IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA

EASTERN ZONAL BENCH: KOLKATA

Appeal No. ST/105/2008

(Arising out of Order-in-Original No. 98/ST/Commr/2008 dated 31/03/2008 passed by Commissioner of Central Excise & Service Tax, Ranchi.)

M/s. Indian Explosives Ltd. Appellant (s)
Vs.
CCE & ST-Ranchi
Respondent (s)

Appeal No. ST/314/2009

(Arising out of Order-in-Appeal No. 26/HST/2009 dated 06/10/2009 passed by Commissioner of Central Excise (Appeals-I), Kolkata.)

M/s. Indian Explosives Ltd. Appellant (s)
Vs.
Commr. of Central Excise, Kolkata-V
Respondent (s)

Appearance
Shri Ravi Raghavan, Harsh Shukla Advcates & Shreya Mandra, CA for the Appellant
Shri K. Chowdhary, Suptd. (A. R.) for the Revenue

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

Date of Hearing-29.01.2019

ORDER NO. FO/75373-75374/2019
PER CORAM

The Appeal No. ST/105/2008 has challenged the Order-in-Original No. 98/ST/Commr/2008 dated 31/03/2008. This appeal has been filed by M/s. Indian Explosives Limited (IEL) and pertains to M/s. ICI Ltd. (ICI) as the appellant was known, at the relevant period of demand. The demand covers the period 2000-2001 to 2004-2005.

2. The Appeal No. ST/314/2009 has challenged the Order-in-Appeal No. 26/HST/2009 dated 06/10/2009. This appeal pertains to M/s. IEL who were known during the period of dispute as M/s. Initiating Explosives Systems India Ltd. (IES). The period of dispute is from April 1997 to February 1999. Both M/s. ICI as well as IES got subsequently emerged as M/s. Indian Explosives Ltd.

3. During the relevant time, an agreement was entered into by M/s. IES as Principal with M/s. ICI (Agent). This agreement dated 29/08/1996, through its various clauses, provided the terms by which M/s. ICI will act as the consignment, distribution and selling agent of M/s. IES. The Department, after perusal of the agreement, came to the conclusion that M/s. ICI was acting as a "Clearing and Forwarding Agent" of M/s. IES as per the provisions of Section 65(25) of the Finance Act, 1994 along with Service Tax Rules, 1994. The Department concluded that M/s. IES was required to pay Service Tax under the category of "C & F Agent Service" on Reverse Charge basis in terms of Rule 2 (d)(xii) and (xvii) of the Service Tax Rules, 1994. Service Tax applicable was paid by M/s. IES under the Reverse Charge Mechanism. However, the dispute regarding liability to payment of Service Tax on Reverse Charge basis in respect of Goods Transport Operators as well as C & F Agent Service, was the subject matter of a longstanding dispute which came to be decided by the Hon'ble Supreme Court in the case of Laghu Udyog Bharati Vs. Union of India reported in 1999 (112) E.L.T. 365 (S.C.). The Hon'ble Supreme Court held the relevant provisions of Service Tax Rules providing for payment of Service Tax on Reverse Charge Basis as *ultravires*.

Consequent upon the decision of the Apex Court, M/s. IES applied for refund of Service Tax paid on Reverse Charge basis, totally amounting to Rs. 64,94,422/-.

4. By Finance Act, 2000, the Government brought about amendment through Section 116 and 117 of the Act and made validation of certain action taken under the Service Tax Rules. The net effect of such validating provisions was that any Service Tax already paid under the disputed categories on Reverse Charge Basis would continue to remain with the Government and any Refund Claims for such tax will not be entertainable. Consequent upon the amendments by Finance Act, 2000, the Jurisdictional Assistant Commissioner rejected the refund claim filed by M/s. IES vide his Order-in-Original dated 10/06/2003. The First Appeal against the said order was decided by the Commissioner (Appeals), vide order dated 29/03/2004. When the above order was appealed against in this Tribunal, the matter was remanded to the Commissioner (Appeals) for Denovo decision vide the Tribunal's Order dated 03/10/2007 reported as 2008 (9) STR 509 (Tri.-Kolkata). In the Denovo proceedings before the Commissioner (Appeals), the impugned order dated 06/10/2009 was passed in which he up-held the Order-in-Original rejecting the refund. This order is under challenge in the Appeal No. ST/314/2009.

5. The Appeal No. ST/105/2008 deals with the dispute for the subsequent period 2004-2005. The Department issued a further Show Cause Notice dated 21/04/2006 to M/s. Indian Explosive Ltd. (Formerly M/s. ICI Ltd.) proposing for demand Service Tax for services provided under the category of "C & F Agent Service". This Show Cause Notice was

issued invoking the extended period of limitation and also demanded in addition, Service Tax under the category of "Consulting Engineer" Service in respect of certain activities performed which involved not only sale of explosives but also "Rock-on-Ground Operation" which involved carrying out the activity of drilling the hole for explosives and other allied works. The demand for Service Tax under both the categories stand confirmed by the Adjudicating Authority vide his Order-in-Original No. 98/2008 dated 31/03/2008. This order is challenged in Appeal ST/105/2008.

