www.taxmann.com

TAXMANN'S

Service Tax Today

A WEEKLY JOURNAL ON SERVICE TAX

REPORTS [365-440]

Banking and other financial services

- Where assessee-bank was engaged in collection of telephone bills for various telephone companies and remittance of same to them, service provided by assessee would essentially fall under category of 'cash management service' (Ker.) **416**

Cenvat credit

- Different types of shortages cannot be dealt with according to any inflexible and fixed standard for purpose of allowing credit under rule 3(1) and, therefore, each case has to be decided according to merit and no hard and fast rule can be laid down for dealing with different kinds of shortages (Chennai - CESTAT) (**FB**) **436**
- Where service tax is paid on GTA service in respect of cement, steel, etc., brought for construction related to setting up of factory, said service will be covered by definition of 'Input service', and, therefore, same is eligible for Cenvat credit (Ahd. - CESTAT) **392**

Import of service

- Prior to enforcement of section 66A, there was no authority vested by law in revenue to levy service tax on a person who is resident in India but receives services from a person resident outside India (Punj. & Har.) **413**

VOLUME 24 ■ PART 6
WEEKLY

FEBRUARY 5 TO FEBRUARY 11, 2010 (WEEKLY)
PRICE : RS. 75

MODE OF CITATION [2010] 24 STT...(...)

TOTAL NO. OF PAGES INCLUDING COVER 92

CENTRAL SALES TAX MAY CONTINUE FOR NON-GST ITEMS

The Central Sales Tax (CST) levy is likely to continue for non-GST items even after the introduction of the Goods and Services Tax (GST) system in the country. As an origin-based tax, India Inc is keen that CST be abolished at the earliest, especially when a destination-based Value Added Tax (VAT) regime is in place. Earlier, the Government had indicated that CST will be abolished along with the introduction of GST. The CST rate was last reduced to 2 per cent in June, 2008. It is likely that the CST levy will continue for non-GST items, official sources said. This implies that CST may go only for those items that will come under the proposed GST system. The Centre and the States have agreed that crude, ATF, motor spirit and high speed diesel will continue to be outside GST net - THE HINDU BUSINESS LINE, NEW DELHI, JANUARY 20, 2010.

IT COS. TO REAP SERVICE TAX REFUND WINDFALL

The $50-billion information technology services and BPO firms, including Infosys, Wipro, TCS, WNS, Genpact, will now be able to get service tax refunds, running into few thousands of crores, expeditiously, as the Government has announced a new simplified procedure to resolve the long-pending issue that has caused much hardship to the industry. The Central Board of Excise and Customs, the apex indirect taxes body, on 19-1-10 issued a circular directing its field officials to issue pending service tax refunds within 30 days, and also relaxed certain norms for issue of such refunds. The refunds will boost the bottomlines of software exporters just when they look to be recovering from the effects of the global economic slowdown - THE ECONOMIC TIMES, NEW DELHI, JANUARY 20, 2010.

CENTRE, STATES WEIGH NEW GST PANEL

The centre and states are mulling setting up a special penal, headed by the Finance Minister and State Finance Ministers as its members, that will decide on any changes in the proposed goods and service tax rate or giving exemptions in proposed new indirect tax regime. "There is a view that a committee be formed to clear any deviation in the tax rates or exemption list from the agreed rate system", S. Dutt Majumdar, Member, Central Board of Excise and Customs, said at seminar on GST organised by the American Chamber of Commerce. However, he said final decision was yet to be taken. The current value added tax regime is fraught with deviation in rates despite all States agreeing to keep deviation in rates at 1 per cent of the total items. Deviation in rates negatively impact revenues of states as also trade and industry. The GST, is a consumption tax that seeks to replace all indirect taxes both at central and State level such as excise duty, service tax, countervailing

duty and special additional duty on customs, value added tax, luxury tax, entertainment tax, entry tax, taxes on lottery and gambling as also all cesses and surcharges - THE ECONOMIC TIMES, NEW DELHI, JANUARY 19, 2010.

12 PER CENT SERVICE TAX LIKELY TO RETURN

The Government may take the first step towards fiscal consolidation in Budget 2010-11 by partially rolling back tax cuts given to the industry last year. The service tax rate may be restored to 12 per cent, while excise duty could be increased marginally. The Finance Ministry is considering a phased exit of the stimulus measures as the economy posted a robust 7.9 per cent growth in July-August quarter of 2009-10. To begin with, it wants to withdraw measures that are not likely to impact the industry significantly, such as the 2 per cent service tax cut. In the case of excise duty, the increase may not be equivalent to 6 per cent reduction that the industry got from the Government as part of the stimulus measures. The Budget changes would also be used as an opportunity to rationalise indirect taxes ahead of introduction of the Goods and Services Tax (GST) - BUSINESS STANDARD, NEW DELHI, JANUARY 19, 2010.

■■

GOODS & SERVICE TAX

Share your
Comments & Suggestions
with your other
professional colleagues

Log on to :
www.taxmann.com

CONTENTS

REPORTS

TABLE OF CASES

Balasai Travels *v.* CCE (Bang. - CESTAT) **423**
C,CE *v.* Bhandari Hosiery Exports Ltd. (Punj. & Har.) **413**
Cauvery Stones Impex (P.) Ltd. *v.* CCE (Chennai - CESTAT) **400**
CCE *v.* Bhuwalka Steel Industries Ltd. (Chennai - CESTAT) (**FB)** **436**
CCE *v.* Jindal Photo Ltd. (Ahd. - CESTAT) **388**
CCE *v.* Kalpana Travels (P.) Ltd. (New Delhi - CESTAT) **408**
CCE *v.* Nitin Spinners Ltd. (New Delhi - CESTAT) **393**
CCE *v.* Showa Engg. Ltd. (Chennai - CESTAT) **379**
CCE *v.* Videocon Industries Ltd. (Ahd. - CESTAT) **392**
CC,CE&ST *v.* Federal Bank Ltd. (Ker.) **416**
CST *v.* McDowel & Co. Ltd. (Kar.) **394**
CST *v.* Tulsyan NEC Ltd. (Bang. - CESTAT) **421**
Dahison Automobiles *v.* CST (Ahd. - CESTAT) **395**
Diamond Cable Network *v.* CCE (New Delhi - CESTAT) **371**
Elappa Granite *v.* CCE (Chennai - CESTAT) **398**
Ghanshyam Lodhwal *v.* CCE (New Delhi - CESTAT) **434**
Hindustan Aeronautics Ltd. *v.* CST (Bang. - CESTAT) **367**
Hitachi Home & Life Solution (I) Ltd. *v.* CCE (Ahd. - CESTAT) **390**
Jay Hind Industries Ltd. *v.* CCE (Mum. - CESTAT) **404**
Kirloskar Oil Engines Ltd. *v.* CCE (Mum. - CESTAT) **406**
Life Insurance Corpn. of India *v.* CCE (New Delhi - CESTAT) **386**
Meka Industries *v.* CC&CE (Bang. - CESTAT) **382**
Rajendran (S.) *v.* CCE (Chennai - CESTAT) **373**
Rane TRW Steering Systems Ltd. *v.* CCE (Chennai - CESTAT) **403**
Safe Test Enterprises *v.* CCE (Chennai - CESTAT) **377**
Sharma Transports *v.* CST (Bang. - CESTAT) **375**
Sharp Communication *v.* CCE (New Delhi - CESTAT) **374**
Sobha Developers Ltd. *v.* CCE&ST (Bang. - CESTAT) **425**
Travel Aid *v.* CST (Chennai - CESTAT) **409**
U. Flex Ltd. *v.* CCE (New Delhi - CESTAT) **396**

Union of India *v.* Indian National Shipowners Association (**SC**) **366**

V. Sriram & Co. *v.* CCE (Chennai - CESTAT) **378**

V.N.S.S. Textiles *v.* CCE (Chennai - CESTAT) **385**

SUBJECT INDEX

BANKING AND OTHER FINANCIAL SERVICES

- Period prior to 1-6-2007 - Assessee-bank was engaged in collection of telephone bills for various telephone companies and remittance of same to them - Service tax was demanded from it under category of 'Business auxiliary service' - Whether above service provided by assessee would essentially fall under category 'cash management service' - *Held,* yes - Whether therefore, when Cash Management Service stood excluded from purview of service tax at hands of bank until 31-5-2007, authorities could not sustain service tax on Cash Management Service under any other charging head including 'Business auxiliary service' and assessment on assessee for services rendered by it until 31-5-2007 was to be cancelled - *Held,* yes - *CC,CE&ST* v. *Federal Bank Ltd.* (Ker.) **416**

BUSINESS AUXILIARY SERVICE

- Period September, 2004 to March, 2007 - Service tax demand was confirmed on assessee for commission received by it from a foreign company for promotion and marketing of their products in India under category of 'Business auxiliary service' - Assessee's appeal was dismissed by Commissioner (Appeals) for non-compliance of pre-deposit direction - In instant appeal, assessee contended that prior to 15-3-2005, such services were fully exempted under Notification No. 2/2003, dated 20-11-2003, benefit of which stood denied by original adjudicating authority only on ground that commission received in foreign currency was not repatriated - As regards period after 15-3-2005, assessee submitted that such services would fall under category of 'Export services' and in terms of Export of Services Rules, 2005, no service tax was liable to be confirmed in respect of same - Whether assessee had good *prima facie* case on merits and, therefore, matter was to be remanded to Commissioner (Appeals) for decision on merits, without insisting on any pre-deposit - *Held,* yes - *Hitachi Home & Life Solution (I) Ltd.* v. *CCE* (Ahd. - CESTAT) **390**

CENVAT CREDIT RULES, 2004

Cenvat credit

Confiscation and penalty

- Assessee availed Cenvat credit of excess service tax paid - Adjudicating authority held that Cenvat credit had wrongly been availed by assessee and, accordingly, demanded said amount along with interest and penalty - Whether since assessee availed Cenvat credit of service tax paid on a *bona fide* belief, and had already discharged adjudication levies along with interest, there was no justification for imposition of any penalty upon assessee - *Held,* yes - *Meka Industries* v. *CC&CE* (Bang. - CESTAT) **382**

Documents and accounts

- Assessee availed Cenvat credit of service tax paid on receipt of services - Adjudicating authority denied credit on ground that input service distributor which was head office of company had not taken service tax registration and because of said reason, registration number was not mentioned on invoices based on which assessee availed credit - On appeal, assessee contended that by time instructions were issued by Government, with respect to input service distributor, Head Office had already issued invoice and therefore, procedural requirement could not be fulfilled - Commissioner (Appeals) on finding that there was no dispute about receipt of service by assessee, allowed credit - Whether since there were valid grounds for omission and further omission took place

when rules relevant to input service distributor were being implemented, impugned order was to be upheld - *Held,* yes - *CCE* v. *Jindal Photo Ltd.* (Ahd. - CESTAT) **388**

General

- Whether different types of shortages cannot be dealt with according to any inflexible and fixed standard for purpose of allowing credit under rule 3(1) and, therefore, each case has to be decided according to merit and no hard and fast rule can be laid down for dealing with different kinds of shortages - *Held,* yes - *CCE* v. *Bhuwalka Steel Industries Ltd.* (Chennai - CESTAT) (**FB**) **436**

Input service

- Period October, 2004 to September, 2005 - During relevant period assessee paid service tax on mobile phones used for official purposes - Whether in terms of Board's clarification contained in Circular No. 97/8/2007-ST, dated 23-8-2007, use of mobile phones in instant case constituted input service and service tax paid on same was admissible as Cenvat credit - *Held,* yes - *CCE* v. *Showa Engg. Ltd.* (Chennai - CESTAT) **379**
- Whether where service tax is paid on GTA service in respect of cement, steel, etc., brought for construction related to setting up of factory, said service will be covered by definition of 'Input service', and, therefore, same is eligible for Cenvat credit - *Held,* yes - *CCE* v. *Videocon Industries Ltd.* (Ahd. - CESTAT) **392**
- Period July, 2005 to January, 2006 - Assessee availed Cenvat credit of service tax paid on freight for empty containers called for export of goods - Whether since containers were used for packing of final products, they could be treated as inputs used by manufacturer in or in relation to manufacture of final products - *Held,* yes - Whether, therefore, credit of service tax paid in question was admissible to assessee - *Held,* yes - *CCE* v. *Nitin Spinners Ltd.* (New Delhi - CESTAT) **393**
- Assessee availed Cenvat credit of service tax paid on transportation of goods from factory to customer's place - Lower authorities disallowed said credit - Tribunal in *ABB Ltd.* v. *CCE & ST* [2009] 21 STT 77 (Bang. - CESTAT), held that service availed by a manufacturer for outward transportation of final products from place of removal should be treated as an input service and thereby enabling manufacturer to take credit of service tax paid on value of such services - Whether, in view of above decision, assessee was eligible to avail input credit of service tax paid on goods transport agency service - *Held,* yes - *U. Flex Ltd.* v. *CCE* (New Delhi - CESTAT) **396**
- Assessee availed Cenvat credit of service tax paid on outdoor catering service availed by it - Said credit was denied on ground that above service was not an input service and, accordingly, demand was confirmed on assessee - Tribunal in *CCE* v. *GTC Industries Ltd.* [2008] 17 STT 63 (Mum. - CESTAT) held that service provided by an outdoor caterer is input service - Whether following above decision, impugned order was to be set aside - *Held,* yes - *Rane TRW Steering Systems Ltd.* v. *CCE* (Chennai - CESTAT) **403**
- Assessee had availed Cenvat credit of service tax paid on outdoor catering service received in canteen of its factory - Original authority disallowed said credit on ground that said service was not used in or in relation to manufacture of final product in factory - Decision of original authority was upheld by Commissioner (Appeals) - Whether since lower authorities had not recorded any finding as to whether cost of supply of food formed part of assessable value of final products of assessee, original authority was to be directed to examine that aspect - *Held,* yes - Whether if it was found that cost of supply of food for period of dispute formed part of assessable value of final products, assessee would get benefit of Larger Bench's decision in *CCE* v. *GTC Industries Ltd.* [2008] 17 STT 63 (Mum.) and if it was found to contrary, Cenvat credit in question would not be admissible to assessee - *Held,* yes - *Jay Hind Industries Ltd.* v. *CCE* (Mum. - CESTAT) **404**

- Period January, 2005 to September, 2007 - Assessee availed Cenvat credit of service tax paid on outdoor catering service used for supply of food to employees at canteen of its factory - Lower authorities held that said service could not be said to be input service inasmuch as canteen services had no bearing on production/manufacture of excisable goods in factory and, accordingly, disallowed benefit of Cenvat credit to assessee - However, Tribunal in *CCE* v. *GTC Industries Ltd.* [2008] 17 STT 63 (Mum. - CESTAT) had allowed Cenvat credit on outdoor catering service to assessees - Whether since there was no pleadings as to number of workers in factory and as to whether cost of supply of food in canteen formed a part of assessable value of excisable goods during material period, matter was to be remanded to original authority to verify relevant facts so as to find out whether Larger Bench's decision in *GTC Industries Ltd.'s* case (*supra*) was applicable to assessee - *Held,* yes - *Kirloskar Oil Engines Ltd.* v. *CCE* (Mum. - CESTAT) **406**

Refund of

- Period January, 2005 to October, 2005 - Assessee, a hundred per cent export-oriented unit, had exported its finished products during relevant period and claimed refund of credit relating to input service consumed in manufacture of goods exported - Lower authorities denied said refund claim on ground that during material period, Central Government had not issued notification under rule 5 specifying any safeguard, conditions and limitations subject to which refund of credit relating to input service could be allowed - In a similar issue Tribunal in *CCE* v. *Himalaya Granites Ltd.* 2008 (228) ELT 492 (Chennai - Trib.) held that for export made between 10-9-2004 and 14-3-2006, claim for refund of duty relatable to inputs was to be allowed even though there was no notification issued under rule 5 - Whether, in such circumstances, there was no justification to deny refund relatable to input service used for production of goods exported during same period - *Held,* yes - *Elappa Granite* v. *CCE* (Chennai - CESTAT) **398**
- Period 1-1-2007 to 31-3-2007 and 1-4-2007 to 30-6-2007 - Assessee, a 100 per cent EOU, was engaged in manufacture and export of polished granite monuments, slabs and tiles - It also cleared a few of its finished products to other 100 per cent EOUs - It filed refund claim for unutilized Cenvat credit of service tax paid on goods transport service availed by it - Authorities rejected said refund on ground that service pertaining to transportation of export goods from factory to port was not an eligible input service - Further, refund claim in respect of goods cleared to other EOUs was denied on ground that refund was to be restricted to its actual export turnover as clearance made to other 100 per cent EOUs was not to be taken into consideration in computation for export purposes - Whether since freight from factory gate to port formed part of FOB price, place of removal was port and GTA service from factory gate to port of shipment was an input service and, hence, credit of service tax paid thereon was admissible to assessee in view of Circular No. 97/6/2007-ST, dated 23-8-2007 - *Held,* yes - Whether further since in view of *CCE* v. *Shilpa Copper Wire Industries* 2008 (226) ELT 228 (Ahd.) and *Sanghi Textiles Ltd.* v. *CCE* 2006 (206) ELT 854 (Bang. - Trib.), clearance made to 100 per cent EOU was also to be considered as export, rejection of remaining part of claim was also not in order - *Held,* yes - Whether, therefore, refund of unutilized credit was to be allowed to assessee - *Held,* yes - *Cauvery Stones Impex (P.) Ltd.* v. *CCE* (Chennai - CESTAT) **400**

CENVAT CREDIT RULES, 2004

- Rule 2(*l*) **379, 392, 393, 396, 403, 404, 406**
- Rule 3 **436**
- Rule 5 **398, 400**
- Rule 9 **388**
- Rule 15 **382**

CHARGE OF SERVICE TAX ON SERVICES RECEIVED FROM OUTSIDE INDIA

- Period 1-3-2002 to 18-4-2006 - Bombay High Court in *Indian National Shipowners Association* v. *Union of India* [2009] 18 STT 212 held that before enactment of section 66A, there was no authority vested by law in revenue to levy service tax on a person who was resident in India and received services outside India and, therefore, no service tax could be levied for period from 1-3-2002 to 17-4-2006 in relation to services received by Indian vessel and shipowners outside India from non-resident and Notification No. 36/2004-ST, dated 31-12-2004 issued under section 68(2) for levy of service tax on such persons from 1-2-2005 could not be justified - Whether Special Leave Petition filed by Revenue against High Court's order was to be dismissed - *Held,* yes - *Union of India* v. *Indian National Shipowners Association* (**SC**) **366**
- Period 9-7-2004 to February 2006 - Whether prior to enforcement of section 66A, there was no authority vested by law in revenue to levy service tax on a person who is resident in India but receives services from a person resident outside India - *Held,* yes - Assessee received services of individual overseas commission agents for export of its products during relevant period - Service tax was demanded from it for above services - Whether prior to enactment of section 66A, *i.e.*, 18-4-2006, revenue did not have any authority to levy service tax on assessee for said service - *Held,* yes - *C,CE* v. *Bhandari Hosiery Exports Ltd.* (Punj. & Har.) **413**

CIRCULARS & NOTIFICATIONS

- Notification No. 12/2003-ST, dated 20-6-2003 **367**
- Circular No. 59/8/2003-ST, dated 20-6-2003 **379**
- Circular No. 97/8/2007-ST, dated 23-8-2007 **379, 400**
- Notification No. 5/2006-CE, dated 14-3-2006 **400**
- Notification No. 58/98-ST, dated 16-7-1998 **409**
- Notification No. 12/2003-ST, dated 20-6-2003 **425**

CLEARING AND FORWARDING AGENT'S SERVICES

- Assessee was engaged in activity of receipt of goods from its principals, storage of same in its premises, dispatch of same to clients on its sale invoices, and collection of amount from clients on behalf of its principals and remittance of same to them - Revenue demanded service tax from assessee under category of 'Clearing and forwarding agent' - Whether since assessee did not undertake clearance of goods from its principals but goods were supplied by its principals to it in view of decision in *CCE* v. *Kulcip Medicines (P.) Ltd.* [2009] 20 STT 264 (Punj. & Har.) it could not be treated as a clearing and forwarding agent and, therefore, impugned demand was to be set aside - *Held,* yes - *V.N.S.S. Textiles* v. *CCE* (Chennai - CESTAT) **385**

COMMERCIAL OR INDUSTRIAL CONSTRUCTION SERVICE

- Period April, 2006 to March, 2007 - Assessee was engaged in providing commercial or industrial construction and construction of residential complex services - It claimed deduction under Notification No. 12/2003-ST, dated 20-6-2003 in respect of value of goods and materials involved in construction contract and paid service tax on 30 per cent of contract value - Commissioner denied said deduction on ground that assessee had not produced documents to evidence sale of materials for which exemption was claimed and, accordingly, confirmed differential service tax - However, undisputedly assessee was registered with State VAT department for payment of VAT under category of 'works contract' for impugned activities and that it paid VAT on 70 per cent of value of works contract as per provisions of KVAT Act - Whether in such circumstances, decision of Commissioner to collect service tax on value on which assessee had already paid State VAT was contrary to principles of fiscal federalism adopted in

Constitution - *Held,* yes - Whether therefore impugned demand of differential duty relating to value of materials supplied in course of provision of construction of commercial or industrial buildings and construction of residential complex services was not sustainable - *Held,* yes - *Sobha Developers Ltd.* v. *CCE&ST* (Bang. - CESTAT) **425**

COMMISSIONER (APPEALS)

Appeals to

- Service tax was demanded from assessee under category of 'Rent-a-cab service' - In first round of litigation, Commissioner (Appeals) considering financial hardship of assessee waived pre-deposit requirement and remanded matter for *de novo* consideration to adjudicating authority who confirmed demand - On further appeal, Commissioner (Appeals) dismissed appeal of assessee for non-compliance of pre-deposit direction - In instant appeal, assessee contended that activity involved was provision of transport vehicles and not passenger vehicles and service tax relatable to provision of passenger vehicle would be approximately Rs. 35,000 which he had agreed to deposit - Whether above amount offered by assessee should be considered adequate to consider appeal on merits and on such compliance, Commissioner (Appeals) would decide appeal on merit - *Held,* yes - *Balasai Travels* v. *CCE* (Bang. - CESTAT) **423**

ERECTION, COMMISSIONING OR INSTALLATION SERVICE

- Assessee was engaged in activity of installation/fitting of CNG/LPG kits in motor vehicles - Service tax was demanded from assessee for above activity - Commissioner (Appeals) dismissed appeal of assessee for non-compliance with pre-deposit direction - Assessee contended that service tax should not have been confirmed against it by including value of kits, which had been bought by it from market and that service tax could be confirmed in respect of service charges received by it from its clients which had already been deposited by it - Whether *prima facie* force was found in above contentions of assessee - *Held,* yes - Whether since assessee had already deposited part of demand and issue was of contentious nature, Commissioner (Appeals) was to be directed to decide issue without insisting on any pre-deposit - *Held,* yes - *Dahison Automobiles* v. *CST* (Ahd. - CESTAT) **395**

FINANCE ACT, 1994

- Section 65(*12*) **416**
- Section 65(*19*) **390**
- Section 65(*25*) **385**
- Section 65(*25b*) **425**
- Section 65(*39a*) **395**
- Section 65(*64*) **367**
- Section 65(*91*) **373, 434**
- Section 65(*115*) **408**
- Section 66A **366, 413**
- Section 68 **386**
- Section 73 **375, 409, 421**
- Section 76 **371, 378**
- Section 78 **377**
- Section 80 **374**
- Section 85 **423**

