FAX : 0532-2400149

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
38,MG Marg Civil Lines,Old Red Building,Allahabad-211001
Regional Branch, Allahabad

Dated: 14/09/2016

To

Appellant as per address in table below

Respondent as per address in table below

Final Order No. ST/A/70812-70813/2016-CU[DB] dated 29/08/2016

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

Application	Appeal	Name and Address of Appellant
1	ST/171/2009 ST/179/2009	Commissioner of CUSTOMS-Meerut-ii OPPOSITE SHAHEED SMARAK, DELHI ROAD...BHANSALI GROUND,MEERUT, UTTAR PRADESH
		Name and Address of Respondent
2		RAKESH AHUJA & OTHERS AHUJA BUILDING,BEGUM SARAI,MORADABAD ROAD,SAMBHAL,, MORADABAD,,UP
	3.	AHUJA BUILDING,BEGUM SARAI,MORADABAD ROAD,SAMBHAL,, MORADABAD,,UP

--

Other Appellants and Respondents as per Annexure

Copy To

4Advocate(s) / Consultant(s): SH V.L.KUMARAN,ADV
5, JANGPURA EXTENSION
LINK ROAD, NEW DELHI

5 Bar Association, CESTAT, Allahabad
6 Director Publications, Customs, Excise. I.P. Estate, Delhi
7 M/s Centax Publications Pvt. Ltd., 1512-B, Bhishm Pitamah Marg, New Delhi-3
8 Company Law Institute of India Pvt. Ltd., No.2 (old no.36), Vaithyaram Street, T. Nagar, Chennai-17
9 Taxmann Allied Service Pvt. Ltd., 59/32, New Rohtak Road, New Delhi-110005
10 Easy Service Tax Online Dot Com Pvt. Ltd., 407A, Iscon Mall, Satellite Road, Ahmedabad-15
11 LAWCRUX Advisors Pvt. Ltd., LAW House, 1-8, Sector-10, Faridabad 121003 (Haryana)
12 TaxIndiaOnline.com Pvt. Ltd., 2nd Floor, Vasant Arcade, Vasant Kunj, New Delhi - 110070
13 Mark Professional Services Pvt. Ltd., 108, Everest Block, Aditya Enclave, Hyderabad -- 38
14 The ICFAI society, 52, Nagarjuna Hill,Punjagutta Hyderabad.-500082
15 M/S Knowledge Processing Pvt. ltd.(taxmanagementindia.com),FF-19,1st Floor,Cross River Mall,CBD Ground,Near Karkardooma Court,Delhi-110032
16 C.D.R. 17 Office Copy 18 Guard File

Asstt. Registrar

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,
REGIONAL BENCH : ALLAHABAD

Appeal No.ST/171 & 179/2009-CU[DB]

Arising out of Order-in-Original No.52/COMMR./M-II/2008 dated 31.10.2008 passed by Commissioner of Central Excise & Service Tax, Meerut-II.

For approval and signature:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. ANIL G. SHAKKARWAR, MEMBER (TECHNICAL)

---

1. Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982? : No
2. Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not? : Yes
3. Whether His Lordship wishes to see the fair copy of the Order? : Seen
4. Whether Order is to be circulated to the Departmental Authorities? : Yes

---

Commissioner of Central Excise, Meerut-II (in Appeal No.171/2009)
Rakesh Ahuja & others (A.O.P) (in Appeal No.179/2009)

...APPELLANT(S)

VERSUS

Rakesh Ahuja & others (A.O.P.) (in Appeal No.171/2009)
Commissioner of Central Excise Meerut-II (in Appeal No.179/2009)

...RESPONDENT (S)

APPEARANCE:

Shri Rajeev Ranjan, Jt. Commr. (A.R.) for the Revenue
Shri B.L. Narasimhan & Shri Atul Gupta, Advocates for the Assessee

CORAM:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. ANIL G. SHAKKARWAR, MEMBER (TECHNICAL)

DATE OF HEARING & PRONOUNCEMENT : 29.08.2016

FINAL ORDER NO. 70812-70813/2016

Per Mr. Anil Choudhary :

These cross appeals have been preferred both by the assessee and the Revenue against the order of adjudication passed by Ld. Commissioner (Appeals) dated 31.10.2008, confirming the service tax of Rs.55,28,832/- along with interest and also imposed penalty under Section 75 A, 76, 77 & 78 of the Finance Act. For alleged short payment of service tax, under the classification of C & F Services.

2. The brief facts are that the appellant was a registered assessee with the service tax department, paying service tax under the classification business auxiliary services after getting registered in March, 2005 and paying tax with effect from 10 September, 2004. Show cause notice dated 18th April, 2007 was issued alleging that the appellant are engaged in providing C & F Services to various Distilleries and accordingly misclassified the taxable services and failed to get themselves registered under the classification C & F services. Accordingly, it was proposed to levy service tax allegedly short paid for the period December, 01 to March, 2006 was demanded for Rs.16,31,063/- with further proposal to appropriate amount ~~is~~ already paid Rs.4,70,281/- with further proposal to levy interest and penalties.

3. The appellant appeared and contested the show cause notice and the same was adjudicated vide the impugned order, confirming the proposed demand save and ~~accept~~ except the claim of tax-cum-duty basis

was accepted. Further, penalty were also imposed under Section 75 A, 76, 77 & 78 of the Act as well as interest was also charged.

