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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/121-22 & 127 /2007 - CU[DB] Date 22/10/2008

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

To :
M/S NAHAR SPINNING MILLS LTD., (100% E.KO.U.)
VILLAGE SIMRAI, INDL. AREA, MANDIDEEP,
MADHYA PRADESH

M/S NAHAR SPINNING MILLS LTD., (100% E.KO.U.) Appellant

Vs

C.C.E. BHOPAL Respondent

I am directed to transmit herewith a certified copy of **Final order No.** ST/282-84/08 **CU|DB|** dated 06.10.08 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
   C.C.E. BHOPAL
   48, ADMINISTRATIVE AREA, AREA HILLS, BHOPAL
2. Adv. / Consult
   MR.Z. U. ALVI
   D-8,BDA COLONY, ADJACENT GARUDA TRAVELS, KOH-E-FIZA BHOPAL-01
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 - 3
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
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 & SERVICE TAX APPELLATE TRIBUNAL
West Block No.2, R.K.Puram, New Delhi-110066.
Principal Bench, New Delhi.

ST/121-22 & 127/07

[Arising out of Order-in-Appeal No.94-96-ST/BPL/06 dt.20.12.06 passed by the Commissioner(Appeals)Bhopal)

For approval and signature:
Hon'ble Mr. S.S.Kang, Vice 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 would 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 Department Authorities: :

M/s. Nahar Spinning Mills — Appellant

Versus

CCE, Bhopal — Respondent

Appearance
Sh. Z.U.Alvi, Adv. For appellant
Shri Sumit Kumar, Authorised Departmental Representative(DR) For respondent

Coram: Hon'ble Mr. S.S.Kang, Vice President
Hon'ble Mr. RAKESH KUMAR, MEMBER (TECHNICAL)

Final

Date of decision: 6.10.08
Order No. ST/282-284/08

Per Rakesh Kumar:

The Appellants, a Public Limited Company, are a 100% E.O.U. having their factory at village Simrai Industrial Area, Mandideep, Distt. Raisen, Madhya Pradesh where they manufactured cotton yarn and blended yarn for export. For export of their finished product, they availed the services of middlemen abroad who help them in procuring the export orders and for which they received commission from the Appellants. The service received by the Appellants from the middlemen abroad is "Business Auxiliary Service" covered by Section 65(19) of the Finance Act,1994. Since the foreign middlemen from whom the service of help in procuring export orders is being received by the Appellants do not have any office or business establishment in India, the Revenue was of the view that during the period from July,04 to Nov'05, during which this service was received, the Appellant, being recipient of the service from service providers not having any office or business establishment in India, would be liable to pay the service tax in terms of the provisions of Rule 2(1)(d)(iv) of Service Tax Rules,1994. It is on this basis that three show cause notices dt. 5.8.05, 13.3.06 and 31.3.06 for demand of non-paid service tax amounting to Rs.9,35,450/- (Rs.3,08,769+3,44,048+2,82,633) during the period from July'04 to Nov'05 were issued to the Appellants alongwith interest on this tax and imposition of penalty on the Appellants under Section 76, 77 and 78 of the Finance Act,1994. The Dy. Commissioner vide order-in-original dt.31.8.06, 31.8.06 and1.8.06 respectively confirmed the service tax demands as raised in the show cause notices alongwith interest at the applicable rate under Section 75 of the Finance Act,1994 and besides this also, imposed penalties on the Appellants under Section 76, 77 and 78 of the Finance Act. On appeal, the Commissioner(Appeals) vide orders-in-appeal dt.19.12.06 & 20.12.06 while upholding the service tax demand and penalty under Section 78, reduced the penalty under Section 76 to Rs.100/- per day and penalty under Section 77 to Rs.500/-. It is against these orders of the Commissioner(Appeals) that these appeals has been filed before the Tribunal.

2. Heard both the sides.

2.1 Shri Z.U.Alvi, Advocate, Ld. Counsel on behalf of the appellant made the following submissions:-

(1) The service received by the Appellants has not been rendered in India but has been rendered by persons outside India from off shore locations. Such import of taxable service became taxable only w.e.f. 18.4.06 when Section 66A was added to the Finance Act,1994 and Taxation of Services (provided from outside India and received in India),Rules 2006 were issued. The period of dispute in this case is from July'04 to March'05 and in view of this, service tax, liability cannot be fastened on the Appellants. In this regard, he cited this Tribunal's judgments in the case of Foster Wheeler Energy Ltd. vs CCE, Vadodara-II reported in 2007(7)STR.443 and CCE, Raipur vs Jindal Steel & Power Ltd. reported in 2008(11)STR.14.

(2) Before demanding service tax under the category of "Business Auxiliary Service" (commission agent), there must be shown to exist a legal contractual relationship of Principal and Agent between the Appellant and the foreign middlemen, which in the case of appellant, has neither been even alleged nor established as a fact.

(3) Commissioner(Appeals) has erred in ignoring the plea of the Appellants that there did not exist the Principal Agency Relationship between the Appellants and the alleged overseas Commission Agents as per the law of contract. The observation of the Commissioner(Appeals) that the existence of Principal agent relationship is not relevant and the definition of 'commission agent' under Section 65(19) need not satisfy all the ingredients of the Principal – Agent relationship under the Indian Contract Act is totally untenable in law. In absence of contractual relationship between the Appellants and the Commission Agents, the service tax on Commission Agent cannot be levied at all.

(4) In so far as Rule 2(1)(d)(iv) of Service Tax Rules,1994 is concerned, it is submitted that it cannot be invoked for collecting Service Tax from recipient of service for the following reasons:

(a) For the period prior to 1.1.05, there was no notification issued under Section 68(2) notifying the taxable service received from an off shore service provider, as the services for which the service recipient would be the "person liable to pay the service tax".