MANAGEMENT, MAINTENANCE OR REPAIR SERVICE

- Assessee was undertaking repair and overhaul of various engines received from Ministry of Defence and others - It availed benefit of Notification No. 12/2003-ST, dated 20-6-2003 excluding cost of material from gross value of taxable service for discharging service tax liability - Adjudicating authority, however, held that cost of material was to be included in gross amount and, accordingly, demanded differential service tax - Whether since assessee while raising invoices, clearly indicated fixed price quotation and cost of materials and activity of repairs considered by it as services rendered and had discharged service tax liability on amount shown as labour cost, it had correctly availed benefit of Notification No. 12/2003-ST - *Held,* yes - *Hindustan Aeronautics Ltd.* v. *CST* (Bang. - CESTAT) **367**

PAYMENT OF SERVICE TAX

- Service tax demand was confirmed on assessee-LIC in respect of risk premium of its four different branches - Assessee submitted that levy was unwarranted for reason that it had been centrally registered in Mumbai and service tax liability, if any, had been discharged - Whether matter was to be remanded to adjudicating authority to make correspondence with Bombay service tax authority and consider plea of double taxation, if any, for self-same service - *Held,* yes - *Life Insurance Corpn. of India* v. *CCE* (New Delhi - CESTAT) **386**

PENALTY

For failure to pay service tax

- Period October, 2004 to December, 2004 - Assessee, a cable operator registered itself as a service tax assessee on 31-3-2003 and was paying service tax - However, during relevant period, assessee failed to pay service tax - Adjudicating authority imposed penalties under sections 76 and 78 which was upheld by Commissioner (Appeals) - Assessee sought benefit under section 80 for waiver of penalties on ground that it was a small time cable operator and was facing financial crisis especially in initial stage of introduction of service tax - Whether since in instant case no evidence of suppression or misstatement had been relied upon, imposition of separate penalty under section 78 was not justified - *Held,* yes - Whether in view of facts and circumstances of case, penalty under section 76 was to be reduced - *Held,* yes - *Diamond Cable Network* v. *CCE* (New Delhi - CESTAT) **371**
- Adjudicating authority set aside proposal to impose penalty on assessee under sections 76 and 78 on ground that assessee had paid service tax amount before issue of show-cause notice - However, Commissioner in revision, imposed penalty under sections 76 and 78 on assessee - Whether since assessee had wilfully avoided taking out service tax registration for taxable service rendered by it, payment before issue of notice was not sufficient to hold that penalty was not payable and, therefore, penalty on assessee was to be upheld - *Held,* yes - Whether, however, since provisions for penalties under sections 76 and 78 are mutually exclusive, penalty imposed under section 78 was to be set aside and penalty imposed under section 76 was to be upheld - *Held,* yes - *V. Sriram & Co.* v. *CCE* (Chennai - CESTAT) **378**

For suppressing value of taxable service

- Penalty under sections 76 and 78 was imposed by adjudicating authority on assessee - Whether since charge of suppression had been confirmed by adjudicating authority while confirming demands beyond normal period of limitation and that confirmation had not been challenged by assessee, penalty was sustainable against it - *Held,* yes - Whether in view of fact that penalty both under sections 76 and 78 cannot be imposed as these two provisions are mutually exclusive, penalty imposed under section 76 was to be set aside - *Held,* yes - Whether since assessee had paid tax together with interest prior to issue of show-cause notice, proviso to section 78 would be applicable and,

therefore, penalty under section 78 was to be reduced to 25 per cent of tax amount - *Held,* yes - *Safe Test Enterprises* v. *CCE* (Chennai - CESTAT) **377**

Not to be imposed in certain cases

- Periods August 2002 to March 2003 and 14-7-2003 to 31-8-2003 - Adjudicating authority confirmed demand of service tax on assessee and also imposed equal amount of penalty under both sections 76 and 78 - From order of adjudicating authority, it was found that impugned levy came into force with effect from 16-8-2002 and there was a dispute relating to valuation of service in view of implementation of law - Whether in view of fact that litigation arose at infancy stage of law, penalty imposed under sections 76 and 78 was to be waived - *Held,* yes - Whether, however, for period in default there would be interest imposable on tax liability - *Held,* yes - *Sharp Communication* v. *CCE* (New Delhi - CESTAT) **374**

RECOVERY OF SERVICE TAX NOT LEVIED OR PAID OR SHORT-LEVIED OR SHORT-PAID OR ERRONEOUSLY REFUNDED

- Show-cause notice was issued to assessee demanding service tax under categories of 'Tour operator service' and 'Business auxiliary service' - Assessee had not replied to show-cause notice nor filed any written submissions - During personal hearing also adjudicating authority granted time for filing reply to show-cause notice, which assessee did not avail - Adjudicating authority confirmed said demand - Whether assessee was to be directed to file reply to show-cause notice and on such reply being received, adjudicating authority would decide issue afresh - *Held,* yes - *Sharma Transports* v. *CST* (Bang. - CESTAT) **375**
- Period 1-4-2000 to 30-4-2001 - Assessees, tour operators, challenged validity of levy of service tax on them before High Court - During pendency of said petition, Notification No. 58/98-ST, dated 16-7-1998 was issued granting exemption from payment of service tax on 'Tour operator service' which exemption was withdrawn on 1-4-2000 - On 30-4-2001, High Court dismissed petitions of assessees and upheld levy - From May, 2001, assessees started paying service tax and filing returns - Revenue by invoking extended period of limitation under section 73, demanded service tax from assessees for relevant period under category of 'Tour operator service' - Whether once High Court dismissed petition challenging validity of levy of service tax on tour operators, department should have issued show-cause notices within normal period of limitation as all facts regarding liability of assessees were known to both sides - *Held,* yes - Whether further since no periodical protective show-cause notice was issued during relevant period and no notice was issued for recovery of tax and for imposition of penalty until June, 2005, extended period of limitation was not available to department - *Held,* yes - Whether therefore impugned demand was to be set aside on ground of limitation - *Held,* yes - *Travel Aid* v. *CST* (Chennai - CESTAT) **409**
- Period 16-7-1997 to 16-10-1998 - Assessee received services of Goods Transport Operator (GTO) during relevant period - Revenue by invoking extended period of limitation under section 73, issued a show-cause notice to assessee to demand service tax - However, Supreme Court in *CCE* v. *Gujarat Carbon & Industries Ltd.* [2008] 16 STT 108 held that liability to file return is cast on recipient of services of goods transport operators only under section 71A and class of persons who come under section 71A, like instant assessee, is not brought under net of section 73 - Whether in view of above case, show-cause notice issued to assessee was not maintainable - *Held,* yes - *CST* v. *Tulsyan NEC Ltd.* (Bang. - CESTAT) **421**

RENT-A-CAB SCHEME OPERATOR'S SERVICE

- Service tax demand was confirmed on assessee on ground that it was providing rent-a-cab operator's service - In instant appeal, assessee contended that demand was barred by limitation as there was no material on record to establish suppression on its part

and that it did not get itself registered with service tax authorities and had not paid taxes due to ignorance of law - Said contention had not been controverted or rebutted by revenue - Whether demand was to be set aside on ground of limitation - *Held,* yes - *S. Rajendran* v. *CCE* (Chennai - CESTAT) **373**

- Assessee had rented out a vehicle to a hirer - Vehicle was to be stationed at premises of hirer and was under his exclusive control - Whether it was a clear case of rent-a-cab service and, therefore, service tax demand confirmed by Commissioner (Appeals) could not be interfered with - *Held,* yes - *Ghanshyam Lodhwal* v. *CCE* (New Delhi - CESTAT) **434**

SERVICE TAX RULES, 1994

Person liable for paying service tax

- Department in terms of section 117(1) of the Finance Act, 2000 had taken action against assessee on 18-1-2000 - Section 117 received assent of President on 12-5-2000 - Whether since action taken by department on 18-1-2000 was earlier to date of receiving assent of President, section 117(1) had no application to instant case - *Held,* yes - Whether, therefore, revenue's review petition seeking review of order of Tribunal, whereby it dismissed appeal of revenue, was to be dismissed - *Held,* yes - *CST* v. *McDowel & Co. Ltd.* (Kar.) **394**

SERVICE TAX RULES, 1994

- Rule 2(1)(*d*) **394**

TOUR OPERATOR

- Period April, 2000 to February, 2004 - Assessee had received consideration for booking tickets for its clients during relevant period - Adjudicating authority confirmed service tax demand on assessee under category of 'Tour operator' - Commissioner (Appeals) rejected that order - Whether since there was no levy prior to 10-9-2004 for taxing considerations received as booking agent, assessee should not have been brought under Act in guise of tour operator - *Held,* yes - Whether further since there was no evidence on record to show that assessee had conducted tours for its clients and ingredients of law in respect of tour operator were present, appeal of revenue against order of Commissioner (Appeals) was to be rejected - *Held,* yes - *CCE* v. *Kalpana Travels (P.) Ltd.* (New Delhi - CESTAT) **408**

FOUNDER EDITOR :
U.K. BHARGAVA

◆

EDITOR :
RAKESH BHARGAVA

◆

HONY. CONSULTING EDITOR :
V.S. DATEY

◆

Service Tax Today comes in Six Volumes, subscription for Jan.- Dec. 2010 is Rs. 2975. Single copy Rs. 75 only.

◆

Service Tax Today is published on every Friday.
Non-receipt of part must be notified within 60 days of the due date.

◆

Address your editorial and subscription correspondence to :
Taxmann Allied Services (P.) Ltd.,
59/32, New Rohtak Road, New Delhi-110 005.
Phone : 91-11-45562222
Fax : 91-11-45562223.

◆

Printed and Published by Amit Bhargava on behalf of Taxmann Allied Services (P.) Ltd. and Printed at Tan Prints (India) Pvt. Ltd., 44 Km. Mile Stone, National Highway, Rohtak Road, Village Rohad, Distt. Jhajjar (Haryana) and Published at 59/32, New Rohtak Road, New Delhi-110 005 - Editor : Rakesh Bhargava

◆

Material published in this part is the exclusive copyright property of Taxmann Allied Services (P.) Ltd. and cannot be reproduced or copied in any form or by any means without written permission of the Publisher.

◆

Editors do not necessarily agree with the views expressed by authors of articles/features. Views so expressed are the personal views of author(s).

◆

This publication is sold with the understanding that authors/editors and publishers are not responsible for the result of any action taken on the basis of this work nor for any error or omission to any person, whether a purchaser of this publication or not. All disputes are subject to jurisdiction of the Delhi High Court.

◆

Email:sales@taxmann.com
Website: http//www.taxmann.com

MODE OF CITATION [2010] 24 STT. . . (. . .)
TOTAL PAGES INCLUDING COVER 92

A dated 23-8-2007 is an "oppressive" one in the parlance used by the Hon'ble Supreme Court in the case of *Suchitra Components Ltd.* (*supra*). Their Lordships held that an "oppressive" circular should be given only prospective effect and that the benefit of a previous "beneficial" circular must be given to the assessee. It appears, this ruling of the Apex Court is squarely applicable to the present case. The old circulars cited by the counsel, although relating to other taxable services, disclose the fact that the department did not want to B levy service tax from a sub-contractor of taxable service where service tax on such service was levied from the main contractor. Therefore, we have found merit in the contention that the assessee should not be asked to pay service tax if they can prove that the main contractor (M/s. Punj Lloyd Ltd.) paid service tax on the same service for the same period. We are of the view that, for this purpose, the assessee should be given an opportunity.

9. Accordingly, the demand of service tax and the associated penalties in C relation to the service rendered by the appellant as sub-contractor to M/s. Punj Lloyd Ltd. (main contractor) during the period 1-3-2006 to 31-12-2006 are set aside and the case is remanded to the adjudicating authority for fresh adjudication in accordance with law after giving the assessee a reasonable opportunity of adducing evidence and of being personally heard. If it is found that the main contractor paid service tax on the same service for the same period, there would be no tax liability for the assessee (sub-contractor). D On the other hand, if the assessee fails to prove payment of service tax by the main contractor, the former would be liable to pay service tax on the service for the period of dispute in accordance with law. In this event, however, their claim for abatement under Notification No. 1/2006 ST, dated 1-3-2006 should be considered. It goes without saying that the assessee should be given a reasonable opportunity of being heard on this aspect also.

10. We have already decided on the issue pertaining to the assessee's E transaction with NTPC. Accordingly, the demand of service tax and the connected penalties will stand set aside with consequential relief as per law.

11. The appeal is disposed of in the above terms.

■■

F

G

[2010] 24 STT 366 (SC)

A

SUPREME COURT OF INDIA

Union of India

v.

Indian National Shipowners Association

S.H. KAPADIA AND AFTAB ALAM, JJ.

B

SPECIAL LEAVE TO APPEAL (CIVIL) NO. 18932/2009
DECEMBER 14, 2009

Section 66A of the Finance Act, 1994, read with rule 2(1)(d) of the Service Tax Rules, 1994 - Charge of service tax on services received from outside India - Period 1-3-2002 to 18-4-2006 - Bombay High Court in Indian National Shipowners Association v. Union of India [2009] 18 STT 212 held that before enactment of section 66A, there was no authority vested by law in revenue to levy service tax on a person who was resident in India and received services outside India and, therefore, no service tax could be levied for period from 1-3-2002 to 17-4-2006 in relation to services received by Indian vessel and shipowners outside India from non-resident and Notification No. 36/2004-ST, dated 31-12-2004 issued under section 68(2) for levy of service tax on such persons from 1-2-2005 could not be justified - Whether Special Leave Petition filed by revenue against High Court's order was to be dismissed - Held, yes

C

D

Mohan Parasaran, **Ms. Binu Tamta**, **Gaurav Dhingra**, **B.K. Prasad** and **Anil Katiyar** *for Petitioner.*

Harish N. Salve, **Tarun Gulati**, **Rony John** and **Praveen Kumar** *for Respondent.*

ORDER

E

Heard learned counsel on both sides.

The special leave petition is dismissed.

■■

F

G

A

[2010] 24 STT 367 (BANG. - CESTAT)

CESTAT, BANGALORE BENCH

Hindustan Aeronautics Ltd.

v.

Commissioner of Service Tax*, Bangalore

B

M.V. RAVINDRAN, JUDICIAL MEMBER
AND P. KARTHIKEYAN, TECHNICAL MEMBER

FINAL ORDER NO. 1221 OF 2009
APPEAL NO. ST/271 OF 2008
SEPTEMBER 10, 2009

Section 65(64) of the Finance Act, 1994 - Management, maintenance or repair service - Assessee was undertaking repair and overhaul of various engines received from Ministry of Defence and others - It availed benefit of Notification No. 12/2003-ST, dated 20-6-2003 excluding cost of material from gross value of taxable service for discharging service tax liability - Adjudicating authority, however, held that cost of material was to be included in gross amount and, accordingly, demanded differential service tax - Whether since assessee while raising invoices, clearly indicated fixed price quotation and cost of materials and activity of repairs considered by it as services rendered and had discharged service tax liability on amount shown as labour cost, it had correctly availed benefit of Notification No. 12/2003-ST - Held, yes [Para 6]

C

D

Circulars & Notifications - Notification No. 12/2003-ST, dated 20-6-2003

FACTS

E

The assessee was undertaking repair and overhaul of various engines received from the Ministry of Defence and others. It availed the benefit of Notification No. 12/2003-ST, dated 20-6-2003 and had excluded cost of material from gross value of taxable service for purpose of computation of service tax liability. However, a show-cause notice was issued demanding service tax short-paid by assessee and the adjudicating authority confirmed differential amount of service tax.

On appeal :

F

HELD

The assessee was entering fixed price quotation for doing the work of Ministry of Defence. On a perusal of the records and the invoices produced by the revenue, it was found that it was specifically showing in the invoices cost of the materials and cost of labour separately. The only contention of the revenue was

G

*In favour of assessee.

that it was not paying sales tax. However, the assessee had produced copies of returns and documents for the sales tax paid. The assessee as an entity paid sales tax for all the divisions and produced copy of the same. [Para 5]

A

On further scrutiny of the records, it was found that the assessee while raising the invoices, clearly indicated the fixed price quotation and cost of the materials and the activity of repairs as considered by it as services rendered and that it was discharging the service tax liability on the amount shown as labour cost. Thus, the assessee had correctly availed the benefit of the Notification No. 12/ 2003-ST and the said benefit of notification could not be denied to it. It is the condition of the notification that there should be documentary proof specifically indicating the value of the goods and materials, which, in the instant case, was on record. It was also found that the decision of the Tribunal in the case of the assessee's own case in Hindustan Aeronautics Ltd. *v.* CST *[2009] 23 STT 120 (Bang. - CESTAT) would separately cover the issue in favour of the assessee. [Para 6]*

B

C

Accordingly, respectfully following the said decision and in view of the facts and circumstances, the impugned order was to be set aside and the appeal was to be allowed. [Para 7]

CASE REVIEW

Hindustan Aeronautics Ltd. v. *CST* [2009] 23 STT 120 (Bang. - CESTAT) (para 3) *followed.*

D

CASE REFERRED TO

Hindustan Aeronautics Ltd. v. *CST* [2009] 23 STT 120 (Bang. - CESTAT) (para 3).

P.J. Joseph *for the Appellant.* **Ms. Joy Kumari Chander** *for the Respondent.*

ORDER

M.V. Ravindran, Judicial Member - This appeal is directed against the Order-in-Original No. 8/2008, dated 31-3-2008.

E

2. The relevant facts that arise for consideration are:–

M/s. Hindustan Aeronautics Ltd., Engine Division, Vimanapura, Bangalore (hereinafter referred to as the 'assessee') are undertaking repair and overhaul of various engines received mainly from Ministry of Defence and others. The said activities constitute taxable service under 'Maintenance or Repair services' as defined under section 65(*64*) of the Finance Act, 1994 (hereinafter referred to as the 'Act') with effect from 1-7-2003. Intelligence was received to the effect that the assessee short paid Service Tax by resorting to suppression of value of taxable Service Tax. Section 67 of the Act relating to valuation of taxable services for charging Service Tax prescribes that the value of any taxable service shall be the gross amount charged by the service provider for such service provided or to be provided by him. Accordingly a show-cause notice was issued. Adjudicating authority after considering the submission made by the appellant before him came to the conclusion that appellants have

F

G

not discharged the correct Service Tax liability and coming to such conclusion passed the following order:–

1. I confirm an amount of Rs. 17,36,16,529 (Rupees seventeen crores thirty six lakhs sixteen thousand five hundered and twenty nine only) towards the Service Tax liability of the assessee on account of Maintenance or Repair Services for the period from October, 2004 to March, 2006 under the provisions of section 73 of the Act. Since the assessee has already paid an amount of Rs. 6,35,11,055 the same is appropriated towards the aforesaid tax liability as confirmed above. The balance amount of Rs. 11,01,05,474 (Rupees eleven crores one lakh five thousand four hundred and seventy four only) shall be paid by the assessee.
2. Interest shall be paid by the assessee in the manner prescribed under the provisions of section 75 of the Finance Act, 1994.
3. As per the legal provisions, the assessee is liable to imposition of penalty under the provisions of section 76, section 77 and section 78 of the Act. However, keeping in view the fact that M/s. HAL is a public sector undertaking, directly under the administrative control of Ministry of Defence, Government of India and no direct responsibility can be fixed on any officer, I consider that there is a reasonable cause for their failure to comply with the provisions of the Act and accordingly, in exercise of powers conferred by section 80 of the Act, I order for waiver of penalty imposable under the aforesaid sections. However, the assessee shall pay the service tax amount as mentioned above as well as interest in the manner prescribed under the provisions of the Act.

3. Ld. Counsel appearing on behalf of the appellant submits that in an identical issue in respect of the very same assessee, but in respect of Helicopter Division was decided finally by this Bench *vide Hindustan Aeronautics Ltd.* v. *CST* [2009] 23 STT 120 (Bang. - CESTAT) and produces a copy of the said order. It is his submission that the issue involved is same and only the Division is different *i.e.,* in this appeal it is Engine Division while in that case it was Helicopter Division.

4. Ld. Jt. CDR on the other hand would reiterate the findings of the adjudicating authority. She would also draw our attention to the documents filed along with comments from the office of the Commissioner of Service Tax and would submit that the invoices which have been raised by the appellant on Indian Air Force or the Ministry of Defence, do not indicate the sales tax liability being discharged by them. It is her submission that in the absence of any sales tax being paid by them, the contention of the appellant that they have supplied the materials separately does not hold any water. She would submit that the appeal filed by the appellant be rejected.

5. We have considered the submissions made at length by both sides and perused the records. It is undisputed that the issue involved in this case is regarding the Service Tax liability and the benefit of Notification No. 12/2003-ST, dated 20-6-2003 as regards the reduction of value of goods and materials

sold by service provider from the gross value of taxable services. It is also undisputed that the appellant is entering fixed price quotation for doing the work of Ministry of Defence. On the perusal of the records and the invoices produced by the ld. Jt. CDR, we find that the appellant is specifically showing in the invoices cost of the materials and cost of labour, separately. The only contention of the ld. Jt. CDR is that they are not paying sales tax. On the specific query from the Bench, the ld. Consultant produces copies of returns and documents for the sales tax paid. It is his submission that the appellant M/s. HAL as an entity pays sales tax for all the divisions and he produces copy of the same.

6. On further scrutiny of the records before us, we find that the appellant while raising the invoices clearly indicates that fixed price quotation and cost of the materials and the activity of repairs as considered by them as services rendered and it is seen that they are discharging the Service Tax liability on the amount shown as labour cost. We are convinced that the appellant has correctly availed the benefit of the Notification No. 12/2003-ST and the said benefit of Notification cannot be denied to them. It is the condition of the notification that there should be documentary proof specifically indicating the value of the goods and materials, which in the case before us on record. We also find that the decision of this Bench in the case of the appellants' Helicopter Division will squarely cover the issue in favour of the appellant. We reproduce the relevant paragraphs which are as under:–

> "6. We have considered the submissions made at length by both the sides and perusal the records. First and the foremost issue to be decided in this case is whether the value of the parts/materials consumed by the appellant needs to be included for arriving at the Service Tax liability of the appellant. On the factual matrix, we find that the invoices which were produced before us clearly indicate materials charges and labour charges differently and we also find that in the very same invoices clearly indicate the discharge of Central Sales Tax as the amount of material cost. The invoices produced before us are not disputed by the revenue. On perusal of the invoices, we find that the contention of the ld. Counsel for the appellant that they are charging for parts/materials separately and paying sales tax is correct. If that be so, we find that the decision of the Hon'ble Supreme Court in the case of *BSNL* (*supra*) will directly cover the issue in favour of the appellant as regard the non-includability of the value of the parts/materials for arriving at the correct Service Tax liability. We also find that the Principal Bench of the Tribunal in the case of *Delux Colour Lab Pvt. Ltd.* (*supra*) were dealing with similar issue, wherein it was held that sale cannot be treated as service and *vice versa.*
>
> 7. In the case before us, the appellant has produced invoices which would clearly indicate that there is a sale of the parts/materials and there is also a element of labour charges charged separately. In view of this when there is a clear distinction available between the sales of the materials/parts and the labour charges, we are of the opinion that the impugned order which confirms the demand on the amount of the materials/parts sold and used for rendering of repair and maintenance service is incorrect and the impugned order to that extent is liable to be set aside and we do so." (p. 122)

A B C D E F G

A **7.** Accordingly, respectfully following our own decision and in view of the facts and circumstances, we set aside the impugned order and allow the appeal with consequential relief, if any.

■■

[2010] 24 STT 371 (NEW DELHI - CESTAT)

B

CESTAT, NEW DELHI BENCH

Diamond Cable Network

v.

