CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,

WEST BLOCK NO.2, R.K. PURAM, NEW DELHI-110066

BENCH-DB

COURT –III

Service Tax Appeal No. ST/1560/2010-ST [DB]

[Arising out of Order-in-Original No. IND/200/2010 dated 04.08.2010 passed by the Commissioner (Appeals), Central Excise, Customs & Service Tax.]

M/s. Carryfast Agencies ...Appellant

Vs.

C.C.E.,- Indore …Respondent

Appearance:
Mr. Manish Saharan, Advocate for the Appellant
Mr. Govind Dixit, DR for the Respondent

CORAM:
Hon'ble Mr. S.K. Mohanty, Member (Judicial)
Hon’ble Mr. B. Ravichandran, Member (Technical)

Date of Hearing.20.12.2016
Date of Decision._12.04.2017_

Final Order No. 52849 /2017

Per S.K. Mohanty:

This appeal is directed against the impugned order dated 04.08.2010 passed by the Commissioner (Appeals), Customs Central Excise & Service Tax, Indore.

2. Brief facts of the case are that during the period April 2002 to March 2007, the Department proceeded against the appellant on the ground that it did not pay the service tax on taxable service namely, 'Clearing and Forwarding services' provided to its clients. The SCN issued by the Department has referred to various agreements entered into between the appellant and its clients namely, M/s. Cadbury India Ltd., M/s. Reckitt Benckiser (India) Ltd., M/s. J.L. Morrisson (I) Ltd., M/s. Gillette India Ltd., M/s. Jovco India Pvt Ltd., M/s. Consumer Marketing (I) Ltd. M/s. Cavin Kare Pvt. Ltd. M/s. Bata India Ltd., M/s. Asian Paints India Ltd., M/s. Dorcas Market Makers Pvt. Ltd., M/s. Wrigley India Pvt. Ltd. and M/s. Dumex India P. Ltd. On the basis of the terms and conditions mentioned in the said agreement, the Department had concluded that the activities undertaken by the appellant are confirming to the definition of taxable category under the Clearing & Forwarding service for the purpose of levy of service tax. The SCN dated 22.10.2007 was adjudicated vide order dated 14.12.2009, wherein service tax demand of Rs.21,88,122/- along with interest was confirmed against the appellant. Besides, penalties under Section 77 and 78 of the Finance Act, 1994 were also imposed in the said order. On appeal, the ld. Commissioner (Appeals) vide the impugned order dated 04.08.2010 has upheld the adjudged demand.

3. The ld. Advocate appearing for the appellant submitted that pursuant to the agreement entered with various client companies, the goods were consigned by them (clients) to the

godown of the appellant and the appellant merely forwarded the goods to the persons as instructed by the principals. He further submitted that in the whole exercise of handling the goods, there was no clearing of goods by the appellant from the factory of the clients and thus, such activity will not fall within the ambit or scope of Clearing & Forwarding service for levy of service tax. To support such stand, the ld. Advocate has relied on the decision of the Tribunal in the case of Kulcip Medicines (P) Ltd. Vs. Commissioner of Central Excise, Delhi-III, 2006 (1) STR 36 (Tri.-Del.) and also the judgment of Hon'ble Punjab & Haryana High Court, reported in 2009(14)S.T.R. 608(P&H).

4. On the other hand, the ld. DR appearing for the Revenue reiterated the findings recorded in the impugned order and further submitted that the appellant has undertaken various activities as per the instructions of its clients; such activities, under the agreements, confirm to both clearing as well as forwarding of goods. Thus, he submitted that the decision of Tribunal in the case of Kulcip Medicines (P) Ltd. (supra) is distinguishable from the facts of this case.

5. Heard both side and perused the records.

6. The definition of taxable service with regard to "Clearing & Forwarding" is contained in clause (j) of Section 65 (105) of the Finance Act, 1994. Under the said clause, taxable service has been defined to mean "services provided to a client, by a clearing and forwarding agent in relation to clearing and forwarding operations, in any manner". Further, the term "Clearing and

Forwarding Agent" has been defined in sub-section (25) of Section 65 *ibid* 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 as a consignment agent".

7. Perusal of the aforesaid statutory definitions make the position clear that in order to fall under the purview of taxable service, both clearing and forwarding activities should be provided by the service provider. This fact is evident from the word 'and' used after the word 'clearing', but before the word 'forwarding' in clause (j) of Section 65 (105) *ibid*. Thus, the word 'and' placed in between the words 'clearing' and 'forwarding' should be considered in a conjunctive sense. In other words, if the clearing operation are separated from forwarding operation, the levy of service tax could not by attracted, as it only involves one of the two activities and not both the operations together. In order to ascertain whether the appellant had provided both the activities of clearing and forwarding service to its clients, the terms and conditions itemized in the contracts require proper analysis. Therefore, the gist of the contracts entered into between the appellants and its clients are extracted here in below:

i). ***M/s. Cadbury India Ltd.-***

CIL hereby appoint the Firm to perform for CIL the services of storing, handling, forwarding and shipping the Products sent by CIL to the premises and the Firm agrees to perform the said services in term of the instruction and direction by CIL from time to time.

