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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066

CUSTOMS APPEAL BRANCH

Appeal No. ST/487 /2007 - CU[DB] Date **27/04/2011**

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

To :
M/S ULTRATECH CEMENT LTD.

(FORMERLY KNOWN AS LARSEN & TOUBRO LTD.-
CEMENT DIVISION) HIRMI CEMENT WORKS, HIRMI
493195

M/S ULTRATECH CEMENT LTD. Appellant

Vs

C.C.E. RAIPUR Respondent

I am directed to transmit herewith a certified copy of **Final order No.ST/161/ 2011 CU[DB]** dated 21.04.11

passed by the Tribunal under **Section 129, (B) of the Customs Act,1962 & Financial Act 1994 relating to Service Tax**

Assistant Registrar
(Customs Appeal Branch)

Copy to :

1. Respondent
C.C.E. RAIPUR
CENTRAL EXCISE BUILDING,
DHAMTARI ROAD, TIKRAPARA,
RAIPUR 492001.

2. Adv. / Consult
MR.V. SRIDHARAN
B-6/10, SAFDARJUNG ENCLAVE, NEW DELHI - 29

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
(Customs Appeal Branch)

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
WEST BLOCK NO.II, R.K. PURAM, NEW DELHI-110066.
DIVISION BENCH

Service Tax Appeal No.ST/487/2007

(Arising out of Order-in-Appeal No.35/ST/2007 dated 07.06.2007 passed by the CCE (A), Raipur)

For approval and signature:
Hon'ble Mr. Justice R.M.S.Khandeparkar, President
Hon'ble Mr. 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 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?	

M/s.Ultra Tech Cement Ltd. Appellants

Vs.

CCE, Raipur Respondent

Present for the Appellant: Shri R.K.Hasija, Advcoate
Present for the Respondent: Shri S.N.Singh, DR

Coram: Hon'ble Mr. Justice R.M.S.Khandeparkar, President
Hon'ble Mr. Rakesh Kumar, Member (Technical)

Date of Hearing: 17.01.2011
Date of Decision: 21/4/11

Final **ORAL ORDER NO.** ST/161/11

PER: RAKESH KUMAR

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

1.1. The appellant are manufacturer of cement and cement clinker chargeable to Central Excise duty. They were also receiving taxable service services from various service providers including the offshore service providers not having any office in India. During the period prior to 16.08.02, in terms of proviso to sub-rule (1) of Rule 6 of Service Tax Rules, 1994, a person who is non resident or is from outside India and does not have any office in India, the service tax on due date for the service rendered in India by him shall be paid by such person or on his behalf by any other person authorised by him, who should submit to the Commissioner of Central Excise a return containing specific details with necessary enclosure. With effect from 16.8.02, proviso to sub-rule 1 of Rule 6 of the Service Tax Rule was deleted and at the same time definition of "person liable for paying service tax" as given in Rule 2 (1) (d) of Service Tax Rules, 1994 was amended so as to provided that in relation to any taxable service provided by a person, who has permanent address or usual place of residence or business establishment in a country than India and does not have any office or business establishment in India, the person in India who receives such service would be the person liable to pay service tax on the service so received by him. During the scrutiny of records, it was found that the appellant during the period from August, 2002 to March, 2004 had received technical consultancy service from non resident foreign Service providers. The department was of the view that in terms of Rule 2 (1) (d) (iv) of Service Tax Rules, 1994, the appellant as service recipient were liable to pay service tax on the value of service of Rs.77,36,340/- received from the foreign service providers and which had not been paid by them. It is on this basis that the show cause notice dated 23.12.05 was issued for confirming service tax demand of Rs.5,67,143/- under Section 73(1) of Finance Act, 1994 alongwith interest on it under

Section 75 and for imposing penalty under Section 76, 77 & 78 of the Finance Act, 1994. The show cause notice was adjudicated by the Additional Commissioner of Central Excise, Raipur vide Order-in-Original dated 29.11.06 by which – (a) service tax demand of Rs.5,65,143/- was confirmed against the appellant alongwith interest and (b) penalty of Rs.200/- per day till the date of payment of service tax under Sections 76of Finance Act, 1994. On appeal, the Commissioner (Appeals) vide Order-in-Appeal dated 7.6.06 upheld the order of the Additional Commissioner and dismissed the appeal of the appellant. It is against this order of the Commissioner (Appeals) that the present appeal has been filed by the appellant.

2. Heard both the sides.

3. Shri R.K.Hasija, Advocate, the learned Counsel for the appellant, pleaded that the services, in question, had been received during the period from August, 02 to March, 04, that during this period, though as per provision of Rule 2(1) (d) (iv) of Service Tax Rules, 1994, in case of taxable service received by a person, having his permanent address or business establishment in India, from a person non resident in India and not having any office or business establishment in India, the service recipient was liable to pay service tax on the service so received by him, neither necessary notification under section 68(2) of Finance Act, 1994 notifying service recipient as "the person liable to pay service tax" had been issued nor there was any statutory provision in the Finance Act, 1994 making such service recipient in India liable to pay the service tax, that it is only with effect from 18.4.06 that section 66A was introduced in the Finance Act, 1994 providing that in case person taxable

service is received from a person not residing in India or having office or establishment in India by a person having his permanent address/business establishment in India, the service recipient in India should be deemed to be the service provider~~s~~ and accordingly all the provision of chapter V of Finance Act, 1994 shall apply, that since there was no provision~~s~~ for retrospective operation of section 66A, the same could not be given retrospective effect, that Hon'ble Bombay High Court in the case of **Indian National Shipowners Association vs. Union of India reported in 2009 (13) STR 235 (Bom.)** held that as it is only with effect from 18.4.06, the section 66A was introduced, which made the person in India receiving taxable service from an offshore service provider, the person liable for paying service tax as a deemed service provider, during the period prior to 18.4.2006, the service recipient in India cannot be made liable to pay the service tax under the provisions of Rule 2(1) (d) (iv) and that in view of this, the impugned order upholding the service tax demand and imposition of penalty on the appellant is not sustainable.