4. Being aggrieved the appellant-assessee is in appeal, against demand of service tax and levy of penalties, whereas the Revenue is in appeal on the issue of allowing the cum-duty benefit and also on the ground that the adjudicating authority have imposed less penalty under the provisions of Section 76, whereas maximum penalty being @ ~~of~~ 2% of the tax amount should have been levied.

5. The learned Counsel for the appellant-assessee Mr. B.L. Narasimhan argues that the elements of C & F services are absent in the facts and circumstances of the case. It is admitted fact that the appellant is not doing any clearing work for their principals. The appellant received liquor bottles from their principals/distilleries, they stored them and thereafter sale the same at the best prices under the market condition having stipulation of minimum sales price by the manufactures. It is also pointed out that there is element of trade also involved as in the case, the appellant sales below the MRP or the minimum price fixed by the Principal/manufacturer the loss so incurred has to be borne by the appellant. It is further urged that as the appellant were ~~have~~ already registered dealers with the Revenue under the provisions of service tax, the show cause notice is defective as no opportunity have been given and or issue is raised by Revenue as to classification of the alleged services under 'clearing and

forwarding agent service. It is further urged that the issue is no longer res-Integra and the Larger Bench of this Tribunal in the case of Larsen & Toubro Ltd., 2006(3) STR 321 have held that both the elements i.e. clearing and forwarding should be involved for classifying the service under this head. The said judgement have been approved by Hon'ble Supreme Court in the case of Coal Handlers Pvt. Ltd. Vs. CCE, 2015 (38) STR 897 (SC). The learned Counsel also relies on the circular of CBEC dated 24.04.2002 No.137/04/2002-CX(IV), wherein clarifying the taxability to service tax as C & F agents, it have been stated- normally a C & F agent receives goods from the factories or premises of the principals or his agents, stores the goods, dispatches goods as per orders received from the principal (owner), arranges transport etc. for the purpose and prepares invoices on behalf of the principal. For this service, the C & F received commissions on the basis of agreed terms. Therefore, an essential characteristics 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 the Principal (owner) and agent. The C & F agent carries out all activities in respect of the goods rights from the stage of their clearances from the premises of the principal to its storage and delivery to the customers. The learned Counsel also referred to the Ruling of Hon'ble Punjab and Haryana High Court in the case of CCE Vs. Kulcip Medicines Pvt. Ltd. 2009 (14) STR 608, wherein Hon'ble High Court considered the use of the word 'and' used after the word 'clearing' but before the word 'forwarding' in Clause (j) of

Section 65(105) of Finance Act, 1994 whether used in conjunctive or dis-injunctive sense. The Hon'ble High Court have ruled that legislative intention to cover a person rendering, clearing and forwarding service, word 'and' to be used in conjunctive sense. As if the word 'and' is read as 'or' then it would amount to doing violence to the simple language used by legislature which cannot be imputed ignorance of English language. Accordingly, prays for allowing the appeal of the assessee with consequential benefits and dismissal of the appeal of the Revenue.

6. The learned A.R. for Revenue relies on the impugned order.

7. Having considered the rival contentions, we find that the show-cause-notice is itself not sustainable as no issue have been framed therein for classification of the gross amount received towards alleged services under the category clearing and forwarding agent service. Further, we find that so far the classification issue is concerned both the elements i.e. clearing and forwarding should be involved for classification of the service under that head. We rely on the Ruling of Hon'ble Supreme Court in the Coal Handlers Pvt. Ltd. (supra), wherein the Hon'ble High Court have observed in para 9 of its order that the Revenue have accepted that decision of the Larger Bench of this Tribunal in the case of Larsen & Toubro (supra) and did not file any appeal thereagainst. Further observing that even otherwise the Larger Bench Ruing has rightly interpreted the definition of clearing and forwarding agent contained in Section 65(25) of the Act. Further referring from the black's law dictionary,

the Apex Court observed that a forwarding Agent is such a person or company whose business is to receive and goods for others also termed as trade forwarder. It was further observed that from reading of the definition and the provisions of the Act together, it becomes apparent that in order to qualify as C&F Agent, such a person is to be found to be engaged in providing any service connected with the clearing and forwarding operations.

8. In view of the admitted facts that the appellant is not involved in clearing of the goods from the factories ~~and~~ of their principal but only for receives and stores such goods when deliver~~y~~ed to them and they thereafter forward the same by way of sale or otherwise as per direction of the principal. They do not provide any services of clearing. Accordingly, we hold that the services provided by the appellant are not classifiable under the classification of clearing and forwarding agent under Section 65(25) read with Section 65(105) of the Finance Act, 1994. Accordingly, we allow the appeal filed by the appellant-assessee being appeal No.179/2009 and dismiss the appeal of Revenue being appeal No.171/2009. The appellant-assessee will be entitled for the consequential benefits, if any, in accordance with Law.

(Dictated & pronounced in the open Court)

Sd/-
(ANIL G. SHAKKARWAR)
MEMBER (TECHNICAL)

Sd/-
(ANIL CHOUDHARY)
MEMBER (JUDICIAL)

प्रमाणित प्रति / Certified True Copy
.16.10
सहायक पंजीकार / Asstt. Registrar
सीमाशुल्क, उत्पादशुल्क एवं सेवा कर
अपील अधिकरण / (C.E.S.T.A.T.)
38, एम. जी. मार्ग, इलाहाबाद-211001
38, M. G. MARG, ALLAHABAD-211001