IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI
PRINCIPAL BENCH, COURT NO. III

Service Tax Appeal No. ST/503/2011-ST[DB]
Excise Appeal No. E/792/2011-ST[DB]
[Arising out of Order-In-Appeal No. 42-ST/PKJ/CCE/ADJ/2010 dated 22.12.2010 passed by CCE Delhi-I]

For approval and signature:
Hon'ble Mr. S.K. Mohanty, Member (Judicial)
Hon'ble Mr. B. Ravichandran, Member (Technical)

C.S.T. Delhi ...Appellant

Vs.

M/s. India Tourism Development Corporation Ltd. …Respondent

Appearance:
Ms. Vibha Narang (Advocate) for the Appellant
Mr. Ranjan Khanna, DR for the Respondent

CORAM:
Hon'ble Mr. S.K. Mohanty, Member (Judicial)
Hon'ble Mr. B. Ravichandran, Member (Technical)

Date of Hearing/ Decision.02.01.2017

Final Order No. 52347-52348 /2017

Per S.K. Mohanty:

Feeling aggrieved by the impugned order dated 22.12.2010 passed by the Commissioner (Adjudication), Service Tax, New Delhi, both the assessee as well as the Revenue have filed the appeal before this Tribunal. The grievance of Revenue is that service tax demand on money changers business has been dropped by the adjudicating authority. The assessee has filed the appeal on two issues mainly relating to disallowance of cenvat credit. The issue involved in Revenue's appeal is as to whether the income earned by the appellant on account of foreign exchange surrendered to Mass Group India Ltd. is taxable under the category of Business Auxiliary Service (BAS). On perusal of the impugned order, we find that upon analysis of the contract entered into between the Mass Group India Ltd., the Ld. Commissioner of Service Tax has arrived at the conclusion that the appellant is not liable to pay service tax on the income margin earned by him on account of foreign exchange surrendered to Mass Group India Ltd. under the category of BAS. Further, in order to arrive at such conclusion, the Ld. Commissioner (Appeals) has also held that the appellant is purchasing the foreign currency from the customer and selling the foreign currency to TCIL. Thus, there is no relation exists between both the parties as principal and agent.

2. Revenue's contention is that the appellant has been appointed as an agent of TCIL and as such the findings of the adjudicating authority is erroneous in so far as the order concludes that the appellant is carrying on the business on its own and is not providing any service to TCIL. On perusal of the contract and the impugned order, we find that the amount received by the appellant from TCIL is towards the sale/purchase proceeds and not in connection with the commission as a commission agent. Thus, the transaction between the appellant and TCIL cannot be termed as a commission agent and will not fall under the scope of the commissioner agent for the purpose of levy of service tax under the category of business auxiliary service.

3. The grievance of the assessee in this appeal is twofold. With regard to denial of cenvat credit utilizing in excess of 20% as per Rule 6(3) of Cenvat Credit Rules, 2004, the submissions of the appellant are that some of the services for which the service tax credit has been denied relates to the services covered under Rule 6(5) of the Cenvat Credit Rules, 2004 under which irrespective of the use for exemption output service, the entire benefit of credit should be permissible to the appellant. Further, the appellant submits that on the other services, the appellant had paid the service tax along with interest and there is net excess payment of service tax on that count. However, on a query from the Bench whether the documents were produced before the authorities below, the Advocate appearing for the appellant submits in the negative.

4. With regard to common input services of cable operator shared by the appellant with hotel Samrat, we find that no documentary evidence were produced by the appellant before the authorities below. The appellant submits that the documents are available with it to demonstrate that the actual quantum of services shared with Hotel Samrat and the amount for which it is entitled for cenvat credit.

5. With regard to denial of cenvat credit utilized exclusively for exempted service amounting to Rs. 44,877/-, the appellant submits that even prior to issuance of SCN, the said amount alongwith interest was paid by the appellant. Thus, the benefits of

sub-section 3 of section 73 should be available to the appellant for non-imposition of penalty.

6. We find that upon analysis of the contract entered into between the appellant and TCIL that the relationship between the appellant and the TCIL is that of seller and purchaser and cannot be termed as principal and agent. Thus, no service tax is leviable on the appellant on the charges received by it from TCIL. With regard to denial of cenvat credit on excess utilization and availment of common input of cable operator service, we are of the view that the authorities below had denied the cenvat benefit on the ground that the appellant had not produced any documents before them. Since the appellant submits that the documents are available with it, we are of the view that the matter should go back to the original authority for verification of the documents. If the documents are in order, the cenvat facility is available on that count to the appellant. As regards denial of cenvat credit, utilized exclusively for exempted service, we find that the appellant had already paid an amount of Rs. 44,877/- alongwith applicable interest before issuance of SCN. Thus, we are of the view that the benefit of sub-section (3) of section 73 ibid should be available to the appellant for non issuance of SCN, especially for imposition of penalty. Therefore, penalty imposed on this count is set aside.

7. In view of above, the Revenue's appeal is dismissed and the assessee's appeal is partly allowed to the extent of setting aside the penalty. For the remaining portion of the cenvat credit, the

matter is remanded to the original authority. The appeal is disposed of in above terms.

(Dictated and pronounced in the open court)

(**B. Ravichandran**)
Member(Technical)

(**S. K. Mohanty**)
Member (Judicial)

Neha