

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/827 /2009 – SM[BR]

Date 04/05/2011

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

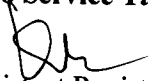
To :
C.C.E. GHAZIABAD
C.G. O. COMPLEX-II, KAMLA NEHRU NAGAR,
GHAZIABAD 201302
C.C.E. GHAZIABAD

Appellant

Vs
Respondent

M/S BPL DISPLAY DEVICES LTD

I am directed to transmit herewith a certified copy of **Final order No. 257 /2011-SM[BR]** dated 31.3.2011
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
M/S BPL DISPLAY DEVICES LTD
A-41,42, SITE-IV INDL.AREA,
SAHIBABAD, GHAZIABAD.
2. Adv. / Consult
NONE:-----
3. C.D.R
4. Bar association, CESTAT, New Delhi
5. Director Publications, Customs, Excise. I.P. Estate, New
6. M/s Centax Publications 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 (Harvana)
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: 31.03.11

Date of decision: 31.03.11

Service Tax Appeal No. 827 of 2009-SM

[Arising out of Order-in-Appeal No. 191-CE/GZB/09 dated 31.07.2009
passed by the Commissioner of Central Excise (Appeals), Ghaziabad].

CCE, Ghaziabad

Appellant

Vs.

M/s. B.P.L. Display Devices Ltd.

Respondent

For approval and signature:

Hon'ble Shri Rakesh Kumar, Member (Technical)

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?

Appearance: Rep. by Shri R.K. Gupta, SDR for the appellant.

Rep. by None for the respondent.

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

Final

Order No. 257/2011 SMCB/ Dated: 31.03.2011

Per Rakesh Kumar

The facts leading to this appeal filed by the Revenue are, in brief, as under:-

1.1 The respondents are manufacturers of Colour Picture Tubes chargeable to central excise duty under Chapter 85 of the Central Excise Tariff. Since they also receive Goods Transport Agency (GTA) services in respect of which as per the provisions of Finance Act, 1994 read with Service Tax Rules, 1994, they are liable to pay service tax as service recipient, they also have service tax registration. They also availed Cenvat credit of central excise duty paid on inputs and capital goods and of service tax paid on "input services" used in or in relation to the manufacture of the final products. The point of dispute in this case is as to whether the respondent could pay the service tax on the GTA services received as service recipient by using Cenvat credit or whether the same was required to be paid in cash. The department was of the view that during April, 05 to September, 2005 period, they have wrongly paid the service tax of Rs.40,949/- though Cenvat credit account and thus, they have wrongly utilised the Cenvat credit as ^{an} per the provisions of Cenvat Credit Excise Rules, the Cenvat credit could be used only for payment of central excise duty on the final products or service tax on output services, while the GTA service received by them is not their "output service". The Asstt. Commissioner vide Order-in-Original dated 12.02.2009 confirmed

the service tax demand of Rs.40,439/- along with interest and also imposed penalty of equal amount on them under Section 78 of the Finance Act, 1994, penalty of Rs.5,000/- under Section 77 and penalty of Rs.200/- per day under Section 76 *ibid.* On appeal to the Commissioner (Appeals), the Commissioner (Appeals) vide order-in-appeal dated 31.07.09 set aside the Asstt. Commissioner's order and allowed the appeal holding that in view of explanation to Rule 2 (p) of Cenvat Credit Rules, 2004 during the period of dispute, GTA services received by the respondent, on which they were liable to pay the service tax is deemed to be their output services and hence, the service tax on GTA has been rightly paid by utilising the Cenvat credit. Against this order of the Commissioner (Appeals), the Revenue has come in appeal.

2. Though several notices have been issued to the respondent on earlier occasions, they have never appeared for hearing. The last notice was attempted to be served through the jurisdictional Assistant/Deputy Commissioner and that the Dy. Commissioner has reported that the factory is lying closed and no authorised person is available to receive the notice and in view of this, the notice of hearing was served by the officer, by affixing the same on the main gate of the noticee. Since in spite of the notices have been issued, the respondent have not appeared, in accordance with the Rule 21 of the CESTAT (Procedure) Rules, this

matter, insofar as the respondents are concerned, is being decided ex parte.

3. Heard Shri R.K. Gupta, Id. DR, who assailed the impugned order by reiterating the grounds of appeal and pleaded that the GTA service received by the respondent is their input service and not their output service, that the explanation to Rule 2 (p) during the period of dispute is applicable to only in respect of those persons who do not manufacture any final products or provide any service, while in this case, the respondent is a manufacturer of excisable goods and hence, the Explanation to Rule 2(p) is not applicable, that as per the definition of 'output service' given in Rule 2(p), the output services means any taxable services provided by the provider of taxable services, to a consumer, client, subscriber, policyholder or any other person, as the case may be, and the expression 'provider' and 'provided' shall be construed accordingly, that from the definition of output service, it is clear that the output service is provided by the "provider of taxable service" to some client or customer and it would not include the services received by a person in respect of which, the person, by virtue of the provisions of Rule 2(1)(d) of Service Tax Rules, 1994 is liable to pay the service tax on the same as the service recipient, that in terms of the Rule 3(4) of the Cenvat Credit Rules, 2004, the Cenvat credit can be utilised for payment of excise duty on the final products or service tax on any output

