

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

Appeal No. ST/116 -17/2007 - CU[DB]

Date 07/04/2011

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

To :
M/S KAVERI COAL SUPPLIERS

IST FLOOR, RAM CHANDRA PALIWAL MARKET,
FIROZABAD (U.P.)
M/S KAVERI COAL SUPPLIERS

Appellant

Vs

Respondent

C.C.E. KANPUR

ST/147-48

I am directed to transmit herewith a certified copy of Final order No. 2011 CU[DB] dated

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. KANPUR

117/7, SARVODYA NAGAR,
KANPUR

2. Adv. / Consult

MR. ANIL SINGH SISODIA

76, SHIVAJI NAGAR, SHAGANJ, AGRA-10

3. C.D.R

4. Bar association, CESTAT, New Delhi

5. Director Publications, Customs, Excise. I.P. Estate, New Delhi

6. M/s Centax Publications Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi -

7. Company Law Institute of India Pvt Ltd., No.2 (Old No. 36), Vaithyaram Street, T. Nagar, Chennai -17

8. M/s. Deeparchie Publications, M-93, Marg. 46, Saket, New Delhi 110017

9. Taxmann Allied Service Pvt Ltd., 59/32, New Rohtak Road, New Delhi - 110005

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

11. LAWCRUX Advisors Pvt Ltd, LAW House.1-8, Sector - 10, Faridabad 121003 (Harvana)

12. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor, Vasant Arcade, Nelson Mandela Road,
Vasant Kunj, New Delhi - 110070

13. Office Copy

14. Guard file


Assistant Registrar

(Customs Appeal Branch)

15. M/s Swastik Coal Suppliers
Bagh Chingamal, Agra Gate,
Firozabad (U.P.)

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
WEST BLOCK NO.II, R.K. PURAM,
NEW DELHI-110066.**

COURT NO. IV

Service Tax appeal No. 116-117 of 2007

[Arising out of Order-in-Appeal No. 614-CE/APPL/KNP/2006 & 615-CE/APPL/KNP/2006 both dated 30.11.2006 passed by the Commissioner (Appeals) Central Excise, Kanpur].

Date of Hearing: 22nd February, 2011

For approval and signature:

Hon'ble Shri Ashok Jindal, Member (Judicial);
Hon'ble Shri Mathew John, 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. Kaveri Coal Suppliers,
M/s. Swastik Coal Suppliers

Appellants

Vs.

CCE, Kanpur

Respondent

Present for the Appellant : Shri G.K. Sarkar, Advocate
Present for the Respondent : Shri Sumit Kumar, D.R.

**Coram: Hon'ble Shri Ashok Jindal, Member (Judicial)
Hon'ble Shri Mathew John, Member (Technical)**

FINAL ORDER NO. 59/1247-148/11

Per ASHOK JINDAL:

These appeals are filed by the appellants against the impugned orders confirming the demand of service tax under the category of "Clearing & Forwarding Agent" against them for the

period 2000-01 to 2003-04. Brief facts of the case are that the appellants are registered under the category of "Business Auxiliary Services" since 2004. On examination of the facts of the case it appeared to the department that the appellants were providing services of coal merchants which were classifiable under the service of "Clearing & Forwarding Agent" (as per classification issue in CBEC Circular No. 159/01/03-CE-4 dated 10.12.2003 and provision of Section 65(25) of Chapter 5 of Finance Act, 1994. The appellants are engaged in financing to prepare pre-paid R/R and were paying freight in advance on behalf of their customers at Ferozabad and were making payment to principal coal agent on behalf of coal buyers. The case made out against the appellants is that as the service of Clearing & Forwarding Agent was taxable w.e.f. 16.7.1997, and that the appellants had provided such services to their clients during the period 2000-01 to 2003-04 as per balance sheet and the same was liable to service tax under the category of Clearing & Forwarding Agent. On pointing out, the appellants had deposited the service tax under protest. Therefore, show cause notices were issued proposing the confirmation of demand and appropriation of amount deposited by the appellants and imposition of penalty under Section 75A, 76, 77 & 78 of the Finance Act, 1994. Show cause notices were adjudicated and demands along with penalty were confirmed against the appellants. Aggrieved from the said orders, the appellants are before us.

