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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/663 /2007 - CU[DB] Date 16/03/2009

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

To :
C.C.E. INDORE

MANIK BAGH PALACE, POST BOX NO. 10, INDORE
452001 (M.P.)

C.C.E. INDORE Appellant

Vs

M/S SHIVHARE ROADLINES Respondent

I am directed to transmit herewith a certified copy of **Final order No. ST/104 2009 CU[DB]** dated 17.02.09

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

M/S SHIVHARE ROADLINES

ROSHINI GHAR ROAD, GWALIOR (M.P.)

2. Adv. / Consult : SH. N.K.BAJPAI, ADV
SH. KRISHAN GARG, CA
C/O RESPONDENT

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)

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
WEST BLOCK NO.II, R.K. PURAM, NEW DELHI-110066.
BENCH-DB

Service Tax Appeal No.ST/663/07 with C.O. No./31/08/CUST.

[Arising out of Order-in-Appeal No.IND-I/159/2007 dated 21.08.2007 passed by the Commissioner (Appeals-I), Indore]

Date of Hearing:17.02.2009

Commissioner, Customs &
Central Excise, Indore ...Appellant

Vs.

M/s. Shivhare Roadlines ... Respondent

Present for the Appellant :Shri Fateh Singh, DR
Present for the Respondent :Shri N.K.Bajaj, Advocate &
Shri Krishan Garg, CA

Coram: Hon'ble Mr.D.N.Panda, Judicial Member
Hon'ble Mr. Rakesh Kumar, Technical Member

Final ORDER NO. ST/104/09 DATED:17.02.2009

**PER: D.N.PANDA**

Both the sides are in appeal before us. Revenue's appeal is against an amount of Rs.22,396/- (which is apparent from para 6 of the impugned order) with the grievance that Respondent should not go away from the ambit of the tax in respect of this amount. The ld. Commissioner (Appeals) has erroneously construed the provisions of law and exempted that sum from tax.

1.2 The respondent is in Cross Objection challenging para 7 of the order in Appeal. Shri Bajpai, ld.Counsel submits that there is a clear distinction between contractor and sub-contractor. The real service is rendered by a contractor while the sub-contractor aids in achieving the objective of the contractor. Therefore, the service provider, who is a contractor, should necessarily be required to discharge service-tax liability as that would be required by law. There is a consistent view of the Tribunal in the cases of (1) M/s. OIKOS vs. Commissioner reported in 2007 (5) S.T.R. 229 (Tri.-Bang.) (2)M/s. Semac Pvt. Ltd. Vs. CST reported in (2006) (4) S.T.R. 475 (Bang. Trib.) (3) BBR (India) Ltd. vs. CCE (2007) 8STT 275 (Bang. CESTAT) holding that a sub-contractor should not be brought to the ambit of the tax and liability to tax is of principal contractor. This view of the Tribunal was supported by CBEC Circular F. No.B-11/3/98-TRE dated 7.10.98.

1.3 Learned Counsel Shri Bajpai relies on para 5.6 of the Circular and pleads that a sub-contractor is not an independent service provider but serves the service provider, for which he should not be liable to pay service tax. He also pleads that in the absence of definition of service provider, the sub-contractor cannot be a service provider who serves to a service provider. He brings to our notice fairly Submitting that the first view of the Board was that subcontractor should not be liable to tax but such view was changed by a master Circular issued on 23rd August, 2007. According to him, the reversed view of the Board was probably in view of the Cenvat Credit made available by Cenvat Credit Rules 2004. The respondent's case is related to the period from August 2002 to Sept., 2004 and that is much before Master Circular was issued on 23.8.07. He submits that the aforesaid decisions of the Tribunal were rendered on the basis of the provisions of the Boards Circular, which were applicable at the material time. Therefore, he strongly pleads that the appellant should not be unequally dealt under the law to cause prejudice to him. He further brings to our notice that none of the decisions of the Tribunal he relied upon are either stayed or reversed by any higher Court. In such a scenario, he also places the operative part of the order of the ld. Commissioner (Appeals) and submits that the ld. Commr. (Appeals) had all materials before him for which he gave liberty to the respondent to file refund application. Accordingly, he pleads that if the record shows that the principal-contractor has discharged the service tax in relation to the subject matter, this respondent should not be doubly taxed. He relies on the letter issued by the principal contractor M/s. Container Corporation of India Ltd. issued on 13th August, 2003 and submits that there was a fair approach made by the principal-contractor bringing the case of the respondent for proper relief. In-spite of such a communication, respondent has been denied justice by the authorities below.

2. Ld. DR submits that the Master Circular issued on 23rd August, 2007 no more leaves sub-contractors free from tax liability. Therefore, the order in appeal had rightly decided against the respondent. He pleads that the relief of Rs.22,396/- granted by the ld. Appellate Authorities below was also uncalled for, for which the appeal of revenue should be allowed.

3. Heard both sides and perused the record.

4. We have gone through the situation, where the sub-contractors were given to understand by the Board in terms of the Circular placed before us by the ld. Counsel that they shall have no liability while they serve the principal service provider. This was probably the basis of the Tribunal to decide the matter in favour of the sub-contractor in series of cases relied upon by the ld. Counsel as aforesaid. Probably to avoid double taxation sub-contractors serving principal contractors were not brought to the ambit of the tax by first Circular.

5. We have perused the letter placed by learned Counsel received from the principal contractor and addressed to the Joint

Commissioner bringing the case of the respondent. We have also examined the last sentence in para 7 of the Order-in-Appeal. We are of the clear opinion that on the given facts and circumstances, the ld. Appellate authority himself felt that the respondent should get refund but he failed to discharge his duty as a public servant to render complete justice as the circumstances warranted since the case is under pre-master Circular era. We do appreciate his difficulties. The appellate order was passed on 21st August 2007 that is just 2 days before the master Circular was issued. We also appreciate that the respondent should get the double taxation relief which is granted in a different manner through the Cenvat Credit Rule 2004. Therefore, we are of the view that if it is proved from record, on verification, that the principal contractor has discharged the tax liability in respect of the contract, cascading effects should be avoided and the appellant is entitled to refund. It would be proper to implement the law without causing any harassment to the respondent if the cascading effect is demonstrated by the record itself upon examination of records of the principal contractor and the sub-contractor. This exercise is required to be done by the learned Adjudicating Authority.

6. In the facts and circumstances as well as due to peculiar observation of the ld. Appellate authority below, we have no hesitation to direct the learned adjudicating authority to call for

record of both the principal contractor and sub-contractor and satisfy that the liability that is required to be discharged has been done. Sub-contractor shall not be doubly taxed if the principal contractor has discharged the liability. Once the Authority is satisfied that there is situation amounting to double taxation of the same subject matter, he should not hesitate to grant refund. We make it clear that due to confusion of the law the respondent should not claim any interest from the department if refund is admissible. It is also made clear that while granting the refund, the sub-contractor has to meet the test of unjust enrichment. We allow the Cross Objection in the aforesaid terms. While holding as aforesaid, revenue's appeal is dismissed finding that proper arithmetical exercise was done in para 6 of the Order-in-Appear.

[Pronounced in the open Court during the course of hearing].

(D.N.PANDA)
JUDICIAL MEMBER

(RAKESH KUMAR)
TECHNICAL MEMBER

Anita