IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH: KOLKATA

Appeal No. ST/239/2009

(Arising out of Order-in-Appeal No. 51/ST/BBSR-I/2009 dated 29.06.2009 passed by the Commissioner of Central Excise, Customs & Service Tax, Bhubaneswar.

M/s. B. M. Enterprises

Appellant (s)

Vs.

CCE, Customs & Service Tax, BBSR-I

Respondent (S)

Appearance:
Shri C. R. Das, Adv. for the Appellant (s)
Shri D. Haldar, A. C. (A. R.) for the Revenue

CORAM:
HON'BLE SHRI P. K. CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE SHRI BIJAY KUMAR, MEMBER (TECHNICAL)

Date of Hearing: -03.07.2018
Date of Pronouncement:-24/09/2018
Order No. FO/76661/2018

PER SHRI P. K. CHOUDHARY

\ The facts of the case in brief are that the appellants are engaged in trading of Cement of M/s. Indian Cement Ltd., Hyderabad, a manufacturer of cement under the brand name "Rassi". A Show Cause Notice dated 22/05/2007 was issued to the appellant for not having taken registration for providing services of "C & F" Agent and for not filing Periodical Returns for the period from 22/09/2005 to 03/03/2006.

2. The Adjudicating Authority confirmed the demand of Service Tax of Rs.1,15,679/- along with interest and imposed penalty of equal amount under Section 78, Penalty of Rs. 1,000/- under Section 77 and Penalty under Section 76 of the Finance Act, 1994.

3. On appeal, the Lower Appellate Authority upheld the Adjudication Order and rejected the appeal filed by the assessee. Hence, the present appeal before the Tribunal.

4. The Ld. Advocate appearing on behalf of the appellant submits that the demand has been made holding the appellant as a consignment agent covered under the category of "Clearing and Forwarding Services" and hence, liable to pay Service Tax.

It is his submission that as per the agreement with M/s. Indian Cement Ltd., the appellant is obliged to undertake the services of unloading at the goods-sheds, transportation at goods-sheds, unloading at the go-down and loading from go-down and as such the appellant is only responsible for clearing services only and not for forwarding services.

Further, the Ld. Advocate argued that the sale of goods is effected by the appellant on his own and they are not under any obligation to sell the goods as per the direction of the principal.

As per the trade parlance, consignment agent job's is to receive the goods from the principal and dispatch the same on the direction of the principal. But in the instant case, no instruction has been given and the appellant is not under obligation to dispatch goods to any specified person as per the instruction of the principal.

The Ld. Advocate also contended that the demand is barred by limitation. Since the appellant was in a bonafide belief that they are not liable to pay tax and there was no intent to evade payment of Service Tax.

5. The Ld. DR reiterates the orders of the Lower Authorities.

6. Heard both sides and perused the appeal records.

7. We find that the dispute in the present appeal is whether the services provided by the appellant are covered under the category of 'clearing and forwarding agent service'. It is the case of the appellant that they are not rendering either C & F Agent Services or the Services of the consignment agent since they are not undertaking the forwarding activities on behalf of their principals M/s. India Cement Ltd.

It is also submitted that the agreement between the appellant and M/s. India Cement Ltd. is only for clearing services and not for forwarding services.

8. We find that the issue is no more res-entigra, in view of the decision of the Hon'ble Supreme Court in the case of Coal Handlers Private Ltd. Vs. CCE, Range Kolkata-I as reported in 2015 (38) S.T.R. 897 (SC). The relevant paragraphs of the aforesaid decision are reproduced below:-

