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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/726 /2007 - CU[DB] Date **09/05/2011**

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

To :
C.C.E. CHANDIGARH
C.R. BUILDING, PLOT NO. 19, SECTOR 17-C,
CHANDIGARH 160017

C.C.E. CHANDIGARH Appellant

Vs

M/S ARPIT ADVERTISING Respondent

I am directed to transmit herewith a certified copy of **Final order No.ST/175/ 2011 CU[DB]** dated 02.05.11 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
M/S ARPIT ADVERTISING
#3233, SECTOR 35-D,
CHANDIGARH.

2. Adv. / Consult

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. IV

Date of Hearing : 11.4.2011

Service Tax Appeal No. 726 of 2007

[Arising out of the Order-in-Appeal No. 405/CE/CHD/07 dated 17.9.2007 passed by the Commissioner (Appeals), Central Excise, Chandigarh]

Coram:

Hon'ble Ms. Archana Wadhwa, 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

CCE, Chandigarh Appellant

Vs.

M/s Arpit Advertising Respondent

<u>Appearance:</u>

Appeared for Appellant : Shri K.K. Jaiswal, DR
Appeared for Respondent : Shri V. Kakaria, Advocate

CORAM: Hon'ble Ms. Archana Wadhwa, Member (Judicial)
Hon'ble Mr. Mathew John, Member (Technical)

Final Order No. ST/175/11 dated 2-5-11

Per Mathew John:

The Appellant is in the business of canvassing advertisements for newspapers and they get commission for such business. They were registered under The Service Tax Rules, 1997 for payment of service tax as an advertising agency. The Revenue claims having received "specific information" that the Appellant was suppressing the value of services rendered by the Appellant. So they conducted some investigations including a search at the premises of the Appellant. Based on evidences gathered a SCN was issued to the Appellant which was adjudicated vide order dated 06-03-07. The operative part of the order is reproduced below:-

"1. I confirm the demand of Service Tax amounting to Rs.13,23,058.34 and Education Cess of Rs.13,386.06, total amounting to Rs.13,36,444/- for the period from 1.4.2001 to 31.12.2005 (sic. under) sub section (2) of Section 73 of the Finance Act, 1994 by invoking extended period of limitation.

2. I confirm the recovery of interest under Section 75 of the Act for the confirmed demand of Rs.13,36,444/-.

3. Under Section 76 of the Act, I impose penalty equal to Rs.100/- for everyday during the period till the amount of Rs.13,36,444/- along with interest is paid by the assessee, subject to the conditions that penalty amount shall not exceed Rs.13,36,444/-.

4. Under Section 78 of the Act, I impose penalty of Rs.13,36,444/- for suppressing the value of taxable service. Provided that if the confirmed amount along with interest is paid within 30 days of the communication of this order, the penalty amount shall get reduced to Rs.3,34,111/- (25% of the confirmed Service Tax amount) under proviso to the Section 78 of the Act.

5. Under Section 77 of the Act, I impose penalty of Rs.1000/- for violation of Rule 7 of the Service Tax Rules, 1994 as the party did not submit correct periodic return to the department."

2. Aggrieved by the order the Appellant filed an appeal with Commissioner (Appeal).

3. The main grounds taken in appeal were the following:

(a) The nature of service has not been examined and its taxability not decided. The appellant is acting as mediator between newspapers and the person desiring to advertise. Such activity does not fall within the ambit of taxable service;

(b) The adjudicating officer has assumed that the payment of Rs. 1,32,24,390.86 shown in the balance sheet relates to commission/discount/incentive whereas this figure includes commission earned on other media activity which is not taxable.

4. Commissioner (Appeal) decided the matter by his order dated 18-09-2007. The operative part of the order is re-produced below:-

> "The appellant have submitted certificates dated 18.6.2007 and 3.7.2007 issued by Rampaul & Associates, Chartered Accountants, # 189, Sector 40-A, Chandigarh who have certified that an amount of Rs.6,63,048/- as detailed above has been deposited as service tax by M/s Arpit Advertising Chandigarh and by others on behalf of M/s Arpit Advertising Chandigarh and that the information has been compiled from the books and records as produced before them and found to be correct.
>
> In the light of the above certificates issued by the Chartered Accountant I accept that the appellant have already discharged their service tax liability of Rs.6,63,048/- and the demand of service tax of that amount was wrongly confirmed. As discussed above, the taxable value of the services of advertising agencies rendered by the appellants during the period 2001-2002 to Dec. 2005 is held to be Rs.95,41,581/-. The service tax liability of the appellants is, therefore, ordered to be re-calculated on the taxable value of Rs.95,41,581/- and the appellants should discharge the service tax liability accordingly after making an adjustment of the amount of Rs.6,63,048/- already paid by them.
>
> As regards the penalty imposed, I find that the appellants had taken the service tax registration and were paying service tax. An amount of service tax of Rs.6,63,048/- had been paid by the due dates. I, therefore, accept their submission that they did not have any intention to evade the payment of service tax. However, there has been delay in the payment of amount of service tax which the appellant would now be required to pay as per this order. Therefore, the penalty imposed under Section 76 on the amount

