

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH – COURT NO. – IV

Service Tax Appeal No. 53668 of 2018 [DB]

[Arising out of Order-in-Appeal No. IND-EXCUS-000-APP-249-18-19 dated 26.07.2018 passed by the Commissioner of Customs, Central Goods & Service Tax and Central Excise (Appeals), Indore]

**Commissioner of C.G.ST. &
Central Excise, Indore**

Post Box No. 10, Manik Bagh
Road, Manik Bagh Palace,
Indore, M.P.-452001

...Appellant

VERSUS

M/s. Carry Fast Agency

418, 419 Lasudia Mori, Dewas Naka,
Indore, M.P.-453771

...Respondent

APPEARANCE:

Shri Harshvardhan, Authorized Representative for the Department
Shri Krishan Garg, Chartered Accountant for the Respondent

**CORAM: HON'BLE DR. RACHNA GUPTA, MEMBER (JUDICIAL)
HON'BLE MRS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)**

DATE OF HEARING: 28.07.2023
DATE OF DECISION: **15.09.2023**

FINAL ORDER No. 51302/2023

DR. RACHNA GUPTA

The department has filed the impugned appeal pursuant to Review Cum Authorization Order No. 115/2018-19 dated 08.10.2018, wherein, it has been opined that the order passed by the Commissioner (Appeals) is not legal and proper. The facts leading to impugned appeal are as follows:

Assessee-respondent is engaged in providing "Clearing and Forwarding Agents Services"¹ and has been registered for the same. During the course of audit of their record for the period from

1. C & F Service

2011-12 to 2014-15, it was observed that while discharging the tax liability of C & F Agent Service, the assessee-respondent has not included the freight value received by him in the taxable value account. Resultantly, it was found that assessee-respondent has short paid the service tax of an amount of Rs.57,50,912/- while discharging their tax liability for providing Clearing and Forwarding Agent Service. The said deficient amount was proposed to be recovered from the assessee-respondent along with the interest and the penalties vide Show Cause Notice No. 23438 dated 13.12.2016. The said proposal was confirmed vide Order-in-Original No. 08/2017-18 dated 28.09.2017, when the appeal against the said order was filed, the Commissioner (Appeals) has allowed the appeal. The Review Committee of the department however opined the said findings to be illegal and improper. Pursuant where to, the impugned appeal has been filed by the department praying for setting aside the said order of Commissioner (Appeals).

2. None had appeared on 27.03.2023 for the assessee-respondent. It was observed from order sheets that the assessee-respondent has not appeared even for once despite that the assessee-respondent was time and again been served with the notice of hearing. Even fresh notices of hearing, as were issued, were reported to have been served. Initially vide report of December, 2012 about date of hearing on 25.01.2023 and subsequently vide report of March 2023 for the date of hearing on 27.03.2023. Due to the continued absence of the respondent-assessee in the appeal, of the year 2018, it was opined, on

27.03.2023, that the assessee-respondent has been negligent in pursuing the matter despite several opportunities afforded. Hence the assessee-respondent was proceeded ex parte and the arguments on behalf of the appellant-department were heard and the matter was reserved for orders.

3. On 24.05.2023, prior the order could be pronounced, a miscellaneous application was filed by the respondent-assessee seeking an opportunity of being heard. The application was allowed vide Miscellaneous Order No. 50220/2023 dated 28.07.2023 and the arguments on behalf of respondent-assessee were heard about the merits of this appeal.

4. Learned DR had submitted a written synopsis for department-appellant on 27.03.2023 itself. It is mentioned that the transportation charges received by clearing and forwarding agent should form the part of consideration for providing Clearing and Forwarding Agent Service. It is mentioned that Commissioner (Appeals) has wrongly bifurcated the same. Learned DR further submitted that two separate contracts for providing separate set of circumstances is wrongly considered as a valid reason for not considering the freight value in the taxable value of Clearing and Forwarding Agent Service. Learned DR has relied upon the relevant definitions, the applicable circulars and the following case laws with the prayer that order under challenge be set aside and department's appeal be allowed:

(i) Medpro Pharma Pvt. Ltd. Vs. Commissioner of C. Ex., Chennai reported as 2006 (3) S.T.R. 355 (Tri. – LB.)

