**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL**
**OLD RED BUILDING, 38,M.G.Marg,CIVIL LINES, ALLAHABAD**

Dated: 16/2/2016

To

Appellant as per address in table below

Respondent as per address in table below

**Final Order No. A/ 70073/2016 &STAY ORDER NO 70058/2016&MISC ORDER NO 70059/2016 dated 18/11/2015**

I am directed to transmit herewith a certified copy of order passed by the Tribunal under section 35-C(1) of the Central Excise and Salt Act, 1944.

Asstt. Registrar

| Application | Appeal | Name and Address of Appellant |
|---|---|---|
| ST/MISC/51750/2015<br>ST/STAY/54180/2014 | ST/53735/2014ST | INTEREACH BUILDING<br>PRODUCT P VT LTD<br>B-30, SECTOR-37<br>NOIDA(UP) |

Name and Address of Respondent: CCE, NOIDA
C-56/42, SECTOR-62
NOIDA(UP)

Other Appellants and Respondents as per Annexure

**Copy To**

3 Advocate(s) / Consultant(s SH SHAILESH P.SHAH,ADV
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6 M/s Centax Publications Pvt. Ltd., 1512-B, Bhishm Pitamah Marg, New Delhi-3

7 Company Law Institute of India Pvt. Ltd., No.2 (old no.36), Vaithyaram Street, T. Nagar, Chennai-17

8 Taxmann Allied Service Pvt. Ltd., 59/32, New Rohtak Road, New Delhi-110005

9 Easy Service Tax Online Dot Com Pvt. Ltd., 407A, Iscon Mall, Satellite Road, Ahmedabad-15

10 LAWCRUX Advisors Pvt. Ltd., LAW House, J-8, Sector-10, Faridabad 121003 (Haryana)
11 TaxIndiaOnline.com Pvt. Ltd., 2nd Floor, Vasant Arcade, Vasant Kunj, New Delhi - 110070
12 Mark Professional Services Pvt. Ltd., 108, Everest Block, Aditya Enclave, Hyderabad -- 38
13 The ICFAI society, 52, Nagarjuna Hill,Punjagutta Hyderabad.-500082
14 C.D.R. 15 Office Copy 16 Guard File

Asstt. Registrar
Regional Bench, Allahabad

# CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL,

Old Red Building , 38 M.G. Marg, Civil Lines, Allahabad

**Date of hearing/decision: 18.11.2015**

**Miscellaneous Application No.51750 of 2015**
**Stay Application No.54180 of 2014 and**
**Service Tax Appeal No.53735 of 2014**

Arising out of the order in -original No.78/Commissioner/Noida/ 2013-14 dated 28.3.2014 passed by the Commissioner of Central Excise, Customs, Service Tax, Noida.

For approval and signature:

Hon'ble Mr. Anil Choudhary, Judicial Member
Hon'ble Mr. C.J. Mathew, Technical Member

| | | |
|---|---|---|
| 1 | Whether Press Reporter may be allowed to see the Order for publication as per Rule 26 of the CESTAT (Procedure) Rules, 1982? | No |
| 2 | Whether it should be released under Rule 26 of CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not? | Yes |
| 3 | Whether their Lordships wish to see the fair copy of the Order? | Seen |
| 4 | Whether Order is to be circulated to the Departmental authorities? | Yes |

Interarch Building Product Pvt. Ltd. .. Appellant

Vs.

C.C.E.& S.Tax, Noida .... Respondent

Appearance:

Present Shri Shailesh P. Sheth, Advocate for appellants
Present Shri Devendra Nagvenkar, Additional Commissioner (A.R) for the respondent/Revenue

Coram: Hon'ble Mr. Anil Choudhary, Judicial Member
Hon'ble Mr. C.J. Mathew, Technical member

Final Order No. 70073/2016
ST/STAY ORDER NO. 70058/2016
ST/MISC/ORDER.NO. 70059/2016

Per Anil Choudhary:

Heard both the parties.

2. Early hearing application is allowed and both the stay application & the appeal are taken up together for disposal with the consent of the parties.

