

M/s. Coal Handlers Pvt. Ltd. Vs. Commissioner of Central Excise Range Kolkata - I

Civil Appeal No. 7215 of 2004 · Supreme Court of India · 2015-05-05 · A.K. SIKRI · ROHINTON FALI NARIMAN · F2J-C-1217

Full judgment text

M/s. Coal Handlers Pvt. Ltd. Vs. Commissioner of Central Excise Range Kolkata - I

[Civil Appeal No. 7215 of 2004]

[Civil Appeal No. 5159 of 2013]

[Civil Appeal No. 9967 of 2014]

A.K. SIKRI, J.

Appellants in both these appeals are the assesseees and the issue involved in these appeals is common. Both the appellants provide certain services as Agents under the contracts signed with their respective Principals.

The issue is as to whether such services provided by them would label them as Clearing & Forwarding Agents (for short, 'C & F Agents') and, thus, make them liable to service tax in accordance with the Finance Act, 1994 (hereinafter referred to as the 'Act'), as amended from time to time. Since the issue to be decided in both the appeals is identical and also arises almost in the same factual background, it would serve our purpose if we reproduce the facts from Civil Appeal No. 7215 of 2004. The appellant in this case is providing certain services as Agent. Such services are provided to M/s. Gujarat Ambuja Cements Limited and M/s. Ambuja Cements Eastern Limited (hereinafter collectively referred to as 'Ambuja companies').

At the material time, these were public sector undertakings under the Government of Gujarat. These industries need coal as a raw material for production of cement, which is the main manufacturing activity undertaken by the said companies. Industries that need coal as a raw material generally approach the Ministry of Industries, Government of India with their requirements. The Ministry of Industries, after enquiry, recommends to the Ministry of Coal the quantity that is required to be supplied to such industries. Thereafter, the Ministry of Coal, as per the norms prescribed, allots the coal to these industries through the Long Term Linkage Committee indicating the coal companies and the location from which coal can be made available to them.

While fixing the locations from where the coal is to be supplied to such companies, the Committee takes into account the Railways commitment for movement of the coal. The Railways is responsible for placing of rail rakes according to the programme. To maintain constant liaison with the Railways for the actual placing of coal rakes, such companies generally appoint its Agents. The aforesaid Ambuja companies, for this purpose, had appointed the appellant for this purpose and a contract was entered into between the said Ambuja companies and the appellant. Under this Agency agreement, the appellant was required to undertake the following activities on behalf of the Ambuja companies:

- (i) following up the allotment of coal rakes by the Railways;
- (ii) expediting and supervising the loading and labeling of rail wagons;
- (iii) drawing the samples of coal loaded on the wagons;
- (iv) complying with the formalities relating to payments for freight to the Railways; and
- (v) dispatching of rail receipts to Ambuja companies. The issue that arose for consideration was as to whether aforesaid services were liable to service tax under the provisions of the Act. By the said Act, sub-section (25) was inserted in Section 65, which defines C & F Agent 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;" We may also note that the taxable service as

provided in Section 65(48)(j) of the Act in relation to service of C & F Agent means 'any service provided to a client, by a clearing and forwarding agent in relation to clearing and forwarding operations in any manner'. It so happened that the appellant had filed an application for registration in Form ST-I under Section 69 of Chapter V of the Act on November 17, 1999 for the service of 'handling agents' (C & F Agent).

Certification of Registration was granted on November 18, 1999. Thereafter, on May 30, 2000, the appellant surrendered the said Registration Certificate on the ground that services rendered by them were not covered by Section 65(25) of the Act. The application for surrender was, however, rejected by the Superintendent of Central Excise (SCE), Service Tax Cell, Kolkata-I, Commissionerate on February 08, 2001 by passing the Order-in-Original. The SCE, in that order, took the view that the services rendered by the appellant under the aforesaid contract with Ambuja companies would be covered by Section 65(25) of the Act and, therefore, exigible to service tax.

Aggrieved by the said order, the appellant preferred an appeal before the Commissioner of Central Excise (Appeals), Kolkata, which was also dismissed by the Commissioner on November 05, 2002. This order was challenged by the appellant before the Customs, Excise & Service Tax Appellate Tribunal (for short, 'CESTAT'). The CESTAT has also dismissed the appeal by the impugned order dated May 24, 2004 by observing that the matter is covered by its own judgment in the case of M/s. Prabhat Zarda Factory (India) Ltd. v. Commissioner of Central Excise, Patna[1]. The Tribunal has noted in this behalf that in the said case the Bench of the Tribunal had considered the definition of C & F Agent and has held that such definition was very wide and includes any service, even provided indirectly. It was also noted that the said judgment was delivered on February 09, 2002 and thereafter Finance Act of 2003 was introduced and the new service, viz. 'Business Auxiliary Service' appearing in Section 65(19) was introduced.