> ***7. It so happened that the ratio of the decision in Prabhat Zarda (supra) was doubted by another Bench of the Tribunal and the said Bench referred the matter to the Larger Bench. On reference being made, the Full Bench of the Tribunal decided the issue and on the aforesaid aspect decision in Prabhat Zarda (supra) has been overruled by it. The judgment of the Full Bench is known as Larsen & Toubro Ltd. v. Commissioner of Central Excise, Chennai - 2006 (3) S.T.R. 321 (Tri.-LB) : 2006 (110) ECC 634 : 2006 ECR 634 Tri.-Delhi. It gets revealed from the decision of the Larger Bench that after taking note of the definition of 'clearing and forwarding agent' (which has already been extracted above), the Larger Bench observed that the service should be connected with clearing and forwarding operations. The 'clearing and forwarding' operations would be various activities having bearing on clearance of goods, which would involve documentary processes and arrangements for transfer of goods to their destination, which process may also involve clearance at subsequent stages during forwarding operations. In the opinion of the Larger Bench, the procurer of orders on commission basis renders services which are not connected with such clearing and forwarding operations, which have bearing on the movement of goods. It also mentioned that normally a C&F Agent undertakes the following activities :***

(i) receiving the goods from the factories or premises of the principal or his agents;

(ii) warehousing these goods;

(iii) receiving despatch orders from the principal;

(iv) arranging despatch of goods as per the directions of the principal by engaging transport on his own or through the authorized transporters of the principal;

(v) maintaining records of the receipt and despatch of goods and the stock available at the warehouse; and

(vi) preparing invoices on behalf of the principal.

8. Since the appellant in that case was engaged only for procuring purchase orders for vendor on commission basis and was not engaged in any of the above activities, the Larger Bench concluded that the services provided by the said appellant would not fall within the definition of 'clearing and forwarding agent' as contained in the Act. The detailed discussion on this aspect runs as follows :

"9.3 An agent engaged only for procuring purchase orders for the vendor on commission basis does not engage in any of the above activities, directly or indirectly. Commission agent engaged to procure orders and not entrusted with the work of clearing and forwarding of the goods would be a person who, in the ordinary course of business, makes contracts for sale or purchase of goods for others. The definition of "commission agent" in Section 2(aaa) of the Central Excise Act, 1944, would apply in relation to Service Tax as it applies in relation to duty of Excise by virtue of sub-section (121) or Section 65 of the Act. Services of commission agent are included in the definition of "business auxiliary service" under sub-section (19) of Section 65 w.e.f. 1-7-2003, which includes service of a commission agent. As defined in Explanation (a) to sub-section (19) of Section 65 commission agent is a person who acts on behalf of another person and causes sale or purchase of goods, or provision or receipt of services, for consideration, and includes any person who, while acting on behalf of another person : deals with goods or services or documents of title to such goods or services; or collects payment of sale price of such goods or services; or guarantees for collection or payment for such goods or services; or undertakes any activities relating to such sale or purchase of such goods or services. This clearly shows that the activity of mere procurement of purchase orders for the principal on commission basis of a commission agent is treated separately by the Parliament from the activities of a clearing and forwarding agent. Activity of procuring orders is thus independent of clearing and forwarding operations. The agents doing these activities can be different. Moreover, clearing and forwarding operations do not flow directly or indirectly from mere procurement of orders. There is no obligation on the person procuring orders as a commission agent for the principal, only by virtue of that agency, to carry out clearing and forwarding operations in respect of the goods which are to be supplied pursuant to the orders so procured.

10. It appears to us that the expressions "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. A person may undertake to provide service of procurement of orders as agent of the principal without agreeing to provide services of clearing and forwarding of the goods. Clearing and forwarding has a very specific connotation in the context of movement of goods from the supplier to their destination and agents undertaking clearing and forwarding operations may never have been concerned with procurement of orders for the goods which are cleared and forwarded. A person entrusted with the work of commission agent for procuring orders for the principal cannot insist on also providing services as clearing and forwarding agent in respect of those goods and it would be open for the principal to engage some other person for the purpose of forwarding such goods. In cases where the buyer is under an obligation to take delivery of the goods from the vendor's premises, there would not be even any need on the part of the vendor to engage any forwarding agent, nor can a person engaged for the purpose of clearing and forwarding operations, insist on procuring orders for the principal in the absence of any stipulation to that effect.

