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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/268 /2008 - CU[DB] Date **31/05/2012**

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

To :
M/S AANEX SEVICES
SCF-8, PHASE-I,INDUSTRIAL AREA,MOHALI
(PUNJAB)

M/S AANEX SEVICES Appellant

Vs

C.C.E. CHANDIGARH Respondent

I am directed to transmit herewith a certified copy of **Final order No.ST/A/411/ 2012 CU[DB]** dated 05.03.12 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.C.E. CHANDIGARH
C.R. BUILDING, PLOT NO. 19,
SECTOR 17-C, CHANDIGARH
160017

2. Adv. / Consult
MR.P.K.SAHU
D-247,SECOND FLOOR,
DEFENCE COLONY, N 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

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi – 110 066.

Date of Hearing : 5.3.2012
Date of Pronouncement : 30.5.2012

Service Tax Appeal No. 268 of 2008

[Arising out of Order-in-Appeal No. 105/CE/CHD/08 dated 31.1.2008 passed by the Commissioner (Appeals), Customs & Central Excise, Chandigarh]

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?	Yes
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 Whether their Lordships wish to see the fair copy of the order?	No
4.	Whether order is to be circulated to the Department Authorities?	Yes

M/s Aanex Services — Appellants

Vs.

CCE, Chandigarh — Respondent

Appearance:

Appeared for Appellant : Shri P.K. Sahu, Advocate
Appeared for Respondent : Shri B.L. Soni, A.R.

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

Final Order No. ST/A/411/12-Cus dated............

Per **Mathew John :**

The appellant booked cargo space with Indian Airlines Limited ("IAL" for short), under City Specific Direct Shipment (CSDS) Scheme and re-distributed such cargo space in retail to persons who wanted to send cargo in such space. A bunch of Airway Bills were issued by IAL on security deposit and submission of bank guarantee. The Appellant paid to the IAL for cargo space booked by them. It is stated that IAL wanted the appellant to pay service tax separately. The appellant submits that they paid such service tax against receipts issued by IAL. During the period 01-04-05 to 30-09-05 the appellant took Cenvat credit of such service tax paid to IAL on the basis of photocopies of receipts issued by IAL and utilized it for payment of service tax on space resold by them to retail customers. Revenue was of the view that such Cenvat Credits were taken without having documents specified in Rule 9 (1) of Cenvat Credit Rules, 2004 and hence were unauthorized credit. Revenue issued a notice dated 14-11-06 for recovering unauthorized credits so taken and utilized. The Notice has been adjudicated resulting in confirmation of tax demand of Rs. 13,51,976/- along with interest. Further a penalty equal to this amount has been imposed on them under Rule 15 (4) of Cenvat Credit Rules, 2004 read with section 78 of Finance Act, 1994.

2. Aggrieved by the order the appellant filed an appeal with the Commissioner (Appeal) who did not give any relief to the appellant. Aggrieved by the order of the Commissioner (Appeal), the appellant has filed this appeal before the Tribunal.

3. The Counsel for appellant submits that the activity of the appellant was not a taxable activity because there was no service being rendered. The contention is that they were buying and selling cargo space and this cannot be considered as "Business Auxiliary Service" under which category they paid service tax. He relies on the following decisions in support of his argument:

(a) **Bhopal Sugar Industries Ltd. Vs. STO** (1997) 3 SCC 147;

(b) **Sunrise Associates Vs. Govt. of NCT of Delhi**-(2006) 5 SCC 603.

4. The Counsel submits that they paid service tax under a wrong understanding of law. Since there is no liability to tax ab-

initio the present demand is not maintainable. It is seen that this contention was not raised before the adjudicating authority but was raised before the First Appellate Authority. The Counsel argues that this is purely a legal issue which can be raised at any stage of the proceeding.

5. The Counsel submits that the appellants produced proof of payment of service tax on input service in the form of following documents:

(a) Photocopies of receipts issued by IAL for payment towards service tax paid by the appellant to IAL;

(b) certificate from IAL showing the amounts collected by IAL from the appellants, indicating cheque number and date issued by appellant towards service tax, Service tax Registration number of IAL and certifying that the impugned service tax amounts were deposited with the service tax authorities

(c) Certificate from Centurion Bank the banker of the appellants showing that the amounts as per the cheques were debited in appellant's account

6. The Counsel for appellant relies on the proviso to Rule 9(2) of the Cenvat Credit Rules 2004 reading as under:

(2) No CENVAT credit under sub-rule(1) shall be taken unless all the particulars as prescribed under the Central Excise Rules, 2002 or the Service Tax Rules, 1994, as the case may be, are contained in the said document :

***Provided** that if the said document does not contain all the particulars but contains the details of duty or service tax payable, description of the goods or taxable service, assessable value, Central Excise or Service tax registration number of the person issuing the invoice, as the case may be, name and address of the factory or warehouse or premises of first or second stage dealers or provider of taxable service, and the Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise, as the case may* *be, is satisfied that the goods or services covered by the said document have been received and accounted for in the books of the account of the receiver, he may allow the CENVAT credit*

