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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/567 /2006 & 161/2007 Date 05/08/2008

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

To :
M/S JINDAL STEEL & POWER LTD
POST BOX NO 16, KHARSIA ROAD, RAIGARH(CG)
496001

M/S JINDAL STEEL & POWER LTD — Appellant

Vs

THE COMMISSIONER OF CUSTOMS & CENTRAL EXCISE, RAIPUR — Respondent

I am directed to transmit herewith a certified copy of **Final order No.** ST/188-89/08 Customs dated 22/4/08 passed by the Tribunal under Section 129, (B) of the Customs Act,1962 & Financial Act 1994 relating to Service Tax

Assistant Registrar
(Customs Appeal Branch)

Copy to :
1. Respondent
   THE COMMISSIONER OF CUSTOMS & CENTRAL EXCISE, RAIP
   CENTRAL EXCISE BUILDING, DHAMTARI ROAD, TIKRAPARA, RAIPUR
   496001
2. Adv. / Consult
   MR.L.P ASTHANA
   R-163, SECOND FLOOR, GREATER KAILASH-1, NEW DELHI - 110 048.
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
16. Easy Service Tax online Dot Com (P) Ltd
    407 A 98com Mall, above Star India Bazar
    Satellite Road, Ahmedabad -15

Assistant Registrar
(Customs Appeal Branch)

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI
PRINCIPAL BENCH, COURT NO. I

Service Tax Appeal Nos. 567 of 2006 & 161 of 2007

[Arising out of Order-in-Original Nos. Commr/RPR/79/2006 dated 26.9.2006 & No. Commr/RPR/03/2007 dated 10.1.2007 both passed by Commissioner of Customs & Central Excise, Raipur, CG]

For approval and signature:

Hon'ble Mr. Justice S.N. Jha, President
Hon'ble Mr. M. Veeraiyan, 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

M/s. Jindal Steel & Power Ltd. — Appellants

Vs.

Commissioner of Central Excise Raipur — Respondent

Appearance:

Ms. Reena Khair, Advocate for the Appellant
Mr. B.K. Singh , DR for the Respondent

CORAM: Hon'ble Mr. Justice S.N. Jha, President
Hon'ble Mr. M. Veeraiyan, Member (Technical)

Date of Decision : 22.4.2008

Final **ORDER NO.** ST/188-189/08

Per M. Veeraiyan (for the Bench):

These appeals by the same appellant involve common issues and therefore, are being dealt with by a common order.

2. Heard both sides.

3. Relevant facts, in brief, relating to Appeal No. ST/567/06 are as follows:-

(a) The appellant was putting up 'Rail and Universal Beam mill' and in that connection entered into two agreements with M/s. JFE Corporation, Japan for getting technical assistance and accordingly, received the services.

(b) The appellant took service tax registration on 14.10.02 for the purpose of paying service tax on the Consulting Engineering Services, as recipient of services from M/s. JFE Corpn. The appellant took out a registration on 16.2.04 for the services of Consulting Engineering Services to be rendered by them. They entered into an MOU dated 5-3-2004 with one M/s. Vallabh Steels for rendering output services.

(c) In pursuance of agreement, the appellant, for a period October, 2003 to March, 2004 , paid a sum of Rs.5,48,85,037/- to M/s. JFE Corpn. They were required to pay service tax of Rs. 43,90,803/- They also paid a sum of Rs.27,44,252/- as Cess under Section 3 of the Research and Development Act, 1986 and after claiming abatement of the said amount paid service tax amounting to Rs.16,46,551/-.

(d) Similarly, for the period April, 2004 to September, 2004,on a value of Rs. 43,127,640/- they paid a sum of Rs. 21,56,382/- as Cess and after claiming abatement of the said amount, paid service tax amounting to Rs. 21,56,382/- out of Cenvat account.

(e) Show cause notice was issued inter alia, proposing to demand service tax amounting to Rs. 49,00,634/- on the ground that they are not eligible to avail the benefit of notification No. 18/2002-ST dated 16.12.2002; seeking to demand Rs. 43,128/ education cess not paid; seeking to recover service tax credit amounting to Rs. 56,52,054/-.

(f) The Commissioner by his order dated 25.9.06 held as follows.

(i) He held that the appellant was eligible to avail the benefit of notification No. 18/2002-ST dated 16.12.2002.

(ii) He held that the credit taken totally amounting to Rs. 22,10,573/-was not admissible on two grounds. The credit amounting to Rs.21,83,009/- was held as not admissible as the same has been taken on the basis of documents issued prior to 5.3.2004, the date on which they came under the purview of output service provider and an amount of Rs. 27,564/- for the period after 5.3.2004 was taken with out producing the original invoices.

(iii) He held that the services received by them is only input service; during the relevant period they were not registered for any output service; that the credit earned on such input services can be utilised only towards payment of tax on the out put services. He, therefore, ordered recovery of Rs.21,56,382/- on the ground that the appellant has wrongly debited the said amount from Cenvat account.

(iv) During the relevant period (i.e. from 5-3-2004), the value of output service rendered by them was only Rs.5,00,000/- on which service tax of Rs.40,000/- was paid whereas the value of inputs service shown to have been received as to the tune of Rs.55,79,049/-. He ordered recovery of Rs.40,000/- holding that the same has been wrongly utilised.

