

2023:BHC-OS:8969-DB



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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

CENTRAL EXCISE APPEAL No. 148 OF 2018

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Venkateshwara Hatcheries Private Limited)

Venkateshwara House, S.No. 114/A/2,)

Pune-Sinhagad Road, Pune 411 030)....Appellant

Versus

The Commissioner of Central Excise,)

Pune III, 41A, ICE House, Sassoon Road,)

Pune – 411 001)...Respondent

Mr.Jitendra Motwani i/b. For Economic Laws Practice for the
Appellant.

Mr. Ram H. Ochani a/w. Mr. Karan Adik for the Respondent.

CORAM: G.S. KULKARNI &
RAJESH S. PATIL, JJ.

RESERVED ON 15 JUNE, 2023
PRONOUNCED ON 28 AUGUST 2023

JUDGMENT [PER RAJESH S. PATIL, J.]

1. This Appeal is filed under Section 83 of the Finance
Act, 1994 read with Section 35G of the Central Excise Act, 1944,

challenging the concurrent findings recorded by Order No. A/93256-93257/16/STB dated 21 October, 2016 (for short referred as “Main Order”) and Order No. M/87288/17/STB dated 5 May, 2017, arising out of application for Rectification of Mistake (for short referred as “ROM”) passed by the Customs, Excise and Service Tax Appellate Tribunal, West Zonal Bench, Mumbai (for short referred as “CESTAT”).

2. The appeal is being considered on following Questions of law:-

"1. Whether the Tribunal was right in passing the impugned order beyond the allegations made in the show cause notice both on merits and limitations?

2. Whether the Tribunal was right in dismissing the Rectification of Mistake Application in cursory manner without discussing various judgments cited by the Appellant which are squarely applicable to the facts of the present case and without considering written submission filed post hearing?

3. Whether the Tribunal was correct in not considering the decision of the coordinate bench in the case of Chahabria Marketing Ltd. V. Commissioner of Service Tax, Mumbai reported as 2016(43) STR 93 which holds that exemption under Notification No. 13/2003-ST dated 20.06.2003 is available to all services provided under Business Auxiliary Service?

4. Whether the Tribunal was correct in restricting the scope of exemption under Notification No. 13/2003-ST dated 20.06.2003 to the sub-category of promotion and marketing of "Business Auxiliary Services" and not the entirety of "Business Auxiliary Services"?

5. Whether the Tribunal was correct in holding that services in the nature of "veterinary services" and "Technical Testing services" will fall under the taxable category of "Business Auxiliary Services" when at the relevant point of time the testing services on animals were specifically excluded from the definition of "Technical Testing services".

3. We have heard the parties finally.

FACTUAL MATRIX

4. Appellant is engaged in business of production and marketing of chicks and other related activities on behalf of its clients/group companies. Appellant has been providing services as a Commission Agent to M/s. Venco Research & Breeding Farm Pvt. Ltd (for short 'Venco') and M/s. Venkateshwar Research & Breeding Farms Pvt. Ltd. (for short 'VRB') in the nature of promotion and marketing service, veterinary service, laboratory analysis and testing service. Commission for the aforesaid services is charged as per the total sales made by Venco and VRB.

5. The Excise Department directed Appellant to pay service tax on commission received for testing and veterinary services, under the taxing entry of 'Business auxiliary services' rendered since 1 July, 2003, on the basis that the said activities/services are covered by customer care services provided on behalf of the client. Accordingly, the Central Excise

Department on 15 April, 2009 issued a Show Cause Notice, demanding Service Tax of Rs.89,38,978/- along with interest and penalty, from the Appellant. The Appellant, by its letter dated 10 June, 2009 replied to the Show Cause Notice giving its explanation to the Show Cause Notice.

6. On 23 August 2011, the Commissioner of Central Excise, Pune-III, heard the parties and by an Order-in-Original dated 31 October, 2011, the demand was confirmed, along with interest, however, no penalty was imposed as per Section 80 of Finance Act, 1994.

7. Appellant being aggrieved by the Order-in-Original preferred an appeal before the CESTAT, being Appeal No.ST/75/12. So also the Respondent/Commissioner of Central Excise and Service Tax, Pune III filed an Appeal under Section 86 of the Finance Act with the Appellate Tribunal of CESTAT, being Appeal No. ST/45/12 as penalty was not imposed.

8. Both the Appeals were heard by CESTAT and by an

order dated 21 October, 2016, the CESTAT confirmed the demand, limiting to the quantum of service provided to customers of Venco/VRB along with penalty imposed under section 78 and no penalty was imposed under section 76 of the Finance Act 1994.

9. Appellant being aggrieved by the Order dated 21 October, 2016 passed by the CESTAT preferred R.O.M. Application under Section 74 of the Finance Act 1994 being Application No. ST/ROM/92261/17, on such application on 20 April, 2017, hearing was held before the CESTAT. By its order dated 5 May, 2017, passed by the CESTAT, the ROM was disposed of confirming the demand in respect of services provided to customers of Venco/VRB. Penalty imposed under Section 78 was upheld and no penalty was imposed under Section 76.

