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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/141 /2008 - CU[DB] Date **20/07/2011**

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

To :
C.C.E. INDORE
MANIK BAGH PALACE, POST BOX NO. 10, INDORE
452001 (M.P.)

C.C.E. INDORE Appellant

Vs

M/S GIRNAR FIBRES LTD. Respondent

I am directed to transmit herewith a certified copy of **Final order No.ST/291/ 2011 CU|DB|** dated 05.07.11 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 GIRNAR FIBRES LTD.
PLOT NO. 516-518, SECTOR-III,
INDUSTRIAL AREA,
PITHAMPUR,DISTT- DHAR (M.P.)

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 (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 Branc

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 : 5.7.2011

ST Appeal No. 141 of 2008

[Arising out of Order-in-Appeal No. IND-I/32/2008 dated 13.2.2008 passed by the Commissioner (Appeals), Customs & Central Excise, Indore]

Coram:
Hon'ble Shri S.S. Kang, Vice President
Hon'ble Shri 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?	
2.	Whether it would be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	
3.	Whether their Whether their Lordships wish to see the fair copy of the order?	
4.	Whether order is to be circulated to the Department Authorities?	

CCE, Indore — Appellant

Vs.

M/s Girnar Fibres Ltd. — Respondent

Appearance:

Appeared for Appellant : Shri K.K. Jaiswal, SDR
Appeared for Respondent : None

Coram:

Hon'ble Shri S.S. Kang, Vice President
Hon'ble Shri Mathew John, Member (Technical)

Final Order No. ST/291/11 dated 5.7.11

Per S.S. Kang :

Heard ld. SDR. None appeared on behalf of the Respondent.

The notice issued to the Respondent was received back with the postal remarks. In these circumstances, the Appeal is being taken up in the absence of the Respondent.

2. Revenue filed this Appeal against the impugned order passed by the Commissioner (Appeals) whereby the Commissioner (Appeals) held as under :-

> "The appeal is being taken up for final disposal after dispensing with pre-deposit. On a careful consideration of the written and oral submissions made by the Appellants, I find the dispute in the present appeal relates to the credit of Service Tax taken by the Appellants with reference to the tax paid on GTA service and utilization of the same for payment of Service Tax on the commission paid to their foreign agent for procurement of export orders (under Business Auxiliary services). The Adjudicating Authority has held that the Service Tax paid on GTA cannot be taken as credit by the Appellants as they are not paying any excise duty on their final product (cotton yarn) and also they are not providing any output service. However, the Appellants have contested the same on the ground that as per the explanation given in the definition of output service in Rule 2(p) of the Cenvat Credit Rules, 2004, they have to be considered as providing an output service and hence eligible for the credit. Their argument in this regard is quite valid and therefore the credit taken by them is in order. In this regard, I would like to mention that the explanation in Rule 2(p) of the Rules was omitted w.e.f. 18.4.2006 and hence prior to that date based on the above explanation in Rule 2(p) not only the credit can taken by a person who is liable to pay Service Tax (on account of the deemed provision of providing output service) but the same can be utilised for payment of excise duty/Service Tax as per Rule 3(4) of the Cenvat Credit Rules, 2004. Thus the credit taken by the Appellants in this case is in order and also the utilization of the same for

payment of Service Tax on Business Auxiliary Service. Accordingly, I have no hesitation in holding that impugned order is not sustainable in the eyes of law and therefore the same is set aside."

3. The contention of the Revenue is as under :-

The Respondent claim is that they are supposed to pay service tax on the commission paid to foreign based agents, in the category of Business Auxiliary Services, it should be treated as their Output Service. In terms of Cenvat Credit Rules, Output Service means any taxable service provided by the provider of taxable service to the service receiver. In the instant case the Respondents are not providing any taxable service, but due to a legal fiction, they fall under the definition of 'a person liable to pay service tax' but in fact they are not an Output Service provider.

Since the Respondents are actually not providing any services, they cannot be treated as provider of an Output Service and therefore the service tax liability arises on the Commission paid to foreign agents has to be discharged by the Respondents in cash only. The above findings have been substantiated in para 8.1 of Board's Circular No. 97/8/2007 dated 23.8.2007 issued under F.No. 137/85/2007-CX.4. Being a manufacturer of exempted final product, who is also not actually providing any output service, the credit availed on GTA Services is in violation of the provisions of Rule 3(1) of Cenvat Credit Rules, 2004 and the same has correctly been disallowed by the Adjudicating Authority in the impugned order. Consequently the service tax paid out of the ineligible credit, on the Business Auxiliary Service has to be recovered from the Appellant in Cash along with the applicable interest under Section 73/75 of the Finance Act, 1994 read with the provisions of Rule 14 of Cenvat Credit Rules, 2004.

4. Revenue also relied upon the decision of the Tribunal in the case of **ITC Ltd. Vs. CCE** reported in [2011] 31 STT 463 (Final Order No.

237/2011 in ST Appeal No. 189/2008 dated 29.3.2011). In this case Tribunal held that during the period prior to 19.4.2006 irrespective of whether a person provided taxable service and/or manufactured dutiable final products or did not provide any taxable service or manufactured any dutiable final products, he was required to pay the service tax on the GTA service received by them in cash, not through Cenvat credit.

5. We find that the issue raised by the Revenue requires re-consideration by the Commissioner (Appeals) afresh. Hence the impugned order is set aside and the matter is remanded to the Commissioner (Appeals) to decide afresh after affording an opportunity of hearing to the Respondent. The Appeal is allowed by way of remand.

(Dictated & pronounced in open Court)

(S.S. Kang)
Vice President

(Mathew John)
Member (Technical)

RM