2. Learned Advocate for the appellants submits that the appellants are engaged in the activity of making payment of price

of coal for various persons and arrange transportation of the same by paying the freight and arranging insurance, & R/R etc. is not covered the services of Clearing & Forwarding Agent as the appellants are receiving commission from their clients, to whom they were providing finance. He, further, submitted that on similar facts in the case of Hanuman Coal Co. vs. CCE, Kanpur this Tribunal vide Final Order No. ST/39/2011 dated 18.1.11 has held that the Revenue cannot contend that prior to registration under "Business Auxiliary Services", they were providing "Clearing & Forwarding Agent" services and also held that show cause notice is barred by limitation. Hence, their appeals be allowed with consequential relief.

3. On the other hand, learned D.R. submits that the appellants are providing services to their clients by handling coal and arranging transportation on the instruction of their clients. Therefore, the appellants are covered under the category of Clearing & Forwarding Agent and demands are rightly confirmed against them. Learned D.R. also relied upon the case law of Coal Handllors (P) Ltd. vs. CCE, reported in 2005 (190) ELT A175 (SC) and CCE, Bangalore vs. Mahavir Generic, reported in 2010 (17) STR 225 (Kerala). He further submitted that as the appeal of Coal Handlers (P) Ltd. is pending before the Hon'ble Apex Court the matter may be adjourned till final disposal of the same by the Apex Court.

4. Heard and considered.

5. On careful examination of the submissions made by both sides, we find that the issue involved in this case is whether the activity undertaken by the appellants is covered under Clearing & Forwarding Agent or not, during the period 2000 to 2004. We further find that it is an admitted fact that the appellants are engaged in financing their clients for purchase of coal and also arranging for transportation of coal.

6. We have also examined the definition of "Clearing & Forwarding Agent".

7. As per Section 65(25) of the Act, "Clearing & Forwarding Agent" means "any person who is engaged in providing any service, either directly or indirectly, connected with Clearing & Forwarding operations in any manner to any other person and includes a consignment agent". Further, as per CBEC Circular No. 37B NO. 2/1/2002-ST dated 20.4.2002, "Clearing & Forwarding Agent normally undertakes the following activities:-

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

On going through the definition as well as the Board circular as stated hereinabove we observe that financing of purchase of coal is not included as service of Clearing & Forwarding Agent and it is a fact on record that the appellants are engaged in the activity of financing only.

6. The case law relied upon by the learned D.R. are not relevant to the facts of this case as in the case of Coal Handlers (P) Ltd. (supra) services undertaken are the persons providing service on behalf of client prior to holding of coal i.e. obtaining consent of coal companies to load the coal makes, sanction from railway authorities, supervising of loading of wagons, sending samples and assuring proper quality and quantity, arranging freight payment etc. which were held to be covered under the definition of Clearing & Forwarding Agent. In the cases before us, the appellants are only financing the purchase of coal. In the case of Mahavir Generics (supra) also the facts are different from the facts of the cases in hand. In fact, in that case also the Hon'ble High Court has observed that the appellant had authority to appoint dealers, stockists and agents on behalf of the principal. In that case it was services were not merely that of commission agent. But the Appellant had the responsibility to carry out activity of getting the goods stored by clearing it and then forwarding it to the stockist and dealers, if any, appointed by the Appellant himself as directed by the principal. These are not the facts in these cases. In fact, in these cases the main activity of the appellants is to arrange finance for payment of coal on behalf of their client. Further, we find that

