

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066
CUSTOMS APPEAL BRANCH

Appeal No. ST/96 /2007 - CU[DB]

Date 15/01/2009

Assistant Registrar
C.E.S.T.A.T, New Delhi

To :
M/S ALLENGERS MEDICAL SYSTEMS LTD.
MUBARIKPUR ROAD, DERABASSI (DISTT- PATIALA)
M/S ALLENGERS MEDICAL SYSTEMS LTD.

Appellant

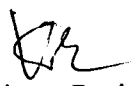
Vs
Respondent

C.C.E. CHANDIGARH

I am directed to transmit herewith a certified copy of **Final order No. ST/28/09**

CU[DB] dated 29.10.08

passed by the Tribunal under Section 129, (B) of the Customs Act, 1962 & Financial Act 1994 relating to Service Tax


Assistant Registrar
(Customs Appeal Branch)

Copy to :

1. Respondent

C.C.E. CHANDIGARH

PLOT NO 19, SECTOR 17-C, CHANDIGARH

2. Adv. / Consult

MR.JAGMOHAN BANSAL

1640/1, SECTOR-40B, CHANDIGARH

3 S.D.R

4 J.C.D.R.

5 Bar association, CESTAT, New Delhi

6 M/s. Deeparchi Publications, M-93, Marg. 46, Saket, New Delhi 110017

7 M/s Centax Publications (P) Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New - 3

8 Excise & Customs cases, B-37, Sector -1, NOIDA - 201301 Gautam Budh Nagar, (U.P.)

9 Raghuraman's 44-B, Regal Flat, Shipra Suncity, Indirapuram - 201010, Ghaziabad, DT, U.P.

10 Nidheshak publications, I.P.Estate, new Delhi

11 Taxmann Allied Service Pvt Ltd., 21/35, West Punjabi Bagh, New Delhi - 110026

12 Commercial Laws of India Pvt Ltd Post Bag No. 1033, No.70(Old No. 88), Thvagaraya Road, T. Nagar, Chennai

13 Taxindiaonline.com Pvt.Ltd, B-XI/8183, Vasant Kuni, New Delhi - 110070

14 Easy Service Tax Online Dot Com Pvt.Ltd.407A, Iscon Mall, Above Star India Bazar, Satellite Road, Ahmedabad-15

15 Office Copy

16 Guard file


Assistant Registrar
(Customs Appeal Branch)

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI
COURT NO.II

ST /Appeal No.96 /2007-ST(BR)

(Arising out of order in original No.45/ST/Chd/2006 dated
30.11.2006 passed by the Commissioner of Central Excise,
Chandigarh)

For approval and signature:

Hon'ble Mr.P.K. Das, Member(Judicial)

Hon'ble Mr. Rakesh Kumar, Member(Technical)

1. Whether Press reporters may be allowed to see the
order for publication as per Rule 27 of the
CESTAT (Procedure) Rules, 1982?
 2. Whether it should be released under Rule 27 of the
CESTAT (Procedure) Rules, 1982 for publication
in any authoritative report or not ?
 3. Whether Their Lordships wish to see the fair copy
of the Order ?
 4. Whether Order is to be circulated to the
Departmental authorities?
-

M/s. Allengers Medical Systems Ltd Appellant
(Rep. by Shri Jagmohan Bansal, Advocate)

Vs

CCE, Chandigarh Respondent
(Rep. by Shri Sumit Kumar, DR)

Coram: Hon'ble Mr P.K. Das, Member(Judicial)
Hon'ble Mr. Rakesh Kumar, Member(Technical)

Date of Hearing: 29.10.08

Final Order No. 57/28/09 /2009-ST (BR)

Per P.K. Das:

The relevant facts of the case, in brief, are that the appellants are registered with the Central Excise Department for manufacture of medical equipment such as X-Ray machines, C-Arm Image Intensifier, Mammography, Mobile Cath Lab classifiable under heading 9022 of the First Schedule to the Central Excise Tariff Act 1985. It has been alleged that the appellants were providing services like imparting training, erection, commissioning and installation of machines/equipments manufactured by them at customers place. It has further been alleged that the activities of training, erection, commissioning and installation would amount to providing technical assistance to the buyers of machines and covered under the service of 'Consulting Engineering' upto 20th June, 2003 and thereafter it is covered under the category of "Erection, commissioning or installation" service to their customer/buyer. Show cause notice dated 23.1.2006 was issued proposing demand of tax and penalties. Commissioner of Central Excise dropped the demand of tax prior to 1.7.2003 and confirmed the demand of tax for the period from 1.7.2003 to 30.9.2005 and imposed penalties and interest.

