FAX : 011-26108426

REGISTERED / AD

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK NO.2, R.K.PURAM, NEW DELHI-110066
CUSTOMS APPEAL BRANCH

Dated: **01/12/2015**

To

Appellant as per address in table below

Respondent as per address in table below

Final Order No. **ST/A/53563-53564/2015-CU[DB]** dated **13/08/2015**

I am directed to transmit herewith a certified copy of order passed by the Tribunal under section **01(5) of the Finance Act, 1994 relating to Service Tax Act, 1994.**

Asstt. Registrar(CUSTOMS Appeal Branch)

	Application	Appeal	Name and Address of Appellant
1	ST/MISC/52801/2014, ST/Stay/58890/2013	ST/58241/2013	**Coca Cola India Inc** Enkay Towers,udyog Vihar GURGAON HARYANA-122016
2	ST/MISC/52802/2014, ST/Stay/58891/2013	ST/58242/2013	**Coca Cola India Inc** Enkay Towers,udyog Vihar GURGAON, HARYANA-122016

Name and Address of Respondent

3	C.S.T.-Service Tax - Delhi MG MARG... IP ESTATE,17-B... IAEA HOUSE...I P ESTATE, DELHI-110002
4	C.S.T.-Service Tax - Delhi MG MARG... IP ESTATE,17-B... IAEA HOUSE...I P ESTATE, DELHI-110002

Other Appellants and Respondents as per Annexure

Copy To

5Advocate(s) / Consultant(s):

Economic LawS Practic At Delhi
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KONNECTUS TOWERS, TOWER A,
BHAVBHUTI MARG, OPP. AJMERI
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NEW DELHI-110002
CENTRE, BARAKHAMBA LANE,
NEW DELHI, DELHI

6 Additional Party's Name & Address :
7 Bar Association, CESTAT, Delhi
8 Director Publications, Customs, Excise. I.P. Estate, Delhi
9 M/s Centax Publications Pvt. Ltd., 1512-B, Bhishm Pitamah Marg, New Delhi-3
10 Company Law Institute of India Pvt. Ltd., No.2 (old no.36), Vaithyaram Street, T. Nagar, Chennai-17
11 Taxmann Allied Service Pvt. Ltd., 59/32, New Rohtak Road, New Delhi-110005
12 Easy Service Tax Online Dot Com Pvt. Ltd., 407A, Iscon Mall, Satellite Road, Ahmedabad-15
13 LAWCRUX Advisors Pvt. Ltd., LAW House, 1-8, Sector-10, Faridabad 121003 (Haryana)
14 TaxIndiaOnline.com Pvt. Ltd., 2nd Floor, Vasant Arcade, Vasant Kunj, New Delhi - 110070
15 Mark Professional Services Pvt. Ltd., 108, Everest Block, Aditya Enclave, Hyderabad – 38
16 The ICFAI society, 52, Nagarjuna Hill,Punjagutta Hyderabad.-500082
17 C.D.R. **18** Office Copy **19** Guard File

Asstt. Registrar(CUSTOMS Appeal Branch)

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST BLOCK NO.2, R.K. PURAM, NEW DELHI – 110 066.

Date of Hearing 13.08.2015

For Approval &Signature :

Hon'ble Hon'ble Justice G. Raghuram, President
Hon'ble Mr. R.K. Singh, Member (Technical)

1.	Whether Press Reporter may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	No
2.	Whether it would be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	Yes
3.	Whether Lordships wish to see the fair copy of the order?	Seen
4.	Whether order is to be circulated to the Department Authorities?	Yes

Application Nos.ST/MISC/52801-52802/2014-CU[DB]
Application Nos.ST/STAY/58890-58891/2013-CU[DB]
Appeal Nos.ST/58241-58242/2013-CU[DB]
[Arising out of Order-in-Original Nos.72 & 73/GB/2013, dated 26.04.2013 passed by the C.S.T., Delhi]

M/s. Coca Cola India Inc. — Appellant

Vs.

C.S.T., Delhi — Respondent

Appearance
Mr. Vikram Nankani, Sr. Adv.
Mr. Somnath Shukla, Adv. - for the appellant
Mr. Govind Dixit, DR - for the respondent

CORAM: Hon'ble Justice G. Raghuram, President
Hon'ble Mr. R.K. Singh, Member (Technical)

Final Order Nos.53563-53564/2015, dated 13.08.2015

Per Mr. R.K. Singh :

Stay applications along with appeals have been filed against Orders-in-Original No.72 & 73/GB/2013, dated 26.04.2013 in terms of which service tax demands of Rs.23,23,81,149/- and Rs.1,24,87,393/- were confirmed along with interest and penalties. These demands essentially pertain to the lease rentals for immovable properties and vehicles, and n foreign exchange payments (under reverse charge mechanism).

