

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL, MUMBAI
REGIONAL BENCH**

Service Tax Appeal No. 88532 of 2014

(Arising out of Order-in-Appeal No. 533/PD/2014 dated 02.05.2014 passed by Commissioner of Central Excise (Appeals-IV), Mumbai-I)

M/s. Sagar Enterprises

99/103, Tambakanta,
4th floor, Bhagwan Bhavan,
Mumbadevi Road,
Mumbai 400 003.

Appellant

Vs.

Commissioner of S. Tax, Mumbai-II

4th floor, New Central Excise Bldg.,
M.K. Road, Churchgate,
Mumbai 400 020.

Respondent

Appearance:

Shri Vinay S. Sejpal, Advocate for the Appellant

Shri D.M. Shinde, Authorised Representative for the Respondent

CORAM:

Hon'ble Mr. S.K. Mohanty, Member (Judicial)

Hon'ble Mr. Sanjiv Srivastava, Member (Technical)

FINAL ORDER NO. **A/86485/2019**

Date of Hearing: 17.05.2019

Date of Decision: 28.08.2019

PER: SANJIV SRIVASTAVA

This appeal is directed against the order in appeal No PD/STC-I/533/ 2014 dated 02.05.2014 of the Commissioner (Appeals) Central Excise Mumbai – I. By the impugned order Commissioner (Appeal) as upheld the order in original No 02/ST II/ADL/YKA/2010-11 dated 22.04.2010 of the Additional Commissioner Service Tax Mumbai II holdings as follows:

"In view of the above, I confirm the Service Tax amounting to Rs 14,86,779/- (Rupees Fourteen lakhs eighty six thousand seven hundred and seventy nine only) under

Section 73(2) of the Act. The interest at applicable rate is confirmed under Sec 75 of the Act.

I impose penalty of Rs 500/- under Sec 75A of the Act.

I impose penalty of Rs 100/- per day till the payment of service tax under Sec 76 of the Act. However, the penalty should not exceed the service tax confirmed as above.

I impose penalty of Rs 1000/- under Sec 77 of the Act.

I impose penalty of Rs 14,86,779/- under Sec 78 of the Act."

2.1 Acting on the intelligence that appellants are depot keepers/ depot agent providing taxable services under the category of "Clearing and Forwarding Agents Services", to various yarn manufacturing mills, without obtaining registration and payment of service tax, investigations were undertaken by the department.

2.2 After completion of investigations a show cause notice dated 20.05.2004 was issued to the appellants asking them to show cause as to why; -

- (i) The service tax amounting to Rs 14,86,779/- (Rupees Fourteen lakhs eighty six thousand seven hundred and seventy nine only) leviable on the consideration/ commission/ remuneration amounting to Rs 2,82,57,464/- received by tem during the period Sept 99 to Sept 2003 should not be recovered from them under Section 68 of the Act and Rule 6 of the Rules read with Section 73(1)(a) of the Act;*
- (ii) The interest, as applicable should not be recovered from them for nonpayment of their dues within the period prescribed under Section 75 of the Act;*
- (iii) Penalty should not be imposed under Section 75A of the Act read with Rule 4 of the Service Tax Rules for failure to make an application to the concerned Superintendent, Central Excise in form ST-1 for registration within the prescribed period;*

- (iv) Penalty should not be imposed for failure to pay service tax within the prescribed period under Section 76 of the Act.*
- (v) Penalty should not be imposed on them for failure to furnish prescribed returns for the period Sept 99 to Sept 2003 under Section 77 of the Act.*
- (vi) Penalty should not be imposed on them under Section 78 of the Act for deliberately concealing/ suppressing the value of taxable service with intent of evading service tax.*

2.3 The show cause notice was adjudicated by the Additional Commissioner as per the order in original referred in para 1 above. Aggrieved by the order of Additional Commissioner, Appellants preferred the appeal before Commissioner (Appeal).

2.4 The appeal filed by the Appellants was dismissed by the Commissioner (Appeal) as per the impugned order referred in para 1, supra. Aggrieved by the dismissal of appeal, appellants have preferred this appeal before the tribunal.

3.1 In their appeal, appellants have assailed the impugned order stating that-

- (i) It is nonspeaking and non reasoned order, passed in casual, cursory and perfunctory manner without considering and dealing with the submissions made by them;
- (ii) The activities undertaken by them do not fall within the ambit of the clearing and forwarding activities. Both Additional Commissioner and Commissioner (Appeal) have without considering the submissions made by them, proceeded to confirm the demand against them.
- (iii) They provide the services as depot agents to their principals and are not covered by the definition of Clearing and Forwarding Agent as provided by

Section 65(25) of the Finance Act, 1994. As per the definition, if a person appointed as an agent is undertaking the activity involving receipt, storage and sale of goods on behalf of the principal then only such agent is a Clearing and Forwarding agent.

- (iv) As they have not undertaken any activity of clearance of goods either from the premises of the principals or from the depot/godown they will not be covered by the definition of Clearing and Forwarding agent. The remuneration received for unloading and transporting the goods from the railway station or any other place where the goods are unloaded from the carrier to the warehouse would not be covered in the meaning of services rendered by a clearing and forwarding agent.
- (v) The warehousing of the goods does not come under either clearing operation or forwarding operation. However a clearing and forwarding agent may render the warehousing services as a ancillary operation.
- (vi) Further the definition of clearing and forwarding agent includes consignment agent. At the same time, the taxable service has been defined to be "in relation to Clearing & Forwarding operations in any manner". Therefore, only if a person acting as a consignment agent and rendering the services of in relation to Clearing & Forwarding operations would he be liable to pay service tax on such services provided by him.
- (vii) The trade notice referred to by the Additional Commissioner is not applicable to present facts of case.
- (viii) The issue on merits is covered by the decisions in following cases: -

- Kulcip Medicines (P) Ltd [2009 (14) STR 608 (P & H)]
 - Mahavir Generics [2006 (3) STR 276 (T-Del)]
 - VNSS Textiles [2010 (24) STR 385 (T-Chennai)]
 - Parekh Apparels [2008 (09) STR 87 (T-Ahd)]
 - Larsen & Tubro Ltd [2006 (3) STR 321 (T-LB)]
 - United Plastometers [2008 (10) STR 229 (P & H)]
 - Pondicherry Agro Services & Indus Corpn Ltd [2010 (17) STR 243 (T-Chennai)]
 - Vijay Traders [2009 (16) STR (T-Bang)]
- (ix) The demand is time barred as they were under a bonafide belief that they were not rendering any taxable service nor undertaking any operations as "Clearing and/ or Forwarding Agent". For the preposition that the demand is barred by limitation, they rely on the following decisions: -
- Sunil Metal Corporation [2009 (16) STR 469 (T-Ahd)]
 - Nirav Industries [2009 (16) STR 69 (T-Ahd)]
 - Padam Chand Mutha & Co [2009 (16) STR 721 (T-Del)]
 - Chemphar Drugs & Liniments [1989 (40) ELT 276 (SC)]
 - Padmini Products [1989 (43) ELT 195 (SC)]
 - Tamil Nadu Housing Board [1994 (74) ELT 9 (SC)]
 - Cosmic Dye Chemical [1995 (75) ELT 721 (SC)]
 - Pushpam Pharmaceutical Company [1995 (78) ELT 401 (SC)]
 - Nexcus Computers 9P) Ltd [2008 (9) STR 34 (T-Chennai)]
 - Bharat Aluminium Co Ltd [2007 (8) STR 27 (T-Del)]

- NRC Ltd [2007 (5) STR 308 (T-Mum)]
- (x) Penalties imposed on them under Section 75A, 76, 77 & 78 are not justified and maintainable in law. They rely on the following decisions: -
 - Singh Brothers [2009 (14) STR 552 (T-Del)]
 - Orient Packagings Ltd [2011 (23) STR 167 (T-Del)]
 - P T Education & Training Services Ltd [2009 (14) STR 34 (T-Del)]
 - Motilal Padampat Sugar Mills Co Ltd [1979 (118) ITR 326 (SC)]
 - Azadi Bachao Andolan {2001 (252) ITR 471 (SC)}
 - Motor World [2012 (27) STR 225 (Kar)]
 - City Motors [2010 (19) STR 486 (P&H)]
 - Mohammad Mustikeen [2011 (22) STR 170 (T-Del)]
 - Financial Software Systems Pvt Ltd [2014 (33) STR 393 (T-Chennai)]
 - Jivant Enterprise {2012 (28) STR 582 (T-Ahd)}

4.1 We have heard Shri Vinay S Sejpal, Advocate for the appellant and Shri D M Shinde, Assistant Commissioner, Authorized Representative for the revenue.