(ii) Commissioner of C. Ex., Panchkula Vs. Kulcip Medicines (P) Ltd. reported as 2009 (14) S.T.R. 608 (P&H)

(iii) Commissioner Vs. Kulcip Medicines (P) Ltd. reported as 2012 (25) S.T.R. J127 (S.C.)

(iv) M/s. Synergy Baxi Logistics Pvt Ltd Vs. Commissioner of Central Excise, Jaipur-I reported as 2019 (11) TMI 1166 – CESTAT New Delhi

(v) M/s. Gunesh India Pvt Limited Vs. Commissioner, Central Excise & Central Goods, Service Tax, Jaipur-I reported as 2022 (5) TMI 1042-CESTAT New Delhi

(vi) Jai Jawan Coal Carriers Pvt. Ltd. Vs. Commr. of S.T., New Delhi reported as 2015 (37) S.T.R. 509 (Tri.-Del.)

(vii) Singh Trading Company Vs. Commissioner of Central Excise, Bhopal reported as 2018 (9) G.S.T.L. 201 (Tri.-Del.)

(viii) Sri Bhagavathy Traders Vs. Commissioner of Central Excise, Cochin reported as 2011 (24) S.T.R. 290 (Tri.-LB)

5. Learned counsel for respondent-assessee has submitted the copy of agreements with M/s. Dabur India Limited. It is impressed upon that the parties agreed for transportation and C & F services to be separate and independent services and therefore, the consideration for both the services cannot be clubbed together to levy services tax under the single service category of C & F service. This will be contrary to the Principle of classification of services as provided under Section 66 F of the Act. Copies of certificates for service recipients for making payment of tax under Reverse Charge Mechanism (RCM) are also placed on record. Relying upon the

decision of **M/s. Synergy Baxi Logistics Pvt. Ltd. of this Tribunal vide Final Order No. 51549/2019 dated 26.11.2019**, learned counsel has requested for order under challenge to be upheld and appeal as filed by the department to be dismissed.

6. Having heard the rival contentions and perusing the case records, We observe and hold as follows:

The only point of adjudication is:

“whether the clearing and forwarding agent is to be assessed separately when he is clearing and transporting the goods under two separate contracts and bills have also been raised separately.”

7. To adjudicate the same foremost it is necessary to look into the definition of clearing and forwarding agent and the goods transport agency. Section 65(25) of the Finance Act, 1994 (hereinafter called as Act) defines clearing and forwarding agent to mean:

“Any person who is engaged in providing any service, either directly or indirectly, connected with the clearing and forwarding operations in any manner to any other person and includes a consignment agent”

This taxable service is defined under 65 (105)(j) of the Act as a service provided to any person by a clearing and forwarding agent in relation to clearing and forwarding operation, in any manner.

Trade notice No. 59/99 dated 04.10.1999 clarified the activities undertaken by clearing and forwarding agents. Following are few of them:

- (a) Receiving the goods from the factories or premises of the principal or his agents;
- (b) Warehousing these goods;
- (c) Receiving dispatch orders from the principal;
- (d) Arranging dispatch of goods as per the directions of the principal by engaging transport on his own or through the authorized transporters of the principal;
- (e) Maintaining records of the receipt and dispatch of goods and the stock available at the warehouse;
- (f) Preparing invoices on behalf of the principal.

A perusal of the definition above when read in light of the said trade notice makes it clear that, in order to attract the levy, the above mentioned activities with similar other services "in relation to clearing forwarding operation" constitute the C&F Service. A Circular of the Board also may be read:

"An essential characteristic of any services, to fall in the category of C&F agent, is that the relationship between the service provider and receiver should be in the nature of principal (owner) and agent. The C&F agent carried out all activities in respect of the goods right from stage of their clearances from the premises of the principal to its storage and delivery to the customers. "

The above Para in the circular makes it clear that when a C&F agent carries out both clearing and forwarding, the levy will be attracted.

8. Now we need to look into the definition of Goods Transport Agency which is defined under Section 65 (50b) of the Act to mean:

“Any person who provides service in relation to transport of goods by road and issues consignment note, by whatever name called”.

It is taxable under Section 65(105)(zzp) the service to any person by a goods transport agency, in relation to transport of goods by road in a goods carriage.