(b) Service Tax Rules 1994 have been framed under Section 94(1) and (2) of the Finance Act,1994 for the purpose of Assessment &

Collection of Service Tax. Service Tax Rules can, therefore, be resorted to only after the charge is created and fixed. Without the charging section, the rules cannot create or fix a charge. In this regard, reliance is placed on Supreme Court's judgment in the case of Laghu Udyog Bharti vs UOI reported in 1999(112)ELT.365(SC).

2.2 Shri Sumit Kumar, Learned Departmental Representative, made the following submissions:

(1) In view of Hon'ble Supreme Court's judgment in the case of Kerala State Electricity Board vs CCE, Thiruvananthapuram reported in 2008(9)STR.3(SC), the Appellants as recipient of taxable service from a foreign/off shore service provider, not having any office or establishment in India, would be liable to pay Service Tax on this Taxable Service received by them during the entire period of dispute by virtue of provisions of Rule 2(1)(d)(iv) of Service Tax Rules.

(2) In any case in view of Hon'ble Rajasthan High Court judgment in the case of UOI vs Aditya Cement reported in 2008(10)STR.228(Raj) and Tribunal(LB)'s judgment in the case of Hindustan Zinc Ltd. vs CCE, Jaipur reported in 2008(11)STR.338, for the period w.e.f. 1.1.05, there is no dispute regarding the liability of the Appellants to pay the Service Tax as recipient of the taxable service from a foreign/off shore service provider.

3. We have carefully considered the submissions from both the sides. The first point raised by the Appellants is that the persons abroad from whom the service has been received by the Appellants are not

Commission Agents, as no agreements between the foreign service provider and the Appellants exist and the service providers are freelance middlemen in different countries who keep contact with the users/customers of yarn in respective country and are abreast of their requirement and inform the Appellants by fax, or through email the quotation from the buyers and the Appellants, thereafter, make a fax to those prospective buyers. On the customer's confirmation of the Appellant's offer the Appellants effect the export supplies. We do not accept this contention of the Appellants. During the period of dispute, the definition of 'Business of Auxiliary Service' as given under Section 65(19) of the Finance Act,1994, among other things, covered – "any service in relation to promotion or marketing or sale of goods produced or provided by or belonging to the client". The middlemen abroad find the prospective buyers and their requirement and inform the Appellants about the same. Thus, the middlemen abroad are providing to the Appellants a service in relation to the marketing or sale of the goods produced by them. Therefore, the service being received by the Appellants is covered by the definition of 'Business of Auxiliary Service'.

4. Another point raised by the appellant is that the service is being provided by persons who are from outside India, not having any office or business establishment in India and the same is being provided from off shore location and that the specific provision for making the service recipient in India as the "person liable to pay the service tax" in such a situation were made by introducing Section 66A of the Finance Act,1994

w.e.f. 18.4.06 and therefore, prior to 18.4.06, in such a situation, the service tax liability could not be fastened on the recipient of service in India. In this regard, the judgments of this Tribunal in the cases of Foster Wheeler Energy Ltd. vs CCE(supra) and CCE, Raipur vs Zindal Steel & Power Ltd.(supra) have been cited. However, we find that this very issue has been considered by the Larger Bench of the Tribunal in the case of Hindustan Zinc Ltd. vs CCE, Jaipur(supra) wherein the Tribunal held that in cases where taxable service is provided by a non-resident or a person from outside India who does not have any office in India and is received by a person in India, the service tax liability can be fastened on the service recipient in India only w.e.f. 1.1.05 and in arriving at this conclusion, the Tribunal had noted the fact that w.e.f. 18.4.06, Section 66A has been inserted in Finance Act,1994 by the Finance Act,2006 incorporating provisions regarding charge of service tax on the services received from outside India and that a number of taxable services can be provided inside India as well as from abroad.

4.1. It has been pleaded by the learned Departmental Representative that in view of Hon'ble Supreme Court's observations in para 14 of its judgment in the case of Kerala State Electricity Board vs CCE, Thiruvananthapuram reported in 2008(9)STR.3(SC), the Appellants as recipient of taxable service from off shore services providers not having any office in India, will be liable to pay the service tax. We do not agree with this contention, as in the case of Kerala State Electricity Board(supra) the Appellants by virtue of their agreement with the foreign service providers were liable to pay service tax in terms of the provisions of the proviso to sub-rule (1) of Rule 6 of the Service Tax Rules,1994 and Hon'ble Supreme Court's judgment is in the context of Kerala State Electricity Board's agreement with their off shore service provider while in the case, there is no such agreement of the Appellants with the off shore service providers and proviso to Rule 6(1) of the Service Tax Rules had been deleted w.e.f.16.8.02. Therefore, Hon'ble Supreme Court's judgment in the case of Kerala State Electricity Board(Supra) is not applicable to the facts of this case.

4.2 We, therefore, hold that the Appellants as recipient of taxable service from off shore service providers are liable to pay the service tax under Rule 2(1)(d)(iv) of the Service Tax Rules only w.e.f. 1.1.05.

5. In view of the above discussion, we remand the matter to the Commissioner of Central Excise(Appeals) for denovo adjudication for - (a) quantification of service tax demand in view of our findings in para 4.2 above and (b) redetermination of quantum of penalties on the Appellant in view of their reduced duty liability.

6. The appeals stand disposed off as above..

(S.S.Kang)
Vice President

(Rakesh Kumar)
Member Technical

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