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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/367 /2007,517 /2007 - CU[DB] Date 16/01/2009
ST/384/07

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

To :
ACTIVE INTERNATIONAL
E-39, FOCAL POINT EXTN., JALANDHAR

ACTIVE INTERNATIONAL — Appellant
Vs
C.C.E. JALLANDHAR(HQ. AT CHANDIGARH) — Respondent

I am directed to transmit herewith a certified copy of **Final order No. ST/30-32 2009 CU[DB]** dated 25.11.08 passed by the Tribunal under Section 129, (B) of the Customs Act,1962 & Financial Act 1994 relating to Service Tax

alongwith misc order no ST/[illegible] 6/09

Assistant Registrar
(Customs Appeal Branch)

Copy to :
1. Respondent
C.C.E. JALLANDHAR(HQ. AT CHANDIGARH)
C.R.BUILDING, PLOT NO. 19, SECTOR 17-C, CHANDIGARH.
2. Adv. / Consult
MR.SUDHIR MALHOTRA
13-R, HUKAM CHAND COLONY, NEAR D.A.V COLLEGE, JALANDHAR

(19) Mr R. Santhanam Adv
C - 3/210 Janak Puri
New Delhi - 58

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)

M/S ACTIVE INTERNATIONAL
E-39, FOCAL POINT EXTN. JALANDHAR

17. M/s Lohia Starlinger Ltd
485-A Amiltha Chaubepur, Kanpur (U.P.)

18. CCE Kanpur

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

Service Tax Appeal Nos. 367 & 517 of 2007

[Arising out of Order-in-Appeal No. 122/CE/Appl/Jal/2007 dated 30.3.2007 passed by Commissioner (Appeals) Customs & Central Excise, Chandigarh

M/s. Active International — Appellant

Vs.

Commissioner of Central Excise Jalandhar — Respondent

Service Tax Appeal No. 384 of 2007

[Arising out of Order-in-Appeal No. 192-ST/APPL/KNP/2007 dated 30.5.2007 passed by Commissioner (Appeals) Customs Central Excise & Service Tax, Kanpur]

M/s. Lohia Starlinger Ltd. — Appellant

Vs.

Commissioner of Central Excise Kanpur — Respondent

For approval and signature:
Hon'ble Mr. M. Veeraiyan, Member (Technical)
Hon'ble Mr. P.K.Das, Member (Judicial)

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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? :
2. Whether it should 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 Departmental authorities? : Y-N

No.

Appearance:
Mr. Sudhir Malhotra & Mr. R. Santhanam, Advocates for the Appellants
Mr. A.K. Madan and Mr. Vijay Kumar, DRs for the Respondent

CORAM:

Hon'ble Mr. M. Veeraiyan, Member (Technical)
Hon'ble Mr. P.K.Das, Member (Judicial)

Date of Hearing/Decision: 25.11.2008

Final **ORDER NO. ST/30-32/09**

Per P.K. Das (for the Bench):

Common issue is involved in these appeals and, therefore, all are being taken up together for disposal.

2. The issue involved in these appeals is as to whether service tax is payable on the amount paid by the assessee as commission to overseas agent, foreign based company, who had no office in India. The period of dispute is 8.7.04 to 31.3.05 in the case of M/s. Active International, and from 9.7.2004 to 30.9.2005 in the case of M/s. Lohia Starlinger Ltd. Adjudicating authority confirmed demand of tax and imposed penalties. Commissioner (Appeals) modified the demand of tax partly in the case of M/s. Active International. So, the Revenue and the assessees both filed the appeals against the order of the Commissioner (Appeals).

3. After hearing both the sides and on perusal of records, we find that the issue has been decided by the Larger Bench of Tribunal in favour of the assessee. in the case of Hindustan Zinc Ltd. vs. CCE, Jaipur [2008 (11) STR 338 (Tri-LB)] held that taxable service provided by a non-recipient or from outside India, who does not have any office in India, having been specified as "taxable service" with effect from 1.1.2005. Further, the Tribunal in the case of Foster Wheeler Energy Ltd. vs. CCE& Cus. Vadodara-II vs. CCE & Cus., Vadodara II [2007 (7) STR 443 (Tri-Ahmd)] held that off-shore services are liable to pay service tax with effect from 18.4.2006 after insertion of Section 66A in Finance Act, 1994. In view of the decisions of the Tribunal, liability of payment of tax on the assessee for the services rendered by the foreign companies who had not office in India would be effective from 18.4.2006.

