CASE NO.:
Appeal (civil) 1713 of 2007

PETITIONER:
M/s. Super Poly Fabriks Ltd

RESPONDENT:
Commissioner of Central Excise, Punjab

DATE OF JUDGMENT: 24/04/2008

BENCH:
S.B. Sinha & V.S. Sirpurkar

JUDGMENT:
J U D G M E N T
REPORTABLE

CIVIL APPEAL NO.1713 OF 2007

S.B. Sinha, J.

1. Short question arising in the appeal is whether in the facts and circumstances of this case, the petitioner renders any services so as to incur the liability to pay service tax.

2. The factual background leading to the said question may briefly be noticed.
Appellants herein entered into an agreement with Gas Authority of India Ltd. (GAIL) titled 'Consignment Stockistship Agreement'.

3. Inter alia, on the premise as to why they should not be asked to pay 'services taxes', a show cause notice was issued on the appellant on 20.10.2003. Cause was shown by it saying that no service is being provided by it as a clearing and forwarding agent of GAIL. An order in original was passed by the Deputy Commissioner, Central Excise on 17.3.2004 directing payment of service tax with interest as also penalties as demanded under the show cause notice.
4. An appeal preferred thereagainst by the appellant was dismissed by the appellate authority by a judgment and order dated 15.2.2005. A further appeal preferred by the appellant before the Central Excise and Sales Tax Appellate Tribunal has also been dismissed.
5. Mr. P.K. Sahu, learned counsel appearing on behalf of the appellant, drawing our attention to the impugned order, would submit that from a bare perusal thereof, it would be evident that the appellant merely accepts offer on behalf of its principal and its activities being not extended to the job of a clearing and forwarding agent, the impugned order cannot be sustained.
It was urged that the authorities under the Act in determining the liabilities of the appellant had proceeded only on the premise that a processing agent would be a clearing and forwarding agent as was held in the case of Prabhat Zarda Factor (Pvt.) Ltd. v. CCE, Patna [2002 (145) ELT 222] which having subsequently been overruled by the larger Bench of the Tribunal, the impugned judgment cannot be sustained.
6. Mr. Gopal Subramanium, learned Additional Solicitor General appearing on behalf of the Respondent, on the other hand, would contend that a document must be read as a whole. So read, it would appear that the appellant not only receives orders on behalf of GAIL but also gets the insurance cover for the goods and sale of the goods which would clearly come within the purview of clearing and forwarding activities. Such activities on the part of the appellant, it was urged, being not incidental to the main purpose for which it was appointed as a stockist agent, the impugned judgment cannot be faulted.
7. Before we embark upon the rival contentions of the parties, we may

notice the definition of 'clearing and forwarding agent' as also 'business auxiliary service' as contained in Section 65(19) and Section 65(25) of the Act, which read as under :

"65(19) "business auxiliary service" means any service in relation to\027

(i) promotion or marketing or sale of goods produced or provided by or belonging to the client; or
(ii) promotion or marketing of service provided by the client; or
(iii) any customer care service provided on behalf of the client; or
(iv) procurement of goods or services, which are inputs for the client; or
(v) production or processing of goods for, or on behalf of, the client;

(vi) provision of service on behalf of the client; or
(vii) a service incidental or auxiliary to any activity specified in sub-clauses (i) to (vi), such as billing, issue or collection or recovery of cheques, payments, maintenance of accounts and remittance, inventory management, evaluation or development of prospective customer or vendor, public relation services, management or supervision,
and includes services as a commission agent, but does not include any information technology service and any activity that amounts to "manufacture" within the meaning of clause (f) of section 2 of the Central Excise Act, 1944(1 of 1944).

(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;

8. There cannot be any doubt whatsoever that a document has to be read as a whole. The purport and object with which the parties thereto entered into a contract ought to be ascertained only from the terms and conditions thereof. Neither the nomenclature of the document nor any particular activity undertaken by the parties to the contract would be decisive.

9. In V. Lakshmanan v. B.R. Mangalagiri and Ors. [1995 Supp.(2) SCC 33] , the Supreme Court in regard to interpretation of the clause stipulating the payment of money as advance and not earnest money provided for in the Sale Deed opined :

"The nomenclature or label given in the agreement as advance is not cither decisive or immutable."

10. In Assam Small Scale Ind. Dev. Corp. Ltd. and Ors. v. J.D. Pharmaceuticals and Anr. [2005 (8) SCALE 298 = (2005) 13 SCC 19], on the decisiveness of the nomenclature of the agreement entered into between the state corporation and small scale industrial unit, opined:

"The expressions 'principal' and 'agent' used in a document are not decisive. The nature of

transaction is required to be determined on the basis of the substance there and not by the nomenclature used. Documents are to be construed having regard to the contexts thereof wherefor 'labels' may not be of much relevance."

11. For the purpose of ascertaining as to whether the appellant in effect and substance was a clearing and forwarding agent or it was merely accepting orders for and on behalf of GAIL, the same must be ascertained from the terms of the agreement itself.

12. Section 68 of the Act envisages every person providing taxable service to any person shall pay the service tax at the rate specified in Section 66 thereof in such manner and within such period as may be prescribed. Section 70 of the Act provides for furnishing of returns to the Superintendent of the Central Excise by every person liable to pay service tax.

