

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066
CUSTOMS APPEAL BRANCH

Appeal No. ST/235 /2008 - CU[DB]

Date 04/10/2011

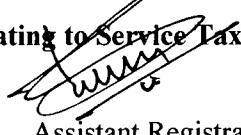
Assistant Registrar
C.E.S.T.A.T, New Delhi

To :
C.S.T. DELHI
17-B, I.P. ESTATE, IAEA HOUSE, NEW DELHI.
C.S.T. DELHI

Appellant
Vs
Respondent

M/S ITC HOTELS LTD.

I am directed to transmit herewith a certified copy of **Final order No.ST/528/ 2011 CU[DB] dated 29.09.2011**
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 ITC HOTELS LTD.
(HOTELS DIVISION),ITC GREEN
CENTRE,PLOT NO. 10,
INSTITUTIONAL AREA,SECTOR-
32, GURGAON HARYANA.

2. Adv. / Consult Mr. RS Batliboi & Co.
Golf View Corporate Tower B
Sector – 42 Sector Road
Gurgaon

3. C.D.R

4. Bar association. CESTAT, New Delhi

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

6. M/s Centax Publications 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

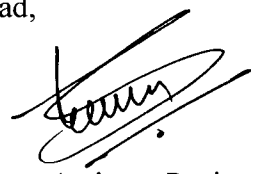
9. Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road,
Ahmedabad-15

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

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)

**CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
West Block No.2, R.K.Puram, New Delhi**

COURT-III

Date of hearing: 17.8.2011
Date of pronouncement: 2011

Service Tax Appeal No.235 of 2008

Arising out of the order in appeal No.52/ST/DLH/2007 dated 8.1.2008 passed by Commissioner (Appeals), Central Excise, Delhi I.

For Approval and Signature:

Hon'ble Mrs. Archana Wadhwa, Member (Judicial)
Hon'ble Mr. Mathew John, Technical Member

1	Whether Press Reporter may be allowed to see the Order for publication as per Rule 26 of the CESTAT (Procedure) Rules, 1982?	No
2	Whether it should be released under Rule 26 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

Commissioner of Service Tax, Delhi I

...

Appellant

Vs.

ITC Hotels Limited

...

Respondents

Appearance:

Shri Amresh Jain, Authorized Departmental Representative(DR) for the Revenue
Shri Anil Sood, Advocate for the respondents

Coram: Hon'ble Mrs. Archana Wadhwa, Judicial Member
Hon'ble Mr. Mathew John, Technical Member

Final Order No. ST/522/11

Per Mrs. Archana Wadhwa:

Being aggrieved with the order passed by the Commissioner
(Appeals), Revenue has filed the present appeal.

2. We have heard Shri Amresh Jain, learned DR appearing for the Revenue and Shri Anil Sood, Advocate appearing for the respondents.

3. As per facts on record, M/s ITC Hotels Ltd. and M/s Ansal Hotels Ltd. were subsidizing companies of ITC Ltd. while holding company was also running a few hotels of its own. M/s ITC Hotels Ltd. were paying service tax under the category of 'management consultant services' being provided by them to M/s ITC Ltd. and M/s Ansal Hotels Ltd.. During the period April, 2004 to September, 2004. Amalgamation proceedings in respect of the three were going on before the Hon'ble Delhi High Court and Hon'ble Kolkata High Court and vide their respective orders, the Hon'ble High Courts allowed the amalgamation of the two companies with the parent company, ITC Ltd. with effect from 1.4.2004 i.e. the appointed date as per Amalgamation Scheme duly approved by the Hon'ble High Courts. As such, according to the respondents, M/s ITC Hotels Ltd. and M/s Ansal Hotels Ltd. ceased to exist as independent entities with effect from 1.4.2004 onwards. Accordingly, they filed refund claims amounting to Rs.88,54,473/- of service tax paid during the period, on the ground that consequent upon amalgamation of the two with the holding company with effect from the appointed date i.e. 1.4.04, they were one and the same entities and as such, it has to be held that such service provided by ITC Hotels Ltd. was to itself and not liable to tax.