6. Since the activities involved in both these appeals deal with the agreement executed between IES and ICI, these two appeals are taken together in decision through this common order.

7. The appellant is represented by Shri Ravi Raghavan, Harsh Shukla Advcates & Shreya Mandra, CA and Revenue is represented by Shri K. Choudhary, Ld. DR.

8. The submissions in respect of Appeal No. ST/314/2009 made on behalf of the appellants are summarized below:-

(i) The activities carrying out by IEL (ICI Ltd.) does not fall under the category of "C & F Agent" Service. He relied on various decisions to support his argument. Finally, he submitted that since the activities are not covered under C & F Agent service, the appellant will not be covered by the validating amendments by Finance Act, 2000 and hence, will be entitled to the grant of refund claimed by them.

(ii) He specifically referred to the impugned order dated 06/10/2009 which was passed in the Denovo Proceedings. He submitted that the remand directions of the Tribunal in its order dated 03/10/2007 was for the Appellate Authority to examine the entire fact with reference to the agreement between the parties and the real nature of the arrangement and come to a conclusion whether ICI Ltd. was a Clearing and Forwarding Agent. He argued that the Ld. Commissioner (Appeals) had passed the impugned order in a mechanical manner without appreciating and discussing the various terms of the agreement and giving reasons for his decision. He further submitted that the second order cannot be considered as speaking order.

9. With reference to appeal No. ST/105/2008 following arguments were advanced:-

(i) It was submitted that the Show Cause Notice dated 21/04/2006 had been issued by invoking the extended period of limitation to cover the demand for the period 2000-2001 to 2003-2004. He submitted that the demand for the above period under the category of "C & F" Agent Service has been made on the basis of the agreement dated 29/08/1996 which was also the subject matter of the earlier dispute which is the subject matter of the other appeal. He relied on the decision of the Apex Court in the case of Nizam Sugar Factory Vs. Coll. Of CE reported as 2006 (197) ELT 465 (S.C.) and submitted that the Department was not justified in invoking the extended period of limitation for a second time after issuing an earlier Show Cause Notice for the same offence in earlier period.

(ii) If the demand is restricted to the normal time limit, he submitted that the entire demand made under 'C & F' Agent Service would be hit by time bar.

10. The Ld. DR justified the impugned orders. He argued that the demand involved in the appeal ST/105/2008 is not hit by time bar. He submits that this demand has been made in respect of IEL, Gomia whereas the other proceedings initiated for the earlier period (and subject matter of Appeal No. ST/314/2009) was in respect of Kolkata Unit. He further submitted that the Jurisdictional Authority at Ranchi, was not preview to the proceedings under taken at Kolkata which in any case was not for demand of Service Tax, but for denying the claim of refund.

11. We heard both sides at length and perused the record carefully.

12. At the outset, we consider the issue of the refund claim filed by the appellant. The refund claim has been filed for refund of Service Tax paid on Reverse Charge Basis by M/s IES (at the relevant time), after the decision of the Hon'ble Supreme Court in the case of Laghu Udyog Bharati (supra) and the subsequent validating amendments by the Finance Act, 2000. The legal position which emerges is that any Service Tax paid on Reverse Charge basis for the period prior to the decision of the Hon'ble Supreme Court, will not be refundable. But the appellant has claimed that the agreement entered into between M/s. IES (Principal) and M/s. ICI (Agent) will not satisfy the definition of 'Clearing and Forwarding' Agent Service under Section 65 (25) of the Finance Act, 1994. The earlier

remand of the Tribunal vide its final Order dated 03/10/2007, has outlined the legal developments but remanded to the Commissioner (Appeals) for considering the agreement and to give finding whether the activity will be covered under 'C & F' Agent Service. In the Denovo Proceedings, the Commissioner (Appeals) has rendered the finding that the agreement is in the nature of C & F Agent Service, but the conclusion of the Ld. Commissioner (Appeals) is not duly supported by analysis and findings with reference to the various clauses of the agreement which should have been done in compliance with the directions of the Tribunal. Hence, we are left with no option but to examine the various clauses of the agreement for coming to a conclusion about the nature of the service.