4.2 Arguing for the appellants learned Advocated submitted that-

- Appellants are only the "Depot Agent" and not the consignment agents. They are undertaking only "Forwarding Operations" from the depot and are in no way concerned with the "Clearing Operations" which is carried out by the mill owners on their own account and the goods are brought and delivered at the depot by them at their own cost and on their own.
- For categorizing the services rendered under the category of "clearing and forwarding services" it is

essential that service should be that clearing and forwarding both. In case the service provider is not providing both the services of clearing and forwarding then the services rendered will not be classifiable under this category. As have been held in following decisions: -

- Kulcip Medicines [2009 (14) STR 608 (P&H)] & {2012 (25) STR J127 (SC)}
 - Shreenath Roadways [2018 (16) GSTL 239 (Raj)]
 - Novacare Drug Specialities Pvt Ltd [2014 (34) STR 247 (T-Mum)]
 - Narottam & Company [2014 (33) STR 472 (T-Del)]
 - Coal Handlers Pvt Ltd [2015 (38) STR 897 (SC)]
- The submissions made by the learned Authorized Representative, in respect of place of removal, as per Section 4 of Central Excise Act, 1944, are contrary to the provisions of the section itself, as the section states that place of removal was only for that section.
- Predominant part of the Show Cause Notice is barred by limitation. The Show Cause Notice dtd 20.05.2004 proposes the demand for period Sept 1999 to Sept 2003. Since the issue involved is one of interpretation of statutory provisions regarding clearing and forwarding agent qua commission agent qua consignment agent has been subject matter of various decisions taking different views at the CESTAT level and the matter was also referred to larger bench of CESTAT. Also the matter was considered by various High Courts. Since issue was one of interpretation of law, the same cannot be made the ground for invoking extending period of limitation to demand tax, by alleging suppression.

- Commissioner (Appeal) has in his order not dealt with the submissions made by them on merits or on limitation and hence the order of Commissioner (Appeals) is a non speaking order and needs to be set aside.

4.3 Arguing for the revenue learned Authorized Representative submitted that

- appellant had been appointed as Depot Agent" by various mills as per agreement between the mills and them. As per these agreements they have been entrusted certain activities associated with the sale of their manufactured goods. The activities undertaken fall within the scope of Clearing and Forwarding Agent Services as defined under Finance Act, 1994. Appellants have not taken the registration, did not pay the service tax nor had filed the ST-3 returns.
- By Finance Act, 1996 definition of place of removal was amended to include, depot, consignment agents or any other place or premises from where the goods are sold by or on behalf of the assessee
- In view of the changes in the definition of place of removal, sale price at the place of removal such as depot etc. has to be taken as normal sale price for determination of assessable value. In view of the above, depot of the manufacturing unit/ company is nothing but an extended arm of such manufacturing unit/ company for the purpose of place of removal. For the purpose of managing the affairs of depot, the mills had appointed the appellants as depot agents.
- Trade Notice No 59/99 dated 04.10.1999 of Service Tax – I Mumbai Commissionerate clarified what are the activities under taken by the Clearing and Forwarding Agents. When the activities undertaken by the appellant as per the agreements are mapped

with the activities as specified by the trade notice, it is evident that appellants will fall within the definition of clearing and forwarding agent.

- Thus appellants are engaged in both the activities i.e. clearing the goods from the sales depot of the Mills and forwarding the goods as per the instructions of the Mills, by way of dispatching these goods to their buyers. Hence are covered by the definition of Clearing and Forwarding Agent as defined by Section 65(25) of the Finance Act, 1994.
- Failure on the part of appellants to comply with the provisions of Finance Act, 1994 and Rules made thereunder, also make them liable for penal actions as prescribed.

5.1 We have considered the impugned order with the submissions made in appeal and during the course of arguments.

5.2 Finance Act, 1994 was amended by Finance Act, 1997 to levy Service tax on various services including the "Clearing and Forwarding Agent Services". The scope of the service Clearing & Forwarding Agents was explained by the Board in its Circular **F.No. B.43/7/ 97-TRU dated 11.7.1997**. The relevant paragraphs of the said circular are reproduced below:

"2. Clearing and Forwarding Agents

2.1 Clearing and forwarding agent has been defined as any person who is engaged in providing any service, either directly or indirectly, connected with clearing and forwarding operations in any manner to any other person and includes a consigning agent. The taxable service has been defined as any service provided to a client, by C&F agent in relation to clearing and forwarding operations in any manner. The clearing and forwarding agents are engaged/appointed by manufacturer of goods (both excisable and non-excisable goods), producers and

distributors of goods and shall also include such agents appointed for agricultural and mineral goods.

2.2 Normally, there is a contract between the principal and the clearing and forwarding agent detailing the terms and conditions and also indicating the commission or remuneration to which the C&F agent is entitled. A clearing and forwarding agent normally undertakes the following :

- (a) Receiving the goods from the factories or premises of the principal or his agents;*
- (b) Warehousing these goods;*
- (c) Receiving dispatch orders from the principal;*
- (d) Arranging dispatch of goods as per the directions of the principal by engaging transport on his own or through the authorised transporters of the principal;*
- (e) Maintaining records of the receipt and dispatch of goods and the stock available at the warehouse;*
- (f) Preparing invoices on behalf of the principal.*

2.3 It has been decided that the person responsible for collecting the service tax in the case of services rendered by a clearing and forwarding agent shall be the person engaging/appointing a clearing and forwarding agent (Notification No. 26/97-Service Tax refers). It may be noted that unlike in the case of other service tax levies where the service provider is the person responsible for collecting the service tax, in the case of services rendered by clearing and forwarding agents the service tax liability shall be discharged by the person availing the service so rendered. In other words, the principal who engages a clearing and forwarding agent is the person responsible for collecting and paying the service tax to the exchequer.

2.4 Further under the Finance Act, 1997 the value of taxable service rendered by a clearing and forwarding agent has been defined as the gross amount charged by such agent from the client for the services of clearing and

forwarding operations in any manner. However, under Service Tax Rules it has been provided that the value of taxable service in relation to services rendered by clearing and forwarding agents to a client shall be deemed to be the gross amount of remuneration or commission (by whatever name called) paid to such agent by the client engaging such agent (Notification No. 27/97-S.T. refers.)

2.5 For the services rendered, the C&F agent receives commission or remuneration which usually consists of two components :

- (I) Minimum commission on a flat rate or turnover basis depending on the packages/consignments handled;*
- (II) A variable commission based on performance which is computed on the performance indicators agreed upon between the agent and the principal. This is usually given as a percentage of the turnover. The above two constitute the remuneration or commission paid to the C&F agent by the principal.*

2.6 In cases where C&F agents engaged for various towns, states or areas are paid only by the regional or the head office of the company appointing such agents, for service tax purposes it would suffice to register only such regional or head offices. In such cases the regional office or the head office, as the case may be, should also be required to give an undertaking to discharge the service tax liability.

