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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/12 /2007 - CU[DB] Date **23/05/2012**

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

To :
KISAN SAHKARI CHINI MILLS LTD.
ANUPSHAHAR, DISTT. BULLANDSHAR U.P.

KISAN SAHKARI CHINI MILLS LTD. Appellant

Vs

C.ST NOIDA Respondent

I am directed to transmit herewith a certified copy of **Final order No.ST/A/392 2012 CU[DB]** dated 22.05.12 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.ST NOIDA
B-123, SECTOR-V NOIDA U.P

2. Adv. / Consult
MR.VINAY GARG
C-253, 1ST FLOOR DEFENCE COLONY,
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-3
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.12/2007**

(Arising out of order in appeal No.137/CE/Appl/Noida/06 dated 29.9.06 passed by the Commissioner of Customs & Central Excise(Appeals), Noida)

Date of Hearing: 9.4.2012
For Approval and signature: Date of pronouncement: 22/05/12

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

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1. Whether Press Reporters 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 lordships wish to see the fair copy of the order?
4. Whether order is to be circulated to the Department Authorities

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M/s Kisan Sahkari Chini Mills — Appellant
Vs
CST, Noida — Respondent

Appeared for the Appellant: None
Appeared for the Respondent: Shri K.P. Singh, DR

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

Final ORDER No. ST/A/392/12 - Cus.

Per Mathew John:

When the matter was called none appeared for the Respondent. So the file was studied with reference to material on record and after hearing the A. R. for Revenue. We find that the issue involved in this case is already decided by two High Courts.

2. The matter involved in this appeal relates to payment of service tax on services rendered by goods transporters which is demanded from the Appellant as receiver of the service as per provisions of Rule 2 (d) (xvii) of the Service Tax Rules 1994, during the period 16-11-97 to 02-06-98. **The Show Cause Notice in this matter was issued on 08-11-04.**

3. An issue came up that Rule 2 (d) (xvii) of the Service Tax Rules 1994 was ultra virus the provisions of the Finance Act, 1994 in as much as the Act provided for demanding duty only from service providers and not from receivers of service. This was a matter of a few decisions of the Courts including the Apex Court and also a matter on which Government of India made certain retrospective legislations. In brief the issue involved in these cases is whether the retrospective amendments made were good enough for collecting the tax liability from the service receivers who did not file any returns and did not pay the tax.

4. The major decision to the effect that Rule 2 (d) (xvii) was ultra virus was in the case of Laghu Udyog Bharati reported at 1999 (112) ELT 365 SC. During the said period there were some service receivers who had paid service tax and there were some others who did not file any return or pay service tax. The assesses involved in the present cases are of the latter category.

5. To overcome the defect pointed out by the Apex Court in the case of Laghu Bharati Udyog (Supra), The Parliament made retrospective amendment by section 117 of the Finance Act, 2000. This amendment validated the action taken under the said rule not withstanding any judgement, decree or order of any court, Tribunal or any authority. Now the question arose whether this amendment was good enough to issue demands under section 73 of Finance Act, 1994 on persons who had not paid tax during the said period a per Rule 2 (d) (xvii). The dispute raised was that during the relevant period, such service receivers were not required to file any return under Section 70 and they were not

required to disclose any information because they were not liable to the assesse under Section 71.

6. Section 73 of the Finance Act as it stood prior to the amendment made on 10-09-2004 to read as under:

"73. **Value of taxable services escaping assessment. - If –**

(a) the Assistant Commissioner of Central Excise or, as the case may be, the Deputy Commissioner of Central Excise has reason to believe that by reason of omission or failure on the part of the assessee, to make a return under section 70 for any prescribed period or to disclose wholly or truly all material facts required for verification of the assessment under section 71, the value of taxable service has escaped assessment or has been under-assessed or any sum has erroneously been refunded, or;

(b) notwithstanding that there has been no omission or failure as mentioned in Clause (a) on the part of the assessee, the Assistant Commissioner of Central Excise or, as the case may be, Deputy Commissioner of Central Excise has, in consequence of information in his possession, reason to believe that the value of any taxable service assessable in any prescribed period has escaped assessment or has been under-assessed, or any sum has erroneously been refunded,

he may, in cases falling under Clause (a), at any time within five years, and in cases falling under Clause (b), at any time within six months from the date for filing the return, serve on the assessee a notice and proceed to assess or reassess the value of the taxable service.

Explanation - Where the service of the notice is stayed by an order of a court, the period of such stay shall be excluded in computing the aforesaid period of five years or six months, as the case may be."