2. In respect of appeal No.58241/2014 pertaining to Order-in-Original No.72/GB/2013, dated 26.04.2013, the appellant has contended that (i) it being an India branch office of Coca-Cola Inc., USA, entered into service agreements with its group companies for providing support services to them. (ii) Under clause 7 of the agreement, it reimbursed the out of pocket expenses on actual basis. In addition to the reimbursement of expenses, it also paid fees on the basis of actual costs, viz., salaries and allowances, moving and

relocation, service charges for use of assets and staff welfare expenses and 5% mark up on such actual costs. (iii) For rendering such services, service charges on account of salary and allowances including P.F., moving and relocation, etc., along with a mark up of 5% is made and then on the total amount, service tax was paid to Revenue. Similarly, it also incurred expenses, which were in the nature of reimbursement, to be claimed on actual basis without any mark up and even on that, it charged service tax and paid to Revenue. (iv) In the notes to accounts for the year 2010-11 para 6(a) from where the figures "for office premises" is taken, it was clearly mentioned that lease payments for taking premises on lease for the year were Rs.5,58,66,278/- (previous year Rs.5,99,70,317/-). These payments were recovered from the user entities. Consequently, charge to appellant profit & loss account was 'Nil'. This clearly proves that it was a payment at the hands of the appellant and not an income as construed by Revenue. Since the said amount is an expense and not income, there is no reason to demand any service tax on the same. (v) Since the premises taken on lease were used by it to provide services to its group companies, the lease charges paid by it were recovered from the group companies as reimbursements and therefore the

same was not charged to the Profit & Loss Account of the appellant. The lease rent was recovered from the group companies not because of the reason that the premises were sub-let to them, but because of the reason that the same was an expenditure incurred by the appellant in the course of providing the services to the group entities. (vi) Such recovery from user entities was not on account of rendering any service which amounted to renting of immovable property for the purpose of levy of service tax. (vii) The commissioner himself has admitted the fact that the appellant was paying service tax even on the reimbursements received from group companies. Therefore, the demand of service tax on reimbursements as proposed in the Show Cause Notice was dropped by the Commissioner. (viii) Similarly, in the notes on accounts for the year 2005-06, in para 6(b) from where the figures "For Vehicles" were taken, it was clearly mentioned that the lease agreement had been entered into with vehicle providers by the appellant for providing vehicles to the officials of the appellant. The lease payments for the vehicles were borne by the appellant but lease payments over and above the entitlement wre recovered from the officials. During the year 2005-06, the appellant made lease payments amounting to Rs.1,62,50,306/- (previous year Rs.1,39,63,455/-), while it

recovered from employees Rs.7,04,409/- (previous year Rs.14,39,410/-) being excess amount over their entitlement. Net charges to profit and loss account was classified as salaries and allowances amounting to Rs.1,55,25,225/- (previous year Rs.1,25,24,054/-) under Schedule-3. This clearly proves that it is a payment at the hands of the appellant and not an income as construed by the Commissioner, and this being a part of salary, it has been taken into account for charging services fees from the sister concerns and consequently service tax has been collected and deposited in the Govt. account. Similar notes were appearing in the balance sheets for the years 2996-07 to 2009-10.

3. Regarding foreign exchange payments, the appellant pleaded that (i) In order to attract the provisions of Section 66A of the Finance Act, 1994, first there must be a receipt of taxable service by the appellant from a foreign service provider, secondly, the money should have been paid in foreign currency and thirdly, the conditions mentioned in the Import of Service Rules, 2011 must be satisfied to attract service tax at the hands of the Indian appellant under reverse charge mechanism. No examination has been made by the

Commissioner as to whether there was a taxable service rendered by foreign service provider to the appellant. All the foreign exchange expenses of the appellant have been treated as being for import of taxable services by the appellant without any basis. In the present case, all payments made by the appellant in foreign exchange did not relate to import of taxable services. The appellant explained that the foreign exchange expenses as under:-

Sl. No.	**Nature of activity**	**Taxable/ Non-taxable**	**Reason for treating services non-taxable**
1.	Telecommunication Services	Taxable	[As per Section 65 (105) (zzzx) of the Finance Act, 1994]
2.	Management Consultant Service	Taxable	[As per Section 65 (105) (r) of the Finance Act, 1994
3.	Purchase of Forex	Non-Taxable	No service tax is liable to be paid as purchase of foreign exchange is not a taxable service as per the provisions of the Act.]
4.	School Fees for American Embassy School	Non-Taxable	Educational services are not liable to service tax as per the provisions of the Act.
5.	Training and Development at foreign locations	Non-Taxable	As per IOS Rules, does not amount to import of service, as the services are wholly performed outside India.