Commissioner of Central Excise*, Jaipur

M. VEERAIYAN, TECHNICAL MEMBER

C

ORAL ORDER NO. 1415 OF 2009-SM(BR)
APPEAL NO. ST/712 OF 2007-SM
SEPTEMBER 30, 2009

Section 76, read with sections 80 and 78, of the Finance Act, 1994 - Penalty - For failure to pay service tax - Period October, 2004 to December, 2004 - Assessee, a cable operator registered itself as a service tax assessee on 31-3-2003 and was paying service tax - However, during relevant period, assessee failed to pay service tax - Adjudicating authority imposed penalties under sections 76 and 78 which was upheld by Commissioner (Appeals) - Assessee sought benefit under section 80 for waiver of penalties on ground that it was a small time cable operator and was facing financial crisis especially in initial stage of introduction of service tax - Whether since in instant case no evidence of suppression or misstatement had been relied upon, imposition of separate penalty under section 78 was not justified - Held, yes - Whether in view of facts and circumstances of case, penalty under section 76 was to be reduced - Held, yes [Para 5]

D

E

CASES REFERRED TO

CCE v. *Science Center* [Final Order No. 1582 (Delhi) of 2007-SM(BR) (PB), dated 24-10-2007] (para 4), *Union of India* v. *Dharamendra Textile Processors* 2008 (231) ELT 3/174 Taxman 571 (SC) (LB) (para 4), *Asstt. CCE* v. *Krishna Poduval* [2006] 3 STT 96 (Ker.) (para 4) and *Chistia Textiles* v. *CCE & Cus.* 2007 (212) ELT 41 (Mum. - Trib.) (para 4).

F

Atul Gupta *for the Appellant.* **Sunil Kumar** *for the Respondent.*

ORDER

1. This is an appeal against the order of the Commissioner (Appeals) No. 162(RKS)ST/JPR-I/07, dated 19-9-2007, by which the order of the original authority demanding service tax of Rs. 1,14,586 along with interest and

G

*In favour of assessee.

imposition of penalty of Rs. 1,14,586 under section 76, Rs. 1,14,568 under section 78, Rs. 500 under section 77 of the Finance Act, 1994 has been upheld.

2. Heard both sides.

3. Learned Company Secretary submits that they are not disputing the liability of service tax and interest. He submits that the appellant is a small time cable network operator and was facing severe financial crisis and therefore, there has been default in payment of service tax. Further, during that time, there was dispute relating to taxability of the impugned service. He also submits that the entire amount of service tax and interest stands paid before issue of show-cause notice. He seeks waiver of penalty under section 80 of the Finance Act, 1994.

4. Learned DR submits that this is a case where the appellants registered themselves for payment of service tax on 31-3-2003 and they were paying service tax thereafter. Therefore, the claim that they entertained *bona fide* belief that service tax was not payable during the period October, 2004 to December, 2004 cannot be accepted at all. He relies on the decision of the Tribunal in the case of *CCE* v. *Science Center* [Final Order No. 1582 (Delhi) of 2007-SM(BR)(PB), dated 24-10-2007], *Union of India* v. *Dharamendra Textile Processors* 2008 (231) ELT 3/174 Taxman 571 (SC)(LB), *Asstt. CCE* v. *Krishna Poduval* [2006] 3 STT 96 (Ker.), *Chistia Textiles* v. *CCE & Cus.* 2007 (212) ELT 41 (Mum. - Trib.) and submits that the penalties imposed should be sustained.

5. I have carefully considered the submissions from both sides and perused the record. The appellant is not disputing the service tax liability and order for interest. The appellant is seeking the benefit under section 80 of the Finance Act, 1994. I find that the appellants registered themselves as service tax assessee on 31-3-2003 and were paying service tax though, in some cases, there was some delay. However, I do not find any justification for not paying service tax from October, 2004 to December, 2004. However, the appellants submit that they are small time cable operator and they were facing financial crisis especially in the initial stage of introduction of service. I find that penalty of Rs. 1,14,586 has been imposed under section 76 as well as under section 78 separately. In the given facts and circumstances of the case, separate penalty under section 78 may not be warranted. The decisions relied upon by the learned DR are mainly relating to Customs Act and Central Excise Act. While considering the penal provisions under the Finance Act, 1994, one should take into account the existence of section 80 of the Finance Act. In the present case, no evidence of suppression or misstatement has been relied upon. The appellant was registered and was paying service tax for initial period and raised the dispute for the subsequent period. Therefore, some leniency is warranted. The separate penalty under section 78 is not justified in the facts and circumstances of the case. Further, I reduce the penalty imposed under section 76 from Rs. 1,14,586 to Rs. 50,000 (rupees fifty thousand). The penalty imposed under section 77 is not interfered with.

6. The appeal is disposed of on the above terms.

■■

A

[2010] 24 STT 373 (CHENNAI - CESTAT)

CESTAT, CHENNAI BENCH

S. Rajendran

v.

Commissioner of Central Excise*, Salem

B

MS. JYOTI BALASUNDARAM, VICE PRESIDENT

FINAL ORDER NOS. 1377 TO 1380 OF 2009
APPEAL NOS. S/139, 140, 180 & 189 OF 2008
OCTOBER 5, 2009

C

Section 65(91) of the Finance Act, 1994 - Rent-a-cab scheme operator's service - Service tax demand was confirmed on assessee on ground that it was providing rent-a-cab operator's service - In instant appeal, assessee contended that demand was barred by limitation as there was no material on record to establish suppression on its part and that it did not get itself registered with service tax authorities and had not paid taxes due to ignorance of law - Said contention had not been controverted or rebutted by revenue - Whether demand was to be set aside on ground of limitation - Held, yes [Para 3]

D

CASE REFERRED TO

Secy., Federation of Bus-Operators Assn. of T.N. v. *Union of India* 2001 (134) ELT 618 (Mad.) (para 3).

S. Murugappan *for the Appellant.* **T.H. Rao** *for the Respondent.*

ORDER

E

1. The above appeals arising out of separate impugned orders involve a common issue and hence are heard together and disposed of by this common order.

2. In all cases, demands of service tax along with interest have been confirmed on the ground that assessees herein were providing 'rent-a-cab operator' service. Penalties have also been imposed upon them.

F

3. I have heard both sides. I find force in the submission of the appellants that the demands are barred by limitation for the reason that there is no material on record to establish suppression on the part of the assessees who, although had not got themselves registered with service tax authorities and not paid the taxes, have stated that they did so out of ignorance which stand has not been controverted or rebutted by the Revenue. Therefore, although demands are sustainable on merits in the light of the decision of the Hon'ble Madras High Court in *Secy., Federation of Bus-Operators Assn. of T.N.* v. *Union of India* 2001

G

*In favour of assessee.

(134) ELT 618, demands are not sustainable on the ground that they are time-barred. I, therefore, set aside the impugned orders and allow these appeals on the ground of limitation. A

■■

[2010] 24 STT 374 (NEW DELHI - CESTAT) B

CESTAT, NEW DELHI BENCH

Sharp Communication

v.

Commissioner of Central Excise*, Jaipur

M. VEERAIYAN, TECHNICAL MEMBER
AND D.N. PANDA, JUDICIAL MEMBER C

FINAL ORDER NO. ST/264 OF 2009
APPEAL NO. ST/618 OF 2007-CUS (BR)
OCTOBER 26, 2009

Section 80, read with sections 76 and 78, of the Finance Act, 1994 - Penalty - Not to be imposed in certain cases - Periods August 2002 to March 2003 and 14-7-2003 to 31-8-2003 - Adjudicating authority confirmed demand of service tax on assessee and also imposed equal amount of penalty under both sections 76 and 78 - From order of adjudicating authority, it was found that impugned levy came into force with effect from 16-8-2002 and there was a dispute relating to valuation of service in view of implementation of law - Whether in view of fact that litigation arose at infancy stage of law, penalty imposed under sections 76 and 78 was to be waived - Held, yes - Whether, however for period in default there would be interest imposable on tax liability - Held, yes [Para 3] D E

S.R. Meena *for the Respondent.*

ORDER

D.N. Panda, Judicial Member - None is present for the appellant.

2. Adjudication has been done in this case for the period from August, 2002 to March, 2003 demanding service tax of Rs. 33,165 and for the period 14-7-2003 to 31-8-2003 resulting in demand of tax of Rs. 18,936. Aggregate demand comes to Rs. 52,101. By adjudication order dated 18-9-2006, there was equal amount of penalty of Rs. 50,101 imposed both under sections 76 and 77 of the Finance Act, 1994. F

*Partly in favour of assessee. G

A

3. Learned Adjudicating authority in his discussion and finding has held that the levy came into force with effect from 16-8-2002 and the appellant did not contest the levy itself on it. But there was a dispute relating to valuation of service and appellant's inability to discharge of penalty in view of implementation of law. None of the authorities have heard the appellant. Even though the appellant is not present today, we waive the penalty imposed under sections 76 and 78 of the Finance Act, 1994 considering that the case is a justified one calling for such decision in view of the litigation arose at the infancy stage of law. Therefore, in the fitness of the circumstances of the case, adjudication is confirmed to the extent of levy of service tax and interest. But penalty imposed under sections 76 and 78 of the Finance Act, 1994 are waived. We make it clear that for the period in default, there shall be interest imposable on tax liability.

B

4. In the result, the appeal is allowed partly.

■■

C

[2010] 24 STT 375 (BANG. - CESTAT)

CESTAT, BANGALORE BENCH

Sharma Transports

D

v.

Commissioner of Service Tax*

M.V. RAVINDRAN, JUDICIAL MEMBER
AND P. KARTHIKEYAN, TECHNICAL MEMBER

FINAL ORDER NO. 1227 OF 2009
STAY ORDER NO. 1402 OF 2009
STAY APPLICATION NO. 56 OF 2009
SERVICE TAX APPEAL NO. 91 OF 2006
SEPTEMBER 17, 2009

E

Section 73 of the Finance Act, 1994 - Recovery of service tax not levied or paid or short-levied or short-paid or erroneously refunded - Show-cause notice was issued to assessee demanding service tax under categories of 'Tour operator service' and 'Business auxiliary service' - Assessee had not replied to show- cause notice nor filed any written submissions - During personal hearing also adjudicating authority granted time for filing reply to show-cause notice, which assessee did not avail - Adjudicating authority confirmed said demand - Whether assessee was to be directed to file reply to show-cause notice and on such reply being received, adjudicating authority would decide issue afresh - Held, yes [Para 5]

F

G

*Matter remanded.

Prasanna Krishnan *for the Appellant.* **Ms. Joy Kumari Chander** *for the Respondent.*

A

ORDER

M.V. Ravindran, Judicial Member - This stay petition and the appeal are directed against the Order-in-Original No. 52/2008, dated 20-11-2008, passed by the Commissioner of Service Tax, Bangalore.

2. Heard both sides and perused the records.

B

3. The issue involved in this case is regarding service tax liability of the appellants as regards the services rendered under the category of 'Tour Operator Service' and some demands under the category of 'Business Auxiliary Service'. At the outset, the learned Counsel submits that the order is an *ex parte* order as the appellant has not filed any reply to the show-cause notice, though time was granted to them by the adjudicating authority to file written submissions.

C

4. The learned Jt. CDR submits that the appellant had been granted enough time to file their written reply but failed to reply to the show-cause notice.

5. On considering the submissions made by both sides and perusal of the records, we are of the view that appeal itself could be disposed off at this stage, hence, after waiving the condition of pre-deposit of the amount involved, we take up the appeal for disposal. We find that the appellant has not replied to the show-cause notice nor filed any written submissions. We find that during the personal hearing, the learned representative before the adjudicating authority, requested time for filing reply to the show-cause notice, which they did not do so. Since the appellant has not filed any reply to the show-cause notice, we direct the appellant to furnish reply to the show-cause notice within a period of four weeks from the date of receipt of this order and on such reply being received, the adjudicating authority will decide the issue afresh within a period of two months thereafter, following the principles of 'Natural Justice'. The stay application and the appeal are allowed by way of remand to original adjudicating authority.

D

E

■■

F

G

A

[2010] 24 STT 377 (CHENNAI - CESTAT)

CESTAT, CHENNAI BENCH

Safe Test Enterprises

v.

Commissioner of Central Excise*, Salem

B

MS. JYOTI BALASUNDARAM, VICE PRESIDENT

FINAL ORDER NO. 1771 OF 2009
APPEAL NO. S/133 OF 2008
NOVEMBER 18, 2009

C

Section 78, read with section 76, of the Finance Act, 1994 - Penalty - For suppressing value of taxable service - Penalty under sections 76 and 78 was imposed by adjudicating authority on assessee - Whether since charge of suppression had been confirmed by adjudicating authority while confirming demands beyond normal period of limitation and that confirmation had not been challenged by assessee, penalty was sustainable against it - Held, yes - Whether in view of fact that penalty both under sections 76 and 78 cannot be imposed as these two provisions are mutually exclusive, penalty imposed under section 76 was to be set aside - Held, yes - Whether since assessee had paid tax together with interest prior to issue of show-cause notice, proviso to section 78 would be applicable and, therefore, penalty under section 78 was to be reduced to 25 per cent of tax amount - Held, yes [Para 2]

D

M. Karthikeyan *for the Appellant.* **C. Dhanasekaran** *for the Respondent.*

ORDER

1. The appellants challenge imposition of penalties both under sections 76 and 78 of Chapter V of the Finance Act, 1994. Penalties have been imposed on the ground that the assessees suppressed receipt of taxable service and did not pay tax with intention to evade payment thereof.

E

2. The plea of the assessees that the extended period is not available to the Department cannot be acceded to for the reason that the charge of suppression has been confirmed by the adjudicating authority who has confirmed the demands beyond the normal period of limitation and the confirmation has not been challenged by the assessees. Therefore, penalty is sustainable against the assessees. However, I see force in the submission of the assessees that penalty both under sections 76 and 78 cannot be imposed for the reason that these two provisions are mutually exclusive. I see further force in the assessee's submission that the liability to penalty has to be restricted to 25 per cent of the service tax amount in the light of first proviso to section 78 which provides that where the service tax as determined under section 73(2) and the interest payable thereon under section 75 is paid within 30 days from the date of communica-

F

G

*Partly in favour of assessee.

tion of the order of the Central Excise Officer determining the tax, amount of the penalty liable to pay shall be 25 per cent of the service tax so determined. The assessees have paid the tax together with interest prior to the issue of the show-cause notice. Therefore, the above proviso to section 78 will be applicable. In the light of the above proviso, I set aside the penalty imposed under section 76 and reduce the penalty under section 78 to 25 per cent of the tax amount.

3. The appeal is thus partly allowed.

■■

[2010] 24 STT 378 (CHENNAI - CESTAT)

CESTAT, CHENNAI BENCH

V. Sriram & Co.

v.

Commissioner of Central Excise*, Salem

MS. JYOTI BALASUNDARAM, VICE PRESIDENT

FINAL ORDER NO. 1687 OF 2009
APPEAL NO. S/151 OF 2008
NOVEMBER 11, 2009

Section 76, read with section 78, of the Finance Act, 1994 - Penalty - For failure to pay service tax - Adjudicating authority set aside proposal to impose penalty on assessee under sections 76 and 78 on ground that assessee had paid service tax amount before issue of show-cause notice - However, Commissioner in revision, imposed penalty under sections 76 and 78 on assessee - Whether since assessee had wilfully avoided taking out service tax registration for taxable service rendered by it, payment before issue of notice was not sufficient to hold that penalty was not payable and, therefore, penalty on assessee was to be upheld - Held, yes - Whether, however, since provisions for penalties under sections 76 and 78 are mutually exclusive, penalty imposed under section 78 was to be set aside and penalty imposed under section 76 was to be upheld - Held, yes [Para 2]

S. Venkatachalam *for the Appellant.* **Ms. Indira Sisupal** *for the Respondent.*

ORDER

1. I have heard both sides on the appeal against the review order of the Commissioner imposing penalty under section 76 as well as under section 78

*Partly in favour of assessee.

A of the Finance Act, 1994 for delay in payment of service tax. The tax liability is not disputed by the appellants.

2. I note that the adjudicating authority has recorded a clear finding that the assessees had wilfully avoided taking out service tax registration for taxable service rendered by them and that finding has not been challenged by the assessees. The ground on which the adjudicating authority set aside penalty namely payment of the tax amount before issue of notice, is no longer good B in law as payment before issue of notice is not sufficient, in the case of suppression, to hold that penalty is not payable. I, therefore, uphold the penalty on the assessees. However, I accept the contention of the assessees that penalties under sections 76 are 78 are mutually exclusive and, therefore, set aside penalty of Rs. 39,463 imposed under section 78, while upholding the penalty imposed under section 76.

3. The appeal is partly allowed as above.

C ■■

[2010] 24 STT 379 (CHENNAI - CESTAT)

CESTAT, CHENNAI BENCH

D **Commissioner of Central Excise, Chennai**

v.

Showa Engg. Ltd.*

P. KARTHIKEYAN, TECHNICAL MEMBER

FINAL ORDER NOS. 129-130 OF 2009
APPEAL NOS. S/8-9 OF 2007
JANUARY 28, 2009

E

Rule 2(l) of the Cenvat Credit Rules, 2004 - Cenvat credit - Input service - Period October, 2004 to September, 2005 - During relevant period assessee paid service tax on mobile phones used for official purposes - Whether in terms of Board's clarification contained in Circular No. 97/8/2007-ST, dated 23-8-2007, use of mobile phones in instant case constituted input service and F service tax paid on same was admissible as Cenvat credit - Held, yes [Para 5]

Circulars and Notifications : Circular Nos. 59/8/2003-ST, dated 20-6-2003 and 97/8/2007-ST, dated 23-8-2007

FACTS

During the relevant period, the assessee had paid service tax for the use of mobile phones for official purposes and availed Cenvat credit of the same. The

G *In favour of assessee.

original authority had disallowed the credit and demanded the same in view of the Board's Circular No. 59/8/2003-ST, dated 20-6-2003 which had been issued in context of the Service Tax Credit Rules, 2004, in terms of which service tax incurred in respect of telephones not installed in the factory premises, was not to be allowed as credit. On appeal, the Commissioner (Appeals) considering the use of the mobile phones in facilitating the business of the assessee, held that the assessee was eligible for the impugned amount of credit.

On appeal :

HELD

The mobile phones in question were used for official purpose. Thus, use of the phones was in or in relation to manufacture of excisable goods by the assessee. In view of the Board's Circular No. 97/8/2007-ST, dated 23-8-2007, the revenue had taken superseded instructions of the Board's earlier circular as a ground to assail the impugned order. In terms of the Board's clarification contained in Circular No. 97/8/2007, dated 23-8-2007, use of phones found in the instant case constituted input service and service tax credit was admissible as Cenvat credit. [Para 5]

In the result, the appeal filed by the revenue was to be dismissed. [Para 6]

CASE REVIEW

CCE v. *Excel Crop Care Ltd.* [2009] 20 STT 164 (Guj.) (para 5) *followed.*

CASES REFERRED TO

CCE v. *Dhiren Chemical Industries* 2002 (143) ELT 19 (SC) [Para 3] and *CCE* v. *Excel Crop Care Ltd.* [2009] 20 STT 164 (Guj.) (para 4).

N.J. Kumaresh *for the Appellant.* **M. Kannan** *for the Respondent.*

ORDER

1. In the impugned orders, the Commissioner vacated demands for credit of service tax availed by the appellants relating to use of mobile phones. Details of the orders are as follows :

Name of the Appellant	*Material Period*	*Appeal No.*	*Amount (in Rs.)*
Showa Engg. Ltd.	Dec. '04 to Sept. '05	S/8/07	3,977
Brakes India Ltd.	Oct. '04 to Sept. '05	S/9/07	17,123

2. Heard both sides. In the impugned orders, the Commissioner (Appeals) found that the impugned credits related to service tax incurred by the respondents for the use of mobile phones and that there was no dispute that such use was for official purpose. He found that the original authority had disallowed the credit and demanded the same in terms of the Board's Circular No. 59/8/2003-ST, dated 20-6-2003 which had been issued in the context of the erstwhile Service Tax Credit Rules, 2002 (STCR). In terms of sub-rule (6) of rule 3 of STCR, service tax incurred in respect of telephones not installed

A in the factory premises was not to be allowed credit. CENVAT Credit Rules, 2004 (CCR) which came into effect from 10-9-2004 did not contain any such prohibition. Considering the use of the mobile phones in facilitating the business of the assessee, the Commissioner (Appeals) held that the appellants were eligible for the impugned amounts of credit.

3. The revenue has sought to vacate these orders on the ground that they were inconsistent with the instructions contained in the Board's Circular B No. 59/8/2003. In terms of the Apex Court's judgment in the case of *CCE* v. *Dhiren Chemical Industries* 2002 (143) ELT 19, the authorities in the department were bound by the instructions of the CBEC. The Commissioner (Appeals) had wrongly held that the circular did not apply post 10-9-2004 when the CCR, 2004 was enacted.

4. The learned counsel for M/s. Brakes India Ltd. submits that *vide* Circular No. 97/8/2007-ST, dated 23-8-2007, CBEC had clarified that its Circular C No. 59/8/03-ST, dated 20-6-2003 had been issued in the context of the STCR and that with effect from 10-9-2004 credit of service tax paid in respect of mobile telephones was admissible, provided the mobile phones were used for providing output service or in relation to manufacture of finished goods. He also placed reliance on the judgment of the Hon'ble High Court of Gujarat in the case of *CCE* v. *Excel Crop Care Ltd.* [2009] 20 STT 164, wherein the Hon'ble High Court had held that the phones not being installed in the factory premises did hot constitute sufficient ground to deny service tax credit.

D **5.** On a careful consideration of the case records and the submissions by both sides, I find that the Commissioner (Appeals) had passed the impugned orders consistent with the interpretation of the provisions by the Hon'ble High Court of Gujarat. The mobile phones in question were used for official purpose. It has to be held that use of the phones was in or in relation to manufacture of excisable goods by the respondents. In view of the Board's Circular dated 23-8-2007, the revenue has taken superseded instructions of the Board's E earlier circular as a ground to assail the impugned orders. In terms of the Board's clarification contained in Circular dated 23-8-2007, cases of use of phones found in the instant cases constituted input service and the service tax credit was admissible as CENVAT credit. Moreover, in the judgment of the Hon'ble High Court of Gujarat cited by the learned counsel for M/s. Brakes India Ltd. their Lordships had dealt with the issue of admissibility of credit for use of mobile phones as follows :–

> F "8. Therefore, on a conjoint reading of the aforesaid provisions, it is apparent that the mobile service provider, who is liable to pay service tax, and recovers the same by adding such service tax in this bill, is the person providing taxable service and is rendering 'output service' so as to constitute 'input service' in hands of respondent assessee.
>
> 9. In the aforesaid circumstances, the ground on which the credit was disallowed, namely, the phones were not installed in the factory premises, cannot be termed to be a ground germane to the provisions of the Rules relevant for the present purpose."

G

6. In the result, I find that the impugned orders do not call for any intervention. The appeals filed by the Revenue are dismissed. A

■■

[2010] 24 STT 382 (BANG. - CESTAT) B

CESTAT, BANGALORE BENCH

Meka Industries

v.