10. Being dissatisfied with the Order passed by CESTAT on the ROM and the Order-in-Original passed by the Commissioner, Central Excise Pune-III, the Appellant has filed the present Central Excise Appeal under Section 83 of the Finance Act 1994 r/w Section 35 G of Central Excise Act.

11. The primary contention as raised by the Appellant is to the effect that the Order-in-Original to the extent it confirms the Service Tax demand on the Appellant limited to the quantum of services provided to customers of Venco/VRB, under the taxable category of business auxiliary services along with interest is illegal, without any basis, without jurisdiction and bad in law. It is contended that the findings of the Tribunal are legally as well as factually incorrect in as much as no service tax was payable on sales commission received towards rendering of veterinary services and laboratory testing and analysis services. Tribunal has erred in holding that the benefit of Section 80 of the Finance Act is incorrect.

Submissions of Parties

12. Mr. Jitendra Motwani, learned counsel for the Appellant submitted that the Appellant is engaged in promoting the sales for its clients and had received payments on commission basis on a fixed percentage of the sales volume. The Appellant had charged certain percentage of sales value for Veterinary Services and Pathological Laboratory Testing of the Chicks. [Such service as involved are only “Business Auxiliary Services” and

nothing else.] The Veterinary Services and Laboratory Testing Services are subsidiary services and are fully tied with the main service of promoting sales. The fact is clear that the payment for these services is on the basis of fixed percentage of sales value and there are no separate payments for these services. It is submitted that prior to 9 July, 2004, the services of commission agent were exempted from service tax and the Appellant was not paying any service tax however from 9 July, 2004 the Appellant has been paying Service Tax regularly under the category “Business Auxiliary Services”. The fact that the Appellant took registration and started paying tax with effect from 9 July, 2004 clearly demonstrates that it had no intention to evade tax. Therefore in the absence of any malafides, there is no justification for invoking the extended period for imposing any penalty under section 78 of the Finance Act 1994.

12.1. To buttress his submission Mr.Motwani also placed reliance upon certain authorities, few of them are as follows:-

- i. *Commissioner of Central Excise, Nagpur V. N.P. Earth Movers Pvt Ltd.* reported in 2018 (19) GSTL 462 (Bom)
- ii. *Electropneumatics & Hydraulics (1) PLtd. V. Commissioner of Central Excise* reported in 2014 (309) ELT 408
- iii. *Mahindra & Mahindra Ltd. V. Union of India* reported in 2019 (367) ELT 609

- iv. *Padmini Products v. Collector of Central Excise* – reported in 1989 (43) E.L.T. 195 (S.C.)
- v. *Chahabria Marketing Ltd. V. Commissioner of Service Tax*, Mumbai reported in 2016 (43) S.T.R. 193
- vi. *Fujifilm India Pvt Ltd. V. Commissioner of Customs (Import) Nhava Sheva* reported in 2017 (349) ELT 203 (SC)
- vii. *Commissioner of Central Excise, Ludhiana V. Dr. La Path Lab (P) Ltd.* reported in 2007 (8) STR 337

12.2. Mr. Motwani further submitted that in view of the law as laid down by the Supreme Court and the High Courts is to the effect that Notification no.13/2003 exemption applies to all Business Auxiliary Services, provided by a ‘Commission Agent’, he prayed that the impugned orders be set aside and Appeal be allowed with cost.

13. On the other hand, Mr. Ram Ochani with Mr. Karan Adik, learned Advocates for the Respondent submitted that Appellant has wrongly claimed exemption under Notification No.13/2003 for the period from July 2003 to September 2004 in relation to Veterinary Services and Testing and Analysis Services. It is submitted that the Authorities cited on behalf of the Appellant would not assist the Appellant. It is submitted that there are concurrent findings recorded in the Order-in-Original by the CESTAT, as also by the CESTAT in rejecting the ROM dated 5 May, 2017. It is hence submitted that the Appeal does not give

rise to any substantial Questions of Law hence it should be dismissed.

Analysis and Conclusion

14. We have heard the learned Counsel for the parties, we have also perused the records.

15. In the present Excise Appeal, Five Questions of Law have been formulated.

16. In so far as the First Question of Law is concerned namely, “*Whether the Tribunal was right in passing the impugned order beyond the allegations made in the show cause notice both on merits and limitations?*” It is the appellant’s case that it is engaged in the business of production of Chicks and their marketing and other related activities on behalf of its client/group companies. Respondents issued Show Cause Notice dated 15 April 2009, invoking the extended period of limitation of 5 years under Proviso to Section 73(1) of the Finance Act 1994. Show Cause Notice, dated 15 April 2009, issued for the period from 1 July 2003 to September 2004 called upon the Appellant/Noticee why

it is not liable to pay Service Tax amounting to Rs.89,38,978/- for services provided to its clients Venco and VRB, falling under the category of “Veterinary Services” and “Laboratory Analysis and Testing Services”.

