

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

CENTRAL EXCISE APPEAL NO.238 OF 2017

Nirmal Seeds Pvt. Ltd.

.. Appellant

v/s.

The Commissioner of Central Excise, Nashik

.. Respondent

Mr. Prakash Shah a/w Mr. Rajesh Ostwal, Mr. Jas Sanghavi I/b PDS
Legal for the appellant

Mr. Pradeep S. Jetly a/w Mr. Amol Joshi for the respondent

**CORAM : AKIL KURESHI &
M.S. SANKLECHA, J.J.**

DATED : 5th DECEMBER, 2018.

P.C.

1. This appeal under Section 83 of the Finance Act, 1994 r/w Section 35G of the Central Excise Act, 1944 (the Act) challenges the order dated 28th February, 2017 passed by the Customs, Excise and Service Tax Appellate Tribunal (the Tribunal).

2. The appellant has urged the following two questions of law for our consideration :-

(i) Whether in the facts and circumstances of the case and in law, the Tribunal is justified in confirming the demand of

service tax from the appellants on freight charges in terms of Rule 2(1)(d)(v) of Service Tax Rules, 1994?

(ii) Whether in the facts and circumstances of the case and in law, the Tribunal is correct in invoking extended period of limitation and upholding the imposition of equivalent penalty under Section 78 of the Finance Act, 1994 along with interest?

3. The appellant is engaged in production of seeds and fertilizers ("said goods" for short). The appellant supplies its said goods to its dealers, who in turn sell it to the ultimate consumers. At the time of entering into sale, the price of the goods includes freight charges to be paid by the appellant. The appellant has no separate written contract / agreement between itself and its dealers with regard to the sale including regarding payment of freight charges incurred while transporting the goods from its premises to the dealer's premises.

4. During the course of audit, the Department noticed that in some of sale invoices issued by the appellant showed that they were deducting freight charges from the total invoice amount with a note that consignee to pay. On detail scrutiny of all the documents, it was found that the freight amount is reduced from the contract price on the ground that it was paid by the consignee i.e. the dealer. The show-

cause notice reproduced details of the sample invoices and the corresponding documents which form the basis of the show-cause notice are as under :-

Sr. No.	Invoice No. & Date	Name of Consignee	Subtotal amount in Invoice	Less freight charges shown in Invoice	Total bill amount shown in Invoice	Balance freight to pay shown in corresponding Dispatch cum Proforma Invoice	Freight reimbursement amount as shown in Freight reimbursement Ledger account
1	00711 dtd. 26.08.2009	Rakonde K.S.K. Kinwat	235412.50	3100	232313	3100	3100
2	00716 dtd. 26.08.2009	Shilpa K.S.K. Hadgaon	126725.00	2800	123925	2800	2800
3	00717 dtd. 26.08.2009	Balaji Fertilizers, Dharmabad	320975.00	2500	318475	2500	2500
4	02139 dtd. 31.08.2009	Umesh K.S.K. Aurangabad	357408.00	4000	351408	4000	4000

From the above, it is the case of the Revenue that the appellant is reimbursing the freight amount to their consignees to the extent freight is paid by the consignee. Besides, it was also found that the appellant was also issuing credit notes for reimbursement of freight charges. Thus, the case of the Revenue is that the freight is ultimately paid by the appellant i.e. the consignor even in the cases where invoices show balance freight amount to be paid by the consignee-dealer. This as the agent of the appellant-assignor.

5. Thus, on the above basis, a show-cause notice dated 19th October, 2011 was issued demanding service tax of Rs. 20,08,727/- for the period April, 2006 to March, 2011 under Section 73(1) of the Finance Act, 1994 and also proposed imposition of equivalent penalty under Section 78 of the Finance Act, 1994. This as pointed out above was for not having paid service tax on the freight element, which was in fact paid by the consignee of the said goods on behalf of the appellant.

6. The appellant resisted the show-cause notice, contending that as the dealer was liable to pay the freight, no liability to pay service tax could be fastened on the consignor-appellant. In any case on these facts, no extended period is applicable.