in the case of Hanuman Coal Co. (supra) this Tribunal on similar set of facts has held that the activity of making payment for price of coal bought by various persons and arranging transportation of the same by paying freight and arranging Railway Receipt etc. is not covered under the category of services rendered by Clearing & Forwarding Agent. Moreover, in that case for the period prior to their registration under the category of "Business Auxiliary Services" the Revenue felt that the services undertaken by them were falling under the Clearing & Forwarding Agent Services for which show cause notices were issued on 12.7.2005 proposing confirmation of demand and imposition of penalty after relying upon the decision of the Larger Bench of this Tribunal in the case of Larsen & Toubro Ltd., reported in 2006 (3) STR 321 (Tri. – LB). In that case the Larger Bench has held that expression "directly or indirectly" and "in any manner" occurring in the definition of "clearing and forwarding agent" cannot be isolated from the activity of clearing and forwarding operations. Thereafter, there are a number of decisions of the Tribunal which hold that such type of services would not be covered by service of Clearing & Forwarding Agent. This Tribunal has, further, observed that the appellants are now registered under "Business Auxiliary services" and in such a situation the Revenue cannot contend that prior to such registration they were providing services of Clearing & Forwarding Agents. The Tribunal set aside the order confirming demands under the category of "Clearing & Forwarding Agent".

7. As we are having judgment before us on similar set of facts, we are bound to follow the same as held by the Bombay High Court in the case of Mercerdese Benz India (P) Ltd. vs. UOI, reported in 2010 (252) ELT 168 (Bombay) wherein the Hon'ble Bombay High Court has observed as under:-

"17. We are not happy to observe but constrained to say that one must remember that pursuit of the law, however glamorous it is, has its own limitation on the Bench. In a multi-judge court, the Judges are bound by precedents and procedure. They could use their discretion only when there is no declared principle to be found, no rule and no authority. The judicial decorum and legal propriety demand that where a learned single Judge or a Division Bench does not agree with the decision of a Bench of co-ordinate jurisdiction, the matter should be referred to a larger Bench. It is a subversion of judicial process not to follow this procedure. In our system of judicial review which is a part of our Constitutional scheme, we hold it to be the duty of the judges of the courts and members of the tribunals to make the law more predictable. The question of law directly arising in the case should not be dealt with apologetic approaches. The law must be made more effective as a guide to behavior. It must be determined with reasons which carry convictions within the Courts, profession and public. Otherwise, the lawyers would be in a predicament and would not know how to advise their clients. Subordinate courts would find themselves in an embarrassing position to choose between the conflicting opinions. The general public would be in dilemma to obey or

not to obey such law and it, ultimately, falls into disrepute. These are the observations made by the Apex Court in *Sundarjas Kanyalal Bhathija v. Collector, Thane*, AIR 1990 S.C. 261.

18. The Apex Court also had an occasion to notice similar impropriety in the case of *Lala Shri Bhagwan v. Ram Chand*, AIR 1965 S.C. 1767; wherein it was observed as under :

"It is hardly necessary to emphasize that considerations of judicial propriety and decorum require that if a learned single Judge hearing a matter is inclined to take the view that the earlier decisions of the High Court, whether of a Division Bench or of a single Judge, need to be reconsidered, he should not embark upon that enquiry sitting as a single Judge, but should refer the matter to a Division bench or, in a proper case, place the relevant papers before the Chief Justice to enable him to constitute a larger Bench to examine the question. That is the proper and traditional way to deal with such matters and it is founded on healthy principles of judicial decorum and propriety. It is to be regretted that the learned single Judge departed from this traditional way in the present case and chose to examine the question himself."

The similar expressions are to be found in the case of *Mahadeolal Kanodia v. The Administrator General of West Bengal*, AIR 1960 SC 936 (at p.941); wherein it is observed :

"We have noticed with some regret that when the earlier decision of two Judges of the same High Court in *Deorajin's* case, 58 Cal. WN 64 AIR 1954

Cal 119 was cited before the leaned Judges who heard the present appeal they took on themselves to say that the previous decision was wrong, instead of following the usual procedure in case of difference of opinion with an earlier decision, of referring no less than legal propriety form the basis of judicial procedure. If one thing is more necessary in law than any other thing, it is the quality of certainty. That quality would totally disappear if Judges of co-ordinate jurisdiction in a High Court start overruling one another's decision."

