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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/515 /2007 - CU[DB] Date **19/09/2011**

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

To :
SHASHI KANT MISHRA
358 B/1B, KRISHNA NAGAR, KYADGANJ,
ALLAHABAD(UP)

SHASHI KANT MISHRA Appellant

Vs

C.C.E ALLAHABAD Respondent

I am directed to transmit herewith a certified copy of **Final order No.ST/471/ 2011 CU[DB]** dated 09.09.2011 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
C.C.E ALLAHABAD
38,M.G.MARG, CIVIL LINES,
ALLAHABAD

2. Adv. / Consult
MR.MAN MOHAN SHARMA
707, PATIALA HOUSE COURT, NEW 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)

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI
Court No.III

ST/Appeal No.515/2007

(Arising out of order in appeal No.27/ST/Appl/Alld/2007 dated 26.6.07 passed by the Commissioner of Central Excise (Appeals), Allahabad)

Date of Hearing: 25.8.2011
Date of Pronouncement:

For Approval and signature:

Hon'ble Ms Archana Wadhwa, Judicial Member
Hon'ble Mr.Mathew John, Technical Member

1.	Whether Press Reporters 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 lordships wish to see the fair copy of the order?	Seen
4.	Whether order is to be circulated to the Department Authorities?	No

Shashi Kant Mishra — Appellant

Vs

CCE, Allahabad — Respondent

Appeared for the Appellant: None
Appeared for the Respondent: Shri Rajinder Gupta, DR

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

Final ORDER No. ST/471/11

Per Mathew John:

When the case was called out, none was present for the appellant.

2. On the previous occasion also, there was nobody to represent the appellant and the case was adjourned on 13.4.2011 by way of last chance to cause appearance. There is a letter dated 25.7.2011 on file praying that suitable order may be passed considering the observations made in the stay order dated 30.01.2008 since the appellant has already complied with the condition of stay order.

3. The appellant had rented out one Maruti Van to M/s IFFCO, Phulpur during the period October, 2000 to September 2005 on rental services for value amounting to Rs. 12,77,147/- but the appellant had not got himself registered under the service tax laws and had not paid any service tax. A show cause notice was issued demanding service tax amount of Rs. 89,652/-. The demand was confirmed by the adjudicating authority under provision of Section 73 of the Finance Act, 1994 along with interest under Section 75 of the Finance Act, 1994. Further penalty under Section 75A, 76, 77 and 78 of the Finance Act, 1994 was also imposed on the appellant. Aggrieved by the order, the appellant filed appeal before Commissioner (Appeals). The Commissioner (Appeals) rejected the appeal. Aggrieved by the order of the Commissioner (Appeals), the appellant has filed this appeal.

4. The appellant has been contesting that the terms 'cab' and 'operator' shall have the same meaning as given in Rent-a-Cab Scheme, 1989 issued vide SO No. 437(e) dated 12.6.1989 issued under the Motor Vehicle Act, 1988. As per the definition, 'operator' means the holder of permit issued under sub-section (9) of Section 88 of the Act in respect of not less than 50 motor cabs. The appellant submitted that he had only one Maruti Van which was placed at the disposal of M/s IFFCO and therefore, he cannot be considered to be falling under the scope of the Scheme.

5. Further the appellant submits that from April, 2005 onwards, he was eligible for exemption under Notification No. 6/2005-ST dated 1.3.2005 which provided exemption for small service provides whose value of turnover was upto Rs. 4 lakhs. Further the appellant submits that he is eligible for exemption under Notification No. 9/2004-ST dated 9.7.2004 which provided exemption to Rent-a-Cab Operator as was in excess of service tax calculated on value equivalent to 40% of the gross amount charged. For claiming this exemption, the appellant affirms that he has not availed any Cenvat credit on inputs or capital goods used for providing the services. The appellant further submits that the value received by him has to be treated as cum-tax value and if these principles are adopted, the service tax liability will come down substantially.