11. We, therefore, hold that mere procuring or booking orders for the principal by an agent on payment of commission basis would not amount to providing services as "clearing and forwarding agent", within the meaning of the definition of that expression under Section 65(25) of the Finance Act, 1994, as has been held in the decision of the Tribunal in Prabhat Zarda Factory (Pvt.) Ltd. v. CCE, Patna reported in 2002 (145) E.L.T. 222 (Tribunal) = 2002 (50) RLT 326 (CEGAT-KOL.). The decision in Prabhat Zarda Factory (Pvt.) Ltd. stands overruled to the extent of the aforesaid ratio laid down thereunder. The reference is answered accordingly. All these appeals will now be placed before the concerned Division Bench for decision on merits in the light of this judgment and in accordance with law.

(emphasis added)"

9. Significantly, the Revenue accepted the aforesaid decision in the case of Larsen & Toubro (supra) and did not file any appeal thereagainst. Even otherwise, we find that the Larger Bench of the Tribunal in the said case has rightly interpreted the definition of 'clearing and forwarding agent' contained in Section 65(25) of the Act. Notwithstanding the aforesaid dicta of the Larger Bench, learned Senior Counsel appearing for the Revenue submitted that judgment in Prabhat Zarda (supra) has not been overruled entirely, as is clear from the reading of para 11 of the judgment where the Larger Bench has said that Prabhat Zarda (supra) 'stands overruled to the extent of the aforesaid ratio laid down thereunder'. His endeavour was to demonstrate that in the present case the Tribunal in the impugned judgment had rightly relied upon Prabhat Zarda (supra) and when the services rendered by the appellant are looked into, it would clearly fall within the definition of 'clearing and forwarding agent' contained in Section 65(25) of the Act.

Let us, therefore, examine whether services rendered by the appellant would qualify it as C&F Agent?

10. It would be relevant to point out the definition of 'forwarding agent', as known in legal parlance, from Black's Law Dictionary (Seventh Edition), which is as under :

"forwarding agent. 1. A person or company whose business is to receive and ship goods for others - Also termed freight-forwarder. 2. A freight-forwarder who assembles less-than-carload shipments 'small shipments' into carload shipments, thus taking advantage of lower freight rates."

The Penguin Business Dictionary defines this expression in the following words :

"Forwarding agent. A General Agent who specializes in moving goods from a factory or port of entry to their proper destination. Such an agent normally owns the transport necessary for this work and often arranges FREIGHT and Customs formalities for his principal."

In Fourth Edition of Halsbury's Laws of England (Volume 5), the characteristics of 'forwarding agents' are narrated in the following manner :

"442. Characteristics of forwarding agents. - A forwarding agent is one who carries on the business of arranging for the carriage of gods for other people. It must be clearly understood that a forwarding agent is not, in general, a carrier: he does not obtain possession of the goods: and he does not undertake the delivery of them at the other end. All that he does is to act as agent for the owner of the goods to make arrangements with the people who do carry, such as shipowners, road hauliers, railway authorities and air carriers, and to make arrangements, so far as they are necessary, for the intermediate steps between the ship and the rail, the Customs or anything else.

Although there is a clear distinction between a forwarding agent and a carrier, the same person may carry on both activities at once, and contract sometimes as one and sometimes as the other. The fact that a person describes himself as a forwarding agent is not conclusive : and it is a question of fact to be decided according to the circumstances of each case whether a person normally carrying on business as a forwarding agent contracts solely as agent so as to establish a direct contractual link between his customer and a carrier (or possibly with several carriers, each undertaking a different part of the transit), or whether he contracts as principal to carry the goods, the customer appreciating that he will perform the contract vicariously through the employment of sub-contractors. The nature of the carriage, the language used by the parties in describing the role of the person concerned, and any course of dealing between the parties will be relevant factors.

Persons properly described as shipping and forwarding agents frequently act as carriers themselves with respect to part of the carriage, for example, by performing collection and delivery services between the customers' premises, their own depots, and warehouses, docks and carriers' depots. In such cases they would have the rights and duties of carriers with respect to such carriage as they undertake personally, but the rights and duties of forwarding agents with respect to the remainder of the transit.

