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

Appeal No. ST/227 /2007 - CU[DB] Date 19/05/2009

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

To :
M/S PADAM CHAND MUTHA & CO.
C-2, MANDORE KRISHI, UPAJ MANDI, MANDORE
JODHPUR (RAJ.)

M/S PADAM CHAND MUTHA & CO. Appellant

Vs

C.C.E. JAIPUR II Respondent

I am directed to transmit herewith a certified copy of **Final order No.** ST/168 2009 CU[DB] dated 15.05.09 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. JAIPUR II
   N.C.R.BUILDING, STATUE CIRCLE, "C" SCHEME, JAIPUR 302005.
2. Adv. / Consult
   MR.OM P.AGARWAL & CO.
   56, SECTION 7, N.P.H ROAD, JODHPUR(RAJ)
3. S.D.R
4. J.C.D.R.
5. Bar association, CESTAT, New Delhi
6. Director Publications, Customs, Excise. I.P. Estate, New Delhi
7. M/s Centax Publictions Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi - 3
8. Commercial Laws of India Pvt Ltd. Post Bag No. 1033, No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
9. Raghuraman's 44-B, Regal Flat,Shipra Suncity, Indirapuram - 201010,Ghaziabad, DT, U.P.
10. M/s Manupatra Information Solutions Pvt Ltd. Excise & Customs Cases B-37, Sector - 1, Noida - 201301, Gautam Budh Nagar, (UP)
11. M/s. Deeparchie Publications, M-93, Marg. 46, Saket, New Delhi 110017
12. Taxindiaonline.com Pvt.Ltd, B-XI/8183,Vasant Kunj, New Delhi - 110070
13. Taxmann Allied Service Pvt Ltd., 21/35, West Punjabi Bagh, New Delhi - 110026
14. Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road,Ahmedabad-15
15. LAWCRUX Advisors Pvt Ltd, LAW House,1-8,Sector - 10, Faridabad 121003 (Haryana)
16. Office Copy
17. Guard file

Assistant Registrar
(Customs Appeal Branch)

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
WEST BLOCK NO. 2, R.K. PURAM, NEW DELHI

COURT – III

SERVICE TAX APPEAL NO. 227 OF 2007

[Arising out of Order-in-Appeal No. 61/HKS/ST/JPR-II/2006 dated 14.2.2007 passed by the Commissioner (Appeals-II), Customs & Central Excise, Jaipur]

For approval and signature:

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

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 would be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	N
3.	Whether their Lordships wish to see the fair copy of the order?	
4.	Whether order is to be circulated to the Departmental authorities?	Yes

M/s. Padam Chand Mutha & Co., Appellant

Vs.

CCE, Jaipur-II Respondent

Appearance:

Shri O.P. Agarwal, C.A. for the appellant,
Shri A.K. Madan, SDR, Departmental Representative, for the Revenue,

Coram:

Hon'ble Mr. M. Veeraiyan, Member (Technical);
Hon'ble Mr. P.K. Das, Member (Judicial),

Date of hearing: 20th January, 2009

Date of decision: 15/5/09.

FINAL ORDER NO. 57/168/09 **dated** ________

Per P.K. DAS:

The relevant facts of the case, in brief, are that the appellant had been receiving blended tea from their principals, namely M/s. The Luxmi Tea Company Limited, M/s. Sancheti Tea Company, M/s. Gillanders Arbuthnot & Co., etc. and storing the same in their go-down at Jodhpur. The appellant was selling tea at a price fixed by their principals and as mutually agreed upon. Show Cause Notice dated 19.4.2006 was issued proposing demand of tax of Rs. 10,97,758/- for the period October, 2000 to March, 2005 under the category of 'Clearing & Forwarding Agent', which includes a 'Consignment Agent'. The adjudicating authority confirmed the demand of tax and imposed penalties along with interest. Commissioner (Appeals) upheld the adjudication order.

