

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No.2, R. K. Puram, New Delhi

COURT –II

Date of hearing: 25.06.2018
Date of Decision: 31.07.2018

Appeal No. ST/57100/2013-DB

[Arising out of Order-in-Original No. 18-19/2012-13 dated 31/01/2013 passed by the Commissioner of Central Excise Delhi-II, New Delhi.]

Olam Agro India Ltd. Appellant

Vs.

C.C.E-Delhi-II Respondent

Appeal No. ST/ 57667/2013-DB

[Arising out of Order-in-Original No. 52/2012-13 dated 06.03.2013 passed by Commissioner of Central Excise Delhi-II, New Delhi.]

Olam Agro India Ltd. Appellant

Vs.

C.C.E-Delhi-II Respondent

Appearance:

Sh. B.L. Narsimhan & Narender Singhavi Advocate for the appellant
Sh. Amresh Jain, DR for the Respondent

Coram:

Hon'ble Mr. V. Padmanabhan, Member (Technical)

Hon'ble Mr. Ajay Sharma, Member (Judicial)

Final Order No.52650-52651/2018

Per: Bench

1. The present appeals are against the Orders-in-Original No. 18-19/2012-13 dated 31/01/2013 and 52/2012-13 dated 06/03/2013.
2. The brief facts of the case are that the appellant are engaged in agri-business and is a major exporter of agricultural products such as cocoa beans, rice, sesame seeds, cotton etc. The lower Authorities have ordered payment of Service Tax in respect of the following two commissions:-

i. **Agency Commission:-**

For undertaking export of rice, the appellant engaged various commission agents in foreign countries, who helped in procurement of export orders for the appellant. Commission was in turn paid by the appellant to such foreign commission agents. Department has demanded Service Tax on such commission paid under the category of 'Business Auxiliary Service' under Section 65(19) of the Finance Act, 1994. Such demands were made under the reverse charge mechanism under Section 66A.

ii. **Corporate Guarantee Commission:-**

For facilitating the appellant to obtain loan from various Indian Banks, they obtained corporate guarantee in favour of banks in India from M/s Olam International Limited, Singapore. In lieu of the said guarantee, the appellant was required to pay commission amounting to 1 per cent of the value of such corporate guarantee to their parent company at Singapore. Such amounts were paid in foreign exchange. The Service Tax was demanded on such commission, under reverse charge basis, under the category of 'Business Auxiliary Service' under Section 65 (105) (zzb) of the Finance Act, 1994; under sub-section (iv) 'procurement of goods or services which are inputs for the client'.

3. The levy of Service Tax under both the categories as above has been challenged in the present appeals.

4. In this connection, we heard the arguments by Shri B.L. Narsimhan, Ld. Advocate which are summarized below:-

i. Regarding Agency Commission, he submitted that such commission was paid in connection with export of rice. The commission paid to Commission Agents in respect of export of all agricultural produce

including rice stand exempted vide Notification No. 13/2003-ST dated 20/06/2003 which was amended vide Notification No. 08/2004-ST dated 09/07/2004 specifically to provide that 'Commission Agent Services' in relation to agricultural produce will enjoy such exemption. He further referred to the clarification circular issued by the Board dated 26/05/2011 in which specific clarification was issued that 'rice' will enjoy such exemption as an agricultural produce.

- ii. In this connection he also relied on the case of ***Kohinoor Foods Ltd. V/s Commissioner 2017(52) STR (Tri.-Del)*** in which the Tribunal has held that no Service Tax is payable on Agency Commission in connection with export of rice. He submitted that since the present case facts are identical to Kohinoor Foods (case) the Service Tax levied on agency commission may kindly be set aside.
- iii. With reference to Corporate Guarantee Commission he submitted that such commission was paid to the appellant's parent company in Singapore towards provision of guarantee for obtaining loan by the appellant. He submitted that the payment of such commission cannot be said to be for procurement of any service. In this connection, he relied on the Tribunal decision in the case of ***Abdullahai Abdul Kader v/s Commissioner 2017 (4) GSTL 38 (Tri Mum.)***. In the said case the Tribunal had occasion to examine the case in which the appellant therein provided the service of opening L/C to various customers. The Tribunal in that case held that providing the facility of L/C through their bank to various importers cannot be charged to Service Tax under the category of 'Business Auxiliary Service' since it was not in

connection with procurement of goods which are inputs for the clients.