service/services, that since the GTA service is not the output service of the appellant, the service tax on the same cannot be paid by utilising the Cenvat credit and should have been paid in cash, that the Tribunal in the case of **CCE, Rajkot Vs. Adishiv Forge P.Ltd. reported in 2008 (9) STR 534 (Tribunal)]** has held that payment of service tax by the respondent on the GTA service received by them does not make them service provider and they continue to be service recipient, that the same view has been taken by the Member (Technical) in the case of **M/s. Panchmahal Steel Ltd. reported in 2008 (12) STR 447 (Tribunal)** and this matter has been referred to the Larger Bench for decision and that in view of this, the impugned order is not correct.

4. I have carefully considered the submissions of Id. DR and have gone through the records. The period of dispute in this case is from April, 2005 to September, 2005. There is no dispute that the respondent is a manufacturer of excisable goods and is liable to pay service tax on the GTA received by them by virtue of the provisions of Section 68(2) of the Finance Act, 1994 read with Rule 2(1)(d)(v) of the Service Tax Rules, 1994. The point of dispute is as to whether the GTA service received by the respondent in respect of which they are liable to pay the service tax, can be considered as their "output service".

5. As per Rule 2(q) of the Cenvat Credit Rules, 2004, the term "the person liable for payment of service tax" has the meaning as assigned to

it in Rule 2(1)(d) of the Service Tax Rules, 1994 and Rule 2(1)(d) of Service Tax Rules mentions various categories of persons including recipient of certain taxable service who are liable to pay the service tax in respect of the same and Clause (V) of Rule 2(1)(d) mentions various categories of persons, who are liable to pay the service tax in respect of GTA services received by them. The respondent, being a Public Limited Company, are the "person liable to pay service tax" in respect of the GTA service received by them. Rule 2(r) of the Cenvat Credit Rules, 2004 states that "provider of taxable service" includes a "person liable for paying service tax". Thus the person who is liable for paying service tax under Rule 2(q) is deemed to be a "provider of taxable service," even in respect of services which have been received by him and in respect of which by virtue of the provisions of Rule 2(1)(d), he is liable to pay the service tax. Rule 2 (p) of the Cenvat Credit Rules defines the term "output service" as any taxable service provided by the "provider of taxable service," to a consumer, client, subscriber, policyholder or any other person, as the case may be, and the expression 'provider and provided' shall be construed accordingly. As per explanation to this Rule, which was there during the period of dispute, if a person liable for paying service tax does not provide any taxable service, or does not manufacture final products, the service for which he is liable to pay the service tax shall, be deemed to be the output service. From the above definition of

“output service”, it is clear that (a) the expression “provider of taxable service” and “provider of output service” are not the same as “provider of taxable service” becomes “provider of output service” only when he provides taxable services to some client or customers, etc., (b) the explanation to Rule 2 (p) is applicable only to those persons liable for paying service tax, who “do not provide any taxable service or do not manufacture any final products.” Therefore, this explanation would not be applicable to those persons liable for paying service tax, who provide any taxable services or manufacture any dutiable final products. There is no dispute that the respondent is a manufacturer of excisable final products and, therefore, this explanation to Rule 2(p) is not applicable and the question as to whether the GTA services received by him can be deemed ^{to be} output services has to be decided by the main definition that the out put services is that which is actually provided by provider of taxable services to his clients or customers.

6. In the present case, the GTA service received by the respondent is not the service which has actually been provided by the respondent. The respondent is only a deemed “provider of taxable service” by virtue of provisions of Rule 2 (V) for the reason he is the person liable to pay the service tax on the GTA service received. Just because by virtue of the legal fiction of Rule 2 (V), the respondent are deemed to be the provider of taxable services ^{another} ~~and the~~ legal fiction can not be imported to treat the

GTA service received by them as their output service. Moreover, the GTA services which is received by the respondent is specifically covered by the definition of "input services" and the same services cannot be considered as "input service" as well as "output service". I find that the same view has been expressed by the Tribunal in the case of **Adishiv Forge P. Ltd. (supra)** and **M/s. Panchmahal Steel Ltd. (supra)**. In view of this, I hold that the GTA services received by the respondent cannot be treated as their "output service" and since in terms of the provisions of Rule 3(4) of Cenvat Credit Rules, the Cenvat Credit could be utilised only for payment of service tax on output services or payment of excise duty on final products, the respondents have wrongly paid the service tax on the GTA serviced received by them through Cenvat credit. In view of this, the impugned order is not sustainable. The same is set aside and the Order-in-Original passed by the original adjudicating authority is restored. The Revenue's appeal is allowed.

(Rakesh Kumar)
Member (Technical)

Ckp.