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

REGIONAL BENCH – COURT NO.2

Service Tax Appeal No. 78720 of 2018

(Arising out of Order-in-Appeal No.442/ST-II/KOL/2018 dated 29.06.2018 passed by Commissioner of CGST & CX (Appeal-I), Kolkata.)

M/s Titagarh Wagons Ltd.
(756, Anandapur, E. M. Bypass, Kolkata-700017
West Bengal, India)

Appellant

VERSUS

Commr. of CGST & Central Excise, Kolkata South
(Kendriya Utpad Shulk Bhawan, 180,
Shantipally, Rajdanga Main Road,
Kolkata-700107)

Respondent

APPEARANCE :
Mr. Jaidip Basu Advocate & Ms. Meghna Chandak, CA for the Appellant
Mr. K. Chowdhury, Authorized Representative for the Respondent

CORAM:
HON'BLE MR. R. MURALIDHAR, MEMBER (JUDICIAL)

FINAL ORDER NO.75497/2024

Date of Hearing : 13th March 2024
Date of Decision: 13th March 2024

PER R. MURALIDHAR:

The Appellant has procured Orders for a Chinese Company from Indian Railways for supply of different grades of Wagons. For the Wagons supplied to them, the Indian Railways is making payment for the value of the Wagons to the Chinese Company. The Chinese Company has appointed the Appellant as Order procurement Agent. As per the Agreement between Chinese Company and Indian Railways, for the Orders procured by the Appellant Indian Railways is required to pay the commission amount to the appellant @ US $ 67 and US $ 65 based on the product imported. The Chinese Company has entered into the Agency Commission Contract with the Appellant for the wagons procured by the Indian Railways. The Railways will pay per wagon US $ 1167/US $1081 as per the grade of wagon involved. This is the net amount to be remitted by the Indian Railways to the Chinese Company. They have also directed the Indian Railways to pay US $ 67/US $65 to the agent by way of agency commission. The exchange rate of US $1 has been taken as Rs. 39.82. During the period 2009-10, the Appellant has received such commission from Indian Railways in Indian Rupees and they have not paid any Service Tax. After due investigation, Show Cause Notice proceedings were taken up. The main ground taken by the Department was that the service cannot be treated as Export of Service because the amount has been received in Indian Currency and hence, Rule 3 (2)(b) of the Export of Service Rules, 2005 is not fulfilled. After due process, the lower authorities have confirmed the demand. Being aggrieved, the Appellant is before the Tribunal.

2. The Learned Counsel points out that admittedly they were engaged by the foreign manufacturer to act as their agent to sell their wagons in India. As per the Contract entered into between the Overseas Exporter and Indian Railways, instead of the Overseas Exporter paying them the agency commission, the Indian Railways was directed to pay the commission by specifying in dollars terms the agency commission to be paid. The Contract itself has specified the rate of exchange for 1 USD as Rs. 39.82. They point out to Para 4 (iv) of the OIO (OIO page No. 8) wherein, the terms of Contract has been reproduced by the Adjudicating Authority. They submit that these facts prove that in the normal course, they have received the amount in dollar terms but because of their agreement with Indian railways, the same has been paid by them in Indian Rupees. Hence, they submit that this fulfills the condition under Rule 3(2)(b) of Export of Service Rules, 2005.

3. They also rely on the case law of **CCE, Jaipur-I Vs. National Engineering Industries Ltd.-2019 (30) G.S.T.L. 211 (Raj.)**. It is submitted that on identical issue, the Hon’ble High Court has taken a view that when the proceeds are received in Indian Rupees which has resulted in

saving of foreign exchange, still the service should be taken as Export of Service. Accordingly, he prays that the Appeal may be allowed on merits.

4. Further, they submit that all their details were properly reflected in their Profit & Loss Account, Balance Sheet and theirs is a Public Limited Company and their Statutory Returns are in the public domain. There is no concealment of any income. As a matter of fact, the Show Cause Notice has been issued based on the figures taken by the Department from the Profit and Loss Account towards such commissions received by them. Therefore, they submit that issue of Show Cause Notice dated 17/4/2012 received by them on 21/4/2012 for the period 2009-10 is hit by bar of limitation. Therefore, they plead that the confirmed demand may be set aside on account of limitation also.