required to be paid is upheld. The other penalties imposed by the Adjudicating Authority are set aside being not sustainable."

5. This order of Commissioner Appeals has been reviewed under section 86 of Finance Act, 1994 by the Committee of Commissioners and as directed by the Committee this Appeal is filed.

6. The ground for Appeal as recorded in the Order-in-review are as under:-

"(i) Commissioner (Appeals) has erred in relying upon the certificate issued by the Chartered Accountant without verifying the facts. This certificate (enclosed as Annexure "A") is ab-initio void as the figures in column 3 which relates to outstanding amount pending recovery due to legal cases pending in the Courts is the gross amount inclusive of Service Tax and not Commission which actually comes to Rs.1,07,406/-. Whereas, the fact is that Chartered Accountant while calculating the net taxable amounts has wrongly subtracted Rs.7,17,157.80 (instead of Commission of Rs.1,07,406/-). This has resulted in misleading the department by distortion of the figures. Commissioner (Appeals) has been misled while adjudging the case;

(ii) Commissioner (Appeals) has committed an error of judgment by accepting that Service Tax liability of the party has been paid on his behalf by some other agencies. Neither there is any legal provision nor any primary documentary verification has been done to verify the factum of payment of Service Tax in this regard;

(iii) Commissioner (Appeals) has not appreciated the in-congruencies in the alleged figures and documents and the figures submitted by the party in the re drawn chart based upon a Chartered Accountant's certificate which has inbuilt inconsistencies as illustrated in para (i) above;

(iv) Acceptance of Chartered Accountant not supported by relevant primary documents, without looking into basic calculations and principles reflects that learned Commissioner (Appeals) has been misled by manipulation of the figures by the Chartered Accountant. Chartered Accountant's certificate cannot be a sole document to vouch for the unlawful claims/deductions by the party. Commissioner (Appeals) has not looked into the authenticity and nature of figures shown in party's record. It was necessary to do such verifications. It has been held by the CESTAT in the case of Commissioner of Customs, Mumbai Vs. Eltech Enterprises reported as 1999 (112) ELT 877 (Tribunal) and Collector of Central Excise, Meeurt Vs. Moon Beverages Pvt. Ltd. reported as 1999 (111) EKT 712 (Tribunal). These cases also affirm that Chartered Accountant's certificate needs complete verification, when elements of mens rea have also been established by circumstantial evidences. In this case the gravity of need of verification is further highlighted;

(v) Commissioner (Appeals) has again committed an error of judgment by adjudging that party was not having intention to evade. It is explicit from the facts and circumstances of the case that party was suppressing taxable value by resorting to colourful devices like "Barter Agreement" with M/s Kinetic Engg., Pune, Commissioner (Appeals) has completely ignored this fact."

7. The above background does not bring out the case quite clearly. This lack of clarity persists through the SCN, Order-in-Original, Order-in-Appeal, Order-in-Review and Appeal Memorandum. To be specific, clarity is lacking on the following points,

(i) Is the service of selling advertising space in news papers taxable?

(ii) Does the figure shown in the Balance Sheet under the head "Commission/Discount/Incentives" correspond to value of taxable service?

(iii) What is the service rendered under the barter agreement? If there is any suppression in the value of any taxable service due to barter of goods how is it to be quantified?

We do not propose to deal with issue (i) above, because this issue is decided by lower authorities against the Respondent and there is no appeal filed by the Respondent on this issue.

8. Though the information received by the department is stated to be very specific, it is seen that the SCN proposed demand based on the figures reported in the balance sheet of the company under the head "Commission/Discount/Incentives" without investigating the true nature of the service and its taxability for the period 2001-02 to 2004-05.

9. Para 7 of the SCN deals with a barter agreement with M/s Kinetic Egg. Pune. This para is reproduced to achieve as much clarity as possible in this case.

