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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/446 /2009-SM[BR]&ST/ CO/174/2009, ST / 447 / 2009, ST / 583 / 2009 –SM[BR] &ST/CO/ 196 /2009 –SM[BR] Date 23/10/2009

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 ANANT COMMODITIES PVT. LTD. Respondent

I am directed to transmit herewith a certified copy of **Final order No.** 1304 – 1306 / 2009 –SM[BR] dated 21.10.2009 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
   M/S ANANT COMMODITIES PVT. LTD.
   211, SHSRIVARDHAN,
   4, R.N.T. MARG, INDORE.
   [2] M/S LAXMI SOLVEX LTD.
   VILLAGE DURAGPURA GRAM SIYA DEWAS [M.P]
   [3]M/S VIPRO EXIM LTD.
   13A, INDUSTRIAL AREA, A.B. ROAD DEWAS [M.P]
2. Adv. / Consult SHRI ASHUTOSH UPADHYAY ADV.
   4, KISHAN COLONY, 567-MG ROAD
   OPP.HIGH COURT NEAR RAJANI
   BUILDING INDORE [M.P]
3. S.D.R
4. ~~J.C.D.R.~~
5. Bar association. CESTAT. New Delhi
6. Director Publications. Customs. Excise. I.P. Estate. New Delhi
7. M/s Centax Publictions Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi - 3
8. Commercial Laws of India Pvt Ltd. Post Bag No. 1033, No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
9. Raghuraman's 44-B. Regal Flat.Shipra Suncity. Indirapuram - 201010.Ghaziabad. DT. U.P.
10. M/s Manupatra Information Solutions Pvt Ltd. Excise & Customs Cases B-37, Sector - 1, Noida - 201301, Gautam Budh Nagar, (UP)
11. M/s. Deeparchie Publications. M-93. Marg. 46. Saket. New Delhi 110017
12. Taxindiaonline.com Pvt.Ltd. B-XI/8183.Vasant Kuni. New Delhi - 110070
13. Taxmann Allied Service Pvt Ltd.. 21/35. West Puniabi Bagh. New Delhi - 110026
14. Easy Service Tax Online Dot Com Pvt.Ltd.407A.Iscon Mall.Above Star India Bazar.Satellite Road.Ahmedabad-15
15. LAWCRUX Advisors Pvt Ltd. LAW House.1-8.Sector - 10. Faridabad 121003 (Harvana)
16. Office Copy
17. Guard file

Assistant Registrar
(SM 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/446/09-SM &
ST/CO/174/09

(Arising out of Order-in-Appeal No.IND-1/69/2009 dt.19.3.09 passed by the Commissioner(Appeals), Indore)

CCE, Indore Appellant

Versus

M/s. Anant Commodities Pvt. Ltd. Respondent

2. **ST/447/09/SM**

(Arising out of Order-in-Appeal No.IND-1/93/2009 dt.31.3.09 passed by Commissioner(Appeals) Indore)

CCE, Indore Appellant

Vs

M/s. Laxmi Solvex Ltd. Respondent

3. **ST/583/09 &**
ST/CO/196/09

(Arising out of Order-in-Appeal No.IND-1/112/2009 dt.22.4.09 passed by Commissioner(Appeals), Indore)

CCE, Indore Appellant

Vs

M/s. Vipro Exim Ltd. Respondent

Appearance
S/Sh. Sansar Chand & B.K.Saxena,JCDR/DR for Appellant
Sh. A.Upadhyay, Adv. For Respondent

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

Date of Hearing: 24.9.09
Date of Decision: 21/10/09

Final Order No. 1304-1306/2009 SM (Br)

Per Rakesh Kumar:

Since the issue involved in these three appeals of the Revenue is identical, the same were heard together and are being disposed off by a common order. The facts, leading to these appeals by the Revenue are, in brief, as under:

1.1 Notification No.41/2007-ST dt.17.9.07 issued under Section 93(1) of the Finance Act,1994 exempts taxable services, specified in column(3)of the Schedule to this notification, which were received by an exporter and used for export of goods, from the whole of the service tax leviable thereon under Section 66 & 66A of the said Finance Act, subject to the conditions specified in the corresponding entry in column (4) of the schedule. As per the provisions of this notification, the exemption has to be claimed by the exporter of goods for the specified services received and used by the exporter of the said goods and this exemption shall be provided by way of refund of service tax paid on the specified services used for export. Some of the services specified for refund, as mentioned in column 3 are -

(a) Port services provided by a major port[Section 65(105)(zm)] or other than major port [Section 65(105)(zzl)] or person authorized by such port;

(b) Technical testing and analysis agency service [Section 65(105)(zzh)] where it is required as per written agreement between exporter and the foreign buyer;

(c) Goods Transport Agency's service for transportation by road provided from ICD to Gateway Port[(Section 65(105)(zzp)] ;

(d) Services provided by a Custom House agent in relation to export of goods (Section 65(105)(h));

(e) Specified clearing services, namely – disinfecting, exterminating, sterilining or fumigating of containers used for export of goods [Section 65(105)(zzzd)].