7. The Counsel argues that credit can be allowed on the basis of documents produced and relies on the following decisions:

(a) **CCE Vs. Eupec-Welspun Pipe Coating India Ltd-** 2010(260) ELT 381 (Guj)

(b) **UOI Vs. Hira Steels Ltd.** -2011 (273) ELT 370 Chattisgarh

(c) **Bharat Heavy Electricals Ltd. Vs. CCE-**2011 (274) ELT 359 (Tri-Del)

(d) **Vardhan Acrylics Ltd. Vs. CCE**-2006 (204) ELT 321 (Tri)

(e) **Sarbi Petroleum and Chemicals Ltd Vs. CCE**-2005 (192) ELt 648 (Tri)

8. The Ld. A. R. for Revenue submits that the appellants had accepted that the service rendered by them was taxable. They paid service tax on such services and the customers to whom they had provided service would have taken Cenvat credit of the tax so paid by them. After having not disputed the tax liability during the relevant time they cannot dispute such liability for such past periods in this proceeding which is on a different issue. He points out that the issue involved in this dispute is a very simple issue as to whether Cenvat credit could be taken without documents prescribed in Rule 9(1) of Cenvat Credit Rules, 2004. He also points out that the issue is not on account of any documents misplaced or lost, but the issue is about documents which should have been issued under Service Tax Rules but were not issued by the service provider and the appellant taking Cenvat credit relying on some other documents. He further points out that the receipts issued does not show the assessable value of the services or its classification. According to him there is no merit in the contentions

of the appellant and allowing credit based on the type of documents produced by the appellant would set at naught Rule 9 (1) of Cenvat Credit Rules, 2004 and such an interpretation should not be adopted.

9. The facts as presented by the appellant give rise to many questions like,-

(a) If IAL was selling cargo space and the appellant was buying cargo space and then selling such cargo space to the ultimate customer, was IAL providing any service to the appellant or the ultimate customer? Can this method of buying and selling of cargo space be used for avoiding tax payable under section 65(105) (zzn)?

(b) If there was a taxable service under section 65 (105) (zzn) being provided by IAL to whom was it provided - to the appellant or the ultimate customer who booked cargo?

(c) If there is a conclusion that the service was being provided by IAL what was the value of service provided by IAL? Was it the value at which space was 'sold' to the appellant or the value at which space was 'sold' to the ultimate customer?

(d) Did IAL issue any invoice to the ultimate customer showing the value of service and service tax paid on it? Did the appellant issue invoice to the ultimate Customer showing the value of service, its classification and service tax paid on the service?

(e) Did the ultimate customer take Cenvat credit on any invoice raised by the IAL or on invoice raised by the Appellant?

(f) Was the activity carried out by the appellant liable to be taxed under the category of "Business Auxiliary Service" ?

10. The Appellant is raising only question at (f) above and is silent on other questions. It may be possible to find answers to the above questions through enquiries regarding facts and through a

legal proceeding for determining the issues based on such facts. The present proceeding cannot be converted into a proceeding to find answers to the above questions because these issues were not before the adjudicating authority. Such a proceeding at this stage will upset the vested rights of the persons who paid service tax to the appellants, to take credit of such tax paid and therefore we hold that such a question is not maintainable at this stage.

11. The questions in para 9 above are listed just to demonstrate the importance of insisting on a document prescribed under Rule 9 (1) of the Cenvat Credit Rules, 2004 for allowing credit. If such invoices were being issued by IAL the above issues would have got settled in the normal course. If IAL did not want to follow the procedure of issuing invoices for impugned services rendered by them and showing the service tax payable, IAL is only ducking the above queries which are fundamental for levying service tax on the impugned activity and in allowing Cenvat credit as claimed by appellant.

12. We further note that the decisions relied upon by the appellant as mentioned in para 7 above were in relation to goods used as inputs in respect of which this type of questions do not arise and it is easy to apply the proviso to Rule 9(2) of the said rules. Input services are on a different footing altogether. In our opinion it is not a case of just ascertaining whether the tax amount has been deposited in the treasury by looking at the bank statements and then allowing credit to any person who stakes claim for credit of the tax so deposited.

13. In view of the above discussion and in view of the provisions in Rule 9 (1) of Cenvat Credit Rules, 2004, we hold that the appellant is not entitled to the credit in question.

14. Now one question to be examined is whether extended period of time can be invoked for demanding the credits improperly taken. We are of the view that this is not a case of

bonafide mistake. It is a attempt to avoid basic issues relevant for levy of service tax and taking of credit. The Rule is simple enough to understand and the arguments for avoiding compliance are complicated to understand and appear to be designed for reasons to avoid the questions relevant for determining tax liability. So we have come to the conclusion that the arguments are not maintainable. Credits are availed without disclosing to Revenue that the credits are being taken though the Rules are not complied with. We are of the view that the extended period of time can be invoked in such cases for demanding credits taken. Consequently the penalty imposed is also maintainable.

15. In the circumstances the appeal filed is rejected.

(Pronounced on 30/5/12)

(S. S. Kang)
Vice President

(Mathew John)
Member (Technical)