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/682 /2010 – SM[BR] Date **20/12/2010**

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

To :
M/S. SWASTIK PIPES LTD.

41 KM STONE, DELHI-ROHTAK ROAD, ASAUDHA,
BAHADURGARH, HARYANA.

M/S. SWASTIK PIPES LTD. Appellant

Vs

C.C.E. ROHTAK Respondent

I am directed to transmit herewith a certified copy of **Final order No.** 1450 / 2010-SM[BR] dated 25.11.2010 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
C.C.E. ROHTAK
SCO NO,6 SECTOR 1, ROHTAK.

2. Adv. / Consult
MR.BHASIN SETHI & ASSICIATE
401,SATYAM CINEMA
BUILDING,RANJEET

3. C.D.R
4. Bar association. CESTAT. New Delhi
5. Director Publications. Customs. Excise. I.P. Estate. New Delhi
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 - 110005
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 (Harvana)
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. III
Service Tax Appeal No. 682 of 2010 (SM)

[Arising out of the Order-in-Appeal No. 68/MA/RTK/2010 dated 11/02/2010 passed by The Commissioner, Central Excise (Appeals), Gurgaon.]

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?	:

M/s Swastik Pipes Ltd. Appellant

Versus

CCE, Rohtak Respondent

Appearance

Shri V.R. Sethi, Advocate – for the appellant.

Shri Anil Khanna, Authorized Representative (DR) – for the respondent.

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

DATE OF HEARING : 25/11/2010.

Final Order No. 1450/2010 SM (BR) Dated : ____________

Per. Rakesh Kumar :-

The facts leading to this appeal are, in brief, as under.

1.1 The appellant are manufacturers of Black Pipes, G.I. Pipes and CR Strips chargeable to Central Excise Duty under Section 72 and 73 of the Central Excise Tariff. They also availed the facility of Cenvat credit of Central Excise duty on inputs and capital goods and service tax paid on the input service used in or in relation to the manufacture of finished products. It is alleged that in course of scrutiny of the appellant's records, the following irregularities were detected by the department.

(a) during the period from October 2005 to July 2006, the appellants had received GTA service in respect of inward transportation of the various inputs and on the freight paid by them in respect of the inward transportation of inputs etc., they had paid service tax amounting to Rs. 2,97,517/- by utilizing the Cenvat credit. According to the department, since the GTA service is the input service and not the output service of the appellant and since the Cenvat credit taken in respect of input services and inputs can be utilized only for payment of duty on finished goods and output services, the payment of service tax on GTA service through Cenvat credit is wrong and that this service tax should have been paid through PLA ;

(b) during the period from October 2005 to July 2006, the appellant also received the GTA service from goods transport agents for outer transportation from the place of removal to the customer's premises and in respect receipt of such GTA service, they paid the service tax amounting to Rs. 3,07,852/-. However, this service tax instead of being paid through PLA was paid by utilizing the Cenvat credit which was not correct, as the GTA service is an input service on which the appellant were required to pay the service tax as service recipient and service tax on the same could not be paid through Cenvat credit as Cenvat credit could be utilized only for payment central excise duty on the finished products and service tax on the output services ;

(c) During the period from January 2004 to September 2006, the appellant received business auxiliary service from the marketing agents located in various countries and the appellant were liable to pay the service tax on the payment made by them to these marketing agents as service recipient but the service tax amounting to Rs. 1,69,912/-, on the amount paid to marketing agents/commission agents was not paid.

1.2 Accordingly, a show cause notice dated 18th April 2007 was issued to the appellant for demand of the above-mentioned amounts of the service tax alongwith interest and also for imposition of penalty on them under Section 76, 77, 78 of the Finance Act, 1994. The show cause notice was adjudicated by the Joint Commissioner vide order-in-original dated 21st April 2008 by which the service tax demands as made in the above-mentioned show cause notice were confirmed alongwith interest and penalties were imposed under Section 76, 77 as well as 78 of the Finance Act, 1994. Here it may be mentioned that so far as the amount of Rs. 2,97,517/- is concerned, the same had been paid alongwith interest through PLA on 4/9/06, that is to the prior to the issue of show cause notice and this amount was ordered to be appropriated in the order passed by the Joint Commissioner. Within a period of 30 days from the date of Joint Commissioner's order the appellant have also paid the penalties under Section 76 and 77 and also an amount towards 25% of Rs. 2,97,517/- towards penalty under Section 78. So far as the other amount of Rs. 3,07,852/- is concerned, the entire amount alongwith interest was also paid through PLA within a period of 30 days from the date of Joint Commissioner's order and alongwith this, the penalty imposed under Section 76 and 78 and also an amount equal to 25% of Rs. 3,07,852/- towards penalty under Section 78 was paid.

