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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/1700/2010 – SM [BR]** Date **02/05/2011**

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 SOLUTIONS** Respondent

I am directed to transmit herewith a certified copy of **Final order No. 239 / 2011 –SM[BR]** dated 15.4.2011 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 SOLUTIONS**
G-12, LAJPAT NAGAR III, N
DELHI.

2. Adv. / Consult SHRI DHEERAJ NETHANI, EMPLOYES OF COMPANY
M/S RESPONDENT:--------------------

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)

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

Date of Hearing:15.04.11
Date of decision:15.04.11

Service Tax Appeal No.1700 of 2010-SM

[Arising out of Order-in-Appeal No.160/ST/DLH/2010 dated 08.07.2010 passed by the Commissioner of Central Excise (Appeals), New Delhi].

C.S.T., Delhi — Appellant

Vs.

M/s. Solutions — Respondent

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?

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Appearance: Rep. by Shri Krishna Pratap Singh, DR for the appellants.
Rep. by Shri Dheeraj Nethani, Employee of the company for the respondent.

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

Final Order No. 239/2011 SM (BR)/Dated:15.04.2011

**Per Rakesh Kumar**

The respondent are registered with Service Tax Department in the category of Real Estate Agent service providers. It was alleged that during the period from October, 2004 to March, 2005, they have taken and utilised Cenvat credit of Rs.13,260/- in respect of certain input services to which they were not entitled. The Asstt. Commissioner vide Order-in-Original dated 20.11.2009 disallowed Cenvat credit and confirmed the Cenvat credit demand along with interest and imposed penalty of equal amount on them under Section 76 of the Finance Act, 1994. From the Order-in-Original, it is seen that the order was passed ex parte as the respondent did not appear for personal hearing on 14.10.2009, 20,10,2009, 23.10.2009 and 28.10.2009. The Order, however, mentions that the respondent in their written submissions had pleaded that they had taken the Cenvat credit of Rs.13,260/- on account of commission paid to one Shri Gopal Krishnan registered with Service Tax Department and had also filed copies of the invoices issued by Shri Gopal Krishnan. However, the Asstt. Registrar while denying the Cenvat credit and confirming the Cenvat credit demand passed the following orders:-

> " I have gone through the case records, namely, the ST-3 Return for the period October, 2004 to March, 2005 submitted by the party. On perusal of the records, it appears that Cenvat Credit is not admissible to the party as they have failed to establish that the service for utilising credit has been availed by them is their input

service. The party is, therefore, liable for penalty and the demand raised against them is legal & proper."

2. The respondent filed the appeal to the Commissioner (Appeals) against this order of the Asstt. Commissioner and before the Commissioner (Appeals), they again pleaded that the services in respect of Cenvat credit had been received by them, they had produced the invoices before the original adjudicating authority. The Commissioner (Appeals) vide order-in-appeal no.160/ST/DLH/2010 dated 8.7.2010 set aside the Asstt. Commissioner's order with direction to re-examine the case and pass the order by affording an opportunity of personal hearing to the appellant and record reasons as to why the services utilised by the appellant were not an input service for the output services of the appellants. Against this order of the Commissioner (Appeals), the department had filed an appeal on the ground that the provisions of Section 86 of the Finance Act, 1994 regarding filing appeal before the Commissioner (Appeals) are in pari materia with the provisions of Section 35 A of the Central Excise Act, 1944, that in view of the judgement of the Hon'ble Supreme Court in the case of **MIL India Ltd. reported in 2007 (210) ELT 188 (SC) and Hon'ble Punjab & Haryana High Court in the case of B.C. Kataria reported in 2008 (221) ELT 508 (P&H),** the Commissioner (Appeals) during the period of dispute did not have the power of remand and hence, the Commissioner

(Appeals)'s order, which amounts to remand of the order to the original adjudicating authority is not legal and proper.

3. Heard both the sides and perused the records.

4. Shri K.P. Singh, ld. DR assailed the impugned order reiterating the grounds of appeal in the Revenue's appeal. He pleaded that since in this case no verification is required, on the basis of the documents available in Divisional or Range Office, it was possible for the Commissioner (Appeals) to take a view with regard to correctness or otherwise of the order-in-original at his level and it was not legal and proper for him to remand the matter for which he had no powers.

5. Shri Deeraj Nethani, employee of the respondent company defended the impugned order by reiterating the findings of the Commissioner (Appeals).

6. I have carefully considered the submissions from both the sides and perused the records. In this case while it is true that the original adjudicating authority has decided the matter against the respondent ex parte and the order is a non-speaking order, as it does not consider the respondent's plea that they had received the services in respect of which Cenvat credit had been taken and that they have also enclosed copies of the invoices, the facts remain that it was possible for the Commissioner (Appeals), at the appellate stage, to take a decision about correctness or otherwise of the order-in-original on the basis of the records available

before him and as such no verification ~~is~~ was required. The law as it stands does not permit the Commissioner (Appeals) to remand any matter. The position ~~may~~ would have been different if in respect of some plea of the respondent, some verification of the records available in Divisional or Range Office was required which could be done only by the original adjudicating authority. But this is not the case here, as on the basis of the documents on records, it was possible for the Commissioner (Appeals) to give his findings even if those had not been considered by the original adjudicating authority. In view of this, I find that the Commissioner (Appeals)'s order remanding the matter to the original adjudicating authority is not sustainable and the same is set aside. The matter is remanded to the Commissioner (Appeals) with directions to decide the matter on records at his level. He can call the Divisional or Range offices, if any, verification or clarification is required.

(Rakesh Kumar)
Member (Technical)

Ckp.