

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

Appeal No. ST/264 /2008 - CU[DB]

Date **25/01/2011**

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

To :
C.C.E. GHAZIABAD
C.G. O. COMPLEX-II, KAMLA NEHRU NAGAR,
GHAZIABAD 201302
C.C.E. GHAZIABAD

Appellant

Vs

Respondent

M/S INDUS TUBES LTD.

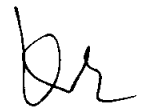
2011 CU[DB] dated 21.01.11

I am directed to transmit herewith a certified copy of **Final order No. ST/21/**
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 INDUS TUBES LTD.
CHHAPRAULA, G.T. ROAD,
DADRI, GHAZIABAD.
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 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. M/s. Deeparchie Publications, M-93, Marg. 46, Saket, New Delhi 110017
9. Taxmann Allied Service Pvt Ltd., 59/32, New Rohtak Road, New Delhi - 110005
10. Easy Service Tax Online Dot Com Pvt.Ltd. 407A, Iscon Mall, Above Star India Bazar, Satellite Road,
Ahmedabad-15
11. LAWCRUX Advisors Pvt Ltd, LAW House.1-8, Sector - 10, Faridabad 121003 (Harvana)
12. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor, Vasant Arcade, Nelson Mandela Road,
Vasant Kunj, New Delhi - 110070
13. Office Copy
14. 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.
Principal Bench, New Delhi**

COURT NO. IV

Date of Hearing : 19.1.2011

Service Tax Appeal No. 264 of 2008-Cus.

[Arising out of the Order-in-Appeal No. 186-CE/GZB/07 dated 28.12.2007
passed by The Commissioner (Appeals), Central Excise, Ghaziabad]

For Approval and signature :

Hon'ble Ms. Archana Wadhwa, Member (Judicial)
Hon'ble Mr. M. Veeraiyan, Member (Technical)

- | | | | |
|----|--|---|------|
| 1. | Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982? | : | No |
| 2. | Whether it would be released under Rule 27 of the 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 Department Authorities? | : | Yes |

CCE, Ghaziabad

Appellant

Vs.

M/s Indus Tube Ltd.

Respondent

Appearance :

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

Coram : Hon'ble Ms. Archana Wadhwa, Member (Judicial)
Hon'ble Mr. M. Veeraiyan, Member (Technical)

Final Order No. ST/21/11 dated 21.1.11

Per **Archana Wadhwa:**

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

accordingly heard Sh. K.K. Jaiswal, Id. SDR for Revenue and none appeared for the respondent.

2. As per the facts on record the respondents were engaged in the manufacture of M.S. pipes falling under Chapter 73 of the Central Excise Tariff Act. They are registered under the category of Goods Transport Agency and are paying Service Tax thereof. Services Tax on the freight paid, ^{when} ~~without~~ inputs are received in the factory and the freight paid at the outward transportation of the finished goods to their customers was being paid by them.

3. The respondents filed a refund claim on 13.4.2006 for the Service Tax amounting to Rs.9,91,428/- on outward freight for the period April 2005 to August 2005 on the ground that the Service Tax required to be paid by them should have been calculated after availing the abatement of 75% of the value in terms of Notification No. 32/2004-ST.

4. The adjudicating authority rejected the refund claim on the ground that the respondent did not follow the conditions of the said notification and the declarations regarding non-availment of Cenvat credit by the transporter has not been given on the individual invoices/challans/GRs/consignment notes. He, however, admitted that the declarations have been given by the Goods Transport Agencies but the same are on the dates beyond the period under reference, which cannot be accepted. He accordingly rejected the refund claim on the above ground as also on the ground that the same is hit by unjust enrichment.

5. On an appeal against the above order, the Commissioner (Appeals) allowed the refund claim by setting aside both the above grounds adopted by the original adjudicating authority. For better appreciation, we reproduce relevant paragraph as under :-