7. In the meanwhile legislature amended Finance Act, 1994 again by Finance Act 2003 to insert a clause 71A retrospectively for the period 16th day of July, 1997 and ending with the 16th day of October, 1998, reading as under:

> '**71A. Filing of return by certain customers.** - Notwithstanding anything contained in the provisions of sections 69 and 70, the provisions thereof shall not apply to a person referred to in the proviso to sub-section (1) of section 68 for the filing of return in respect of service tax for the respective period and service specified therein and such person shall furnish return to the Central Excise Officer within six months from the day on which the Finance Bill, 2003 receives the assent of the President in the prescribed manner on the basis of the self assessment of the service tax and the provisions of section 71 shall apply accordingly.';"

8. Still there appeared to be difficulty in recovering the amounts not paid during the said period because section 73 of Finance Act, 1994 enabling issue of demand short levy did not include returns filed in the new section 71A inserted as indicated above. The question whether this amendment enabled issue of notices for recovery of taxes not paid in the impugned circumstances under the provisions of section 73 of the Act as it stood prior to 10-09-2004 was initially decided by Tribunal in the case of L.H. SUGAR FACTORIES LTD. Vs. CCE- 2004 (165) E.L.T. 161 (Tri. - Del.) which was affirmed by the Apex Court as reported at 2005 (187) ELT 5 (SC) in favour of the service recipients.

9. After amendment by Finance Act 2004, Section 73 was made applicable without reference to any specific section under which return was to be filed as was the case earlier. So the issue had to be decided with reference to the relevant date as defined in sub-section (6) of section 73 as re-produced above.

10. Because there were conflicting decisions of the co-ordinate Benches on the issue whether recovery provisions would apply to the impugned short levies for which Show Cause Notices were issued after 10-09-2004 the matter was refereed to Larger Bench of the Tribunal in appeal numbers Appeal Nos. ST/32, 88/2007 and

532/2006 as reported at 2007 (8) S.T.R. 496 (Tri. - Del.). In this decision the Larger Bench of Tribunal held that the Show Cause Notices issued in the matter after amendment of section 73 by Finance Act, 2004 are sustainable.

11. We note that notwithstanding the decision of the Larger Bench of the Tribunal as discussed above, various High Courts have decided that demands issued in 2004 for liability that arose for the period the 16-11-97 to 02-06-98 is barred by limitation. They rely on the following decisions in this regard:

(i) Precot Mills Vs. UOI-2011 (24) STR 283 (Ker)
(ii) CCE Vs. Eimco Elecon Ltd-2010 (20) STR 603 (Guj)
(iii) CCE Vs. Hiran Aluminium Ltd-2010 –TIOL 682-HC-AHM-ST;

12. For the sake of convenience para 3 and 4 of the judgement of the Hon. Gujarat High Court in the case of Eimco Elecon Ltd (supra) are reproduced below:

> "**3.** *It is not in dispute that till Finance Act, 2003 introduced a Proviso under sub-section (1) of Section 68 of the Finance Act, 1994 the liability to pay Service Tax was on the person providing taxable service, and not on the recipient. Simultaneously Section 71A came to be introduced by the Finance Act, 2003 casting the liability on the service recipient to file a return within six months from the date on which the Finance Bill, 2003 receives assent of the President. However, even after this amendment, the Apex Court has noted that in absence of Section 71A of the Finance Act, 1994 (which has retrospectively been introduced w.e.f. 16-7-1997) appearing in Section 73 of the Finance Act, 1994 no levy of any short duty or non-levy could have been demanded.*
>
> **4.** *Thus, it is apparent that till the point of time Section 73 of the Finance Act, 1994 came to be substituted w.e.f. 10-9-2004 provisions of the said section could not be made applicable despite retrospective amendment in Sections 68 and 71A of the Finance Act, 1994. In these circumstances, admittedly, the assessee could not be faulted with for*

not having filed a return after getting himself registered. More particularly, when one considers the language employed in the Proviso below sub-section (1) of Section 68 and the provisions of Section 71A of the Finance Act, 1994, it is not possible to state that the language of the Statute is so clear that any default can be fastened on the respondent-assessee."

13. We are of the view that when an issue is decided by the High Courts and such decisions were not before the Larger Bench of Tribunal when it took the decision on the same issue, we should respectfully follow the order of the High Courts keeping in view the hierarchy of Courts and Tribunal. So we follow the decisions of the High Courts as cited above and hold that the demands issued after in 2004 or later in respect of the short levies in dispute in the three cases filed by assesses are not maintainable.

14. Consequently we set aside the impugned order and allow the appeal.

(Pronounced in Court on 22/05/12)

(Archana Wadhwa)
Member(Judicial)

(Mathew John)
Member(Technical)

MPS*