6. The appellant submits that he was under the bonafide belief that he was not required to pay service tax on account of exemption granted under Notification No. 3/99-ST dated

28.2.1999. He submits that he had reasonable cause for non-payment of service tax and not submitting of returns. He should be given the benefit under Section 80 of the Finance Act under which penalties can be waived.

7. The learned DR on the other hand submits that taxability of the services provided by the appellant is no longer res integra in view of the decision of the Tribunal in the case of R.s. Travels Vs CCE reported in 2008 (12) STR 27 (Tri.-Del) He further submits that the benefit of Notification No. 9/2004-ST dated 9.7.2004 cannot be given because he has not produced any evidence that he has not claimed cenvat credit in respect of the inputs or capital goods used for providing service. He argues that this exemption is intended for a person who is registered with the department and filing returns. In the case of Notification No. 6/2005-ST dated 1.3.05, for small service provider his argument is that this notification was not claimed by the appellant. In the matter of cum duty benefit, he points out that it has been mentioned in the order in original that supplementary bills have been raised . In the circumstances, benefit of cum-tax value cannot be given.

8. Heard arguments on both sides. We do not agree with the arguments given by the DR and in the orders of the lower authorities that the appellant is not eligible for exemption under Notification No. 9/2004-ST dated 9.7.2004. Since the appellant was not registered with the Service Tax Department and not filing return, there was no question of availing any cenvat credit on inputs or capital goods for providing service. Since this is a fact

which is very apparent from the facts and circumstances of the case, we are of the view that the benefit of exemption under Notification No.9/2004-ST dated 9.7.04 cannot be denied to the appellant. We also note that there is no chance of the appellant having availed benefit of Notification No.12/03 dated 26.6.03 for goods sold while providing the service. For this reason, we hold that the appellant is eligible for Notification No. 9/2004-ST dated 9.7.04.

9. Further in the case of exemption under Notification No. 6/2005-ST, we find that the entire data to determine whether the appellant had provided services more than the prescribed limit of Rs. 4 lakhs is available with the department and the same should be verified and exemption extended. In the matter of cum duty benefit, the fact that the amount realized by the appellant is cum duty is not disputed by the Revenue. The objection raised is that the appellant had raised supplementary invoices for realizing the service tax. It is not known whether those bills have been paid. It appears likely that the supplementary bills may not have been paid by IFFCO and therefore, this fact has to be verified by the adjudicating authority and if the supplementary bills are not paid by M/s IFFCO, the benefit of cum duty should be extended to the appellant. In the view of the above findings, there is need for re-quantifying the tax liability.

10. In the case of penalties imposed, we find that the adjudication order has imposed penalties both under Sections 75A, 76 77 and 78 of the Finance Act, 1994. Basically penalties under

sections 76 and 78 are for the same offence which principle has been recognized by amendment done w.e.f.10.5.2008 by Finance Act, 2008 by adding a proviso under Section 78. We are of the view that this benefit should be given to small service provider even if the period of dispute is prior to the said amendment. Therefore, we set aside the penalty under Section 76. Further it is also noticed that the adjudicating authority has not given the option to pay fine of 25% of the duty evaded to the appellant for closure of the matter. In this case the penalties imposed in the adjudication orders are based on quantum of duty worked out without following judicial principles and he could not have paid 25% of duty determined in the order in original. Therefore, we grant the appellant an opportunity to pay 25% of the duty amount as may be quantified by the adjudicating authority. Since the appellant had not registered and filed service tax return, penalty under Section 77 is maintainable. In the case of penalty under Section 75A, we notice that the said section did not exist on the date of issue of show cause notice. Moreover, the offence involved is almost the same as in Section 77. So penalty under Section 75A is waived. The appellant is required to pay the penalty.

11. Thus appeal is allowed partially both in the matter of quantum of tax and in the matter of penalties as detailed and the appeal is allowed by way of remand.

(Order pronounced on)

(ARCHANA WADHWA)
Judicial Member

(MATHEW JOHN)
Technical Member

MPS*