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

To

Dated: **08/10/2014**

Appellant as per address in table below
Respondent as per address in table below

Final Order No. **ST/A/53776/2014-CU[DB]** dated **25/09/2014**

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/1116/2011	**C.S.T. DELHI** 17-B, I.P. Estate, IAEA House, New Delhi.
			Name and Address of Respondent
2			**ESSEM HIGH TECH PVT. LTD.** D-76, AYA NAGAR, PHASE-II, NEW DELHI.

Copy To
3 Advocate(s) / Consultant(s):

4 Bar Association, CESTAT, Delhi

5 Director Publications, Customs, Excise. I.P. Estate, Delhi

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, 1-8, 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

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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 25.09.2014

For Approval &Signature :

Hon'ble Mrs. Archana Wadhwa, Member (Judicial)
Hon'ble Mr. Rakesh Kumar, 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?	No
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

Appeal No. ST/1116/2011 -CU[DB]
[Arising out of Order-in-Appeal No.129/S.Tax/D-II/2011, dated 15.03.2011 passed by the C.C.E.(Appeals), Delhi-I]

C.S.T., Delhi — Appellants

Vs.

M/s. ESSEM High Tech Pvt. Ltd. — Respondents

Appearance
Shri Govind Dixit, DR - for the appellants

Shri A.K. Batra, Advocate - for the respondent

CORAM: **Hon'ble Mrs. Archana Wadhwa, Member (Judicial)**
Hon'ble Mr. Rakesh Kumar, Member (Technical)

Final Order No. 53776/2014 **dated 25.09.2014**

Per Hon'ble Mrs. Archana Wadhwa :

Being aggrieved with the order passed by Commissioner (Appeals), Revenue has filed the present appeal.

2. After hearing both the sides duly represented by Shri Govind Dixit, ld. Departmental Representative and Shri AK Batra, ld. advocate for the respondent, we find that the appellants are providing marketing services to its principal situated in a foreign land. They were depositing the service tax on the said services, by treating the same as falling under the category of "Business Auxiliary Service". However, subsequently they realised that as they are providing services to an overseas principal, the same would amount to "Export of Services", which were not liable to service tax. Accordingly, they filed refund claims of service tax paid by them in cash as also through CENVAT credit.

3. The original adjudicating authority rejected the refund claims by observing that the appellant's activities correctly fall under Business Auxiliary Services, which are liable to service tax. He did not agree with the contention of the appellants that the same would amount to export of services and as such not liable to pay service tax.

4. The said order of the original adjudicating authority was challenged by the appellant before commissioner (Appeals). The appellate authority observed that the appellant's activities would amount to export of services under Export of Service Rules, 2005 and as such would not be liable to service tax. He, accordingly, allowed the refund of service tax to the extent of Rs.13, 35,013/- (Rupees thirteen lakh thirty five thousand and thirteen only), paid by the appellant in cash. However, the balance refund of Rs.3,64,039/- (Rupees three lakh sixty four thousand and thirty nine only), paid by the appellant through

CENVAT credit was rejected by him on various grounds, including the ground of limitation.

5. Revenue is in appeal against the said order on the ground that the appellant's activities of undertaking marketing operations for its foreign based principal cannot be held to be export of services. Revenue has also challenged a part of the refund claim on the ground that the same was barred by limitation.

6. As regards merits of the case, we find that the issue is no more *res integra* and stands settled by the majority decision of the Tribunal in the case of ***Paul Merchants Ltd. Vs. CCE, Chandigarh [2013 (29) STR 257 (Tri. – Del.)]*** as also in the case of ***M/s GAP International Sourcing (India) Pvt. Ltd. vs. CST, Delhi* [2014-TIOL-465-CESTAT-Delhi]**. As such, we find no merits in the appeal of Revenue.

7. We further note that Revenue has also contended that the part of the refund stands filed after the normal period of limitation. We note that while rejecting the refund claim of the assessee relatable to payment of service tax through CENVAT credit, Commissioner (Appeals) has observed as under:-

> *"The next question before me is whether the limitation prescribed under Sec.11B is applicable in this case or not. The contention of the appellant is that the said amount was not a tax, hence the one year bar is not applicable in this case, but I find that the contention of the appellant is not sustainable as the Hon'ble High Court of Delhi, in Jumax Foam (P) Ltd. v. UOI, 2003 (157) ELT 252 (Del.), had held as under:-*
>
> > *4. In view of the authoritative pronouncement of the Supreme Court that even for refund of an illegal levy claim application has to be moved before the customs*

> *authorities within the period of six months, in my view, the present writ claiming the refund of the duty alleged to have been paid in excess will not be maintainable. Moreover, duty having already been recovered by the petitioners from the purchaser the petitioner would not be entitled to the refund of the alleged excess duty from his purchaser at one end and also collect the same duty from the State on the ground that the same was collected from him illegally. Power of the Court is not meant to be exercised for unjustly enriching a person. I, therefore, do not find any merits in this petition and the same is, accordingly, dismissed with no order as to costs.*

From the above, it is clear that the provisions contained in Section 11B of the Central Excise Act, 1944, as made applicable to the Service Tax matters are squarely applicable in this case. In this case the applicant had paid the Service Tax on the services which qualifies as 'Export of Service' and the payments were made both in Cash as well as by way of debit of CENVAT Credit A/c. The cash payments were made much beyond the due date of payment of Service Tax. The said claim was filed within one year from the date of payment of tax, but after the expiry of one year from the due date of payment of tax. The Original Adjudicating Authority found that the payment from CENVAT Credit was deemed to be made on the due date of payment of tax, hence the claim is barred by limitation to that extent. I find no infirmity in the said findings. Moreover, the claim of refund of payments made by way of debit in CEMNVAT Credit A/c. is, otherwise also not admissible on merits, as discussed hereinafter."

The above part of the order of the Commissioner (Appeals) does not stand challenged by the assessee. As such it can be concluded that the same has attained finality. Otherwise also we find that the law on the limitation is well settled and the Tribunal being the creature of statute, cannot go beyond the provisions of the Act or Rules. The reliance placed by Commissioner (Appeals) on the decision of Hon'ble High Court of Delhi in the case of ***Jumax Foam (P) Ltd. Vs. Union of India [2003 (157) ELT 252 (Del.)]*** is appropriate. As such, we find no merits in the contention of the ld. advocate appearing for the respondent that the said refund has to be treated as a mere deposit, in which case, no limitation would apply.

8. At this stage, we are informed by the ld. advocate that only an amount of Rs.58,059/- (Rupees fifty eight thousand and fifty nine only) would fall outside the limitation period. In as much as the original adjudicating authority has not dealt with the aspect of limitation independently and has not calculated the amount falling outside the limitation period, we deem it fit to remand the matter to the original adjudicating authority for fresh decision, in the light of the observations made by us in the preceding paragraphs.

9. In view of our foregoing observations and reference to the Hon'ble High Court decision under whose jurisdiction we fall, it is not considered fit to refer to all the decisions relied upon by the ld. advocate by the respondent.

10. Revenue's appeal is disposed of in the above manner.

(Dictated and pronounced in the Open Court)

26/9/14
(Archana Wadhwa)
Member (Judicial)

29/9/14
(Rakesh Kumar)
Member (Technical)

SSK