Commissioner of Customs & Central Excise*, Belgaum

T.K. JAYARAMAN, TECHNICAL MEMBER
AND M.V. RAVINDRAN, JUDICIAL MEMBER C

FINAL ORDER NO. 134 OF 2009
APPEAL NO. E/488 OF 2007
FEBRUARY 24, 2009

Rule 15 of the Cenvat Credit Rules, 2004, read with section 11AC of the Central Excise Act, 1944 - Cenvat credit - Confiscation and penalty - Assessee availed Cenvat credit of excess service tax paid - Adjudicating authority held that Cenvat credit had wrongly been availed by assessee and, accordingly, demanded said amount along with interest and penalty - Whether since assessee availed Cenvat credit of service tax paid on a bona fide belief, and had already discharged adjudication levies along with interest, there was no justification for imposition of any penalty upon assessee - Held, yes [Para 5] D

FACTS

The assessee was a manufacturer of PCC and RCC Poles and was also engaged in providing the services of erection and installation of such poles at the site. It was collecting separate charges for having rendered such services. It availed Cenvat credit of service tax paid on outward transportation and erection, commissioning or installation services. The adjudicating authority held that Cenvat credit had wrongly been availed by the assessee and, accordingly, demanded the said amount along with interest. It also imposed the penalty under rule 15 of the Cenvat Credit Rules, 2004, read with section 11AC of the Central Excise Act, 1944 upon the assessee. On appeal, the Commissioner (Appeals) upheld the action of the adjudicating authority. In the instant appeal, the assessee contended that it was under *bona fide* belief that excess amount of service tax paid by it was available as credit, and since it had deposited service tax amount before receipt of show-cause notice, imposition of penalty was not warranted. E F

*In favour of assessee. G

A **HELD**

On going through the record, it was clear that the assessee availed Cenvat credit of service tax paid on a bona fide *belief. It was under the impression that it could avail Cenvat credit of service tax paid mistakenly, once it had come to know that it was not at all liable to pay the said service tax. There was no* mala fide *on the part of the assessee. Moreover, the assessee was separately challenging the levy. It was also seen that the adjudication levies had already been* B *discharged along with interest. Therefore, there was no justification for imposition of any penalty on the assessee. Hence, the penalty imposed upon the assessee was to be set aside. [Para 5]*

CASES REFERRED TO

Evergreen Suppliers v. *CCE* [2008] 16 STT 122 (CESTAT - Bang.) (para 4), *BBR (India) Ltd.* v. *CCE* [2007] 8 STT 275 (Bang. - CESTAT) (para 4).

K.K. Varier *for the Appellant.* **Smt. Joy Kumari Chander** *for the Respondent.*

C **ORDER**

T.K. Jayaraman, Technical Member - This appeal has been filed against the Order-in-Appeal No. 175/2007, dated 30-3-2007 passed by the Commissioner of Central Excise (Appeals), Mangalore.

2. We heard both sides.

3. The appellants are manufacturers of PCC and RCC Poles and are also D engaged in providing the services of Erection and Installation of such Poles at the site. They are collecting separate charges for having rendered such services. They had availed Service Tax credit on the Service Tax paid by them for rendering the output service such as erection of poles, installation and commissioning and on outward transportation. Revenue proceeded against them on the ground that the credit had been availed wrongly. Therefore, the said amount was demanded along with interest. There was a proposal for imposition of penalty also. The Adjudicating Authority, in his order, disallowed E and demanded Service Tax credit of Rs. 6,43,668 along with interest. He imposed equal penalty under Rule 15 of the Cenvat Credit Rules, 2004 read with section 11AC of the Central Excise Act, 1944. The appellants approached the Commissioner (Appeals). The Commissioner (Appeals) examined the issue and came to the conclusion that the appellants availed credit on the following services *viz.,* (*i*) Goods Transport Service; and (*ii*) Erection, Installation and Commissioning Services. They availed credit of Service Tax paid on these two F services and utilized the same for discharge of duty liability on PCC and RCC Poles. The Commissioner (Appeals) reasoned that availment of credit of tax paid on erection, installation and commissioning is not correct as admittedly, the said service was an output service provided and only the receiver of the service is entitled to avail the credit of Service Tax. As regards the outward transportation, the Commissioner (Appeals) held that the appellants cannot take credit of the tax paid on outward transportation inasmuch as the transportation charges and incidence of tax is borne by someone else. Further, G he held that the outward transportation is not an input service for the

appellants and actually only the receiver is entitled for the credit. Holding such a view the Commissioner (Appeals) upheld the order of the Original Authority. The appellants are highly aggrieved over the impugned order of the Commissioner (Appeals) and have come before this Tribunal for relief.

4. Shri K.K. Varier, the learned Consultant, appeared for hearing on behalf of the appellants. He stated in the course of hearing that they are not challenging the point that they are ineligible for availing the credit. They had *bona fide* belief that the excess amount of Service Tax paid by them is legally available as credit. It was stated that the appellant had discharged service tax liability of Rs. 58,822 on Transport of Goods by Road by their own vehicles which was not liable to service tax at the relevant time. Consequently, the excess Service Tax paid was availed as input service credit under rule 6 of the Service Tax Rules. Similarly, they had taken input service credit of the excess Service Tax of Rs. 2,26,938 discharged as a sub-contractor to M/s. ABB Ltd. in their ER-1 Returns for the month of December, 2005. When the main contractor has already discharged the Service Tax liability on the activity of Erection and Commissioning, the sub-contractor is not liable to discharge any service tax liability as held in the case of *Evergreen Suppliers* v. *CCE* [2008] 16 STT 122 (Bang. - CESTAT) and in the case of *BBR (India) Ltd.* v. *CCE* [2007] 8 STT 275 (Trib. - Bang.). In any case, they had deposited the Service Tax due from them on 31-12-2005 well before the receipt of the show-cause notice dated 21-3-2006. There was no *mala fide* intention on the part of the appellant to attract the mandatory penalty provided under rule 15 of the Cenvat Credit Rules read with section 11AC of the Central Excise Act, 1944. It was also stated that the provisions of rule 15 of the Cenvat Credit Rules, 2004 has been wrongly invoked in the present case. The said Rule applies only when there is wanton violation of Cenvat Credit Rules, 2004, which is clear from the plain reading of language of rule 15. Therefore, it was submitted that the Adjudicating Authority and the Appellate Authority had wrongly imposed penalties of Rs. 6,43,668. Further, under sub-rule (3) of rule 15 of the Cenvat Credit Rules, 2004, the maximum penalty provided is Rs. 10,000 which has been reduced to Rs. 2,000 with effect from 1-3-2007 whereas the Adjudicating Authority has imposed equal amount as penalty amounting to Rs. 64,358, which was not warranted and the said penalty has been confirmed by the Appellate Authority. It was stated that the adjudication levies of Rs. 6,31,967 towards Cenvat credit and Rs. 11,701 towards Education Cess and Rs. 1,22,879 as interest was paid *vide* TR-6 Challan dated 23-6-2007. In view of the above, it was argue that the penalties are not warranted.

5. On a very careful consideration of the matter, we find that the appellants had already paid the adjudication levies. The point made by the learned Consultant is that the appellants discharged Service Tax liability when it was not due from them. Therefore, they took credit of the amounts. But however, when the revenue proceeded against them, they discharged the adjudication levies along with interest and pleaded that the penalties imposed are excessive. They are separately challenging the levies. The prayer of the appellants at present is for setting aside the penalties. On going through the records, we

A B C D E F G

A are of the view that the appellants availed the credit on a *bona fide* belief. The appellants appear to be under the impression that they could avail Cenvat credit of the Service Tax paid mistakenly, once they had come to know that they were not at all liable to pay the said Service Tax. We do not find any *mala fide* on the part of the appellants. Moreover, the appellants are separately challenging the levy. It is also seen that the adjudication levies in the present case have already been discharged along with interest. In view of these factors, we do not find any justification for imposition of any penalty on the B appellants. Hence, the penalties are set aside and the appeal is disposed of in the above manner.

■■

C

[2010] 24 STT 385 (CHENNAI - CESTAT)

CESTAT, CHENNAI BENCH

V.N.S.S. Textiles

v.

Commissioner of Central Excise*, Madurai

MS. JYOTI BALASUNDARAM, VICE PRESIDENT

D

FINAL ORDER NO. 1383 OF 2009
APPEAL NO. S/39 OF 2008
OCTOBER 5, 2009

Section 65(25) of the Finance Act, 1994 - Clearing and forwarding agent's services - Assessee was engaged in activity of receipt of goods from its principals, storage of same in its premises, dispatch of same to clients on its E **sale invoices, and collection of amount from clients on behalf of its principals and remittance of same to them - Revenue demanded service tax from assessee under category of 'Clearing and forwarding agent' - Whether since assessee did not undertake clearance of goods from its principals but goods were supplied by its principals to it in view of decision in CCE v. Kulcip Medicines (P.) Ltd. [2009] 20 STT 264 (Punj. & Har.), it could not be treated as a clearing and forwarding agent and, therefore, impugned demand was to** F **be set aside - Held, yes [Para 2]**

CASE REVIEW

CCE v. *Kulcip Medicines (P.) Ltd.* [2009] 20 STT 264 (Punj. & Har.) (para 2) *followed.*

CASE REFERRED TO

CCE v. *Kulcip Medicines (P.) Ltd.* [2009] 20 STT 264 (Punj. & Har.) (para 2).

G

*In favour of assessee.

Joseph Prabhakar *for the Appellant.* **T.H. Rao** *for the Respondent.* A

ORDER

1. In this case, service tax demand has been confirmed against the appellants on the ground that they are rendering 'clearing and forwarding' service, together with interest and penalty has been imposed.

2. I have heard both sides. There is no dispute that the activity of the assessees consists of receipt of goods from their principals storage of the same in their premises, despatch of the same to clients on their sale invoices, maintenance of records for receipts, sales, preparation of periodical statements about stock position, collection of amount from the clients on behalf of their principals and remittance of the amount collected from the clients and undertaking of payment of taxes and rental charges of godown etc. on behalf of the principals. There is no dispute that the goods are cleared by the principals to the assessees. In other words, the assessee do not undertake clearance of goods from their principals but the goods are supplied by their principals to them. In this view of the matter, the decision of the Hon'ble Punjab & Haryana High Court in *CCE* v. *Kulcip Medicines (P.) Ltd.* [2009] 20 STT 264 holding that if the goods are already cleared by the principal, the recipient who receives the goods, stores them and sells them cannot be held to be a 'clearing and forwarding agent' so as to be liable to service tax under this category. Following the ratio of the above decision, I set aside the impugned order and allow the appeal.

■■

B C D

[2010] 24 STT 386 (NEW DELHI - CESTAT)

CESTAT, NEW DELHI BENCH

Life Insurance Corpn. of India

v.

Commissioner of Central Excise*, Jaipur

D.N. PANDA, JUDICIAL MEMBER

FINAL ORDER NOS. 1313-1316/2009-SM(BR.)
STAY ORDER NOS. 628-631/2009-SM(BR.)
SERVICE TAX STAY NOS. 1658-1661 OF 2007-SM
APPEAL NOS. ST/378-381 OF 2007-SM
OCTOBER 20, 2009

E F

Section 68 of the Finance Act, 1994 - Payment of service tax - Service tax demand was confirmed on assessee-LIC in respect of risk premium of its four different branches - Assessee submitted that levy was unwarranted for

*Matter remanded.

G

A **reason that it had been centrally registered in Mumbai and service tax liability, if any, had been discharged - Whether matter was to be remanded to adjudicating authority to make correspondence with Bombay service tax authority and consider plea of double taxation, if any, for self-same service - Held, yes [Para 6]**

S.P. Mittal *for the Appellant.* **M. Rastogi** *for the Respondent.*

B **ORDER**

1. Although these four appeals were listed yesterday, at the request of the Appellant, those were adjourned for hearing today.

2. Ld. Counsel Shri S.P. Mittal submits that service tax in respect of following four branches of LIC has been levied as noted against each in respect of risk premium :

C

Sl. No.	*Name of the notice*	*Amount of insurance premium received during the month Sept. 2004 (Rs.)*	*Amount of insurance premium received during the month Oct. 2004 (Rs.)*	*Amount of Service Tax* i.e., *1% of total premium in case they opted for the benefit under Notification No. 11/2004-ST, dtd. 10-9-2004 (Rs.)*	*Amount of Service Tax inclusive Education Cess (Rs.) [as demanded in (SCN)]*
1.	LIC, Jalore	12680536	11779379	244599	249491
2.	LIC, Unit-I, Pali	6897264	16374322	232716	232716
3.	LIC, Sanchore	10502419	11001376	215038	219339
4.	LIC, Sumerpur	13653468	15861600	295151	295151
	Total				996697

D

E

3. Ld. Counsel submits that the levy was unwarranted for the reason that LIC has been centrally registered in Mumbai and service tax liability, if any, has been discharged in respect of its branches. Once there is centralised registration, jurisdiction of other Authorities end and impugned order is beyond jurisdiction. He further submits that the demand related to only risk premium relating to above branches. He also guides that if the Authorities get proper F information from the Bombay office they themselves shall be satisfied that they have no jurisdiction to raise the impugned demand and the impugned order shall not sustain. Therefore he prays that there should be total waiver of pre-deposit since the appellant has fair chance to succeed in the appeal. He also prays that the order not being sustainable, appeals be disposed.

4. Ld. DR Shri Rastogi fairly agrees that revenue does not intend to resort to G double taxation on the self same services. But verification is required before

concluding the matter to ascertain whether there was any double taxation made both in Bombay and by the present orders under appeal.

5. Heard both sides and also perused the records.

6. Para 6 of the order of Adjudication clearly demonstrates that appellant had sought registration in Mumbai centrally. Therefore without keeping the matter pending, it would be proper to waive the requirement of pre-deposit as well as to dispose the Appeal with the direction that the ld. Adjudicating Authority shall make correspondence with Bombay service tax authority and consider the plea of double taxation if any for the self same service. If he is satisfied that the impugned services have already been taxed in Bombay jurisdiction there may not be further proceeding. If outcome of enquiry comes otherwise, law shall apply as that may be proper. With this direction, all the four appeals are disposed and ld. Adjudicating Authority is required to cause enquiry as above and afford fair opportunity of hearing to the appellant and bring the litigation to an end.

7. In the result, all the four stay applications and appeals are disposed remanding the matter to the ld. Adjudicating Authority, setting aside the impugned orders.

■■

[2010] 24 STT 388 (AHD. - CESTAT)

CESTAT, AHMEDABAD BENCH

Commissioner of Central Excise, Vapi

v.

Jindal Photo Ltd.*

B.S.V. MURTHY, TECHNICAL MEMBER

FINAL ORDER NO. A/318/2009-WZB/AHD.
APPEAL NO. ST/165 OF 2008
JANUARY 27, 2009

Rule 9 of the Cenvat Credit Rules, 2004 - Cenvat credit - Documents and accounts - Assessee availed Cenvat credit of service tax paid on receipt of services - Adjudicating authority denied credit on ground that input service distributor which was head office of company had not taken service tax registration and because of said reason, registration number was not mentioned on invoices based on which assessee availed credit - On appeal, assessee contended that by time instructions were issued by Government, with respect

*In favour of assessee.

A **to input service distributor, Head Office had already issued invoice and therefore, procedural requirement could not be fulfilled - Commissioner (Appeals) on finding that there was no disput about receipt of service by assessee, allowed credit - Whether since there were valid grounds for omission and further omission took place when rules relevant to input service distributor were being implemented, impugned order was to be upheld - Held, yes [Para 2]**

B

Sameer Chitkara *for the Appellant.* **Manas Ghosh** *for the Respondent.*

ORDER

1. This appeal has been filed by revenue against the order of the Commissioner who has allowed the benefit of Cenvat credit of service tax rejected by the original adjudicating authority on the ground that the input service distributor, which is the Head Office of the company, had not taken the service tax registration and because of this reason, the registration number was not mentioned on the invoices based on which the appellants availed the credit. He has allowed the Cenvat credit in view of the proviso to sub-rule (2) of rule 9 of Cenvat Credit Rules. He has observed that there is no dispute about the receipt of the services by the appellant.

C

2. Heard both sides. The only ground on the basis of which the credit has been denied is that the registration number was not available and this has been explained subsequently by the respondent by explaining by the time instructions were issued by the Government, the Head Office had already issued the invoice and therefore, procedural requirement could not be fulfilled. In this case, there are very valid grounds for omission. Further omission took place when rules relevant to input service distributor were being implemented. Therefore, I find no merit in the appeal filed by the revenue and accordingly reject the same.

D

E

■■

F

G

[2010] 24 STT 390 (AHD. - CESTAT)

A

CESTAT, AHMEDABAD BENCH

Hitachi Home & Life Solution (I) Ltd.

v.

Commissioner of Central Excise*, Ahmedabad

MS. ARCHANA WADHWA, JUDICIAL MEMBER
AND B.S.V. MURTHY, TECHNICAL MEMBER

B

FINAL ORDER NO. A/676/2009-WZB/AHD.
STAY ORDER NO. S/498/2009-WZB/AHD.
APPLICATION NO. ST/S/46 OF 2009
APPEAL NO. ST/9 OF 2009
MARCH 19, 2009

C

Section 65(19) of the Finance Act, 1994 - Business auxiliary service - Period September, 2004 to March, 2007 - Service tax demand was confirmed on assessee for commission received by it from a foreign company for promotion and marketing of their products in India under category of 'Business auxiliary service' - Assessee's appeal was dismissed by Commissioner (Appeals) for non-compliance of pre-deposit direction - In instant appeal, assessee contended that prior to 15-3-2005, such services were fully exempted under Notification No. 2/2003, dated 20-11-2003, benefit of which stood denied by original adjudicating authority only on ground that commission received in foreign currency was not repatriated - As regards period after 15-3-2005, assessee submitted that such services would fall under category of 'Export services' and in terms of Export of Services Rules, 2005, no service tax was liable to be confirmed in respect of same - Whether assessee had good prima facie case on merits and, therefore, matter was to be remanded to Commissioner (Appeals) for decision on merits, without insisting on any pre-deposit - Held, yes [Para 4]

D

E

CASES REFERRED TO

Blue Star Ltd. v. *CCE* [2009] 18 STT 34 (Bang. - CESTAT) (para 3) and *ABS India Ltd.* v. *CST* [Final Order No. 942/2008, dated 5-8-2008] (Bang. - CESTAT) (para 3).

S.J. Vyas *for the Appellant.* **Ms. M.I.J. Micheal** *for the Respondent.*

F

ORDER

Archana Wadhwa, Judicial Member - After hearing both the sides, we find that Commissioner (Appeals) has dismissed the appeal for non-compliance with the stay order passed by him *vide* which the applicant/appellant was directed to deposit 50 per cent of the Service tax confirmed against them.

*Matter remanded.

G

A **2.** The said Service tax stands confirmed against the appellants on the commission received by them from a foreign company M/s. Hitachi (Asia) Home & Life Solutions (India) Ltd., for promotion and marketing of their products in India, under the category of Business Auxiliary Services. The period involved is September, 2004 to March, 2007.

3. Ld. Advocate submits that prior to 15-3-2005, such services were fully exempted under Notification No. 2/2003, dated 20-11-2003, the benefit stands B denied by Original Adjudicating Authority only on the ground that the commission received by the appellants in foreign currency was not repatriated and no evidence stand produced by the appellant to that effect. The appellants have contended that if the amount is not repatriated, the production of positive evidence is not possible. There is no evidence produced by the revenue to the contrary. The appellants have sworn on affidavit that the amount was not repatriated.

C As regards the period after 15-3-2005, ld. Advocate submits that such services would fall under the category of Export Services and in terms of Export of Services Rules, 2005, no tax is liable to be confirmed in respect of the same. Ld. Advocate has placed reliance on Circular No. 111/05/2009-ST, dated 24-2-2009, laying down that Indian agents who undertake marketing in India of goods of a foreign seller, would get covered under the said Export of Services Rules. Ld. Advocate also placed reliance on the Tribunal's decision in the case of *Blue Star Ltd.* v. *CCE* [2009] 18 STT 34 (Bang. - CESTAT) D and in the case of *ABS India Ltd.* v. *CST* [Final Order No. 942/2008, dated 5-8-2008], setting aside the confirmation of service tax in respect of identical services.

4. In view of the above, we are of the opinion that the appellant has good *prima facie* case on merits, so as to allow the stay petition unconditionally. We order accordingly and set aside the impugned order and remand the matter to Commissioner (Appeals) for decision on merits, without insisting on any pre-E deposit.

■■

F

G

A

[2010] 24 STT 392 (AHD. - CESTAT)

CESTAT, AHMEDABAD BENCH

Commissioner of Central Excise, Vadodara

v.

Videocon Industries Ltd.*

B.S.V. MURTHY, TECHNICAL MEMBER

B

FINAL ORDER NO. A/357/2009-WZB/AHD.
APPEAL NO. E/1063 OF 2008
JANUARY 30, 2009

Rule 2(l) of the Cenvat Credit Rules, 2004 - Cenvat credit - Input service - Whether where service tax is paid on GTA service in respect of cement, steel, etc., brought for construction related to setting up of factory, said service will be covered by definition of 'Input service', and, therefore, same is eligible for Cenvat credit - Held, yes [Para 3]

C

S.R. Prasad *for the Appellant.* **S.R. Dixit** *for the Respondent.*

ORDER

1. The respondents had taken Cenvat credit of service tax paid on goods transport operator service for the transportation of iron, steel and cement used by them in the civil work of the new plant. Both the lower authorities have held that the benefit of Cenvat credit of service tax paid on GTO service is available to the respondents. Revenue is in appeal.

D

2. The learned D.R. submits that the G.T.O. service cannot be considered to have been used for setting up, modernization, renovation or repairs etc. in terms of the definition of input service in the Cenvat Credit Rules. The transportation service is altogether a different class of service and therefore not admissible. The definition of input service for the purpose of Cenvat Credit Rules includes services used in relation to setting up, modernization, renovation or repairs of a factory and also the service tax paid on inner transportation of inputs or capital goods. The learned advocate for respondents argued that the respondents are eligible.

E

3. The service tax paid on G.T.O. service in respect of cement, steel etc. brought for construction clearly related to setting up of the factory and is covered by definition. Therefore the respondents are eligible for the same. In view of the above discussion appeal filed by the Revenue is devoid of any merits and accordingly dismissed.

F

■■

*In favour of assessee.

G

A

[2010] 24 STT 393 (NEW DELHI - CESTAT)

CESTAT, NEW DELHI BENCH

Commissioner of Central Excise, Jaipur-II

v.

Nitin Spinners Ltd.*

B

MS. JYOTI BALASUNDARAM, VICE PRESIDENT

FINAL ORDER NO. 413 OF 2009-SM(BR)(PB)
APPEAL NO. E/940 OF 2007
MAY 12, 2009

C

Rule 2(l) of the Cenvat Credit Rules, 2004 - Cenvat credit - Input service - Period July, 2005 to January, 2006 - Assessee availed Cenvat credit of service tax paid on freight for empty containers called for export of goods - Whether since containers were used for packing of final products, they could be treated as inputs used by manufacturer in or in relation to manufacture of final products - Held, yes - Whether, therefore, credit of service tax paid in question was admissible to assessee - Held, yes [Para 3]

S. Gautam *for the Appellant.* **Atul Gupta** *for the Respondent.*

ORDER

D

1. The issue for determination in this appeal is the admissibility of Cenvat credit of Rs. 56,077 availed of service tax paid on freight for empty containers called for export during the period July, 2005 to January, 2006. The credit was disallowed by the adjudicating authority who also imposed a penalty of Rs. 10,000 upon the assessee; however, the demand was set aside by the Commissioner (Appeals); hence this appeal by the Revenue.

2. I have heard both sides.

E

3. The definition of 'Input service' provided under sub-rule (*l*) of rule 2 of the Cenvat Credit Rules, 2004 is as follows :

"'Input service' means any service–

(*i*) used by a provider of taxable service for providing an output service; or

(*ii*) used by the manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products and clearance of final products, from the place of removal."