4. The original adjudicating authority rejected the said refund claim on the ground that the effective date for amalgamation was the last of the dates on which all the orders, sanctions, approvals, consents, conditions, matters or filings referred to in clause 15 of the amalgamation have been obtained or filed. The last date for such approvals was 30.6.2005. Inasmuch as the ITC Ltd. filed application with the Registrar of Companies on 23.3.2005, the effective date of amalgamation has to be considered as 23.3.2005. Any such service provided by ITC Hotels Ltd. prior to the said effective date i.e 23.3.2005 would be liable to service tax. Accordingly, he rejected the refund claim.

5. On appeal filed before Commissioner (Appeals), the appellate authority accepted the assessee's stand and held that it is the appointed date i.e. 1.4.2004 which has to be considered as the date of amalgamation. As such, any service provided by ITC Hotels Ltd. to ITC Ltd. and M/s Ansal Hotels Ltd. would be service to itself and not to another person. Thus, the same were not liable to service tax. For better appreciation, we reproduce the relevant paragraph from the order of Commissioner (Appeals):

"5. I heard Shri Anil Sood, Authorised Representative and Shri Avinash C. Kaushal, Finance Manager on 01.11.2007 who appeared on behalf of the appellants and reiterated the grounds already taken up in the appeal memorandum. I have gone through the facts and circumstances of the case and various submissions made by the appellants. I find that the primary issue in the instant case is the determination of the date of effect of the said 'Scheme of Amalgamation' between the appellants, M/s ITC Hotels Limited Ltd. and M/s Ansals Hotels Ltd. I find that the adjudicating authority has erred in considering that the effective date of subject amalgamation was 23.3.2005 and not 1.04.2004 which is contrary to the principle laid down by the Hon'ble Apex Court in the matter of M/s Marshall Sons & Co (India) Ltd. vs. Income Tax Officers – 1997 (223) ITR 0809 SC that the date provided in the 'Scheme of Amalgamation' is the effective date. The ratio of the judgment quoted above squarely covers the instant case and in view of the principle laid down by the Hon'ble Apex Court I hold that the effective date of amalgamation was 01.4.2004 provided in the 'Scheme of Amalgamation' and assessment of the service tax payable has to be done treating the individual companies as the single legal entity emerged as a consequence of the amalgamation and not separate entities after the said amalgamation. I also find sufficient force in the plea of the appellants that the service tax is not payable if the service has been provided to oneself treating all the companies after amalgamation i.e. w.e.f. 01.04.2004 as one single legal entity or person. I rely on judgments of the Hon'ble Tribunal in the case of Precot Mills Ltd. vs. C.C.E. , Tirupati – 2006 – TIOL 818 CESTAT – Bang. And Kwality Zipper Ltd. vs. C.C.E., Kanpur – 2002 (145) ELT 296 (Tri-Del.) in this regard. However, I find that the refund of service tax claimed by the appellants had to be sanctioned only after verifying and

confirming that fact that the amount of service tax deposited for which refund had been claimed, pertained to the services provided by M/s ITC Hotels Limited Ltd. to M/s ITC Ltd. and M/s Ansals Hotels Ltd. and not to some company or person other than M/s ITC Ltd. and M/s Ansals Hotels Ltd. In view of the above, I set aside the impugned order with directions to the adjudicating authority to consider sanctioning of the said refund claim by verifying the above facts and corresponding original duty paying documents and thereafter sanction the amount of refund which pertain to the service tax paid on account of services provided by M/s ITC Hotels Limited Ltd. to M/s ITC Ltd. and M/s Ansals Hotels Ltd. only. The appellants are also directed to produce all the relevant documentary evidence in support of their claim that the service tax had been paid on account of services provided by M/s ITC Hotels Limited Ltd. to M/s ITC Ltd. and M/s Ansals Hotels Ltd. which are one single legal entity after the amalgamation held to be effective from 01.4.2004. I further direct the adjudicating authority to satisfy himself before sanctioning of the subject refund claim that the incidence of service tax involved has not been passed on by any one of the companies i.e M/s ITC Ltd., M/s Ansals Hotels Ltd. and M/s ITC Hotels Limited Ltd. individually or jointly after amalgamation w.e.f. 0.1.04.2004 to any person, for fulfilling the conditions of Section 11B of the Central Excise Act 1944 as made applicable to like matters of service tax by virtue of Section 83 of the Finance Act, 1994. The appellants are also directed to produce documentary evidence to establish that incidence of such service tax involved has not been passed on by them to any other person as per Section 11 B ibid before the adjudicating authority."

