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Commissioner of Central Excise Vs Salem Starch and Manufacturers' Service Industrial Co-operative Society Ltd.

C.M.A. No. 1212 of 2007

Court: Madras High Court

Date of Decision: June 28, 2013

Citation: (2013) 42 GST 191 : (2014) 33 STR 16 : (2013) 66 VST 170

Hon'ble Judges: K.B.K. Vasuki, J; Chitra Venkataraman, J

Bench: Division Bench

Advocate: Vikram Ramakrishnan, for the Appellant; K.S. Venkatagiri, for the Respondent

Judgement

Chitra Venkataraman, J.
The Revenue is on appeal as against the order of the Customs, Excise and Service Tax Appellate Tribunal,

Principal Bench at New Delhi. The above appeal was admitted on the following substantial questions of law:--

(1) Whether in the facts and circumstance of the case, the Appellate Tribunal is correct in law in holding that the activities of the respondent would

not come within the purview of clearing and forwarding agents as per section 65(a) of the Finance Act, 1994?

(2) Whether in the facts and circumstances of the case, the Appellate Tribunal is correct in holding that the respondent is not rendering clearing and

forwarding service as per section 65(a) of the Finance Act, 1994 and hence, the levy and demand of service tax is unsustainable?

The Tribunal allowed the assessee"s appeal pointing out that the consignments of sale were brought by the Principal to the premises of the assessee

for auction and that the assessee did not clear the consignments from its premises. After the sale, the goods delivered to the buyer at the sales

premises itself by the owner/Principal. As such there was no forwarding took place. Referring to the decision in 2004 (95) ECC 54 the Tribunal

held that the assessee was not doing forwarding services and consequently, there was no liability to pay the service tax.

2. It is seen from the facts narrated that the respondent herein is a registered Co-operative Society formed with the object of improvement of

tapioca cultivation and tapioca sago and starch industry and of the economic condition of tapioca cultivators and sago and starch manufacturers in

the area of operation mentioned. Since the issue raised in this appeal related to the chargeability of the transactions to service tax provisions, the

assessee initially raised question regarding maintainability of the appeal before this Court. However, learned counsel for the assessee pointed out

that since the issue raised herein involves factual aspects, they have no objection for hearing this matter.

3. The society obtained registration under the category of storage and warehousing under the service tax provisions and has been paying service

tax there on from 16.8.2002. It is seen from the facts herein that based on the intelligence gathered on the nature of services rendered by the

assessee as falling under the category of "clearing and forwarding agents", not under the category of "storage and warehousing", the officials of the

Preventive Group visited the office of the assessee on 20.3.2003. As per the letter given on 6.5.2003, the activities undertaken by the assessee

were reported as follows:--

(a) Advance loans to members on the pledge of sago and starch manufactured by its members.

(b) Undertake sales of sago and starch of its members in consuming market centres to the best advantage of the manufacturer on agency basis,

dissemination of market intelligence to members.

(c) Purchase such materials and appliances as may be required for the industry and retain the same either for cash or credit to members.

(d) Exercise quality grading of the products and to undertake grinding of starch for fineness of mesh and for better price.

(e) Construct or hire godowns or other buildings for marketing of the goods.

(f) Undertake such other activities as conducive to the attainment of the general objects of the service society.

4. The nature of activities was sought to be explained by the assessee that members of the society sent their products by making their own

arrangements for loading, transport and unloading of the goods in the premises of the society. Thereupon, they were weighed and sent to the

godown maintained by the assessee. Samples were drawn for quality testing as well as for display in the tender hall. On receipt of the tenders from

the registered merchants, who also happened to be members of the society, the higher rate offered for each lot was displayed. On confirmation of

the price by the principal, the buyer was thus intimated suitably to make his arrangements to lift the stock. Thereupon the assessee herein prepared

the statement bill to the members, wherein, deductions were made towards advance paid, interest payable, go-down services charges, godown

rent, unloading charges, marking charges, bank service charges and courier charges etc. According to the assessee, it acted as agent between the

members and buyers; provided warehousing the starch and sago in the godown; gave advance money to the members before sale if so requested

by the members. It facilitated calling of tenders from the buyers. Given the nature of the service thus provided, the assessee contested that they

could not be characterised as clearing and forwarding agent to fall under sub-section (23) of section 65 of Finance Act, 1994.

5. The claim of the assessee that the activity of the assessee did not fit in with the understanding of the clearing and forwarding agency, was,

however, rejected by the Assessing Officer in a very detailed manner. The said Officer pointed out that the Society effected sales only after

obtaining the concurrence of the principal; they maintained the records for receipts, despatches and the stock available with them in the warehouse.

