

2013 (1) ECS (150) (Tri-Mum)

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL, WEST ZONAL BENCH AT MUMBAI

COURT No. II

Provincial Life Style Retail Services, Nagpur
Vs.
Commissioner of Central Excise, Nagpur

APPEAL No.ST/ 113/ 10

(Arising out of Order-in-Review No.09/2009/ST/Review dated 13/11/2009 passed by
Commissioner of Central Excise, Nagpur)

Provincial Life Style Retail Services
Nagpur

Appellant

Vs.
Commissioner of Central Excise,
Nagpur

Respondent

Appearance:

Shri.Ricab Chand, Advocate for appellant
Shri.V.R.Kulkarni, Addl. Comm. (AR), for respondent

CORAM:

Hon'ble Mr. P.R. Chandrasekharan, Member (Technical)

Date of Hearing : 19/10/2012

Date of Decision:19/10/2012

ORDER NO A/56/13/SMB/C-IV

“In the present case, the appellant is not merely acting as a Commission Agent but does something much more than that i .e., designing, managing and operating a showroom, receiving goods on stock on transfer basis, undertaking sales promotion activities and collecting the sale proceeds on behalf of the principal. These activities in my view do not come within the purview of "Commission agent" as defined in the notification No.13/2003.”
[Para 5.1]

Per: P. R. Chandrasekharan

1. The appeal is directed against order-in-review No.09/2009/ST/Review dated 13/11/2009 passed by the Commissioner of Central Excise, Nagpur.
2. The appellant, M/s. Provincial Life Style Retail Services, Nagpur, owns a premium showroom and are registered under the service tax in the category of "Business Auxiliary Service" and has been discharging service tax liability since November 2005. Scrutiny of the records of the appellant revealed that the appellant had entered into a Management Agent agreement dated 23/09/2005 with M/s. Titan Industries Ltd. (TANISHQ). As per the agreement, it has been made a Principal to Agent basis where the appellant shall display, stock and sell the jewellery products to customers through the showroom managed and operated by the agent on a stock transfer basis. The appellant agent is required to ensure that the showrooms are bested signed, maintained and operated and shall be responsible for the upkeep and maintenance of the showrooms. The appellant agent is also required to insure the premises, furniture and fittings and allied services to the satisfaction of the principal. The agent is further required to stock, display and sell the products in the showroom in the name of Titan Industries Ltd. and the cash memos issued for sale shall also carry the name of Titan Industries Ltd. The money collected as receipt of sale have to be deposited in the designated bank account of the principal on the same day or on the following day of sale and any failure to do so will attract 24% interest per annum. Upon the services rendered, the appellant receives a consideration in the form of "management fee", which is based on the turn over of sales and for different slabs of sales turn over, percentage of the management fee also varies. During the period 01/07/2003 to 31/03/2004 the appellant received consideration amounting to Rs.27,53,522/- on which the service tax liability worked out to Rs.2,20,282/-; for the period 01/04/2004 to 08/07/2004 the appellant received. a consideration of Rs.9,09,258/- on which the service tax liability amounted to Rs.72,741/-. However, the appellant did not discharge the service tax liability. Accordingly, a show-cause notice dated 28/12/2007 was issued to the appellant demanding service tax under the category of "Business Auxiliary Services" amounting to Rs.2,93,023/- under the provisions of Section 73 of the Finance Act, 1994 along with interest thereon and also proposing to impose penalty under Section 76, 77 & 78 of the said Finance Act. The case was adjudicated by the Deputy Commissioner of Central Excise, who vide order-in-original No.119/STC/2007-08 dated 31/03/2008 dropped the duty demand and proceedings on the ground that during the impugned period the appellant was eligible for exemption under Notification No.13/2003-ST dated 20/06/2003. The said order of the Deputy Commissioner was reviewed by the Commissioner, who found that the order was not legal, proper or correct and accordingly, issued a notice dated 03/07/2009 to the appellant under Section 84 (2) of the Finance Act, 1994 asking the appellant as to why benefit of Notification No.13/2003-ST should not be denied and why the service tax amount indicated in the notice should not be demanded along with interest thereon and why penalty should not be imposed on them. The case was adjudicated vide the impugned order and the Ld. Commissioner held that the appellant is not eligible for

benefit of Notification No.13/2003 and confirmed the service tax of Rs.2,93,023/- along with interest thereon and also imposed penalties under Section 76, 77 & 78 of the Finance Act, 1994. Hence, the appellant is before me.

