IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH : KOLKATA

REGIONAL BENCH - COURT NO.2

Service Tax Appeal No.176 of 2011

(Arising out of Order-in-Original No.01-08/S.Tax/Commr/2011 dated 28.01.2011 passed by Commissioner of Central Excise & Service Tax, Jamshedpur.)

M/s. Tinplate Company of India Limited
(Golmuri, Jamshedpur-831003.)

...Appellant

VERSUS

Commissioner of Central Excise & Service Tax, Jamshedpur

.....Respondent

(143, New Baradwari, Sakchi, Jamshedpur-831001.)

WITH

(i) Service Tax Appeal No.177 of 2011 (M/s. Tinplate Company of India Limited); (ii) Service Tax Appeal No.178 of 2011 (M/s. Tinplate Company of India Limited); (iii) Service Tax Appeal No.179 of 2011 (M/s. Tinplate Company of India Limited); (iv) Service Tax Appeal No.180 of 2011 (M/s. Tinplate Company of India Limited); (v) Service Tax Appeal No.181 of 2011 (M/s. Tinplate Company of India Limited); (vi) Service Tax Appeal No.182 of 2011 (M/s. Tinplate Company of India Limited); (vii) Service Tax Appeal No.183 of 2011 (M/s. Tinplate Company of India Limited); (viii) Service Tax Appeal No.70330 of 2013 (M/s. Tinplate Company of India Limited); (ix) Service Tax Appeal No.70331 of 2013 (M/s. Tinplate Company of India Limited);

[(i) to (vii)] (Arising out of Order-in-Original No.01-08/S.Tax/Commr/2011 dated 28.01.2011 passed by Commissioner of Central Excise & Service Tax, Jamshedpur.)

[(viii) to (ix)] (Arising out of Order-in-Original No.01-02/S.Tax/Commr/2013 dated 15.01.2013 passed by Commissioner of Central Excise & Service Tax, Jamshedpur.)

APPEARANCE

Dr.Samir Chakraborty, Senior Advocate & Shri Abhijit Biswas, Advocate for the Appellant (s)
Shri T.Mondal, Authorized Representative for the Respondent (s)

CORAM: HON'BLE SHRI P. K.CHOUDHARY, MEMBER(JUDICIAL)
HON'BLE SHRI P.ANJANI KUMAR, MEMBER(TECHNICAL)

FINAL ORDER NO. 75001-75010/2021

DATE OF HEARING : 14 October 2020
DATE OF DECISION : 05 January 2021

P.K.CHOUDHARY :

These batch of appeals are against two adjudication orders bearing Nos. 01-8/S.Tax/Commr/2011 dated January 23, 2011 and 01-02/S.Tax/Commr/2013 dated January 15, 2013 both passed by the Commissioner of Central Excise & Service Tax, Jamshedpur. The periods involved are from 01.05.2006 to 31.01.2011 and from 01.02.2011 to 31.12.2011 respectively.

1.1 By the two orders the Commissioner has confirmed service tax demands of Rs.8,86,82,006.09 and Rs.2,37,88,670.00 respectively against the appellant, under the Proviso to Section 73(1) of the Finance Act, 1994 (in short, "the Act"), along with interest in terms of Section 75 of the Act. Penalties of Rs.9.00 crores and Rs. 2,37,88,670/- respectively under Section 78 of the Act and Rs. 5000/- and Rs. 10,000/- respectively under Section 77 of the Act have also been imposed upon the appellant. The first order adjudicated eight periodical show cause notices whereas the second order adjudicated two periodical show cause notices.

2. The issue involved in both the cases relate to leviability of service tax on the consignment agency services under the category of "clearing and forwarding agent service" alleged to have been rendered by the appellant to Tata Steel Limited (in short, "TSL").

3. The brief facts of the cases are:

(a) The appellant was engaged by TSL for carrying out the job of conversion of raw materials into finished goods on job work basis as per the provisions of the Central Excise Act,

1944 under an agreement entered into between them in this respect. For conversion of raw materials to finished goods the appellant was paid conversion charges as per the agreement. The agreement also included various other activities, including that of a consignment agent.

