25

TELEGRAM : CEGCANAL
Website : www.cestat.gov.in

REGISTERED / AD
Email : cestat08@gmail.com

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066
SINGLE MEMBER APPEAL BRANCH

Appeal No. ST/32 & 88 /2007
ST/532 & 67/06

Date **31/05/2012**

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

To :
M/S AGAUTA SUGAR & CHEMICALS
VILLAGE- BHANDORIA P.O. AURANGABAD, DISTT-BULANDSHAHR.

M/S AGAUTA SUGAR & CHEMICALS Appellant
Vs
C.C.E.NOIDA Respondent

I am directed to transmit herewith a certified copy of **Final order No.ST/A/407-410 2012 CUS[DB]** dated 30.05.12 passed by the Tribunal under **Section 129, (B) of the Customs Act,1962 & Financial Act 1994 relating to Service Tax**

Assistant Registrar
(SM Appeal Branch)

Copy to :

1. Respondent
C.C.E.NOIDA
OFFICE OF COMMISSIONER OF CUSTOMS,CENTRAL EXCISE AND SERVICE TAX, C-56/42, SECTOR-62, NOIDA - 201307
2. Adv. / Consult
MR.V. LAXMIKUMARAN
B-6/10, SAFDARJUNG ENCLAVE, NEW DELHI-110029
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
(CUS Appeal Branch)

R-700

14. M/S Jaipur Glass & Potteries - ST/ 88/07
Tonk Road. Jaipur.

15. M/S Gulsey Indu. Ltd - ST/ 532/06
Natha Bhawan
Chopasani Road
Jodhpur

16. CCE Raipur (CG)
Central Excise Building
Tikrapara Raipur (C.G)

17. M/S Nova Iron & Steel Ltd ST/ 67/06
Vill. & Post Dagori
Teh. Belha
Distt Bilaspur.

18. Mr. Bipin Garg
B-1/1289-A Vasant Kunj
New Delhi

19. CCE Jaipur. - ST/ 532/06
NCRB Statue Circle.
Jaipur.

20. Mr. O.P. Agarwal & Co.
56, Section 7. N.P.H. Road.
Jodhpur

21. Mr. K.K. Anand - ST/ 88/07
A-5 Basement Lajpat

22. CCE Jaipur-I
NCRB, Statue Circle-C
Scheme Jaipur

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

ST/Appeal No.32/2007, ST/Appeal No.532/2006,

ST/Appeal No.88/2007 and ST/Appeal No.67/2006

Date of Hearing: 14.3.2012

For Approval and signature:

Hon'ble Mrs. Archana Wadhwa, Member Judicial
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?

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?

ST/Appeal No.32/2007

(Arising out of order in appeal No.143/CE/Appl/Noida/06 dated 18.10.06 passed by the Commissioner of Customs & Central Excise(Appeals), Meerut-II, Noida)

M/s Agauata Sugar & Chemicals Appellant

Vs

CCE Noida Respondent

Appeared for the Appellant: Shri B.L. Narasimhan, Advocate
Appeared for the Respondent: Shri B.L. Soni, DR

ST/Appeal No.532/2006

(Arising out of order in appeal No.65/GRM/CE/JPR.I/06 dated 29.8.06 passed by the Commissioner of Customs & Central Excise(Appeals), Jaipur)

M/s Guljag Industries Ltd Appellant

Vs

CCE Jaipur-I Respondent

Appeared for the Appellant: None
Appeared for the Respondent: Shri B.L. Soni, DR

ST/Appeal No.88/2007

(Arising out of order in appeal No.104/GRM/ST/JPR.1/06 dated 7.12.06 passed by the Commissioner of Customs & Central Excise (Appeals), Jaipur)

M/s Jaipur Glass & Potteries Appellant

Vs

CCE, Jaipur-I Respondent

Appeared for the Appellant: Shri B.L. Narasimhan, Advocate
Appeared for the Respondent: Shri B.L. Soni, DR

ST/Appeal No.67/2006

(Arising out of order in original No.III/20/Arc/Comm/A/645/05 dated 17.1.06 passed by the Commissioner of Customs & Central Excise, Raipur)

CCE Raipur Appellant

Vs

M/s Nova Iron & Steel Respondent

Appeared for the Appellant: Shri B.L. Soni, DR
Appeared for the Respondent: Shri Mayank Garg, Advocate

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

FINAL ORDER ST/A/ 407-410/12-Cus

Per Mathew John:

In this proceeding four appeals are being decided. All the appeals are on the same issue. Three appeals are filed by assesses. One appeal is filed by Revenue. There is some difference about the date of issue of Show Cause Notice in this case.

2. The matter relates to payment of service tax on services rendered by goods transporters which is demanded from the receivers of the service as per provisions of Rule 2 (d) (xvii) of the Service Tax Rules 1994. All these cases relate to the period 16-11-97 to 02-06-98.

3. An issue came up that the above rule is 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. Before we examine the relevant decisions and also the retrospective amendment in law it is necessary to summarize the facts of the cases at hand. This is done in the following table.

Appeal No	Name of Assessee	Period of demand	Amount of tax demanded	Date of the SCN
ST/32/07	Augatha Sugar and Chemicals	16-11-97 to 02-06-98	6,75,545	08-11-04
ST/88/07	Jaipur Glass and Potteries	16-11-97 to 02-06-98	32,512	10-11-04
ST/532/06	Guljag Industries	16-11-97 to 02-06-98	10,279	08-11-04
ST/67/06	Nova Iron and Steel	16-11-97 to 02-06-98	20,52,244	SCN dated 01-10-01 and Corrigendum. Dated 01-11-04

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.).

