provided by the client; or

(iii) Any customer care service provide on behalf of the client; or

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(iv) Procurement of goods or services, which are inputs for the client; or

[Explanation. – For the removal or 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;]

(v) Production or processing or 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, but does not include any information technology service and any activity that amounts to "manufacture" within the meaning of clause (f) of section 2 of the Central Excise Act, 1944 (1 of 1944).

[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 cause 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;

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> *(b) "information technology service" means any service in relation to designing [or developing of computer software] or system networking, or any other service primarily in relation to operation or computer systems;"*

8.6 What is not disputed is that the appellants were acting as brokers and auctioneers in accordance with the rules of Connoor Tea Trade Association. Appellants are also licensed by the Tea Board and deemed to be a member of the association only as "broker".

8.7 As per the investigation by the department, the appellants render the following services for their clients:-

(a) They are not appointed as Commission Agents by their clients but licensed by the Tea Board and governed by the Rules framed by the Coonoor Tea Trade Association. Hence there is no principal - agent relationship between the service provider and their clients.

(b) They are engaged in the promotion, marketing and sale of goods provided by various clients i.e. tea factories as defined in clause 19(i) of Section 65.

(c) They are engaged in the activity of tea tasting and valuation of the tea.

(d) They are engaged in auxiliary services like billing, collection of sale proceeds on behalf of their clients.

(e) For the services rendered, consideration such as brokerage, lot money and service charges are collected at the rates fixed by the Coonoor Tea Trade Association.

(f) Lot money is received not only from their clients but also from the buyers.

(g) The sale proceeds are not received by the principal but by the service provider and paid to their clients after deduction of the consideration due.

(h) They make advances to their clients in anticipation of receipt of goods for sale in auction and interest collected therein.

(i) They are engaged in the activity of collection and payment of taxes viz. sales tax on behalf of the clients, for which they are registered as dealers under TNGST Act, 1959 on behalf of the clients and collect 1 paise per kg as service charges from their clients.

8.8 Even as per the appellants own submissions in this appeal, they have admitted to be rendering the following services:-

a) The Appellants upon being appointed by the sellers as brokers for auctioning Tea received a Tea Arrival Weight Report (AWR Form) from the Warehouse in which the principal sellers had stored the tea.

b) Upon receipt of the AWR Form, the Appellants drew samples from the Warehouse as contemplated by Appendix 'A' of the Rules.

c) Thereafter, the Appellants undertook the printing of catalogues. This was in accordance with the Rules 1 and 2 of Part II of the Rules.

d) The Appellants also undertook the distribution of samples of tea to the buyers in accordance with Rule 2 contained in Part II of the Rules.

e) Thereupon, the Appellants as agents conducted the auction in accordance with Part III of the Rules which contained "conditions of sale by auction."

f) Upon completion of the auction sales and after receipt of the sales consideration from the buyers, the Appellants issued delivery orders in order to enable the successful bidders in the auction to secure position of the Tea purchased by them from the Warehouse in which the sellers had stored their Tea. This was in accordance with Rule 3 of Para IV of the rules. Para IV contained "general post sales condition".

8.9 The appellants, no doubt are called 'brokers' in terms of the Coonoor Tea Trade Association Rules. However, they do not merely cause the sale of goods on behalf of their clients, the tea sellers, for a consideration that is based on the quantum of the sale. They are also engaged in drawing samples, undertaking printing of catalogues, distribution of samples to their buyers and conduct of auction in accordance with the procedure laid down by the Coonoor Tea Trade Association. Upon completion of the auction, the sales consideration is received not by the sellers but by the appellants. Thereafter, the appellant themselves issue delivery orders which enables the buyers to take delivery of the tea from the warehouse. They do the billing work and collection of sale proceeds on behalf of their clients. The appellants also collect lot money not only from their clients but also from the buyers. Appellants also make advances to their clients in anticipation of receipt of goods for sale. They are also engaged in activity of collection and payment of tax namely sales tax on behalf of their clients. The appellants promote the sale of the tea produced by their clients by sending out samples to their prospective buyers advertising by way of printing and distribution of catalogues. It therefore appears to reason that this wide gamut of activities of the appellant would go far beyond the scope of a commission agent since the services rendered by them are not restricted only to sale of goods on behalf of the sellers for consideration, which is the main edifice of the definition of commission agent. We find that the activities of the appellant go much beyond even the amended definition of 'commission agent' which was brought into the Explanation to Section 65(19) with effect from 16.6.2005. There is then merit in the contention of the department that the services rendered by the appellant would be more in the nature of promotion or marketing or sale of goods produced or provided or belonging to the client, namely, the type of service falling within the ambit of section 65(19)(i) of the Act. Notwithstanding the fact that the appellant may have been appointed as a broker, that by itself is only a requirement of Coonoor Tea Trade Association. Though they are called as 'broker' under the Association rules that will not enable the appellant to claim that they are only 'commission agent' for the purpose of section 65(19) ibid. The services performed by the appellant is thus promotion and sale of goods produced or provided or belonging to their clients and thus fall within the ambit of section 65(19)(i) of the Act.