(b) The appellant also entered into an agreement with TSL on March 30, 1998, in addition to the conversion agreement, to act as a consignment agent for TSL. As per the said agreement the appellant was entitled to receive service charges @Rs.250.00/ Rs.275.00 per MT for various places in India.

(c) Under the conversion agency agreement the appellant manufactured and converted raw materials such as Hot Rolled Coils supplied by TSL, Photo Electrolytic Tin Plate/ Tin-free Steel/ Full Hard Coil Rolls/ Lacquered Sheets/Lacquered and Printed Sheets (hereinafter referred to as the "said goods") for TSL.

(d) The appellant also appointed various consignment agents across the country jointly with TSL under tripartite agreements entered into by the parties concerned.

(e) After manufacturing of the said goods the appellant sent the same to the said consignment agents in different parts of the country. The appellant paid handling charges to the said consignment agents for handlings TSL's said goods at the stockyards where they were sent @Rs. 275.00 per MT for Mumbai and Rs. 250.00 per MT for all other places in India. The said amount was added/included in the assessable value of the said goods cleared on which central

excise duty under the Central Excise Act were paid by the appellant.

(f) The consignment agents duly paid service tax on the said handling charges received by them from the appellant.

4. In all the 10 show cause notices it was alleged that the appellant had received consignment agency charges of Rs.250.00 and Rs. 275.00 respectively as per the agreement dated March 30, 1998 from TSL but had failed to discharge proper service tax on the same. On the said basis demands of service tax payable but not paid were made.

5. According to the appellant, however, although it had entered into a consignment agency agreement with TSL, this agreement was never acted upon by the parties; the appellant also did not receive any amount for acting as a consignment agent or towards providing any consignment agency service under the said consignment agency agreement and the said consignment agency agreement remained inoperative.

6. We have heard Dr. Samir Chakraborty, learned Senior Advocate along with Shri Abhijit Biswas, learned Advocate for the appellants and Shri T. Mondal, learned Authorized Representative for the Department through video conferencing and have perused the records of both the set of appeals.

7. It is submitted by Dr. Chakraborty on behalf of the appellant that :

(i) The issue involved in these appeals stands settled by the decision of this Bench of the Tribunal in the case of the appellant itself on the self same issue pertaining to separate demands involving a part of the same period involved herein, which arose in appeals preferred by the Revenue against orders of the

Commissioner of Central Excise (Appeals), Ranchi, being *ST Appeal Nos. 70999/13 and 71273/13 and CO 75253/15 (Commissioner of Central Excise & Service Tax, Jamshedpur Vs. Tinplate Company of India Ltd.)*.

(ii) In the said appeals involving the same facts, including the same agreements, the adjudicating authority confirmed demands of service tax against the appellant totalling Rs. 59,36,428/-, along with interest and had imposed penalties. Being aggrieved thereby the appellant preferred appeals before the Commissioner of Central Excise and Service Tax (Appeals), Ranchi. By Orders-in-Appeal Nos. 86/JSR/2013 dated April 16, 2013 and 150/JSR/2013 dated June 14, 2013 the Commissioner of Central Excise & Service Tax (Appeals), Ranchi allowed the appeals filed by the appellant and set aside the adjudication orders passed by the adjudicating authority. Being aggrieved thereby the Department preferred appeals before this Bench of the Tribunal.

(iii) By an Order No. FO/76346-76347/2018 dated March 13, 2018 this Bench of the Tribunaldismissed the appeals filed by the Revenue and confirmed the impugned orders of the Commissioner (Appeals).

(iv) The said order dated March 13, 2018 of the Tribunal has become final and binding, both the parties having accepted the same and no appeal(s) having been preferred by the Revenue before any higher Court against the said order.

(v) Hence, the instant appeals are also to be allowed, following the said order dated March 13, 2018 of this Tribunal and the impugned orders of the Commissioner of Central Excise & Service Tax are to be set aside.

8. Shri T.Mondal, learned Authorized Representative for the respondent Revenue justified the findings of the Commissioner in both the impugned orders.

9. On perusal of the records, including the agreements, we find that the appellant's activities were limited to conversion of the raw materials supplied by TSL into finished goods and to send the said finished goods of TSL to the clearing and forwarding agent/consignment agent, appointed by the appellant and TSL jointly, who were situated at various parts of the country.