"With regard to non-fulfilment of conditions, I observe that Notification No. 32/2004-ST, *supra* confers a substantial benefit in that it provides for abatement to the extent of 75% of the gross amount charged for the service provided. The conditions for availing of the said benefit are that the Goods Transport Agency does not avail of the benefit under the Cenvat credit scheme or of that under Notification No. 12/2003-ST *supra*. In the present case, the appellants inadvertently deposited Service Tax on 100% of the gross amount charged instead of on 25% during the period in question. Thereafter, they filed the impugned refund claim for the excess Service Tax so deposited. In other words, they opted for the benefit provided by the said exemption notification at a later date. The requisite declarations under the said notification were also furnished by them to the Department. I find that the Department has not challenged the fact that the Goods Transport Agencies have not availed of either of the above-said two benefits. It is settled law that, if the eligibility criterion is satisfied, a substantial right conferred by law cannot be taken away for procedural infringements. The Hon'ble Supreme Court, in **Compack (P) Ltd. Vs. CCE, Vadodara** (2005 (189) ELT 3 (SC) held that, while interpreting an exemption notification, once the eligibility criteria are satisfied by the assessee, conditions are to be construed liberally in the case of **Applicomp India Ltd. Vs. Commissioner of Customs, Bangalore** (2007 (213)ELT 317 (Tri.-Bang.), the Hon'ble Tribunal held that, so long as the appellants fulfil the conditions of the exemption notification, they should be given the benefit even when they opt for the same at a later date. In **CCE, Tirupathi Vs. Amara Raja Power Systems (P) Ltd.** (2006 (201) ELT 599 (Tri.-Bang.), benefit of the exemption notification was allowed in spite of the fact that the requisite certificate was not produced at the time of clearance, as that was only a procedural lapse for which substantial benefit could not be denied.

Coming to the question of unjust enrichment, I find that the impugned amounts of Service Tax have been deposited by the appellants through TR-6 challans. Copies of the challans have been placed on record. The tax for each of the five months in question has been deposited in the succeeding month. Thus the presumption of the tax burden having been passed on to the customers, contemplated under Sections 11B(1) and 12B of the Central Excise Act, 1944, cannot be raised in this case. The Hon'ble High Court of Punjab & Haryana at Chandigarh, while answering a reference in **CCE, Chandigarh-I Vs. Modi Oil and General Mills** (2007 (210) ELT 342 (P&H) held that incidence of duty could not be transferred to the buyer after the date of clearance as duty had been paid on a subsequent date and the same is sufficient to rebut the presumption raised under Section 12B.

The adjudicating authority has recorded a finding that, on examination of the bills/invoices raised by the appellants and their ledger, it is proved beyond doubt that they have received the total billed amount and thus have passed on the tax incidence to their customers. Sample copies of the impugned invoices and the corresponding extracts of the appellants' party wise ledger are on record. It is seen that, although the appellants have charged freight from their customers, the Service Tax payable thereon has not been charged. Thus, the above finding of the adjudicating authority is not based on fact but only on surmise. In cases of refund claim of duty which was paid subsequent to clearance of goods, the burden rests on the Department to establish that the claim was barred by unjust enrichment, as presumption under Section 12B, supra is not applicable to such cases. The Department not having discharged the burden, the claim is to be allowed. I reach this finding on the basis of the decision of the Hon'ble Tribunal in **CCE, Pondicherry Vs. Southern Agrifurane Industries Ltd.** (2004 (178) ELT 980 (Tri.,-Chennai) wherein it was so held. The impugned Order-in-Original dated 8.9.2006 therefore suffers from a legal infirmity and deserves to be set aside."

)s

The said order (impugned before us.

6. The Revenue in their memo of appeal have contended that the Commissioner (Appeals) has examined only the sample invoices and not the entire invoices involved in the refund claim. They have also challenged the findings of the appellate authority on the ground of unjust enrichment.

7. We find that the fact of filing declaration by the transporters that no Modvat credit stand availed by them does not stand disputed by the Revenue. In fact the original adjudicating authority has also held that the declaration stand filed. However, he has rejected the refund on the ground that such declarations were not on each of the invoice and were filed after the services were available. We do not find any merits in the above reasoning of the original adjudicating authority. The Commissioner (Appeals) has correctly observed that by filing declaration, the basis of Notification No. 32/2004-ST dated 3.12.04 stands fully satisfied, in which case abatement to the extent of 75% of the gross amount charged was available to the assessee.

8. As regards unjust enrichment also, Revenue has simply contended that the burden of proof is on the assessee. We have no quarrel with the above legal issue. However, the findings of the appellate authority with the said tax was paid subsequent to the clearance of the goods and the party wise ledger on record clearly show that the appellants have only claimed freight from their customers and Service Tax paid has not been charged, do not stand rebutted by the Revenue. In fact the said finding is not even contested on facts.

9. In view of the above, we find no merit in the Revenue's appeal and reject the same.

(Pronounced in Court)

(ARCHANA WADHWA)
MEMBER (JUDICIAL)

(M. VEERAIYAN)
MEMBER (TECHNICAL)

RM