KERALA High Court– Courier Service – Franchisee not liable to pay tax again when courier agency has paid tax on gross amount charged

THE appellant is engaged in rendering courier service, which involves collection of letters, parcels, articles etc from customers and then delivery of the same to the addressees. In this business, the appellant has engaged several agents who are named as Franchisees in the agreement between the appellant and them where under these agents collect articles from customers along with service charges at the tariff prescribed by the appellant. These agents called Franchisees are also collecting service tax along with service charges from the customers while accepting articles and are remitting the same in their own name after taking registration with Central Excise Department in terms of Section 65(33) read with Section 65 (105)(f) of the Act. The entire service charges collected are stated to be passed on to the appellant and from out of the same, the appellant makes payment to the agents/franchisees at the rate fixed in the agreement. The rate fixed in the agreement is 50% of service charge collected for articles collected for delivery within the State and 25% for articles collected from the State for delivery outside Kerala. Similarly for parcel collected for delivery outside India, the agents/franchisees are paid Rs.50 /- for every parcel with service charges above Rs.500 /- and in respect of parcels with service charges below Rs.500 /-, charges payable to the agents/franchisees is only 10% of such charges. The courier service operation therefore leads to sharing of substantial amount of charges collected from the customers with the franchisees and appellant gets only the balance amount. The agreement provides for payment of remuneration to the agents/franchisees only for service charges recovered by them for the articles collected by them for delivery at various destinations.

The department assessed net amount retained by appellant from out of the charges collected for courier service after payment to agents/franchisees towards value of taxable service payable for franchise service under Section 65(47) read with Section 65(105) (zze) of the Act. In effect, the service charges collected and shared between the appellant and the agents/franchisees got partly taxed twice for service tax under the Act, one under the head 'tax on courier service' and other under the head 'tax on franchise service'. Since the appeal filed against the Commissioner's order was rejected by the Tribunal, the appellant has approached the High Court with these appeals filed under section 35G of the Central Excise Act, 1944. It is seen that while one appeal was decided by the Tribunal on merit, the other appeal was rejected by the Tribunal for non-deposit of the amount ordered to be paid as a condition for maintainability of the appeal.

Even though second appeal to this Court will not lie against the order issued by the Tribunal rejecting an appeal for non-compliance of pre-deposit of duty ordered by them, the High Court found that in the connected appeal filed by the sister concern, the issue is decided by the Tribunal on merit. Therefore High Court proceeded to consider the correctness of the levy of service tax in both these cases.

The High Court observed that the appellant's activity is essentially rendering courier service, which is, collection of articles from customers at various places and delivery of the same at the destination requested by the customers. The counsel contended that the

appellant transports goods between major centres and local collection and deliveries are done by engaging agents/franchisees. So much so, the services of agents/franchisees and appellant together will only constitute the complete courier service. Facts seen from the agreement and accepted by the lower authorities is that the courier service charges collected from the customers for booking the cargo is shared between the appellant and the agents/franchisees in an agreed manner.

The question therefore to be considered is whether the service charges collected from the customers on which full tax is paid for rendering courier service under Section 65(33) read with Section 65 (105)(f) by the agents/franchisees after registration with the Department could be subject to a further tax for franchisee service under section 65(47) read with 65(105) (zze) to the extent of the net amount received by the appellant.

The Department has admitted the liability for the agents/franchisees for payment of service charges on the entire courier service charges recovered from customers and have therefore permitted them to register and remit the tax on regular basis. Therefore, the remaining question to be considered is whether net service charges recovered from customers for courier service retained by the appellant after payment of the portion due to the agents/franchisees is again assessable for service tax under the head 'franchise service' under Section 65 (47) read with 65(105) (zze) of the Act.

In the first place High Court found from Section 67 that taxable service is the gross amount in money consideration received from the customers for service provided. In terms of section 67, the entire amount collected from the customers for rendering courier service is subject to tax at the hands of agent/franchisee. If a service falls under two heads, there is no provision in the Finance Act, 1994 to tax the very same service charges twice under two heads. In this case, what was done is double assessment on part of the service charges collected, for rendering courier service at the hands of the appellant. Further, Section 65(47) read with 65(105)(zze) has no application in regard to rendering of courier service by appellant with the assistance of agents/franchisees. Franchise is defined in section 65(47).