The definitions make it clear that for the Goods Transport Service, it is the service for transportation of goods that too by road provided by the Goods Transport Agency which issues the consignment note also.

9. From the above discussion, we conclude that C&F Agent Service includes two kinds of service providers i.e. the freight forwarders and the clearing agent. When the C&F himself is providing both the services to the principle, he is liable to tax under Section 65(25) of the Finance Act. However, when C&F agent is engaging a GTA or another agency who are freight forwarders than the levy cannot be raised against the C&F agent for providing C&F agent service.

10. Though, this Tribunal in the case of **Medpro Pharma Pvt. Ltd. (supra)** had held that even isolated activity of freight forwarding is covered under C & F operations and is taxable as C &

F Agent Service. It was held by the Tribunal that segregation of holistic concept of clearing and forwarding into divisible activities is not possible due to presence of word 'and' in between 'clearing' and 'forwarding'. The relevant para of the decision is as follows:

"Due to their orchestrated nature of work, such isolated activity can also be covered under "C&F Operations". Merely, because the bassoon was not played in one of the movements of a symphony, it does not cease to be otherwise a part of the orchestra. While forming this view, we have certainly not overlooked the fact that while music can be sometimes taxing, a tax can never be musical!"

11. However, we observe that the said findings have been overturned by the High Court of Punjab and Haryana while deciding the appeal of Revenue in the case of **Kulcip Medicines (P) Ltd. (supra)**, where while interpreting the definition of Clearing and Forwarding Agent Service it was held that taxable service has been defined to mean any service provided or to be provided to a client by a 'clearing and forwarding agent in relation to clearing and forwarding operations in any manner'. If the clearing operations are separated from forwarding operation, the levy of tax would not be attracted as it only involves one of the two activities. **It was also held that by necessary intendment the expression 'a clearing and forwarding agent in relation to clearing and forwarding operations, in any manner' contemplates only one person rendering service as 'clearing and forwarding agent' in relation to 'clearing and forwarding operations'.**

12. This decision though has taken a contrary view than decision in **Medpro Pharma Pvt. Ltd. (supra)** in the sense that clearing & forwarding can be segregated. However, the rationale of the

Kulcip Medicines (P) Ltd. (supra) decision still is that if clearing & forwarding both the operations are undertaken by only one person, the activity shall be clearing & forwarding agent service only. The outcome of this decision therefore is that if one person has rendered service as 'forwarding agent' and also the service as 'clearing agent' then he be deemed to have rendered both services would amount to replacing the conjunctive 'and' by a disjunctive which is not possible. The SLP filed by the assessee against the said decision has been dismissed by Hon'ble Supreme Court of India vide decision reported as **2012 (25) S.T.R. 1127 (S.C.)**, while **holding that service tax is leviable under the category of clearing and forwarding agent only if an agent renders both clearing and forwarding services.**

13. The conclusion which stands finalized to our understanding is that for the service of clearing and forwarding agent to be taxable, the activities of clearing as well as forwarding shall be performed by one and the same agent. To put it otherwise, the service of clearing and forwarding agent will not be taxable if:

(i) The agent outsources the activity of forwarding to a goods transport agency.

(ii) The principle himself hires the GTA to perform forwarding activity and the clearing and forwarding agent is engaged only to perform the clearing activities.

In both the situations the service provider for the forwarding activity since is a person different from C&F agent that the value of freight forwarding shall not be included in the value of taxable C&F

Agent Service. If fact, service cannot be taxed as C&F Agent Service.

14. Reverting to the facts of the present case, we observe that irrespective there are two separate agreements between the principle and the agent, one for transportation and another for clearing. In addition, the consideration received is also in two different modes with respect to the invoices of respondent's clearing activity, he is receiving the consideration as commission. Whereas for the invoices about providing forwarding services, he is receiving the contractual payment. But the forwarding activity has been provided by the C&F agent i.e. the assessee and he, himself is clearing the product of his principle. The bifurcation of both the services, there is no doubt, permissible as per the decision in **Kulcip Medicines (P) Ltd. (supra)**. However, we also observe that the agent in both these contracts is same i.e. the respondent. It is important here to go through the said two different contracts/agreements:

(i) The agreement dated 20.12.2012 executed between M/s. Dabur India Limited and the respondent is about business of transporting the company's goods from company's warehouses on door delivery basis to the different stockists in state of Madhya Pradesh or delivery of goods to any other place/state as per the request of the company.