4. Learned SDR reiterates the findings of the Commissioner (Appeals). He also submits that the Tribunal in the case of Unitech Ltd. vs. CST, Delhi [2008 (88) RLT 953(CESTAT-Del) after considering the decision of the Larger Bench in the case of Hindustan Zinc Ltd. (supra) held that recipient

of services provided by the foreign company would be liable to pay tax with effect from 1.1.2005. He particularly drew the attention of the Bench to para 3.4 and 3.5 of the said decision. For the purpose of proper appreciation the relevant portion of Unitech Ltd. (supra) is reproduced below:

> "3.5 It is true that comprehensive provisions for taxing the import of service by all possible modes came w.e.f. 18/4/06 when Section 66A was introduced in the Finance Act, 1994 and simultaneously Taxation of Services (Provided from outside India and Received in India) Rules, 2006 were notified vide Notification 11/2006-ST dated 18/4/06. But as discussed above, so far as the taxable services provided from India by a foreigner or non-resident, not having any officer or business establishment in India to a person in India are concerned, these services were taxable even prior to 18/4/06 under Section 66 read with Section 65 (105) of the Finance Act, 1994 and by virtue of Rule 2 (1)(d)(iv) of the Service Tax Rules, 1994 read with Notification 36/04-ST dated 31/12/04 issued under Section 68(2) of the Finance Act, 1994, the recipient in India, was liable to pay the service tax.

5. The learned advocates relied upon decision of the Tribunal in the case of Foster Wheeler Energy Ltd. (supra). The relevant portion of the Tribunal in the case of Foster Wheeler Energy Ltd.(supra) is reproduced below:-

> "6.7 The appellant have submitted that part of the services are rendered from outside India. The agreement entered into by them clearly indicates that certain service are rendered outside India and the detailed billing agreed upon between the appellant and PLL based on man days spent separately for onshore and offshore services confirms this. The very same agreement is being relied upon to conclude that the assessees are rendering the services of consulting engineers and the said agreement also clearly specifies which are onshore services and

which are offshore services. It also indicates the rates for offshore services are higher. PLL was not expected to pay a much higher amount by classifying the onshore services as offshore services, just to avoid some percentage as service tax.

6.8 We also noticed that there has been an amendment by way of inserting Section 66A in the Service Tax Provisions by the Finance Act, 2006 w.e.f. 18.4.2006. There is no doubt that the services rendered are ultimately in relation to setting up of the LNG terminal in India. Nevertheless, no reliable evidence has been adduced to contradict the claim of the appellant that the services claimed by them as offshore services are not offshore services. Such offshore services are liable for tax consequent to the amendment w.e.f. 18.4.2006, but for earlier period the same will not be so.

6.9 Service Tax Circular No. 36/4/01 dt. 8.10.2001 hold that service provided beyond the territorial waters will not attract service tax. This circular will be relevant till the amendment brought out in service tax laws by insertion of Section 66A w.e.f. 18.4.2006. Therefore, the appellant's contention that the demands on services relating to identified offshore services cannot be subjected to service tax during the relevant period is acceptable."

6. We find that the decision of Foster Wheeler Energy Ltd. (supra) considered the CBEC Circular No. 36/4/2001 dated 8.10.2001, which was withdrawn from 18.4.06. It is noted that Circular dated 8.10.2001 clarified that service provided beyond the territorial waters would not attract service tax. It appears that consequent upon insertion of Section 66A in Finance Act, 1994 effective from 18.4.2006 charge of service tax on service received from outside India, Circular dated 8.10.2001 was

withdrawn. It is seen that Board Circular was not placed before Bench in the case of Unitech Ltd. (supra).

7. In view of the above discussion, and respectfully following the decision of the Tribunal in the case of Foster Wheeler Energy Ltd. (supra), we set aside the demand of tax along with interest and penalties. The appeals filed by the assessee are allowed. Appeal filed by the Revenue is rejected.

(Pronounced in the open Court)

(M. Veeraiyan)
Member(Technical)

(P.K.Das)
Member(Judicial)

ss

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
West block No. 2, R.K. Puram, NEW DELHI

COURT No. III

ST/Misc. application No. 618/08 in Service Tax appeal No. 367 of 2008

M/s. Active International, — Appellants
Reptd. By Shri R. Santhanam, Advocate

Versus

CCE, Jalandhar — Respondent
Reptd. By Shri Vijay Kumar, DR

Date of Hearing/decision: 25th November, 2008

Coram: Hon'ble Mr. M. Veeraiyan, Member (T),
Hon'ble Mr. P.K. Das, Member (J)

MISC. ORDER NO. 57/6/09 dated ____________

Per P.K. Das:

The applicant filed this application for extension of stay order. We find that the appeal has been listed in today's list. In view of that it is not necessary for extension of stay order as the appeal has been taken up for hearing. Misc. application is dismissed as infructuous.

(Dictated & pronounced in the Open Court.)

(M. VEERAIYAN)
MEMBER (TECHNICAL)

(P.K. DAS)
MEMBER (JUDICIAL)

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