11. Pursuant to the above reference, the Larger Bench of Tribunal has given its decision vide Misc Order Misc. Order No. 219/2010-SM(BR)(PB), dated 1-9-2010 in Appeal Nos. ST/32 & 88/2007 and ST/532/2006 reported at -2010 (19) S.T.R. 849 (Tri.

- LB). Now these appeals are placed before this bench to pass final order in appeal nos ST/32 & 88/2007 and ST/532/2006 in pursuance to the above order. Thus three appeals in present proceedings relate to the cases where the matter was referred to larger Bench. The fourth one is on the same issue but there is no order in relation to that party. The operative part of the decision of the Larger Bench is as under:

> "**18.** *In the light of the foregoing, when we consider the submissions made on behalf of the appellants, we arrive at the following inescapable conclusions : -*
>
> *(i) The decision in Mangalam Cement (supra) lays down the correct proposition in law holding that the relevant date has to be determined with reference to Section 71A of the Finance Act, 1994 read with Rule 7A and that the time period for issue of a valid demand has to be calculated with reference to such relevant date under the amended Section 73.*
>
> *(ii) The appellants cannot now take a stand that the tax was payable during November 16, 1997 to June 1, 1998 when in fact no tax could be successfully demanded and recovered from them earlier in view of Hon'ble Supreme Court's decisions in the case of Laghu Udyog Bharati (supra) and L.H. Sugar (supra). Having laid a successful challenge against the demand during the earlier period, now they cannot turn around and say that the department should have raised the demand during that period itself. Such arguments are in the nature of 'Heads I win, tails you lose' logic designed to deprive the public revenue its legitimate dues even after the levy has been declared valid by the highest Court of the land.*
>
> *(iii) As rightly pointed out by the ld D.R, in the case of S.S. Gadgil (supra), time limit was sought to be extended after the expiry of the prescribed period and in that context the said judgment was delivered by the Hon'ble Supreme Court, but in the instant cases, a special time limit has been prescribed under Section 71A which was inserted by the Finance Act, 2003 to operationalise the retrospectively validated levy and hence the ratio of S.S. Gadgil (supra) is not applicable to the present cases.*
>
> *(iv) The decisions given in R.K. Marbles (supra) and in B.P.L. Engineering (supra) do not lay down the correct proposition of law having been rendered by wrong application of the decision in L.H. Sugar and hence those have no precedential value.*
>
> **19.** *As the issue involved in these appeals relate to demand of tax and hence to determination of the rate of tax*

applicable, after answering the reference as above, we direct the Registry to list the appeals before the concerned Division Bench for final orders."

12. The Counsels for assessees point out 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;

13. 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."

14. The argument of the Counsels is that the matter has been decided by two High Courts in favour of assesses which are directly opposite to the decision given by the Larger Bench and since the Larger Bench has not considered the above decisions of the High Courts, the final order should be passed based on the decisions of the High Courts and not based on the decision of the Larger Bench of Tribunal.

15. 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.

16. Consequently the three appeals filed by the assessees are allowed.

17. We would like to examine the case of Nova Iron and Steel separately. In this case, unlike in the other case a demand was issued as early as 01-10-2001. The department had been pursuing with the Respondents to furnish the information regarding value of service received by them. They asked for such information vide letters vide letter dated 10-01-2001, 29-01-2001, and 14-03-2001. They received information vide letter dated 23-03-01 received by the department on 23-04-01 and SCN was issued on 01-10-01. Significantly the Show Cause Notice invoked section 66 and 68 (and not section 73) of the Finance Act for demanding the

tax short paid. Para 17 of the SCN is relevant. Section 66 creates the charge for service tax and section 68 prescribes the procedure for payment and these are not sections for issue of notice which was short paid. The case of the assesses is that at the time when they received the tax these sections were not applicable to them. So there was no short payment at the relevant time The provisions of section 73, which was the provision for issuing notices for tax short paid after retrospective amendment is already reproduced in para 6 above.

18. Thus in this case Notice was issued after retrospective amendments made by Finance Act, 2001 but before the retrospective amendments by Finance Acts, 2003 and Finance Act 2004. But the question whether such notices issued after amendment made by Finance Act, 2001 was valid for recovery of taxes short paid during 16-11-97 to 02-06-98 was the issue before the Tribunal in the case of L.H. Sugar Factories Ltd (Supra) and the Tribunal answered the question in the negative and the decision has been affirmed by the Hon. Apex Court. Further after amendment made by Finance Act 2004, Revenue issued a corrigendum to the notice dated 01-11-04quoting the amendments made in Finance Act, 2004. This has to be essentially understood as a notice issued on 01-11-04 when the corrigendum was issued. The ratio of the decisions of the High Courts quoted in para 13 above is to the effect such notices issued in 2004 also cannot be enforced. Therefore in this case also the decision goes in favour of the assesse. So this appeal filed by Revenue is rejected.

19. Thus the three appeals filed by assesses are allowed and the fourth appeal filed by Revenue is rejected.

(Pronounced in Court on 30/5/12)

(Mathew John)
Member(Technical)

(Archana Wadhwa)
Member(Judicial)

MPS*