10. We also find that although the appellant had entered into the consignment agency agreement with TSL this agreement was never acted upon by the parties. The appellant also did not receive any amount from TSL as and by way of consignment agent or towards providing any consignment agency service under the said consignment agency agreement. No evidence to the contrary is available from either the show cause notices or the impugned orders.

11. From the Order No. FO/76346-76347/2018 dated 13.03.2018 passed by this Bench in the case of the appellant itself, in S.T. Appeal Nos. 70999/13 & 71273/13 & C.O. 75253/15 (Commr. of Central Excise & Service Tax Vs. Tinplate Co. of India Ltd.), we find that exactly the same issue and the same agreements had come up for consideration in the two appeals filed by the Revenue against the two appellate orders passed by the Commissioner (Appeals), Ranchi. In paragraphs 7 and 8 of the said order it has been held as under:

> *"7. The Learned A.R. for the Revenue reiterates the Grounds of Appeal filed by the Revenue. The Learned A.R. submitted that the Assesseerendered the services to Tata Steel Limited as Consignment Agent as revealed from the Agreement. The Commissioner (Appeals) observed that the Assessee was converting the raw materials procured*

from TSL into finished products and supplied the same to TSL on payment of excise duty. It is further observed that the assessable value for payment of excise duty includes the freight and transportation charges from factory gate to the premises of Stockyard/Consignment Agent. The assessee contended that they never acted as consignment agent though there is an agreement for consignment agent. For the proper appreciation of the facts, the findings of the Commissioner (Appeals) are reproduced below:

> *'The contention of the appellant is that they are converting the raw material procured from TSL into finished product and supply the same to the stockyard/consignment agent of M/s TSL on payment of excise duty. The assessable value for payment of excise duty includes the freight and transportation charges from factory gate to the premises of stockyard/consignment agent. The contention continued that they never acted as consignment agent of TSL though there is an agreement by the title consignment agent but no such activity was carried by them. Whereas Ld. Adjudicator reasoned that consignment agency contract cast upon TCIL for making necessary arrangement of stock transfer of materials to various stockyards/consignment agent of TCIL appointed in accordance with advice of TSL for which remuneration @Rs. 250 and 275 per matric tone for different destination were provided by TSL. I find that the central excise duty is paid on finished product after converting the raw material received from TSL. The assessable value in this case includes the freight/transportation of finished goods upto the place of stockyards/consignment agent appointed with the advice of TSL. Few relevant invoices were produced by the appellant showing the said freight/transport charges having been included in the assessable value. Since the excise duty has been paid on the freight/transport of Rs.250/- or Rs. 275/- per matric tone, the service tax on such value/amount cannot be demanded. I also find that the title of this agreement is consignment agency agreement however no work of consignment agent as such has been carried by the appellant and whatever remuneration/charges were received on this*

> *account were added in the assessable value of the finished goods on which due excise duty was paid. Accordingly, the demand of service tax is not justified. Since demand is not there the question of interest and penalty do not arise.*

On perusal of the Grounds of Appeal we find that the Revenue had reproduced the portion of the Consignment Agent Agreement to establish that the Assessee has acted as Consignment Agent. We have perused the copy of the invoices placed by the Learned Counsel for the assessee in the compilation. It is seen that the Assessee paid the duty on the invoice value. We find that the Hon'ble Punjab & Haryana High Court in the case of Commissioner of Central Excise, Panchkulla Vs. Kulcip Medicines (P) Ltd., 2009 (14) STR 608 (P&H) while dealing with the taxability on clearing and forwarding agent service rejected the appeal filed by the Revenue. The relevant portion of the said decision is reproduced below:

"10. A perusal of the aforesaid Section shows that taxable service has been defined to mean any service provided or to be provided to a client by a 'clearing and forwarding agent in relation to clearing and forwarding operations in any manner'. If the clearing operations are separated from forwarding operations, the levy of tax would not be attracted if it only involves one of the two activities.