The above clarification has been issued by the various Commissionerates as trade notice for information of all concerned. **[Trade Notice No 87/97 (10/Service Tax/97), dated 14-7-1997 of the Madurai-2 Commissionerate, Trade Notice No 59/99 dated 04.10.1999 of Service Tax – I Mumbai Commissionerate].**

5.3 Undisputedly appellants have been appointed as depot agents by various mills under a contractual agreement. The terms of contract clearly provide as follows:

1. *"M/s Sagar Enterprises Mumbai, referred to before shall be the Dept Agent of the Sales Depot of the Mills in the State of Maharashtra. When the Company increases production and decides to introduce its yam in Ichalkarankji and in case the Company is intending to have its own Depot, Sagar Enterprises will be given the right to sell on the terms to be fixed latter.*
2. *The Depot Agent is entrusted with and shall have overall charge of sales at the said Depot of the Mills subject to the control and approval of the Mills. The Depot Agent is hereby authorized and empowered to apply for registration to the appropriate Sales Tax authorities in the state of Maharashtra on behalf of the Mills and ensure the due registration of the Mills as declares of yarn. The Depot Agent I further empowered and authorised to sign on behalf of the Mills all necessary forms, Applications and Returns for Sales Tax purposes and Contracts, Invoices, Receipt and all other papers necessary for or incidental to the purpose of proper working of the depot.*
3. *That the Depot Agent will have to remit an initial Security Deposit of Rs 14.00 Lakhs (Rupees Fourteen Lakhs only) by cash to the Mills and the Mills will be dispatching to the Depot Agent Goods COTTON YARN, BLENDED YARN AND POLYESTER STAPLE FIBRE YARN and will send the documents directly to the Depot Agent. Interest at 12% (twelve percent only) per annum will paid by the Mills to the depot Agent on the whole advance amount and will be settled yearly. Such advance amounts shall be liable to be adjusted at the discretion of the Mill against all or any amount due from or accountable under this agreement by the Depot Agent to the Mills from time to time.*

4. That the Depot Agent shall at all times during the continuance of this Agreement carry out and observe all directions and instructions which may be given to them by Mills concerning the sale or disposal of the goods or otherwise relating to and in the course of business under this Agreement.

5. (a) THAT THE MILLS shall dispatch goods to the destination of the Depot areas and forward the related documents to the Depot Agent direct and that the Depot Agent shall sell the goods and remit the sale proceeds to MILLS by TT OR DD immediately within 7 days (seven days) from the date of sale.

(b) For Belated payments, the Mill will be charging interest @ 24% on the Depot Agent which will have to be paid by the Depot Agent. Credit shall be given to the Agents for interest on advance remittances made by them against sale proceeds before the due date @ 15% on such advances.

6. THAT THE MILLS will pay the Depot Agent's Commission 1.5% (one and half percent only) flat rate for sales made by them on the Ex mill value of yarn realised by the Mills, for the services rendered by them. It is clarified that the Ex-mill realization would be realization exclusive of all expenses and outgoings such as EXCISE DUTY, SALES TAX, SURCHARGE, TURNOVER TAX AND OTHER TRANSIT DUES, INSURANCE, INTEREST, OVERDUE INTEREST AND DEMURRAGE AND ANY COMMISSION PAID ON THE SALES. The Depot Agent will have to send their debit notes for the Commission amount in each month and the Commission will be settled monthly by the Mills.

7. THAT the goods in the custody of the Depot Agent shall always be the property of the Mills and the Officers of the Mills are at liberty to check stocks and Accounts in the godown at all reasonable times. The Depot Agent shall not

pledge or hypothecate the goods consigned or supplied to them on any account.

8. *That the Depot Agent shall not assign or in any other manner made over this Contract to any other person.*

9. *THAT the Depot Agent will bear the expenses such as STAFF SALARIES, TELEPHONE CHARGES, POSTAGE, STATIONARY, HANDLING CHARGES, GODOWN RENT incurred at the Depot and HAMALI CHARGES.*

10. *THAT the Telegraphic transfer charges in respect of remittances made by the Depot Agent to the Mills will be borne by the Mills.*

11. *THAT the Depot Agent has to maintain a godown for the stocks to be kept on behalf of the Mills.*

12. *THAT the Depot Agent will take an insurance policy covering "ALL RISKS" in the name of the Mills and the premium will be borne by the Mills.*

13. *THAT the Depot Agent will make best efforts to sell the Mills' goods at the maximum rate possible in consultation with the MILLS.*

14. *THAT the Mills will bear the expanses such as FREIGHT, SALS TAX, EXCISE DUTY, OCTROI. The pot Agent has to collect the Sales Tax from the buyer and remit the same to the Sales tax Authorities before the due date. The Depot Agent should send the necessary "F" forms to the Mills regularly on monthly basis.*

15. *THAT the Depot Agent shall sell the goods only in the consuming Centers of Maharashtra State.*

16. (a) *THAT the Depot Agent will sell the goods in Cases/ Bags/ Bales actually received and not those which are in transit.*

(b) *Though the Excise duty will be paid by the Mills while dispatching the goods, the Depot Agent has to collect the same from the buyers and reimburse to the Mills.*

17. THAT the Depot Agent will solely be responsible for any loss that may be incurred by any credit of such sales or damages/ shortages of the goods at the Depot.

18. THAT the Depot Agent will send by post to the Mills daily sales particulars everyday along with the copies of Invoices, Delivery orders and Stock statements.

19. THAT the daily sales effected at the Depot have to be communicated to the Mills telegraphically/ fax. Similarly, remittances effected to Mills should also be communicated to the Mills telegraphically/ fax.

20. THAT the Depot Agent shall not be entitled for any remittance if the goods are sold for export through a party of the above area by the Mills.

21. THAT the Depot Agent will prepare the yarn invoice in quadruplicate and post three copies direct to the Mills and by the next day available post.

22. THAT the Depot Agent shall reconcile the Accounts once in a month wherever the difference occurs between the Mills and the Depot. The Depot Agent and Mills will finalize and settle the Accounts within three months of the termination of this agreement."

5.4 From plain reading of the agreement along with the activities as specified in the Circular dated 11.07.1997 it is observed that appellants are undertaking all the all the activities as specified at para 2.2 (a to f). The relevant clause(s) of the agreement which is in respect of the specified activity is as indicated in table below:

Sl No	Activity	Clause of Agreement
(a)	Receiving the goods from the factories or premises of the principal or his agents;	3 & 5
(b)	Warehousing these goods;	9, 11 & 12
(c)	Receiving dispatch orders from the principal;	4 & 5

(d)	Arranging dispatch of goods as per the directions of the principal by engaging transport on his own or through the authorised transporters of the principal;	4
(e)	Maintaining records of the receipt and dispatch of goods and the stock available at the warehouse;	2, 18, 19 & 22
(f)	Preparing invoices on behalf of the principal.	2, 5(a) & 21

5.5 Thus from the agreement it is quite evident that the appellant undertakes all activities right from the receipt of the goods, storage of same, sale from depot, preparation of invoices, maintenance of records collection of the sale proceeds and remitting the sale proceeds to their principals. It is also evident from clause 2, 7 8, 12 & 20 that the substantial ownership of the goods is with the Mills (principal). Thus in terms of the Circular/ Trade Notices issued, appellants undertake all the activities that a Clearing and Forwarding Agent undertakes. Also the agreement provides for the remuneration for the services rendered by the appellants as percentage of the sale effected by them. Hence we do not have any doubt that the activities undertaken by the appellant are covered by the definition of "Clearing and Forwarding Agent" as per Section 65(25) of the Finance Act, 1994.

5.6 Appellants have relied on various dictionary meanings to argue that the activities undertaken by them do not qualify to be that of clearing and forwarding, thus they cannot be held to be clearing and forwarding agent for the purpose of levy of service tax. We are not in position to agree with the above preposition, because when service tax was levied under this taxable category, CBEC (TRU), has clarified the scope of services sought to be taxed under this category. Hon'ble Supreme Court has in case of Kajaria Tiles [2005 (191) ELT 20 (SC)] held that **"28. The Circular can be read as a contemporaneous**

understanding and exposition of the intention and purport of the Notification. Courts have treated contemporary official statements as contemporary exposition and used them as aids' to interpret even recent statutes."