Thus, the assessee was undertaking all the activities normally undertaken by the clearing and forwarding agents. After receiving the goods, the

clearing and forwarding agency also undertook to arrange dispatch of goods as per the directions of the Principal by arranging transport on his

own or through various transporters. The Assessing Officer pointed out that even if the goods were not received from the factory directly, it was

enough if they had received the goods from any other premises belonging to the Principal. The assessee admitted the fact that it received the

goods. However, on receipt of the goods, they were weighed and weighment card was issued to the customers. The goods were sent to the

godown in a lot and lot number was assigned and stacked. The Assessing Officer, however, pointed out that even though the assessee denied the

allegations contained in the show-cause notice that they had received dispatch orders from the members and arranged dispatch of goods as per the

directions of the Principal, no evidence was let in by them to substantiate this aspect. The Assessing Officer viewed that transport could be

arranged either by the Principal or by the assessee and as far as the present case is concerned, it was totally immaterial, since, the sale was

effected by the assessee only after obtaining the concurrence of the Principal. This action was nothing but arranging dispatch of goods on the

instruction of the Principal; consequently, the activities undertaken by the assessee was connected with or in relation to sale of sago. The Assessing

Officer further found that apart from maintaining details as regards the receipt of goods and the dispatch, the invoices were prepared by the

assessee. Going by the nature of activity, it was clear that the assessee was required to be assessed as clearing and forwarding agents. The

Assessing Officer further pointed out that the assessee had paid the service tax under storage and warehousing, with effect from 16.8.2002. Thus,

considering the status to be assigned to the assessee herein as a clearing and forwarding agent, the Assessing Officer adjusted this payment

towards the liability fastened on the assessee. Thus holding against the assessee, the Assessing Officer confirmed the levy of penalty too in not

submitting the transactions.

6. Aggrieved by the same, the assessee went on appeal before the Commissioner of Central Excise (Appeals), who pointed out to the circular

issued by the Central Board of Excise and Customs in F. No. B/43/7/97 TRU, dated 11.7.1997, which categorised the various activities normally

undertaken by the clearing and forwarding agents and the one by the assessee, which read as follows:--

Category of Activities mentioned in the CBEC Cir. Dt. 11.7.1997

Activities undertaken by the appellant

Receiving the goods from the factories or premises of the principal or his agents

Appellants have received the goods from the manufacturers/members of the society

Warehousing

Appellants have warehoused the goods received from its members.

Receiving despatch orders from the Principal

Arranging despatch of goods as per the directions of the principal by engaging transport on his own or through the authorised transporters of the

principal

Only on confirmation of the highest bid amount from its members for the goods tendered in auction, the appellants inform the buyers to take

delivery of the said goods.

It is seen from the records that the appellants are directly despatching the goods by issuing invoices but the buyers engage transport themselves

Maintaining records of the receipt and despatch of goods and the stock available in warehouse.

Appellants are maintaining receipt and despatch of goods lot-wise, membership-wise etc., and also insuring the goods in stock

Preparing invoices on behalf of the principal

Appellants are issuing sales invoices on behalf of the members.

7. The Commissioner viewed that since the activity of the assessee fitted in with the nature of activity under the head of "clearing and forwarding

agency", the liability of the assessee could be only as "clearing and forwarding agency". In the circumstances, taking note of the report filed on

25.10.2002 for the period from 1.4.2002 to 30.9.2002, he restricted the demand under service tax as clearing and forwarding agent after

adjusting the amount already paid during the period 16.8.2002 to 30.6.2003. Thus a sum of Rs. 19,56,866/- was demanded towards balance of

service tax payable. He, however, set aside the order of penalty. The first Appellate Authority viewed that the assessee, being a co-operative

society functioning under the control of Director of Industries & Commerce, Government of Tamil Nadu, discharged certain important welfare

measures for the tapioca cultivators and the manufacturers of sago/starch. Having regard to the same, the Commissioner viewed that it was difficult

to impute any malafide intention, to evade tax. Accordingly, he set aside the penalty imposed by the lower Authority. Thus, the appeal was partly

allowed.

8. Aggrieved by the same, the assessee went on appeal before the Customs, Excise and Service Tax Appellate Tribunal, which, as already pointed

out, allowed the appeal, holding that the assessee was, in no way, connected with the clearing and forwarding agent. Aggrieved by the same, the

present appeal by the Revenue.