3. The Ld. Counsel for the appellant submits that against the order of the Deputy Commissioner dated 31/03/2008 the department had preferred an appeal before the Commissioner (Appeals) vide appeal dated 17/07/2008 and the same was withdrawn vide application dated 24/10/2008. Thereafter, notice for reviewing the order of the Deputy Commissioner dated 03/07/2009 was issued and the impugned order has been passed. The order of the Ld. Commissioner in reviewing the lower adjudicating authority is erroneous, arbitrary and against the settled principles of law. Once the appeal before the Commissioner (Appeals) is withdrawn, the order of the lower adjudicating authority has become final and therefore, no proceedings can be initiated and he relies on the judgement of this Tribunal in the case of Bhagwati Electrical Industries Vs. CC, Hyderabad reported in 2005 (189) ELT 467. The Ld. Counsel further pleads that under Notification No.13/2003, the service rendered by a "Commission Agent" is exempt from levy of service tax and as per the definition provided in the said notification, the Commission agent means "any person who acts on behalf of another person and causes sale or purchase of goods or provision or receipt of services, for a consideration, and includes any person who while acting on behalf of another person (i) deals with the goods or services or documents of title to such goods. or services; or (ii) collects payment of sale price of such goods or services; or (iii) guarantees collection or payment for such goods or services; or (iv) undertakes any activities relating to such sale or purchase of such goods or services". The activity undertaken by the appellant is squarely covered by notification and therefore, they are rightly entitled for the benefit of the exemption and therefore the impugned order is bad in law. He also relies on their decision of the Tribunal in the case of CCE, Ahmedabad Vs. Somani Exports, 2009 (13) STR 562, in support of the above contention and also on the decision of the Tribunal in the case of Premier Enterprises Vs. CCE, Hyderabad, 2009 (16) STR (158) (Tri-Bang), CCE, Allahabad Vs. Chandan Chemicals, 2007 (7) STR.
4. The Addl. Commissioner (AR) appearing for the Revenue on the other hand strongly opposes the contention of the appellant. He further submits that the activity undertaken by the appellant in the instant case is not that of a mere Commission Agent but it is an activity of operation and management of a showroom on behalf of the principal and in terms of agreement entered into, the appellant is receiving a management fee and therefore, he pleads that the order of the adjudicating authority is correct and needs to be sustained.
5. I have carefully considered the rival submissions.
 - 5.1 I have perused the Management Agent agreement entered into by the appellant with the principal M/s.Titan Industries Ltd. In terms of the agreement, the appellant is required to

display, stock and sell jewellery products to the customers through showrooms managed and operated by the agent on stock transfer basis. The design, maintenance and operation of the showrooms has to be undertaken as per the directions of the principal and the insurance cover for the showroom has to be provided by the agent. The agent, subject to approval by the principal, can also appoint any number of additional agents, franchisees, dealers, assignees, etc. There is also condition that the agent shall manage and operate or deal in the showroom only the products supplied by the principal company and shall not deal with any other products in the showroom except with the prior written consent of the principal. Even the bills raised for the sale of the products should be in the principal's name. All the expenses in running the showroom such as wages, salary, employee payments, etc. have to be borne by the agent. In consideration for these services rendered, the agent is entitled to receive a "management fee" based on the turn over achieved by him on a slab basis. From the tenor of the agreement, it is absolutely clear that the appellant is not a mere "commission agent" as envisaged in the Notification No.13/2003. As per the definition of Commission agent given in the explanation to the notification, Commission agent means "a person who causes sale or purchase of goods on behalf of another person for a consideration which is based on quantum of sale and purchase of goods". The case laws relied upon by the appellant in the case of Premier Enterprises, Chandan Chemicals and Somani Exports cited supra are distinguishable on facts. In those cases there was no condition relating to operation and maintenance of the showroom or restriction regarding dealing in other products. Further, there was no condition stipulating that even receipts/ cash memos issued to the buyers should be in the principal's name and sales tax registration of the principal should be indicated. In the present case, the appellant is not merely acting as a Commission Agent but does something much more than that i.e., designing, managing and operating a showroom, receiving goods on stock on transfer basis, undertaking sales promotion activities and collecting the sale proceeds on behalf of the principal. These activities in my view do not come within the purview of "Commission agent" as defined in the notification No.13/2003. Therefore, I do not find any infirmity in the order of the Commissioner in holding that the appellant is not eligible for the benefit of notification No.13/2003.

- 5.2 As regards the other contention that initially an appeal was filed before the Commissioner (Appeals), which was withdrawn subsequently and thereafter the order was taken up in review, there is no restriction in the law in doing so. Once the appeal before the Commissioner (Appeals) is withdrawn, the Commissioner is free to initiate review proceedings in terms of Section 84. Such a course of action cannot be faulted so long as it is done within the time stipulated in the said section. In the instant case, the review action undertaken by the Commissioner is within the time limit prescribed.

6. In view of the foregoing, I do not find any merit in the appeal and the same is dismissed as devoid of merits.

(Operative part pronounced in Court)