F

The containers are used for packing the final products; therefore, they can be treated as inputs used by the manufacturer in or in relation to the manufacture of final products, although final products are manufactured prior to being packed in containers, containers are used in relation to the manufacture thereof. I, therefore, hold that credit of Service Tax paid on freight for containers called for export of goods is admissible to the respondents, and hence uphold the impugned order and reject the appeal.

G ■■

*In favour of assessee.

A

[2010] 24 STT 394 (KAR.)

HIGH COURT OF KARNATAKA

Commissioner of Service Tax, Bangalore

v.

McDowel & Co. Ltd.*

V. GOPALA GOWDA AND RAVI MALIMATH, JJ.

B

REVIEW PETITION NO. 267 OF 2008
CEA NO. 42 OF 2006
FEBRUARY 27, 2009

Rule 2(1)(d) of the Service Tax Rules, 1994, read with section 117 of the Finance Act, 2000 - Person liable for paying service tax - Department in terms of section 117(1) of the Finance Act, 2000 had taken action against assessee on 18-1-2000 - Section 117 received assent of President on 12-5-2000 - Whether since action taken by department on 18-1-2000 was earlier to date of receiving assent of President, section 117(1) had no application to instant case - Held, yes - Whether, therefore, revenue's review petition seeking review of order of Tribunal, whereby it dismissed appeal of revenue, was to be dismissed - Held, yes [Para 3]

C

CASE REVIEW

D

Gujarat Ambuja Cements Ltd. v. *Union of India* [2005] 1 STT 41 (SC) (para 3) *followed.*

CASES REFERRED TO

Gujarat Ambuja Cements Ltd. v. *Union of India* [2005] 1 STT 41 (SC) (para 1) and *Laghu Udyog Bharati* v. *Union of India* [2006] 4 STT 322 (SC) (para 3).

N.R. Bhaskar *for the Appellant.*

ORDER

E

V. Gopala Gowda, J. - This review petition is filed by the department seeking to review the order dated 26-5-2008 passed in C.E.A. No. 42/2006 placing reliance upon sections 116 and 117 of Finance Act, 2000 and the decision in *Gujarat Ambuja Cements Ltd.* v. *Union of India* 2005 (182) ELT 33/ [2006] 1 STT 41 (SC). Learned counsel for the petitioner relied upon section 117 of the Act which validated the action taken by the Department from 16-7-1997 and ending with the day on which the Finance Act, 2000 received the assent.

F

2. There is a delay of 1 day in filing this review petition and I.A.I./08 is filed to condone the same.

3. As could be seen, action was taken by the department on 18-1-2000 which is earlier to the day of receiving assent on 12-5-2000 to the above amended

*In favour of assessee.

G

A provisions of the Finance Act, therefore section 117(1) of the Act has no application to the facts of the case. Applying the decision of the Apex Court in *Laghu Udyog Bharati* v. *Union of India* 1999 (112) ELT 365/[2006] 4 STT 322, the appeal was dismissed. Hence, there is no ground to review the judgment. However, the date of receipt of assent of President is wrongly mentioned as 12-5-2005 in the order sought to be reviewed and it shall be read as 12-5-2000.

B Subject to the above, I.A.I./08 is rejected and the review petition is dismissed.

■■

[2010] 24 STT 395 (AHD. - CESTAT)

C

CESTAT, AHMEDABAD BENCH

Dahison Automobiles

v.

Commissioner of Service Tax*, Ahmedabad

MS. ARCHANA WADHWA, JUDICIAL MEMBER
AND B.S.V. MURTHY, TECHNICAL MEMBER

D

FINAL ORDER NO. A/471/2009-WZB/AHD.
STAY ORDER NO. S/358/2009-WZB/AHD.
APPLICATION NO. ST/S/1669 OF 2008
APPEAL NO. ST/190 OF 2008
FEBRUARY 12, 2009

E F

Section 65(39a) of the Finance Act, 1994 - Erection, commissioning or installation service - Assessee was engaged in activity of installation/fitting of CNG/LPG kits in motor vehicles - Service tax was demanded from assessee for above activity - Commissioner (Appeals) dismissed appeal of assessee for non-compliance with pre-deposit direction - Assessee contended that service tax should not have been confirmed against it by including value of kits, which had been bought by it from market and that service tax could be confirmed in respect of service charges received by it from its clients, which had already been deposited by it - Whether prima facie force was found in above contentions of assessee - Held, yes - Whether since assessee had already deposited part of demand and issue was of contentious nature, Commissioner (Appeals) was to be directed to decide issue without insisting on any pre-deposit - Held, yes [Para 2]

Rahul Patel *for the Appellant.* **Dr. Manoj Kumar Rajak** *for the Respondent.*

G

*Matter remanded.

A

ORDER

Archana Wadhwa, Judicial Member - After dispensing with the condition of pre-deposit of duty and penalty, we proceed to decide the appeal itself as we find that the Commissioner (Appeals) has dismissed the appeal for non-compliance with the stay order passed by him, directing the applicant/appellant to pre-deposit 20 per cent of the service tax and interest and penalty imposed upon him. Arguing on the appeal, ld. Advocate submits that the applicant is engaged in the profession of installation/fitting of CNG/LPG kits in the motor vehicles and is charging Rs. 500 per installation. The service tax stands confirmed against him by including the value of the kits, which has been bought by him from the market. He submits that the service tax can be confirmed in respect of the service charges received by him from his clients, which would be to the tune of Rs. 30,860, which already stands deposited by him.

B

2. In view of the above, we find *prima facie* force in the appellant's contention. As the appellant has already deposited an amount of Rs. 30,860 and the issue is of contentious nature, we direct the Commissioner (Appeals) to decide the appeal on merits without insisting on any pre-deposit. We set aside the impugned order and remand the matter to Commissioner (Appeals) for decision on merits. Stay petition also gets disposed of.

C

■■

D

[2010] 24 STT 396 (NEW DELHI - CESTAT)

CESTAT, NEW DELHI BENCH

U. Flex Ltd.

v.

Commissioner of Central Excise*, Indore

E

P.K. DAS, JUDICIAL MEMBER

FINAL ORDER NO. 1281 OF 2009-SM(BR)
STAY ORDER NO. 585 OF 2009-SM(BR)
E/STAY/954 OF 2009-SM(BR)
APPEAL NO. E/994 OF 2009-SM(BR)
SEPTEMBER 7, 2009

F

Rule 2(l) of the Cenvat Credit Rules, 2004 - Cenvat credit - Input service - Assessee availed Cenvat credit of service tax paid on transportation of goods from factory to customer's place - Lower authorities disallowed said credit - Tribunal in ABB Ltd. v. CCE & ST [2009] 21 STT 77 (Bang. - CESTAT), held that service availed by a manufacturer for outward transportation of final

*In favour of assessee.

G

A **products from place of removal should be treated as an input service and thereby enabling manufacturer to take credit of service tax paid on value of such services - Whether, in view of above decision, assessee was eligible to avail input credit of service tax paid on goods transport agency service - Held, yes [Para 4]**

CASE REVIEW

B *ABB Ltd.* v. *CCE&ST* [2009] 21 STT 77 (Bang. - CESTAT) (para 4) *followed.*

CASE REFERRED TO

ABB Ltd. v. *CCE&ST* [2009] 21 STT 77 (Bang. - CESTAT) (para 3).

H. Bajaj *for the Appellant.* **I. Baig** *for the Respondent.*

ORDER

1. After hearing both the sides and perusal on of the records, I find that the C issue involved in this case is in narrow compass and, therefore, after granting stay, the appeal is taken-up for hearing.

2. Original Authority disallowed Cenvat credit of Rs. 7,715 and imposed penalty of equal amount along with interest.

3. The Commissioner (Appeals) modified the Adjudication Order, insofar as penalty was reduced to Rs. 4,000. The issue involved in this case is related to allowing of Cenvat credit in respect of service tax paid on transportation of D goods from the factory to the customer's place. The Larger Bench of the Tribunal in the case of *ABB Ltd.* v. *CCE & ST* [2009] 21 STT 77 (Bang. - CESTAT) as under :

> "24. In the light of the discussion, we hold that the definition of 'input service' has to be interpreted in the light of the requirements of business and it cannot be read restrictively so as to confine only up to the factory or up to the depot of manufactures.
>
> E 25. In the result, we answer the reference by holding that the services availed by a manufacturer for outward transportation of final products from the place of removal should be treated as an input service in terms of rule 2(*l*)(*ii*) of the CENVAT Credit Rules, 2004 and thereby enabling the manufacturer to take credit of the service tax paid on the value of such services." (p. 89)

4. In view of the decision of the Larger Bench of the Tribunal in the case of *ABB Ltd.* (*supra*), the appellant is eligible for availing input credit of service tax paid on Goods Transport Agency Service. Accordingly, the impugned order is set-F aside. The appeal is allowed with consequential relief. The stay application is disposed of.

■■

G

[2010] 24 STT 398 (CHENNAI - CESTAT)

CESTAT, CHENNAI BENCH

Elappa Granite

v.

Commissioner of Central Excise*, Salem

P. KARTHIKEYAN, TECHNICAL MEMBER

FINAL ORDER NO. 40 OF 2009
APPEAL NO. S/272 OF 2006
JANUARY 7, 2009

Rule 5 of the Cenvat Credit Rules, 2004 - Cenvat credit - Refund of - Period January, 2005 to October, 2005 - Assessee, a hundred per cent export-oriented unit, had exported its finished products during relevant period and claimed refund of credit relating to input service consumed in manufacture of goods exported - Lower authorities denied said refund claim on ground that during material period, Central Government had not issued notification specifying any safeguard, conditions and limitations subject to which refund of credit relating to input service could be allowed - In a similar issue Tribunal in CCE v. Himalaya Granites Ltd. 2008 (228) ELT 492 (Chennai - Trib.) held that for export made between 10-9-2004 and 14-3-2006, claim for refund of duty relatable to inputs was to be allowed even though there was no notification issued under rule 5 - Whether, in such circumstances, there was no justification to deny refund relatable to input service used for production of goods exported during same period - Held, yes [Para 4]

CASE REVIEW

CCE v. *Himalaya Granites Ltd.* 2008 (228) ELT 492 (Chennai - Trib.) (para 4) *followed.*

CASE REFERRED TO

CCE v. *Himalaya Granites Ltd.* 2008 (228) ELT 492 (Chennai - Trib.) (para 2).

M.N. Bharathi *for the Appellant.* **V.V. Hariharan** *for the Respondent.*

ORDER

1. Elappa Granite, a 100 per cent EOU, had exported their finished products during the period 1/05 to 10/05 and claimed credit of input service consumed in the manufacture of the goods exported under rule 5 of CENVAT Credit Rules, 2004 (CCR). The above claim for refund of service tax to the extent of Rs. 55,023 was denied by the lower authorities on the ground that during the material period the Central Government had not issued Notification under rule 5 of CCR, 2004 specifying any safeguard, conditions and limitations subject to which the refund of credit relating to input service could be allowed.

*In favour of assessee.

A During the material time Notification No. 11/02-CE(NT), dated 1-3-2002 issued under rule 5 of CCR, 2002 was in force which had laid down the safeguard, conditions and limitations as regards the refund of duty relatable to inputs used in the export of goods.

2. Ld. Counsel for the appellants submits that rule 5 of CCR, 2004 introduced on from 10-9-2004 provided for utilization of input service credit for payment of duty on final products or service tax on output service. However, for any B reason, such adjustment was not possible, the manufacturer should be allowed refund of such input service credit/input duty. Though the said rule provided for issue of a Notification by the Central Government to regulate grant of refund, no notification was issued after the CCR, 2002 were replaced by CCR, 2004. As the rule 5 of CCR, 2004 provided for grant of refund, denial of the refund claim by the lower authorities was not sustainable. He relies on a decision of this Tribunal in a similar case in *CCE* v. *Himalaya Granites Ltd.* 2008 (228) ELT 492 (Trib. - Chennai) where refund relatable to C input service consumed in the production of final goods exported after the introduction of CCR, 2004 and before issue of Notification No. 5/2006-CE(NT), dated 14-3-2006 under rule 5 of CCR, 2004 was held to be admissible.

3. Ld. JDR reiterates the grounds on which the lower appellate authority found the impugned claim to be not admissible.

4. After careful consideration of the case records and the submissions made by both sides, I find that the impugned claim for refund was admissible D in terms of rule 5 of CCR, 2004. For export made between 10-9-2004 and 14-3-2006, similar claim for refund of duty relatable to inputs were being allowed even though there was no Notification issued under rule 5 of CCR, 2004. Therefore, there is no justification to deny refund relatable to input service used for production of goods exported during the same period. I find that in the *Himalaya Granites Ltd.'s* case (*supra*), a similar refund claim for credit of input service denied by the authorities was held to be admissible as E Rule 5 of CCR, 2004 provided for such refund. Revenue has no case that the above decision has been appealed against by them before a competent court. In the circumstances, I hold that the appellants were eligible for the impugned claim for refund. In the result, the impugned order is set aside and this appeal allowed.

■■

F

G

[2010] 24 STT 400 (CHENNAI - CESTAT)

CESTAT, CHENNAI BENCH

Cauvery Stones Impex (P.) Ltd.

v.

Commissioner of Central Excise*, Salem

MS. JYOTI BALASUNDARAM, VICE PRESIDENT

FINAL ORDER NO. 1756 OF 2009
APPEAL NO. E/455 OF 2008
NOVEMBER 13, 2009

Rule 5 of the Cenvat Credit Rules, 2004 - Cenvat credit - Refund of - Period 1-1-2007 to 31-3-2007 and 1-4-2007 to 30-6-2007 - Assessee, a 100 per cent EOU, was engaged in manufacture and export of polished granite monuments, slabs and tiles - It also cleared a few of its finished products to other 100 per cent EOUs - It filed refund claim for unutilized Cenvat credit of service tax paid on goods transport service availed by it - Authorities rejected said refund on ground that service pertaining to transportation of export goods from factory to port was not an eligible input service - Further, refund claim in respect of goods cleared to other EOUs was denied on ground that refund was to be restricted to its actual export turnover as clearance made to other 100 per cent EOUs was not to be taken into consideration in computation for export purposes - Whether since freight from factory gate to port formed part of FOB price, place of removal was port and GTA service from factory gate to port of shipment was an input service and, hence, credit of service tax paid thereon was admissible to assessee in view of Circular No. 97/6/2007-ST, dated 23-8-2007 - Held, yes - Whether further since in view of CCE v. Shilpa Copper Wire Industries 2008 (226) ELT 228 (Ahd.) and Sanghi Textiles Ltd. v. CCE 2006 (206) ELT 854 (Bang. - Trib.), clearance made to 100 per cent EOU was also to be considered as export, rejection of remaining part of claim was also not in order - Held, yes - Whether, therefore, refund of unutilized credit was also to be allowed to assessee - Held, yes [Paras 3 and 5]

Circulars & Notifications : Notification No. 5/2006-CE, dated 14-3-2006; Circular No. 97/8/2007-ST, dated 23-8-2007

FACTS

The assessee, a 100 per cent EOU, was engaged in the manufacture and export of polished granite monuments, slabs and tiles. It also cleared few of its finished products to other 100 per cent EOUs. It filed refund claim for

*In favour of assessee.

A unutilized Cenvat credit of service tax paid on goods transport service availed by it. The adjudicating authority was of the view that service pertaining to transportation of export goods from factory to port was not an eligible input service and that the refund was to be restricted to its actual export turnover as clearance made to other 100 per cent EOUs was not to be taken into consideration in calculation for export purposes. Accordingly, the adjudicating authority rejected the refund claim. On appeal, the Commissioner (Appeals) upheld the adjudication order.

B

On appeal :

HELD

The factory gate is the place of removal for an assessee in the light of Tribunal's decision in India Japan Lighting (P.) Ltd. *(*supra*). Therefore, the assessee was entitled to credit of service tax paid up to port in the light of CBEC's Circular No. 97/8/2007-ST, dated 23-8-2007. [Para 3]*

C

The High Court in Ambuja Cements Ltd. *2009 (236) ELT 431 (Punj. & Har.) held that the above circular is binding on the department. The assessees satisfied all the conditions set out in the circular since the price of the goods exported was on FOB basis and, therefore, the ownership of the goods exported remained with the assessee up to the port of shipment and it also bore the risk of the goods up to the port of shipment. Further, the freight from the factory gate to the port formed part of the FOB price. Therefore, the place of removal was the port and GTA service from factory gate to port of shipment was an input service and, hence, credit of service tax paid thereon was admissible. Therefore, it was held that the assessee was entitled to refund claim on outward transportation up to the port. [Para 4]*

D

The rejection of the remaining part of the claim was also not in order as clearance made to 100 per cent EOU was also to be considered as export in the light of Tribunal's decisions in Shilpa Copper Wire Industries' *case (*supra*) and also* Sanghi Textiles Ltd.'s *case (*supra*). Refund of unutilized credit was, therefore, to be allowed in the light of the above decisions. In the light of the above discussions, the denial of refund claim was to be set aside and the appeal was to be allowed. [Para 5]*

E

CASE REVIEW

India Japan Lighting (P.) Ltd. v. *CCE* [2007] 11 STT 498 (para 3); *CCE* v. *Shilpa Copper Wire Industries* 2008 (226) ELT 228 (Ahd. - Trib.) and *Sanghi Textiles Ltd.* v. *CCE* 2006 (206) ELT 854 (Bang. - Trib.) (para 5) *followed.*

F

CASES REFERRED TO

India Japan Lighting (P.) Ltd. v. *CCE* [2007] 11 STT 498 (Chennai - CESTAT) (para 3), *Ambuja Cements Ltd.* v. *Union of India* [2009] 20 STT 182 (Punj. & Har.) (para 4), *CCE* v. *Shilpa Copper Wire Industries* 2008 (226) ELT 228 (Ahd. - Trib.) (para 5) and *Sanghi Textiles Ltd.* v. *CCE* 2006 (206) ELT 854 (Bang. - Trib.) (para 5).

R. Srinivasan *for the Appellant.* **T.H. Rao** *for the Respondent.*

G

ORDER

A

1. The appellants herein, who are a 100 per cent EOU, engaged in the manufacture and export of polished granite monuments, slabs and tiles and also cleared few of their finished products to other 100 per cent EOUs, filed refund claim for unutilized CENVAT credit of input services in terms of Notification No. 5/2006-CE, dated 14-3-2006, under the provisions of rule 5 of CENVAT Credit Rules, 2004. The period covered by the refund claims was 1-1-2007 to 31-3-2007 and 1-4-2007 to 30-6-2007. Refund claimed for the first period was Rs. 3,75,978 and the refund claimed during the second period was Rs. 1,16,386. Claim for refund of Rs. 1,04,678 was rejected and the balance sanctioned. The adjudication order was upheld by the lower appellate authority; hence this appeal.

B

2. I have heard both sides. The grounds for rejection are that service availed on GTA service pertaining to transportation of export goods from factory to port is not an eligible input service and that the refund is to be restricted to their actual export turnover as clearances made to other 100 per cent EOUs are not to be taken into reckoning for export purposes.

C

3. As regards the first ground, I note that it has been held that factory gate is the place of removal for the appellants in the light of Tribunal's decision in *India Japan Lighting (P.) Ltd.* v. *CCE, Chennai* [2007] 11 STT 498 (Chennai - CESTAT). Therefore, I agree with the assessees that they are entitled to credit of service tax paid up to port in the light of CBEC's Circular No. 97/8/2007-ST, dated 23-8-2007, the relevant portion of which is reproduced hereunder:–

D

> "8.2 . . . However, there may be situations where the manufacturer/consignor may claim that the sale has taken place at the destination point because in terms of the sale contract/agreement (*i*) the ownership of the goods and the property therein remain with the seller of the goods till the delivery of the goods in acceptable condition to the purchaser at his door step; (*ii*) the seller bore the risk of loss of or damage to the goods during transit to the destination; and (*iii*) the freight charges were an integral part of the price of goods. In such cases, the credit of service tax paid on the transportation up to such place of sale would be admissible if it can be established by the claimant of such credit that the sale and the transfer of property in goods (in terms of the definition as under section 2 of the Central Excise Act, 1944 as also in terms of the provisions under the Sale of Goods Act, 1930) occurred at that said price."

E

4. The Hon'ble Punjab & Haryana High Court has held in the case of *Ambuja Cements Ltd.* v. *Union of India* [2009] 20 STT 182 that the above circular is binding on the department. The assessees satisfied all the conditions set out in the circular since the price of the goods exported was on FOB basis and therefore the ownership of the goods exported remained with the assessees up to the port of shipment and they also bore the risk of the goods up to the port of shipment. Further, the freight from the factory gate to the port formed part of the FOB price. Therefore, the place of removal is the port and GTA service from factory gate to port of shipment is an input service and hence credit of service tax paid thereon is admissible. I, therefore, hold that the

F

G

A assessees are entitled to refund of Rs. 69,172 on outward transportation up to the port.

5. The rejection of the remaining part of the claim is also not in order as clearance made to 100 per cent EOU is also to be considered as export in the light of Tribunal's decision in *CCE* v. *Shilpa Copper Wire Industries* 2008 (226) ELT 228 (Ahd. - Trib.) and also *Sanghi Textiles Ltd.* v. *CCE* 2006 (206) ELT 854 (Bang. - Trib.). Refund of unutilized credit is, therefore, to be allowed in the B light of the above decisions. In the light of the above discussion, I set aside the denial of refund claim of Rs. 1,04,678 and allow the appeal.

■■

[2010] 24 STT 403 (CHENNAI - CESTAT)

C

CESTAT, CHENNAI BENCH

Rane TRW Steering Systems Ltd.

v.

Commissioner of Central Excise*, Trichy

MS. JYOTI BALASUNDARAM, VICE PRESIDENT

D FINAL ORDER NOS. 1798 AND 1799 OF 2009
APPEAL NOS. E/501 AND 502 OF 2008
NOVEMBER 23, 2009

Rule 2(l) of the Cenvat Credit Rules, 2004 - Cenvat credit - Input service - Assessee availed Cenvat credit of service tax paid on outdoor catering service availed by it - Said credit was denied on ground that above service was not an input service and, accordingly, demand was confirmed on assessee - Tribunal E in CCE v. GTC Industries Ltd. [2008] 17 STT 63 (Mum. - CESTAT) held that service provided by an outdoor caterer is input service - Whether following above decision, impugned order was to be set aside - Held, yes [Para 2]

CASE REVIEW

CCE v. *GTC Industries Ltd.* [2008] 17 STT 63 (Mum. - CESTAT) (para 2) *followed.*

CASE REFERRED TO

F

CCE v. *GTC Industries Ltd.* [2008] 17 STT 63 (Mum. - CESTAT) (para 2).

G. Natarajan *for the Appellant.* **C. Rangaraju** *for the Respondent.*

ORDER

1. Availment of credit of service tax paid on "Outdoor Catering Services" provided to the assessees by M/s. Aamman Catering, M/s. SRM Hotels and

G

*In favour of assessee.

M/s. Naths Academy has been objected to by the department resulting in confirmation of demand of Service Tax of Rs. 2,81,048 and Rs. 2,34,113 on the ground that catering services are not input service, together with interest.

2. I have heard both sides. I find that the issue stands settled in favour of the assessee by the decision of the Larger Bench of the Tribunal in *CCE* v. *GTC Industries Ltd.* [2008] 17 STT 63 (Mum. - CESTAT) holding that service provided by an Outdoor Caterer is input service. Following the ratio of the above decision, I set aside the impugned orders and allow the appeals.