11. The question which falls for consideration is whether word 'and' used after the word 'clearing' but before the word 'forwarding' at two places in clause (j) be considered in a conjunctive sense or dis-injunctive sense. It appears to be fairly well settled that the context and intention of legislature are the guiding principles. In that regard reliance may be placed on the judgement of Hon'ble the Supreme Court in the case of Mazagaon Dock Ltd. V CIT (1958) 34 ITR 368. By necessary intendment the expression 'a clearing and forwarding agent in relation to clearing and forwarding operations, in any manner' contemplates only one person rendering service as 'clearing and forwarding agent' in relation to 'clearing and forwarding operations'. To say that if, one person has rendered service as 'forwarding agent'

without rendering any service as 'clearing agent' and he be deemed to have rendered both services would amount to replacing the conjunctive 'and' by a disjunctive which is not possible. The counsel for the revenue has not been able to bring on record any material to show the word 'and' should be construed as disjunctive. He has not shown any 'trade practice' which may lead to a necessary inference that service of one kind rendered by one is invariably considered to comprise both. No argument has been advanced before us by him to canvass that the legislature intention is discernible from the scheme of the statute or from any other relevant material. Therefore the word 'and' should be understood in a conjunctive sense. (See Maharaja Sir Pateshwari Prasad Singh v. State of U.P. (1963) 50 ITR 731). In these circumstances if we read the word 'and' as 'or' then it would amount to doing violence to the simple language used by Legislature which cannot be imputed ignorance of English language. In that regard we place reliance on the judgement of Hon'ble the Supreme Court rendered in the case of Inayat Ali Khan v. State of U.P. (1971) 2 SCC 31 (Para 5) and para 6 of the judgement of Hon'ble the Supreme Court rendered in the case of Ape Belliss India Ltd v. Union of India (2001) 132 ELT 8. The observations of their Lordship reads thus:

> *"6..... A plain reading of the Section (sic Tariff Public Notice) clearly shows, as contended by Mr. Bhatt, that for an alloy steel to be considered as stainless steel, it will have to satisfy two conditions i.e. The alloy steel should be known in the trade as stainless steel and further, it should contain 11% chromium as a component of the allow steel. This is clear from the use of the word "and". If the intention of the trade notice was to treat the two types of alloy steels as stainless steel, then it would have been made clear by using the word "of" instead of the word "and"."*

12. We are further of the view that the circulars issued by the Board are binding and meant for adoption for the purposes of bringing uniformity. In that regard reliance may be placed on the judgements of Hon'ble the Supreme Court in the cases of Ranadey Micronutrients

v. Collector of Central Excise, 1996 (87) ELT 19 (SC) and Paper Products Ltd. v. Commissioner of Central Excise, 1999 (112) ELT 765 (SC) = (1999) 7 SCC 84. If the aforesaid principle is applied to the facts of the present case there does not remain any doubt that the circular issued by the Board is to be considered as binding and cannot be deviated even by the department. On that account also the expression 'clearing and forwarding agent' have to be interpreted in the light of the circular.

13. The view taken by the Tribunal in M/s MahavirGenerics's case (supra) has been accepted by the revenue as no appeal has been filed. Moreover we are not able to persuade ourselves to accept the view taken by the larger Bench of the Tribunal in the case of Medpro Pharma Pvt. Ltd. (supra) which has been fascinated by musical notes of symphony as is evident from the following paras:

> *"31. We have heard both sides and perused the record. On a fresh look at the whole issue and after taking into account the various newfangled arguments and nascent lines of thinking, unwrapping before us, as discussed in the fore-going paragraphs, we find ourselves in a better position to appreciate the wisdom in the words of Jules Romains when he said "What I say below represents only conclusions with which I would identify myself, if I were obliged to stop thinking today". The underlying wisdom in these words has greatly encouraged us in this inquest to appreciate the emerging facts and scenario in a proper perspective. Crucial key-word the definition of taxable services, namely "C&F Operations" needs to be viewed afresh in this scenario. The whole "operations" involved in "C&F operations" now remind us of an orchestra, performing a western classical symphony. It reminds us of a connoisseur's experience of harmony in western classical music. While listening to Mahler's 9th symphony, one does not listen to an individual violin or a trumpet, but the harmony emanating from many different seemingly unrelated instruments. In the same way, a C&F Agent's functions consisting of seemingly*

unrelated tasks are well orchestrated. This view of ours is strengthened by various references including the Report of United Nations Economic Commission for Africa referred to by us in the preceding paragraphs all revealing in no uncertain terms that the freight forwarders are known variously as clearing agent, shipping forwarding agent etc. We are, therefore, of the view that even if one segment of activities is not demonstrated to be performed, it cannot be held that the appellants were not engaged in taxable service. Due to their orchestrated nature of work, such isolated activity can also be covered under "C&F Operations". Merely, because the bassoon was not played in one of the movements of a symphony, it does not cease to be otherwise a part of the orchestra. While forming this view, we have certainly not overlooked the fact that while music can be sometimes taxing, a tax can never be musical.