6.	Travel arrangement for foreign expatriates	Non-Taxable	The levy of service tax as per Section 65 (105) (zzzo) of the Act is on a person embarking on journey from India. Since the journey was embarked outside India, no service tax is liable to be paid on such amounts.
7.	Employee benefits	Non-Taxable	The same is not a taxable service as per the provisions of the Act.

(ii) It revisited its accounts relating to foreign exchange expenses and examined the foreign exchange payments made by it during the relevant period. It was noticed that as mentioned in table above on some foreign currency payments, there may be a liability to discharge service tax. Accordingly, the appellant discharged the service tax liability on such foreign exchange payments and also paid applicable interest on the delayed payment. The appellant has paid a total service tax of Rs.6,43,228/- along with interest of Rs.4,16,010/- during the relevant period in relation to the foreign exchange payment made to the foreign parties and intimated the same to ld. Commissioner (Similarly, appropriate tax with interest was remitted in respect of Appeal No.58242/2013).

4. Ld. Departmental Representative, on the other hand, supported the impugned order reiterating the grounds/ reasons contained therein.

5. As both sides agreed that the appeals themselves can be taken up at this stage, we proceed to do so waiving requirement of pre-deposit.

6. We have considered the contentions of both sides. Regarding the demand of service tax pertaining to "Renting of Immovable Property" service and "Leasing of Vehicles", we find that the adjudicating authority has taken due note of the contentions of the appellant, but has confirmed the demand essentially observing as under:-

> *"38.4 In this connection, I observe M/s. CCII has not submitted copies of the relevant lease agreements so the factual position in this regard could not be examined. Further, as per notes of accounts lease payments made by them have been recovered from some user entities. In case the properties taken on lease were used by M/s. CCII themselves for providing services to their group companies from whom reimbursements were made (on which they have claimed to have paid appropriate service tax as part of their service cost) then in such situation, question of recovery of amount from some other user entity cannot arise. Therefore, it becomes quite clear that recovery of amounts from some other user entities can be made only on account of renting of some properties. In such*

circumstances the demand of service tax under 'Renting of Immovable Property Service' as mentioned in the instant Show Cause Notice is very well sustainable and I hold it accordingly."

"38.7 In this regard M/s CCII has contended that these payments recovered from the group companies are included in the account of 'Salaries and allowances' which has been taken into account for charging service fees and consequently service tax has been collected and deposited to the department. In this connection, I find that the party has not provided details of the head 'Salaries and allowances' in order to prove their claim that these amounts are already included therein. Therefore, in such circumstances, the contention of the party can not be acceded to and I reject the same accordingly. I hold that M/s CCII is liable to pay service tax on this account as mentioned in the instant Show Cause Notice."

Thus, it is evident that the adjudicating authority admitted that the factual position could not be examined by him. He has also not countered the contentions of the appellant that it was paying appropriate service tax on the amounts recovered for providing services to its group companies. There is no evidence that the property which appellant leased was further (sub) leased by it to its group companies/ employees. The appellant had repeatedly stated that the properties leased by it were used by it for providing services to its group companies and for such services they charged their group companies on which it paid service tax. In these circumstances, it does not come out at all that the appellant

leased or sub-leased any immovable properties to its group companies/employees. In the Show Cause Notice or in the impugned order, no evidence that the appellant gave any premises on rent/lease has been mentioned. The appellant has shown that it took the premises on lease and therefore was a recipient of renting of immovable property service and not a provider thereof. The onus to establish that the appellant provided renting of immovable property service is on Revenue and as is evident from the paragraphs 38.4 and 38.7 quoted above, such onus has not been discharged by Revenue. Therefore, the question of levying service tax under "Renting of Immovable Properties" service does not arise.

As regards vehicles, the adjudicating authority does not counter the contention of the appellant that it had taken the vehicles on lease for providing the same to the officials and the lease payments for these vehicles were made by it. The adjudicating authority has only stated that he found that the appellant had not provided the details of the head "salary and allowances" in order to "*prove their claim that these amounts were already included therein*" and in these circumstances, the contentions of the appellant cannot be acceded to. In this