We observe that clause 48 of this agreement addresses the carrier i.e. the respondent as C&F agent, who is not allowed to part with the consignment, in any case, without the acknowledgement of the receipt of goods by the stockist. We also observe that the

agreement is absolutely silent about issuance of consignment notes and admittedly respondent is not registered as Goods Transport Agency.

These observations are sufficient for us to hold that even if respondent is rendering transportation service under a separate contract but said service rendered by him cannot be called as Goods Transport Service.

(ii) The second agreement dated 19.04.2012 between M/s. Dabur India Limited and the respondent is about undertaking the business of clearing, storing and forwarding of company's goods as C&F agent of the company for State of Madhya Pradesh.

We observe from clause 1 that C&F shall transfer stocks to any of the company stockiest/super stockiest or C&F agent located all over India. As per clause 2 of the agreement, appellant as C&F agent is allowed to use the warehouse/godowns of M/s. Dabur India Limited to receive and stock the goods therein & to consign its goods from time to time, as per requirement, by Road and Rail.

From these clauses of both the agreements, it is clear that respondent is admitted to be the C&F agent. As already observed above respondent only is providing clearing as well as forwarding service. Hence it is not open to respondent to say that service provided by him is different from C&F Agent Service. Irrespective there are two separate contracts executed by the principle but for appointing one and the same person i.e. respondent to render carrying as well as forwarding service. This fact distinguishes the present case from **Kulcip Medicines (supra)**. Thus, we hold that both the activities rendered by respondent shall constitute one

synchronized service of C&F agent. Hence respondent is liable to levy under Section 65(25) of the Finance Act. More so for the reason that appellant is registered as C&F agent and not as GTA.

Thus we answer the above question in negative by holding that when one and the same person is providing service of clearing as well as forwarding irrespective under two separate contracts, it shall not amount to be the bifurcation of C&F Service. The agent has to be assessed for rendering C&F Service 65(25) and 65(105) of the Finance Act.

15. We find that respondent-assessee has relied upon the decision of **M/s. Synergy Baxi Logistics Pvt. Ltd. (supra)**, we notice the decision of Hon'ble Supreme Court in the case of **Coal Handlers Private Limited Vs. CCE reported as 2015 (38) STR 897 (SC)**, wherein while discussing the meaning and scope of forwarding agent, the court held that the transportation service is not part of the forwarding operations. Further the same person can act both in the capacity of C & F agent as well as courier in a separate transportation and different contract. We observe that in **M/s. Synergy Baxi Logistics Pvt. Ltd. (supra)** the C&F himself was not transporter. He had assured that wherever bank approved transporters are available, their services shall be utilized as a first priority. In case, bank approved transporters are not specified for certain places, care shall be exercised to dispatch the said products through registered transporters or through reputed transporters. While entrusting the Products to transporters in the course of forwarding, the C&F shall arrange and ensure that all the required excise gate passes / invoices / documents are carried by the

transporters, The relevant invoices / documents / challans shall carry the name of the Company as the consignor and the name of the customer as the consignee. But in the present case as per agreement dated 20.12.2012, the assessee –respondent i.e. M/s. Carry Fast Agency only has been appointed as transporter. For these reasons we are of the opinion that facts of **M/s. Synergy Baxi Logistics Pvt. Ltd. (supra)** are distinguishable.

16. As the result of above discussion we answer the question framed in negative that two separate contracts bifurcating the activity of clearing and forwarding will not discharge the C&F Agent from his liability of C&F Service taxable under Section 65(105)(i) of the Finance Act. It is for the sole reason that under two separate contracts, the respondent himself is the service provider. We hold that such an arrangement is to camouflage the C&F Agent's liability for providing clearing & Forwarding Agent Service.

17. Accordingly, we hereby set aside the impugned order of Commissioner (Appeals). Consequent thereto, the appeal filed by the department is hereby allowed.

[Order pronounced in the open Court on **15.09.2023**]

(DR. RACHNA GUPTA)
MEMBER (JUDICIAL)

(HEMAMBIKA R. PRIYA)
MEMBER (TECHNICAL)