1.2 The Respondents – M/s. Anant Commodities(P) Ltd., M/s. Laxmi Solvex Ltd. and M/s. Vipro Exim Ltd., all merchant exporters, exported certain goods and since for the export of goods, the service mentioned in para 1.1 were used, they filed refund claims for amounts of Rs.5,06,756/-, Rs.1,01,111/- and Rs.1,08,153/- respectively, out of which, the jurisdictional Assistant/Deputy Commissioner, vide orders-in-original dt.22.12.08; 15.9.08 and 23.10.08, sanctioned the refund of Rs.21,044./-, Rs.88998/- and Rs.1,08,153/- respectively. The Revenue however, filed review appeals against each of orders dt.15.9.08 & 23.10.08 before the CCE(Appeals) on the ground that out of the refund amounts of Rs.88,998/- and Rs.1,08,153/- sanctioned by the Deputy Commissioner, amounts of Rs.30,547/- and Rs.14,920/- respectively have been wrongly sanctioned, as these amounts pertain to the service tax paid by the service providers on the amounts charged for the services which are not included in the exemption notification No.41/2007-ST dt.17.7.07. The CCE(Appeals), vide orders-in-appeal No.IND-I/93-09 dt.31.3.09 and No.IND-I/112/09 dt.22.4.09 respectively only partly allowed the Revenue's appeals by disallowing the refund of only Rs.2,046/- and Rs.1,297/- respectively and upheld the Dy. Commissioner's order for the remaining amounts of Rs.28,501/- and Rs.13,623/- respectively. The Revenue has filed appeals before the Tribunal against these two orders dt.31.3.09 and 22.4.09 of the Commissioner of Central Excise(Appeals).

1.2.1 M/s. Anant Commodities(P) Ltd. filed appeal before CCE(Appeals), against Asstt. Commissionr's order dt.22.12.08 rejecting the refund claim of Rs.4,85,712/- out of claimed amount of Rs.5,06,756/- and the CCE(Appeals), vide order-in-appeal dt.18.3.09 allowed the appeal with consequential relief. The Revenue is in appeal before the Tribunal against this order of Commissioner(Appeals).

1.3. M/s. Anant Commodities Pvt. Ltd. and M/s. Vipro Exim Ltd. have filed cross objections in respect of the appeals by the Revenue.

2. Heard both the sides.

2.1 Shri B.K.Saxena, Jt.CDR and Shri Sansar Chand, SDR, the learned Departmental Representatives made the following and as well as written submissions,

(1) The service tax refund has been allowed in respect of "supervisions of container Stuffing", "weighment", Sampling and Analysis services", "Cargo handling", and "Stevdoring charges", which are not specified for refund in the notification No.41/07-ST dt.17.9.07 and, therefore, the same has been wrongly allowed by the Appellate Authority.

(2) The weighment and sampling have not been treated by Hon'ble Tribunal, in a number of cases, as taxable services. Therefore, even if service tax has been paid by the service provider to the respondents, on the amount, representing the value of sampling and weighment services, such payment cannot be treated as service tax and its refund is not permissible.

(3) The Commissioner(Appeals) has erred in allowing refund to M/s. Vipro Exim Ltd., of service tax on account of "Agency services", as, if the said services were considered as services provided by Custom House Agent, the exporter was required to produce invoices issued by the custom house agent for providing the services specified in column (3) specifying the number and date of shipping bill, description of export goods number and date of invoice issued by exporter relating to the export goods, and details of all charges, whether or not

reimbursable, collected by the CHA from the exporter in relation to the export goods, which has not been done.

(4) Refund is not admissible of the tax which was not payable by the service provider, but was paid. Any amount paid as tax, which was not payable is to be treated as a deposit, not service tax and its refund would not be admissible.

2.2 Shri Ashutosh Upadhyay, Advocate, the learned Counsel for the Respondents made the following submissions:

(1) There is no separate service tax paid by the service provider on sampling, weighment and container stuffing supervision service tax has been paid by the service provider under heading – "Technical Testing & Analysis" on the gross value which includes the amounts charged for sampling, weighment and supervision of container stuffing. When the Department has accepted the payment of service tax on "Technical Testing and analysis" service on the basis of certain gross amount charged by the service provider, while considering refund of this service tax to the exporter, who had availed their service, the assessment of service tax paid by the service provider cannot be reviewed.

(2) Similarly when the Respondent(exporter) availed Custom House Agent(CHA)'s service for export of goods and the CHA had paid service tax on gross amount charged including cargo handling, stevedoring charges etc., while considering refund of service tax to the Respondent, who had availed the

services of the CHA, the assessment of service tax at the end of service provider(CHA) cannot be reopened - more so when there is no allegation that the CHA also had separate registration as cargo handling agent.

(3) As per the Board's circular, "Port services" among others, cargo handling and storage charges, warehousing charges, container handling charges and railway haulage charges for rail borne cargo.