■■

[2010] 24 STT 404 (MUM. - CESTAT)

CESTAT, MUMBAI BENCH

Jay Hind Industries Ltd.

v.

Commissioner of Central Excise*

P.G. CHACKO, JUDICIAL MEMBER

FINAL ORDER NO. A/201 OF 2009-WZB/C-IV/(SMB)
STAY ORDER NO. S/152 OF 2009-WZB/C-IV/(SMB)
APPLICATION NO. E/S 265 OF 2009
APPEAL NO. E-221 OF 2009
MAY 14, 2009

Rule 2(l) of the Cenvat Credit Rules, 2004 - Cenvat credit - Input service - Assessee had availed Cenvat credit of service tax paid on outdoor catering service received in canteen of its factory - Original authority disallowed said credit on ground that said service was not used in or in relation to manufacture of final product in factory - Decision of original authority was upheld by Commissioner (Appeals) - Whether since lower authorities had not recorded any finding as to whether cost of supply of food formed part of assessable value of final products of assessee, original authority was to be directed to examine that aspect - Held, yes - Whether if it was found that cost of supply of food for period of dispute formed part of assessable value of final products, assessee would get benefit of Larger Bench's decision in CCE v. GTC Industries Ltd. [2008] 17 STT 63 (Mum.) and if it was found to contrary, Cenvat credit in question would not be admissible to assessee - Held, yes [Para 4]

CASE REFERRED TO

CCE v. *GTC Industries Ltd.* [2008] 17 STT 63 (Mum.) (LB) (para 3).

*Matter remanded.

A **S.S. Hawaldar** *for the Appellant.* **K. Lal** *for the Respondent.*

ORDER

1. After examining the records and hearing both sides, I am of the view that the appeal itself requires to be finally disposed of at this stage. Accordingly, after dispensing with pre-deposit, I proceed to deal with the appeal.

2. During the period April, 2007 to October 2007, the appellants had availed CENVAT credit of Rs. 65,926 on outdoor catering service received in their factory canteen. In adjudication of a show-cause notice, the original authority disallowed this credit to the appellants under rule 14 of the CENVAT Credit Rules, 2004 read with section 11A(1) of the Central Excise Act, 1944 on the ground that the service was not used in or in relation to manufacture of final product in the factory. This decision was based on the interpretation given by that authority to the definition of "input services" given under rule 2(*l*) of the CENVAT Credit Rules, 2004. The adjudicating authority also ordered for recovery of interest on the above amount, apart from imposing a penalty of Rs. 65,926 on the assessee under rule 15 of the Cenvat Credit Rules, 2004 read with section 11AC of the Central Excise Act, 1944. The decision of the original authority was upheld by the Commissioner (Appeals). Hence the present appeal of the assessee.

3. The Counsel for the appellants submits that the issue is already covered in their favour by the Tribunal's Larger Bench decision in the case of *CCE* v. *GTC Industries Ltd.* [2008] 17 STT 63 (Mum.). On this basis, he has prayed for allowing this appeal.

4. I have heard the SDR also. It appears from the records that, more than 250 workers were working in the appellants' factory during the period of dispute. The Larger Bench noted that, in the case of a factory having more than 250 workers under section 46 of the Factories Act, 1948, it was mandatory to provide canteen facility within the factory premises. It was also noted that the cost of supply of food by the manufacturer to the workers in the factory canteen formed part of the expenditure incurred by the manufacturer and thereby entered into the cost of production forming part of the assessable value of the final products manufactured in the factory. In this view of the matter, the outdoor catering service received by the manufacturer for the purpose of supply of food to the workers in the canteen was held to be an "input service" as defined under rule 2. Accordingly, CENVAT credit was allowed on that service to the assessee. In the present case, it appears, neither of the lower authorities had occasion to record any finding as to whether the cost of supply of food formed part of the assessable value of the final products. Even the memo of appeal before me is silent on this aspect. Nevertheless, to meet the ends of justice, I would direct the original authority to examine this aspect. If it is found that the cost of supply of food in the factory canteen to workers for the period of dispute formed part of the assessable value of the final products, the appellants will get the benefit of the Larger Bench decision. If it is found to the contrary, the CENVAT credit in question will not be

admissible to them. For the purpose of a decision on this question, I set aside the orders of the lower authorities and remand the matter to the original authority who shall give the assessee a reasonable opportunity of being heard.

5. The appeal stands allowed by way of remand.

■■

[2010] 24 STT 406 (MUM. - CESTAT)

CESTAT, MUMBAI BENCH

Kirloskar Oil Engines Ltd.

v.

Commissioner of Central Excise*, Aurangabad

P.G. CHACKO, JUDICIAL MEMBER

FINAL ORDER NO. A/157/2009-WZB/C-IV/SMB
APPEAL NO. E/385 OF 2008
APRIL 6, 2009

Rule 2(l) of the Cenvat Credit Rules, 2004 - Cenvat credit - Input service - Period January, 2005 to September, 2007 - Assessee availed Cenvat credit of service tax paid on outdoor catering service used for supply of food to employees at canteen of its factory - Lower authorities held that said service could not be said to be input service inasmuch as canteen services had no bearing on production/manufacture of excisable goods in factory and, accordingly, disallowed benefit of Cenvat credit to assessee - However, Tribunal in CCE v. GTC Industries Ltd. [2008] 17 STT 63 (Mum. - CESTAT) had allowed Cenvat credit on outdoor catering service to assessees - Whether since there was no pleadings as to number of workers in factory and as to whether cost of supply of food in canteen formed a part of assessable value of excisable goods during material period, matter was to be remanded to original authority to verify relevant facts so as to find out whether Larger Bench's decision in GTC Industries Ltd.'s case (supra) was applicable to assessee - Held, yes [Para 2]

CASES REFERRED TO

Victor Gaskets India Ltd. v. *CCE* [2008] 14 STT 403 (Mum. - CESTAT) (para 1) and *CCE* v. *GTC Industries Ltd.* [2008] 17 STT 63 (Mum. - CESTAT) (para 1).

K. Lal *for the Respondent.*

*Matter remanded.

A **ORDER**

1. There is no representation for the appellants despite notice, nor any request for adjournment. After examining the records, I find that the original authority disallowed CENVAT credit of Rs. 3,86,250 to the assessee and imposed on them equal amount of penalty. The appellate authority affirmed that decision on merits except that it reduced the quantum of penalty to Rs. 35,000. The above credit had been taken by the assessee on outdoor catering service B which was used for supply of food to factory employees during the period January 2005 to September 2007. The lower authorities have held that outdoor catering service cannot be said to be an 'input service' within the ambit of this term defined under rule 2(*l*) of the CENVAT Credit Rules, 2004. According to them, canteen services had no bearing on production/manufacture of excisable goods in the factory. In the memorandum of appeal, the assessee has relied on this Tribunal's decision in *Victor Gaskets India Ltd.* v. *CCE* [2008] 14 STT 403 (Mum. - CESTAT), wherein it was held that the credit C of service tax paid on outdoor catering service (used in the factory canteen for supply of food to factory workers) was admissible as 'input service' under rule 2(*l*) *ibid.* The learned SDR submits that the service used in a factory canteen for supply of food to employees has no connection with the manufacture or clearance of the goods manufactured in that factory. In this connection, he has made an endeavour to show that the catering service so used would not come within the ambit of the definition of 'input services' given under rule 2(*l*). D With reference to the Tribunal's Larger Bench decision in the case of *CCE* v. *GTC Industries Ltd.* [2008] 17 STT 63 (Mum. - CESTAT), the SDR submits that CAS-4 principles were wrongly applied in that case.

2. After considering the grounds or this appeal and submissions of the SDR, I have no option but to follow the Larger Bench decision in *GTC Industries Ltd.'s* case (*supra*) wherein, in respect of a factory which employed more than 250 workers for the manufacture of excisable goods, the Bench found that outdoor catering services were used in the factory-canteen for supply of food E to the workers and that the cost of food so supplied formed a part of the cost of production of excisable goods. In the present appeal, however, I have not come across any pleadings as to the number of workers in the factory and as to whether the cost of supply of food in the factory-canteen formed a part of the assessable value of the excisable goods during the material period. It is for the original authority to verify the relevant facts so as to find out whether the Larger Bench decision in *GTC Industries Ltd.'s* case (*supra*) is applicable. In F this view of the matter, I set aside the orders of the lower authorities and allow this appeal by way of remand, directing the original authority to adjudicate the case afresh in the above lines after giving the assessee a reasonable opportunity of being heard.

■■

G

[2010] 24 STT 408 (NEW DELHI - CESTAT)

A

CESTAT, NEW DELHI BENCH

Commissioner of Central Excise, Jaipur

v.

Kalpana Travels (P.) Ltd.*

D.N. PANDA, JUDICIAL MEMBER
AND RAKESH KUMAR, TECHNICAL MEMBER

B

FINAL ORDER NO. ST/225 OF 2009 (PB)
APPEAL NO. ST/71 OF 2007-CUS. (BR)
JULY 9, 2009

Section 65(115) of the Finance Act, 1994 - Tour operator - Period April, 2000 to February, 2004 - Assessee had received consideration for booking tickets for its clients during relevant period - Adjudicating authority confirmed service tax demand on assessee under category of 'Tour operator' - Commissioner (Appeals) rejected that order - Whether since there was no levy prior to 10-9-2004 for taxing considerations received as booking agent, assessee should not have been brought under Act in guise of tour operator - Held, yes - Whether further since there was no evidence on record to show that assessee had conducted tours for its clients and ingredients of law in respect of tour operator were present, appeal of revenue against order of Commissioner (Appeals) was to be rejected - Held, yes [Para 5]

C

D

S.L. Kumar *for the Appellant.* **Atul Gupta** *for the Respondent.*

ORDER

D.N. Panda, Judicial Member - Revenue's appeal is against the order passed by ld. Commissioner (Appeals) on 30-11-2006 holding that the service provided by the appellant to M/s. Neelam Travels, Bikaner who was its customer is not covered under 'Tour Operator' service.

E

2. Ld. DR Shri S.L. Kumar appearing for revenue supports the order-in-original to say that the appellant is also a tour operator having tourist vehicles and that has been found by the ld. Authority in para 10 of the order-in-original. Apart from this activity, the appellant even though no holders of tour permit, it is still to be considered as 'Tour Operator' as discussed in para 11. Therefore revenue is aggrieved by the finding of ld. Commissioner (Appeals).

F

3. Ld. Authorised Representative Shri Atul Gupta on behalf of the Respondent submits that the Respondent has faced Adjudication for the period April, 2000 to February, 2004 only for booking tickets for M/s. Neelam Travels. The Respondent has placed its defence before learned Adjudicating Authority making it clear that they are only booking agents and for such service they are

*In favour of assessee.

G

A not liable to pay Service Tax since consideration received for booking tickets were brought to ambit of law from 10-9-2004. This submission of the appellant is recorded in para 4 of the order-in-original. Therefore the stand of Revenue is baseless since learned Adjudicating Authority found that this appellant has not conducted any tour operator service for the passengers of M/s. Neelam Travels.

4. Heard both sides and perused the record.

B **5.** The stand of the Respondent appears to be very clear when law itself was not in force to tax consideration received for booking tickets for a principal when para 4 of the order-in-original is looked into. If there was no levy prior to 10-9-2004 for taxing considerations received as booking agent, the Respondent should not have been brought to Service Tax Act in the guise of tour operator. Such view gets support from para 8 of the order passed by ld. Commissioner (Appeals). There is no evidence on record to show that the Respondent had conducted tours for M/s. Neelam Travels, and ingredients of C law in respect of tour operator were present. In absence of any evidence to this effect revenue fails to succeed for which we dismiss its appeal.

■■

D

[2010] 24 STT 409 (CHENNAI - CESTAT)

CESTAT, CHENNAI BENCH

Travel Aid

v.

Commissioner of Service Tax*, Chennai

MS. JYOTI BALASUNDARAM, VICE PRESIDENT

E

FINAL ORDER NOS. 1441-1452 OF 2009
APPEAL NOS. S/58 TO 69 OF 2008
OCTOBER 9, 2009

Section 73 of the Finance Act, 1994 - Recovery of service tax not levied or paid or short-levied or short-paid or erroneously refunded - Period 1-4-2000 to 30-4-2001 - Assessees, tour operators, challenged validity of levy of service tax F on them before High Court - During pendency of said petition, Notification No. 58/98-ST, dated 16-7-1998 was issued granting exemption from payment of service tax on 'Tour operator service' which exemption was withdrawn on 1-4-2000 - On 30-4-2001, High Court dismissed petitions of assessees and upheld levy - From May, 2001, assessees started paying service tax and filing returns - Revenue by invoking extended period of limitation under section 73,

G

*In favour of assessee.

demanded service tax from assessees for relevant period under category of 'Tour operator service' - Whether once High Court dismissed petition challenging validity of levy of service tax on tour operators, department should have issued show-cause notices within normal period of limitation as all facts regarding liability of assessees were known to both sides - Held, yes - Whether further since no periodical protective show-cause notice was issued during relevant period and no notice was issued for recovery of tax and for imposition of penalty until June, 2005, extended period of limitation was not available to department - Held, yes - Whether therefore impugned demand was to be set aside on ground of limitation - Held, yes [Para 3]

A

B

Circulars & Notifications : Notification No. 58/98-ST, dated 16-7-1998

FACTS

Service tax levy on 'Tour operator service' was challenged by tourist taxi Owners' Association before the High Court of which the assessees were members. During pendency of that petition, Notification No. 58/98-ST, dated 16-7-1998 was issued granting exemption from payment of service tax on 'Tour operator service' which exemption was withdrawn on 1-4-2000. Thereafter, service tax on tour operator's service became leviable with effect from 1-4-2000. On 30-4-2001, the High Court dismissed the petition filed by the Tourist Taxi Owners' Association challenging the constitutional validity of the levy. From May, 2001, the assessees started paying service tax and filing returns. The Jurisdictional Superintendent of Service Tax issued two different letters to assessees one on 4-9-2001 and one on May 2004 seeking recovery of service tax for the period from 1-4-2000 to 30-4-2001. The Commissioner (Appeals) in respective appeals filed against said letters, held that the letters issued to the assessees were only a communication and not a speaking order and, therefore, no appeal was maintainable against same. The revenue issued the show-cause notices under section 73 to the assessees for dates ranging from June 2005 to October 2005, proposing for recovery of service tax and penal action for the period from 1-4-2000 to 30-4-2001. The Assistant Commissioner dropped the proceedings on the ground that the demand was barred by limitation. The Commissioner revised the said order and held that failure on the part of the assessees to remit service tax dues especially when the High Court upheld the levy and their stubborn attitude of withholding the information by not filing the half-yearly returns for the disputed period, was nothing but suppression of facts and deliberate and wilful intent to evade payment of service tax and, therefore, the extended period of time-limit under section 73 was very much invocable in the instant case for demand of service tax for the disputed period.

C

D

E

F

On appeal :

HELD

The finding of the Commissioner was not sustainable as once the High Court dismissed the writ petitions challenging the validity of the levy of service tax

G

A *on tour operators, the department should have issued show-cause notices within the normal period of limitation as all the facts regarding liability of the assessees to service tax during the relevant period, after withdrawal of exemption, were known to both the sides. When everything was known to both sides, there could be no allegation of suppression of facts with wilful intent to evade payment of service tax. The fact that service tax was not paid by the assessees after the dismissal of the writ petition by the High Court was not sufficient to hold that there was suppression on their part as it was in the open knowledge* B *of both sides that the assessees were liable to pay tax, which was the reason for them to challenge the levy before the High Court (although unsuccessfully). No periodical protective show-cause notice was issued during the period 1-4-2000 to 30-4-2001 - no notice was issued for recovery of tax and for imposition of penalty until June, 2005. Therefore, the extended period of limitation was not available to the department. Since the demand had been raised after the expiry of the normal period of limitation, it was time-barred and, accordingly, the* C *impugned order confirming tax demand and penalties was to be set aside and the appeal was to be allowed on the ground of limitation. [Para 3]*

J. Shankarraman and **T.A. Rangarajan** *for the Appellant.* **T.H. Rao** *for the Respondent.*

ORDER

1. Demands of service tax under the heading 'Tour Operator Service' and imposition of penalties on these assessees have been challenged in the present D batch of appeals which are, therefore, heard together and disposed of by this common order.

2. Service tax levy was introduced on 'Tour Operator Service' on 1-9-1997. The levy was challenged by Chennai Tourist Taxi Owners Association before the Hon'ble Madras High Court (of which the appellants herein are members), by filing Writ Petition No. 18673/1997 and stay was granted by the High Court in WMP No. 29429, dated 16-12-1997. On 16-7-1998, Notification No. 58/98-ST E was issued granting exemption from payment of service tax on 'Tour Operator Service' which exemption was withdrawn on 1-4-2000. Thereafter service tax became leviable once again with effect from 1-4-2000. On 30-4-2001, the Madras High Court dismissed Writ Petition No. 18673/1997 and others, challenging the constitutional validity of the levy by upholding the validity. From May, 2001, the appellants started paying service tax and started filing returns. From 4-9-2001, the jurisdictional Superintendent of Service Tax issued letters to all tour operator service providers including the appellants F herein, seeking recovery of income-tax for the period from 1-4-2000 to 30-4-2001. Aggrieved by the above, the appellants filed appeals before the Commissioner (Appeals), Chennai, who *vide* order dated 23-11-2001, held that the letters dated 4-9-2001 issued to the appellants by the jurisdictional Superintendent of Service Tax to all 'Tour Operator Service' providers was only a communication and not a speaking order and, therefore, no appeal was maintainable against such letters. Once again in May, 2004, the jurisdictional G superintendent issued letters to all members of the Association including the

appellants for recovery of service tax. For the period in dispute, namely, 1-4-2001 to 30-4-2001, similar fate befell the appeals filed by the assessees as that in the earlier order dated 23-11-2001 of the Commissioner. From June, 2005, to October, 2005 onwards, show-cause notice was issued by the jurisdictional Assistant Commissioner to several tour operators including the appellants, proposing recovery of service tax and proposing penal action. Orders-in-Original were passed by the jurisdictional Assistant Commissioner, dropping proceedings for recovery of tax and penalty, on the ground that the demands were barred by limitation, relying upon Order-in-Original Nos. 38 & 39/2005, dated 20-9-2005 in respect of M/s. Ganesh Travels and M/s. Bala Travels (these two travel companies are also members of the Association). The department accepted the above Orders-in-Appeal by not filing any appeal against them. On 31-5-2007, the Commissioner of Service Tax issued a revision notice to all tour operators and adjudicated the notice by the impugned orders, upholding the liability to service tax during the period April 2000-01 under the provision to section 73(1) together with interest, and imposing penalties under the provisions of sections 76, 77 and 78 of Chapter V of the Finance Act, 1994. Hence these appeals.

3. I have heard both sides. The finding of the Commissioner (Appeals) on limitation is contained in paragraph 10 of the impugned order which is reproduced herein below :

> "From the foregoing, it is clear that though the assessee were well aware of their service tax liability from 1-4-2000 did not prefer to remit the service tax because of their awareness only when they approached the Hon'ble High Court. Therefore, when the High Court dismissed their pleas during April, 2001, they ought to have paid service tax and filed returns. The department's directions by way of letter was only to remind him about his dues. When the assessee did not do so the Assistant Commissioner, had reason to believe that by reason of omission or failure on the part of assessee to make a return under section 70 for the period from 1-4-2000 to 30-4-2001 or disclose wholly or truly all material facts required for verification of the assessment, thereby suppressed the facts with wilful intent to evade payment of service tax. Therefore, the impugned show-cause notice was issued to the assessee by invoking the extended period of time-limit as provided for such situation under section 73 of the Finance Act stood at the relevant point of time and after 10-9-2004. I observe that the failure on the part of the assessee to remit the service tax due especially when the Hon'ble High Court of Madras upheld the levy and their stubborn attitude of withholding the information by not filing the half-yearly returns for the disputed period is nothing but suppression of facts and deliberate and wilful intent to evade payment of service tax. As already explained voluntary compliance is being insisted by the department on the assessee as far as service tax matters are concerned. The assessee should not wait for a formal show-cause notice from the department when they are aware of the service tax liability. So when the assessee continued to withhold the information which they were expected to disclose at least after the High Court's decision in their case, and also did not comply with the department's directions, the department has no other alternative but to issue show-cause notice invoking extended period of time-limit. Therefore, by omission, and failure to file the statutory return the assessee had suppressed the facts with wilful intent to evade

A

payment of service tax and the extended period of time-limit under section 73 of the Act is very much invocable in this case for demand of service tax for the disputed period."

The above finding is not sustainable - once the Hon'ble High Court of Madras dismissed the writ petitions challenging the validity of the levy of service tax on Tour Operators, the department should have issued show-cause notice within the normal period of limitation as all facts regarding liability of the appellants to service tax during the relevant period, after withdrawal of exemption, were known to both sides. When everything is known to both sides, there can be no allegation of suppression of facts with wilful intent to evade payment of service tax. The fact that service tax was not paid by the assessees after the dismissal of the writ petition by the High Court is not sufficient to hold that there was suppression on their part as it was in the open knowledge of both sides that the assessees were liable to pay tax, which is the reason why they challenged the levy before the High Court (although unsuccessfully). No periodical protective show-cause notice was issued during the period 1-4-2000 to 30-4-2001 – no notice was issued for recovery of tax and for imposition of penalty until June, 2005 (show-cause notices in the present set of cases range from June 2005 to October 2005). Therefore, the extended period of limitation is not available to the department. Since the demands in all these cases have been raised after the expiry of the normal period of limitation, I hold that they are time-barred and accordingly set aside the impugned orders confirming tax demands and penalties and allow these appeals on the ground of limitation.

B C D

■■

[2010] 24 STT 413 (PUNJ. & HAR.)

E

HIGH COURT OF PUNJAB AND HARYANA

Commissioner, Central Excise Commissionerate, Ludhiana

v.

Bhandari Hosiery Exports Ltd.*

M.M. KUMAR AND JASWANT SINGH, JJ.

CEA NO. 30 OF 2009
NOVEMBER 17, 2009

F

Section 66A of the Finance Act, 1994 - Charge of service tax on services received from outside India - Period 9-7-2004 to February 2006 - Whether prior to enforcement of section 66A, there was no authority vested by law in revenue to levy service tax on a person who is resident in India but receives

G

*In favour of assessee.

services from a person resident outside India - Held, yes - Assessee received services of individual overseas commission agents for export of its products during relevant period - Service tax was demanded from it for above services - Whether prior to enactment of section 66A, i.e., 18-4-2006, revenue did not have any authority to levy service tax on assessee for said service - Held, yes [Para 4]

A

FACTS

B

The assessee was engaged in the manufacture of hosiery goods and was also involved in their export. In the process, it availed services of individual overseas commission agents under 'Business auxiliary services'. A show-cause notice was issued to it for demand of service tax for the period from 9-7-2004 to February 2006. The adjudicating authority confirmed the demand and imposed penalty. However, the Commissioner (Appeals) set aside the demand to the extent it was beyond the period of limitation and also set aside the penalty. The order of the Commissioner (Appeals) had been upheld by the Tribunal on the premise that prior to enforcement of section 66A, above services were not subjected to service tax.