16.1. Appellant got itself registered with the Service Tax Cell, Pune-III, and started paying Service Tax regularly under the category “Business Auxiliary Services” with effect from 9 July 2004. According to Appellant, prior to 9 July, 2004, the services of Veterinary and Laboratory Analysis provided as commission agent were exempted from Service Tax. Appellant submitted that the Show Cause Notice, is barred by limitation, as it is issued after the statutory period of one year. The extended period of 5 years is not attracted for issuance of Show Cause Notice.

16.2. Appellant relied upon the Judgment of Supreme Court in the case of Padmini Products (Supra), which held that mere failure or negligence on the part of the producer or manufacturer either not to take out a licence or not to pay duty in case where there was scope for doubt as to whether licence was required to be taken out or where there was scope for doubt

whether goods were dutiable or not, would not attract the extended period. Paragraph No. 8 of the judgment reads as under:-

“8. Shri V. Lakshmikumaran, learned Counsel for the appellant drew our attention to the observations of this Court in Collector of Central Excise, Hyderabad v. M/s Chemphar Drugs and Liniments, Hyderabad - 1989 (40) ELT 276 (Beyond 1080 (2) SCC 127 where at page 131 of the report, this court observed that in order to sustain an order of the Tribunal beyond a period of six months and up to a period of 5 years in view of the proviso sub-section (1) of Section 11-A of the Act, it had to be established that the duty of excise had not been levied or paid or short-levied or short-paid, or erroneously refunded by reasons of either fraud or collusion or willful mis-statement or suppression of facts or contravention of any provision of the Act or Rules made there under, with intent to evade payment of duty. It was observed by this Court that something positive other than mere inaction or failure on the part of the manufacturer or producer or conscious or deliberate withholding of information when the manufacturer knew otherwise, is required before it is saddled with any liability beyond the period of six months had to be established. Whether in a particular set of facts and circumstances there was any fraud or collusion or willful mis-statement or suppression or contravention of any provision of any Act, is a question of fact depending upon the facts and circumstances of a particular case. The Tribunal, however, had held contrary to the contention of the appellants. The Tribunal noted that dhoop sticks are different products from agarbaties even though they belonged to the same category and the Tribunal was of the view that these were to be treated differently. Therefore, the clarification given in the context of the agarbaties could not be applicable to dhoop sticks etc., and the Tribunal came to the conclusion that inasmuch as the appellant had manufactured the goods without informing the Central Excise authorities and had been removing these without payment of duty, these would have to be taken to attract the mischief of the provisions of rule 9(2) and the longer period of limitation was available. But the Tribunal reduced the penalty. Counsel for the appellants contended before us that in view of the trade notices which were referred to by the Tribunal, there is scope for believing that agarbaties were entitled to exemption and if that is so, then there is enough scope for believing that there was no need of taking out a licence under rule 174 of the said Rules and also that there was no need of paying duty at the time of removal of dhoop sticks, etc. Counsel further submitted that in any event apart from the fact that no licence had been taken and for which no licence was required because the whole duty was exempt in view of Notification No. 111/78, referred to hereinbefore, and in view of the fact that there was scope for believing that it was exempt under Schedule annexed to the first notification, i.e., 55/75, being handicrafts, the appellants could not be held to be guilty of the fact that excise duty had not been paid or short-levied or short-paid or

erroneously refunded because of either any fraud or collusion or wilful misstatement or suppression of facts or contravention of any provision of the Act or Rules made there under. These ingredients postulate a positive act. Failure to pay duty or take out a licence is not necessarily due to fraud or collusion or wilful misstatement or suppression of facts or contravention of any provision of the Act. Suppression of facts is not failure to disclose the legal consequences of a certain provision. Shri Ganguly, appearing for the revenue, contended before us that the appellants should have taken out a licence under rule 174 of the said Rules because all the goods were not handicrafts and as such were not exempted under Notification No. 55/75 and therefore, the appellants were obliged to take out a licence. The failure to take out the licence and thereafter to take the goods out of the factory gate without payment of duty was itself sufficient, according to Shri Ganguly, to infer that the appellants came within the mischief of Section 11-A of the Act. We are unable to accept this position canvassed on behalf of the revenue. As mentioned hereinbefore, mere failure or negligence on the part of the producer or manufacturer either not to take out a licence in case where there was scope for doubt as to whether licence was required to be taken out or where there was scope for doubt whether goods were dutiable or not, would not attract Section 11-A of the Act.

[Emphasis Supplied]

In the present proceeding Show Cause Notice dated 15 April, 2009, was issued for the period of 1 July, 2003 to September, 2004. Thus, the Judgment of Padmini Products squarely applies to the facts of the present proceedings. In our opinion the Respondent failed to prove that there was suppression on the part of Appellants as during the period from July 2003 to September 2004, the Appellant had claimed exemption under the Notification No.13/2003. Hence in our view, in the present proceedings, the extended period of limitation as per Section 73(1)

proviso could not have been invoked and the demand vide Show Cause Notice dated 15 April 2009, for the period of 1 July 2003 to September 2004 was barred by limitation.