Under franchise agreement, the franchisor gives a right to the franchisee to do business in a representative manner by using franchiser’s trade mark or trade name. In such case, the franchisee is to make payments to the franchisor for using their name, trademark etc., in respect of the goods sold or the service rendered. In this case, in fact, the agent/franchisee is not doing independent business but is only acting as agent for collection and delivery of parcel as agent in the courier service. Apart from appointing the agent / franchisees, the appellants are not rendering any service to the franchisees. The franchisees also do not make any payment to the appellant, which alone could be subject to tax.

In fact, franchisee gets paid only for the work done for the franchisor , i.e. In the courier service by acting as agent for collection and distribution of articles for customers. The only provision under which tax can be levied for the entire transaction involving the appellant and franchisees/agents is the tax on courier service covered under section 65(33) read with Section 65(105)(f) of the Act.

The High Court therefore held that the assessment and demand of tax from the appellant under section 65(47) read with Section 65(105)(zze) is untenable.

IN THE HIGH COURT OF KERALA
C.E.Appeal.No. 21 of 2009
M/s SPEED AND SAFE COURIER SERVICE
Vs
THE COMMISSIONER

C N Ramachandran Nair And V K Mohanan, JJ

Dated: November 5, 2009

Appellant Rep. by : Sri Paul Mathew
Respondent Rep. by : Sri P Gopinath Menon, SC

Service Tax – Courier Service – Franchisee not liable to pay tax again when the courier agency has paid tax on the gross amount charged: the agent/franchisee is not doing independent business but is only acting as agent for collection and delivery of parcel as agent in the courier service. Apart from appointing the agent / franchisees, the appellants are not rendering any service to the franchisees. The franchisees also do not make any payment to the appellant which alone could be subject to tax.

The only provision under which tax can be levied for the entire transaction involving the appellant and franchisees/agents is the tax on courier service covered under section 65(33) read with Section 65(105)(f) of the Act.

JUDGEMENT

Per: Ramachandran Nair, J.:

Connected appeals are filed by a courier service agency challenging the orders of the Customs, Excise & Service Tax Appellate Tribunal upholding the levy of service tax on the appellant for rendering franchisee service falling under sub-clause 47 of Section 65 read with Section 65 (105)(zze) of the Finance Act, 1994 (hereinafter referred for short ,'The Act').

2. We have heard the counsel appearing for the appellant and Sri Abraham Thomas, Standing Counsel appearing for the respondent.

3. Admittedly, the appellant is engaged in rendering courier service which involves collection of letters, parcels, articles etc from customers and then delivery of the same to the addressees. In this business, the appellant has engaged several agents who are named as Franchisees in the agreement between the appellant and them whereunder these agents

collect articles from customers along with service charges at the tariff prescribed by the appellant. We are told that these agents called Franchisees are also collecting service tax along with service charges from the customers while accepting articles and are remitting the same in their own name after taking registration with Central Excise Department in terms of Section 65(33) read with Section 65 (105)(f) of the Act. The entire service charges collected are stated to be passed on to the appellant and from out of the same; the appellant makes payment to the agents/franchisees at the rate fixed in the agreement. We are told that the rate fixed in the agreement is 50% of service charge collected for articles collected for delivery within the State and 25% for articles collected from the State for delivery outside Kerala. Similarly for parcel collected for delivery outside India, the agents/franchisees are paid Rs.50/- for every parcel with service charges above Rs.500/- and in respect of parcels with service charges below Rs.500/-, charges payable to the agents/franchisees is only 10% of such charges. The courier service operation therefore leads to sharing of substantial amount of charges collected from the customers with the franchisees and appellant gets only the balance amount. The agreement provides for payment of remuneration to the agents/franchisees only for service charges recovered by them for the articles collected by them for delivery at various destinations The department assessed net amount retained by appellant from out of the charges collected for courier service after payment to agents/franchisees towards value of taxable service payable for franchise service under Section 65(47) read with Section 65(105) (zze) of the Act. In effect, the service charges collected and shared between the appellant and the agents/franchisees got partly taxed twice for service tax under the Act, one under the head 'tax on courier service' and other under the head 'tax on franchise service'. Since the appeal filed against the Commissioner's order was rejected by the Tribunal, the appellant has approached this Court with these appeals filed under section 35G of the Central Excise Act, 1944. It is seen that while one appeal was decided by the Tribunal on merit, the other appeal was rejected by the Tribunal for non-deposit of the amount ordered to be paid as a condition for maintainability of the appeal.

