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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/410 /2008, ST/S/1265/08 Date 19/08/2008

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

To :
M/S OMAR AGENCIES(HUTCH)
KOTWALI ROAD, BANDA

M/S OMAR AGENCIES(HUTCH) Appellant
Vs
C.C.E ALLAHABAD Respondent

I am directed to transmit herewith a certified copy of **Final order No.** ST/202/08 **Customs** dated 05.08.08 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/296/08

Assistant Registrar
(Customs Appeal Branch)

Copy to :
1. Respondent
   C.C.E ALLAHABAD
   38,M.G.MARG, CIVIL LINES, ALLAHABAD
2. Adv. / Consult
   MR.L.P. ASTHANA & MS REENA KHAIR
   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. P[illegible]huraman'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. Easy Service Tax Online Dot Com Pvt. Ltd. 407A, Iscon Mall, Above Star India Bazar, Satellite Road, Ahmedabad - 15
15. Office Copy
16. Guard file

Assistant Registrar
(Customs Appeal Branch)

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

Service Tax Appeal No. 410 of 2008 with
Service Tax Stay Application No. 1265 of 2008

[Arising out of Order-in-Appeal No. 23/ST/ALLD/2008 dated 26.3.2008 passed by Commissioner of Central Excise, (Appeals) Allahabad.]

For approval and signature:
Hon'ble Mr. Justice S.N. Jha, President
Hon'ble Mr. M. Veeraiyan, Member (Technical)

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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? : NO
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

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M/s. Omar Agencies (HUTCH) — Appellant

Vs.

Commissioner of Central Excise
Allahabad — Respondent

Appearance: Ms. Reena Khair, Advocate for the Appellant
Mr. R.K. Verma , DR for the Respondent

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

Date of Hearing : 5.8.2008

Final **ORDER NO.** ST/202/08
Stay Order No ST/296/08

Per M. Veeraiyan (for the Bench):

After hearing both sides for a while on the stay petition, we feel that it is expedient to finally dispose of the appeal on a short issue and accordingly, we waive the pre-deposit of the dues as per the impugned order and proceed to hear the appeal.

2. The relevant facts, in brief, are as follows:-

The appellants are engaged in purchase and sales of SIM cards /rechargeable coupons of M/s. Aircel Digilink India Ltd. M/s. Aircel Digilink India Ltd. has paid service tax under the heading telephone services and raised invoices on the appellants. When the department directed the appellant to register as service tax provider under the head Business Auxiliary service, they claim to have registered themselves and paid service tax under protest. They have taken as credit of tax paid by M/s. Aircel Digilink India Ltd. The service tax amounting to Rs7,47,575/- relating to the period February, 2005 to March, 2006 has been demanded by the original authority and he has also imposed penalty of Rs. 1,71,899/-. The original authority decide two issues namely, liability to service tax and eligibility of credit of service tax paid by M/s. Aircel Digilink India Ltd. Both the issues have been decided against the appellant. Commissioner (Appeals) however, has dealt with only one issue and has not dealt with the issue relating to liability of service tax.

3. The learned advocate submits that as the matter relating to taxability has been decided by the original authority and this issue is vital and primary and the second issue will become academic if the first issue is decided in their favour.

4. We have carefully considered the submissions. The Commissioner (Appeals) has not chosen to decide the issue of liability to service tax, with the following observations:-

> *"In their appeal, the appellants instead of contesting the question of admissibility of Service Tax Credit to them, have mainly argued that they are not provider of Business Auxiliary Services. Although in impugned order-in-original, the adjudicating authority has given findings on both points, i.e., (i) whether the appellants are provider of business auxiliary service (ii) whether the service tax credit availed and utilised by them is legal. However, I observe that point no. (i) above is not involved in show cause notices dated 14.2.2006 and 28.2.2006 and also that the appellants are registered with the department as service provider of business auxiliary service and discharging their tax liabilities. There is also no evidence on record that they had taken registration and discharged tax liabilities under protest. In these circumstances, I confine me to determine the issue involved in show cause notice viz. availability of service tax credit to the appellants in facts and circumstances of the case."*

5. As we find that the original authority has decided the issue of taxability also and since the issue is at the root of the dispute, we direct that this issue should also be decided by the Commissioner (Appeals) and to enable this, we set aside the order of the Commissioner (Appeals) and

remand the matter for fresh consideration after affording a reasonable opportunity of hearing to the appellant.

6. The appeal is allowed by way of remand. Stay petition is also disposed of.

(Dictated & pronounced in the open Court)

(Justice S.N. Jha)
President

(M. Veeraiyan)
Member(Technical)

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