6. Learned DR appearing for the Revenue has contested the above findings of Commissioner (Appeals) on the ground that as per clause 15 of the scheme of amalgamation the effective date of amalgamation is the last of the date on which the conditions of clause 15 are made. Inasmuch as the certified copy of the order of the Hon'ble High Court and Kolkata High Court were filed with the Registrar of the Companies on 23.3.05, the said date has to be taken as the effective date under the scheme of amalgamation. As such, the services provided prior to the said scheme, when the respondents, were considered as a separate

Entities from the service receiver would be liable to service tax which stands correctly paid. He has also drawn our attention to clause 8 of the scheme of amalgamation according to which the employees of transferor company i.e. ITC Hotels Ltd. shall become the employees of the transferee company. As such, he submits that the identity of the service provider and the service receiver remained intact till the effective date which is 23.3.2005. He has also drawn our attention to clause 7 of the scheme of amalgamation which is a saving clause in respect of concluded transaction and submits that any transaction or proceedings already conducted by the transferor company on or before the effective date shall not be affected by the scheme of amalgamation. It is also the contention of the learned DR that the incidence of tax under the Finance Act, 1994 i.e. providing management consultant services has occurred before the effective date of amalgamation. Relying upon the Hon'ble Supreme Court decision in the case of Wallace Flour Mills Co. Ltd. vs. Collector of Central Excise - 1989 (44) ELT 598 (SC), he submits that the ratio of the law declared by the Hon'ble Apex Court to the effect that excise duty is to be determined at the rate prevalent on the date of removal. Similarly, the taxable event being providing of service by the service provider to the service receiver, the Commissioner (Appeals) order to the contrary cannot be sustained. He has further submitted that the scheme sanctioned by the Court has to be implemented by the companies and it is achieved filing certified copies with the Registrar of the Companies amalgamation gets statutory force from that date only and the position cannot be varied by an act of the parties. He accordingly prays for setting aside the impugned order and allowing the appeal.

7. Countering the above arguments, the learned Advocate draws our attention to the order dated 2.2.2005 passed by the Hon'ble High Court of Delhi sanctioning the scheme of amalgamation from the appointed date i.e. 1.4.2004. He submits that inasmuch as the amalgamation is effective from 1.4.04, the intent and purpose of the two companies is to be treated as one with effect from the

said date. The effective date as defined in the scheme of amalgamation approved by the Hon'ble High Court is the date relating to the implementation of the order as is clear from the date appearing in the said scheme. He draws our attention to Hon'ble Supreme Court decision in the case of Marshall Sons & Co. (India) Ltd. vs. Income Tax Officer – AIR 1997 SC 173. He also refers to the Tribunal's decision in the case of C.C.E., Trichy vs. IOC Ltd. – 2011 – TIOL – 718 – CESTAT – MAD holding that the effective date of amalgamation would be one made in the order of amalgamation and not the one on which the papers for amalgamation were filed in the office of the Registrar of Companies. As such, the Tribunal while discarding the Revenue's stand that it is the date when the amalgamation was registered with the Registrar of the Companies which should be considered as the relevant date, held that the amalgamation would be effective from the date of the order issued by the Ministry of Petroleum on 30.4.07 providing the date of merger as 1.4.04. As such, the Tribunal held that any service provided by the respondent is required to be considered as service to himself and any service tax paid on such service is required to be refunded. The Tribunal also considered the earlier decision of the Tribunal in the case of Technocraft Industries (I) Ltd. vs. C.C.E., Mumbai III – 2000 (120) ELT 106 (Tribunal) which is also being relied upon by the Revenue in the present case and observed that “ *The decision of the Tribunal in the case of Technocraft Industries (I) Ltd. cited (supra) is also preferring to accept what is referred to as the effective date which was different from the approval date*”. As such, the learned Advocate appearing for the respondents prays for rejecting the Revenue's appeal.

8. We have considered the submissions made by both sides. There is no denial to the fact that in terms of the Hon'ble High Court of Delhi and Kolkata's order for amalgamation, the appointed date is 1.4.2004. The period involved in the present appeal for claiming refund of service tax is from 1.4.2004 onward till September, 2004.