Further Hon'ble Apex Court has in case of Ajay Gandhi vs B Singh [2004 (167) ELT 257 (SC)] held as follows:

"16. In CORPUS juris secundum, Volume 82, PP. 761, it is stated that the controlling effect of this aid which is known as 'executive construction' would depend upon various factors such as the length of time for which it is followed, the nature of rights and property affected by it, the injustice resulting from its departure and the approval that it has received in judicial decisions or in legislation.

17. In Francis Bennion Statutory Interpretation, Fourth Edition, the law is stated in the following terms at page 596 :

"Section 231. The basic rule. - In the period immediately following its enactment, the history of how an enactment is understood forms part of the contemporanea expositio, and may be held to throw light on the legislative intention. The later history may, under the doctrine that an ongoing Act is always speaking, indicate how the enactment is regarded in the light of developments from time to time.

COMMENT

On a superficial view, it may be thought that nothing that happens after an Act is passed can affect the legislative intention at the time it was passed. This overlooks the two factors stated in this section.

Contemporanea expositio. The concept of legislative intention is a difficult one. Contemporary exposition helps to show what people thought the Act meant in the period immediately after it was passed. Official statements on its meaning are particularly important here, since every Act is supervised, and most were originally promoted, by a government department which may be assumed to know what the legislative intention was."

18. In *R.V. Wandsworth London Borough Council, Ex parte, Beckwith* [(1996) 1 All E.R. 129], the House of Lords has held that a departmental circular is entitled to respect. It can only be ignored when it is patently wrong. The said principle has also been followed in *Indian Metals and Ferro Alloys Ltd. v. Collector of Central Excise* [1991 (51) E.L.T. 165 (S.C.) = AIR 1991 SC 1028, p. 1034]; *Keshavji Ravji and Co. v. Commissioner of Income Tax* [AIR 1991 SC 1806, p. 1817], *Raymand Synthetics Ltd. v. Union of India* [AIR 1992 SC 847, p. 859]; *Kasilingam v. P.S.G. College of Technology* [1995 (2) SCALE 387, p. 397] and *Collector of Central Excise, Vadodra v. Dhiren Chemical Industries* [2002 (139) E.L.T. 3 (S.C.)].”

5.7 Appellants have relied upon various decisions including the decision of Punjab and Haryana High Court in case of *Kulcip Medicines* to argue that the activities undertaken by them will not be covered by the definition of Clearing and Forwarding Agent. It is noticed that the decision of tribunal in case of *Kulcip Medicines*, was based on the decision of Tribunal in case of *Mahaveer Generics* as is evident from the paras reproduced below:

“3. Learned Counsel has also submitted that this issue had come up before this Tribunal in the case of another C&F agent of *Cipla, M/s. Mahaveer Generics, Bangalore* wherein also, the terms of the relationship was similar and the Tribunal held vide its order *ST F. No. 12/04-NB(A), dated 27-4-2004* [2004 (170) E.L.T. 78 (Tribunal)] that no Service Tax was attracted. The learned Counsel strongly relied upon on this decision in support of his case.

4. The learned Departmental Representative’s contention is that there is no dispute that the appellant is a C&F Agent of *Cipla*. It is his contention that once the person is admittedly a C&F Agent, it is not open to him to argue that the services rendered by him is not the services of C&F

Agent. Learned Departmental Representative, therefore, submitted that matter is to be treated as settled.

5. *The taxable service in the present case is "any service provided to a client, by a clearing and forwarding agent, in relation to clearing and forwarding operation in any manner" [Sub-clause (j) of Section 65(105) of Finance Act, 1994]. A perusal of this definition makes it clear that, in order to attract the levy, the services must be "in relation to clearing forwarding operation". Thus, the definition makes it clear that all services rendered by the clearing and forwarding agent are not within the scope of the levy; the levy is limited to "clearing and forwarding operations". The Circular of the Board on this issue may be read :*

"The matter has been examined. Normally, a C&F agent receives goods from the factories or premises of the Principal or his agents, stores these goods, dispatches these goods as per orders received from the Principal or owner, arranges transport, etc. for the purpose and prepares invoices on behalf of the principal. For this service, the C&F agents receive commissions on the basis of agreed terms. Therefore, an essential characteristic of any services, to fall in the category of C&F agent, is that the relationship between the service provider and receiver should be in the nature of principal (owner) and agent. The C&F agent carried out all activities in respect of the goods right from stage of their clearances from the premises of the principal to its storage and delivery to the customers."

6. *The above Para in the circular makes it clear that only when a C&F agent carries out both clearing and forwarding, the levy will be attracted. It is clear from the terms of the agreement that appellant herein does not attend to the clearing of the medicines manufactured by Cipla. Consignments of medicines are cleared from the factory by the manufacturer and delivered to the appellant at his premises. In this factual situation, it has to be held*

*that there is no clearing by the appellant and for that reason; the service rendered by the appellant does not satisfy the requirement of clearing and forwarding. We, therefore, are of the view that demand is not sustainable. **To the same effect is our earlier decision in the case of M/s. Mahaveer Generics. Accordingly, following our earlier decision, the present appeal is allowed after setting aside the impugned order. The appellant shall be entitled to relief, if any.***

Punjab and Haryana High Court upheld the said decision after noting that the decision in case of Mahaveer Generics have acquired finality as revenue has not appealed against it as is evident from para 6 of the decision reproduced below:

“6. At the outset, we asked Mr. Gurpreet Singh, learned Counsel appearing for the revenue about the status of the decision rendered by the Tribunal in Mahavir Generics case (supra) and whether revenue has accepted the same or has appealed against that decision. Mr. Gurpreet Singh could not disagree that the decision has attained finality and no appeal has been filed by the revenue.”

The decision of tribunal in case of Mahaveer Generics was set aside by the Karnataka High Court as reported at [2010 (17) STR 225 (Kar)]. While setting aside the order, Karnataka High Court took note of decision of Punjab and Haryana High Court in case of Kulcip Medicines also. The relevant paragraphs of the said decision are reproduced below:

6. The learned counsel appearing for the appellant would contend that authorities were fully justified in rejecting the claim of the assessee who had sought for surrendering of the registration Certificate on the ground that it did not come within the purview or category of clearing & forwarding agents and the authorities had taken a holistic view in interpreting the Section 65(25) of the Finance Act

which defines the activity of clearing and forwarding agent and as such the reversal of the said orders by Tribunal, by interpreting the definition "C & F Agent" on the basis of dictionary meaning is erroneous and liable to be set aside.

7. Sri Raghavendra B., learned counsel for the appellant would elaborate his submissions to contend that the Tribunal ought not to have traversed beyond interpreting the Section as per the language employed in the Statute itself and would submit that while interpreting the taxing Statutes the authorities cannot import which is not expressed in the provision itself and in this regard he relies upon the decision in the matter of Commissioner of Sales Tax U.P v. Modi Sugar Mills Pvt. Ltd., reported in AIR 1961 S.C. 1047. He would also add that Tribunal was in error in relying upon the dictionary meaning and in this regard he would rely upon the decision of the Hon'ble Supreme Court in the case of Ponds India Ltd v. Commr. of Trade Tax, Lucknow reported in 2008 (227) E.L.T. 497 (S.C.) by drawing our attention to paragraph 24 contending that definition of dictionary meaning as found in Wikipedia should not be used in aid of construction of a Fiscal Statute. He would also submit that Section itself being explicitly clear wherein the word consignment agent has also been included in the Section itself and hence it comes within inclusive definition of "C & F Agents" and thus supports the order of Original Authority & 1st appellate authority. He relies upon the decision of the Hon'ble Supreme Court in the matter of Karnataka Power Transmission Corporation Ltd. & Another v. Ashok Iron Works Pvt. Ltd., reported in 2009 AIR SCW 1502 and seek for answering the question of law in favour of the appellant-revenue and against the assessee.