2. The learned Counsel on behalf of the appellant submits that the appellant was rendering services as commission agent to sell blended tea on behalf of their principals. He submits that unloading and storing of the goods in go-down are incidental to job of commission agent. He, further submits that it is revealed from the agreement of the appellant with their principals that they were appointed as agent for selling tea as commission agent. In this context, he drew the attention of the Bench to agreements with the principals. He also submits that the appellant selling of tea in the market is essential activity of the appellant and, therefore, it

will fall under the category of commission agent and not clearing and forwarding agent. He further submits that section 65A(2)(b) of Finance Act, 1994 provides that composite services shall be classifiable as if they are consisting of a service which gives them their essential character. It is his contention that on perusal of the agreement with the principals, it is apparent that they have engaged for selling of tea and not for loading and storing of tea. He relied upon the decision of the Hon'ble Supreme Court in the case of Super Poly Fabriks Ltd. vs. CCE, Punjab, reported in 2008 (10) STR 545 (SC). He also relied upon the following decisions of the Tribunal:-

(i) CCE vs. Trade Tech Corporation – 2006 (93) STR 598 (Tri.);

(ii) Sreenidhi Polymers Pvt. Ltd. vs. CCE, Bangalore-III – 2005 (186) ELT 195 (Tri.-Bang.);

(iii) Manickbag Industries vs. CCE – 2007 (82) RLT 805 (CESTAT-Ban.);

(iv) CCE & ST, Bangalore vs. Shah Polymers Ltd. & Ors – 2007 (83) RLT 1038 (CESTAT-Ban.)

He also contested the demand of tax on limitation. He submits that there is no suppression of facts with intent to evade payment of tax. He further, submits that the impugned order was passed on the basis of the decision of the Tribunal in the case of Prabhat Zarda Factory (India) Ltd. vs. CCE, reported in 2002 (145) ELT 222 (Tribunal) which was over ruled by the Larger Bench of the Tribunal in the case of Larsen & Toubro Ltd. vs. CCE, reported in 2006 (3) STR 321 (Tri.-LB). Therefore, demand of tax for the extended period of limitation cannot be sustainable. He relied upon the decision of the Tribunal in the case of Mahavir Generics vs. CCE, Bangalore, reported in 2004 (170) ELT 78 (Tri.-Del.) and Bharat Aluminium Co. Ltd. vs. CCE, reported in 2007 (8) STR 27 (Tri.). He also relied upon the decision of the Hon'ble Supreme Court in the case of Geotech Foundation & Construction vs. CCE, reported in 2008 (85) RLT 590 (S.C.).

3. Learned S.D.R. on behalf of Revenue reiterates the findings of the Commissioner (Appeals). He submits that Shri Mutha in his statement dated 3.3.2006 has stated that the appellant received the goods and unloaded to store in their godown. After selling of the tea, the sale proceeds thereof were sent to the principals through demand draft deducting freight, loading, un-loading charges and commission etc. He submits that the appellant are also preparing invoices on behalf of their principals. He refers to the Board's Circular No. 43/7/97-TRU dated 11.7.97 and submits that the said circular clarifies that such services would come within the purview of 'Clearing & Forwarding Agent'. Apart from that, the appellant is handling the consignments sent by the principals for un-loading, storing and delivery and also preparing the records, which are clearly a job of consignment agent. It is his submission that the activities of the appellant are nothing but of consignment agent and selling of the goods is additional job. He relies upon the decisions of the Hon'ble Supreme Court in the following cases:-

(i) Rajesh Kumar Sharma vs. UOI – 2007 (209) ELT 3 (SC);

(ii) Amrit Papers vs. CCE, Ludhiana – 2006 (200) ELT 365 (SC)

He also relied upon the decision of the Tribunal in the case of Vijay Enterprises vs. CCE, reported in 2007 (7) STR 339 (Tri.). He submits that the Larger Bench of the Tribunal in the case of Medpro Pharma Pvt. Ltd. vs. CCE, Chennai, reported in 2006 (3) STR 355 (Tri.-LB) has held that clearing and forwarding operations cannot be segregated into "Clearing" and "Forwarding" as they fall in common category and, hence, all services of that category will be services provided by 'C & F Agent'. He also submits that the appellant has not disclosed their activities to the department with intent to evade payment of tax and, therefore, extended period of limitation would be invokable.