17. In so far as the Second Question of Law is concerned, namely, “*Whether the Hon'ble Tribunal was right in dismissing the Rectification of Mistake Application in cursory manner without discussing various judgments cited by the Appellant which are squarely applicable to the facts of the present case and without considering written submission filed post hearing?*”

17.1. The appellant has submitted that the ROM does not take into consideration the ratio laid down by various Judgments cited by the Appellants before the Appellate Tribunal. There is no discussion on the ratio and/or the principle of law as therein, laid down in the authorities cited applicable to the facts of the present proceedings.

17.2. The Supreme Court in Shukla Brothers (Supra) held that non-recording of reasons could lead to dual

infirmities; Firstly, it may cause prejudice to the affected party and secondly more particularly, it would hamper proper administration of justice. These principles are not only applicable to administrative or executive actions, but they apply with equal force and in fact, with a greater degree of precision to judicial pronouncements. Paragraph No. 12 of the Judgment reads as under:-

12. At the cost of repetition, we may notice, that this Court has consistently taken the view that recording of reasons is an essential feature of dispensation of justice. A litigant who approaches the Court with any grievance in accordance with law is entitled to know the reasons for grant or rejection of his prayer. Reasons are the soul of orders. Non-recording of reasons could lead to dual infirmities; firstly, it may cause prejudice to the affected party and secondly, more particularly, hamper the proper administration of justice. These principles are not only applicable to administrative or executive actions, but they apply with equal force and, in fact, with a greater degree of precision to judicial pronouncements. A judgment without reasons causes prejudice to the person against whom it is pronounced, as that litigant is unable to know the ground which weighed with the Court in rejecting his claim and also causes impediments in his taking adequate and appropriate grounds before the higher Court in the event of challenge to that judgment. Now, we may refer to certain judgments of this Court as well as of the High Courts which have taken this view.

17.3. A Division Bench of this Court in Electropneumatics (Supra) held that minimum expectation from tribunal was complete application of mind to controversy dealing with submissions canvassed orally and in

writing and by reasoned order whether to uphold or reject them. The proceedings were remanded back to the tribunal so as grant to the assessee on opportunity to argue its case completely. It was observed that it was not possible to ascertain from tribunal's order as to which of contentions have been dealt with and considered. Paragraph 8 of the said judgment reads as under:-

“8. To our mind, the Tribunal was required to consider the issues raised in the appeal in-depth and render a complete finding. If a particular issue was pressed or was given up that should be indicated in the order of the Tribunal. We would expect the Tribunal, which is manned by both judicial and technical experts, to be aware of the seriousness of the adjudication and not take up the assignment lightly and casually. There is no specific target which has to be achieved nor could the Tribunal be expected to decide particular number of appeals during a calendar year. Therefore, undue haste is not at all called for. That results in miscarriage of justice and in a given case would result in vital issues of both sides being concluded in most unsatisfactory manner. We would expect the Tribunal to guide the adjudicating authorities so that they would properly adjudicate the cases with reasoned orders and after considering the evidence on record. It is this duty of the Tribunal which has been repeatedly emphasized and to be performed to the best of its ability.”

17.4 Taking into consideration the above principles of law as applicable to the facts of the present case, after going through the impugned Judgment in ROM, in our opinion, the Second Question of Law, needs to be answered in favour of Appellant and

against the Revenue, as in the order passed on the ROM the CESTAT has not recorded any findings on the position in law as canvassed by the petitioner which had a material bearing on the orders passed by the tribunal.

18. In so far as the Third Question of Law is concerned, namely, “*Whether the Tribunal was correct in not considering the decision of the coordinate bench in the case of Chahabria Marketing Ltd. V. Commissioner of Service Tax, Mumbai reported as 2016(43) STR 93 which holds that exemption under Notification No. 13/2003-ST dated 20.06.2003 is available to all services provided under Business Auxiliary Service?*”

18.1. In Chahabria Marketing (Supra) decided by the CESTAT Mumbai it was held that the benefit of exemption was available to all the business auxiliary Services provided by a commission Agent. Paragraph 6.1 of the judgment reads as under:-

6.1 In the impugned order the Commissioner has denied the benefit of exemption on the ground that the activities performed by the appellant were much wider than that of a 'commission agent as defined in the Notification. He has observed that though the commission was fixed with reference to the quantity of goods actually sold, the activities of the appellant were not

confined to sale only but covered various other services starting from arranging the production of goods by engaging bottlers/distillers upto collection of sale proceeds. The Commissioner proceeds on the premise that the benefit of the exemption is available to a 'commission agent' who provides services 'only' in respect of sale or purchase of goods. In our view, this is an incorrect reading of the Notification as the exemption under this Notification applies to all Business auxiliary services provided by a 'commission agent, and not merely to the services of selling or purchasing goods on behalf of the client. No doubt a commission agent as defined under this Notification is a person who provides service in relation to purchase or sale of goods, this is only for defining the eligibility criterion and is relevant only for determining whether or not an assessee claiming the benefit of this Notification is a 'commission agent' or not. Once it is held that the assessee is a 'commission agent' by virtue of being engaged in the activity of causing sale or purchase for a consideration which is linked to the quantum of sale or purchase, the benefit of this Notification will cover all business auxiliary services rendered by such a 'commission agent'. The activities which are covered under the head 'Business auxiliary services are the following :-

“(19) Business auxiliary service means any service in relation to -

- (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 of goods on behalf of the client; or
- (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)".