8. Per contra, the learned counsel appearing for respondent would contend that the authorities relied upon the decision of Prabhat Zarda Factory (India) Ltd. v. CCE,

Patna reported in 2006 (2) S.T.R. 584 (Tribunal) = 2002 (145) E.L.T. 222 (Tribunal) and the said decision having been overruled by the Larger Bench of the Tribunal in the case of Larsen and Toubro v. Commissioner of Central Excise, Chennai reported in 2006 (3) S.T.R. 321 (Tri. - LB) and affirmed by the Punjab & Haryana High Court in the case of Commissioner of Central Excise Jalandhar v. United Plastomers reported in 2008 (10) S.T.R. 229 (P & H), the tribunal was fully justified in allowing the appeal of the assessee. He would also contend that the very same Principal namely, Cipla Ltd., had engaged a similar agent in Punjab known as Kulcip Medicines Private Ltd., which activity carried on by the said assessee was identical to the activity carried on by the present assessee and the Punjab & Haryana High Court [2009 (14) S.T.R. 608 P&H] having taken a view that the activity carried out by the assessee therein was of commission agent and submits that while examining the said issue the order of CESTAT in Mahavir Generics (present case) also came up for consideration & came to be approved and prays this Court should also fall in line with the said Judgment and seeks for answering the question of law against the revenue and in favour of the assessee. He would also bring to our notice the definition of "Commission Agent as defined under Section 2(19)(a) to contend that respondent would fall within the purview of said definition and the Circular bearing No. 59/8/2003 S.T., dated 20-6-2003 issued by the Department wherein the definition of Commission Agent with reference to clearing and forwarding agent has been clearly spelt out and the nature of activity carried on by the present assessee is in consonance with the meaning assigned in the said Circular and thus the activity carried on by the assessee falls outside the purview of clearing and forwarding agent and as such prays that the question of law be answered against the revenue and in favour of the assessee.

11. Further, we are not able to accept the contention of the assessee for more than one reason. At the outset it is to be seen that agreement itself terms the assessee as a consignment agent. Thus, the parties were at ad-idem when the contract was entered into between them as to what their status would be. In so far this contention is concerned the parties namely that the principal and the agent having understood in unequivocal terms as to their duties and responsibilities which include not only having effective control of the goods by the Principal but also in so far as the price determination is concerned it was in the hands of both the principal and as well as the agent namely, the assessee. Hence, by no stretch of imagination it can be concluded that in the event, of assessee being a commission agent the price determination would also be left within the domain of a Commission agent. The said reasoning would not appeal to logic. Hence, we are unable to accept the said contention.

12. Another aspect being that the assessee having given the authority and power to appoint dealers, stockists and distributors it is clear that it is not a mere case of commission agent but, on the other hand it is the responsibility fixed on the assessee to carry out the activity of getting the goods stored by clearing it and then forwarding it to the stockists and dealers if any appointed by the assessee itself or as directed by the Principal. If it were to be the commission agency only these clauses would not have found a place in the contract. Hence, we are unable to agree with the contention of the assessee that they should be classified under the category of commission agent. In so far as the Judgment relied upon by the assessee viz., L & T supra, the Tribunal has held therein at para 9.3 to the following effect :-

"9.3 An agent engaged only for procuring purchase orders for the vendor on commission basis does not engage in

any of the above activities, directly or indirectly. Commission agent engaged to procure orders and not entrusted with the work of clearing and forwarding of the goods would be a person who, in the ordinary course of business, makes contracts for sale or purchase of goods for others, the definition of "Commission agent" in Section 2(aaa) of Central Excise Act, 1944, would apply in relation to service tax as it applies in relation to duty of excise by virtue of sub Section(121) or Section 65 of the Act. Services of Commission agent are included in the definition of "business auxiliary service" under sub-Section(19) of Section 65 w.e.f. 1-7-2003, which includes service of a Commission agent. As defined in explanation (a) to sub-section (19) of Section 65 Commission agent is a person who acts on behalf of another person and causes sale or purchase of goods, or provision or receipt of services, for consideration, and includes any person who, while acting on behalf of another person: deals with goods or services or documents of title to such goods or services; or collects payment of sale price of such goods or services; or guarantees for collection or payment for such goods or services; or undertakes any activities relating to such sale or purchase of such goods or services. This clearly shows that the activity of mere procurement of purchase orders for the principal on commission basis of a Commission agent is treated separately by the Parliament from the activities of a clearing & forwarding agent. Activity of procuring orders is thus independent of clearing & forwarding operations. The agents doing these activities can be different. Moreover, clearing & forwarding operations do not flow directly or indirectly from mere procurement of orders. There is no obligation on the person procuring orders as a commission agent for the principal, only by virtue of that agency, to carry out clearing & forwarding operations in respect of the goods

which are to be supplied pursuant to the orders so procured."

and have come to the conclusion that the agent engaged for procuring the purchase orders for the vendor on commission basis does not engage in the above activities as mentioned at para 9.2 therein, if there was mere procurement of purchase orders for the principal on commission basis by the assessee, it would have definitely fallen under the category of commission agent and would have stood outside the activity of the clearing and forwarding agent. But, it is not so in the instant case as seen from the Clauses mentioned in the Agreement. Thus, we will have to hold in the context of the agreement in question that apart from procuring the orders the assessee is also engaged in the activities as mentioned in the agreement which is thus independent of commission agency. In certain circumstances there may be a situation where only commission agency work is carried out and in a situation as is existing in the present case the assessee may also indulge or carry on with not only with the work of commission agent but also with the clearing and forwarding as a Consignment Agent and thus both these activities might overlap and on account of such overlap it cannot be said that the assessee would fall only under the category of commission agent and claim to distance himself from coming within the ambit and purview of clearing and forwarding agent. If it was only the case of commission agency there was no necessity or requirement by a commission agent to empower the respondent to appoint Dealers, Stockiest etc., for the principal as we have noticed in the instant case. Hence, the said decision of Larsen and Toubro (supra) pressed into service is distinguishable on the facts of the present case.

13. In so far as the second case is concerned that is the Judgment in the case of Commissioner of C.Ex., Jalandhar

v. Kulcip Medicines (P) Ltd. (sic) [United Plastomers] referred to supra wherein the Larsen and Toubro case of the Larger Bench of the Tribunal having been relied upon it has been held in paragraph 13 in Kulcip's case to the following effect :-

"13..... and mere procuring or having orders for the principal by an agent on payment of commission basis would net amount to providing services as "clearing and forwarding agent", within the meaning of the definition of that expression under Section 65(25) of the Finance Act, 1994. While reaching to this conclusion the Tribunal has observed that the expression "directly or indirectly" and "in any manner" occurring in the definition of "clearing and forwarding" agent cannot be isolated or the activity of dealing and forwarding operations and an agent it engaged only for procuring purchase orders for the vendor on commission basis does not engage in any of the activities connected with clearing and forwarding operations directly or indirectly."

*And thus found on facts that it was mere procuring the orders for the principal by an agent on payment of commission basis and thus would fall outside the purview of clearing and forwarding agent. The said decision would be inapplicable to the facts of the case as we have held that activity carried on by the assessee is that of a Consignment Agent. **The Judgment of Kulcip Medicine (supra) relied on by the learned counsel for the respondent to contend that. Mahaveer Generics case namely, the judgment in question before this Court in the present appeal has also been taken into consideration in Kulcip's case is liable to be brushed aside the contention of the assessee is not appealing to us for the reason that Tribunal in the said decision (Kulcip's case) at paragraph 13 has taken the view that the Judgment in Mahaveer Generic (present***

case) has been accepted by the revenue and no appeal has been tiled and accordingly was persuaded to accept the stand of assessee. The view taken by the Punjab & Haryana High Court in Kulcip's case, we find is factually in error since the revenue had filed the present appeal challenging the legality and correctness of Mahaveer Generic case in the present appeal & it was pending as on the date of disposal in Kulcip's case by Punjab & Haryana High Court and hence, the view taken in Kulcip Medicine case is inapplicable to the facts & circumstances of the case and also in the background or our examination, scrutiny and interpretation with regard to the agreement in question.