13. Rule 7 of the Finance Rules, 1994 provides for submitting a half-yearly return by the assessee in the prescribed form. Section 77 provides for penalty for contravention of any provision for which no other penalty is provided.

14. Unfortunately, the appellant did not appear before the assessing authority. He also did not appear before the appellate authority. The appellate authority in its order dated 15.2.2005, inter alia, noticed :

"During the appeal no one appeared for personal hearing fixed on 12.7.2004 and 20.7.2004. Therefore, I am going to decide the case on the basis of evidence available on records. I have carefully gone through the facts and records of the case and observe that the issue involved is non-payment of Service Tax by the appellant. The appellant has contended that levying of Service Tax on amount received as commission for procuring orders for another person is not legal. Under Section 65(25) "C&F Agent" has been defined as any person who is engaged in the providing any service, directly or indirectly connected with clearing and forwarding operation in any manner to any other person and "C&F agent" includes consignment agent. The appellant has themselves admitted that they were procuring orders for M/s. GAIL. Since during the relevant period appellant was providing services to M/s. GAIL so service tax has been correctly demanded from them."

15. The High Court, however, relying on clauses 4, 5, 11, 14 and 15 of the Agreement opined :

"The agent were not at all concerned with the handling or movement of goods unlike in the present case where the consignment agent is required to lift the goods from the factory of the principal and distribute the same either directly to the buyers or bring them to his godown for future sale and delivery. From the agreement under our scanner, it also appears that the liability for delays in delivery in transit through the air, road or water ways solely rested on the appellant. There is a more explicit indication of the fact that the appellant was required by his agency terms to lift the goods for delivery and arrange for distributing them to the buyers, by making necessary transit arrangements. Therefore, the activities of lifting, receiving, stocking and delivering the goods to the buyers, clearly make a clear chain of activities,

involving clearing and forwarding operations."

16. The High Court also, while distinguishing the judgment of the larger Bench of the Tribunal, in Larsen & Tourbo Ltd. v. Commissioner of Central Excise, Chennai [(2006) 3 STR 321 (T-LB)] and Medpro Pharma Pvt. Ltd. v. CCE, Chennai [(2006) 3 STR 355 (T-LB), opined :
"In this context, a plain reading of Section 65(105)(j), would reveal that 'Taxable Service' should mean any service provided to a client by a clearing and forwarding agent including a consignment agent (Emphasis supplied) in relation to clearing and forwarding operations, in any manner. In the present case, the appellant is admittedly a consignment stockist, who is actively involved in "Clearing & Forwarding Operation" by taking responsibilities for the movement of goods right from the factory/warehouse of the principal upto the stage of delivery to the buyers in one or many ways. There is, therefore, no doubt, that the appellant is fully covered within the tax framework, being a "Clearing & Forwarding Agent" engaged in relation to 'Clearing & Forwarding Operations'."

17. The agreement is titled as "Consignment Stockistship Agreement". Appellant has various jobs to perform thereunder. It does not arrange for any transport. It, however, provides for godowns. It gets the insurance company to conduct a survey. It has to furnish dates as regards stock in its custody. It has to furnish guarantee to recover full value of the stocks which it holds for the company or sell on behalf of the company or for such a sum as would be determined by the company in its discretion. The company, however, has to indicate the recommended list prices for the sale of the product whereto the appellant is entitled to at octroi duty, terminal tax, sales tax or other local taxes or levies in forced in the local area and recover the same from their customers and maintain proper accounts for the same. Clauses 13 and 14 of the said agreement empower to sell the goods as also to issue Form 'F' to the Company.

It is also responsible for collection of tax.

18. What is necessary for determining the question is as to whether the purported job of the appellant as a clearing and forwarding agent was incidental to its main activity, namely, getting orders from the clients and selling the products to various customers of the company or not. The notice to show cause contained the following elements:
"(i) Service charges of Rs.500/- PMT shall be paid by M/s GAIL to the consignment stockist (i.e. noticee) for the quantity sold by them.
(ii) Rs.400/- PMT shall be paid to the consignment stockist for getting/booking orders for the product of M/s. GAIL.
(iii) Rs.100/- PMT shall be paid to the consignment stockist for release/clearance of product locally from their stock on the orders booked by M/s. GAIL directly."

19. The period in question is from 1.9.1999 to 31.7.2002. The notice to show cause had referred only to paragraph 20.1 and 20.3 of the agreement. Its activities are said to be sale and/or getting booking orders for the product.

20. Whether in the aforementioned situation, the appellant has incurred any liability to pay service tax or not has not been determined. Its principal activities, as indicated hereinbefore, have not been determined.

21. It is true that the appellant has not appeared before the assessing authority or the appellate authority.

However, keeping this in view, we are of the opinion, that the interest of justice would be subserved if the matter is remitted to the assessing authority with liberty to the parties to adduce such evidence as may be found necessary for determining the issue(s).

Appellant, however, shall not take any adjournment before the assessing authority and shall render all cooperation with it in the matter of determination of the question.

22. The impugned orders are set aside including the order of penalty with the aforementioned directions. Appeal is allowed to the aforementioned extent with no orders as to costs.