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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/237 & 271/2007 - CU[DB] Date **23/02/2011**

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

To :
C.C.E ALLAHABAD
38,M.G.MARG, CIVIL LINES, ALLAHABAD

C.C.E ALLAHABAD Appellant

Vs

M/S JAYPEE REWA PLANT CEMENT Respondent

I am directed to transmit herewith a certified copy of **Final order No. ST/46-47/ 2011 CU[DB]** dated 17.02.11 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 JAYPEE REWA PLANT CEMENT
(REGIONAL MARKETING
OFFICE), 45/21, MUIR ROAD,
ALLAHABAD (U.P.)
2. Adv. / Consult Mr. V.Laxmikumaran, Adv
B-6/10, Safdarjung Enclave
New Delhi – 29
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. 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 (Haryana)
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)

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
WEST BLOCK NO.II, R.K. PURAM, NEW DELHI-110066.
BENCH-DB

Date of Hearing:15.2.2011

For approval and signature:

HON'BLE Mr. ASHOK JINDAL, MEMBER (JUDICIAL)
HON'BLE MR. MATHEW JOHN, 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?	Yes
2	Whether it should 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?	No
4	Whether Order is to be circulated to the Departmental authorities?	No

Service Tax Appeal No. ST/237/2007

[Arising out of Order-in-Appeal No.08-ST/ALLD/2007 dated 19.02.2007 passed by the Commissioner (Appeals), Central Excise, Allahabad (U.P.)]

Commissioner of Central Excise, Allahabad ...Appellant

Vs.

M/s.Jaypee Rewa Plant Cement, Allahabad ... Respondent

Present for the Appellant : Shri.Amrish Jain, SDR
Present for the Respondent: Shri.B.L. Narasimhan, Advocate

Service Tax Appeal No. ST/271/2007

[Arising out of Order-in-Appeal No.08-ST/ALLD/2007 dated 19.02.2007 passed by the Commissioner (Appeals), Central Excise, Allahabad (U.P.)]

M/s.Jaypee Rewa Plant Cement, Allahabad ...Appellant

Vs.

Commissioner of Central Excise, Allahabad ... Respondent

Present for the Appellant : Shri.B.L. Narasimhan, Advocate
Present for the Respondent: Shri.Amrish Jain, SDR

Coram: HON'BLE MR. ASHOK JINDAL, MEMBER (JUDICIAL)
HON'BLE MR. MATHEW JOHN, MEMBER (TECHNICAL)

Final **ORDER NO.** ST/46 & 47/11 **DATED:** 17.2.11

PER: ASHOK JINDAL

Appeal No.ST271/07 has been filed by the assessee, namely, J.P. Rewa Plant Cement against the order of service tax demand for goods transport operators service and Appeal No.ST/237/07 has been filed by the Revenue against the dropping of penalty against the assessee. A show cause notice was issued on 14.11.2003 regarding the demand of service tax in respect of goods transport operators services. The contention of the assesses is that the levy of tax was set aside by the Hon'ble Supreme Court in the case of Leghu Udyog Bharati v/s. Union of India reported in 1999 (112) ELT 365 S.C. Thereafter the relevant provisions were amended retrospectively but no fresh show cause notice was issued to the appellants. In this situation the assessee relied on the decision of the Tribunal in the case of CCE, Raipur vs. Jaiswal Equipment and Holding, Final Order No.336/07-ST dated 06.06.2007, whereby the demand of service tax was set aside.

2. Ld. Advocate for the assessee also relied on the decision of Union of India vs. Shri Mahesh Granites Pvt. Ltd. reported in 2008 (1) or (10) STR 3 (Raj.) He also relied on the decision

of CCE, Vadodara, vs. Gujarat Carbon & Industries Ltd. reported in 2008 (12) STR 3 (S.C.) and CCE vs. Eimco Elecon Ltd. reported in 2010 (20) STR 603 (Guj.). On the other hand, the ld. DR reiterated the impugned order and submitted that the penalty is to be imposed on the assessee.

3. Heard and considered.

4. On perusal of the records before us and the submission made by both the sides, we find that in the present case the show cause notice was issued on 4.11.2003 and after amendment of the provisions of service tax, the notice was not revised nor the fresh notice was issued. Moreover, in the case of Union of India vs. Shri Mahesh Granites Pvt. Ltd. the Hon'ble Rajasthan High Court on identical facts has observed as under:-

> ***5.*** *We have considered the arguments of the learned Counsel for the Union of India and perused the impugned judgment of the tribunal. The perusal of the judgment of the tribunal shows, that a limited issue has been answered, which is otherwise covered by the judgment of Hon'ble Apex Court, in case of L.H. Sugar Factories v. CCE, Meerut-II, reported in 2005 (187) E.L.T. page 5 (S.C.). The issue involved herein and in the said case was as to whether the Show Cause Notice can be served by invoking the provision of Section 73 of the Act, when admittedly, assessee is not covered by the provision of Section 70, but was covered by the provisions of Section 71A of the Act. The tribunal relaying on the judgment of the Hon'ble Apex Court held that the Show Cause Notice under Section 73 is not maintainable, as it does not cover*

those cases, which falls under Section 71A of the Act. The issue regarding the liability to pay tax and all other matters were not required to be gone into and has not even been decided in view of above facts. Assessee had challenged issuance of the Show Cause Notice, by the respondent by invoking the provision of Section 73 of the Act. Hence, the main argument taken by the learned Counsel for the Union of India, that the tribunal failed to consider the issue of liability of payment of service tax by the assessee is not correct, as the said issue can be looked into if initiation of proceedings for that purpose is as per law. Hence, the argument raised by the learned Counsel for the appellant cannot sustain because even in the earlier judgment rendered by the tribunal and also in the judgment decided by the Hon'ble Apex Court maintaing the view of the Tribunal, held that the Show Cause Notice under Section 73 cannot be issued by the Department. The department is not however debarred to take action as per any other provision of the Act of 1994 if so permissible for recovery of Tax, if any.

5. The similar view has taken by the Hon'ble Rajasthan High Court in the case of Shri Mahesh Granites Pvt. Ltd. (supra) relying on the decision of Hon'ble Apex Court in the case of Gujarat Carbon & Industries Ltd. (supra), we find that the issue is no more resintegra in the light of the above cited decisions. Accordingly, demands against the assessee are not sustainable. When there is no demand, the question of imposing penalty does not arise.

6. With these findings, the assesse's appeal is allowed and Revenue's appeal is rejected.

[Pronounced in the open Court on 15.02.2011].

(ASHOK JINDAL)
MEMBER (JUDICIAL)

(MATHEW JOHN)
MEMBER (TECHNICAL)

Anita