7. However, the Additional Commissioner of Central Excise by order dated 28th June, 2012 confirmed the show-cause notice dated 19th October, 2011. This after holding that consignee – dealer is only the medium through which freight is paid as it is reimbursed. Besides, on facts he also finds that freight charges as well as freight reduced in invoices show the same as 'freight to pay' in dispatch notes and are included in Transport outward charges. This also evidenced the fact that the appellant and not the dealer consignee was liable to pay the

freight and had in fact so paid. Besides, on facts it was found that there was suppression and, therefore, extended period is applicable.

8. Being aggrieved, the appellant filed an appeal to the Commissioner of Central Excise (Appeals). By order dated 4th March, 2013 the appeal of the appellant was dismissed.

9. Being aggrieved, the appellant filed further appeal to the Tribunal. By the impugned order dated 28th February, 2017, the Tribunal dismissed the appellant's appeal. It *inter alia* held on facts that the manner of invoicing and the internal accounts maintained by the appellant shows that the entire arrangement has been made with dealers so as to reduce its service tax liability. It upheld demand, invocation of extended period of limitation and imposition of penalty.

10. Mr. Shah, learned Counsel in support of the appeal submits as under :-

(a) In view of the clear provisions of Rule 2(1)(d)(v) of the Service Tax Rules, the freight in this case has been paid by the consignee. Thus, they could not be made liable to pay the service tax on the same.

(b) The extended period of limitation would not be invocable in the

present facts as there was never any intention on their part to evade any service tax. It was only where the consignee has paid the freight, the appellant has reduced the price of the goods and not reimbursed the price as contended by the Revenue.

(c) Lastly, on identical facts, the Tribunal in the case of ***Raj Laxmi Paper Mills Vs. Commissioner of Central Excise, Madurai, 22 STR 635*** had held in favour of the assessee therein. In case, the Tribunal did not concur with its earlier view, it should have referred the issue to a Larger Bench.

11. Mr. Jetly, learned Counsel appearing on behalf of the Revenue points out that the entire issue is fact based. All the authorities under the Finance Act, 1994 have come to the conclusion on examination of the invoices as well as ledger account maintained by the appellant which indicates that the amount paid / reduced from the contracted price is shown as a freight reimbursement in the ledger account. Thus, it is submitted that on facts, the finding of the Tribunal cannot be faulted. Thus, no interference is warranted.

12. We find that all the authorities under the Act on facts, have come to the conclusion that the arrangement arrived at between the

appellant and its dealers was so as to reduce the payment of service tax obligation of the appellant. This factual finding of the authorities was based on detailed scrutiny of the invoices and documents, in particular, the ledger account maintained by the appellant which shows the amount, which was reduced from the invoice is also accounted as freight reimbursement. It was in these facts that the authorities have held that the freight paid by the dealers was for and on behalf of the appellant. Thus, the appellant would be liable for payment of service tax. We note that the Tribunal in the impugned order makes a specific reference to the decision in *Raj Laxmi Mills* (supra) and found that the same would not apply in the facts of the appellant's case as in that case unlike in this case, a finding has been reached that the consignees were paying freight on its own behalf and not on behalf of the consignor as in this case. Thus, on the basis of the definition as provided in Rule 2(1) (d)(v) of the Service Tax Rules, the payment made by the agent would be a liability of the principal for the purposes of service tax. In so far as extended period of limitation is concerned, we find that once the authorities have found on facts that there was an arrangement arrived at between the parties so as to reduce the payment of service tax, invocation of extended period of limitation cannot be faulted with. It was held on facts that there was suppression. Nothing has been shown

to us that on these facts, that the finding is perverse.

13. In the above view, the proposed questions of law do not give rise to any substantial question of law. Thus, not entertained.

14. Accordingly, the appeal is dismissed. No order as to costs.

(M.S. SANKLECHA, J.)

(AKIL KURESHI, J.)