13. In terms of the agreement dated 29th August, 1996 the appellant engaged M/s. ICI (India) Ltd. as their Consignment, Distribution and Selling agent. Clause 2.1 of the said Agreement defined the relationship of both parties. Duties of the agent were defined by clause 3 of Agreement. Such agent in terms of clause 3.2 of the agreement was to use its best endeavour to promote and market the products of the appellant. Clause 3.3 required the Agent to promote, market and sell the products of the appellant. According to clause 3.2.1 of the Agreement, the Agent was required to accept orders from the customers for effecting sale of the products. Clause 3.14 required the Agent to bear all distribution costs including customers servicing, credit evaluations, selling, advertising, marketing, transportation, transit losses and delivery cost pertaining to the products. As per para 7.2 of Agreement, for discharging

the duties under the Agreement, the Agent was entitled to a commission of 21% of the net selling price of the products.

14. The Clearing and Forwarding Agent is defined under Section 65 (25) of the Finance Act, 1994 as under:-

> *(25) "Clearing and forwarding agent" means 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 a consignment agent.*

The above definition essentially covers a relationship between the Principal and Agent subject to the following terms conditions:-

(i) The principal will supply the goods from their factory to Depot of Agents on consignment basis for sale by Agent on behalf of Principal. The Principal required to deliver the goods to the premises of the agent.

(ii) The Agent will sell the products as consignment agent of the Principal and the price at which products can be sold shall be fixed by the Principal from time to time.

(iii) The Agent will be entitled to Commission as per the recorded terms.

(iv) The reference to the clauses of the agreement reveals that in clause 2.1, the Principal (IES) has appointed ICI as agent. Further this clause clarifies that the appointment is as the consignment, distribution and selling agent.

(v) The sub clause 2.2 states that the principal shall, from time to time dispatch products to the Agent, on a consignment basis and upon receipt of the products the Agent shall hold the same for and on behalf of the Principal.

(vi) The clause 3.6 states that the Agent shall effect all sales on behalf of the Principal, in its own name and under its own invoices clearly including the words to the effect that it is doing so as: "Consignment, Distribution and Selling Agent of IES.

(vii) The clause 7.1 indicates the Commission which will be payable to the agent. Further the clause 7.6 indicates that the Agent shall effect the sales of the products and collect the proceeds thereof.

(viii) Further the clause 7.3 specifies that the Principal shall establish periodically, but not less frequently than annually, a published list price for each of the Products after consultation thereon with the agent.

15. After considering the various clauses of the agreement visa vis the definition of Clearing and Forwarding Agent Service, we are of the view that the relationship is in the nature of Principal and Agent and further satisfies the definition of 'Clearing and Forwarding' Agent under Section 65 (25) ibid. Consequently, we are of the view that during the period 1997-1999, M/s. IES would be liable for payment of Service Tax on Reverse Charge Basis. In the light of the validating amendments vide Finance Act, 2000, subsequent to the order of the Hon'ble Supreme Court in Laghu Udhog (supra), Service Tax paid under the category of 'C & F' Agent Service, will not be refundable. Hence, we find no infirmity in the

decision of the First Appellate Authority vide its impugned order dated 06/10/2009, up-holding the rejection of refund claim. We uphold the decision and reject the appeal No. ST/314/2009.

16. Next, we turn to Appeal No. ST/105/2008, the demand has been raised by Show Cause Notice dated 21/04/2006 for payment of Service Tax under the category of 'Clearing and Forwarding Agent' service. The Lower Authority has examined the agreement dated 29/08/1996 (the same agreement which was examined in the other dispute covered appeal ST/314/2009). He has concluded that the activity is covered under the category of 'clearing and forwarding agent' service and hence, liable for payment of Service Tax under Section 65 (25) ibid. In the discussion in the above paragraphs, we have examined the agreement dated 29/08/1996 and have come to the conclusion that M/s. ICI has acted as C & F Agent of M/s. IES for providing clearing and forwarding agent service. Since the agreement has continued during the dispute period, the classification of the service will continue under the Clearing and Forwarding Agent Service. Hence, M/s. IEL will be liable for payment of Service Tax as a service provider in terms of the agreement and we uphold the demand for Service Tax.

17. The demand for Service Tax has also been contested by the appellant on the ground of time bar. The Show Cause Notice dated 21/04/2006 has been issued for demanding Service Tax payable during the period 2000-2001 to 2004-2005. It has been submitted that the Revenue will not be entitled to invoking of extended period since the subject agreement dated 29/08/1996 was very much within the

knowledge of Revenue, being the subject matter of claim for refund by M/s. IES as the Principal in terms of the Agreement. The Department Representative has however, justified the invoking of extended period. He has submitted that the liability for payment of Service Tax in terms of the agreement has shifted from the service receiver (Principal) to the agent, viz. ICI Ltd., for the period subsequent to the decision of the Supreme Court in Laghu Udhog Bharti. It is further argued that the Jurisdictional Authorities for M/s. ICI, were situated at Ranchi and were not preview to developments at Kolkata where the Principal, IES was covered for Service Tax payment.

