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

Dated: 29/05/2014

To

Appellant as per address in table below

Respondent as per address in table below

Final Order No. **ST/A/52327/2014-CU[DB]** dated **20/05/2014**

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/Stay/58618/2013	ST/58002/2013	**Prabhu Dayal Kanojiya** 15/109,malviya Nagar JAIPUR RAJASTHAN
			Name and Address of Respondent
1		ST/58002/2013	**Commissioner of Central Excise and Service Tax-Jaipur-i** NCR BUILDING, STATUE CIRCLE, C-SCHEME, JAIPUR-302005 RAJASTHAN

Other Appellants and Respondents as per Annexure

Copy To

3Advocate(s) / Consultant(s):

Pankaj Malik
Chartered Accountants 207-208,
Shree Gopal Tower,
Krishna Marg, C-Scheme,
Jaipur-302001
Rajasthan

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
13 C.D.R. **14** Office Copy **15** Guard File

Asstt. Registrar(CUSTOMS Appeal Branch)

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, PRINCIPAL BENCH NEW DELHI.

Date of Hearing/Decision: 20.05.2014

For approval and signature:

Hon'ble Mr. Justice G. Raghuram, President
Hon'ble Mr. Rakesh Kumar, 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?	
2	Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	
3	Whether Their Lordships wish to see the fair copy of the Order?	
4	Whether Order is to be circulated to the Departmental authorities?	

Service Tax Stay No.58618/2013 in
Appeal No.ST/58002/2013-CU(DB)

[Arising out of Order-in-Original No.13/2013(ST) Comm'r dated 18.03.2013 passed by the Commissioner of Central Excise, Jaipur-I)

M/s.Prabhu Dayal Kanojiya — Appellant

Vs.

CCE, Jaipur — Respondent

Appearance:

Rep. by Ms. Sukriti Das, Advocate for the Appellant
Rep. by Shri Pramod Kumar, Joint CDR for the Respondent

CORAM : Hon'ble Mr. Justice G. Raghuram, President
Hon'ble Mr. Rakesh Kumar, Member (Technical)

Final Order No. 52327/2014

Per Justice G. Raghuram:

Assessee has preferred this appeal against the order dated 18.03.2013 passed by the Commissioner of Central Excise, Jaipur-I confirming a service tax of Rs.4,18,665/- under Section 73A(4) of the Finance Act, 1994 apart from interest under Section 73 (B) and penalties under Sections 76 and 77(2) of the Act.

2. At the hearing of the stay applications, having regard to the very short issue that falls for consideration, we proceed to dispose of the appeal itself, with the consent of the parties and after a hearing on merits.

3. Proceedings were initiated by the show cause notice dated 21.10.2011 proposing service tax levy of Rs.55,79,681/- apart from interest and penalties for having provided - Erection, Commissioning, or Installation Services; Commercial or Industrial Construction Services; or work contracts service during the period 2010-2011, to several organizations. The appellant submitted its response thereto asserting that all the services provided under several agreements entered into with several entities fall within the general scope of Commercial or Industrial Construction Service but the works executed fall outside the ambit of the definition of "Commercial or Industrial Construction" Service, since the works were not for commercial or industrial purposes but were executed as public works, for reservoirs, sewerage treatment plants or municipalities including ERA Jammu, Jaipur Municipal Corporation, and Delhi Jal Board, etc. The ld. Adjudicating Authority accepted the classification of the taxable service proposed by the appellant and concluded that the services fall within the ambit of Commercial or Industrial Construction Service. The Adjudicating Authority also accepted that the several works executed by the appellant fall outside the ambit of the taxable service as defined in the Act. Consequently, the substantive demand for service tax was dropped.

4. However, in para-39 of the impugned order, the Authority confirmed a demand for Rs.4,18,665/- on the ground that this amount is the service tax component on the work executed by the appellant under work order no.MB6 PO-2817 dated 4.3.2010, involving construction of "digester domes" for the Delhi Jal Board. The Adjudicating Authority observed that since the relevant agreement contains a term that service tax element if payable is extra, it must be inferred that the appellant had collected the amount of service tax; the appellant had not furnished any evidence to prove that no service tax was collected from the recipient under this contract, hence, Rs.4,18,665/- must be remitted, in terms of Section 73 A(2) of the Act.

5. Section 73 A of the Act enumerates provisions for liability to remit service tax collected by a person. Sub-section (2) of this provision enacts: "where any person, who has collected any amount, which is not required to be collected, from any other person, in any manner, as representing service tax, such person shall forthwith pay the amount so collected to the credit of the Central Government". On a true and fair construction of this provision, the legislative intent is clear. The conditions precedent for ordering any person to remit (an amount collected as service tax, which is not required to be so collected), is a finding of fact that the person had in fact collected an amount towards service tax even though no service tax liability arises under the transaction qua which such collection is made. This finding of fact must be recorded by the Revenue. The liability to remit service tax under Section 73 A(2) does not arise on the basis of a mere permission in an agreement that the liability to compensate/reimburse to service tax liability of the service provider, is on the service recipient. A factual finding that a person

has collected service tax is a condition precedent for passing an order under Section 73A(2) read with sub-section (4) thereof. Sub-section (4) specifically enjoins that an order should be passed under this provision only after considering the representation, if any, made by the person on whom the notice is served under sub-section (3) and to determine the amount due from such person, not being in excess of the amount specified in the notice. Sub-section (3) of Section 73(A) requires a notice to be issued to show cause why the amount, as specified in the notice, in respect of a liability arising under Section 1 and 2, should not be paid by the noticee to the credit the Central Government.

6. The show cause notice in this case failed to allege that the appellant had collected ~~same~~ Service tax of Rs.41,18,665/- from the Delhi Jal Board.

7. On the aforesaid analysis, the impugned order is unsustainable and is accordingly, quashed. The appeal is allowed. No costs.

(Justice G. Raghuram)
President

(Rakesh Kumar)
Member (Technical)

Ckp.