The said service is in relation to promotion or marketing of service provided by the client; any customer care service provided on behalf of the client and any incidental or auxiliary support service such as billing, collection or recovery of cheques, accounts and remittance, evaluation of prospective customer and public relation services, and includes services as a commission agent. The CESTAT, however, held that the activities undertaken by the appellant were not covered by the expression 'Business Auxiliary Service', which include Commission Agents, and stand exempted from service tax with effect from July 01, 2003 vide Notification No. 13/2003 dated June 20, 2003. Therefore, no such exemption was available.

The relevant paras of the impugned order containing the aforesaid discussion are as under:

"5) The appellants have agreed that the issue involved stands decided in the case of Prabhat Zarda Factory (India) Ltd. (Supra). The Tribunal under the said judgment has observed that as per definition of clearing and forwarding agent, he is a person who is engaged for providing any service, either directly or indirectly connected with clearing and forwarding operations in any manner to any other person and includes a commission agent. The use of the expression "any" and "indirectly" in the said definition of clearing and forwarding agent, is indicative of the fact that the scope of the services to be provided by clearing and forwarding agent is quite wide.

He is not only the person who is actually dealing with the goods, which has to be termed as clearing and forwarding agent, but even if the services are indirect and if the same are connected with the clearing and forwarding operations in any manner of the other persons, he would be covered within the scope of the said definition. The appellants in the instant case render their services in all the sections of pre load of the coal rakes i.e. obtaining consent on behalf of their customers, sanctions from the office of Executive Director-Rail Movement, supervising loading of the wagons, sending samples and assuring the proper quality and quantities, complying with the formalities relating to payments for freight. As such, it is quite clear that the appellant is covered by the definition of clearing and forwarding agent, as interpreted by the Tribunal in the above referred case of Prabhat Zarda.

6) The appellants have alternative contention that they are covered by the new i.e. Business Auxiliary Service introduced vide Finance Act of 2003. However, we find that the said services are in the nature of promotional or marketing of the customers goods or in the nature of doing the other routine type of jobs like billing or collection of cheques, maintenance of accounts and evaluation of prospective customers and public relation services. The services being provided by the appellant cannot be equated to the above. It is also seen that the expression 'commission agent' has been explained by the Notification dated 20th June, 2003 reported in 155 ELT N-171, vide paragraph 2.1.3 it has been

clarified that C & F agents work on commission basis do not fall under the definition of 'Business Auxiliary Service', in as much as they are substantially covered within the definition C & F service. It has, further, been clarified that under Section 65A of Finance Act, 1994, it has also been provided that in case of overlap, a service would be classified under the head,

(a) which provides most specific description,

(b) in case of a composite service having combination of different taxable services, the service which give them their essential character and

(c) in case the test of (a) and (b) does not resolve, the service which comes earlier in the clauses of Section 65, i.e. the service that was subjected to service tax earlier.

Since Insurance services and C & F Services are more specific description and were also subjected to service tax prior to imposition of tax on business auxiliary service, the insurance agents, C & F agents working on commission basis would fall under those respective categories. From this, it follows that a particular service can be taxed only under one head of service."

As is clear from the reading of the aforesaid extracted portion of the order, the Tribunal has rested its impugned decision on its earlier judgment in the case of Prabhat Zarda (supra) and the reasons contained in the said judgment are restated in support of the view taken by the Tribunal in the impugned judgment. 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[2]. 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. 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) ELT : 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)" 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 there under'.

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? 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 goods 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 knows 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 goods 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." 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. 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 liaising 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. In view of the aforesaid discussion, the appeals are allowed and the impugned orders passed by the Tribunal are set aside by quashing the demand of service tax made from the appellants.

No costs.

CIVIL APPEAL NO. 9967 OF 2014

The Commissioner of Service Tax, Kolkata, is aggrieved by the orders dated August 21, 2013 passed by the High Court of Calcutta, which has dismissed the appeal of the Revenue by the impugned judgment, refusing to entertain the said appeal which was preferred by the Revenue against orders dated April 02, 2013 passed by CESTAT. In the said appeal before the CESTAT, it had taken the view, in the case of same appellant, that the appellant was not liable to pay any service tax as it was not covered by the definition of C & F Agent as contained in Section 65(25) of the Act. The appeal preferred by the Revenue was dismissed by the High Court on the ground that Civil Appeal No. 5159 of 2013 is pending in this Court. Since the said appeal of the appellant is allowed by us, as a

consequence, this appeal warrants to be dismissed and it is ordered accordingly.

No costs.

.....J. (A.K. SIKRI)

.....J. (ROHINTON FALI NARIMAN)

NEW DELHI;

MAY 05, 2015.

[1] 2002 (145) ELT 222

[2] 2006 (3) STR 321 (Tri.-LB):: 2006 (110) ECC 634 :: 2006 ECR 634 Tri Delhi

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