(4) In any case, payment of service tax by the service provider to the Respondent exporters cannot be reviewed while considering refund of the service tax to the respondents. In this regard, reliance is placed on Tribunal's judgment in case of MDS Switchgear Ltd. vs CCE, Aurangabad reported in 2001(132)ELT.405 and CCE, Surat vs Trinetra Texturisers Pvt. Ltd. reported in 2004(166)ELT.384.

3. I have carefully considered the submissions from both the sides and perused the records.

3.1 In Appeal No.ST/446/09-SM wherein M/s. Anant Commodities (P) Ltd. are the respondents, the respondents, for export of Molasses during April-June,2008 had used the services of a CHA and port services and had claimed service tax refund of Rs.5,06,756/- under notification No.41/2007-ST. But an amount of Rs.4,74,897/- was disallowed in respect of CHA service on the ground that this does not represent the service tax on the value of customs clearance service as the same pertains to charges for cargo handling, stevedoring charges and stock management charges on DOB which are not part of custom house agent's service. Similarly an amount of Rs.10,815/- has been disallowed in respect of 'port service' on the ground that this represent the service tax on the 'wharfage' which is not part of 'port service'.

3.2 In appeal No.ST/447/07-SM, wherein M/s. Laxmi Solvex Ltd. are the respondents, the respondents exported "Soyabeen De-oiled cake for which they used Technical testing and analysis service [Section 65(105)(zzh)], GTA service [Section 65(105)(zzp)] and surveyor's service [Section 65(105)(zl)], in respect of which they filed refund claim of Rs.1,01,111/- out of which an amount of Rs.88,998/- was sanctioned by the Deputy Commissioner. The Revenue seeks to disallow an amount of Rs.29,435/- on the grounds that –

(i) Service tax on "Technical testing & analysis" service paid by the service provider includes the tax paid on the amount charged for shipment sampling and supervision charges, which are not the service specified in the notification number and

(ii) Service tax paid on the GTA service also includes the amount charged for return of empty trucks from railway station to factory which is not the amount charged for transportation of goods for export.

3.3 In appeal No.ST/583/09-SM, wherein M/s. Vipro Exim Ltd. are the respondents, the respondents exported Soyabeen De-oiled cake during April'08-June'08, for which they received Port Services [Sec.65(105)(zn)], Technical Testing and analysis service [Section 65(105)(zzh)] and Custom House Agent services. [Section 65(105)(h)] from various service providers who had paid service tax on these services whose incidence had been passed on to the Respondents. The Respondents filed a refund claim under Notification No.41/2007-ST for the refund of the service tax on these services, which was sanctioned by the Dy. Commissioner. The Revenue seeks to disallow an amount of Rs.13,623/- on the grounds that -

(a) service tax paid on Technical testing and analysis service includes the tax paid on the amount charged for "weighment", "sampling" and "supervision of container stuffing" which are not the services specified in Notification No.41/2007-ST; and

(b) service tax paid on CHA service includes the tax on the amounts charged for "Agency service" which are not the services of CHA relating to custom clearance.

4. Notification No.41/2007-ST provides for claim of refund by an exporter who had used certain specified the services for the export of the goods, subject to the conditions specified in the notification – the service tax whose refund can be claimed by the

exporter had been paid by the service provider. In each of the three appeals of the Revenue, it is not the Revenue's case that the service provider who had provided the taxable services, in question, to the Respondents, were not of the categories specified in the notification 41/2007-ST. What the Revenue seeks to do is to conduct a detailed review [illegible] of the service tax payment by the service providers i.e. the Goods Transport Agencies, Ports, CHA, and Technical testing and analyses service providers and then disallow certain amounts of service tax refund to the Respondents on the ground that those amounts represent the tax on the amounts charged for the services which are not the part of the value of GTA service, CHA services, Port services on Technical testing & analysis services. In other words the refund of the disputed amounts is sought to be disallowed to the Respondents (Service receiver) by reviewing the assessment of the service tax at service provider's end. Tribunal in a series of its judgment cases of –

(i) MDS Switchgear Ltd. vs CCE, Aurangabad
2001(132)ELT.405

(ii) Johson & Johnson Ltd. vs CCE
1997(112)ELT.901

(iii) CCE vs MOEL Pharmaceuticals
1997(113)ELT.66

Has held that Cenvat credit cannot be denied to a receiver of duty paid inputs, by the Central Excise authorities having jurisdiction over the input receiver, by revising the assessment of duty at the supplier's end. The same principle will be applicable to this group of cases and unless and until, the service tax payment by the service providers is revised by the jurisdictional service tax officers, the service tax refund available to the exporters, who had received those taxable service in connection with export of goods, cannot be revised.

5. In view of the above discussion, I do not find any infirmity in the impugned orders in appeal. The Revenue's appeals are, therefore, dismissed. The cross objection No.ST/CO/174/09 filed by M/s. Anand Commodities Pvt. Ltd. and No.ST/CO/196/07 filed by M/s. Vipro Exim Ltd. also stand disposed off as above.

(Rakesh Kumar)
Member Technical

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