

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

Appeal No. ST/420 /2008,435 /2008 - CU[DB]

Date 12/06/2012

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

To :
M/S HINDALCO INDUSTRIES LTD.
RENUKOOT, DISTT. SONEBHADRA (U.P)
M/S HINDALCO INDUSTRIES LTD.

Appellant

Vs
Respondent

C.C.E ALLAHABAD

I am directed to transmit herewith a certified copy of **Final order No.ST/A/454-55 2012 CU[DB]** dated 15/05/12 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
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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-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

M/S HINDALCO INDUSTRIES LTD.
RENUKOOT, SONEBHADRA (UP)


Assistant Registrar
(Customs Appeal Branch)

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

Date of Hearing: 15.5.2012

For Approval and signature:

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? | <i>Yes</i> |
| 2. | Whether it would be released under Rule 27 of the CESTAT (Procedure) rules, 1982 for publication in any authoritative report or not? | <i>No</i> |
| 3. | Whether their lordships wish to see the fair copy of the order? | <i>Seen</i> |
| 4. | Whether order is to be circulated to the Department Authorities? | <i>No</i> |

ST/Appeal No.435/2008

(Arising out of order in original No.MP(ST)3/2005 31 of 2008 dated 20.3.2008 passed by the Commissioner of Customs & Central Excise, Allahabad)

M/s Hindalco Industries Ltd

Appellant

Vs

CCE, Allahabad

Respondent

ST/Appeal No.420/2008

CCE, Allahabad

Appellant

Vs

M/s Hindalco Industries Ltd

Respondent

Appeared for the Appellant: Shri B.L. Narsimhan, Advocate

Appeared for the Respondent: Shri P.K. Sharma, DR

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

Final ORDER No. 9/A/454-455/12-Cut

Per Mathew John:

In this proceeding two appeals, one by Hindalco Industries Ltd ("HINDALCO" for short) on whom demand is confirmed and another by Revenue against the same impugned order are being considered.

2. The matter relates to service tax demanded from the HINDALCO for the services of Clearing and Forwarding Agents received by the HINDALCO under provisions of Rule 2 (1) (d) (xii) of the Service Tax Rules. The Show Cause notice was issued on 11-10-2002. While adjudicating the notice the Commissioner confirmed the service tax along with interest. Further he imposed penalty under section 76 of Finance Act equal to Rs. 200 per day from the date of default to date of payment, penalty under section 77 and section 75A. HINDALCO has filed appeal challenging tax, interest and penalties. Revenue has filed appeal on the ground that the penalty imposed under section 76 should have been at the rate of 2% of the tax for every month instead of Rs. 200 per day imposed by the adjudicating officer.

3. This is a matter where there has been 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 provisions of Rule 2 (1) (d) shifting incidence from service providers to service receivers was ultra virus provisions of Finance Act, 1994 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 case of HINDALCO in the present cases is 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 notwithstanding any judgement, decree or order of any court, Tribunal or any authority.

6. The Show Cause Notice in this case is issued after the retrospective amendment made by Finance Act, 2000 but before the amendment made by Finance Act, 2003 and 2004 in this matter which are also being mentioned in this order for sake of clarity on the issue and for the reason that though Show Cause Notice was issued on 11-10-2002 it was adjudicated on 20-03-2008 during which time those amendments also had come into force.

7. After the retrospective amendment by Finance Act 2000, 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 as per Rule 2 (1) (d). 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 an "assessee" within the meaning of the word under Sections 70 and 71, specifically mentioned in section 73. This issue is relevant for deciding the present case.

8. 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."

9. The question whether notices issued under the provisions of section 73 of the Act as it stood prior to 10-09-2004, for recovery of taxes not paid for the said period 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. Going by this decision the demand in this case is not maintainable.

10. Now what is being stated is only for an understanding of the situation with reference to changes in law after the issue of the Show Cause Notice in this case.

11. Finance Act, 1994 was amended 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.'"

12. 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.

13. Section 73 was amended by Finance Act 2004, to replace section 73. After such amendment Section 73 was made applicable without reference to any specific section under which return was to be filed as was the case earlier. Revenue then issued notices invoking provisions of the new section 73 in many such cases where the service receivers had not paid tax during the period 16-11-97 to 02-06-98. No such notice has been issued in the case before us.

14. We note that two High Courts have decided that demands issued even after amendments by Finance Act, 2004 for liability that arose for the period the 16-11-97 to 02-06-98 were barred by limitation. The following decisions are relevant 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;

15. In view of the above position it is very clear that the demand issued in 2002 invoking provisions of section 73 of the Finance Act as existing at that time is not maintainable.

16. HIDALCO has a contention that the service involved was not service of clearing and forwarding agent because the agents were acting as selling agents on commission and not as a clearing and forwarding agent. This issue is not being examined because the demand is being held to be time barred

17. In view of the legal position as discussed above the Appeal filed by HINDALCO is allowed holding that the demand is time barred. Once the demand itself is held to be not maintainable the appeal for increasing penalty fails. So the appeal filed by Revenue is rejected.

(Pronounced in Court)

(Archan Wadhwa)
Member (Judicial)

(Mathew John)
Member (Technical)

MPS*