14. *The contention of the learned counsel with regard to the definition of commission agent as defined under the Finance Act namely, Section 65 (19) under the heading Business Auxiliary Service that they would come within the said purview and would fall outside the purview under the definition of the clearing and forwarding agent is examined in the background of definition Clauses which has been extracted by us herein above and we find that in the definition of "Clearing & Forwarding Agent" itself the consignment agent has been brought within the said Section. We have also examined the agreement in question and we find not only the consignment agent is expressly described at various places as stated herein above and on combined reading of the agreement we find that assessee in question has not restricted its activities to business of commission agency but has also carried on business as Consignment Agent as mentioned in Clause (iii), (v) and (vii) of the agreement and as such we are unable to accept the contention of the learned counsel for the assessee to hold that they would stand outside the*

definition of clearing and forwarding agent. In this context, it would be of benefit to extract the Judgment of the Hon'ble Supreme Court of India in the case of KPTCL supra at paras 12, 13 & 14 which reads as follows :

"12. Lord Watson in Dilworth v. Commissioner of Stamps (1899) AC 99 made the following classic statement :

"The word "include" is very generally used in interpretation clauses in order to enlarge the meaning of words or phrases occurring in the body of the statute; and when it is so used these words or phrases must be construed as comprehending, not only such things as they signify according to their natural import, but also those things, which the interpretation clause-declares that they shall include. But the word "include" is susceptible of another construction, which may become imperative, if the context of the Act is sufficient to show that it was not merely employed for the purpose of adding to the natural significance of the words or expressions defined, It may be equivalent to "mean and include", and in that case it may afford an exhaustive explanation of the meaning which, for the purposes of the Act, must invariably be attached to these words or expressions."

15. Dilworth (supra) and few other decisions came up for consideration in Peerless General Finance and Investment Co. Ltd. and this Court summarized the legal position that inclusive definition by the Legislature is used; (one) to enlarge the meaning of words or phrases so as to take in the ordinary, popular and natural sense of the words and also the sense which the statute wishes to attribute to it; (two) to include meaning about which there might be some dispute; (three) to bring under one nomenclature all transactions possessing certain similar features but going under different names.

16. *It goes without saying that interpretation of a word of expression must depend on the text and the context. The resort to the word 'includes' by the Legislature often shows the intention of the Legislature that it wanted to give extensive and enlarged meaning to such expression. Sometimes, however, the context may suggest that word "includes" may have been designed to mean "means" The setting, context and object of an enactment may provide sufficient guidance for interpretation of word "includes" for the purposes of such enactment."*

Thus, the activity carried on by the assessee with reference to the text of the enactment would depend on the nature and activity and as held by Their Lordships both in text and context the word 'includes' as mentioned in the definition clause of clearing and forwarding agent we find that the Legislature in its wisdom have desired to give extended and enlarged meaning to such expression and as such we accept the contention of the revenue to hold that the activity carried on by the assessee in question would fall within the purview of clearing and forwarding agent and accordingly we answer the question of law framed herein above by holding that the services rendered by the respondent would fall within the category of "clearing and forwarding agent" and thus, amenable to the definition of taxable service. Accordingly, the following order is passed :

ORDER

The substantial question of law formulated herein above is answered in favour of the appellant revenue and against the assessee and the order passed by the Tribunal in Appeal No. 18/2003 vide its Final Order No. 12/2004 dated 27-4-2004 is hereby set aside and the order passed by the original authority dated 12-5-2003 is hereby confirmed. No costs."

In our view Karnataka High Court has in this decision considered all the argument including the case laws advanced by the appellants before us and have rejected the same.

5.8 In case of Medpro Pharma Pvt Ltd [2006 (3) STR 355 (T-LB)], a larger bench of tribunal has already rejected the arguments in relation to use of word "and" in the definition and has held as follows:

"31. We have heard both sides and perused the record. On a fresh look at the whole issue and after taking into account the various newfangled arguments and nascent lines of thinking, upwrapping before us, as discussed in the fore-going paragraphs, we find ourselves in a better position to appreciate the wisdom in the words of Jules Romain when he said : "What I say below represents only conclusions with which I would identify myself, if I were obliged to stop thinking today". The underlying wisdom in these words has greatly encouraged us in this inquest to appreciate the emerging facts and scenario in a proper perspective. Crucial key-word in the definition of taxable services, namely, "C&F Operations" needs to be viewed afresh in this scenario. The whole "operations" involved in "C&F Operations" now remind us of an orchestra, performing a western classical symphony. It reminds us of a connoisseur's experience of harmony in western classical music. While listening to Mahler's 9th Symphony, one does not listen to an individual violin or a trumpet, but the harmony emanating from many different seemingly unrelated instruments. In the same way, a C&F Agent's functions consisting of seemingly unrelated tasks are well orchestrated. This view of ours is strengthened by various references including the Report of the United Nations Economic Commission for Africa referred to by us in the preceding paragraphs all revealing in no uncertain terms that the freight forwarders are known variously as clearing

agent, shipping forwarding agent etc. We are, therefore, of the view that even if one segment of activities is not demonstrated to be performed, it cannot be held that the appellants were not engaged in taxable service. Due to their orchestrated nature of work, such isolated activity can also be covered under "C&F Operations". Merely, because the bassoon was not played in one of the movements of a symphony, it does not cease to be otherwise a part of the orchestra. While forming this view, we have certainly not overlooked the fact that while music can be sometimes taxing, a tax can never be musical !

32. *While arriving at this conclusion, we also go by the trade understanding based on sheer common sense, which is often uncommon. Because a buyer buys only rice and not wheat in a grocery shop, which claims to sell "wheat and rice", the shop cannot cease to be a shop selling "wheat and rice". In the same way, rendering only "forwarding" service cannot make the appellant cease to be a "Clearing and Forwarding Agent", so as to save him from the tax. Some customers may want only clearing operations, while some forwarding, and others both. The expression "clearing and forwarding operations" is a compendious expression of nature of services offered, any of which will bring the service providers in the tax net of this category. Moreover, in the process of forwarding operations - clearance stages may arise such as at octroi posts or subsequent transits.*

33. *We, do agree that it is the context in which the word "and" is positioned, being sandwiched between the words "clearing" and "forwarding" has to be looked into, while interpreting the meaning. Like the legendary Trishanku, the word "and" is dangling between "clearing" and "forwarding" - neither divorcing from the Heavens, nor from the Earth. In such a positioning, it is not possible to segregate the holistic concept of "clearing and forwarding"*

into divisible activities, either or both of which can be provided for answering the customers' needs.

34. *It has also been argued before us at length that whenever any ambiguity exists, the decision should be in favour of the assessee. Thanks to the competent assistance available from the rival parties, the expression "C&F Operations" appears no longer esoteric. Hence, there is no case to extend any benefit of doubt to the assessee.*

35. *In new of the above discussion and findings, we hold that the "C&F Operations" cannot be dissected into "Clearing" and "Forwarding" as they fall in the common category and hence all or any of the services of that category will be services provided by a "C&F Agent", connected with "C&F Operations" and would attract levy of service tax under Section 65(23). Question No. 1 referred to us is accordingly answered in the affirmative and the question No. 2 in the negative."*

5.9 Tribunal has in case of Telera Logistics Pvt Ltd [2014 (33) STR 514 (T-Mum)] while upholding the demand made under taxable category of Clearing and Forwarding Agent Services have also upheld the invocation of extended period of limitation as per proviso to section 73(1) of Finance Act, 1994 stating as follows:

4.5 *The next plea of the appellants is that keeping in view the nature of operation they were under the bona fide belief that no Service Tax is payable and hence extended period of limitation cannot be extended. We note that the demand is from October, 1999 onwards. The appellant had not taken any registration. The first time they took registration was in December, 2001 relating to clearing and forwarding services. However, after taking the registration they did not pay Service Tax or filed any returns. After sometime they started correspondence disputing the leviability of Service Tax. Keeping in view the conduct of the appellants, we have no hesitation in holding*

that there was a clear cut suppression of activities before 2002 and later on also the act of correspondence, not filing the returns, etc., clearly indicates the wilful intention to evade Service Tax. We therefore hold that the extended period is correctly invoked."