regard it is pertinent to note that the onus of establishing that the immovable properties/vehicles were actually given on lease (sub-lease) by the appellant is on Revenue and as contended by the appellant, we also do not find any evidence to the effect that the appellant had given the immovable properties or the vehicles on lease or sub-lease to its officials. Indeed from the submissions of the appellant, it is clear that it had taken vehicles on lease and therefore was recipient of service and not provider thereof. Further, the appellant's contention that it has already paid appropriate service tax on the reimbursement recovered from its group companies [which included reimbursement towards lease rent paid by it for immovable property or towards the provision of vehicles for its officials (reckoned in the salary and allowances)] for providing service to its group companies has not been questioned by the adjudicating authority. In fact, the adjudicating authority has already dropped demand of Rs.9,17,06,862/- relating to "salary and allowances, moving and relocation, service charges for use of assets, staff welfare shown at Sl. No. 6 to 9 of the statement of the Show Cause Notice". In any case such reimbursements would not be liable to service tax under "Renting of Immovable Property Service" or for taxable service relating to lease of vehicles. In these

circumstances, we are of the view that the demands relating to renting of immovable properties and leasing of vehicles are not sustainable.

7. As regards the component of the impugned demand pertaining to expenditure in foreign currency under reverse charge mechanism, we note that this component of demand has been confirmed by the adjudicating authority by observing as under:-

> *"39.1In this regard, department's case is that as per balance sheets during the period under dispute M/s. CCII has incurred Expenses in Foreign currency for the services received by them on which, they are liable to pay service tax under reverse charge mechanism.*
>
> *39.2 In this regard M/s. CCII's defense is that service tax is not leviable just because some expenditure is incurred in foreign currency and to attract the provisions of Section 66A, first there must be a receipt of service by the company from a foreign service provider. Secondly, the money should have been paid in foreign currency and thirdly the conditions mentioned in the rules must be satisfied to attract service tax in the hands of the Indian company. No examination has been made by the Department whether at all there is a service rendered by a foreign service provider but tax levied without any examination; that Section 66A of the Act has been applied without examining the nature of payments made by the company.*
>
> *39.3 In this connection, I observe from the 'Notes to accounts' of the Balance Sheets that the foreign currency expenditures are on account of Travelling, Employee benefits, Moving & Relocation, Misc. Expenses, Telecommunication and Training & Development etc. These all elements show that the*

payments made against these elements are for making their working staff trained for rendering effective services to their group companies. Therefore, appropriate service tax is payable on these amounts by the service receiver under reverse charge mechanism in terms of the provisions of Section 66A of the Act, w.e.f. 18.04.06. However, no demand under reverse charge mechanism for the period 2005-06 is sustainable in view of the decision of Hon'ble Supreme Court in case of Indian National Ship-owners Association (2010) 24 STT 366 (SC). Therefore, demand of service tax amounting to Rs.18,74,543/- on an amount of Rs.18,377,873/- (@10.20%) merits to be dropped and I hold it accordingly."

As is evident from the foregoing, the adjudicating authority has not identified any taxable service for which service tax is liable to be paid under reverse charge mechanism. We find that while service tax under reverse charge mechanism has been confirmed on the foreign currency expenditure, there is not even a whisper in the adjudication order as to what were the taxable services received by the appellant from abroad to make it liable to pay service tax under reverse charge mechanism. For levying of service tax under reverse charge mechanism, Revenue has to first identify the taxable service received from abroad for which payment was made in foreign currency, which, as seen from the paragraphs of the impugned order quoted above, has not been done at all. This is clearly fatal. It can be nobody's case that any amount spent in foreign exchange is liable to service tax under

reverse charge mechanism; such expenses have to be shown to be related to import of taxable service. Even so, the appellant has on its part stated that the expenditure relating to purchase of foreign exchange, school fees for American Embassy School, training and development on foreign locations, travel arrangement for foreign expatriates and employee benefits are not liable to service tax for the reasons given in their submissions and recorded earlier in para 3 and only foreign exchange expenses relating to tele-communication service and management consultant service were liable to service tax which it has paid along with interest.

8. Issues involved in Appeal No.58242/2013 are identical and therefore the aforesaid discussion is also *mutatis mutandis* applicable thereto.

9. In the light of the foregoing analysis, we set aside the components of demand pertaining to "Renting of Immovable Property" service and "Leasing of Vehicles". With regard to the demand pertaining to the expenditure in foreign currency under reverse charge mechanism, we set aside this component of the demand as well; and remit the cases to the adjudicating authority to clearly identify the taxable services in

respect of which service tax under reverse charge mechanism is leviable and quantify the service tax if and so leviable taking into account the submissions of the appellant in that regard, after giving it an opportunity of being heard. Needless to say that the penalties will have to be re-adjusted accordingly. Stay applications and miscellaneous applications for early hearing stand disposed of with the disposal of the appeals themselves.

(Justice G. Raghuram)
President

(R.K. Singh)
Member (Technical)

SSK