

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,  
WEST ZONAL BENCH : AHMEDABAD**

REGIONAL BENCH - COURT NO. 3

**SERVICE TAX Appeal No. 10583 of 2014-DB**

[Arising out of Order-in-Original/Appeal No VAD-EXCUS-001-APP-596-2013-14 dated 03.01.2014 passed by Commissioner of Central Excise, Customs and Service Tax-VADODARA-I]

**Enbee Education Centre Pvt Limited**

3rd Floor, B- Wing, Windsor Plaza,  
R.C. Dutt Road, Alkapuri, VADODARA, GUJARAT

**.... Appellant**

*VERSUS*

**Commissioner of Central Excise & ST, Vadodara-i**

1st Floor, Central Excise Building,  
Race Course Circle, Vadodara, Gujarat-390007

**.... Respondent**

**APPEARANCE :**

Shri Mahesh Raichandani & Shri Ansul Jain, Advocates for the Appellant  
Shri Rajesh K Agarwal, Superintendent (AR) for the Respondent

**CORAM: HON'BLE MR. RAMESH NAIR, MEMBER (JUDICIAL)  
HON'BLE MR. C.L. MAHAR, MEMBER (TECHNICAL)**

DATE OF HEARING : 04.07.2023

DATE OF DECISION : 03.11.2023

**FINAL ORDER NO. 12545/2023**

**RAMESH NAIR :**

The present appeal is directed against the Order-in-Appeal No. VAD-EXCUS-001-596-2013-14 dated 03.01.2014 passed by the Commissioner (Appeals) of Customs, Central Excise, and Service Tax, Vadodara.

2. Briefly stated facts of the case are that the Appellant is engaged in the business of providing services of 'Commercial Training or Coaching Services' as defined under Section 65 of the Finance Act. On the basis of information collected that the appellant was not paying service tax on the services received from service providers based outside India and who have not office in India, an enquiry was initiated against the Appellant. On scrutiny of the records it was observed that the appellant had received taxable services of Commission Agent under Business Auxiliary Service from service provider based outside India during the year 2006-07 to 2009-10 and had paid the commission to the service provider in foreign currency for the services

received. Accordingly, appellant was issued show cause notice dated 02.09.2011 proposing service tax demand of Rs. 45,94,496/- on 'Business Auxiliary Services' along with interest and penalties. In adjudication, the adjudicating authority vide order-in-original dated 28.03.2011 confirmed the demand along with interest, imposed penalty under Section 78; penalty under section 76; section 77(1)(a); penalty of Rs. 5000/- was imposed under Section 77(2) of the Finance Act 1944, and also a late fees of Rs. 2000 under Rule 7C of the Service tax Rules, 1994 . The appeal against the said Order-in-Original was filed by the Appellant which has been rejected vide impugned Order-In-Appeal dated 03.01.2014. Hence the present appeal.

3. Shri Ansal Jain Learned Advocate appearing for the appellant submits that the foreign subsidiary company of Appellant is not providing Business Auxiliary Services to the appellant. Subsidiary company of the appellant is acting as consignment cum clearing and forwarding agent. Payment made by the appellant to subsidiary company is shown in the books of account of the appellant as 'Commission on Sales (Export)'. The department seeks to tax this amount under the category of 'Business Auxiliary Services' alleging that subsidiary company is acting as Commission agent for the appellant. This allegation made by the department is clearly unsustainable and the activity undertaken by their subsidiary company is classifiable under clearing and forwarding agent service.

4. By relying the definition of 'consignment agent' and 'consignment' he further submits that consignment agent can act as an intermediary between the seller and the purchaser, by receiving the goods from the seller and transmitting the same to the purchaser. In the present case also, the subsidiary company as receiving the goods from the appellant on consignment basis and undertaking the clearing and forwarding activity in USA in order to transmit the same to the customers of the appellants, therefore, the activity undertaken by the appellant will be classified under clearing and forwarding agent service. Hence impugned order confirming demand under Business Auxiliary Services is liable to be set aside.

5. He also submits that there is a difference between the terms consignment agent and commission agent. This distinction is also clarified in

the show cause notice itself which is based on the board circular No. 59/8/2003-ST dated 20.06.2003. The said circular also supports the activity undertaken by the appellants is covered by the consignment agent and not commission agent. In the present case, the subsidiary company of the Appellant is not causing the sale of books sent by the appellant. The subsidiary company is merely clearing the goods in USA and forwarding the same to the customers of the appellant based on the directions given by the appellant, therefore, the activity undertaken by the appellant will be properly classifiable under clearing and forwarding agent's service. These facts are also evident from clause 2 of the agreement between appellant and subsidiary company in which it is mentioned that the books sold /shipped to subsidiary company is on consignment basis.

6. He also submits that the subsidiary company is not undertaking any marketing or promotional activity for sale of the books exported by the appellant. Thus the activity undertaken by the appellant will not be classified under the commission agent or business auxiliary services.