2. The learned Advocate on behalf of the appellants submitted that the appellants were engaged in the manufacture and sale of medical equipment. He drew the attention of the Bench to the copy of the invoices and Order Booking Despatch Instructions (i.e. OBDI). He submits that the appellants were paying duty on the total value of the machines. They were not charging additional amount as erection and commissioning charges from the customers and therefore, service tax as demanded is not

sustainable. He also submits that they were manufacturing and selling the medical equipment. He further submits that there is no contract/agreement for erection and commissioning of the machines with the customers and therefore, the demand of tax is unjustified. He relied upon the decision of the Hon'ble Supreme Court in the case of State of Andhra Pradesh Vs Kone Elevators (India) Ltd reported in 2005 (181) ELT 156 (SC) and also relied upon the decision of the Tribunal in the case of Idea Mobile Communications Ltd Vs CCE Trivandrum reported in 2006 (4) STR 132 (Tri. Bang).

3. The learned DR reiterates the finding of the Commissioner. He submits that the Authorized Representative of the appellants admitted in his statements that they were providing services like imparting of training, erection, commissioning and installation of machines/equipments at the customers premises. He further submits that the statements are corroborative with OBDI. The service of erection, commissioning or installation had come within the purview of service tax effective from 1.7.03. So, they are liable to pay the tax on such service. He further submits that the OBDI consists of different elements including the service provided by them on erection, commissioning and installation of medical equipments. So, the levy of service tax would be determined having regard to the respective nature of service as envisages in OBDI. He also relied upon the decision of the Hon'ble Supreme Court as under:-

a) Imagic Credit Pvt Ltd Vs CC
2008 9 (STR) 337 (SC)

M.M. Goyal & Co Vs Sales-tax officer
1998 (38) ELT 733(SC)

Moriroku UT India (P) Ltd Vs State of UP
2008 (224) ELT 365 (SC)

4. After hearing both the sides and on perusal of the record, it is seen that the representative of the appellants in his statement dated 13th October, 2005 stated that OBDI contained the total cost of equipment including the cost of machine and value of optional services such as erection and commissioning of machines and equipment sold by them. In reply to show cause notice, the appellants contended that they had been paying duty on the total invoice value of medical equipment charged from the customers, which establishes the activity of installation, commissioning or erection had been considered as part of sale. On perusal of the copy of the Central Excise invoice and the Annexure VI to the show cause notice, we find that the demand of tax was determined on the basis of Central Excise invoice value, as taxable value. It is also noticed that for some periods, taxable value has been taken as 33% of invoice value in terms of the Notification No.19/2003-ST dated 21.8.2003 as amended. In some cases, total invoice value has been taken as taxable value since the appellant was availing cenvat credit of invoice and benefit under Notification No.19/03-ST dated 21st August, 2003 cannot be availed. The learned Advocate submits that in only one case, they charged commissioning and installation charges separately in the purchase order wherein they paid service tax. The main contention of the learned Advocate is that they have paid the Central Excise duty on the invoice value and the demand of tax on the said value is not sustainable.

5. We find force in the submission of the learned Advocate. It is seen that the appellants paid the Central Excise duty on the manufacture and sale of medical equipments as is evident from the invoice. The appellant is not contesting the levy of Central Excise duty. It appears that the activity of erection, commissioning and installation of equipments are part of sale of excisable goods and Central Excise duty was paid thereon. There is no material placed by the Revenue that the appellants charged separately for erection and commissioning of equipments. In this context, the levy of service tax on such activity like erection, commissioning and installation is not proper and legal. The learned DR contended that the OBDI indicates contract for erection and installation of the medical equipments at the customer premises. We are unable to accept the contention of the learned DR. We are of the view that whether the activity is service or sale would be determined on the basis of examination of the contract between the parties and evidences.

