IN THE CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI

APPEAL NO: ST/88525/2014

Arising out of:	Order-in-Appeal No. 11/ST/2014/C dated 12/06/2014
Passed by:	Commissioner of Customs, Nagpur

Appellants – Represented by:

Zim Laboratories Ltd. — Shri Ganesh Iyer, Advocate

versus

Respondent – Represented by:

C.C.E, Nagpur — Shri Dilip Shinde, Assistant Commissioner (AR)

Date of hearing: 12/11/2018
Date of pronouncement: 28/02/2019

CORAM

Hon'ble Shri Ajay Sharma, Member (Judicial)
Hon'ble Shri P.Anjani Kumar, Member (Technical)

ORDER NO: A/85421 / 2019

Per: P. Anjani Kumar

The appellants, M/s Zim Laboratories are manufacturers of P&P medicines and are engaged in export of the same. The appellants have appointed commission agents in foreign countries to promote their business. The department felt that the service provided by the commission agents is in the nature of "business auxiliary service" defined under Section 65 (19) of Finance Act 1994; in terms of Section 66 (A) of the Act, the respondent is liable to pay service tax on the same; Notification No. 18/2009ST dated 07.07.2009 has been issued providing for exemption from payment of service tax by the respondent of such service subject to observing conditions and procedures listed therein. Department has issued a show cause notice seeking the below:

(i) Confirmation of service tax of Rs.3,67,134/- paid by the appellants for the month of January 2018.

(ii) Demanding service tax of Rs.91,33,582/- for the period of 2008-09 to 2011-12.

2. Commissioner has confirmed service tax of Rs.3,67,134/- and service tax of Rs.22,69.757/- on the grounds of non-observance of the condition of the notification. Commissioner has also imposed penalties under Section 76 and 78. Hence this appeal.

3. Learned Counsel for the appellant submitted that during the year 2008-09 the commission of Rs.4,58,15,980/- was paid by the appellant to the commission agents; the same has been declared the 2nd half year ST-3 Return; amount of Rs.86,03,919/- declared in the 1st half year ST-3 Return of 2008-09 was actually the commission paid in 2007-08; the show cause notice considered the figures in the P & L A/c which is on accrual basis instead of considering the actual commission paid during the period.

3.1 He further submitted that during 2009-10 commission paid was Rs.7,19,67,756/- out of which Rs.86,52.440/- was declared in the 1st half year ST-3 Return. Appropriate service tax has been paid on this commission; this amount is paid before the issue of notification no. 18/2009; no value was declared in the 2nd half ST-3 Return and service tax was paid after availing the benefit of the notification 18/2009. The Learned Counsel submitted that the lapses the show cause notice highlighted on their part in respect of filing of EXP-1 was only procedural; as clarified by CBEC lack 334/13/2009 dated 06.07.2009 the requirement of filing EXP-1 is only for the purpose of enabling the department to know the persons claiming such exemption; the delay in filing this EXP-1 cannot be so fatal to deny the exemption benefit to the appellant and therefore is not a substantive requirement. They relied upon Supreme Court decision in the case of Shambhaji Vs. Gangabai 2009(240) ELT 161(SC).

3.2 They have got registered themselves with the Pharmaceutical Export Promotion Counsel from 20.06.2005 itself therefore the allegation that they have registered w.e.f. 12.04.2010 is contrary to the facts. The entire exercise is revenue neutral as the appellants were entitled to avail Cenvat credit has inputs services or could have claimed refund therefore no intent to evade payment of duty can be alleged.

4. The Learned Authorised Representative for the department has reiterated the findings of the order-in-original and has submitted that a view of the ratio of the decision of Hon’ble Supreme Court in the case of Harichand Shri Gopal 2010(260) ELT 3(SC) conditions in the

notification are to be complied to be eligible for the benefit thereof.