19. Having said so, the impugned view taken by the Tribunal by no means can be said to be correct approach. Needless to mention that if the Tribunal wanted to differ to the earlier view taken by the Tribunal in the identical set of facts, the judicial discipline required reference to the larger bench. One co-ordinate bench finding fault with another co-ordinate bench is not a healthy way of dealing with the matters. In this view of the matter, we have no option but to set aside the impugned judgment passed by the Tribunal on 20th November, 2009 incorporated at Exh.A to the petition.

20. In the result, impugned judgment dated 20th November, 2009 is quashed and set aside. Appeal is restored to the file of the Tribunal with direction to hear and decide the same afresh by a reasoned order following principles of natural justice. If the Tribunal decides to take view contrary to the view holding the field, then in that event it is expected of the Tribunal to pass appropriate order leading to reference to a larger bench to resolve differences, if any."

8. We have also seen that in the case of Vivilon Textile Industries vs. CCE, Raigarh this Tribunal vide order No. A/82 to 86/2011/C-II/EB dated 10.2.11 has also observed as under:-

"8. Further we have examined the issue in the case of Pramod Shah vs. CC in Criminal application 4230/06 wherein the Hon'ble High Court of Bombay has observed as under:-

"To say the least, the learned Additional Sessions Judge has committed a grave error in not following the binding precedent. The precedent does not cease to be binding merely because in the opinion of the learned Judge, the same is challenged in the Supreme Court and its operation stayed by the Supreme Court. In the decision reported in AIR 1992 Supreme Court Page 1439 in the case of M/s. Shree Chamundi Mopeds Ltd. vs. Church of South India Trust Association, Madras, the Hon'ble Supreme Court has very succinctly pointed out the differenced between a judgment being quashed and set aside and its operation stayed by the higher court. The judgement being stayed does not wipe it out unless and until it is so wiped out, it continues to be binding on the lower and subordinate courts. Thus, the learned Judge ought to have decided the application on the touch stone of the law laid down

by this court as also the Hon'ble Supreme Court in other decisions brought to his notice."

9. Further in the case of Sant Lal Gupta & ors., in civil appeal no. 9439 of 2003 the Hon'ble apex Court has observed as under:-

"18. A coordinate bench cannot comment upon the discretion exercise or judgment rendered by another coordinate bench of the same court. The rule of precedent is binding for the reason that there is a desire to secure uniformity and certainty in law. Thus, in judicial administration precedents which enunciates rules of law form the foundation of the administration of justice under our system. Therefore, it has always been insisted that the decision of a coordinate bench must be followed. (Vide: Tribhovandas Purshottamdas Thakkar v. Ratilal Motilal Patel & Ors., AIR 1968 SC 372; Sub-Committee of Judicial Accountability v. Union of India & Ors., (1992) 4SCC 97; and State of Tripura vs. Tripura Bar Association & Ors., (1998) 5 SCC 637).

19. In Rajasthan Public Service Commission & Anr. V. Harish Kumar Purohit & Ors., (2003) 5 SCC 480, this Court held that a bench must follow the decision of a coordinate bench and take the same view as has been taken earlier. The earlier bench of the

coordinate bench is binding upon any latter coordinate bench deciding the same or similar issues. If the latter bench wants to take a different view than that taken by the earlier bench, the proper course is for it to refer the matter to a larger bench."

10. Considering the fact, that coordinate Bench of this Tribunal in the case of Hanuman Coal Company (supra) has also arrived at a decision and [✓] ~~since~~ we are also of the view that the decision taken by the coordinate bench of this Tribunal is a correct view. Hence, the request for adjournment of the learned D.R. is rejected.

11. We find that the issue has already been settled in favour of the assessee by holding that the activity undertaken by the appellants in these cases is not covered under the category of "Clearing & Forwarding Agent". Therefore in these appeals also we hold that the activities undertaken by the appellants are not covered under the category of "Clearing & Forwarding Agency". The SCN is also time barred. Therefore, the impugned orders are set aside and appeals are allowed with consequential relief.

(ASHOK JINDAL)
JUDICIAL MEMBER

(~~MATHEW~~ JOHN)
TECHNICAL MEMBER

RK