5. The Learned AR submits that admittedly there is nothing to show from the Contract entered into between the Chinese Exporter and Indian Railways that the total cost of wagon was inclusive of the commission to be paid by the Indian Railways to the Appellant. Admittedly, they have paid the amount in Indian Rupees to the Appellant. He also draws my attention to Para 4(iv) of the OIO wherein it is stated that the Contract prices are *"exclusive of Agency commission"*. He submits that in the case law of **CCE, Jaipur-I Vs. National Engineering Industries Ltd.**, the High Court has given the benefit to the assessee only on the ground that the price was *"inclusive"* of the commission to be paid whereas in this particular case, the contract itself shows that it is *"exclusive of the Commission"* to be paid to the Appellant. Therefore, he justifies the confirmed demand.

6. Heard both sides and perused the Appeal Papers and other documents on record.

7. Admittedly, there is no dispute that the service has been provided by the Appellant in the capacity of an agent for the overseas exporter. There is

nothing to suggest that they have acted as purchase agent on behalf of the Indian Railways. As per the details given at Para 4(iv) of the OIO (Page No. 8), it is seen that the Indian Railways is required to pay the net amount of US $ 1167/1081 to the Chinese Company. Apart from that they are required to pay US $ 67/US$65 to the Appellant on account of Chinese Commission wherein the rate of exchange has been taken as US $ 1= Rs. 39.82. Based on this rate of exchange, Indian Railways has paid the commission amount to the Appellant in Indian Rupees.

8. A harmonious reading of the Contract would clarify that when Chinese Company says it is exclusive of Agency commission, they have made it clear that they want net payment of US $ 1167/1081 from Indian Railways without any deductions. Apart from that they have directed Indian Railways to pay US $ 67/US $ 65 to the Appellant towards Agency Commission. This would show that the net cost for Indian Railways would be US $ 1167+US $ 67 and US $ 1081 +US $ 65 based on the type of wagon purchased by them. Hence, the issue is squarely covered by the decision of the **Hon'ble Rajasthan High Court in the case of Commr. of C. Ex., Jaipur-I Vs. National Engineering Industries Ltd.,** cited supra.

9. I have considered one more point to come to this conclusion. There is nothing to indicate that there was any contract between Indian Railways and the Appellant to make any payment as a Purchase Agent on behalf of Indian Railways. So long as the Indian Railways has not given any contract, they are not required to pay any amount to the Appellant. Obviously, in this case, they have paid the amount only on the specific instruction of the Chinese Company on their behalf.

10. Coming to the decision of the Rajasthan High Court, cited supra, I find that they have has under:-

> ***4.1*** *One more option is available in the Distributorship Agreement where the buyer can opt for payment of commission directly to assessee which is separately*

> *indicated in the sale invoice. In such a case the amount of commission is not passed on to the seller by the buyer. Where the buyer pays price inclusive of commission to the foreign seller the portion of the commission from the price is paid by the seller to NEI. Thus when the amount paid by the Indian buyer in foreign currency to the foreign seller which is inclusive of assessee's commission the foreign seller pays the commission portion out of the price to assessee in foreign currency. Where the Indian buyer pays that portion of price which represents commission, directly to assessee in that case NEI do not get commission from seller in foreign currency but gets from the Indian buyer in Indian rupee.*
>
> ***17.*** *In that view of the matter, the assessee was a party to the services which was required to be rendered for earning the foreign exchange therefore a very narrow compass put by the department is considered then no citizen in India will be benefited from the exchange of foreign currency.*
>
> ***18.*** *In that view of the matter, the interpretation of the department cannot be accepted and we are bound to accept the interpretation as given by the Tribunal.*
>
> *[Emphasis supplied]*

11. Respectfully following this decision, I allow the Appeal on merits.

12. I also find force in the Appellant's arguments that there has been no concealment on their part. All their commission receipts were reflected in their P & L Account and in their Balance Sheet from where the data was collected by the Department to issue the Show Cause Notice. Therefore, I hold that the Show Cause Notice issued on 21/04/2012 for the period 2009-10 is time barred. Therefore, I allow the Appeal even on account of limitation.

13. The Appeal stands allowed with consequential relief, if any, as per law.

(Dictated and pronounced in the open court.)

Sd/-
(R. Muralidhar)
Member (Judicial)

Pooja