

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/513 /2008 – SM[BR] ST/ CO/ 310/2008-SM[BR]

Date 21/01/2010

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

M/S AVERY INDIA LTD.

Appellant

Vs

Respondent

I am directed to transmit herewith a certified copy of **Final order No. 92 / 2010-SM[BR]** dated 13.1.2010 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

M/S AVERY INDIA LTD.

PLOT NO. 50-54,
SECTOR-25,
FARIDABAD.

2. Adv. / Consult

MR.J.K.MITTAL & CO,ADV

A-15,THIRD FLOOR,PRIYADARSHINI VIHAR,DELHI.110092

3 S.D.R

~~4 J.C.D.R.~~

5 Bar association, CESTAT, New Delhi

6 Director Publications, Customs, Excise. I.P. Estate, New Delhi

7 M/s Centax Publications Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi - 3

8 Commercial Laws of India Pvt Ltd. Post Bag No. 1033, No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17

9 Raghuraman's 44-B, Regal Flat,Shipra Suncity, Indirapuram - 201010,Ghaziabad, DT, U.P.

10 M/s Manupatra Information Solutions Pvt Ltd. Excise & Customs Cases B-37, Sector - 1, Noida - 201301, Gautam Budh Nagar, (UP)

11 M/s. Deeparchie Publications. M-93. Marg. 46. Saket. New Delhi 110017

12 Taxindiaonline.com Pvt.Ltd, B-XI/8183,Vasant Kuni, New Delhi - 110070

13 Taxmann Allied Service Pvt Ltd., 21/35, West Punjabi Bagh, New Delhi - 110026

14 Easy Service Tax Online Dot Com Pvt.Ltd.407A.Iscon Mall.Above Star India Bazar,Satellite Road,Ahmedabad-15

15 LAWCRUX Advisors Pvt Ltd, LAW House,1-8,Sector - 10, Faridabad 121003 (Harvana)

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(SM Appeal Branch)

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL,

West Block No.2, R.K.Puram, New Delhi

COURT-III

Date of hearing/decision:13.1.2010

Service Tax Appeal No.513 of 2008-SM with Cross-Objection No.ST/CO/310/08-SM

Arising out of the order in appeal No.11-ST/DLH/2008 dated 10.4.2008 passed by the Commissioner (Appeals), Central Excise, Delhi I.

Hon'ble Shri M. Veeraiyan, Member (Technical)

1	Whether Press Reporter may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	Yes
2	Whether it should be released under Rule 27 of CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	Yes
3	Whether their Lordships wish to see the fair copy of the Order?	Seen
4	Whether Order is to be circulated to the Departmental authorities?	Yes

C.S.T.,Delhi

...

Appellant

Vs.

M/s Avery India Ltd.

...

Respondents

Appearance:

Shri V.K. Saxena, Authorized Departmental Representative (Jt.CDR) for the Revenue and Shri J.K. Mittal, Advocate for the respondents

Coram: Hon'ble Shri M. Veeraiyan, Member (Technical)

Oral Order No. 92/2010 SM (Br)

Per M. Veeraiyan:

Appeal No.ST/513/2008 is by the Department against the order of the Commissioner (Appeals) No. 11-ST/DLH/2008 dated 10.4.2008. Cross-Objection No.ST/CO/310/2008 is related to this appeal.

2. Heard both sides.

3.1 The relevant background facts are that the respondents were issued with a show cause notice dated 10.10.2003 proposing service tax under the Head "Consulting Engineering Service" in respect of services received by

them from Overseas Company and by order dated 31.5.05, the original authority confirmed the demand of service tax along with interest and imposed penalty under various Sections. On appeal by the party, the Commissioner (Appeals) vide order dated 17.1.2006 set aside the order of the original authority and the said order of Commissioner (Appeals) has been upheld by the Tribunal vide order dated 10.1.2008 thus rejecting appeal by the Department against the order of the Commissioner (Appeals).

3.2 In the meanwhile, the respondents filed refund claim dated 1.9.2004 of the service tax and interest already paid by them. After issuing show cause notice dated 15.2.2005, the original authority by order dated 10.1.2006 sanctioned the refund claim but ordered the same to be deposited to the Consumer Welfare Fund. Commissioner (Appeals) vide impugned order dated 10.4.2008 held that unjust enrichment is not applicable and ordered for cash refund. Hence the Department is in appeal. The cross-objection filed by the respondents is basically in support of the order of the Commissioner (Appeals) sanctioning refund in cash.