[Emphasis supplied]

18.2 One of the learned Member (Judicial) who was part of the Bench of the CESTAT which decided Chahabria Marketing,

was also member of the Bench, in present proceedings. Chahabria Marketing (Supra) was decided by the Mumbai Tribunal on 6 January 2016, and in the present proceedings, Tribunal decided the Appeals on 21 October 2016.

18.3 The Supreme Court in Fujifilm (Supra) held that judicial discipline requires that Tribunal follows decision of a Co-ordinate Bench. Paragraph Nos. 4 to 9 of the Judgment read as under:-

“4. There was an order dated 20-2-2013 of the same Tribunal in the case of M/s. Jindal Photo India Pvt. Ltd. v. Commissioner of Customs (Import), Nahva Sheva' [Order No. 12/1237/2013/CST/C-I in Appeal No. C/415/2012-Mum] [2014 (300) E.L.T. 568 (Tribunal)] holding that Imaging Plates and IP Cassettes to be classifiable under Chapter 90 CTH 9018 90 99 and, therefore, entitled to the benefit of Notification No. 21/2002, dated 1-3-2002. The classification of FCR Capsula was also decided in Jindal Photo India Pvt. Ltd. (supra) in a manner adverse to the assessee. No issue on the said classification was raised by the assessee in the present case wherein the issue of classification of Imaging Plates, IP Cassettes was alone contested.

5. In the impugned order, the learned Tribunal did not accept the decision of the coordinate Bench in Jindal Photo India Pvt. Ltd (supra) and took the view that the two items were more appropriately classifiable under Chapter 37 CTH 3701 10.

6. As benefit under the Notification No. 21/2002-Cus., dated 1-3-2002 was allowable in respect of Imaging Plates and IP Cassettes even if the same is to be classified under Chapter 37, the learned Tribunal, by the impugned order, held that the said two items will be eligible to the benefit of Notification No. 21/2002, dated 1-3-2002.

7. Notwithstanding the above, as the appellant-assessee would be liable for payment of additional duty of customs by virtue of the notification under Serial No. 357B, the present appeal has been filed.

8. If the learned Tribunal was not in a position to accept the correctness of the decision of a coordinate Bench of Jindal Photo India Pvt. Ltd. (supra), the correct course of action would have been to seek the views of a Larger Bench. Judicial discipline demanded the quasi judicial authority i.e. the learned Tribunal to act in such a manner. That apart, the learned Tribunal seems to have found a case which was not even urged by any of the parties before it, namely, that Imaging Plates and IP Cassettes merit classification under Chapter 37.

9. *In the aforesaid circumstances, we are of the view that the order of the learned Tribunal should be interfered with and the matter be remitted for a decision de novo keeping in mind what has been stated above. We order accordingly.”*

18.4 In N.P. Earth (Supra) a Division Bench of this Court held that same bench of the CESTAT having taken a contrary view on same issue thus shows non-application of mind. In such circumstances the order of the Tribunal was set aside with a direction to decide the proceedings afresh. Paragraphs 9 to 12 of the Judgment read as under:-

9. *In order dated 3-10-2013, passed in Appeal Nos. ST/98/2008 and ST/165/2008 [2016 (46) S.T.R. 544 (Tri. - Mum.)] assailed in Central Excise Appeal No. 11/2015, consideration by CESTAT in paragraph No. 7 shows mention of Section 76 or 77 or Section 78 of the Finance Act and CESTAT has found that notwithstanding anything in these sections, because of Section 80, if the Assessee can prove that there was a reasonable cause for his failure, the penalty need not be imposed. However, except for mentioning this provision, data about reasonable cause which then introduced Assessee not to pay service tax, does not figure anywhere. In paragraph No. 8 of the said order, composition of Assessee as such has been commented upon and its perusal reveals that a lenient view has been taken. In this situation, because of different view in the matter, we find substance in submission of Shri Bhattad, Learned Counsel that this order dated 3-10-2013 also shows non-application of mind.*

10. *In so far as the order which took converse view and assailed by the Assessee in other matters are concerned, there the consideration ends with a finding on nature of contract. The CESTAT holds that contract of Assessee with WCL is for a site formation. There the provisions of Section 80 of Finance Act or then Circular dated 12-11-2007 are totally omitted from consideration. The said order, therefore, also show non-application of mind.*

11. *In Central Excise Appeal Nos. 4/2015 and 7/2012, apart from the question of law in Central Excise Appeal No.11/2014, about confusion about nature of activity, i.e. cargo handling or transporter and its impact, the department has raised one more question and that question reads as under :*

of limitation under Section 73(1) of the Finance Act, 1994? "Whether the CESTAT in facts and circumstances of the case is justified in reversing the invocation of extended period".

