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FAX : 011-26108426 REGISTERED / AD

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

Dated: **05/12/2012**

To

Appellant as per address in table below

Respondent as per address in table below

Final Order No. **ST/A/732-733/2012-CU[DB]** dated **09/11/2012**

I am directed to transmit herewith a certified copy of order passed by the Tribunal under section **01(5) of the Finance Act, 1994 relating to Service Tax Act, 1994.**

Asstt. Registrar(CUSTOMS Appeal Branch)

	Application	Appeal	Name and Address of Appellant
1	ST/Stay/1671/2008	ST/524/2008	**INDIA THERMIT CORPORATION LTD.** 84/22, FAZAL GANJ,KANPUR.
			Name and Address of Respondent
2			**C.C.E. KANPUR** 117/7, Sarvodaya Nagar, Kanpur 208005.

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Copy To
3 Advocate(s) / Consultant(s):

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4 Bar Association, CESTAT, Delhi

5 Director Publications, Customs, Excise. I.P. Estate, Delhi

6 M/s Centax Publications Pvt. Ltd., 1512-B, Bhishm Pitamah Marg, 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, Satellite Road, Ahmedabad-15

10 LAWCRUX Advisors Pvt. Ltd., LAW House, 1-8, Sector-10, Faridabad 121003 (Haryana)

11 TaxIndiaOnline.com Pvt. Ltd., 2nd Floor, Vasant Arcade, Vasant Kunj, New Delhi - 110070

12 Mark Professional Services Pvt. Ltd., 108, Everest Block, Aditya Enclave, Hyderabad – 38

13 C.D.R. **14** Office Copy **15** Guard File

Asstt. Registrar(CUSTOMS Appeal Branch)

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

ST/Appeal Nos. 524/2008

(Arising out of order in appeal No.171-ST/Appl/KNP/2008 dated 24.4.2008 passed by the Commissioner of Customs & Central Excise (Appeals), Kanpur)

Date of Hearing: 9.11.2012

M/s India Thermit Corporation Ltd — Appellants

Vs

CCE, Kanpur — Respondent

ST/Appeal No. 856/2008

(Arising out of order in Revision No.16/2008-09 dated 8.9.2008 passed by the Commissioner of Customs & Central Excise, Kanpur)

Date of Hearing: 9.11.2012

M/s India Thermit Corporation Ltd — Appellants

Vs

CCE, Kanpur — Respondent

Appeared for the Appellant: Shri B.L. Narsimhn, Advocate
Appeared for the Respondent: Shri N. Pathak, DR

Coram: **Hon'ble Mr D.N. Panda, Judicial Member**
Hon'ble Shri Mathew John, Technical Member

Final ORDER No. ST/A/732-733/12-cus

Per Mathew John:

There are two appeals that are being considered in this proceeding. One is against an order issued by Commissioner (Appeal) under section 85 of Finance Act, 1994 confirming the tax demand and penalty under section 78 of Finance Act, 1994. The other appeal is against an order issued by Commissioner of Central

Excise under section 84 of Finance Act, 1994 imposing penalty under section 76 and 77 on account of the same short payment of tax for the same period.

Appeal No. ST/524/2008.

2. This is a case where the appellant was paying service tax on the services of Goods Transport Agency as a recipient of service. On freight paid for transportation of inputs into the factory they were paying service tax on the full freight value. On freight paid for transportation of goods from factory to the customers' premises they were paying service tax on 25% of the value of freight after availing the exemption under notification 32/2004-ST. Revenue issued a Show Cause Notice on the ground that such distinction is not warranted and on outward transportation also they should have paid tax on full value of freight. The demands were adjudicated confirming the demands along with interest and penalty under section 78. On Appeal filed by the assessee with Commissioner (Appeal) the adjudication order was upheld.

3. The demand confirmed is based on the argument that an assessee could not have availed abatement under Notif 32/2004-ST in certain instances of transportation and not for other instances of transportation. No such condition is seen in the notification. It is a conditional notification. The conditions are with reference to the transporter who rendered the service and not with reference to the person who availed service, that is the appellant. So the appellant

could avail the abatement depending on whether they could prove the condition in respect of each of the transporters who rendered the service. There is no compulsion that the appellant had to avail abatement under Notification 32/04-ST either on all cases of transportation service availed by them or on none. Since the proceedings have gone on such basis we do not find the impugned order maintainable. So the impugned order is set aside.

Appeal No. ST/856/2008

4. In this appeal also the issue involved is the same. As already stated the show cause notice issued was adjudicated by the adjudicating authority confirming the demand and interest and also imposing penalty under section 78. No penalties were imposed under section 76 and 77. Aggrieved by the adjudication order the appellants filed an appeal with Commissioner (Appeal) who upheld the adjudication order which is the order impugned in Appeal No. ST/524/2008.

5. Thereafter the Commissioner of Central Excise exercised powers under section 84 of Finance Act 1994 and issued a Notice for revision of the adjudication order. That show cause notice is adjudicated by the impugned order imposing penalties under section 76 and 77.

6. The main argument of the appellant is that the adjudication orders had merged with the order of the Commissioner (Appeals)

and such an order could not have been reviewed under section 84 of Finance Act, 1994 by the Commissioner of Central Excise.

7. Revenue's argument is that the adjudication order did not deal with the issue of penalties under section 76 and 77 and hence the issue had not merged with any order of Commissioner (Appeal) and hence the order under section 84 is maintainable.

8. Since we have held the demand itself to be not maintainable this order imposing penalties on that matter also cannot be maintained. It is not necessary to dwell on other issues raised.

9. This appeal also is allowed.

(Order pronounced in the open Court.)

(MATHEW JOHN)
Member Technical
MPS*

(D.N. PANDA)
Member Judicial