7. He placed reliance on the following judgment in support of argument:-

- (i) CCE, Bangalore vs. Mahaveer Genrics -2010(17)STR 225 (Kar.)
- (ii) Larsen and Toubro Ltd. Vs. CCE, Chennai -2006(3) STR (Tri. LB)
- (iii) CCE Jalandhar Vs. United Plastics – 2008(10) STR 229 (P&H)

8. Without prejudice, he also submits that 'clearing and forwarding' service fall under Rule 3(ii) of the Taxation of Services (Provided from outside India and Received In India) Rules, 2006. In the present case the entire activity of the clearing and forwarding is performed outside India. Therefore the activity undertaken by subsidiary company does not qualify as import of service by appellant and therefore is not liable to service tax in India. Thus, appellant are not liable to pay service tax under the category of 'Business Auxiliary Service'.

9. He also argued that the nomenclature of the consideration or the payment terms alone cannot decide the nature of the services provided which is a trite law. The contention of the revenue that the appellant have paid the commission on sales (based on Balance Sheet nomenclature)

therefore, acted as commission agent, is incorrect in law as well as on fact. He placed reliance on the following judgments.

- (i) Moped India Limited. -1986(23) ELT 8 (SC)
- (ii) Hindustan Gas & Industries Ltd. -1991(54) ELT 383.

10. He further submits that the show cause notice had been issued to the appellant on 02.09.2011. The period in dispute is April 2006 to March 2011. The extended period of limitation cannot be invoked in the present case as there was no suppression of facts with intent to evade payment of service tax. The Appellant have maintained regular books of accounts shown as the commission paid in the P&L account of the appellant. The appellant has shown the same in the income tax returns. The demand in the present case is based on the books of accounts maintained and provided during the course of investigation only. The Appellant were under bonafide belief that they were not liable to pay Service tax. He placed reliance on the following judgments:-

- (i) Continetal Foundation vs. CCE - 2007 (216) ELT 177 (SC)
- (ii) Padmini Products vs. CCE – 1989 (43) ELT 195 (SC)
- (iii) CCE Vs. Chemphar Drugs – 1989 (40) ELT 276 (SC)
- (iv) Anand Nishikawa Co. Limited vs. CCE 2005 (188) ELT 149
- (v) Pushpam Pharmaceuticals Company vs. CCE 1995 (78) ELT 401 (SC)
- (vi) Tata Iron and Steel Co. Limited vs. Union of India -1988 (35) ELT 605 (SC)

11. Shri R.K. Agarwal Learned Superintendent (AR) reiterates the findings in the impugned order.

12. We have carefully gone through the submissions made by both sides and perused the case record. We find the issue to be decided in the present case is whether the subsidiary company of appellant located in USA is acting as C&F Agent or as a Commission Agent and if it is a commission agent whether the service tax is payable on the commission received by them in view of the provisions of Section 66A of the Finance Act, 1994 read with Rule 2(1)(d)(iv) of Service Tax Rules, 1994. The case of the revenue is that Subsidiary Company of appellant at USA had taken the delivery of the goods

from the port of destination i.e from Port in USA and effected sale of the goods on behalf of the Appellant with some consideration. Therefore, the services received by the appellant i.e commission agent service' will classifiable under the category of 'Business Auxiliary Services' and are chargeable to Service tax.

13. We find that appellant are engaged in the business of export of educational books. The Appellant purchase the books from the publisher in India and export the same as per the requirement of their customers abroad. The Appellant had entered into a consignment agreement dated 01.01.2014 with its subsidiary the relevant clause of the said agreement provide as under:

a. Clause 1 of the said agreement provides the information about the parties to the agreement. It described the Appellant as sellers and subsidiary as Buyer.

b. Clause 2 of the said agreement provides for payment of instruments and terms.

Clause 2.1 provides that books sold/shipped to Subsidiary company are on consignment basis. Should the books remain unsold at the end of 360 days from the date of invoice they may be disposed abandon basis.

Clause 2.2 provides that Subsidiary company i.e Edge Exim Inc. will retain 15% commission of the ultimate sale price of the third parties for each shipment or part thereof and bank transfer the remaining 85% proceeds to its Indian Parent Company, Enbee Education Centre Pvt. Ltd. within 360 days of the invoice date.

Clause 3 provides for port of loading and destination. According to this clause, the port of loading is to be determined at the seller's choice and the port of destination shall be 'ASWP CIF BASIS ANY USA PORT'

Clause 4 provides the documentation details. This clause provides that following documents must be in English language and shall be sent directly to the buyer or to the buyer's bank within 21 working days from the bill of landing date.

- (i) 3/3 set of bill of lading (3 original and 3 copies)
- (ii) Certificate of Origin, issued by the chamber of commerce of the country of origin
- (iii) Signed commercial invoices in the name of buyer,
- (iv) Packing list of shipment

Clause 5 provides that the seller shall provide insurance at his sole expenses and responsibility.

Clause 6 provides for vessel discharge and terms of delivery.