12. Again, after hearing Learned Counsel for the parties, we find that the very confusion claimed by Assessee is being relied upon by the department to seek extended period of limitation. Perusal of the impugned order reveals that in paragraph No. 6.8, CESTAT has referred to problems faced at infancy stage of implementation and confusion then prevailing. Benefit thereof is given to the Assessee and is declined to department. This common order dated 23-11-2011 in ST Appeal Nos. 166-167 of 2008, is questioned in Central Excise Appeal Nos. 7/2012 and 4/2015. In other appeals, impact of "confusion" about nature of activity undertaken is already directed to be looked into and matters are remanded back. If claim of assessee, that service tax is paid on transportation charges is incorrect, effect thereof or then entitlement of department to invoke "extended period" due to may be a material consideration. This also appears to have escaped attention. This view, therefore, again shows non-application of mind. The impact of clarification circular dated 12-11-2007 has not been considered at all. As the other matters need a relook, it is in the interest of justice that this view is also given a fresh thought by CESTAT.

18.5 A Division Bench of this Court in Mahindra & Mahindra (Supra) held that decisions of a coordinate bench of tribunal in petitioners own case on identical facts was not taken into consideration. No reasons were given for non-applicability of said decisions. Paragraph No. 5 of the judgment reads as under:-

5. In this case, it is clear from the impugned order of the Tribunal that the petitioners had placed reliance upon the two orders dated 20th September, 2016 (supra) and 21st March, 2017 (supra) passed by Co-ordinate Benches of the Tribunal in the petitioner-assessee's own case on identical facts. However, the impugned order dated 11th May, 2018 after referring to the reliance placed by the petitioner on the aforesaid two decisions, completely ignores the same. It makes no attempt to even distinguish the facts therein with the facts which arose in the present case. The Tribunal in the impugned order seems to do away with its obligation to be bound by the decisions of its Coordinate Benches by observing that "the issue of revenue

neutrality is to be decided on the basis of facts of each case and the judgments cited by the appellant cannot be made applicable automatically". Once the litigant before the Tribunal placed reliance upon the decision of a Coordinate Bench of the Tribunal, then a speaking order would require the Tribunal to consider those decisions and state how and why the aforesaid decisions are not applicable to the facts of the present case. In the absence of this exercise is being done, the impugned order itself suffer from being a non-speaking order. Moreover, we find that where Authorities like the Tribunal functioning within the State of Maharashtra exercise jurisdiction in breach of principles of natural justice or in flagrant disregard of the law of precedents by not referring the issue to the President for constituting a Larger Bench of Tribunal, if it did not agree with the earlier decisions of the Tribunal then we would certainly exercise our writ jurisdiction. Merely stating that the earlier judgments would not be applicable, without more, would not meet the requirement of an order with reasons.

[Emphasis supplied]

18.6 On behalf of the Revenue, we are not pointed out any reason as to why the decision in Chahabria Marketing (Supra) as referred by the CESTAT in the notification in question, would not be applicable in the appellant's case so as to grant the benefit of the exemption for the period covered by the Show Cause Notice. The tribunal thus has erred in not considering that the issue was covered by the decision of Chahabria Marketing (Supra). For such reasons, we answer the Third Question of Law in favour of Appellant, and hold that the exemption benefits as per Notification No.13/2003, is available to the services provided under "Business Auxiliary Services" for the period in question.

19. In so far as the Fourth Question of Law is concerned, namely, *“Whether the Tribunal was correct in restricting the scope of exemption under Notification No. 13/2003-ST dated 20.06.2003 to the sub-category of promotion and marketing of "Business Auxiliary Services" and not the entirety of "Business Auxiliary Services"?”*

19.1 The Appellant has claimed exemption under Notification No.13/2003 dated 20 June 2003. It would be appropriate to note the provisions of Notification no.13/2003 (as applicable during the period in dispute), the relevant extract of which is reproduced hereinbelow for ready reference:-

*“Business auxiliary services provided by commission agents –
Exempted in exercise of the powers conferred by section 93 of the Finance Act, 1994 (32 of 1994), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts the business auxiliary services provided by a commission agent from the service tax leviable thereon under sub-section (2) of section 66 of the said Act.*

Explanation.- For the purposes of this 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 the quantum of such sale or purchase.”

[Emphasis supplied]

19.2 The Appellant has been paying Service Tax on the “promotion and marketing services” under the taxable

category of “Business Auxiliary Service” as defined under Section 65(105)(zzb) of the Act, with effect from 9 July, 2004.

Section 65(105) “taxable service” means any service provided or to be provided -

“(a) ...

.

.

(zzb) to a client, by any person in relation to business auxiliary service.”

19.3. The Revenue has not disputed that Veterinary Services and Testing and Analysis services falls under the definition of “Business Auxiliary Services”. The dispute is about whether the Veterinary services and Testing and Analysis services rendered by the Appellant would satisfy the criteria of ‘Commission Agent’. In other words whether such services amount to sale or purchase of goods on behalf of Venco/VRB for a consideration which is based on quantum of such sale or purchase. They certainly do not.

19.4 The notification in question clearly exempts the business auxiliary services provided by a commission agent

and such commission agent should cause sale or purchase of goods, on behalf of another person for a consideration which is based on the quantum of such sale or purchase.

