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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/1605/2010 – SM[BR]** Date **28/04/2011**

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

To :
C.S.T. DELHI
17-B, I.P. ESTATE, IAEA HOUSE, NEW DELHI.

C.S.T. DELHI Appellant
Vs
M/S SHALOO AGENCIES, Respondent

I am directed to transmit herewith a certified copy of **Final order No. 217 / 2011 –SM[BR]** dated 13.4.2011 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 SHALOO AGENCIES,
412-A, ANSAL BHAWAN, 16, K.G.
MARG, NEW DELHI.

2. Adv. / Consult SHRI SUNIL ARORA C.A.
412-A, ANSAL BHAWAN, 16, K.G. MARG
NEW DELHI-110002.

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 & SERVICE TAX APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi – 110 066.
Principal Bench, New Delhi

COURT NO. II
Service Tax Appeal No. 1605 of 2010 (SM)

[Arising out of the Order-in-Appeal No. 134/ST/DLH/2010 dated 02/07/2010 passed by The Commissioner (Appeals), Central Excise (Appeals), New Delhi.]

For Approval and signature :
Hon'ble Shri 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?	:

CST, Delhi — Appellant

Versus

M/s Shaloo Agencies — Respondent

Appearance

Shri Krishan Pratap Singh, Authorized Representative (SDR) – for the appellant.

Shri Sunil Arora, C.A. – for the respondent.

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

DATE OF HEARING : 13/04/2011.

Final Order No. 217/2011 SM(BR) Dated : ____________

Per. Rakesh Kumar :-

The respondent are registered with service tax under the category of Real Estate Agent services. The point of dispute in this case was that according to the department during the period of dispute i.e. during period from October 2005 to March 2006, the respondent have short paid service tax amounting to Rs. 1,19,008/- as instead of paying service tax on the gross amount received, they had removed the element of service tax from the gross amount received, while there was no evidence that the gross amount also included the element of service tax. It is on this basis that the Assistant Commissioner vide order-in-original dated 25/11/09 confirmed the service tax demand of Rs. 1,19,008/- alongwith interest and also imposed penalty on the appellant under Section 76 of the Finance Act, 1994. On appeal to Commissioner (Appeals), the Commissioner (Appeals) vide order-in-appeal No. 134/ST/DLH/2010 dated 2/7/2010, while accepting the appellant's plea that the service tax is to be paid only on the amount received after the removing the element of service tax, directed the respondent to appear before the original Adjudicating Authority and produce all the relevant invoices alongwith bank statement to justify their claim that the gross amount charged included the service tax and directed the original Adjudicating Authority to examine this claim on the basis of record submitted by them. The department has come in appeal against this order of the Commissioner (Appeals) on the ground that the provisions of Section 85 of the Finance Act, 1994 are in parimateria with the provisions of Section 35A of the Central Excise Act, 1994 and in view of the judgment of Hon'ble Supreme Court in the case of **MIL India Ltd.** reported in **2007 (210) E.L.T. 188 (S.C.)** and Hon'ble Punjab & Haryana High Court in the case of **B.C. Kataria** reported in **2008 (221) E.L.T. 508 (P&H)**, the Commissioner (Appeals), even in respect of service tax matters, has no power of remand.

2. Heard both the sides.

2.1 Shri K.P. Singh, the learned Departmental Representative, assailed the impugned order reiterating the grounds of appeal in the Revenue's appeal and pleaded that in view of judgment of **Hon'ble Supreme Court in the case of MIL India Ltd.** (supra) and **Hon'ble Punjab & Haryana High Court judgment in the case of B.C. Kataria** (supra) the Commissioner (Appeals) has no power of remand, that in this case the Commissioner (appeals) has remanded the matter to the original Adjudicating Authority for determining as to whether the gross amount received by the respondent included the element of service tax that the Commissioner (Appeals) should have done this scrutiny at his level instead of directing the original Assistant Commissioner and in view of this, the impugned order is not correct.

2.2 Shri Sunil Arora, C.A., the learned Counsel for the respondent, pleaded that this matter has not been remanded, that the Commissioner (Appeals) has decided the principle that the service tax can be charged only on the amount received excluding – service tax and if the amount received includes the service tax, the same has to be excluded, that the Commissioner (Appeals) has only directed the original Adjudicating Authority to examine the respondent's claim that the amount received by them included the element of service tax, that this direction cannot be called remand, that in any case Hon'ble Gujarat High Court in the case of **Coates of India Ltd. vs. CC (Airport), Kolkata** reported in **2005 – TIOL – 671 – CESTAT – KOL.**, has held that the Commissioner (Appeals) has power the remand even after the amendment of Section 35 A (3) of the Central Excise Act, that same view has been taken in the case of **CCE, Kolkata – II vs. Indian Aluminium Co. Ltd.** reported in **2005 – TIOL – 695 – CESTAT – Kol.**, that the Tribunal in the case of **CCE, Meerut – I vs. Amba Steels** reported in **2007 (5) STR 275 (Tri. – Del.)**, relying upon Hon'ble Gujarat High Court's judgment in the case of **CCE, Ahmedabad – I vs. Medico Labs** reported in **2004 (173) E.L.T. 117 (Guj.)**, has held that the Commissioner (Appeals) is vested with such power of remand while deciding the appeal, and that in view of this there is no merit in the Revenue's appeal.

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

4. In this case the department wanted to charge service tax from the respondent on the basis of their gross amount

received, while according to the respondent the gross amount received included the element of service tax and hence the service tax could be charged only after removing the element of service tax from the gross amount. Since, the Commissioner (Appeals) found that the original Adjudicating Authority while giving a finding that service tax had been short paid, has not examined the documents produced by the respondent in support of their claim that the gross amount included the element of service tax, the Commissioner (Appeals) after holding that the service tax can be charged only on the amount received excluding service tax, has directed the original Adjudicating Authority to verify the respondent's claim in this regard on the basis of the documents produced by them. In my view, this direction does not amount to remand of matter. I, therefore, do not find any merit in the Revenue's appeal. The same is dismissed.

(Dictated and pronounced in open court.)

(Rakesh Kumar)
Member (Technical)

PK