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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

Appeal No. ST/110 /2008, ST/STAY/419/08 Date 05/06/2008

Assistant Registrar
C.E.S.T.A.T, New Delhi

To :
C.C.E. KANPUR
117/7, SARVODAYA NAGAR, KANPUR 208005.

C.C.E. KANPUR Appellant

Vs

M/S JKEW FORGINGS LTD. Respondent

I am directed to transmit herewit.. a certified copy of Final order No. ST/88/08 Customs dated 21.05.08 passed by the Tribunal under Section 129, (B) of the Customs Act,1962 & Financial Act 1994 relating to Service Tax Alongwith Stay Order No ST/188/08

Assistant Registrar
(Customs Appeal Branch)

Copy to :
1. Respondent
M/S JKEW FORGINGS LTD.
MAGARWARA, UNNAO.
2. Adv. / Consult Sh. A.K. Dixit
113/145 Swaroop Nagar, Kanpur - 02

3. S.D.R.
4. J.C.D.R.
5. Bar association, CESTAT, New Delhi
6. M/s. Deeparchi Publications, M-93, Marg. 46, Saket, New Delhi 110017
7. M/s Centax Publictions (P) Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi -
8. Excise & Customs cases, B-37, Sector -1, NOIDA - 201301 Gautam Budh Nagar, (U.P.)
9. Raghuraman's 44-B, Regal Flat,Shipra Suncity, Indirapuram - 201010,Ghaziabad, DT, U.P.
10. Nidheshak publications, I.P.Estate, new Delhi
11. Taxmann Allied Service Pvt Ltd., 21/35, West Punjabi Bagh, New Delhi - 110026
12. Commercial Laws of India Pvt Ltd Post Bag No. 1033, No.70(Old No. 88), Thyagaraya Road, T. Nagar,Chennai 60017
13. Taxindiaonline.com Pvt.Ltd, B-XI/8183,Vasant Kunj, New Delhi - 110070
14. Office Copy
15. Guard file

Assistant Registrar
(Customs Appeal Branch)

CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, PRINCIPAL BENCH,
NEW DELHI, COURT NO.1

SERVICE TAX / STAY APPLICATION NO. 419 OF 2008 IN SERVICE TAX APPEAL NO. 110 OF 2008

[Arising out of Order-in-Appeal No.374-ST/APPL/KNP/07-08 dated 30.11.2007 passed by the Commissioner of Central Excise (Appeals), Kanpur]

Date of Hearing/Decision: 21.5.2008

Hon'ble Mr. Justice S.N. Jha, 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.	:	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 Their Lordships wish to see the fair copy of the Order?	:	Seen
4. Whether Order is to be circulated to the Departmental authorities?	:	Yes

CCE, Kanpur — Applicant
[Rep. by: Shri A.K. Madan, Advocate]

Versus

M/s. Jkew Forgings — Respondent
[Rep. Shri A.K. Dixit, Advocate]

Coram: Hon'ble Mr. Justice S.N. Jha, President
Hon'ble Mr. Rakesh Kumar, Member (Technical)

FINAL **ORDER** No. 588/08 —
STAY ORDER No. 1088/08 —

Per Justice S.N.Jha:

This appeal has come up for hearing on the point of stay but after hearing for some time it appeared to us that the main appeal itself may finally be disposed of and we accordingly heard the parties.

2. The appeal by the Revenue is directed against the order of Commissioner of Central Excise (Appeals) setting aside the order-in-original of the Assistant Commissioner and allowing the appeal of the respondent. The respondent is a recipient of 'goods transport agency' service. The dispute relates to availment of the benefit of abatement on the gross amount

charged from the customer in terms of Notification No.32/2004-ST dated 3.12.2004. The Notification reads as under :-

> "In exercise of the powers conferred by sub-section (1) of section 93 of the Finance Act, 1994 (32 of 1994), the Central Government, being satisfied that it is necessary in public interest so to do, hereby exempts the taxable service provided by a goods transport agency to a customer, in relation to transport of goods by road in a goods carriage, from so much of the service tax leviable thereon under section 66 of the said Act, as is in excess of the service tax calculated on a value which is equivalent to twenty-five per cent of the gross amount charged from the customer by such goods transport agency for providing the said taxable service:
>
> **Provided** that the exemption shall not apply in such cases where-
>
> (i) the credit of duty paid on inputs or capital goods used for providing such taxable service has been taken under the provisions of the Cenvat Credit Rules, 2004; or
>
> (ii) the goods transport agency has availed the benefit under the notification of the Government of India in the Ministry of Finance (Department of Revenue) No.12/2003-Service Tax, dated the 20th June, 2003 [G.S.R.503(E), dated the 20th June, 2003]".

3. The Board (CBEC) issued circular vide letter F.No.B1/6/2005-TRU dated 27.7.2005 to operationalise different notifications. In so far as the above Notification dated 3.12.2004 is concerned, it was provided as follows :-

> "......a declaration by the goods transport agency in the consignment note issue, to the effect that neither credit on inputs or capital goods used for provision of service has been taken nor the benefit of notification No.12/2003-Service tax has been taken by them may suffice for the purpose of availment of abatement by the person liable to pay service tax".

The respondent produced photocopies of the so-called declaration purportedly by the transporters on their letterheads on behalf of the concerned transport agency, claiming the benefit of abatement. The Assistant Commissioner found that the declarations were photocopies and they did not tally with another set of photocopies of similar declarations filed at the time of, hearing. He concluded that the respondent had failed to make out a case for availment of the exemption notification. He accordingly confirmed a demand of Rs.1,57,204/- towards service tax with interest. He also imposed penalty of equal amount under Section 76 of the Finance Act.

4. On appeal by the respondent, the Commissioner (Appeals) noted that a claim for abatement can be allowed provided no cenvat credit has been availed of. He, however, also held that the respondent's claim of non-availment of cenvat credit is "not liable to be rejected" in view of the endorsed copies and certificates produced "until proved otherwise". He also observed that before arriving at any contrary conclusion about the varacity of documents under reference, the adjudicating authority ought to have verified the same from the concerned transport agency or by resorting to some other alternate method which had not been done. Having observed and held so the, Commissioner (Appeals) instead of sending the matter back to the adjudicating authority for verification simply set aside the order without any further consequential order.

5. After hearing the parties at length we are of the view that it would be in the interest of justice that the varacity of the documents and the certificates submitted by the respondent in support of its claim is verified not only by the concerned transporters, but also by other sources. By only setting aside the order of the Assistant Commissioner without any consequential order of remand, learned Commissioner (Appeals) gave quietus to the controversy which was not correct. We are not able to appreciate the use of expression "until proved otherwise" in the context of the present case. The onus of proof for claiming abatement is clearly on the assessee and not on the Revenue. We have come across cases

where goods were allegedly transported by scooters, motor cycles, vans, jeeps etc. and benefit claimed. Whether actual transportation took place by the concerned vehicles has to be proved by the respondent and the same has to be verified - not by taking the words of the transporters to be correct on their face value but by cross-checking from other reliable sources and agencies.

6. In these premises, we set aside the order of the Commissioner (Appeals) and remand the matter back to the Assistant Commissioner of Central Excise, Division II, Kanpur for passing fresh orders in accordance with law.

7. Before we part with the case, it may be clarified that no part of this order or observation herein should be understood as our concluded opinion on merit of the case.

8. Appeal stands allowed by way of remand.

[Dictated and pronounced in the open Court]

[Justice S.N. Jha]
President

[Rakesh Kumar]
Member (Technical)

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