

**IN THE CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI**

APPEAL NO: ST/87537/2018

Arising out of: Order-in-Appeal No. NA/GST A-III/MUM/392/17-18 dated 31/01/2018

Passed by: Commissioner of CGST & CX (Appeals-III), Mumbai.

FDC Limited	<i>Appellants – Represented by:</i> Shri Mehul Jivani, Advocate
<i>versus</i>	

CCGST, Mumbai West	<i>Respondent – Represented by:</i> Shri O.M Shivadikar, AC (AR)
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Date of hearing: 09/10/2018
Date of Pronouncement:

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Hon'ble Shri Ajay Sharma, Member (Judicial)

ORDER NO: A/87764 / 2018

The instant appeal has been filed from the order-in-appeal no. NA/GST A-III/MUM/392/17-18 dated 16.03.2018 passed by the Commissioner (Appeals-III), CGST and CX, Mumbai.

2. Refund claim of service tax of Rs. 3,51,117/- was filed by the appellant on the ground that they have not provided any service to M/s Generic Partners, Australia but only provided documents to them, in respect of the products manufactured and supply to them, in order to enable them to apply and obtained marketing authorization from

distribution and for providing the documents, the appellant has received the amount as per the Manufacture and Supply Agreement dated 05.02.2018 between M/s Generic Partners, Australia and the appellant.

3. According to the appellant, since the amount received by them from M/s Generic Partners, Australia is not towards any service provided by them, therefore they are eligible for refund of service tax paid on the said amount.

4. The said refund claim was rejected by the adjudicating authority while order-in-original dated 21.02.2015 being time barred under Section 11B. Aggrieved the appellant filed appeal before the Commissioner (Appeals-III) on the ground that they had not provided any service but only provided documents and that the principle of natural justice is violated because no show cause notice was issued to the appellant proposing rejection of refund claim. The Commissioner (Appeals-III) *vide* impugned order dated 16.03.2018 without going into the issue of violation of principle of natural justice, dismissed the appeal filed by the appellant.

5. I have heard ld. Counsel for the Appellant and Learned Authorised Representative for the Revenue and perused the record. The appellant has challenged the impugned order on various grounds viz. that the issue of the violation of principle of natural justice has not

been gone into by the Commissioner while deciding the appeal; that since no service was provided by the appellant, the amount paid by the appellant is not service tax and therefore, the time limit as prescribed under Section 11B is not applicable for refund of the amount which is not service tax at all; that unjust enrichment is not applicable in the facts of the present case since the agreement between M/s Generic Partners, Australia and the appellant clearly stipulates that the consideration is exclusive of VAT and exclusive of other taxes if applicable; that even if the activity is treated as a provision of service, the same will fall under the definition of export of service and therefore, no service tax is payable. Learned Authorised Representative, on the other hand reiterated the findings recorded in the impugned order and submitted that the appeal filed by the appellant deserves to be dismissed.

6. Although, various grounds have been raised by the appellant, but firstly I will take up the ground of non-issuance of show cause notice to the appellant and if the appellant succeeded on this point then there is no need for me to go to the other grounds raised by the appellant. It has not been disputed by the Learned Authorised Representative that the refund claim of the appellant was rejected by the department without issuing any show cause notice to the respondent. He contended that although no show cause notice was issued to the Appellant, but they were heard by the Adjudicating

Authority before their claim was rejected by them. It means that the adjudicating authority proceeded to dispose of the refund claim of the appellant without issuing the show cause notice. It is settled legal position that in the absence of show cause notice the claimant cannot be held to have a fair opportunity of defending the case. A consistent view taken by this Tribunal is that there has to be issuance of show cause notice, since it is mandatory and if the same has not been issued, then it is contrary to law and such proceedings have to be quashed. The lacunae of non issue of show cause notice is not curable and such proceedings are not sustainable. Even if a party has waived the show cause notice, it will not absolve the department's statutory liability to issue show cause notice under the relevant provision. Mere presence of the appellant before the Adjudicating Authority during the course of hearing does not authorise the department to encroach upon the right of the appellant to have a fair the opportunity of placing his defence before the adjudicating authority. The presence of the appellant before the Adjudicating Authority, without issuance of show cause notice, cannot lead to the conclusion that the appellant had a fair opportunity to defend the case. Otherwise also principle of natural justice requires issuance of show cause notice before the adjudication proceedings. It is not open to the revenue to bypass such legal requirement. There is no doubt that the principle of natural justice has been violated in the present matter and therefore without going into

other grounds raised by appellant, the impugned order is set aside and the appeal filed by the appellant is allowed with consequential relief, if any.

(Pronounced in Court on)

(Ajay Sharma)
Member (Judicial)

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