This decision has been upheld by the Hon'ble Apex Court as reported at [2014 (35) STR J182 (SC)].

5.10 Similarly in case of Somani Agencies [205 (43) STR 242 (T-Del)], Delhi bench has also upheld the demand made under the taxable category of Clearing and Forwarding Agent Services in similar situation. They have also upheld the invocation of extended period of limitation. The relevant paras of the aid decision is reproduced below:

"4. We have considered the contentions of both sides. We appreciate the nature of service rendered by the appellant. It is useful to quote from the agreement/contract/appointment of the appellant in terms of which the appellant rendered the impugned service.

(i) Noticee shall act as C & F agent for the purpose of receiving, storing and forwarding of goods.

(ii) Noticee shall unload, load, stock and store merchandise sent by the principals.

(iii) Noticee shall maintain a warehouse/godown for storing of the goods and maintain proper records of the receipts and dispatches of the goods.

(iv) The noticee is fully responsible for making arrangements for dispatch, delivery and transportation thereof to various destinations as per directions from the company.

(v) Ownership of the goods is fully with the company and C&F Agent merely acts as a custodian of the goods.

(vi) *Goods are dispatched as advised by the company.*

(vii) *The noticee is fully responsible for collection of the payments for goods and deposit the same in the principals' account.*

(viii) *Noticee shall comply with all statutory and legal requirements such as registration/license for operation of C & F agency and for any other legal requirements that may be applicable to the operations of the C & F agency.*

It is clear from the provisions of the above-quoted agreement that as per the agreement itself the appellant was to act as clearing and forwarding agent for the purpose of receiving, storing and forwarding of goods. It was to unload, load and stock and store the merchandise sent by the service recipient and the ownership of the goods remained with the service recipient and the appellant merely acted as a custodian of the goods and dispatched them as per the advice of the service recipient. It is thus obvious that the appellant cleared the goods received at its end and stored them in the warehouse and thereafter forwarded them as per the directions of the service recipient. Section 65(25) of Finance Act, 1994 defines clearing and forwarding agent as under :

"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."

The taxable service is defined under Section 65(105)(j) ibid is as under :

"Taxable service" means any service provided or to be provided to a client, by a clearing and forwarding agent in

relation to clearing and forwarding operations, in any manner."

It is thus clear that as per the activities performed by the appellant, it is squarely covered within the definition of clearing and forwarding agent and it provided service to a client in relation to clearing and forwarding operations. We have taken note of the Punjab and Haryana High Court judgment in the case of Kulcip Medicines Pvt. Ltd. (supra) wherein the word "clearing" was given the meaning as if such clearing was required from the factory. Supreme Court vide its order [2012 (25) S.T.R. J127 (S.C.)] summarily dismissed the special leave petition against the said order of Punjab and Haryana High Court. Thus in the wake of Supreme Court judgment in the case of Kunhayammed v. State of Kerala - 2001 (129) E.L.T. 11 (S.C.) there was no merger of the Punjab & Haryana High Court order with the order of Supreme Court and consequently the judgment of Punjab & Haryana High Court did not acquire the strength and vitality of the Supreme Court order. We find that the definition of clearing and forwarding agent nowhere requires the clearing to be effected from the factory. Indeed the said judgment of Punjab and Haryana High Court has been taken due note of by the Karnataka High Court in the case of Mahavir Generics (supra). In the said judgment Karnataka High Court considered the service rendered by Mahavir Generics in terms of the agreement which has been quoted in the said judgment. The said agreement is similar (if not identical) to the one under which the appellant rendered service and therefore the said judgment of Karnataka High Court is squarely applicable to the present case. It may be pertinent to note that P & H High Court in its judgment in the case of Kulcip Medicines (supra) took note of the assertion of Madhav Rao, Id. Counsel that the CESTAT judgment in the case of Mahavir

*Generics [2006 (3) S.T.R. 276 (Tribunal)] was not appealed against by Revenue which was factually incorrect as the judgment of CESTAT in the case of Mahavir Generics was appealed against before Karnataka High Court. **Indeed as per the agreement under which the appellant rendered service all the ingredients required for coverage of the service under C & F agent service are so clearly present that there was no scope for any confusion or ambiguity with regard to the taxability of the said service and therefore the appellant's contention that it had bona fide belief about the non-taxability of service rendered by it is totally untenable. Bona fide belief is not a hallucinatory belief; it is a genuine belief of a reasonable person operating in an appropriate environment. When the terms of the agreement were so clear, any reasonable person operating in an appropriate environment would have no basis to entertain a belief that the service rendered by it in terms of the agreement cited above by any stretch of imagination would not be covered under the scope of clearing and forwarding agent service. Therefore the extended period has been rightly invoked. As regards the contention of the appellant that the reasoning of the Commissioner (Appeals) in the impugned order is inadequate, suffice to say that even if that is the case, the appellate Court can use different reasoning based on transactional documents and come to an appropriate finding and the appellate Court is not in any way bound by the reasoning of the lower authorities in this regard.***

In our view all the arguments advanced by the appellants both on the merits and limitation have been considered and rejected in these decisions. In view of these decisions appeal filed should fail both on merits and limitation.

5.11 Since the demand of tax has been upheld the demand for interest will follow. It is now settled law that interest under Section 75, is for delay in the payment of tax from the date when it was due. Since appellants have failed to pay the said Service Tax by the due date interest demanded cannot be faulted. In case of P V Vikhe Patil SSK [2007 (215) ELT 23 (Bom)] Hon'ble Bombay High Court has stated as follows:

"10. So far as interest u/s. 11AB is concerned, on reference to text of Section 11AB, it is evident that there is no discretion regarding the rate of interest. Language of Section 11AB(1) is clear. The interest has to be at the rate not below 10% and not exceeding 36% p.a. The actual rate of interest applicable from time to time by fluctuations between 10% to 36% is as determined by the Central Government by notification in the Official Gazette from time to time. There would be discretion, if at all the same is incorporated in such notification in the gazette by which rates of interest chargeable u/s. 11AB are declared.

The second aspect would be whether there is any discretion not to charge the interest u/s. 11AB at all and we are afraid, language of Section 11AB is unambiguous. The person, who is liable to pay duty short levied/short paid/non-levied/unpaid etc., is liable to pay interest at the rate as may be determined by the Central Government from time to time. This is evident from the opening part of sub-section (1) of Section 11, which runs thus :

"Where any duty of excise has not been levied or paid or has been short levied or short paid or erroneously refunded, the person, who is liable to pay duty as determined under sub-section (2) or has paid the duty under sub-section (2B) of Section 11A, shall in addition to the duty be liable to pay interest at such rate"

The terminal part in the quotation above, which is couched with the words "shall" and "be liable" clearly indicates that

there is no option. As discussed earlier, this is a civil liability of the assessee, who has retained the amount of public exchequer with himself and which ought to have gone in the pockets of the Central Government much earlier. Upon reading Section 11AB together with Sections 11A and 11AA, we are of firm view that interest on the duty evaded is payable and the same is compulsory and even though the evasion of duty is not mala fide or intentional."

Similar views have been expressed in the following decisions:

- a) Kanhai Ram Thakedar [2005 (185) ELT 3 (SC)]
- b) TCP Limited [2006 (1) STR 134 (T-Ahd)]
- c) Pepsi Cola Marketing Co [2007 (8) STR 246 (T-Ahd)]
- d) Ballarpur Industries Limited [2007 (5) STR 197 (T-Mum)]

Thus we uphold the demand of interest made under Section 75 of the Finance Act, 1994.