443. Rights and liabilities of forwarding agents. - The rights and liabilities of a forwarding agent are governed by the general principles of the law of agency : and so he is entitled to be indemnified against all expenses incurred on behalf of his principal and to be paid his proper charges for his services. He is liable for failure to make proper arrangements for the carriage and for ancillary matters which he has undertaken, such as Customs clearance. He is not liable for the failings of persons with whom he makes contracts on behalf of his principal, unless he know of those failings and ought to have taken action either to remedy them or at least to inform his principal so that damage might be avoided or mitigated: thus he is under no duty to supervise the actions of carriers whom he reasonably and properly expects to perform their normal obligations competently.

In ordinary transactions a forwarding agent is not liable for failing to insure the goods, in the absence of instructions from his customer to do so: but he may, in certain circumstances, be liable for not consulting his customer and advising him as to the proper transport and insurance arrangements which should be made for valuable goods.

A forwarding agent is not normally personally liable to pay the charges of carriers whom he engages to carry the gods on behalf of his principal; but there is a Custom of the London freight market that forwarding agents incur personal liability to shipowners for the payment of freight or of dead freight for booked space left unfilled.

A forwarding agent who tenders dangerous goods to carriers without warning them of their nature or of the precautions which should be taken in their carriage is personally liable to the carriers for any resulting damage through breach of the implied warranty that the goods are fit for carriage."

11. From the reading of the definition contained in the aforesaid provision, together with its dictionary meanings contained in Legal and Commercial dictionaries, it becomes apparent that in order to qualify as a C&F Agent, such a person is to be found to be engaged in providing any service connected with 'clearing and forwarding operations'. Of course, once it is found that such a person is providing the services which are connected with the clearing and forwarding operations, then whether such services are provided directly or indirectly would be of no significance and such a person would be covered by the definition. Therefore, we have to see as to what would constitute clearing and forwarding operations. As is clear from the plain meaning of the aforesaid expression, it would cover those activities which pertain to clearing of the goods and thereafter forwarding those goods to a particular destination, at the instance and on the directions of the principal. In the context of these appeals, it would essentially include getting the coal cleared as an agent on behalf of the principal from the supplier of the coal (which would mean collieries in the present case) and thereafter dispatching/forwarding the said coal to different destinations as per the instructions of the principal. In the process, it may include warehousing of the goods so cleared, receiving dispatch orders from the principal, arranging dispatch of the goods as per the instructions of the principal by engaging transport on his own or through the transporters of the principal, maintaining records of the receipt and dispatch of the goods and the stock available on the warehouses and preparing invoices on behalf

> ***of the principal. The Larger Bench rightly enumerated these activities which the C&F Agent is supposed to perform.***
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> ***12. On the facts of the present case, we find that none of the aforesaid activities are performed by the appellant. There is no role of the appellant in getting the coal cleared from the collieries/supplier of the coal. Movement of the coal is under the contract of sale between the coal company and Ambuja companies. Even the coal is loaded on to the railway wagons by the coal company. The goods are not under any legal detention from which they need to be freed by the appellant. Not only this, destination of the goods is known to the coal company and the railway rakes are placed by the coal company for the said destinations. The destination is the factories of the principal itself, namely, Ambuja companies, where the coal is to be delivered by the coal company as per pre-determined/agreed covenants between them. Therefore, there is no occasion for Ambuja companies to instruct the appellant to dispatch/forward the goods to a particular destination which is already fixed as per the contract between the coal company and the Ambuja companies. The appellant does not even undertake any loading operation. The primary job of the appellant, as per the contract between the appellant and the Ambuja companies, is of supervising and liaisoning with the coal company as well as the Railways to see that the material required by Ambuja companies is loaded as per the schedule. At no stage custody of the coal is taken by the appellant or transportation of the coal, as forwarders, is arranged by the appellant. We are, thus, of the clear opinion that the services rendered by the appellant would not qualify as C&F Agent within the meaning of Section 65(25) of the Act.***

9. By respectfully following the decision of the Hon'ble Supreme Court, the impugned orders are set aside and the appeal filed by the appellant is allowed with consequential relief, if any to the appellants.

(Order pronounced in the open court on 24/09/2018.)

Sd/-	Sd/-
(BIJAY KUMAR)	**(P. K. CHOUDHARY)**
MEMBER (TECHNICAL)	**MEMBER (JUDICIAL)**

Pooja