4. The learned JCDR in his written and oral submissions pleaded that during the period of dispute, Rule 2(1) (d) (iv) provided that the person liable for paying service tax, in respect of taxable service received from the foreign service provider who did not have office/permanent place of residence in India, would be recipient of such service in India, that in this case, there is no dispute that the service provider was non resident who did not have office in India and hence in terms of proviso to Rule 2(1) (d), it is the appellant being the recipient was liable to pay service tax, that Hon'ble Supreme Court in the case of **Kerala State Electricity Board vs. CCE reported in 2009 (9) STR 3 (SC)** has

upheld the demand of service tax from the Kerala State Electricity Board in respect of taxable services received from foreign service provider, that the ratio of this judgement of the Apex Court is applicable to this case and there is no infirmity in the impugned order. He also pleaded that in any case, liability of payment of service tax from 1.1.2005 cannot be disputed as the Larger Bench of this Tribunal in the case of **Hindustan Zinc Ltd. vs. CCE, Jaipur reported in 2008 (11) STR 338 (Tri.-LB)** has held that in case of receipt of taxable service by a person in India from the foreign service provider not having office or establishment in India, the service recipient in India would be liable to pay service tax in terms of the provisions of Rule 2(1) (d) (iv) with effect from 1.1.2005, the date on which the Notification 36/2004-ST under Section 68(2) of the Finance Act, 1994 notifying the service recipient in India as the person liable to pay service tax, was issued.

5. We have carefully considered the submissions from both the sides and perused the records. The period of dispute in this case is from August, 2002 to March, 2004. There is no dispute about the fact that the service received by the appellant from the Foreign Service provider is a taxable service. The point of dispute is as to whether during this period, the appellant as recipient of this service were liable for payment of service tax. Section 65 (105) of the Finance Act, 1994 defines the term "taxable service" and term "taxable service" covers various services, as enumerated in the various clauses, provided to any person. Under section 66 there shall be levy of tax on the services referred to in Section 65 (105) at the rate mentioned in the section. From the reading of section 65 (105) and section 66 it will be seen that service tax is attracted when the services as enumerated in section 65 (105) are

provided in India and since this section does not mention the nationality of the service provider, even foreign service provider providing the same taxable service to a person in India would be liable to pay service tax. During the period prior to 16.8.2002, as per proviso to Rule 6 (1) of Service Tax Rules, 1994, in case of person who was non resident or was from outside ~~from~~ India, not having any office in India, the service tax due on the service rendered by him could ~~should~~ be paid by such person or on his behalf by another person authorized by him, who was required to submit to jurisdictional Central Excise Commissioner, a return containing the specific details. **In the case of Kerala State Electricity Board** (supra), service tax demand from Kerala State Electricity Board had been made under the proviso to Rule 6 (1) as it existed at that time, as Kerala State Electricity Board had been authorised by the Foreign Service provider to pay service tax on their behalf. But with effect from 16.8.2002 the Service Tax Rules were ~~was~~ amended and the above mentioned proviso to Rule 6(1) was deleted and instead of this, Rule 2(1) (d) was amended by introducing a clause (iv) which provided that in case of taxable service received from the foreign service provider not having office in India it is the service recipient in India, who would be liable to service tax. In this case, the dispute is for the period from 16.8.2002 when proviso to Rule 6(1) of Service Tax Rules had been deleted and hence judgement of the Apex Court in Kerala State Electricity Board (supra) which is with regard to proviso to Rule 6(1), as the same existed prior to 16.8.2002, would not be applicable. Hon'ble Bombay High Court in the case of **Indian National Shipowners Association vs. Union of India** has held that during the period prior to ~~from~~ 18.4.2006 the recipient of taxable service in India, receiving service from offshore service provider, not having office in India cannot be made liable to pay service tax only on the basis of Rule 2(1) (d) of Service Tax Rules as specific provision making the service recipient in India liable to pay service tax was introduced only with effect from 18.4.2006 by inserting Section 66A in the Finance Act, 1994 and that during the period prior 18.4.2006, Rule 2(1) (d) without backing of statutory provisions in the Finance Act, 1994 was not valid. It is not the case of the department that the Foreign Service provider had some office or establishment in India or that the service had been provided by them in India. In view of the settled legal position on the issue involved in this case, the impugned order is not sustainable. The same is set aside. The appeal is allowed.

(Pronounced in the open court on 21/4/11

(JUSTICE R.M.S.KHANDEPARKAR)
PRESIDENT

(RAKESH KUMAR)
MEMEBR (TECHNICAL)

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