- iv. He also assailed the impugned orders on the grounds of time bar.
5. Shri Amresh Jain, Ld. DR justified the impugned orders.
- i. He submitted in connection with the Agency Commission that the lower Authority has dealt with case in para No. 25.5 to 25.7 of the impugned order. He specifically referred to the Explanation (ii) to the Notification No. 08/2004-ST and argued that the appellant has failed to satisfy two of the main conditions specified therein regarding Agricultural Produce i.e:-
 - a. On which either no further processing is done;
 - b. Or such processing is done by the cultivator;
 - ii. He also submitted that the case law in case of Kohinoor was not applicable to the facts of the present case.
 - iii. In regard to Corporate Guarantee Commission he submitted that the case law cited by the appellant may not be applicable to the facts of the present case. He specifically submitted that in the case of **Abdullahai Abdul Kader**, the Tribunal was discussing the provision of L/C but in the present case it has dealt with the case of service provided by the parent company of the appellant to the appellant in relation to procurement of service by the Appellant. This activity is squarely covered under BAS.
 - iv. He also submitted that the arguments on limitation raised by the appellant have been dealt with by the adjudicating authority in para 28.2-28.3.
6. In the rejoinder Ld. Advocate submitted that M/s Olam International Ltd., Singapore did not procure service from the bank for the appellant. He referred to the CBEC Circular dated 10/09/2004 (issued at the time

of expanding the coverage of Business Auxiliary Service,) in which it is clarified that BAS will be applicable to instances wherein a commercial concern provides service on behalf of the client. Since that is not the fact in the present case, he reiterated that the impugned orders merit to be set aside.

7. Heard both sides and perused the appeal records.
8. The definition of 'Business Auxiliary Service' is very wide and it covers all the activities which promotes business of clients. The services detailed under clause iv of Section 65 (105) (zzb) of the Act made taxable from 10/09/2004. For the purpose of this case, the provisions of Rule 2 (i)(d)(iv) of Service Tax Rules, 1994 reads as under:-

2 (i)(d)(iv):-

In these rules, unless the context otherwise required 'person liable for paying the Service Tax', means in relation to any taxable service provided or to be provided by any person from a country other than and received by any person in India under Section 66A of the Act, the recipient of such service.

And whereas explanation to Section 65 (105) of the Finance Act, 1994 read as under:

For the removal of doubts, it is hereby declared that where any service provided or [to be provided w.e.f 16.06.2005] by a person, who has established a business or has a fixed establishment from which the service is provided to be provided or has his permanent address or usual place of residence, in a country other than India and such service is received or to be received by a person who has his place of business, fixed establishment, permanent address or, as the case may be, usual place of residence, in India, such service shall be deemed to be taxable service for the purpose of this clause.

And whereas, Section 66A of the Finance Act, 1994, w.e.f. 18/04/2006 reads as under:-

1. *Where any service specified in clause (105) of Section 65 is-*

a. *Provided or to be provided by a person who has established a business or has a fixed establishment from which the service is provided or to be provided or has his permanent address or usual place of residence, in a country other than India, and*

b. *Received by a person (hereinafter referred to as the recipient) who has his place of business, fixed establishment, permanent address or usual place of residence in India,*

such service shall, for the purpose of this section, be the taxable service, and such taxable service shall be treated as if the recipient had himself provided the service of India, and accordingly all the provisions of Chapter V of the Finance Act, 1994 shall apply.