ii). ***M/s. Wrigley India Pvt. Ltd.-***

The CFA shall receive stocks of goods/products (the "Products") for and on behalf of the Company, and store such PRODUCTS under its control. The CFA shall place its indent on the Company's factory or depot. The Company shall dispatch the PRODUCTS, on a stock transfer basis, from the Company's factory or depot, as applicable, to the CFA under a Stock Transfer Note of the Company. The PRODUCTS shall then by sold by the CFA to retail outlets and/or other distributors (the Company's Customer's).

iii). ***Bata India Ltd.-***

The Company or its manufactures, sub-contracting units, suppliers etc shall dispatch, at its discretion, such quantities of the products as it considers fit from factory or from designated suppliers of the Company and inform the C&FA of such dispatch and the location from which the dispatched Products are to be received. The C&FA shall arrange, at its own cost to receive and clear into the Warehouse, without delay, the Products dispatched by the Company from time to time. The Company or its manufacturers, supplier's etc shall dispatch the Products to the Company's stock point/s maintained by the C&FA on stock transfer basis.

iv). Dumex India Private Ltd.- *The CFA acknowledges the [timely receipt of the Products form the Company and] delivery of the received Products to customers at locations specified by the Company is of essence of this Agreement and further that any failure by the CFA to comply with its obligations in this manner could cause substantial losses to the Company monetary terms and to the reputation of the Company. The CFA also acknowledges that compliance by* *it of all applicable laws keeping in mind the letter and spirit of such applicable laws is of utmost importance to the Company. The CFA shall therefore, comply with its obligations set out generally in this Agreement and specifically in this Clause 3 keeping in mind the aforesaid requirements of the Company. The CFA represents and warrants to the Company that it has the expertise and experience to fulfill the obligations and that it will be able to comply with its obligations keeping in mind the aforesaid requirements of the Company.*

8. Perusal of the above agreement reveals the fact that the goods were consigned by the principals to the appellant's premises and the appellant did not undertake any clearing activity. Since the appellant is not undertaking the activities of both clearing and forwarding, service tax would not be leviable on the activity of mere forwarding and other incidental and ancillary activities, with reference to goods. In this context, this Tribunal in the case of Kulcip Medicine (P) Ltd. (supra) has held that the levy of service tax is limited to providing of both the activities by the C&F Agents i.e. clearing and forwarding and in absence of either to the activities, levy of service tax would not be justified. The relevant paragraphs in the said decision are extracted here in below:

"5. *The taxable service in the present case is "any service provided to a client, by a clearing and forwarding agent, in relation to clearing and forwarding operation in any manner" [Sub-clause (j) of Section 65(105) of Finance Act, 1994]. A perusal of this definition makes it clear that, in order to attract the levy, the services must be "in relation to clearing* *forwarding operation". Thus, the definition makes it clear that all services rendered by the clearing and forwarding agent are not within the scope of the levy; the levy is limited to "clearing and forwarding operations". The Circular of the Board on this issue may be read:*

> *"The matter has been examined. Normally, a C&F agent receives goods from the factories or premises of the Principal or his agents, stores these goods, dispatches these goods as per orders received from the Principal or owner, arranges transport, etc. for the purpose and prepares invoices on behalf of the principal. For this service, the C&F agents receive commissions on the basis of agreed terms. Therefore, 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."*

6. *The above Para in the circular makes it clear that only when a C&F agent carries out both clearing and forwarding, the levy will be attracted. It is clear from the terms of the agreement that appellant herein does not attend to the clearing of the medicines manufactured by Cipla. Consignments of medicines are cleared from the factory by the manufacturer and delivered to the appellant at his premises. In this factual situation, it has to be held that there is no clearing by the appellant and for that reason; the service rendered by the appellant does not satisfy the requirement of clearing and forwarding. We, therefore, are of the view that demand is not sustainable. To the same effect is*

our earlier decision in the case of M/s. Mahavbeer Generics. Accordingly, following our earlier decision, the present appeal is allowed after setting aside the impugned order. The appellant shall be entitled to relief, if any.”

9. Revenue’s appeal against the decision of the Tribunal in the case of Kulcip Medicines (P) Ltd. (supra) was rejected by the Hon’ble Punjab & Haryana High Court, reported in 2009 (14) S.T.R. 608 (P &H). Further, SLP filed by the Revenue against the said judgment has also been dismissed by the Hon’ble Supreme Court, reported in 2012 (25) S.T.R. j 127 (S.C.).

10. In view of the above settled position of law, we do not find any merits in the impugned order. Accordingly, after setting aside the same, we allow the appeal in favour of the appellant.

(Pronounced in the open court on 12.04.2017)

(**B. Ravichandran**)
Member(Technical)

(**S. K. Mohanty**)
Member (Judicial)

Sakshi