"Period from 1.4.2005 to 31.12.2005:-

The notice have entered into a Barter Agreement with M/s Kinetic Engg. Pune and in terms of this agreement dated 19.9.05, M/s Kinetic Engg. Pune has to make 50% of payment in cash within 20 days of submitting of bill and balance 50% in the shape of their products as demanded by the noticee anywhere in India. The notice are entitled for cash payment in case of failure of supplies from M/s Kinetic Engg. Pune.

As per the bills resumed, during the period 8.10.2005 to 31.12.2005, the noticee had raised Bils S No. 301 to 500 and 602 to 775 against M/s Kinetic Engg. Pune for total amount of Rs. 46,60,731/- for cash payment and for total amount of Rs. 46,60,731/- for payment as Barter. The notice had recovered an amount of Rs. 1,44,499/- as service tax from M/s Kinetic Engg. Pune on the bills raised for cash payment.

To corroborate further M/s Kinetic Engg. Pune were requested to supply copy of the ledger account in respect of the notice. M/s Kinetic Engg. Pune have supplied copy of the ledger account in respect of the notice for the period 1.10.2005 to 1.12.2005 vide their letter F No. ST/151 dated 23.1.2006, the scrutiny of which reveals that the payments for cash part as well as barter supplies being made to the notice regularly by M/s Kinetic Engg. Pune.

As per the bills resumed during the period 1.4.05 to 31.12.2005, the notice had raised Bills S No.3166 to 4000, S.No. 1 to 300, 501 to 600 and 801 to 1043 against their clients, other *than M/s Kinetic Engg. Pune for total amount of Rs. 2,08,56,294.10 and had recovered an amount of Rs. 1,98,112.66 as service tax from them.*

Thus, as per the bills resumed during the period 1.4.05 to 31.12.05, the noticee had provided services having total value of Rs. 3,01,77,756.05."

10. The Appeal paper has not enclosed the barter agreement. Information available is that this matter relates to purchase of old vehicles and giving new vehicles in exchange. The nature of service rendered to Kinetic Egg. Pune is not clear. This confusion is not a hindrance in appreciating facts for the four financial years 2001-02, 2002-03, 2003-04 and 2004-05. But this confusion is a ground for ignoring ground (v) given in the Appeal as reproduced in para 6 above which ground is applicable for the Period after April 2005 only.

11. The Appeal is not filed with a clarity as to what should be the taxable value. The whole approach is that there is some doubt about the assessable value. So the entire figure shown in the balance sheet under the head Commission/Discount/Incentives is to be taken as value of taxable service. There is no willingness on the part of the Commissioner (Appeal) or the Department to quantify the extent of undervaluation or under declaration. Commissioner (Appeal) showed the willingness to accept the figures quoted by the Chartered Accountant. We consider this a better approach than just asserting that the Commissioner (Appeal) and the Chartered Accountant are wrong.

12. When the matter was first heard by this Tribunal on 17/12/2010, The Tribunal vide its Misc Order No. ST/134/10 dated 15-12-2010 directed that the adjudicating authority should "call for the records of the Respondent issuing one month's notice and examine the veracity of Chartered Accountant Certificate with reference to the accounting records and report to the Tribunal on the results of the examination".

12. In pursuance of the Tribunal's order dated 15-12-2010, the Appellant wrote a letter to the Adjudicating Authority vide letter dated 08-02-2011 submitting that the entire records of the assesse were seized by the department and are in possession of the department and so necessary verification may be done from the seized records. They also submitted that the correctness of the service tax liability as certified by the Chartered accountant was the adjudicated vide O-in-R No.15/DC/ST/CHD/09/R dated 12-08-09 issued by Deputy Commissioner, Service Tax Division, Chandigarh, in the matter of a refund claim filed by the Appellant on the basis of Chartered Accountant's certificate. The order sanctioned a refund of Rs. 21,269/- after making adjustment of dues. So the Appellant was not in a position to understand what further verification is required.

13. When the matter came up for hearing on 11-04-2011, no verification report as desired by Tribunal in its order dated 07-12-10 was produced by Revenue. Further the Ld. DR was not able to explain what further verification was required after sanction of refund amounting to Rs. 21,269 as stated above.

14. In the circumstances we do not see any reason to keep this appeal filed by the department pending. The Appeal is dismissed as unsubstantiated and not pursued diligently.

(Pronounced in open Court on 11.4.2011).

(Archana Wadhwa)
Member(Judicial)

(Mathew John)
Member (Technical)