Clause 6.4 Provide that all the import expenses on cargo at the port of destination are sole responsibility of the buyer. The Buyer guarantees it has authority to import the cargo at the destination port.

Clause 6.6 provides that the buyer is responsible for cargo discharge, including all charges incurred in supervision of the discharge.

Clause 7 provides for import facilities, documents, taxes and fees.

In view of above clause of the agreement we find that the books are exported by the appellant to the subsidiary company located in USA. The purchase orders are received from the customer directly by the appellant. Further, after the arrival of the said books at USA destination port, the subsidiary company will undertake the clearing activity of the said books from the customs authorities. The invoices to the customers are issued by the subsidiary company. Payment is also received by subsidiary company from the customers located in USA. As per the terms of the agreement,, the subsidiary company retains a 15% commission of the ultimate sale price to the third parties for each shipment or part thereof and bank transfer the reaming 85% proceeds to the appellant. The appellant are booking the said expenses under the head 'selling expenses' as 'commission on sales (export).

14. We notice that in the present matter the demand for Service Tax under the category of "Business Auxiliary Services" has been made on the ground that Appellant is acting as commission agent. The revenue alleges that service tax ought to be paid on such expenses under the Business Auxiliary Service under reverse charge mechanism. However, we observe that definition of 'Business Auxiliary Services' contained numerous sub-heads and it was necessary for Revenue to point out under which head of the said definition the demand was raised. It is important to classify the activity under the specific sub-clause before confirming the demand. We find that the same has not been done in the present matter. In the absence of the specification of the exact sub-clause under which the demand was raised the said demand cannot be sustained. In this regard judgment in the case of *United Telecoms Ltd. v. Commissioner of Service Tax* - [2011 \(22\) S.T.R. 571](#) (supra), *Sharma Travels* - [2017 \(52\) S.T.R. 272](#) (supra) and *Balaji Enterprises v. C.Cx. & S.T.* - [2020 \(33\) G.S.T.L. 97](#) (Tri. - Del.) (supra)

support their case. The said decisions are squarely applicable to the facts of the present case.

15. We find that department alleged that appellant are receiving the services of 'Commission Agent' from subsidiary Company. Whereas as per the appellant subsidiary company is acting as consignment cum clearing and forwarding agent. However there is difference between the terms 'consignment agent' and 'commission agent'. This distinction is also clarified in Board Circular No. 59/8/2003-ST dated 20.06.2003. The relevant portion is reproduced as below:

*"It may be appreciated that the nature of service provided by a Consignment agent is different than that provided by a commission agent. A consignment agent's job is to receive the goods from the principal and dispatch them on the directions of the principal, whereas a commission agent's job is to cause sale/purchase on behalf of another person. Thus, the essential difference is that a commission agent sells or purchases on behalf of the principal while consignment agent receives and dispatches the goods on behalf of a principal. It is possible that a person may be a consignment agent as well as a commission agent. Such a person would already be covered in the category of Clearing and Forwarding agent and would be liable to pay service tax in that category. In other words, the present exemption is available only to such commission agent who is not a consignment agent."*

As it is clear from above, there is difference between commission agent and consignment agent. Consignment agent actually deals with the goods, when he receives the same from the principal and dispatches them on the direction of the principal, to the ultimate customer. Consignment agent may not be even associated with the procurement of orders or does not directly deal with the sale purchase. He is acting on behalf of the principal and deals with the movement of the goods as per the direction of the principal. On the other hand commission agent is only concerned with the procurement of orders for which he may receive the fixed amount along with some percentage amount.

16. As per the agreement entered between the appellant and subsidiary company, we also find that subsidiary company is merely clearing the goods in USA and forwarding the same to the Customers of the Appellant. This fact also evident from the clause 2 of the agreement between appellant and subsidiary company in which it is mentioned that the books sold/shipped to subsidiary company is on 'consignment basis'. Clause 6 of the said

agreement provides that all import expenses on cargo at the port of destination, are sole responsibility of the buyer and he is responsible for cargo discharge, including all charges incurred in supervision of the discharge. Clause 7 also provides that the buyer bears the sole responsibility of securing all permits, licenses or any other documents required by the government of the importing nation. Thus the Subsidiary company is also undertaking the activity of clearing and forwarding agent. No clause of the agreement provides that subsidiary company also undertaking any marketing or promotion activity for the sale of the books exported by the appellant. In such a scenario, the subsidiary company who is the service provider had to be held as consignment agent rather than commission agent.

17. Since we decide the matter on merits, we do not incline to deal with the issues of Limitation, and others argued by the appellant and the same are kept open.

18. In this factual and legal scenario, the conclusion of the Learned Adjudicating authority that the appellant are liable to pay service tax under the taxable service 'Business Auxiliary Services' cannot be sustained. Accordingly, we set aside the impugned order and allow the appeal with consequential relief, if any, in accordance with law.

*(Pronounced in the open court on 03.11.2023)*

**(Ramesh Nair)**  
**Member (Judicial)**

**(C L Mahar)**  
**Member (Technical)**

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