1.3 The appellant thereafter filed an appeal to the Commissioner (Appeals) and the Commissioner (Appeals) vide order-in-appeal No. 68/MA/RTK/2010 dated 11/2/10 –

(a) set aside the service tax demand of Rs. 1,69,912/- alongwith interest ;
(b) set aside the penalty of Rs. 2,97,517/- imposed under Section 78 in respect of service tax demand of the same amount; and
(c) upheld the rest of the order of the Joint Commissioner.

1.4 Against the above order of the Commissioner (Appeals) the present appeal has been filed. While the service tax demand of Rs. 6,05,369/- (Rs. 2,97,817 + 3,07,852) alongwith interest has not been challenged, as the appellant have already paid the same, the appellant in this appeal have challenged only the imposition of penalty under Section 76, 77 and 78.

2. Heard both the sides.

2.1 Shri V.R. Sethi, Advocate, the learned Counsel for the appellant pleaded that the appellant had correctly paid the service tax amounting to Rs. 2,97,517/- on inward freight of service tax amounting to Rs. 3,07,852/- on outward freight by utilizing Cenvat credit, that the Tribunal in the cases of **Scan Synthetics Ltd. vs. CCE, Jaipur – I** reported in **2008 (12) S.T.R. 766 (Tri. – Del.), India Cements Ltd. vs. CCE, Salem** reported in **2007 (80) RLT 719 (CESTAT-Che.)** and **Bhushan Power & Steel Ltd. vs. CCE, Cus. & ST, BBSR-II** reported in **2008 (10) S.T.R. 18 (Tri. – Kolkata)** has held that an assessee as recipient of the service of Goods Transport Agency can pay the service tax on it by utilizing the Cenvat credit, that since there are contrary judgments on this issue, the Tribunal in the case of **Panchmahal Steel Ltd. vs.**

CCE&Cus., Vadodara – II reported in **2008 (12) S.T.R. 447 (Tri. – Ahmd.)** has referred the matter to a Larger Bench, that this shows that there was no clarity on this issue and in view of this, no malafide can be alleged against the appellant and that in view of this, the penalty on the appellant under Section 76, 77 and 78 was not called for as there was reasonable cause for the appellant for payment of service tax through Cenvat credit.

2.2 Shri Anil Khanna, the learned Departmental Representative while conceding that the issue involved in this case is before the Larger Bench, defended the impugned order reiterating the Commissioner (Appeals)'s finding.

3. The allegation against the appellant is that during the period from October 2005 to July 2006 they paid the service tax on GTA service utilized by them as service recipient by utilizing Cenvat credit, while they were required to pay the service tax through PLA, as the GTA service received by them cannot be said to be the outward service and as per the provisions of Cenvat Credit Rules, 2004, the Cenvat credit

taken by a manufacturer or service provider can be utilized by him only for payment of Central Excise Duty on the finished goods or service tax on the output services. I find that there are contrary judgments on this issue as while in the cases of India Cements Ltd. vs. CCE, Salem (supra), Bhushan Power & Steel Ltd. vs. CCE, CUS&ST, BBSR-II (supra) and Scan Synthetics Ltd. vs. CCE, Jaipur-I (supra) it has been held that an assessee as recipient of the GTA service can pay the service tax on GTA service by utilizing the Cenvat credit, contrary view has been expressed in case of Panchmahal Steel Ltd. vs. CCE & CUS, Vadodara – II (supra) and this matter has been referred to the Larger Bench. Moreover, I also find that the Commissioner herself in respect of service tax demand amounting to Rs. 2,97,517/- in respect of inward freight, while upholding the service tax demand, has set aside the penalty of equal amount under Section 78. In view of this, there is no justification for upholding the penalty of Rs. 3,07,582/- in respect of the outward freight. Moreover when there were contrary decisions on this issue, there is substance in the appellant's plea that there was no malafide in payment of service tax through Cenvat credit and there is no justification for imposition of penalty under Section 76 and 77 of the Finance Act. In view of this, the impugned order, so far as it upheld the penalty on the appellant under Section 76, 77 and 78 of the Finance Act, 1994, is set aside. The appeal stand disposed of, as above.

(Dictated and pronounced in open court.)

(Rakesh Kumar)
Member (Technical)

PK