19.5 Therefore in view of interpretation of the notification once it is established that the Appellant is a commission agent of Venco/VRB, any service provided to them which falls under the definition of business auxillary services will be exempt from Service Tax prior to 9 July, 2004. Therefore the Appellant is entitled to the benefit of the said notification no.13/2003 during the period in dispute and therefore the demand is unsustainable.

19.6 The Supreme Court in Federal Bank (Supra) held that Section 65(12) of the Act covers all charging services rendered by banks and hence by express provisions in the same very section, cash management services stood excluded from the purview of service tax. On account of such exclusion the authorities cannot levy service tax by indirect method of

charging the same services under the head “business auxiliary service”. The Paragraphs 11 & 12 of the Judgment read as under:-

“11. In that view of the matter, the High Court held that Clause (12) of Section 65 covers all charging services rendered by the Banks. The High Court is further of the view that when cash management services stood excluded from the purview of service tax at the hands of the Bank until 31-5-2007, the authorities cannot levy service tax on an activity which is essentially cash management service, by taking aid of other general charging heads, such as business auxiliary service.

12. Having considered the various provisions in the Act, we are in agreement with the views expressed by the High Court even for a further reason that Section 65A of the Act, while dealing with classification of taxable services, has clarified in sub-section (2) that when for any reason, a taxable service is, prima facie, classifiable under two or more sub-clauses of clause (105) of Section 65, classification shall be effected as follows :

(a) the sub-clause which provides the most specific description shall be preferred to sub-clauses providing a more general description;

(b) composite services consisting of a combination of different services which cannot be classified in the manner specified in clause (a), shall be classified as if they consisted of a service which gives them their essential character, insofar as this criterion is applicable;

(c) when a service cannot be classified in the manner specified in clause (a) or clause (b), it shall be classified under the sub-clause which occurs first among the sub-clauses which equally merit consideration.”

19.7 Prior to July 9, 2004, the Appellant was eligible for exemption under Notification No.13/2003 dated 20 June, 2003 (“Notification No.13/2003”). In terms of the said Notification, for a period up to 9 July, 2004, business auxiliary services provided by the commission agent who caused sales and purchase of goods on behalf of another client was exempt from Service Tax. Hence,

the promotion and marketing services provided by Appellant was liable to Service Tax only with effect from 9 July, 2004, post which the Appellant has been paying Service Tax.

19.8 We are therefore of a view that Tribunal erred in restricting the scope of exemption under Notification No.13/2003 to promotion and marketing of “Business Auxiliary Services”. The benefits of notification applies to entire “Business Auxiliary Service”. Hence, the Fourth Question of law is answered in favour of Appellant.

20. In so far as the Fifth Question of Law is concerned, namely, *“Whether the Tribunal was correct in holding that services in the nature of “veterinary services” and “Technical Testing services” will fall under the taxable category of “Business Auxiliary Services” when at the relevant point of time the testing services on animals were specifically excluded from the definition of “Technical Testing services”.*”

20.1 The Appellant claims that it was raising invoices, for its commission on Venco and VRB based on the total sales made by

Venco and VRB. According to Appellant, Services relating to veterinary services and laboratory analysis and testing services provided by the Appellant were incidental to the main service of promotion and marketing service and the commission agent service provided by the Appellant to Venco and VRB. With Effect from July 9, 2004, the appellant voluntarily obtained Service tax registration under the category of business auxiliary service, and started paying Service tax on the entire commission received by it from Venco and VRB for providing such services. The Service tax was paid by the Appellant under the category of commission agents and the same has been accepted by the Department. This clearly showed that veterinary services and laboratory analysis and testing services provided by the Appellant as a commission agent, was a part of the service of promotion and marketing.

20.2 Appellant has submitted that the veterinary service provided to its client formed part and parcel of promotion activity services and in terms of the key words of the Notification No. 13/2003 i.e. "Business Auxiliary Service" provided by a commission agent', they were clearly eligible for exemption. It is not in dispute that the Appellant is a commission agent and it is

also not in dispute that the service of aforesaid customer care was given in consideration which is linked to the quantum of sale.

20.3 “Technical testing and analysis” is defined in Section 65(106) as under:

“any service in relation to physical, chemical, biological or any other scientific testing or analysis of goods or material or material or information technology software or any immovable property, but does not include any testing or analysis service provided in relation to human beings or animals;

Explanation: For the removal of doubts, it is hereby declared that for the purpose of this clause, (“technical testing and analysis” includes testing and analysis undertaken for the purpose of clinical testing of drugs and formulations; but does not include testing or analysis for the purpose of determination of the nature of diseased condition, identification of a disease, prevention of any disease or disorder in human beings or animals.”

20.4 Commission agent defined under Notification No. 13/2003 is a person who provides service in relation to purchase or sale of goods, this is only for defining the eligibility criteria. Once it is held that the assessee is a “Commission Agent” by virtue of being engaged in the activity of causing sale or purchase for a consideration which is linked to the quantum of sale or purchase, the benefit of this Notification will cover all business auxiliary services rendered by such “commission agent”.