32. While arriving at this conclusion, we also go by the trade understanding based on sheer common sense, which is often uncommon. Because a buyer buys only rice and not wheat in a grocery shop, which claims to sell "wheat and rice", the shop cannot cease to be a shop selling "wheat and rice". In the same way, rendering only "forwarding" service cannot make the appellant ceases to be "Clearing and Forwarding Agent", so as to save him from the tax. Some customers may want only clearing operations, while some forwarding, and others both. The expression "clearing and forwarding operations" is a compendious expression of nature of services offered any of which will bring the service providers in the tax net of this category. Moreover, in the process of forwarding operations- clearance stages may arise such as at octroi posts or subsequent transits.

33. We, do agree that it is the context in which the word "and" is positioned, being sandwiched between the words

> *"clearing" and "forwarding" has to be looked into while interpreting the meaning. Like the legendary Trishanku, the word "and" is dangling between "clearing" and "forwarding"- neither divorcing from the Heavens, nor from the Earth. In such a positioning, it is not possible to segregate the holistic concept of 'clearing and forwarding" into divisible activities, either or both of which can be provided for answering the customers' needs."*

14. We have not been able to understand with utmost respect to the Tribunal as to what is 'Orchestrated nature of work' involved in the present transaction. The dealer in the present case as per the arrangements reached between the parties has to receive goods which are already got 'cleared' by the manufacturer. The dealer is to store those goods and forward to the buyer of the goods as per direction received. In that regard the findings of the Tribunal in the instant case is patently clear when it observed as under in para 6 :

> *"It is clear from the terms of the agreement that appellant herein does not attend to the clearing of the medicines manufactured by Cipla. Consignments of medicines are cleared from the factory by the manufacturer and delivered to the appellant at his premises. In this factual situation, it has to be held that there is no Clearing by the appellant and for that reason, the service rendered by the appellant does not satisfy the requirement of clearing and forwarding. We, therefore, are of the view that the demand is not sustainable. To the same effect is our earlier decision in the case of M/s Mahavir Generics"*

15. The example of 'wheat and rice' grocery shop is obviously wholly mis-appropriate and does not fit in the context. We are also not in agreement with the interpretation of word 'and' which has already been dilated upon by us.

8. After considering the decisions cited by the assessee and on perusal of the records we find that the Revenue had not disputed the fact that the assessee cleared the converted goods on payment of

central excise duty. It is claimed that the charges of the freight is included in the invoice value. Accordingly, we do not find any reason to interfere with the orders of the Commissioner (Appeals). The appeals filed by the Revenue are dismissed. Cross objection gets disposed off."

12. In as much the facts of the instant appeals and those involved and considered in the order dated 13.03.2018 of this Bench of the Tribunal are the same and involves the same parties, we are in agreement with the appellant's submission that the said order dated 13.03.2018 is also applicable to the instant appeals.

13. In the instant appeals also we find from the records that the Department has not disputed the fact that the appellant had cleared the converted goods on payment of central excise duty and that the charges for freight is included in the invoice value.

14. Hence following the said order dated 13.03.2018 of this Bench of the Tribunal and respectfully following the decision of the Hon'ble Punjab & Haryana High Court in *Commissioner of Central Excise Vs. Kulcip Medicines (P) Ltd., 2009 (14) STR 608 (P&H)* relied upon therein, we hold that both the impugned orders of the Commissioner are erroneous and unsustainable.

15. We therefore set aside the impugned orders passed by the Commissioner and allow the appeals, with consequential relief.

(Order pronounced in the open court on 05 January 2021.)

SD/

(P.K.CHOUDHARY)
MEMBER (JUDICIAL)

SD/

(P.ANJANI KUMAR)
MEMBER (TECHNICAL)

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