4. After hearing both sides and on perusal of the records, we find that the appellants contested the demand of tax and penalty on merits as well as on limitation. The Commissioner (Appeals) observed that the activities of the appellants are clearly related to clearing & forwarding operations and the case is covered by the decision of the Tribunal in the case of Prabhat Zarda Factory (India) Ltd. vs. CCE, Patna, reported in 2002 (145) ELT 222. The Larger Bench of the Tribunal in the case of Larsen & Toubro Ltd. vs. CCE, Chennai, reported in 2006 (3) STR 321 (Tri.-LB) held that mere procuring or booking orders for the principal by an agent on commission basis would not amount to providing services as "Clearing & Forwarding Agent", within the meaning of definition of that expression under Section 65 (25) of Finance Act, 1994. The decision in Prabhat Zarda Factory (India) Ltd. stands over-ruled to the extent of the

aforesaid ratio laid down thereunder. Thus, it appears that there were conflicting decisions of the Tribunal on the levy of tax in this situation. In the present case, the appellant is also undertaking incidental activities namely unloading, storing of goods etc. So, ratio of the Larger Bench decision would not apply here. But, we find force in the submission of the learned Advocate that demand of duty by show cause notice dated 19.4.2006 for the period October, 2000 to March, 2005 is barred by limitation. The main contention of the learned SDR is that the department has given wide publicity on levy of service tax and issued various circulars and trade notices clarifying scope of C&F operations. It is contended that the appellants had not made any inquiry with the department for levy of tax, which indicates the clear case of suppression of facts with intention to evade payment of tax.

5. We are unable to accept the submission of the learned SDR. We have already discussed that there are conflicting decisions on the levy of tax. It is seen that the Tribunal in the case of Mahavir Generic (supra) held that the products of principal are supplied to the appellants on consignment basis and the appellants sell to customer. Such an activity would not come within the service provided to client by a Clearing & Forwarding Agent. We find that in an identical situation the Tribunal in the case of Bharat Aluminium Co. Ltd. (supra) set aside the demand of tax as barred by limitation. The findings of the Tribunal in the case of Bharat Aluminium Co. Ltd. (supra) is reproduced below:-

"11. We have already noted the observations of the Commissioner that conflicting views had been taken by the Tribunal on the issue of taxability of consignment agent as clearing and forwarding agent. It is well settled that when different views are prevalent about the applicability of a tax, extended period is not available to the revenue for the purposes of raising demands. The present is such a case. The Tribunal itself had rendered conflicting decisions and the issue was subsequently decided by a Larger Bench [2007 (3) S.T.R. 321 (Tri. – LB)]. In this factual situation, we are of the opinion that the procedural failure on the part of the appellant was the result of bona fide belief that it was not liable to pay the tax and that extended period is not applicable in the facts of the case.

12. In view of what is stated above, the Appeal No. 25/06 of M/s. Bharat Aluminium Co. is allowed on the ground of limitation with consequential relief, if any."

6. In the present case, it is contended by the Revenue that the appellants failed to submit the Return and to observe the procedure. In our view, procedural failure on the part of the appellants was a result of bona fide belief. As such, demand of tax is barred by limitation and the impugned order is liable to be set aside. Accordingly, we set aside the impugned order on limitation without going into the merits of the case. Appeal is allowed with consequential relief.

(Pronounced in the Open Court on 15/5/09.)

(M. VEERAIYAN)
MEMBER (TECHNICAL)

(P.K. DAS)
MEMBER (JUDICIAL)

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