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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/85 /2009 – SM[BR] ST /CO/208/2009-SM[BR] Date **24/01/2011**

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

To :
C.C.E. LUDHIANA
CENTRAL EXCISE HOUSE, 'F' BLOCK, RISHI NAGAR,
LUDHIANA 141001 (PUNJAB)
C.C.E. LUDHIANA Appellant

Vs

M/S GILL GODOWN Respondent

I am directed to transmit herewith a certified copy of **Final order No.** 76 /2011- **SM[BR]** dated 24.12.2010 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 GILL GODOWN G.T. ROAD, VILAGE-GHAL KALAN, MOGA(PB)

2. Adv. / Consult SHRI ALOK ARORA ADV.
#82, MISSION COMPOUND SAHARANPUR

3. C.D.R
4. Bar association, CESTAT, New Delhi
5. Director Publications, Customs, Excise. I.P. Estate, New
6. M/s Centax Publictions Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi -
7. Company Law Institute of India Pvt Ltd.,No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
8. M/s. Deeparchie Publications, M-93, Marg. 46, Saket, New Delhi 110017
9. Taxmann Allied Service Pvt Ltd., 59/32, New Rohtak Road, New Delhi -
10. Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road, Ahmedabad-15
11. LAWCRUX Advisors Pvt Ltd, LAW House,1-8,Sector - 10, Faridabad 121003 (Haryana)
12. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor,Vasant Arcade,Nelson Mandela Road, Vasant Kunj, New Delhi - 110070
13. Office Copy
14. Guard file

Assistant Registrar
(SM Appeal Branch)

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI, PRINCIPAL BENCH NEW DELHI

Service Tax Appeal No. 85 of 2009-SM and
ST/CO/208/2009-SM

[Arising out of Order-in-Appeal No.341/CE/Ldh/2008 dated 20.10.2008 passed by the Commissioner of Central Excise (Appeals), Chandigarh].

For approval and signature:

Hon'ble Shri Rakesh Kumar, Member (Technical)

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1. Whether Press Reporters may be allowed to see 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?

CCE, Ludhiana   Appellant

Vs.

M/s. Gill Godown   Respondent

Appearance: Rep. by Shri R.K. Gupta, SDR on behalf of the Deptt.
Rep. by Shri Alok Arora, Advocate on behalf of the respondent.

CORAM: **Hon'ble Shri Rakesh Kumar, Member (Technical)**

Final Order No. 76/2011/SM(BR)/Dated:24.12.~~2010~~

<u>Per Rakesh Kumar</u>

The facts leading to filing of this appeal by Revenue and cross objection by the respondent are, in brief, are under:-

1.1 The respondents were having their godown at G.T. Road, Village Ghal Kalan, Moga. In this godown, the goods of M/s. Nestle India Ltd. were being stored for which the respondents were receiving certain remuneration. On 10.08.2006 a show cause notice was issued to the respondent alleging that they were providing storage and warehousing facility to M/s. Nestle India Ltd. and since storage and warehousing services is taxable w.e.f. 16.08.2002, the amount being received by them from Nestle India Ltd from 16.08.2002 attracts service tax. On this ground, the show cause notice demanding service tax of Rs.54,750/- along with interest from the respondent for the period from 16.08.2002 to 31.12.2005 were issued. The show cause notice also proposed imposition of penalty on the respondent under Section 77, 76 as well as 78 of the Finance Act, 1994. It appears that no reply was given by the respondent in respect of show cause notice and the respondent even did not appear for personal hearing.