6. The Hon'ble Supreme Court in the case of Kone Elevators (I) Pvt Ltd (supra) held that the substance and terms of contract, customs or trade and circumstances/facts of each case are to be looked into in this aspect. In the said case, the Hon'ble Supreme court held that if the main object of contract is transfer of finished goods, it is contract of sale. If the main object is work and labour and property passing by accessories during the process of work to the movable property of customer, it is works-contract. The relevant portion of the decision of the Hon'ble Supreme court in the case of Kone Elevators (I) Ltd supra is reproduced below:

"It can be treated as well settled that there is no standard formula by which one can distinguish a 'contract for sale' from a 'works contract'. The question is largely one of fact depending upon the terms of the contract including the nature of the obligations to be discharged there under and the surrounding circumstances. If the intention is to transfer for a price a chattel in which the transferee had no previous property, then the contract is a contract for sale. Ultimately, the true effect of an accretion made pursuant to a contract has to be judged not by artificial rules but from the intention of the parties to the contract. In a 'contract of sale', the main object is the transfer of property and delivery of possession of the property, whereas the main object in a 'contract for work' is not the transfer of the property but is one for work and labour. Another test often to be applied to is: when and how the property of the dealer in such a transaction passes to be customer is it by transfer at the time of delivery of the finished article as a chattel or by accession during the procession of work on fusion to the movable property of the customer? If it is the former, it is a sale if it the latter, it is a 'works contract'. Therefore, in judging whether the contract is for a sale or for work and labour, the essence of the contract or the reality of the transaction as a whole has to be taken into consideration. The pre-dominant object of the contract the circumstances of the case and the custom of the trade provides a guide in deciding whether transaction is a sale or a works contract. Essentially, the question is of interpretation of the contract. It is settled law that the substance and not the form of the contract is material in determining the nature of transaction. No definite rule can be formulated to determine the question as to whether a particular given contract is a contract for sale of goods or is a works contract. Ultimately, the terms of a given contract would be determinative of the nature of the transaction, whether it is a sale or a works contract. Therefore, this question has to be ascertained on facts of each case, on proper construction of terms and conditions of the contract between the parties."

7. In the present case, the appellants manufactured and hold the medical equipment. It is revealed from the record that the activity of installation, erection and commissioning are incidental to delivery of goods to the customers. Therefore, there is no reason for levy of service tax on the installation and commissioning of medical equipment.

8. The learned DR relied upon the decisions of the Hon'ble Supreme Court which are not applicable in the present case.

(a) In the case of Moriroku UT India (P) Ltd (supra), it has been held that liability under excise law is event based irrespective of whether the goods are sold or captively consumed.

(b) In the case of M.M. Goel & Co (supra), it has been held that in order to be sale and levy of duty, not only the property in the goods should pass from the contractor to the Government, but they should be independent contract, separate and distinct, apart from mere passing of the property.

(c) In the case of Imagic Creative Pvt Ltd (supra), the issue is whether the service provider paying service tax is liable to Sales Tax/VAT which are mutually exclusive. It has been held that having regard to the respective parameters on service tax and the sales tax as envisaged in a composite contract, from a indivisible contract levy would be determined.

9. We find that in the instant case, the appellant engaged on business of manufacturer and sale of medical equipment and no separate contract for erection and installation of the medical

equipments. The erection and installation charges are covered in the value of the medical equipments and the central excise duty was discharged thereon. So, the case laws relied upon by the learned DR are not applicable herein.

10. In view of the above discussion, we find that the demand of tax and penalties are not sustainable. Accordingly the impugned order is set aside. The appeal is allowed with consequential relief.

(Order dictated and pronounced in the open Court).

(P.K. Das)
Member(Judicial)

(Rakesh Kumar)
Member(Technical)

MPS*