5. Heard both sides and perused the records of the case on going through the records of the case it is seen that the learned Commissioner had accepted the submissions of the appellant with regard to the quantum of commission paid to overseas agents and has dropped the substantial portion of the demand. Commissioner has held that compliance to the conditions of the notification is not a procedural requirement but was a substantive requirement.

5.1 For a proper analysis of the provision of the notification a reference to the same is required to be made;

Notification No. 18/2009- Service Tax New Delhi, the 7th July, 2009 issued under F.No.341/15/2007-TRU reads as under-

In exercise of the powers conferred by ***Sub-Section (1) of Section 93 of the Finance Act, 1994(32 of 1994)*** (hereinafter referred to as the said Act), the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby exempts the taxable service received by an exporter of goods (hereinafter referred to as the exporter) and used for export of goods (hereinafter referred to as the said goods), of the description specified in column (3) of the Table below (hereinafter referred to as the specified service), pertaining to sub-clauses of clause (105) of Section 65 of the said Act specified in the corresponding entry in column (2) of the said Table, from the whole of the service tax leviable thereon under Section 66 and Section 66A of the said Act, subject to the conditions specified in column (4) of the said Table, namely:-

Sl. No	Sub-clause	Description of the taxable service	Conditions
1	(zzp)	1.Service provided to an exporter for --------	***Conditions (1) (2) (3) (4) –As detailed below**
2	(zzb)	2. Service provided by a commission agent located outside India and engaged under a contract or agreement or any other	

<u>*Conditions (1) (2) (3) (4) –</u>

(1)The exporter shall declare the amount of commission paid or payable to the Commission Agent document by the exporter in India, to act on behalf of the exporter, to cause sale of goods exported by him, in the shipping bill or bill of export, as the case may be.

(2)**<u>The exemption shall be limited to one percent of the free on board value of export goods for which the said service has been used.</u>**

(3)The exemption shall not be available on the export of canalized item, project export, or export financed under lines of credit extended by Government of India or EXIM Bank, or export made by Indian partner in a company with equity participation in an overseas joint venture or wholly owned subsidiary.

(4)The exporter shall submit with the half yearly return after certification of the same as specified in clause (g) of the proviso-(i) the original documents showing actual payment of commission agent; and (ii) a copy of the agreement or contract entered into between the commission agent located outside India and the exporter in relation to sale of export goods, outside India:

Provided that-

(a) the exemption shall be available to an exporter to an exporter who,-

- (i) informs the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, having jurisdiction over the factory or the regional office or the regional office or the head office, as the case may be, <u>in Form EXPL, before availing the said exemption;</u>
- (ii) is registered with an export promotion council sponsored by the Ministry of Commerce or the Ministry of Textiles, as the case may be;
- (iii) Is a holder of Import-Export Code Number;
- (iv) is registered under Section 69 of the said Act;
- (v) is liable to pay Service Tax under Sun-Section (2) of Section 68 of said Act, read with sub clause
- (vi) or sub-clause (v) of clause (d) of sub-rule (1) of Rule 2 of the Service Tax Rules, 1994, for the specified service;

(b) the invoice, bill or challan, or any other document issued by the service provider to the exporter, on which the exporter intend to avail exemption, shall be issued in the name of the exporter, showing that the exporter is liable to pay the service tax in terms of item(v) of clause (a);

(c)the exporter availing the exemption shall file the return in <u>Form EXP2 every six months of the financial year, within fifteen days of the completion of the said six months;</u>

(d)the exporter shall submit with the half yearly return, after

> certification, the documents in original specified in clause (b) and the certified copies of the documents specified in column (4) of the said Table;
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> (e) the documents enclosed with the return shall contain a certification from the exporter or the authorised person, to the effect that taxable service to which the document pertains, has been received and used for export of goods by mentioning the specific shipping bill number on the said document.
>
> (f) where the exporter is a proprietorship concern or partnership firm, the documents enclosed with the return shall be certified by the exporter himself and where the exporter is a limited company, the documents enclosed with the return shall be certified by the person authorised by the Board of Directors;
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> (g) where the amount of service tax in respect of the service specified against serial No.2 of the Table exceeds one percent of the free on board value of the export then, the amount in excess of the said one percent, shall be paid within the period specified under Rule 6 of the Service Tax Rules, 1994;