18. We note that the service, "Clearing and Forwarding Agent Service" has been the subject matter of much Litigation. There have been conflicting decisions at the level of various judicial fora regarding the activities which are covered under the definition of Clearing and Forwarding Agent Service. A perusal of the agreement indicates that the activity undertaken is in the nature of "Consignment Agent" which is subsumed within the definition of Clearing and Forwarding Agent Service. The question whether the department will be entitled to recover the Service tax on consignment agent, by invoking the extended period of limitation was the subject matter in the case of Bharat Aluminum Co. Ltd. V. CCE, Raipur reported in 2007 (8) STR 27 (Tri.-Delhi). The Tribunal concluded that the appellant in that case was entitled to bonafide belief that the Service Tax was not liable under clearing and forwarding Agent Service, in view of the fact that two divergent views of the CESTAT were

prevalent during the relevant period. The observations of the Tribunal are reproduced below:-

> ***"7.*** *We take up the appellant's contention on limitation first. The submission of the learned Counsel is that facts noted in the impugned order itself would show that the failure to pay tax, if at all, is the result of a bona fide belief by the appellant that the service in question was not taxable as "clearing and forwarding" agency service. Reference in this connection is made to para 26 of the Commissioner's order where the Commissioner has noted as under :-*
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> *"I find that two opposite views of the CEGAT/CESTAT are available on the issue of taxability of consignment agents i.e. the cases of Prabhat Zarda Factory and Mahavir Generics. Hon'ble Supreme Court in the cases of Liberty Oil Mill Pvt. Ltd. v. CCE [1995 (75) E.L.T. 13 (S.C.)] and Novopan India Ltd v. CCE [1994 (73) E.L.T. 769 (S.C.) = 1994 (6) J.T. 80] have issued guidelines for interpreting the taxing statute. As per these guidelines, in case of ambiguity or doubt in an exemption provision, the same will be resolved in favour of the revenue and not in favour of the assessee. I feel that the CEGAT's decision in the case of Prabhat Zarda Factory is more appropriate in the facts and circumstances of the instant case."*
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> ***8.*** *Even though the Commissioner noted that there were conflicting view of the Tribunal on the issue of taxability of the service, he rejected the appellant's contention on limitation with the following observations :-*
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> *"I find that relevant Section 73 of the Act provided for invoking of five years period in cases of non-submission of returns for the prescribed period or non-disclosure of material facts required for verification of the assessment. In the instant case, the appellant have not submitted required returns despite various demands from the department and they did not disclose the amount paid to their consignment agents and therefore, failed to disclose material information to the department. They therefore, deliberately withheld the material information from the department and deliberately contravened relevant provisions of the act and the rules made thereunder. There is no case of bona fide belief as the appellant have deliberately ignored the amended provisions of the Act and the Rules effective from 16-10-1998. The cases cited by the appellant are not applicable for this period. Accordingly, the case is covered in clause (a) of Section 73(i) of the Act prevailing at the time of issue of show cause notice and limitation of five*

years period for issue of show cause notice is applicable in this case. Therefore, the show cause notice issued to the appellant so far as it relates to period from 16-10-1998 to 31-8-1999 is not time barred under Section 73 of the Act."

9. *The contention of the learned Counsel for the appellant is that it is well settled that when there is difference of opinion in judicial bodies, the assessee could not be faulted for holding either of the views. It is being pointed out that in such a case, failure to comply with the procedural requirement of law cannot be held as resulting from mala fides but from a bona fide belief that tax was not attracted. Reliance in this connection is placed on the decision of this Tribunal in the case of CCE v. Wonderax Laboratories (I) Pvt. Ltd. reported in 2005 (186) E.L.T. 427.*

10. *The learned Joint CDR would, however, contend that the Commissioner has considered the facts carefully and he has reached a sound conclusion on the applicability of extended period and that finding is required to be confirmed.*

11. *We have already noted the observations of the Commissioner that I 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."*

19. The decision of the Tribunal in the case of Bhart Aluminum was affirmed by the Hon'ble High Court, Chhattisgarh reported in 2012 (26) STR 101 (Chhttis.)

20. By following the above decision, we are led to the conclusion that the Revenue is not entitled to raise the demand for the extended period of limitation.

21. In view of the above, appeal No. ST/105/2008 is allowed in favour of the appellant on time bar except the demand falling in normal time limit. Since, we are setting aside the demand on time bar; we are not giving any detailed findings on the demand raised under the category of "Consulting Engineering Service". The said demand also gets sets aside on the question of time bar.

22. Appeal ST/314/2009 rejected.

(Dictated and pronounced in the open court.)

Sd/-
(P. K. CHOUDHARY)
MEMBER (JUDICIAL)

Sd/-
(V. PADMANABHAN)
MEMBER (TECHNICAL)

Pooja