1.2 The show cause notice was adjudicated by the jurisdictional Asstt. Commissioner vide order-in-original dated 13.11.2006 by which the service tax demand was confirmed along with interest and besides this, penalty of Rs.1,000/- was imposed under Section 77 and penalty of Rs.100/- per day under Section 76. In this order, there is no mention of any penalty under Section 78 though the show cause notice had proposed imposition of penalty. Subsequently, when this mistake came to the notice of the department, the department issued a notice dated 10.08.2008 to the respondent for rectification of the order-in-original dated 10.08.2006 for imposition of penalty under Section 78. But again, there was neither any response from the respondent to the department's notice nor the respondent appeared for personal hearing, as a result of which, the Asstt. Commissioner passed an ex parte order dated 30.04.2008 imposing penalty of Rs.54,750/- on the Respondent. Here it may be mentioned that no appeal was filed by the respondent against the earlier order dated 13.11.2006. But the respondent filed appeal against rectification order dated 29.04.2008 before the CCE (Appeals). Though before the Commissioner (Appeals) it was pleaded that the services provided by the respondent were not the services of storage and warehousing and that there is no ground for imposition of penalty and that they had infact rented the godown to Nestle India Limited and that during the period of dispute, the service of renting of immovable property was not even taxable, the Commissioner (Appeals) vide order-in-appeal dated 20.10.2008 upheld the penalty under Section 78, but set aside the penalty under Section 76. It is against this order of the Commissioner (Appeals) that the department has filed the present appeal challenging the Commissioner's order setting aside the penalty under Section 76 on the ground that during the period of dispute, there was no provision that penalty under Section 76 as well as 78 could not be imposed simultaneously and during that period, penalties under both sections 76 as well as 78 could be imposed. The respondents have filed a memorandum of cross objection and in their memorandum of cross objection, they have emphasised that during the period of dispute i.e. from 16.08.2002 to December, 2005, the services provided by them were not even taxable as they were not providing storage and warehousing services, that they had rented their godown to Nestle India Ltd. under a rent agreement and that the service of renting of immovable property became taxable w.e.f. 1.6.2007 only, that in this regard, the department had issued a show cause notice dated 21.08.2008 demanding service tax amounting to Rs.13,350/- along with interest for the period from 1.10.2007 to 31.03.2008 and that show cause notice was dropped by the Dy. Commissioner vide order-in-original dated 27.09.2010 on the ground that the value of taxable service during each of the financial year during the period of dispute was under the threshold limit provided under Notification No.6/2005-ST dated 1.3.2005 and as such the respondent fall under the category of small service provider and hence no tax is chargeable, that from the order of Dy. Commissioner, it is clear that department has accepted the respondent's contention that they were providing the services of renting of immovable property during the period from

1.10.2007 to 31.10.2008, that in view of this, for the period from 16.08.2002 to December, 2005, the same services cannot be treated at the services of storage and warehousing, more so, when a rent agreement of the respondent with Nestle India Limited has been produced and that when the service tax itself was not chargeable, there is no question of imposing penalty on the respondent under Section 78 of the Finance Act, 1994.

2. Heard both the sides.

2.1 Shri R.K. Gupta, ld. Departmental Representative assailed the impugned order reiterating the grounds of appeal in the Revenue's appeal and pleaded that the Commissioner (Appeals)'s order dropping the penalty under Section 76 of the Finance Act, 1994 is not correct.

2.2 Shri Alok Arora, Advocate, the learned Counsel for the respondent, pleaded that as mentioned in the memorandum of cross objection, the respondent were never provided the storage and warehousing services to Nestle India Ltd., that the agreement with the Nestle India Ltd. was rent agreement for renting of the godown, that in this regard, a certificate from the Nestle India Ltd. has also been produced, that the TDS certificates issued by the Nestle India Ltd. also show that what they were paying to the Respondent was rent for the godown and not warehousing charges, that the services of the renting of immovable property became taxable w.e.f. 10.06.2007 and as such the same was not taxable during the period of dispute, that for the subsequent period, the department had issued a show cause notice demanding service tax for the period from 1.10.2007 to 31.03.2008 on the ground that Respondent were providing service of renting of immovable property to M/s.Nestle India Ltd. and subsequently, this show cause notice was dropped only on the ground that during each of the financial year, during period of dispute, their turnover was less than the threshold limit and hence, no service tax was payable but in this order the Department has accepted that the services provided by the respondents were the services of renting and not the services of storage and warehousing and that in view of this, for the previous period, from 16.06.2002 to December, 2005, the services cannot be treated as the services of storage and warehousing. He, therefore, pleaded that there is no ground for imposition of penalty under Section 76.

3. I have carefully considered the submissions from both the sides and perused the records. I find that in the course of filing of the appeal before the Commissioner (Appeals), it has been pleaded by them that they had not provided any storage and warehousing services and had given godown on rent to Nestle India Limited. In this regard, they had submitted a copy of the rent agreement before the Commissioner (Appeals). I find that the Department itself for the period w.e.f. 1.10.2007 is treating the services provided by the respondent as the

services of renting of immovable property not as storage and warehousing services. Therefore, the services provided by the respondent during the period of dispute cannot be the services of storage and warehousing services, more so, when there is a rent agreement on record. In view of this, levy of service tax itself for the period of dispute is not correct. In my view, therefore, there is no justification in department's plea for imposition of penalty on the respondent under Section 76 of the Finance Act, 1994. In view of this, I do not find any merit in the department's appeal and the same is dismissed. Cross objection filed by the respondent also stand disposed of as above.

(Rakesh Kumar)
Member (Technical)

Ckp.