9. Learned standing counsel appearing for the Revenue placed reliance on the Notification dated 11th July, 1997 in F. No. B.43/7/97- TRU of

Ministry of Finance contending that the circular issued clearly listed out the nature of discharge of functions by the clearing and forwarding agents

and contested that the nature of activities discharged by the assessee fitted in well with the description given therein. It is clear that the assessee

could only be treated as clearing and forwarding agent. He further pointed out that the reliance placed by the Tribunal in the case of Mahavir

Generics (supra) has no relevance to the case on hand. Hence, the Tribunal misdirected itself in granting the relief to the assessee. He took us

through the order in original which dealt with the various aspects of the activities rendered by the assessee and looking on the totality of the facts

herein, the assessee is liable to be treated as clearing and forwarding agents only and not as provider of storage facilities.

10. Per contra, learned counsel appearing for the assessee submitted that on the face of the findings of the Tribunal that the assessee had not

rendered any service of clearing and forwarding, the order of the Tribunal does not call for any interference. He further pointed out that subsequent

to the decision of the Tribunal, the Revenue issued a notice on 20.9.2007 to the assessee, proposing to treat the transactions for the period

1.5.2006 to 31.3.2007 as that of auctioneering service in terms of Clause (105) to Section 65 of Finance Act, 1994, brought in by Finance Act,

2006. Thus going by the contradictions in the stand taken by the Revenue, the appeal lacks merit. He further pointed out that the nature of activity

undertaken by the assessee is clearly spelt out in the order of the Assessing Officer; however, without noting the predominant activity which was

spelt out clearly by the facts narrated and the objects of the assessee''s Society, the Assessing Officer misdirected himself totally to bring the

transactions within the meaning of ''clearing and forwarding agency''. On the admitted fact that the assessee had not done any clearing and

forwarding of the goods and that the principal alone brought sago to the assessee''s premises and after auction, the purchaser themselves had

cleared the goods, it is clear that the case of the assessee could not be brought within the parameters given in the circular on clearing and

forwarding agency. In any event, the activities of the assessee do not fit in within the general understanding of clearing and forwarding agency. In

this connection, he placed reliance on Section 65A(2)(b) of the Finance Act that even assuming that there is a combination of different services, the

Revenue must find out the essential character of the service for the purposes of bringing the assessee within the framework of the activity as a

clearing and forwarding agency. In the absence of any material at the hands of the Revenue, which has the onus of proving that the assessee''s case

falls within the meaning of ''clearing and forwarding agency'', no exception could be taken to the finding of the Tribunal.

11. Heard learned standing counsel appearing for the Revenue and learned counsel appearing for the assessee as well as perused the materials

available before us.

12. We agree with the submissions made by learned counsel for the assessee, principally for the reason that the finding of the Tribunal that the

assessee was, in no way, connected with clearing and forwarding of the goods, remains undisturbed and undisputed by the Revenue in the appeal

filed before us. Even though the Assessing Officer had stated in paragraph 5.14 that even though the assessee Society was formed by the

members, in order to undertake the activities with or in relation to sale of sago and created the market platform for the members and hence, the

assessee had not claimed that it has no role on dispatch of goods to the purchaser, yet, in the face of the findings of the Tribunal, as to the essential

nature of the activity undertaken by the assessee, we hold that the same does not call for any interference and hence, no substantial question of law

arises for consideration in this appeal.

13. As far as the contention of the assessee based on Section 65A(2)(b) of the Finance Act is concerned, we find that as per Section 65A(2) of

the Finance Act, when a taxable service, is prima facie, classifiable under two or more sub-clauses of clause (105) of Section 65, classification

shall be effected as follows:--

(a) the sub-clause which provides the most specific description shall be preferred to sub-clauses providing a more general description;

(b) composite services consisting of a combination of different services which cannot be classified in the manner specified in clause (a), shall be

classified as if they consisted of a service which gives them their essential character, insofar as this criterion is applicable;

(c) ****

14. The case of the Department is that the nature of services accepted by the assessee included receiving of goods from the Principal, warehousing

of the goods, receiving the dispatched orders from the Principal, arranging dispatch of goods as per the directions of the Principal, maintaining

records of the receipt and dispatch of goods and the stock available at the warehouse and preparing invoices on behalf of the Principal. As far as

the parameters which are contained in circular dated 11th July, 1997, as applicable to the facts of the case is concerned, as already seen from the

extract of the Commissioner''s order, it is no doubt true that the assessee prepared invoices on behalf of the Principal. The invoice consisted of the

amount payable, to the Society by way of storage charges, testing charges and other handling charges. We do not find any material herein to hold

that the assessee was having any responsibility for receiving the goods from the factory or from the premises of Principal or his agents. It is only the