3. The appellant herein is a manufacturer of pre-fabricated building materials and thereafter undertakes erection of structures at site. The appellant was discharging service tax liability since September 2004 under classification of "Commercial or Industrial Construction Service. The appellant in the calculation of the service tax liability, took credit of the excise duty paid on the value of materials utilised in their construction activity, which was discharged on the gross amount of the construction activity i.e. including the materials. The appellant was also regularly paying their tax liability and was also filing ST-3 return, which is an admitted fact.

4. A show cause notice dated 23.10.2012 was issued. It appeared to Revenue that correct classification will be "works contract" instead of "Commercial or Industrial Construction Service" and it accordingly appears that the appellant have availed inadmissible Cenvat Credit on this material portion of input. It further appears that as services were classifiable under Works Contract, the appellant could not have discharged the liability on the gross value received for construction activity as well as availing of the input credit on the material component. It also appears that

the appellant has passed on excess Cenvat Credit to the customers. The appellant herein contested the show cause notice and the same was adjudicated by the impugned order dated 28.3.2014 for the extended period holding that correct classification is Works Contract service and accordingly, the appellant is not entitled to Cenvat Credit on the input and further without giving option to the appellant the liability has been worked out under Rule 3 of Composition Scheme for Payment of Service Tax Rules, 2007. Being aggrieved , the appellant is before this Tribunal.

5. Ld. Counsel for the appellant argues that under Section 67 the appellant has option to pay service tax on the gross amount by taking incidental benefit of cenvat credit on the input and input services as per the Scheme of the Act. Further, Section 67(4) can be resorted to only in the case there have been difficulty in arriving at on the taxable value under sub-section (1), (2) and (3) of Section 67 of the Act. It is further urged that Composition Scheme is optional Scheme and the same cannot be enforced or thrashed upon by the assessee. It is further urged that Coordinate Bench of this Tribunal in the case of S.V. Jiwani vs. C.C.E. & S.Tax, Vapi - 2014 (35) STR 351 (Tri-Ahmd.) vide Final Order dated 10.3.2014 held that even in case of Works Contract the appellant is entitled to discharge the tax liability under Section 67(1), (2) and (3) and the residuary sub-section (4) of Section 67 cannot be enforced upon the assessee. It is further held that in case tax liability is discharged on the gross value under Section 67(1) the appellant/assessee is entitled to Cenvat Credit of input and input service. It is further

brought to our notice that order of the Tribunal in the case of S.V. Jiwani (supra) was pronounced and made available to the assessee after passing of the impugned order. Hence the ld. Commissioner did not have the benefit of the law explained by this Tribunal. In this view of the matter, ld. Counsel prays for setting aside the impugned order for de novo determination of the tax liability in terms of law explained by the Tribunal in S.V. Jiwani case and other rulings as may be brought to the notice of the authority. Ld. Counsel also argues on the limitation aspect that there is no suppression or contumacious conduct on the part of the appellant and as such the extended period is not attracted.

6. Ld. A.R. for Revenue relies on the impugned order and further states that matter may be remanded to the adjudicating authority in view of subsequent pronouncement of the law by the Tribunal.

7. Having considered the rival contentions, we find it fit and appropriate in the interest of justice set aside the impugned order and remand the issue to the Adjudicating Authority who shall re-determine the tax liability after hearing the appellant and considering the case-law of this Tribunal in S.V. Jivani (supra) and other case law as may be brought to the notice of the authority. We further make it clear that all the issues are kept open. Thus the appeal is allowed by way of remand. Stay application also stands disposed of. We further direct the ld. Commissioner to pass de novo order within period of three months from the date of receipt of

this order. The appellant is also directed to appear before the Adjudicating Authority and seek opportunity of hearing.

8. Appeal allowed by way of remand. Misc.Application and Stay Application disposed off.

(Pronounced in the open Court)

(Anil Choudhary)
Judicial Member

(C.J. Mathew)
Technical Member

scd/

प्रमाणित प्रति / Certified True Copy
8.2.16
सहायक पंजीकार / Asstt. Registrar
सीमाशुल्क, उत्पादशुल्क एवं सेवा कर
अपील अधिकरण / (C.E.S.T.A.T.)
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