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

Appeal No. ST/628 /2008 – SM [BR] Date 25/11/2008

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

To :
M/S LILASONS BREWERIES LTD.
INDUSTRIAL AREA, GOVINDPURA, BHOPAL-462023.

M/S LILASONS BREWERIES LTD. Appellant
Vs
C.C.E BHOPAL Respondent

I am directed to transmit herewith a certified copy of **Final order No.** 1511 / 2008-**SM[BR]** dated **3.11.2008**

passed by the Tribunal under Section 129, (B) of the Customs Act,1962 & Financial Act 1994 relating to Service Tax

Assistant Registrar
(SM Appeal Branch)

Copy to :
1. Respondent
C.C.E BHOPAL
HOSHANGABAD ROAD, 48, ADMINISTRATIVE AREA, AREA HILLS, BHOPAL (M.P.) 462011
2. Adv. / Consult
MR.M.K.SHARMA, CHARTERED ACCOUNTANT
30, ZONE-1, MAHARANA PRATAP NAGAR, BHOPAL-462011.
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-1
15 Office Copy
16 Guard file

Assistant Registrar
(SM Appeal Branch)

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No.2, R.K.Puram, New Del
P[hi-110066.
Principal Bench, New Delhi.

ST/628/08-SM

[Arising out of Order-in-Appeal No.76/BPL/2008 dt.14.6.08 passed by the Commissioner(Appeals), Bhopal)

For approval and signature:

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. Lilasons Breweries Ltd. Appellant

Versus

CCE, Bhopal Respondent

Appearance
Shri M.K.Sharma, Adv. For appellant
Shri A.K.Rastogi, Authorised Departmental Representative(DR) For respondent

Coram: Hon'ble Mr. RAKESH KUMAR, MEMBER (TECHNICAL)

Date of decision: 3.11.08
Final Order No. 1511/08-SM (BR)

Per Rakesh Kumar:

The Appellant raised bills to their franchisees wherein franchise and service tax was separately mentioned and according to the Appellant, against those bills only the franchise fee plus service tax was received from franchisees. The Appellant, however, claim that by mistake paid service tax on the gross amount inclusive of the service tax and when they realized their mistake, they filed refund claim for an amount of Rs.1,76,194/-. The refund claim was rejected by the Dy. Commissioner on the ground that no excess amount of service tax has been paid warranting any refund. The Dy. Commissioner's order was upheld by the Commissioner(Appeals).

2. Shri M.K.Sharma, Advocate, Ld. Counsel on behalf of the Appellant pleaded that in the debit notes, which are nothing but invoices raised by the Appellant to their franchisee, the franchise fee and service tax at the rate of 12.24% is separately mentioned, but when the payment was received against the debit notes, the Appellant by mistake paid service tax on the gross amount collected, while the tax was payable only on the portion representing the franchise fee, as a result of which the service tax actually paid by the Appellant is more than the amount of service tax shown in the debit notes and according to them, the excess amount, is refundable to them. He also pleaded that this excess amount is not hit by the principle of unjust enrichment, as the service tax actually paid by them is more than the amount which has been charged from franchisees as service tax in the debit notes. Ld. Counsel also mentioned that no notice mentioning the ground for rejecting the refund claim was issued to the Appellant

- only an employee of the Appellant was called by the Central Excise Officers on phone to explain the calculation and refund claim was decided based on the clarification given by the employee and as such neither the basis for rejecting the refund was communicated to them nor proper personal hearing has been given to them. He also cited the decision of Hon'ble High Court of Allahabad in the case of Straw Board Manufacturing Co. Ltd. vs UOI reported in 1994(09)LCX.0065 in support of his plea that refund claim cannot be rejected without issue of a notice mentioning the ground for rejecting the claim.

2.2 The learned DR reiterated the findings in the impugned order and pleaded that the service tax has been correctly paid and no amount is refundable to the Appellant.

3. I have considered the submissions from both the sides. I find that the refund claim has been rejected without issuing any show cause notice to the Appellant. I also find that in para 6(v) of the Dy. Commissioner's order, the Dy. Commissioner has given a finding that "a perusal of the S.T.3 for the relevant period (Oct.06 to March'07) clearly proves that the applicant have made payment of service tax on the amount received by them and their burden of service tax had been passed on to the customers not for the amount calculated on the amount received but on the basis of amount of service tax calculated on the actual royalty amount payable by their party and that the amount of service tax has also been debited from the ledger of the party on the basis of the amount of service tax payable and charged through debit notes". From this finding of the Dy. Commissioner, it appears that the service tax has been calculated and paid on the gross amount received without deducting the service tax. However, the Dy.

Commissioner inspite of this finding, concluded that no excess amount of service tax has been paid and this finding of the Dy. Commissioner was upheld by the Commissioner (Appeals).

4. As per the provision of Section 67(2) of the Finance Act,1994 where the gross amount charged by a service provider, for the service provided is inclusive of service tax payable, the value of such taxable service shall be such amount as, with the addition of tax payable, is equal to the gross amount charged. In other words if, for example, the gross amount inclusive of service tax charged is Rs.X and the rate of service tax is r%, the assessable value for calculating service tax would be Rs.100X/100+r). In this case from the impugned order, it is not clear as to whether this aspect has been examined. The impugned order, therefore, is set aside and the matter is remanded to the Dy. Commissioner for denovo adjudication of the refund claim. The Dy. Commissioner is to ascertain as to whether the service tax was paid [illegible] ~~as~~ cum tax amount and if this is so, the value is to be determined as per the provisions of Section 67(2). The appeal is disposed of as above.

Order dictated in the open Court.

(Rakesh Kumar)
Member Technical

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