TELEGRAM : CEGCANAL
Website : www.cestat.gov.in

REGISTERED / AD
Email : delhi@cestat.gov.in

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/57 /2011 – SM[BR] & ST /STAY / 109 /2011-SM[BR]** Date **02/05/2011**

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

To :
M/S B.D. SARDANA, PROP.,
SARDANA TELECOMMUNICATIONS, 252, SANT
NAGAR, EAST OF KAILASH, NEW DELHI.
110005

M/S B.D. SARDANA, PROP., Appellant

Vs

C.C.E. DELHI II Respondent

I am directed to transmit herewith a certified copy of **Final order No. 229/2011-SM[BR]&S/187/2011** dated 28.3.2011 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
C.C.E. DELHI II
C.R. BUILDING, I.P. ESTATE, NEW
DELHI 110002

2. Adv. / Consult
MR.SAMYNK & CO,CA
205,TRIVENI PLAZA, 17A/56,WEA, KAROL BAGH, N DELHI.

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. Taxmann Allied Service Pvt Ltd., 59/32, New Rohtak Road, New Delhi -
9. Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road, Ahmedabad-15
10. LAWCRUX Advisors Pvt Ltd. LAW House,1-8,Sector - 10, Faridabad 121003 (Haryana)
11. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor,Vasant Arcade,Nelson Mandela Road, Vasant Kunj, New Delhi - 110070
12. Office Copy
13. Guard file

Assistant Registrar
(SM Appeal Branch)

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI
Court No.IV

ST/Stay No.109/11, ST/Appeal No.57/11

(Arising out of order in appeal No.529/ST/D.II/10 dated 16.9.2010 passed by the Commissioner of Central Excise (Appeals), New Delhi)

Date of Hearing: 28.3.2011

For Approval and signature:

Hon'ble Mr.Mathew John, Technical Member

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?

Shri B.D. Sardana Prop.
Sardana Telecommunications — Appellants

Vs

CCE, Delhi-II — Respondent

Appeared for the Appellant: Shri Manmohan Kuller, C.A
Appeared for the Respondent: Ms. R.J. Perasad, SDR

Coram: **Hon'ble Mr. Mathew John, Member (Technical)**

Final ORDER 229/2011 SM (BR) &
S-187/2011 SM (BR)

Per Mathew John:

The Appellant submits that he was in the business of running a private telephone exchange as franchisee ~~on behalf~~ of Airtel and MTNL. It is seen that the department has sought to charge service tax under the heading of Commissioning and Installation of Telephone Exchange. Prima facie, the heading under which the service tax is charged is inappropriate. However, this view does not seems to have been contested at the adjudicating stage or at the appellate stage.

2. The learned Advocate submits that this has happened because the service provider is a private individual who was not aware of the charging sections in Finance Act, 1994.

3. The case before the Tribunal is that while claiming Cenvat credit, for tax paid on the services provided by Airtel and MTNL, to carry on the operations, the appellant had submitted invoices in the name of another party M/s Guru Kirpa Telecommunication, which was another Proprietor ship concern of the same appellant. At the initial stage, the appellant was not able to explain why these invoices in the name of another firm was submitted. Therefore, the credit was disallowed. At the appellate stage, the Commissioner (Appeals) remarked that the appellant has produced all relevant invoices before him. At the same time, he observed that the appellant had not contested findings of the adjudicating authority and for that reason the adjudication order was upheld by the Commissioner (Appeals). The learned A.R. submits that if opportunity is given for a fresh consideration of this

matter, they will submit all the relevant records before the adjudicating authority to satisfy that all the credit claims are legal and proper.

4. The learned DR on the other hand submits that the assessee is negligent in not providing invoices relating to input services received by the concerned firm and providing bills relating to some other firm and there is no merit in the argument of the A.R. She also submits that it is not clear whether any fresh evidence was submitted before the Appellate Authority.

5. Considered arguments of both sides.

6. The very issue of liability to tax itself is doubtful. It is not clear how the services of providing telephone is charged under the heading of "Commissioning and Installation". It is true that this issue was not contested at the adjudication stage or at the appellate stge. At the same time, the department is supposed to know the meaning of each entry imposing service tax. It cannot be mis-guiding or taking benefit of the ignorance of an individual who is a small business man. Therefore, this issue also has to be examined.

7. The main contention is that he has got all necessary bills to prove his eligibility for the input credit he claimed. Therefore, I consider it proper to remit this matter to the adjudicating authority to examine the issue of taxability as well as eligibility for credit for which the appellant is making the claim. Therefore, I consider it proper to waive pre-deposit for admission of the appeal.

8. After waiving the pre-deposit, I have taken up the appeal for disposal of the matter and the same is remanded for de-novo consideration of the two issues specified above. It is made clear that if there is a finding that service was not taxable, the assessee shall not be eligible for any refund of tax already paid because this matter was not challenged initially. However, this issue will be relevant for deciding any further tax to be collected from the Appellant.

(Order dictated and pronounced in the open Court.)

(MATHEW JOHN)
Technical Member

MPS*