9. The sole dispute required to be decided in the present appeal is as to whether the appointed date as approved by the Hon'ble High Court i.e. 1.4.2004 is required to be taken as the date of amalgamation of ITC Hotels Ltd. and Ansal Hotels Ltd. with ITC Ltd. or the date on which the entire formalities were completed and the application was filed with the Registrar of the Companies i.e. whether 23.3.2005 should be taken as the relevant date for amalgamation. We find that the law on the issue stands settled by the Hon'ble Supreme Court decision in the case of Marshall Sons & Co. (India) Ltd. vs. Income Tax Officer referred supra. It stands held in para 14 of the said judgement as under:

*" Every scheme of amalgamation has to necessarily provide a date with effect from which the amalgamation/transfer shall take place. The scheme concerned herein does so provide viz. January 1, 1982. It is true that while sanctioning the scheme it is open to the Court to modify the said date and prescribe such date of amalgamation/transfer as it thinks appropriate in the facts and circumstances of the case. If the Court so specifies a date, there is little doubt that such date would be the date of amalgamation of transfer. But where the Court does not prescribe any specific date but merely sanctions the scheme presented to it – as has happened in this case – **It should follow that the date of amalgamation/date of transfer is the date specified in the scheme as "the transfer date"**. It cannot be otherwise. It must be remembered that before applying to the Court under Section 39(1) a scheme has to be framed and such scheme has to contain a date of amalgamation/transfer. The proceedings before the Court may take sometime; indeed, they are bound to take some time because several steps provided by Section 391 to 394-A and the relevant Rules have to be followed and complied with. During the period the proceedings are pending before the Court, both the amalgamating units, i.e. the Transferor company and the Transferee company may carry on business, as has happened in this case but normally provision is made for this aspect also in the scheme of amalgamation. In the scheme before us, clause 6(b) does expressly provide that with effect from the transfer date, the transferor company (subsidiary company) shall be deemed to have carried on the business for and on behalf of the Transferee company (holding company) with all attendant consequences. It is equally relevant to notice that the Courts have not only sanctioned the scheme in this case but have also not specified any other date as the date of transfer/amalgamation. **In such a situation, it could not be reasonable to say that the scheme of amalgamation takes effect on and from the date of the order sanctioning the scheme.** We are, therefore, of the opinion that the notices issued by the Income Tax Officer (impugned in the writ petition) were not warranted in law. The*

business carried on by the transferor company (subsidiary company) should be deemed to have been carried on for and on behalf of the transferee company. This is the necessary and the logical consequence of the Court sanctioning the scheme of amalgamation as presented to it. The order of the Court, sanctioning the scheme, the filing of the certified copies of the orders of the Court before the Registrar of Companies, the allotment of shares etc. may have all taken place subsequent to the date of amalgamation/transfer, yet the date of amalgamation in the circumstances of this case would be January 1, 1982. This is also the ratio of the decision of the Privy Council in Raghubar Dayal v. Bank of Upper India Ltd. AIR 1919 PC 9."

As is seen from the above, the Hon'ble Apex Court has observed that it is the date of amalgamation as presented in the scheme which has to be taken as the 'transfer date', inasmuch as the Court's approval may come much later. Further, it is seen from the highlighted portion of the above reproduced order that the Hon'ble Supreme Court observed that the scheme of amalgamation would not take effect on and from the date of the order sanctioning the scheme but would relate back to the transfer date as presented in the amalgamation scheme. The business carried out by the subsidiary company should be deemed to have been carried on and for on behalf of the transferee company. As such, by taking into account the other facts and circumstances of the case, the Court observed that subsequent to the sanction of the scheme, formalities of filing certified copies of the order before the Registrar of the companies, the allotment share etc. may take some time but the date of amalgamation would be the date as presented in the scheme.