4. Even though second appeal to this Court will not lie against the order issued by the Tribunal rejecting an appeal for non-compliance of pre-deposit of duty ordered by them, we find that in the connected appeal filed by the sister concern, the issue is decided by the Tribunal on merit. Therefore we proceed to consider the correctness of the levy of service tax in both these cases.

5. Admittedly, the appellant's activity is essentially rendering courier service, which is, collection of articles from customers at various places and delivery of the same at the destination requested by the customers. The counsel contended that the appellant transports goods between major centres and local collection and deliveries are done by engaging agents/franchisees. So much so, the services of agents/franchisees and appellant together will only constitute the complete courier service. Facts seen from the agreement and accepted by the lower authorities is that the courier service charges collected from the customers for booking the cargo is shared between the appellant and the agents/franchisees in an agreed manner. The question therefore to be considered is whether the service charges collected from the customers on which full tax is paid for rendering courier service under Section 65(33) read with Section 65 (105)(f) by the

agents/franchisees after registration with the Department could be subject to a further tax for franchisee service under section 65(47) read with 65(105) (zze) to the extent of the net amount received by the appellant. The Department has admitted the liability for the agents/franchisees for payment of service charges on the entire courier service charges recovered from customers and have therefore permitted them to register and remit the tax on regular basis. Therefore, the remaining question to be considered is whether net service charges recovered from customers for courier service retained by the appellant after payment of the portion due to the agents/franchisees is again assessable for service tax under the head 'franchise service' under Section 65 (47) read with 65(105) (zze) of the Act. In the first place we find from Section 67 that taxable service is the gross amount in money consideration received from the customers for service provided. in terms of section 67, the entire amount collected from the customers for rendering courier service is subject to tax at the hands of agent/franchisee. In our view, if a service falls under two heads, there is no provision in the Finance Act, 1994 to tax the very same service charges twice under two heads. In this case, what was done is double assessment on part of the service charges collected, for rendering courier service at the hands of the appellant. Further, we do not think Section 65(47) read with 65(105)(zze) has any application in regard to rendering of courier service by appellant with the assistance of agents/franchisees. Franchise is defined in section 65(47).

> "(47) "franchise" means an agreement by which -
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> (i) franchisee is granted representational right to sell or manufacture goods or to provide service or undertake any process identified with franchisor, whether or not a trademark, service mark, trade name or logo or any such symbol, as the case may be, is involved.
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> (ii) the franchisor provides concepts of business operation to frachisee, including know- how, method of operation, managerial expertise, marketing technique or training and standards of quality control except passing on the ownership of all know-how to franchisee;
>
> (iii) the franchisee is required to pay to the franchisor, directly or indirectly, a fee; and
>
> (iv) the franchisee is under an obligation not to engage in selling or providing similar goods or services or process, identified with any other person;"

From the above, it is clear that under franchise agreement, the franchisor gives a right to the franchisee to do business in a representative manner by using franchisor's trademark or trade name. In such case, the franchisee is to make payments to the franchisor for using their name, trademark etc., in respect of the goods sold or the service rendered. In this case, in fact, the agent/franchisee is not doing independent business but is only acting as agent for collection and delivery of parcel as agent in the courier service. Apart from appointing the agent / franchisees, the appellants are not rendering any service to the

franchisees. The franchisees also do not make any payment to the appellant which alone could be subject to tax under the I.T. Act. In fact, franchisee gets paid only for the work done for the franchisor, i.e. in the courier service by acting as agent for collection and distribution of articles for customers. The only provision under which tax can be levied for the entire transaction involving the appellant and franchisees/agents is the tax on courier service covered under section 65(33) read with Section 65(105)(f) of the Act. We therefore hold that the assessment and demand of tax from the appellant under section 65(47) read with Section 65(105)(zze) is untenable. Consequently, we allow the appeals by vacating the impugned orders of the Tribunal and that of the lower authorities in regard to levy of tax and penalties. However, it would be open to the department to cross check the amounts received by the appellant from agents/franchisees and verify whether all the franchisees who have made payments have remitted service tax for entire courier service charges collected as stated by the appellants based on which we have allowed the appeals.