Principal who brought their products to the doorsteps of the assessee to make use of the common market platform provided by the Society for its

members and on the request of the Principals for warehousing of the goods the assessee offered the storage facility. It is a matter of record that for

the purpose of auction sale, on receipt of the goods, the same was sorted out according to the quality testing and kept in a lot in the godown. A lot

number was assigned and stacked. The samples were drawn for quality testing as well as to display in the tender hall. Once tenders were received,

they were opened. On opening, the highest rate offered for each lot was displayed. On confirmation from the Principal on the price offered, the

sale was confirmed. Thereupon, the buyer took delivery of the goods.

15. As far as maintenance of records were concerned, there is no denial of the fact that the assessee maintained records on receipt of the amount

and the stock received and available after the sale. On a reading of the nature of activity thus rendered by the assessee, it is clear that except for

receiving the goods which were brought to its doorsteps by its Principal and displaying the goods received for sale, practically, nothing else was

done by the assessee in the matter of taking the goods from the Principal and for further despatching of the goods to the buyer by engaging

transporter or on its own transporter. The conduct of the assessee, handling the goods on receipt raising invoices on sale or maintaining of the

records as to the stock availability, at best, showed it only as an agency offering storage facility. This act, per se, does not convert the assessee"s

transaction as that of a clearing and forwarding agency. Thus, when the burden is on the Revenue to prove that the assessee, in fact, received the

goods from the premises of the Principal and arranged despatch of goods as per the directions of the Principal by engaging transporter on its own

or through various transporters, we have no hesitation in accepting the submission of the assessee that the nature of transactions viz., despatching

of goods and offering storage facilities by the assessee, does not fit in with the criteria given in the circular to treat the assessee as a clearing and

forwarding agent. As pointed out by the learned counsel appearing for the assessee, the nature of activity is a composite one, enabling the Principal

to bring the products to the assessee"s premises and the assessee giving financial facility to the members, so that, ultimately on the sale of sago, on

the receipts received by the assessee on behalf of the Principal, the same was settled after deducting whatever amounts were due to the assessee

on the advance payment made by the assessee to the principal. Thus, providing a platform for the sellers and buyers to meet in a common place,

providing a storage facility to the manufacturer, the financial help rendered to the members and organising of the sale of the products, per se, do

not, in any manner take the assessee anywhere near the activities discharged by a clearing and forwarding agent. Thus, going by Section 65A(2) of

the Finance Act, the essential predominant character of the activity being one of facilitating the sale of the products, apart from providing storage

facilities, the view of the Revenue that the nature of activity, per se, has to be tested from the point of facilitating the sale, thereafter, could not be

sustained. In any event, even as per the conditions prescribed in the circular dated 11th July, 1997, we do not find that the nature of activity

undertaken by the assessee could be brought under ''clearing and forwarding agency''. Thus, the incidental services offered in the transaction in

arranging the transporting of the goods to the buyer would not, however, decide the nature of the transaction as one of clearing and forwarding

agency.

16. As far as the present case is concerned, as already pointed out, there is no evidence to show that the assessee had the responsibility of

arranging the despatching of goods purchased by the buyer in the auction nor had responsibility undertaken to collect the goods from the

Principal''s premises to hold that the assessee is a clearing and forwarding agency under the provisions of the Act. Thus, the assessee''s business

was never that of a clearing and forwarding agency.

17. It may be noted that u/s 65(102) of the Finance Act, 2006, even in respect of storage and warehousing facilities, the Act exempts such

services insofar as it related to storage of agricultural produce or any service provided by a cold storage. The question as to whether the activity of

the assessee would fall u/s 65(102) of the Act not being a question raised and considering the show-cause notice issued on 20.9.2007 for the

period falling after 1.5.2006 on the introduction of Clause (105) to Section 65 of the Finance Act, 1994 for the period 1.5.2006 to 31.3.2007

under the Finance Act, 2006, to treat the assessee as an auctioneer, we have no hesitation in holding that when the Department itself is not certain

about the head under which the transaction character would fall, the criteria which is of great significance in the matter of taxation, we have no

hesitation in accepting the stand of the assessee. The attempt of the Revenue appears to be to hit at some clause to bring the assessee somehow

with the net of taxation. Thus, on the factual finding and on going through the nature of activities rendered by the assessee, the above Civil

Miscellaneous Appeal is liable to be dismissed. Accordingly, the same is dismissed. In the circumstances, it is not necessary for us to get into the

question of maintainability of the appeal. No costs.