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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/393 /2010 , ST/S/273/2010- CU[DB] Date **02/05/2011**

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

To :
M/S AJAY CONSTRUCTION COMPANY,
E-326, KESHAR KUNJ, EAST VINOD NAGAR, MAYUR
VIHAR, PHASE-II, DELHI-110091.

M/S AJAY CONSTRUCTION COMPANY, Appellant

Vs

C.S.T. DELHI Respondent

I am directed to transmit herewith a certified copy of **Final order No.ST/169/ 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**

Alongwith Stay Order No ST/273/2011

Assistant Registrar
(Customs Appeal Branch)

Copy to :

1. Respondent
C.S.T. DELHI
17-B, I.P. ESTATE, IAEA HOUSE,
NEW DELHI.

2. Adv. / Consult
MR.A.K.BATRA & ASSOCIATES
A-36, FIRST FLOOR, RAJOURI GARDEN,
RING ROAD, N DELHI.

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. Taxmann Allied Service Pvt Ltd., 59/32, New Rohtak Road, New Delhi - 110005
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
(Customs Appeal Branch)

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi – 110 066.

COURT NO. III

Date of Hearing : 25.2.2011

Service Tax Stay No. 644 of 2010 and Service Tax Appeal No. 393 of 2010

[Arising out of the Order-in-Original No. 48-49/RDN/2009 dated 3.11.2009 passed by the Commissioner of Central Excise, Delhi]

Coram:
Hon'ble Mr. Ashok Jindal, Member (Judicial)
Hon'ble Mr. Mathew John, 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 would be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	NO
3.	Whether their Whether their Lordships wish to see the fair copy of the order?	Seen
4.	Whether order is to be circulated to the Department Authorities?	NO

M/s Ajay Construction Company — Appellant

Vs.

CCE, New Delhi — Respondent

Appearance:

Appeared for Appellant : Shri A.K. Batra, Advocate
Appeared for Respondent : Shri Amrish Jain, DR

CORAM: Hon'ble Mr. Ashok Jindal, Member (Judicial)
Hon'ble Mr. Mathew John, Member (Technical)

Stay order No. ST/273/11
Final Order No. ST/169/11 dated 21.4.11

Per Mathew John :

The Appellant is engaged in the business of providing "Commercial or Industrial Construction" as defined under section 65 (25b) of the Finance Act 1994 and "Construction of Complex" as defined under section 65 (30a) of the said Act and are registered with the service tax authorities.

2. On scrutiny of the contract agreements and other related documents it was found that the Appellants were receiving steel, cement and ready-mix concrete on free of cost basis from their clients.

3. It was seen, from the ST-3 returns filed, that the Appellant was claiming benefit of Notification 15/2004-ST dated 10-09-2004 applicable to "Commercial and Industrial Construction" and Notification 18/2005-ST dated 07-06-2005 applicable to "Construction of Complex" and was paying tax only on 33% of the remuneration received by them from their clients, without including the value of materials supplied by the clients.

4. The department is of the view that the abatement of 67% provided in the above notifications is for main construction materials like cement and steel used in construction activity and once such costs are not included in the contract value there is no scope for claiming abatement of 67%. The department is of the view that the value of such materials received from clients constitute non-monetary consideration and hence such value should get added to the money value received for arriving at gross value as stipulated in Rule 3 of the Service Tax (Determination of Value) Rules 2006.

5. The department also noticed a huge gap between the figures shown in their annual financial statements under the head "Project Income" and the value of taxable services reported during the year in their ST-3 returns. Repeated reminders to the Appellant to reconcile the difference did not evoke any response. So the department has taken the total amount shown under the head "project income" and issued SCN dated 15-05-08 demanding tax amounting to Rs. 4,36,56,235 and SCN dated 28-01-09 demanding tax amount of 1,73,60,023/- without

allowing any abatement towards materials supplied by the Appellant for doing the construction work. The SCNs proposed levy of Interest and imposition of penalty under the various provisions of Finance Act 1994.

6. The Appellant was intimated vide letter dated 17-07-09 regarding opportunity for hearing on 06-08-09 at 11.30 Hrs., 13-08-09 at 11.30 Hrs. and 20-08-09 at 11-30 Hrs. The Appellant did not appear for hearing on either of the appointed dates at the appointed time and the adjudicating authority decided the SCN on the basis of reply of the Appellant dated 23-04-09. He confirmed the demands proposed in SCN along with interest and penalty under section 78 of the Act.

7. The Counsel for Appellant pleads that natural justice has been denied to his client since no proper opportunity was given for hearing. It is held by judicial pronouncements that giving three nearby dates by the same letter does not amount to giving adequate opportunity for hearing.

8. After hearing the counsel for some time, and briefly hearing the Ld. DR, we are of the view that no purpose will be served by keeping this appeal pending with the Tribunal since there has been denial of natural justice and since this matter cannot be resolved without further examination of documents which exercise has not been done so far. Further we are not prima facie convinced that the Appellant should be asked to deposit any money based on the adjudication order passed because there are contentious issues of facts and law involved. So we have decided to hear the Appeal itself after dispensing with the requirement of pre-deposit. Accordingly pre-deposit is waived and Appeal itself is heard.

9. The Counsel also pleads that in this case there is no further tax due to the Revenue because he can produce evidence to show the value of goods sold by the Appellant to the clients for executing the contract and claim benefit under notification 12/2003-ST dated 20-06-2003. He

submits that as per the wording of this notification it is not necessary that each invoice should show details of material sold.

10. The Counsel for Appellant rebuts the contention of Revenue in the matter of difference between figures in annual financial statement and ST-3 returns by stating that it is only due to the fact the former shows income that has accrued and the latter shows the payments that has been actually received.

11. The counsel has submissions to make on limitation also.

12. Having regard to all these aspects the impugned order is set aside and the matter is remitted to the lower authority keeping all issues open - for production of further evidence and for submission of arguments. The Commissioner should give adequate opportunity to the Appellant for a proper hearing to meet the end of natural justice. The Appellant is directed to appear before the lower authority within one month from the date of receipt of this order and seek a date for hearing. On the appointed day the Appellant should cause appearance in the absence of any major unforeseen event and submit all the evidences that the Appellant wants to rely on and submit all legal arguments. Both the sides should conduct the affair in such a manner that their approach in the matter does not become questionable. At any rate the process should be completed within four months from date of receipt of this order.

13. With directions as above, both the stay petition and Appeal are disposed of.

(Ashok Jindal)
Member (Judicial)

(Mathew John)
Member (Technical)

RM