IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH: KOLKATA

Appeal No. ST/96 & 97/2011

(Arising out of Order-in-Appeal No.136-137/ST/HAL/2010 dated 31.12.2010 passed by the Commissioner of Central Excise (Appeals-I), Kolkata)

M/s. Ellenbarrie Exim Ltd.

Applicant (s)/Appellant (s)

Vs.

Commissioner of Central Excise, Haldia

Respondent (s)

<u>Appearance:</u>

Shri S.Bagaria, Advocae & Shri O.P.Tribedi, Advocate for the Appellant (s)
Shri D.Haldar, AC (AR) for the Respondent (s)

CORAM:
Hon'ble SHRI JUSTICE (DR.) SATISH CHANDRA, PRESIDENT
HON'BLE SHRI C. J. MATHEW, TECHNICAL MEMBER

Date of Hearing/Decision:-22.03.2018

ORDER NO.FO/75694-695/2018

Per Dr. Satish Chandra,

1. The present appeals are filed against Order-in-Appeal No.136-137/ST/HAL/2010 dated 31.12.2010.

2. Vide Order dated 16.3.2018, our earlier Final Order No.75263-75264/2017 dated 21.03.2017 has been recalled, where the appeals were dismissed for non-prosecution. Since the appeals have been restored, with the consent of the parties we took the appeals to decide on merit.

3. The period of dispute is April, 2006 to September, 2006. The amendment came w.e.f. March, 2008, so both the appeals are prior to the pre-amended period. The brief facts of the case are that during the period under consideration the appellant received the goods from goods transport agency and paid the tax under Rule 2(1) (d) (v) of the Service Tax Rules, 1994. The appellant paid this tax by debiting the CNVAT Credit amount. The

appellant has utilised the credit for payment of service tax. The department asked the appellant to pay the tax by way of PLA (in cash) and not by adjusting CENVAT Credit. Being aggrieved, the appellant has filed the present appeals.

4. With this background, we heard both the parties.

5. After hearing both the sides and on perusal of the case records, we find that the identical issue has come up in the case of Commr. of Central Excise, Indore Vs. Spendex Industries Ltd. reported in 2013 (31) S.T.R. 472 (Tri.-Del.) where it was observed that:

> "**4.** We find that the said Tribunal's decision stands upheld by the Hon'ble Punjab & Haryana High Court, reported as [2010 (19) S.T.R. 166 (P&H)], when the appeals filed by the Revenue was rejected. However, learned AR submits that the period involved in the present appeal is from April, 2006 to September, 2006. The legal fiction given to the said service for treating the same as output service, as defined in Rule 2(p) was withdrawn with effect from 19-4-2006 inasmuch as Explanation to Rule 2(p) was deleted. As such, he submits that as the period involved in the case of *Nahar Industrial Enterprises* was prior to 19-4-2006, the ratio of law declared therein cannot be applied to the facts of the present case. He also draws our attention to a Single Member decision of the Tribunal in the case of *Uni Deritend Ltd.* [2012 (25) S.T.R. 475 (Tri.-Mum.)] wherein after taking note of the *Nahar Industrial Enterprises* decision it was held that the benefit of law as declared in the above decision cannot be extended to the assessee for the period beyond 18-4-2006. As such, he prays for allowing the Revenue's appeal.
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> **5.** As against the above learned Advocate appearing for the respondent submits that the fact of withdrawal/deletion of explanation to Rule 2(p) of Cenvat Credit Rules, 2004 will not have much effect inasmuch as no amendment was made to the provisions of Rule 2(r) of Cenvat Credit Rules. In terms of said sub-rule (r), 'provider of taxable service' include a personal liability for paying Service Tax. Inasmuch as the respondent is liable to pay Service Tax in respect of GTA service so received by them, he is required to be treated as 'provider of taxable service' in terms of the said Rule. Consequently, if he is a provider of taxable service, he is covered by the definition of output service, as defined in Rule 2(p).
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> He submits that above submissions were taken note of by the Tribunal in the case of *Shree Rajasthan Syntex Ltd.* v. *CCE, Jaipur* [2011 (24) S.T.R. 670 (Tri.-Del.)] and were found favour with. He also draws our attention to another decision of the Tribunal in the case of *Dhillon Kool Drinks & Beverages Ltd.* [2011-TIOL-307-CESTAT-Del = 2011 (263) E.L.T. 241 (Tri.-Del.)]. He submits that Single Member decision of the Tribunal in *Uni Deritend Ltd.* relied upon by learned AR has not taken note of by Division Bench of the Tribunal in the case of *Shree Rajasthan Syntex Ltd.* . and as such, should not be relied upon.

> **6.** After hearing both the sides, we find that the Tribunal in the case of *Shree Rajasthan Syntex Ltd.* referred supra has taken note of identical submissions made on behalf of the assessee has held that recipient of services from the GTA is liable to pay the Service Tax and as such provider of taxable service in terms of Rule 2(r) and consequently gets covered by output service definition as appearing in Rule 2(p) of the Rules. As such, we find that deletion of explanation with effect from 18-4-2006 from Rule 2(p) of the Cenvat Credit Rules, 2004 would not make much difference. We also note that *Uni Deritend Ltd.* is a Single Member Bench decision without taking note of the earlier Division Bench judgment. In view of the above, we find no merits in the Revenue's appeals and reject the same."

6. By following our earlier order, we set aside the impugned order.

7. In the result, the impugned order is set aside and the appeals are allowed.

(Dictated and Pronounced in the Open Court)

S/d.
(Justice Dr. Satish Chandra)
President

S/d.
(C. J. MATHEW)
MEMBER (Technical)

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