5.12 It is now settled position in law that penalty under section 78 can be imposed only if the ingredients specified in the said section are present. The ingredients specified for invoking the Section 78 are identical to those specified for invoking the extended period of limitation as provided by Section 73 *ibid*. Since in respect of show cause notice, we hold that demand could have been made by invoking the extended period of limitation as provided by Section 73, we uphold the penalties imposed under Section 78 of The Finance Act, 1994. Hon'ble Supreme Court has in case of Rajasthan Spinning and Weaving Mills [2009 (238) ELT 3 (SC)] held as follows:

"23. The decision in Dharamendra Textile must, therefore, be understood to mean that though the application of Section 11AC would depend upon the existence or otherwise of the conditions expressly stated in

the section, once the section is applicable in a case the concerned authority would have no discretion in quantifying the amount and penalty must be imposed equal to the duty determined under sub-section (2) of Section 11A. That is what Dharamendra Textile decides."

5.13 Penalties under Section 75A, 76 and 77 of Finance Act, 1994 are in nature of civil penalties and are imposed in cases where the person who by his act of omission or commission has failed to fulfill the obligations cast on him under the statute. Hon'ble Supreme Court has in case of Gujarat Travancore Agency [1989 (42) ELT 350 (SC)] held as follows:

"4. Learned Counsel for the assessee has addressed an exhaustive argument before us on the question whether a penalty imposed under Section 271(1)(a) of the Act involves the element of mens rea and in support of his submission that it does he has placed before us several cases decided by this Court and the High Courts in order to demonstrate that the proceedings by way of penalty under Section 271(1)(a) of the Act are quasi criminal in nature and that, therefore, the element of mens rea is a mandatory requirement before a penalty can be imposed under Section 271(1)(a). We are relieved of the necessity of referring to all those decisions. Indeed, many of them were considered by the High Court and are referred to in the judgment under appeal. It is sufficient for us to refer to Section 271(1)(a), which provides that a penalty may be imposed if the Income Tax Officer is satisfied that any person has without reasonable cause failed to furnish the return of total income, and to Section 276C which provides that if a person wilfully fails to furnish in due time the return of income required under Section 139(1), he shall be punishable with rigorous imprisonment for a term which may extend to one year or with fine. It is clear that in the former case what it intended is a civil obligation while in

the latter what is imposed is a criminal sentence. There can be no dispute that having regard to the provisions of Section 276C, which speaks of wilful failure on the part of the defaulter and taking into consideration the nature of the penalty, which is punitive, no sentence can be imposed under that provision unless the element of mensrea is established. In most cases of criminal liability, the intention of the Legislature is that the penalty should serve as a deterrent. The creation of an offence by Statute proceeds on the assumption that society suffers injury by and the act or omission of the defaulter and that a deterrent must be imposed to discourage the repetition of the offence. In the case of a proceeding under Section 271(1)(a), however, it seems that the intention of the legislature is to emphasise the fact of loss of Revenue and to provide a remedy for such loss, although no doubt an element of coercion is present in the penalty. In this connection the terms in which the penalty falls to be measured is significant. Unless there is something in the language of the statute indicating the need to establish the element of mens rea it is generally sufficient to prove that a default in complying with the statute has occurred. In our opinion, there is nothing in Section 271(1)(a) which requires that mens rea must be proved before penalty can be levied under that provision. We are supported by the statement in Corpus Juris Secundum Volume 85, page 580, Paragraph 1023 :

“A penalty imposed for a tax delinquency is a civil obligation, remedial and coercive in its nature, and is far different from the penalty for a crime or a fine or forfeiture provided as punishment for the violation of criminal or penal laws.”

5. *Accordingly, we hold that the element of mensrea was not required to be proved in the proceedings taken by the Income Tax Officer under Section 271(1)(a) of the*

Income-tax Act against the assessee for the assessment years 1965-66 and 1966-67."

In *Chairman, SEBI v. Shriram Mutual Fund* [2006-TIOL-72-SC-SEBI] the Hon'ble Apex Court held that mensrea is not an essential element for imposing penalty for breach of civil obligations.

'A penalty imposed for a tax delinquency is a civil obligation, remedial and coercive in its nature, and is far different from the penalty for a crime or a fine or forfeiture provided as punishment for the violation of criminal or penal laws.'

5.11 Penalty under Section 76 of the Act is imposed for failure to pay Service Tax by the due date. Kerala High Court has in case of *Krishna Poduval* {2006 (1) STR 185 (Ker)] held follows:

"11. The penalty imposable under S. 76 is for failure to pay service tax by the person liable to pay the same in accordance with the provisions of S. 68 and the Rules made thereunder, whereas S. 78 relates to penalty for suppression of the value of taxable service. Of course these two offences may arise in the course of the same transaction, or from the same act of the person concerned. But we are of opinion that the incidents of imposition of penalty are distinct and separate and even if the offences are committed in the course of same transaction or arises out of the same act, the penalty is imposable for ingredients of both the offences. There can be a situation where even without suppressing value of taxable service, the person liable to pay service tax fails to pay. Therefore, penalty can certainly be imposed on erring persons under both the above Sections, especially since the ingredients of the two offences are distinct and separate. Perhaps invoking powers under S. 80 of the Finance Act, the appropriate authority could have decided not to impose penalty on the assessee if the assessee proved that there

was reasonable cause for the said failure in respect of one or both of the offences. However, no circumstances are either pleaded or proved for invocation of the said Section also. In any event we are not satisfied that an assessee who is guilty of suppression deserves such sympathy. As such, we are of opinion that the learned Single Judge was not correct in directing the 1st appellant to modify the demand withdrawing penalty under S. 76. Therefore, the judgment of the learned Single Judge, to the extent it directs the first appellant to modify Ext. P1 by withdrawing penalty levied under S. 76, is liable to be set aside and we do so. The cumulative result of the above findings would be that the Writ Petitions are liable to be dismissed and we do so. However, we do not make any order as to costs."

Same view was again expressed by Kerala High Court in case of Lawson Travel and Tours (I)(P) Ltd [2015 (37) ELT 183 (Ker)] as follows:

"5. What we notice is, the liability to pay Service Tax is in accordance with the Finance Act, 1994, as the taxable services involved in the matter was for the period from April, 2000 to March, 2004. The decision of this High Court referred above in Krishna Poduval's case (supra) was also prior to Finance Act, 2008, which made a remarkable distinction between Sections 76 and 78 of Service Tax Act. As the period in question relates prior to Finance Act, 2008, the assessing authority and later the Tribunal were justified in placing reliance on Krishna Poduval's case (supra) by the High Court of Kerala.

6. We find no good reason to opine that both Sections 76 and 78 are not applicable to the case of the appellant. On the other hand, we find, at the relevant point of time prior to Finance Act, 2008, penalty could be imposed under both the provisions and it is for appellant/assessee to convince authorities concerned by evidence that they are not liable to pay Service Tax and that there is justification in the

defence raised by them regarding refund of the amounts. Accordingly, the appeal is dismissed."

Tribunal has in case of Checkmate Industries Services [2016 (44) STR 290 (T-Mum)] held as follows:

"5.4 With regard to penalties imposed on the appellant, penalty under Section 76 is imposed for default in payment of tax and, no mensrea is required to be proved for imposing such penalty. For mere default and delay in payment of tax, the liability to penalty arises. The Hon'ble High Court of Kerala in the case of Asst. Commissioner of Central Excise v. Krishna Poduval - 2006 (1) S.T.R. 185 (Ker.) has held that penalty under Section 76 of the Finance Act, 1994 can be imposed for mere default/delay in payment of Service Tax in addition to the penalty under Section 78 and these penalties are mutually exclusive and even if offences are committed in the course of same transaction or arise out of same act, penalty is imposable for ingredients of both offences."

6.1 In view of the discussions as above we do not find any merits in the appeal filed by the appellants and dismiss the same.

(Order pronounced in the open court on 28.08.2019)

(S.K. Mohanty)
Member (Judicial)

(Sanjiv Srivastava)
Member (Technical)