C

On appeal :

HELD

*There is nothing in section 66A or rule 2(1)(*d*)(*iv*) of the Service Tax Rules, 1994 which may lead to a conclusion that prior to 18-4-2006, the Legislature intended for imposition of tax on the services received by a recipient in India from outside India. The High Court in the case of* Indian National Shipowners Association *v.* Union of India *[2009] 18 STT 212 (Bom.), following the judgment of the Supreme Court rendered in the case of* Laghu Udyog Bharati *v.* Union of India *[2006] 4 STT 322, held that the Finance Act, 1994 was for the first time amended on 18-4-2006 whereby the revenue acquired legal authority to levy service tax on the recipient of taxable service from a person who is resident in India or has business in India. Accordingly, such a person becomes liable for payment of service tax when he receives service outside India from a person who is non-resident or is from outside India after 18-4-2006. Prior to enforcement of section 66A, there was no authority vested by law in revenue to levy service tax on a person who is resident in India but who receives services from a person resident outside India. Till the time section 66A was enacted only the person who rendered the service was liable to pay tax and not the recipient of the service. Accordingly, the revenue did not have any authority to levy service tax on the assessee. [Para 4]*

D

E

In view of the above, these appeals failed and the same were, accordingly, dismissed. [Para 5]

F

CASE REVIEW

Indian National Shipowners Association v. *Union of India* [2009] 18 STT 212 (Bom.) and *Unitech Ltd.* v. *CST* [2009] 21 STT 330 (Delhi) (para 4) *followed.*

G

A **CASES REFERRED TO**

Foster Wheeler Energy Ltd. v. *CCE&C* [2007] 9 STT 320 (Ahd. - CESTAT) (para 3), *Indian National Shipowners Association* v. *Union of India* [2009] 18 STT 212 (Bom.) (para 4), *Laghu Udyog Bharati* v. *Union of India* [2006] 4 STT 322 (SC) (para 4) and *Unitech Ltd.* v. *CST* [2009] 21 STT 330 (Delhi) (para 4).

Sushil Gautam and **Gurpreet Singh** *for the Appellant.* **Jagmohan Bansal** *for the Respondent.*

B **JUDGMENT**

M.M. Kumar, J. - This order shall dispose of CEA No. 30 of 2009 and STA No. 14 of 2009 because common question of law and facts are involved. However, facts are being referred from CEA No. 30 of 2009.

2. The instant appeal filed by the revenue under section 35G of the Central Excise Act, 1944 (for brevity, 'the Act') is directed against order dated 19-2-2008, passed by the Customs, Excise and Service Tax Appellate Tribunal, New C Delhi (for brevity, 'the Tribunal'). The revenue has claimed that the following substantive questions of law would emerge from the order of the Tribunal and, thus, the same be adjudicated by this Court :

(*i*) Whether the service tax was leviable on the recipient of service irrespective of section 66A of the Finance Act?

(*ii*) Whether non-supply of information to the department regarding overseas commission with the intention to evade service tax does not amount D to suppression of facts and invite invocation of extended period of limitation?

3. It is appropriate to mention that the assessee-respondent are engaged in the manufacture of hosiery goods and are also involved in their export. In the process they avail services of individual overseas commission agents under auxiliary services. A show-cause notice was issued to them for demand of service tax for the period from 9-7-2004 to February 2006 alleging that the E assessee was recipient of services of commission agent who has been residing outside India. The Adjudicating Authority confirmed the demand and imposed penalty. However, on appeal the Commissioner (Appeals) set aside the demand to the extent it was beyond the period of limitation and also set aside the penalty. The order of the Commissioner (Appeals) has been upheld by the Tribunal on the basic premise that section 66A of the Finance Act, 2006 (for brevity, 'Finance Act'), was enforced with effect from 18-4-2006, which covered the services rendered outside India for the purposes of imposition of F service tax and those services prior to enforcement of section 66A of the Finance Act were not subjected to service tax. The Tribunal followed its own view rendered in the case of *Foster Wheeler Energy Ltd.* v. *CCE&C* [2007] 9 STT 320 (Ahd. - CESTAT) and rejected the argument of the revenue that section 66A could be construed retrospectively.

4. We have heard learned counsel for the parties at a considerable length and find that there is nothing in section 66A or section 2(1)(*d*)(*iv*) which may lead G to a conclusion that earlier to 18-4-2006 the Legislature intended imposition

of tax on the services received by a recipient in India from outside India. The matter was considered in some detail by a Division Bench of Bombay High Court in the case of *Indian National Shipowners Association* v. *Union of India* [2009] 18 STT 212. Following the judgment of Hon'ble the Supreme Court rendered in the case of *Laghu Udyog Bharati* v. *Union of India* [2006] 4 STT 322, the Division Bench of Bombay High Court held that the Finance Act, 1994 was for the first time amended on 18-4-2006 whereby the revenue acquired legal authority to levy service tax on the recipient of taxable service from a person who is resident in India or has business in India. Accordingly, such a person becomes liable to payment of service tax when he received service outside India from a person who is non-resident or is from outside India after 18-4-2006. Earlier to the enforcement of section 66A there was no authority vested by law in the revenue to levy service tax on a person who is resident in India but who receive services from a person resident outside India. Till the time section 66A was enacted only the person who rendered the service was liable to pay tax and not the recipient of the service. Accordingly, the revenue did not have any authority to levy service tax on the assessee. The aforesaid view of the Bombay High Court has been followed and applied by a Division Bench of Delhi High Court in the case of *Unitech Ltd.* v. *CST* [2009] 21 STT 330. We are in respectful agreement with the aforesaid view expressed by the Bombay and Delhi High Court.

5. In view of the above, these appeals fail and the same are accordingly dismissed.

■■

[2010] 24 STT 416 (KER.)

HIGH COURT OF KERALA

Commissioner of Customs, Central Excise & Service Tax

v.

Federal Bank Ltd.*

C.N. RAMACHANDRAN NAIR AND C.K. ABDUL REHIM, JJ.

C.E. APPEAL NOS. 4, 6, 11 AND 13 OF 2009
JULY 27, 2009

Section 65(12) of the Finance Act, 1994 - Banking and other financial services - Period prior to 1-6-2007 - Assessee-bank was engaged in collection of telephone bills for various telephone companies and remittance of same to them - Service tax was demanded from it under category of 'Business auxiliary service' - Whether above service provided by assessee would

*In favour of assessee.

A **essentially fall under category 'cash management service' - Held, yes - Whether therefore, when Cash Management Service stood excluded from purview of service tax at hands of bank until 31-5-2007, authorities could not sustain service tax on Cash Management Service under any other charging head including 'Business auxiliary service' and assessment on assessee for services rendered by it until 31-5-2007 was to be cancelled - Held, yes [Para 2]**

B

FACTS

The assessee-bank was engaged in collection of telephone bills for various telephone companies and remittance of same to them. The lower authorities took the view that service provided by assessee would attract service tax under category of the 'Business auxiliary service'. However, the Tribunal held that services provided by the assessee were not business auxiliary services.

C On appeal :

HELD

The finding of the Tribunal that the service rendered by the bank was not a business auxiliary service, did not appear to be correct. On the other hand, the argument of the assessee that the service essentially falls under cash management service under clause 12 of section 65 appeared to be correct. In fact, cash management service was deleted from exclusion clause contained in clause 12 of section 65 with effect from 1-6-2007 and in the clarification letter issued by the Central Board of Excise and Customs, it is clear that the service of collection of receivables is a cash management service rendered by a banking company. In fact, cash management service remained excluded for the purpose of levy of service tax until it is deleted through an amendment with effect from 1-6-2007. It is clear from the definition of 'Banking and other Financial Services' that the provisions contained in clause 12 are rather exhaustive covering all services of banking and other financial services. In a broad sense, cash management service is also a business auxiliary service. However, the question was; which was the more appropriate charging provision under which the assessee-bank's service would fall. The definition of 'Business auxiliary service' is with specific reference to each and every service covered by sub-clauses (i) and (vi) which do not specifically cover banking and other financial services. Banking and other financial services are specifically covered by clause 12 and there is no scope for charging tax on any service rendered by banks under any other head. In other words, clause 12 of section 65 covers all charging services rendered by banks. When cash management services stood excluded from the purview of service tax at the hands of the bank until 31-5-2007, the authorities could not sustain service tax on cash management service under any other charging head including 'business auxiliary service'. Therefore, order of the Tribunal was upheld though not for the reasons stated by it, but for the findings rendered above. It was also conceded that from 1-6-2007 onwards the very same service was taxed at the hands of the assessee by the department under the head 'Cash Management Service'. Therefore, these

D E F G

appeals were dismissed by upholding the order of the Tribunal cancelling the assessments on the assessee for the service rendered by it until 31-5-2007. [Para 2] A

CASE REVIEW

Order of Tribunal, dated 23-1-2008 in ST 191 & 192/2006 FO-68 to 70/2008 in ST. 187/2006 (Bang.) (para 2) *affirmed.*

Tojan J. Vathikulam and **Abraham Thomas** *for the Appellant.* **Joseph Kodianthara** and **Terry V. James** *for the Respondent.* B

JUDGMENT

C.N. Ramachandran Nair, J. - The common question raised in the connected appeals filed by the department against the order of the Customs, Excise and Service Tax Appellate Tribunal (CESTAT) is whether the Tribunal was right in holding that the collection of telephone bills by the respondent bank for Bharat Sanchar Nigam Limited (BSNL), Airtel and other companies is not business auxiliary service attracting liability for service tax falling under section 65(*19*) of the Finance Act 1994? The Finance Act, 1994 was amended by section 90 of the Finance (No. 2) Act, 2004 introducing clauses (*12*) and (*19*) in section 65 of the Finance Act, 1994. While clause (*12*) of section 65 defines banking and other financial services which specifically excludes service pertaining to cash management, clause (*19*) defines business auxiliary services which includes in it any customer care service provided on behalf of the client including service incidental or auxiliary to any activity specified in sub-clauses (*i*) to (*vi*), such as billing, issue of collection or recovery of cheques, payments, etc. The case of the department is that, service rendered by respondent by way of collection of bills for telephone companies and other parties is a business auxiliary service attracting tax under clause (*19*) of section 65. On the other hand the contention of the respondent is that collection of bills is nothing but a cash management service and the same is specifically excluded from the definition clauses covering banking and other financial services under clause (*12*) of section 65. It is further pointed out that the exclusion of cash management service from clause (*12*) was deleted with effect from 1-6-2007 and thereafter respondent bank is remitting service tax including for cash management service which covers bill collection for the companies referred above. C D E

2. We have heard Standing Counsel appearing for the appellants and counsel appearing for the respondent bank. On going through the Tribunal's order we notice that the Tribunal has held that services rendered by the respondent in the form of collection of bills and remittance of the same to their clients namely BSNL, Airtel, etc., are not a business auxiliary service. The Standing Counsel submitted that, the Tribunal's finding is fallacious because clause (97) specifically provides for collection of bills, for recovery of cheques and payments as specifically covered under business auxiliary service. As a matter of fact various clients of the respondent, like BSNL, Airtel, etc. maintain accounts with one or two branches of the bank with Hub Account. Customers F G

A in receipt of telephone bills are free to deposit the bill amount in any branch of the respondent bank which will collect the payment and credit in the Hub Account maintained by their client company. In fact the bank is issuing receipt to the subscribers of telephone against bill amount paid by them to the bank. For the service rendered the bank is said to be collecting a specified rate of commission of Rs. 5.50 per every bill. It is this amount which is subject to service tax. Even though the finding of the Tribunal that the service rendered by the bank is not a business auxiliary service, does not appear to be correct, B we feel argument of the counsel for respondent that the service essentially falls under cash management service under clause (12) of section 65 is correct. In fact cash management service is deleted from exclusion clause contained in clause (12) of section 65 with effect from 1-6-2007 and in the clarification letter issued by the Central Board of Excise and Customs the cash management service is explained as follows :–

> "At present cash management is specifically excluded from the scope of this C service. Specific exclusion of cash management is being omitted. Consequently, cash management services includes services of collection of receivables, execution of payment, management of liquidity and providing customized Management Information System (MIS) reports, provided by banks to clients such as corporate clients."

From the above it is clear that the service of collection of receivables is a cash management service rendered by a banking company. In fact cash management service remained excluded for the purpose of levy of service tax until it D is deleted through an amendment with effect from 1-6-2007. Prior to the deletion clause (*12*) was covering the following services :–

"(*12*) 'banking and other financial services' means–

(*a*) the following services provided by a banking company or a financial institution including a non-banking financial company or any other body corporate, namely :–

(*i*) financial leasing services including equipment leasing and hire-E purchase by a body corporate;

(*ii*) credit card services;

(*iii*) merchant banking services;

(*iv*) securities and foreign exchange (forex) broking;

(*v*) asset management including portfolio management, all forms of fund management, pension fund management, custodial depository and trust services, but does not include cash management;

F

(*iv*) advisory and other auxiliary financial services including investment and portfolio research and advice, advice on mergers and acquisitions and advice on corporate restructuring and strategy;

(*vi*) provision and transfer of information and date processing; and

(*vii*) other financial services, namely, lending; issue of pay order, demand draft, cheque, letter of credit and bill of exchange; providing bank guarantee, over draft facility, bill discounting facility, safe deposit G locker; safe vaults; operation of bank accounts;

(*b*) foreign exchange broking provided by a foreign exchange broker other than those covered under sub-clause (*a*);"

It is clear from the above that the provisions contained in clause (*12*) are rather exhaustive covering all services of banking and other financial services. The Standing Counsel for the revenue contended that the service rendered by the respondent though essentially banking service falls within the description of business auxiliary services as defined under clause (*19*)(*vii*). We feel in a broad sense cash management services is also a business auxiliary service. However the question is which is the more appropriate charging provision under which the Respondent Bank's service would fall. In order to examine this we have to refer to the definition of business auxiliary service also and for this purpose clause (*19*)(*vii*) defining 'business auxiliary service' is extracted hereunder.

"a service incidental or auxiliary to any activity specified in sub-clauses (*i*) to (*vi*), such as billing, issue or collection or recovery of cheques, payments, maintenance of accounts and remittance, inventory management, evaluation or development of prospective customer or vendor, public relation services, management or supervision."

We are of the view that the above definition, is with specific reference to each and every service covered by sub-clauses (*i*) and (*vi*) which do not specifically cover Banking and other financial services. Banking and other financial services are specifically covered by clause (*12*) and there is no scope for charging tax on any service rendered by Banks under any other head. In other words we are of the view that clause (*12*) of section 65 covers all charging services rendered by Banks. When Cash Management Services stood excluded from the purview of service tax at the hands of the Bank until 31-5-2007, the authorities cannot, sustain service tax on an essentially Cash Management Service under any other charging head including Business Auxiliary Service. We, therefore uphold order of the Tribunal though not for the reasons stated by them but for the findings rendered by us above. It also conceded that from 1-6-2007 onwards the very same service is taxed for service tax at the hands of the respondent by the department under the head 'Cash Management Service'. We, therefore, dismiss these appeals by upholding the orders of the Tribunal cancelling the assessments on respondent for the service rendered by them until 31-5-2007.

■■

A

[2010] 24 STT 421 (BANG. - CESTAT)

CESTAT, BANGALORE BENCH

Commissioner of Service Tax, Bangalore

v.

Tulsyan NEC Ltd.*

B

M.V. RAVINDRAN, JUDICIAL MEMBER

FINAL ORDER NO. 1344 OF 2009
APPEAL NO. CE/45-A OF 2008
OCTOBER 8, 2009

C

Section 73 of the Finance Act, 1994 - Recovery of service tax not levied or paid or short-levied or short-paid or erroneously refunded - Period 16-7-1997 to 16-10-1998 - Assessee received services of Goods Transport Operator (GTO) during relevant period - Revenue by invoking extended period of limitation under section 73, issued a show-cause notice to assessee to demand service tax - However, Supreme Court in CCE v. Gujarat Carbon & Industries Ltd. [2008] 16 STT 108 held that liability to file return is cast on receipt of services of goods transport operators only under section 71A and class of persons who come under section 71A, like instant assessee, is not brought under net of section 73 - Whether in view of above case, show-cause notice issued to assessee was not maintainable - Held, yes [Para 5]

D

CASE REVIEW

CCE v. *Gujarat Carbon & Industries Ltd.* [2008] 16 STT 208 (SC) (para 5) *followed.*

CASES REFERRED TO

CCE v. *Gujarat Carbon & Industries Ltd.* [2008] 16 STT 108 (SC) (para 4) and *CCE* v. *L.H. Sugar Factories Ltd.* [2005] 2 STT 282 (SC) (para 5).

E

M. Vivekanandan *for the Appellant.* **Ramesh Ananthan** *for the Respondent.*

ORDER

1. This appeal is filed by the Revenue against the Order-in-Appeal No. 97/2007, dated 23-11-2007, passed by the Commissioner of Central Excise (Appeals-II), Bangalore.

F

2. The relevant facts of the case for consideration are, the original authority had confirmed the demand of service tax amounting to Rs. 49,095 under the category of 'Goods Transport Operators' (GTO) services received by the respondent, during the period from 16-7-1997 to 16-10-1998, demanded through show-cause notice dated 13-9-2004 by an Order-in-Original No. 28/DII/2005, which was challenged in appeal and the matter was remanded back for fresh decision duly observing the principles of natural justice *vide* Order-in-Appeal No. 86/2006-C.E., dated 23-6-2006. The original authority *vide*

G

*In favour of assessee.

impugned *de novo* order confirmed the amount of service tax, also demanded interest under section 75, imposed penalties under each sections of 76, 77 and 78 of the Finance Act, 1994. On appeal, the Commissioner (Appeals) relying upon various decisions of the Tribunal set aside the Order-in-Original and allowed the appeal. A

3. Aggrieved by such an order, the Revenue has come before the Tribunal. The learned SDR reiterates the 'grounds of appeal' and submits that the Commissioner (Appeals)'s order is not correct. B

4. The learned Counsel submits that the recent judgment of the Hon'ble Supreme Court in the case of *CCE* v. *Gujarat Carbon & Industries Ltd.* [2008] 16 STT 108 has clearly settled the law stating that for the recovery of the amount for non-filing of return would not be correct as per provisions of section 70 of the Finance Act.

5. I have carefully considered the submissions made by both sides and perused the records. The issue involved in this case is regarding liability to pay service tax for GTO service received from 16-7-2007 for which a show-cause notice was issued on 13-9-2004 invoking the provisions of section 73 of the Finance Act, 1994, for recovery of the amount. The findings of the Commissioner (Appeals) are as under :– C

> "4. I have carefully gone through the records of the case and the submissions of the appellant, it is a fact on record that the demand for service tax, for the receipt of GTO service availed during the period from 16-7-1997 to 16-10-1998 was made for the first time *vide* show-cause notice 13-9-2004, which is beyond the extended period of limitation of 5 years specified under section 73 of the Finance Act, 1994. The original authority's conclusion that the validated provisions inserted *vide* sections 116 and 117 of the Finance Act, 2000 and the provisions of Finance Act, 2003 are applicable to the present case is totally misplaced inasmuch the said provisions of the Finance Act do not provide for making any fresh demand after lapse of five years from the relevant date. The present case is not a case wherein such demand was made earlier and was either pending or decided in terms of any provision of law, or case law, on the subject, in favour of the appellant. The validation provisions of sections 116 and 117 of the Finance Act, 2000 did validate the provisions of collection of service tax with effect from 16-7-1997 as also the action already taken or initiated, and to be taken within the prescribed time-limit, but did not envisage fresh demand beyond the statutory time-limits *i.e.,* cases where the department had failed to initiate action in accordance with the existing provisions. Hence the demand is clearly hit by limitation and requires to be set aside...." D E

I find that the finding of the Commissioner (Appeals) are very clear. I also find strong force in the contentions made by the learned Counsel that the Hon'ble Supreme Court in the case of *Gujarat Carbon & Industries Ltd.* (*supra*) has now settled the issue in favour of the assessee and concurred with a similar view of the Apex Court in the case of *CCE* v. *L.H. Sugar Factories Ltd.* [2005] 2 STT 282. The ratio of the Apex Court in the case of *Gujarat Carbon & Industries Ltd.* (*supra*) is reproduced : F

> "5. The Tribunal referred to a decision in the case of *L.H. Sugar Factories Ltd.* v. *CCE* 2004 (165) ELT 161/[2007] 8 STT 295 (New Delhi - CESTAT) where under G

A similar circumstances the show-cause notice was issued. It was held that during the relevant period section 73 takes in only the case of assessees who are liable to file return under section 70. The liability to file return is cast on the assessees only under section 71A which was introduced in the Finance Bill, 2003. Thus, during the period in question no notice could have been issued under section 73 for non-filing of return under section 70. According to the Tribunal, the service receiver was not required to file any return under section 70 of the Finance Act, 1994 prior to 2003. The Tribunal accordingly quashed the order demanding service tax from the respondents-service availers. Similar view has been ex-B pressed in the connected cases.

** ** **

8. It is to be noted that in an identical case in *CCE* v. *L.H. Sugar Factories Ltd.* [2005] 2 STT 282, this Court agreed with similar conclusions of the Tribunal. In the said case, the conclusions of the Tribunal were as follows :

'The above would show that even the amended section 73 takes in only the case of assessees who are liable to file return under section 70. Admittedly, the liability C to file return is cast on the appellants only under section 71A. The class of persons who come under section 71A is not brought under the net of section 73. The above being the position show-cause notices issued to the appellants invoking section 73 are not maintainable.'" (p. 110)

In view of the same, I do not find any infirmity in the impugned order. In the facts and circumstances of the case, the impugned order is correct and legal. I do not find any merit in the Revenue's appeal and the same is dismissed.

D ■■

[2010] 24 STT 423 (BANG. - CESTAT)

CESTAT, BANGALORE BENCH

E

Balasai Travels

v.

Commissioner of Central Excise*, Tirupathi

M.V. RAVINDRAN, JUDICIAL MEMBER
AND P. KARTHIKEYAN, TECHNICAL MEMBER

FINAL ORDER NO. 1367 OF 2009
STAY ORDER NO. 1628 OF 2009
F APPEAL NO. ST/STAY./390 OF 2009
AND ST/648 OF 2009
OCTOBER 26, 2009

Section 85 of the Finance Act, 1994 - Commissioner (Appeals) - Appeals to - Service tax was demanded from assessee under category of 'Rent-a-cab

G *Matter remanded.

service' - In first round of litigation, Commissioner (Appeals) considering financial hardship of assessee waived pre-deposit requirement and remanded matter for de novo consideration to adjudicating authority who confirmed demand - On further appeal, Commissioner (Appeals) dismissed appeal of assessee for non-compliance of pre-deposit direction - In instant appeal, assessee contended that activity involved was provision of transport vehicles and not passenger vehicles and service tax relatable to provision of passenger vehicle would be approximately Rs. 35,000 which he had agreed to deposit - Whether above amount offered by assessee should be considered adequate to consider appeal on merits and on such compliance, Commissioner (Appeals) would decide appeal on merit - Held, yes [Para 5]

A

B

Ch. Venkateshwara Rao *for the Appellant.* **Ms. Sudha Koka** *for the Respondent.*

ORDER

C

P. Karthikeyan, Technical Member - *Vide* the impugned order, the Commissioner (Appeals) dismissed the appeal filed by the appellant M/s. Balasai Travels for their failure to comply with section 35F of the CE Act.

2. The original authority had confirmed a service tax of Rs. 5,93,032 found due from the appellant under the category 'rent-a-cab operator scheme'. He had also imposed penalties under different sections of the Finance Act, 1994. The Commissioner (Appeals) had directed the appellants to pre-deposit an amount of Rs. 2,00,000 for hearing the appeal.