(v) He ordered recovery of Rs. 43,128/-as education cess not paid.

(vi) He also imposed a penalty Rs. 5,00,000/- on the appellant.

3.2 In the case in Appeal No. 116/07, during December, 2004 and January, 2005, on the value of Rs.4,07,88,688/- on engineering services received by them, the appellant paid service tax amounting to Rs.20,80,223/- using their Capital Goods Cenvat Credit Account. Similarly, during January, 2005 to March, 2005 on the value of Rs. 2,81,15,576/- on Goods Transport Agency services received paid service tax amount to Rs.29,31,071/- using Capital Goods Cenvat Credit Account and service tax credit account.

Holding that the appellant was not entitled to utilise the Cenvat Credit for payment of service tax, the Commissioner demanded the service tax amounting to

Rs 50,09,298/- (Rs. 49,11,033 + education cess of Rs.98,265/-) and imposed penalties.

4.1 The learned advocate drew our attention to the findings of the Commissioner to the effect that the services received by them from the Japanese firm was only relating to transfer of technology and did not relate to the consulting engineers service and that they need not have paid the service tax. He submitted that though they were not provider of services, they paid the tax only as directed by the Department. Service tax paid by them was towards 'services rendered as deemed service provider' in terms of Rule 2(r) of the Cenvat Credit Rules. The services for which they have paid the tax is 'deemed out put service in terms of Rule 2(p) of the Cenvat Credit Rules.' Having paid the service tax, they were entitled to take the Cenvat Credit and that there was no time limit prescribed for availing the Cenvat credit. Therefore the denial of Cenvat credit was not correct.

4.3 Regarding the value of output services rendered being only Rs.5,00,000/- during the relevant period, compared to the value of input services received being Rs.55,79,819/-, it was submitted that the inputs services were not directly co-relatable on a one to one basis to the output services as the input services were useable on a long term basis and did not get used up immediately.

4.4 . Regarding the demand of educational cess on service tax amounting to Rs.43,128/-, it was submitted that they were not required to pay the same for the period prior to 10.9.04; they had wrongly claimed the exemption; and subsequently on the advice of the department wrongly paid the duty and thereafter claimed the refund.

4.5. The Ld Advocate relies on the decisions of the Tribunal in the following cases in support of their contentions.

i) Bushan Power and Steel Ltd. vs. CCE & CST, BBSR II [2008(10)STR.18(Tri-Kokatta).]

ii) CCE, Nagpur vs. Visaka Industries Ltd. [2008(8)STR.231(Tri-Mumbai)].

iii) CCE, Belgaum vs. Flowserve Microfinish Pumps Pvt. Ltd. [2008(9)STR.278(Tri-Del)].

5.1 We have carefully considered the submissions from both the sides. The appellant has been denied the right to credit on different grounds which we find are not sustainable.

5.2 They paid the service tax on the services received by them. Had the service tax been actually paid the actual service provider, the appellant was undoubtedly entitled to take the credit. Merely because the rule envisaged them to pay the tax on behalf of the provider, can their actual status as the recipient be denied? They have played the dual role as provider of deemed output service and as actual recipient of service. Merely because they were required to pay the tax on behalf of the supplier, they should not be denied the right as a recipient. Therefore, the credit taken by them can not be denied on this ground.

The credit amounting to Rs.21,83,009/- has been held as not admissible as the same has been taken on the basis of documents issued prior to 5.3.2004, the date on which they actually become the output service provider. The date 5-3-2004 has no legal significance to the present case. During the period prior to 5-3-2004 , the service received by them is deemed to be an out put service for them and hence they are eligible to take the said credit. It has been held that an amount of Rs. 27,564/- for the period after 5.3.2004 was taken with out producing the original invoices. The receipt of the service and payment of duty on the services so received is not being disputed. In the given circumstances of this case, denial of credit of Rs 27,564/- is also not justified.

5.3 The services received by the appellant are admittedly relating to 'transfer of technology'. They have wrongly paid service tax as 'consulting engineer services'. They have made the payment of the service tax as 'consulting engineer services' only at the instance of the department. Therefore, they cannot be denied service tax credit on this ground also.

5.4 Having held that the credit taken is in order, we examine the correctness or otherwise of their utilisation. During the relevant period the services for which they have paid the service tax was defined /deemed to be out put service in terms of Rule 2(p) of the Cenvat Credit Rules. As recipient, they paid the service tax on the deemed out put services; the tax so paid was available as credit to them. Further, there is no time limit prescribed for utilisation of credit: the restriction that the credit taken in respect of tax paid on an input service should be used only towards payment of tax on the same category of out put service stands removed subsequently. When subsequently the registration was taken for rendering the out-put services on their own, utilisation of available credit on the said service, is also permissible. The appellant was entitled to utilise the same without such restriction. Thus the utilisation of credit was permissible in view of the extended definition of out put service and in view of the fact they also started rendering out put services . The decisions cited also support the case of the appellant. Therefore, we hold that credit taken and its utilisation were regular.

5.5. We also hold that the appellant was not required to pay education cess amounting to Rs 43,128/- as the demand relates to the period prior to 10-9-2004, when the levy is not applicable to service tax.

6. In view of the above, we allow both the appeals with consequential relief.

(Pronounced in the open Court)

(Justice S.N. Jha)
President

(M. Veeraiyan)
Member (Technical)

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