10. The law declared by the Apex Court is binding and is required to be followed. The submission of the learned DR that the ratio of the above judgment given in the context of income tax would not be applicable to the facts of the present case as there is no specific provision to that effect under the Central Excise Act or under the Chapter V of the Finance Act, 1994 cannot be appreciated inasmuch as the law declared by the supreme Court is binding on all the Courts, in terms of the Article 141 of the Indian Constitution. The Hon'ble High Court of

Delhi and the Kolkata having held the date of amalgamation as 1.4.2004 has to be considered as the correct date of amalgamation. If that be so, admittedly, the appellant cannot be held to be providing services to itself. The Tribunal in the case of Precot Mills – 2006 - TIOL – 818 – CESTAT – BANG. has held that for levability of service tax, there should be a service provider and a service receiver. No one renders service oneself, as such, there can be no question of levability of service tax. Having held that the amalgamation is effective from 1.4.2004, the service provided by the respondent has to be considered as provided to himself, in which case, no service tax would arise against them. The order of the Commissioner cannot be faulted upon on this ground. At this stage, we may take into consideration the learned DR's reference to clause 7 of the scheme of amalgamation which is as follows:

"7. Savings of concluded Transactions: The transfer of the undertaking of the Transferor Companies under clause 4 above, the continuance of the proceedings under clause 5 above and the effectiveness of contracts and deeds under clause 6 above, shall not effect any transaction or the proceeding already concluded by the transferor companies on or before the effective date and shall be deemed to have been done and executed on behalf of the Transferee Company."

By referring to the above clause, the contention of the learned DR is that any transaction or proceeding conducted by the transferor company on or before the effective date will not be affected by the scheme of amalgamation. However, we find that such clause stands incorrectly interpreted by the learned DR. A reading of the above clause is reflective of the fact that the action of the transferor company on or before the effective date shall be deemed to have been done and executed on behalf of the transferee company. As such, it is clear that the said clause supports the respondent's stand that any business conducted by the respondents is to be held as having been conducted on behalf of the transferee company. As such, the service tax provided to the ITC Ltd. and Ansal Hotels Ltd. have to be

considered as having been provided on behalf of the transferee company viz. ITC Ltd., in which case, no service tax liability would arise against the service provider.

11. The decision of the Tribunal in the case of Technocraft Industries (I) Ltd.- 2000 (120) ELT 106 which stands relied upon by the Revenue was taken note of by the Tribunal in a subsequent decision in the case of C.C.E., Trichy vs. IOC Ltd. reported as 2011 – TIOL – 718 – CESTAT – MAD. For better appreciation, we reproduce the para 7 of the decision.:

"7. The case of C.C.E., Chandigarh vs. Nahar Industrial Enterprises Ltd. (cited supra) relied by the Ld. SDR does not support his case. In the said decision, it has been held that when the Hon'ble High Court has given effective date which was different from the date of approval granted by the Hon'ble High Court, the former date should prevail. In the present case, the Ministry's order clearly specifies the effective date, which is 01.04.04. Therefore, the original authority's order rejecting the refund claim holding that the effective date for amalgamation is from 2.5.07, cannot be approved. In view of the above, the Appellate Commissioner's order appears legal and proper. The decision of the Tribunal in the case of Technocraft Industries (I) Ltde. (cited supra) is also preferring to accept what is referred to as effective date which was different from the approval date. The other submission that the certificate has been surrendered on 04.05.2007 is also not relevant as on the said date both IOCL and IBP w.e.f. 01.04.04 were present only as IOCL. IOCL has taken over the assets and liabilities of erstwhile IBP w.e.f. 01.04.04 in view of the amalgamation. Undisputedly, the surrender formalities were also undertaken by IOCL. Therefore, IOCL is stepping into the shoes of erstwhile IBP, have claimed the refund."

12. As is seen from the above, the Tribunal decision in the case of Technocraft Industries (I) Ltd. supports the respondent's case and does not advance the Revenue's plea.

13. We also note the learned DR's reliance in the case of Wallace Flour Mills Company Ltd. vs. C.C.E – 1989 (44) ELT 598 (SC) is not appropriate inasmuch as the issue in that case was entirely different, the fact of applicability of

● rate of duty of excise in respect of the goods produced during a period when the product was not exercisable but cleared after imposition of excise duty. The decision has nothing to do with the effective date of amalgamation of companies.

14. In view of the above, we find no reason to take a view different from the one taken by the Commissioner. We accordingly find no merits in the Revenue's appeal and reject the same.

(Pronounced in the open Court on 29/9/2011)

(Archanā Wadhwa)
Judicial Member

(Mathew John)
Technical Member

scd/