5.2 On going through the notification it is seen that the noticee have not informed the department and obtained acknowledgment from the jurisdictional Deputy/Assistant Commissioner; whereas the appellants were required to furnished all relevant documents they fail to furnish the copy of the agreement between them and the commission agents and have not furnished a copy of original documents showing actual payment of commission; they have not furnished copies of the bills which Challans as required under table B of the forum EXP-2; the documents whatever submitted by the appellants have not certified by the person who has been authorities by the board of directors; they have not furnished the declaration to the effect that the claim of exemption is not in respect of export of canalized items, product report are export financed underlines of credit extended by Government of India or AXIM Banks or export made by Indian partner in a company with equal participation in an overseas joint-venture are wholly owned subsidiary of the exporter had been produced by the exporter along with the claim.

6. We find that the learned Commissioner has found that the appellants failed to comply with the conditions of the notification 18/2009 ST dated 07.07.2009. Learned Commissioner further held that the noticee has failed to comply with the mandatory conditions of the notification he relied upon the ration of Supreme Court decision in the following cases:

(1) Eagle Flask Industries (2204) 171 ELT (296) (SC).

(2) Indian Aluminium Company Ltd. 1991 (55) ELT 454 (SC) wherein it was held that the benefit of notification which is a part of the statute should not be allowed to a manufacturer until and unless he has followed and fulfill all the procedures and the conditions laid down therein.

Commissioner has also found that Smt. Shweta Jivan Mangrulkar excise officer and authorised signatory of the notice seek in her statement has admitted that they did not pay the service tax for the amount of the commission paid in respect of service received from the commission agents located in abroad for the period January 2018 till it was pointed out by the department. The statement has not been retracted. Therefore, it is to be relied upon, we find that the Commissioner has given a clear finding on as to how the appellants have not fulfilled the conditions of the notification. We find that the learned Commissioner is correct in his findings.

6.1 We hold that it is not open for the appellant to continue to follow the conditions of the notification and claim substantial compliance and thus benefit of the notification. We find that the intention of the Government was to extent the benefit subject to the compliance of the conditions mentioned therein in the notification. The appellant having not complied with the same would forgo the right to avail the benefit of the notification. As submitted by the Learned Authorised Representative for the department we find that the issue is squarely covered by the ratio of the Supreme Court decision in the case of harichand Shri Gopal (supra). Therefore, we find that the learned Commissioner’s order in as much as the denial of the benefit of notification is concerned need not be interfered with.

7. Coming to the issue of penalty the appellants have pleaded that in view of the fact that the case was about fulfilling of the conditions of the notification extended period cannot be invocable. We find that the argument of the appellants for the aforesaid reasons is not acceptable. Having not complied with the conditions of the notification it was not open for the appellants to claim that there was no extent to evade payment of duty. Moreover, we find that for the subsequent period they have not discharged their duty liability. They have only paid the duty liable to be paid by them for the year 2007-08 along with interest. Therefore, we find that the penalty imposed in respect of the demand of Rs.3,67,133/- can be waved as duty and interest have been paid. However, with respect to the penalty on the

service tax confirmed for Rs.22,69,757/- held that the penalty imposed is sustainable.

8. In view of the above, the appeal is partly allowed to the extent of waving penalty under Section 76 & Section 78 in respect of the demand of service tax of Rs.3,67,133/- for the period 2007-08 of other demand and penalties are upheld.

(Pronounced in Court on28/02/2019)

(Ajay Sharma)
Member (Judicial)

(P. Anjani Kumar)
Member (Judicial)

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