And whereas, Rule 3 of Taxation of Services (provided from outside India & received in India) Rules, 2006, w.e.f. 19.04.06 reads as under:

"3. Subject to Section 66A of the Act, the taxable services provided from outside India & received in India shall, in relation to taxable services-

(iii) Specified in Clause 105 of section 65 of the Act,---

be such services as are received by a recipient located in India for use in relation to Business or Commerce."

9. A corporate guarantee is used when a corporation agrees to be held responsible for completing the duties and obligations of debtor to a lender, in case the debtor fails to comply with the terms of the debtor- lender contract. Whereas a bank guarantee is a promise from a bank that the liability of the debtor will be met in the event the debtor fails to favour his contractual obligations. Therefore, the nature of corporate guarantee as well as of bank guarantee is one and the same i.e. for facilitation of the lending facilities. .It was noticed that M/s Olam Agro India Ltd, Singapore, the parent company has executed corporate bank guarantee in favour of banks in India for facilitation of lending of funds to the appellant and in lieu of the said guarantee the appellant

paid 1 per cent of value of guarantee as commission to their parent company at Singapore by way of foreign exchange remittance and their parent company provided them debit notes on quarterly basis. The copies of the said debit notes clearly indicate the transactions with regard to lending facilities in India and therefore through Corporate Guarantee Commission the appellant are chargeable to Service Tax. And the commission paid was taxable under 'Business Auxiliary Service'. Merely because the name of the guarantee has been changed from 'Bank' to 'Corporate' it cannot be said that it won't fall under 'Business Auxiliary Service' as defined under Section 65 (105) of the Finance Act, 1994.

10. **Agency Commission:** - This commission has been paid by the appellant to Foreign Commission Agents towards procurement of export orders for the appellant for export of rice. The demand for Service Tax has been raised against the appellant on reverse charge basis under the 'Business Auxiliary Service'. The contention of the appellant is that they will be entitled to the benefit of the Notification No. 13/2003-ST dated 20/06/2003 (as amended). This notification exempts Service Tax payable on Commission Agent Services in relation to agricultural produce. The lower Authorities have not extended the benefit while taking the view that the committee rice is not covered under the said notification but in the case of Kohinoor (supra), the Tribunal has taken the view that commission paid for export of rice to Commission Agents will be entitled to benefit of the Notification, particularly in view of the Circular issue by the Board dated 26/05/2011. The observations of the Tribunal are reproduced below:-

"5. The next grievance of the appellant is that no service tax is payable on account of brokerage and commission and payment to the agents in foreign currency. The appellant has exported the rice during the period under consideration. For the purpose, the appellant had paid the commission in foreign currency to a foreign agent abroad. The department has brought that such activity to the service tax net.

6. After hearing both the sides, it appears that as per Board Circular No. 143/12/2011-S.T., dated 26-5-2011, it is clarified that;

Board Circular No. 143/12/2011-S.T., dated 26-5-2011

"3. Also where the commission agents stationed abroad provide business auxiliary service to promote the export of rice, said business auxiliary service is covered by Notification 13/2003-S.T. (as amended) because, the word 'rice' is mentioned under the explanation to the term 'agricultural produce', in the inclusive portion along with other items like cereals, pulses, etc."

Hence, the abovementioned services are not subjected to service tax as per the Board Circular (supra). Hence, we set-aside the impugned order in this regard and allow the claim of the appellant."

11. By following the decision of the Tribunal (supra) we set aside the demand for Service Tax on Agency Commission.

In view of the above discussions we upheld the demand of Service Tax on the Corporate Guarantee Commission but set aside the demand of Agency Commission.

12. In the result, appeals are partly allowed.

(Order pronounced in the open Court on 31/07/2018)

(Ajay Sharma)
Member (Judicial)

(V. Padmanabhan)
Member (Technical)

Rekha