8.10 Appellants have also made an alternative contention that their activities would fall under the category of 'auction of property service' only with effect from 1.5.2006, when the services provided in relation to auction of property was brought to tax for the first time by section 65(7a) by section 65(105) (zzzr) of the Act; that however the existing category of 'Business Auxiliary Service' as defined under section 65(19) stood unamended; that consequently introduction of a separate category of 'auction services' meant that the same was not covered by the category of 'Business Auxiliary Service'; that as a result, the appellant could not be exposed to any liability prior to 1.5.2006. To weigh this contention, it is useful to study the definition of "Auction of Property" under section 65(7a), introduced with effect from 1.5.2006 by the Finance Act, 2006 as follows:-

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"auction of property" includes calling the auction or providing a facility, advertising or illustrating services, pre-auction price estimates, short-term storage services, repair or restoration services in relation to auction of property".

The taxable service relating to auction of property service has been defined in section 65(105)(zzzr) is as follows:-

"to any person, by any other person, in relation to auction of property, movable or immovable, tangible or intangible, in any manner, but does not include auction of property under the directions or orders of a court of law or auction by the Government;

[Explanation: For the removal of doubts, it is hereby declared that for the purposes of this sub-clause, "auction by the Government" means the Government property being auctioned by any person acting as auctioneer]".

A close reading of the above definitions, it emerges that the auction of property services is a category of services which is limited to calling an auction or providing a facility for conduct of the auctions; advertising or illustrating services, providing pre-auction price estimates, short term storage services etc. However, the activities of the appellants herein go much beyond only the conduct of an auction. On the other hand, as discussed above, they are also engaged in a number of other activities which promote the sale of goods of the tea of their clients. It is not as if the appellants are only auctioneers who conduct auctions in the sense generally understood and more importantly, as per definition of section 65(7a) of the Act. This being so, we are afraid that this alternative plea of the appellant also will not succeed.

9. In the result, we are of the considered opinion that the services provided by the appellant will not fall either in the category of 'commission agent' under section 65(19) or as a 'commission agent' under Notification No. 13/2003-ST or for that matter under 'auction of property service' under section 65(7a) but only under 'Business Auxiliary Service' for promoting sale and marketing of goods of the tea sellers as falling under section65(19)(i) of the Act. The services rendered by appellants for 'private sales' also being of the same genre, they would also fall under the ambit of section 65(19)(i) only.

10. We find resonance of this conclusion in the decision of the Tribunal in the case of Container Tea and Commodities Vs. Commissioner of Central Excise, Salem – 2016 (42) STR 400 wherein, inter alia, after considering the legal provisions of section 65(19), it was held as under:-

> *"From the above definition, it is abundantly clear that the commission agent is a person who causes sale or purchase of goods on behalf of the principal company for a consideration which is normally governed by an agreement between the principal and the agent. Whereas, in this present case, we find that, as already explained in the above paragraphs, appellant's activities are not only restricted to sale, but includes host of other activities including assisting in the system of grading and standardization of tea for the purpose of export and also deals with details such as colour, taste, quality and quantity for export of tea and are professional tea taster. They also monitor the shipment of the goods and verify shipment documents, port regulations and other formalities for export of tea. Therefore, we find that the above activities do not fall within the meaning of commission agent. Accordingly, we hold that the appellant's activities are rightly covered under the*

> *category of "BAS" other than commission agent. Therefore, the question of appellant claiming tea as agricultural produce, which is applicable for only commission agent and not applicable to the appellant-assessee's case. Accordingly, we hold that the demand along with interest is liable to be upheld.*
>
> *8. The citations relied on by the appellant-assessee are not related to the present case, as they are only related to commission agents. Hence, the same are not applicable to the present case. As regards the penalty, we find that the assessee has paid the entire dues. Since, there was ambiguity in the initial period of service tax and taking into overall circumstances of the case, there was a bona fide doubt in the mind of the assessee that they are exempted as they are dealing in tea which is an agricultural produce. Accordingly, we waive the penalty under Sections 76 and 78, by invoking Section 80 of the Finance Act. Accordingly, the Revenue appeal is rejected and assessee's appeals are partly allowed in the above terms."*

11. In light of the discussions above, we do not find any merit in the appeals filed by the appellants for which reason their plea to set aside demand of service tax and interest thereon fails.

12. However, on the issue of penalty, we do find that the appellants from the beginning have been making a contention, albeit misconceived, that their activities are of a commission agent for sale of 'agricultural produce' and hence they are covered by exemption from tax liability. They also have taken a stand that since they conduct auction, their activity would come within the ambit of 'auction service' with effect from 1.5.2006. Thus, the whole dispute has been based on interpretation as to classification of their services. This being so, we find that there is a strong case for setting aside the

penalties. Accordingly, penalties imposed on the appellant in these cases are set aside.

13. As it has been concluded that the activity of the appellants would fall under section 65(19)(i), and not under 'commission agent' we do not intend to enter into the question of whether tea would fall under agricultural produce for the purpose of notification No. 13/2003-ST as amended, as claimed by the appellant.

14. The impugned orders are modified to the extent of setting aside the penalties imposed without disturbing the demand of service tax or interest thereon. The appeals are partly allowed on the above terms.

(Pronounced in open court on 22 · 1 · 2018)

(**Madhu Mohan Damodhar**)
Member (Technical)

Sulekha Beevi
(**Sulekha Beevi C.S.**)
Member (Judicial)

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Customs, Excise & Service Tax Appellate Tribunal