20.5 In our view, if the main service as Commission agent of providing service of promotion and marketing is exempted, the incidental services in the nature of laboratory testing, analysis and veterinary services ought to be exempted as well. There cannot be a situation where the main service is exempt and all other services in relation to the same are excluded. Appellant carries out various laboratory analysis and tests in respect of the chicks and the services provided by them are in relation to the brooding, growing and laying of birds which includes routine diagnostic services, specialized laboratory examinations, analysis of feed and feed ingredients and water related tests.

20.6 The Appellant also relies on the definition of "animal" to support its contention that the products in question are duly excluded from the definition of technical testing and analysis as provided in the explanation to Section 65(106).

20.7 The definition of animal as provided in Oxford Advanced Learners Dictionary is as follows:

"any living thing that is not a plant or a human",

So also, Black Law Dictionary, defines “animal” as:-

“Any living creature other than a human being”.

In the present proceedings the issue is whether Veterinary Services and Pathological laboratory Testing of chicks, will fall into ‘Business Auxiliary Services’, therefore, Sub-section (106) of Section 65, cannot be read so as to exclude ‘chicks’. We are thus of the opinion that sub-section (106) of Section 65, would include poultry (chicks) also. Therefore, chicks being animals are specifically carved out of the ambit of Service tax in relation to technical testing and laboratory and analysis services.

20.8 Services of testing and analysis in relation to animals are clearly excluded from the technical testing and analysis service as defined under Section 65(106) of the Finance Act, and therefore there will be no liability for payment of Service tax on them.

20.9 A Division Bench of the Punjab & Haryana High Court in Dr. Lal Path (Supra) held that the expression ‘Technical Testing and Analysis’ does not include any testing or analysis service provided in relation to human being or

animals. The Paragraphs 7 and 8 of the judgment reads as under:-

7. The case of the assessee-respondent appears to be covered by the exception postulated by sub-Section (106) of Section 65, which defines the expression 'technical testing and analysis'. The provision is reproduced hereunder for facility of reference -

"technical testing and analysis" means any service in relation to physical, chemical, biological or any other scientific testing or analysis of goods or material or any immovable property, but does not include any testing or analysis service provided in relation to human beings or animals;

[Explanation: For the removal of doubts, it is hereby declared that for the purposes of this clause, "technical testing and analysis" includes testing and analysis undertaken for the purpose of clinical testing of drugs and formulations; but does not include testing or analysis for the purpose of determination of the nature of diseased condition, identification of a disease, prevention of any disease or disorder in human beings or animals;]

8. A perusal of the afore-mentioned provision makes it clear that the expression 'technical testing and analysis' does not include any testing or analysis service provided in relation to human being or animals. The explanation goes to the extent of excluding from the afore-mentioned definition, a testing or analysis for the purposes of determination of the nature of diseased condition, identification of a disease, prevention of any disease or disorder in human beings or animals. Such being the statutory provision, we do not entertain any doubt that merely because any incidental service is rendered by the assessee-respondent like putting across or dropping of the name of the principal company, it would become part of the definition of 'Business Auxiliary Service' within the meaning of Section 65 (19) (il) of the Act. The view taken by the Tribunal is unassailable and deserves to be upheld.

20.10 The Supreme Court in A. V. Fernandez vs. The State of Kerala reported in AIR 1957 SC 657 held as follows:-

"5. Tax can be charged only if the activity sought to be taxed falls squarely within the taxing entry a tax cannot be imposed by presumption, inference or conjecture, but must be imposed only as per the specific language of the taxing entry; each word used in a taxing provision must be given effect to."

20.11 We therefore answer Fifth Question of law in favour of Appellant to hold that at relevant time the services in the nature of 'Veterinary Services' and 'Technical and Laboratory Testing Services' did not fall under taxable category of Business Auxiliary Services.

21. The Supreme Court of India in the case of Pratibha Processors vs. Union of India [1996 (88) ELT 12 (SC)] has held that the "interest" payable under Section 61(1)(2) of the Act is a mere "accessory" of the principal and if the principal is not recoverable/payable, so is the interest on it. This is a basic principle flowing from the language of Section 61(1)(2) of the Act. The principal amount herein is the amount of duty payable on clearance of goods. When such principal amount is nil because of the exemption, a fortiori, interest payable is also nil. Thus, the interest is necessarily linked to the duty payable. The interest provided under Section 61(2) has no independent or separate existence. When the goods are wholly exempted from the payment of duty on removal from the warehouse, one cannot be saddled with the liability to pay interest on a non-existing duty.

Payment of interest under Section 61(2) is solely dependent upon

the eligibility or factual liability to pay the principal amount, i.e., the duty on the warehoused goods at the time of delivery. At that time, the principal amount (duty) is not payable due to exemption. So, there is no occasion or basis to levy any interest either. The Appellant hence would also be not liable to pay interest. Also as we have held that Appellant was not liable to pay taxes, during the relevant time, there is no question of imposing penalty u/s. 78 of the Act, as there is no suppression of taxable service provided during the material time.

22. In view of the above discussion, the questions of law are answered in favour of the Appellant, and against the Respondent. We accordingly quash and set aside the impugned orders and allow the Appeal. No costs.

(RAJESH S. PATIL, J.)

(G.S. KULKARNI, J.)