4. The learned Jt.CDR reiterates the grounds of appeal and draws my attention to para 12 in the grounds of appeal wherein it has been submitted that "party had availed cenvat credit and had also utilised the same, that the case of unjust enrichment is clearly there as when the manufactured goods were cleared the service tax factor would have been got included in the cost of goods. This means service tax burden has been passed on the customers, and this position would not alter if the credit taken is reversed".

5. Learned Advocate for the respondents submits that the respondent is basically recipient of service tax from the foreign company. It is not the case of actual service tax provider paying service tax passing on the burden to the recipient. They, as recipient paid the same from their pocket and part of the amount taken as credit was also reversed by them along with interest before the issue of show cause notice under intimation to the Department. As they are recipients, the question of passing on the burden does not arise. He also submits that the Commissioner (Appeals) has relied upon the decision of the

Tribunal in the case of Hexacom (I) Ltd. vs.C.C.E., Jaipur – 2003 (156) ELT 357 and the grounds of appeal by the Department does not disclose that the said order has been challenged by them. He also draws my attention to the fact that before the original authority they have also submitted, as additional evidence, certificate of Chartered Accountant dated 19.9.06 to show that burden of service tax has not been passed on to the consumer. Under these circumstances, he seeks upholding the order of the Commissioner (Appeals).

6.1 I have carefully considered the submissions from both sides. The fact that the respondents are eligible for refund claim is not in dispute inasmuch as both the original authority and Commissioner (Appeals) have held that the claim is admissible. The original authority held that the party has not proved that they have not passed on the burden of tax whereas the Commissioner (Appeals) has held otherwise with the following findings:

" I have that the ground taken for arriving at the conclusion of unjust enrichment that the appellants availed the Cenvat credit and the burden of service tax was passed on to the customers in the form of excisable goods, is ill-founded inasmuch as the service tax was not applicable on the technical know-how and the appellants on the insistence of the department paid the same from their own pocket even being service receivers and nor service providers. The ground that the appellants availed of the same as Cenvat credit is also not sustainable as the appellants vide letter dated 28.8.2004 informed the department that they had re-paid the said availed service tax along with interest to the department it cannot be said by any stretch of imagination that the burden of service tax amount to be refunded has been passed on to any other person or customers as service tax has gone in the excisable goods sold by the appellants. Above all, it has already been held that the service tax was not leviable /payable on the said amount for getting technical know-how paid by the appellants from foreign firm being intellectual property and service tax was paid by the appellants from their own pocket and collected by the Revenue without the authority of law and the principle laid down by the Hon'ble Tribunal in the case of Hexacom (I) Ltd. vs. C.C.E., Jaipur – 2003 (156) ELT 357 (Tri.-Del.) is squarely applicable to the instant case."

6.2 I find that during the relevant period the respondents were not required to pay service tax as recipient . Their Chartered Accountant's

certificate additionally supports their case that the burden of service tax has not been passed on. The Tribunal's decision in the case of Hexacom (I) Ltd. is also in support of the submission on behalf of the respondent. The relevant portion of the order is reproduced below:

"2. We have perused the records and heard both sides. It is not in dispute that no service tax was leviable during the period in question. Therefore, whatever payment was made did not relate to service tax at all. It was merely an erroneous collection by DOT and payment by the appellants. Therefore, provisions relating to refund of service tax, including those relating to unjust enrichment, cannot have any application to the return of the amount in question. It is further noted that provisions contained in Section 11D of the Central Excise Act have not been made applicable to service tax. Therefore, if any amounts are collected erroneously as representing service tax, which is not in force, there is no bar to the return of such amounts. The rejection of refund application was, therefore, not correct".

6.3 The grounds of appeal do not disclose any reason for disagreeing with the factual findings by the Commissioner (Appeals). Further, no averments have been made as to why the decision of the Tribunal in the case of Hexacom (I) Ltd. is not applicable to the facts of the present case as held by the Commissioner (Appeals).

7. In view of the above, no valid grounds have been adduced to interfere with the decision of the Commissioner (Appeals). Therefore, the appeal of the Department is rejected. Cross-Objection by the respondents which is basically in support of the order of Commissioner (Appeals) is also disposed of.

(M. Veeraiyan)
Member (Technical)

scd/