D

3. Moving the application for waiver of pre-deposit and stay of recovery of the adjudged dues, the learned counsel for the appellants submits that the order of the Original authority which stood affirmed by the impugned order was passed in *de novo* proceedings and that in the first round, the Commissioner (Appeals) had waived the pre-deposit accepting the submissions of the appellants as regards their financial hardship. It is submitted that in the circumstances, the Commissioner (Appeals) should not have insisted on pre-deposit and dismissed their appeal for their failure to make deposit under section 35F of the Act. He submits that the activity involved was provision of transport vehicles and not passenger vehicles. The service tax relatable to provision of passenger vehicle, under rent-a-cab operator scheme would be approximately Rs. 35,000. He offers to pre-deposit this amount.

E

4. We have also heard learned SDR who submits that in the first round, the Commissioner (Appeals) had considered the stay application and the appeal together and had not recorded any finding as regards the appellants' financial hardship. At this juncture the learned counsel submits that in their appeal before the Commissioner (Appeals), they had explained their financial difficulty and this had been taken into consideration.

F

5. On a careful consideration of the facts of the case and the submissions made by both sides, we find that the Commissioner (Appeals) found it appropriate to dispose of the appeal without insisting on pre-deposit in the first round,

G

A obviously considering the financial hardship of the appellants. Before us, the representative of the appellants offers to make pre-deposit of Rs. 35,000 towards tax liability for provision of passenger vehicles. Apparently the balance amount is wrongly confirmed. We find that pre-deposit of Rs. 35,000 is adequate to consider the appeal on merits. In the circumstances we order that the appellants shall make pre-deposit as offered and report compliance to the Commissioner (Appeals) on 27-11-2009. On report of such compliance the Commissioner (Appeals) shall decide the appeal on merits. The stay B application and appeal are disposed of by way of remand to the Commissioner (Appeals).

■■

C

[2010] 24 STT 425 (BANG. - CESTAT)

CESTAT, BANGALORE BENCH

Sobha Developers Ltd.

v.

Commissioner of Central Excise and Service Tax*, Bangalore

D

M.V. RAVINDRAN, JUDICIAL MEMBER
P. KARTHIKEYAN, TECHNICAL MEMBER

FINAL ORDER NOS. 1407 & 1408 OF 2009
APPEAL NOS. ST/689 & 690 OF 2008
SEPTEMBER 1, 2009

Section 65(25b) of the Finance Act, 1994 - Commercial of industrial construction service - Period April, 2006 to March, 2007 - Assessee was engaged in E **providing commercial or industrial construction and construction of residential complex services - It claimed deduction under Notification No. 12/ 2003-ST, dated 20-6-2003 in respect of value of goods and materials involved in construction contract and paid service tax on 30 per cent of contract value - Commissioner denied said deduction on ground that assessee had not produced documents to evidence sale of materials for which exemption was claimed and, accordingly, confirmed differential service tax - However,** F **undisputedly assessee was registered with State VAT department for payment of VAT under category of 'works contract' for impugned activities and that it paid VAT on 70 per cent of value of works contract as per provisions of KVAT Act - Whether in such circumstances, decision of Commissioner to collect service tax on value on which assessee had already paid State VAT was contrary to principles of fiscal federalism adopted in Constitution - Held, yes**

G

*In favour of assessee.

- Whether therefore impugned demand of differential duty relating to value of materials supplied in course of provision of construction of commercial or industrial buildings and construction of residential complex services was not sustainable - Held, yes [Para 7] A

Circulars and Notifications : Notification No. 12/2003-ST, dated 20-6-2003

FACTS

The assessee was engaged in providing commercial or industrial construction and construction of residential complex services. During the material period it claimed deduction under Notification No. 12/2003-ST, dated 20-6-2003 in respect of the value of goods and materials consumed for providing above services. To determine value of goods and material involved in construction contract, the assessee followed the formula prescribed under Karnataka VAT Act, and, accordingly, paid VAT on 70 per cent of contract value and service tax on 30 per cent of the value. However, a show-cause notice was issued to the assessee proposing for demand of differential service tax on the ground that assessee had consumed materials in the provision of services but had not sold them to the customer; such consumption did not amount to sale and, therefore, it was not entitled to the benefit of Notification No. 12/2003-ST (*supra*). The Commissioner confirmed the said demand on the ground that assessee had not produced documents to evidence sale of materials for which exemption was claimed. B C

On appeal : D

HELD

The requirement to qualify for the exemption under Notification No. 12/2003-ST, dated 20-6-2003 is that materials are sold in the course of provision of service and the service provider maintains a record of the same. There was no dispute that the assessee was registered with the State VAT department for payment of VAT under the category of works contract for the impugned activities and that it paid VAT on 70 per cent of the value of the works contract as per the provisions of KVAT Act. As clarified by the Deputy Secretary, Ministry of Finance, CBEC, exemption in respect of materials consumed/sold by the service provider to the service recipient providing taxable service is available if the service provider maintains records showing the materials consumed/ sold while providing the taxable service. Interpreting the provisions of this notification, the Tribunal in Shilpa Colour Lab *v.* CCE *[2007] 8 STT 102 (Bang. - CESTAT) held that the notification did not require that the inputs used should be mentioned in the invoices/bills issued to the customers. The Tribunal also held that exemption was admissible on the value of the goods consumed. Value of such goods consumed in the provision of service could not be included in the taxable value for levy of service tax. The impugned order sought to recover service tax on a portion of the contract amount relating to materials consumed/ sold in the course of provision of construction service. As rightly pointed out by the assessee, clause 29A of article 366 of the Constitution provides that tax on the sale or purchase of goods includes,* inter alia, *a tax on the transfer of* E F G

A *property in goods whether as goods or in some other form involved in the execution of a works contract. [Para 5.1]*

The different Governments, viz., *Centre and States, cannot intrude on the jurisdiction of each other. The decision of the Commissioner to collect service tax on the value on which the assessee had already paid State VAT was contrary to the principles of fiscal federalism adopted in the Constitution. In the circumstances, the impugned demand of differential duty relating to value of* B *materials supplied in the course of provision of construction of commercial or industrial buildings and construction of residential complex services was not sustainable. Consequently, the demand of interest and penalties was also liable to be vacated. Accordingly, the impugned order was vacated and the appeal filed by assessee was allowed. [Para 7]*

CASES REFERRED TO

Daelim Industrial Co. v. *CCE* 2003 (155) ELT 457/[2007] 7 STT 184 (Delhi - CESTAT) C (para 4), *Diebold Systems (P.) Ltd.* v. *CST* [2008] 12 STT 346 (Chennai - CESTAT) (para 4), *Air Liquide Engg. India (P.) Ltd.* v. *CCE* [2008] 13 STT 78 (Bang. - CESTAT) (para 4), *Glaxo Smithkline Pharmaceuticals Ltd.* v. *CCE* 2005 (188) ELT 171/1 STT 37 (Mum. - CESTAT) (para 4), *Mahavir Generics* v. *CCE* 2004 (170) ELT 78/[2007] 6 STT 523 (New Delhi - CESTAT) (para 4), *Bharat Sanchar Nigam Ltd.* v. *Union of India* [2006] 3 STT 245 (para 4), *Gujarat Ambuja Cements Ltd.* v. *Union of India* [2005] 1 STT 41/144 Taxman 512 (SC) (para 4), *Idea Mobile Communications Ltd.* v. *CCE* [2006] 5 STT 352 (Bang. - CESTAT) (para 4), *Shilpa Calour Lab.* v. *CCE* [2007] 8 STT 102 (Bang. - CESTAT) (para 4) and *Hindustan Steel Ltd.* v. *State of Orissa* AIR 1970 SC 253 (para 4).

D **G. Shivadass, Siddarth** and **Srivastava** *for the Appellant.* **Ms. Joy Kumari Chander** *for the Respondent.*

ORDER

P. Karthikeyan, Technical Member. - These appeals filed by M/s. Sobha Developers Ltd. (SDL) challenge orders of the Commissioner of Central Excise & Service tax, LTU, Bangalore as per the following details :

E

Appl. No.	*OIO No.*	*Period of dispute*	*Duty demanded+ interest*	*Penalty*
ST/690/08	98/2008-Commr.LTU dt. 18-9-2008	April, 2006 to March, 2007	Rs. 69,28,94,102 + interest	Rs. 200 or 2% of such tax per month which-ever is higher under section 76 of the Finance Act.
ST/689/08	97/2008-Commr.LTU dt. 18-9-2008	April, 2006 to March, 2007	Rs. 9,75,51,961 + interest	Rs. 200 or 2% of such tax per month which-ever is higher under section 76 of the Finance Act.

F

G

As the appeals deal with a common dispute, appeal No. ST/690/08 is taken up for examination in detail. A

2. The appellants SDL are engaged in provision of, *inter alia*, commercial or industrial construction services and construction of residential complex. During the material period, they availed the benefit of Notification No. 12/2003-ST, dated 20-6-2003. After due process of law, the Commissioner found that the appellants had wrongly availed the said benefit in that it had failed to fulfil the conditions to qualify for the exemption. Accordingly, he confirmed B demand of differential duty of Rs. 69,28,94,102 under section 73(1) of the Finance Act, 1994 (the Act) along with applicable interest and imposed penalty at the rate of Rs. 200 per day for everyday during which the default continued or 2 per cent of such tax per month whichever was higher starting from the first day after the due date till the date of actual payment of the outstanding amount of Service tax under section 76 of the Act.

3. In the appeal filed before the Tribunal, SDL submitted that they were C engaged in construction of commercial or industrial buildings, construction of residential buildings and maintenance and repairs of those buildings. The appellant undertook the project either on contract basis or on 'own construction basis'. When the activities were undertaken on contractual basis, the land was owned by the service receiver who raised a purchase order on the appellants. The project would be carried out on turnkey basis. The contract would give description of individual work without split up of labour, materials, rent, rates, etc. In the second category of cases, the appellant would undertake D construction on the land owned by it or by a co-developer. The appellant was registered with the department as a provider of construction of commercial or industrial complex service, among others. The appellants were assessed to Karnataka VAT (KVAT) and paid tax under works contract in terms of KVAT. 70 per cent of the contract value was subjected to VAT and 30 per cent was deemed to be towards labour. The appellant paid VAT on 70 per cent of the contract value and service tax on 30 per cent of the value. Under show-cause notice C.No. V/15/32/2007 LTU ADJN, dated 12-10-2007, it was proposed to E demand service tax of Rs. 48,48,06,462 being the differential service tax on account of the wrong availment of Notification No. 12/2003 on the ground that SDL had consumed materials used in the provision of services and had not sold them to the customer; such consumption had not amounted to sale. The appellant was also not entitled to the benefit of Notification No. 1/2006-ST, dated 1-3-2006. The appellant resisted the proposal in reply dated 17-3-2008. They availed the opportunity to explain their case before the F Commissioner personally on 17-3-2008. The Commissioner rejected the submissions of SDL and confirmed the demand of service tax of Rs. 69,28,94,102. The Commissioner found that SDL had paid service tax up to 31-3-2006 availing 67 per cent abatement of the gross amount charged as provided under Notification No. 15/2004-ST, dated 10-9-2004 without availing credit of duty paid on inputs or capital goods. From 1-4-2006, the assessee switched to Notification No. 12/2003-ST, and claimed deduction towards the value of goods and materials following the formula prescribed in the KVAT to deter- G

A mine value of goods and materials involved in the construction contract. The Commissioner find that as per the clarification issued by the CBEC *vide* Circular M.F.(DR) letter F.No. 233/2/2003, CX-4, dated 3-3-2006, benefit of Notification No. 12/2003 exempting the value of goods and materials sold during the provision of service was available subject to documentary evidence of such sale. The appellants had not produced documents to evidence sale of materials for which exemption was claimed. Appellants had wrongly followed the percentage formula prescribed under KVAT for determining the B value of goods and materials involved in the construction contract. The appellants were liable to pay interest and were liable for penalty.

4. The appellants have taken the following grounds to assail the order impugned:–

(*a*) The construction activity undertaken by the appellant was in terms of turnkey contracts. A 'works contract' could not be vivisected and part of C it subjected to tax as held by the Tribunal in the case of *Daelim Industrial Co.* v. *CCE* 2003 (155) ELT 457/[2007] 7 STT 184 (Delhi - CESTAT). It is claimed that the CBEC *vide* Circular No. 98/1/2008-ST, dated 4-1-2008 had clarified that prior to 1-6-2007 construction contracts were single composite contracts and the Department accepted that a composite work contract could not be vivisected. The ratio of the *Daelim Industrial Co.'s* case (*supra*) applied for the period prior to 1-6-2007 and tax was not payable by the appellant. The impugned demand amounted to artifi- D cially bifurcating a composite contract and demanding duty on part of it. The impugned order did not deny that the activity involved was construction undertaken under composite contracts and could not be vivisected. It is submitted that with effect from 1-6-2007, a new taxable service *viz.,* works contract was introduced in the statute. 'Works contract' covered the construction of a new building for the purpose of commerce or industry and construction of new residential complex. It is claimed that the assessee was not liable to pay service tax at all during E the material period as the impugned activity had been undertaken prior to 1-6-2007, when works contract was brought under the tax net. SDL relied on the decision of the Tribunal in the case of *Diebold Systems (P.) Ltd.* v. *CST* [2008] 12 STT 346 (Chennai - CESTAT) wherein it was held that ATM related services had been introduced for the levy of service tax only with effect from 1-5-2006 and indivisible works contract like the ones involved in that case came to be chargeable to service tax only with F effect from 1-6-2007. Thus the subject-matter of that case had not attracted service tax for any service prior to 1-5-2006. In *Air Liquide Engg. India (P.) Ltd.* v. *CCE* [2008] 13 STT 78 (Bang. - CESTAT), eight contracts considered by the Tribunal were actually works contract on turnkey basis. Works contract came into service tax net only with effect from 1-6-2007. Therefore for a period from 1-6-2007, works contract could not be covered under the 'consulting engineering service'. Several other case laws holding the same view also were cited. It was a G consistently followed position that services brought under service tax

through new service definition were not taxable under pre-existing categories of services. This was the ratio of the decision in *Glaxo Smithkline Pharmaceuticals Ltd.* 2005 (188) ELT 171/1 STT 37 (Mum. - CESTAT). It is submitted that *vide* Circular F.No. V/DGST/22 Audit/ Misc./1/2004/Mumbai, dated 16-2-2006, CBEC clarified that if construction was undertaken by the builder for prospective customer under an agreement for sale and after construction, the rights in property were transferred to the said prospective purchasers, the activity would amount to 'works contract' or taxable service was covered under the service tax and not sale. Therefore, impugned activity clarified to be 'works contract' under the above Circular could not be taxed for the period prior to 1-6-2007. The Commissioner had wrongly held that the activity undertaken by the appellants was classifiable under the taxable service of construction of commercial or industrial buildings and construction of residential complex service.

(*b*) That the appellant had paid Service tax under a particular category of taxable service for the period prior to 1-6-2007 would not make the appellant, a service provider and they relied upon the decision of the Tribunal in the case of *Mahavir Generics* v. *CCE* 2004 (170) ELT 78/ [2007] 6 STT 523 (New Delhi - CESTAT) in support. The Tribunal had held that the appellant having once got registered as a clearing and forwarding agent for the purpose of service tax under a misunderstanding could not be compelled to continue such registration if they were not liable under law.

(*c*) As regards the point in issue relating to the exemption under Notification No. 12/2003 and Notification No. 1/06-ST, it is submitted that the intention behind the Notification was to tax only the service element and not the value of the goods and materials transferred to the customer. The constitutional provisions empowered the Legislatures of States to levy sales tax on certain transactions which also covered transfer of property in goods in the execution of a works contract. They relied upon the Apex Court's judgment reading the relevant constitutional provisions in *Bharat Sanchar Nigam Ltd.* v. *Union of India* [2006] 3 STT 245. No Service tax could be demanded on the value of goods and materials sold/consumed during provision of service. The mutual exclusivity between sale of goods and services for taxation by the different Governments was underlined by the Apex Court in the case of *Gujarat Ambuja Cements Ltd.* v. *Union of India* [2005] 1 STT 41/144 Taxman 512. This position was restated in *BSNL* (*supra*) wherein it was held that the Centre could not include the value of SIM cards under service tax if they were ultimately found to be goods. In *Idea Mobile Communications Ltd.* v. *CCE* [2006] 5 STT 352 (Bang. - CESTAT) the Tribunal had held as follows :

"On a careful consideration, we notice that the assessee is not contesting the levy of sales tax. They have already paid the sales tax. It follows that service tax is not leviable on the item on which sales tax has been collected. . . ." (p. 353)

A B C D E F G

A

In the light of these authorities, it is claimed that the value of the goods and materials sold by the service provider during the course of provision of service could not form part of the value of taxable service. The department had clarified the scope of Notification No. 12/2003-ST in its letter dated 7-4-2004 addressed to M/s. Punjab Color Lab Association, Jalandar as under :

B

". . . the exemption in respect of input material consumed/sold by the service provider to the service recipient while providing the taxable service is available. However, the exemption is available only if the service provider maintains the records showing the material consumed/sold while providing the taxable service. The value of such material should also be indicated on the bill/invoice issued in respect of the taxable service provided.".

C

The Department itself had thus equated consumption with sale for the purpose of the notification. The appellant furnished figures of break-up of material, labour, administrative expenses, profit etc. to show that material constituted 77 per cent of the total project cost during the period 2006-07 and therefore, there was no short payment of service tax as service tax was paid on 30 per cent of the project cost. The appellant relied on the following observations contained in the decision of the Tribunal in the case of *Shilpa Colour Lab* v. *CCE* [2007] 8 STT 102 (Bang. - CESTAT) in support of the claim that value of the goods and materials could not be included in the value of service for levy of service tax when the assessee had maintained account of the inputs used during the course of provision of service.

D

"8.5 This Bench had occasion to deal with this issue when the benefit of deduction was denied on the ground that the value of the goods consumed is not indicated in the invoice in the case of *Adlabs* v. *CCE* [2006] 4 STT 133 (Bang. - CESTAT) in the above case, this Bench, made the following observations:–

E

"3. On a careful consideration, we notice that the Commissioner was not justified in taking the view, *in contra* to the Board's letter and the Notification. The appellants have maintained the records of the inputs used in the photography, nowhere it is stated in the Circular and Notification that the inputs used in the photography should be mentioned in the invoices/bills issued to the customers. The reasoning given by the Commissioner is not sustainable. In view of the clarification given in the Board's letter and the Notification itself the denial of benefit by the lower authorities is not justified and not correct in law. The appellants are eligible for the benefit of deduction in terms of the Board's Circular and the Notification. The order passed by the impugned authorities is not correct in law as the same is contra to the Board's letter and the Notification. The impugned order is set aside by allowing the appeal." (p. 135)

F

. . .The implication of the above decision for the present case is that in the services relating to photography, if certain goods and materials are consumed, then the value of those goods and materials cannot be included in the value of the services for levy of Service tax. In the result, the decision of this Tribunal in the *Adlabs'* case (*supra*) is correct and legal in the light of the Apex Court's decision in *BSNL's* case (*supra*). Hence, we allow the appeals with consequential relief if any. We also

G

observe that the Circular dated 3-3-2006 is not in accordance with the ratio of the decision of the Apex Court in the *BSNL's* case (*supra*)" (p. 117)

(*d*) As regards denial of exemption extended under Notification No. 1/2006-ST allowing 67 per cent of the gross amount charged for commercial or industrial construction services or construction of complex service, it is claimed that the assessee had the option to avail either exemption under Notification No. 12/2003-ST or Notification No. 1/06-ST. SDL had opted to avail benefit of Notification No. 12/2003-ST. They had discharged the legitimate liability.

(*e*) The appellants submitted that the impugned order denied CENVAT credit available on input services, and capital goods in computing the liability. Moreover incorrect rate of service tax was applied in computing the liability. Since the service tax liability itself could not be sustained, the liability towards interest and penalty also was not sustainable. Relying on the judgment of the Apex Court in the case of *Hindustan Steel Ltd.* v. *State of Orissa* AIR 1970 (SC) 253, it is submitted that in the absence of intention on the part of the appellant to evade payment of duty, imposition of penalty could not be justified.

5. We have heard both sides. The dispute relates to interpretation of the Notification No. 12/2003-ST which reads as follows:–

> "*General exemption - Exemption to value of goods and materials sold by service provider.*– In exercise of the powers conferred by section 93 of the Finance Act, 1994 (32 of 1994), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts so much of the value of all the taxable services, as is equal to the value of goods and materials sold by the service provider to the recipient or service, from the service tax leviable thereon under section 66 of the said Act, subject to condition that there is documentary proof specifically indicating the value of the said goods and materials.
>
> 2. This notification shall come into force on the 1st day of July, 2003."

5.1 The impugned order seeks to deny the benefit of this notification availed by the appellant during the material period and orders recovery of exemption availed for the failure of the assessee to fulfil the conditions of the notification. We find that the requirement to qualify for the exemption, is that materials are sold in the course of provision of service and the service provider maintains a record of the same. There is no dispute that the appellants are registered with the Karnataka VAT department for payment of VAT under the category of works contract for the impugned activities and that it paid VAT on 70 per cent of the value of the works contract as per the provisions of KVAT Act. As clarified by the Deputy Secretary, Ministry of Finance, CBEC, exemption in respect of materials consumed/sold by the service provider to the service recipient providing taxable service is available if the service provider maintains records showing the materials consumed/sold while providing the taxable service. Interpreting the provisions of this notification, this Tribunal held that the notification did not require that the inputs used should be mentioned in the invoices/bills issued to the customers. The Tribunal held that

A B C D E F G

A exemption was admissible on the value of the goods consumed. Value of such goods consumed in the provision of service could not be included in the taxable value for levy of service tax. This was the ratio of the decision in *Shilpa Colour Lab.'s* case (*supra*). The impugned order seeks to recover service tax on a portion of the contract amount relating to materials consumed/sold in the course of provision of construction service. As rightly pointed out by the appellant, clause 29A of article 366 of the Constitution provides that tax on the sale or purchase of goods includes *inter alia*, a tax on the transfer of property B in goods whether as goods or in some other form involved in the execution of a works contract which reads as follows :–

> "(29A) 'Tax on the sale or purchase of goods includes'–
>
> (*a*) a tax on the transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration;
>
> (*b*) a tax on the transfer of the property in goods (whether as goods or in some other form) involved in the execution of a works contract;..............
>
> C and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made;"

6. In *Bharat Sanchar Nigam Ltd.'s* case (*supra*), the Apex Court observed as follows at paragraphs 38 & 39 of the judgment:–

> D "38. . . , Transactions which are mutant sales are limited to the clauses of article 366(29A). All other transactions would have to qualify as sales within the meaning of Sale of Goods Act, 1930 for the purpose of levy of sales tax.
>
> 39. Of all the different kinds of composite transactions the drafters of the 46th Amendment chose three specific situations, a works contract, a hire purchase contract and a catering contract to bring within the fiction of a deemed sale. Of these, three, the first and third involve a kind of service and sale at the same time. Apart from these two cases where splitting of the service and supply has been constitutionally permitted in clauses (*b*) and (*g*) of clause (*29A*) of Article 366, E there is no other service which has been permitted to be so split. . . ." (p. 259)

7. The mutual exclusivity of service tax and sales tax and the powers to tax assigned by the Constitution to the States and the Centre respectively on sales and services was highlighted by the Apex Court in the *Gujarat Ambuja Cements Ltd.'s* case (*supra*). The taxing powers of the Centre and States assigned in the Constitution have been restated by the Apex Court in the judgments cited by SDL. The different Governments *viz.,* Centre and States F cannot intrude on the jurisdiction of each other. The decision of the Commissioner to collect service tax on the value on which the appellants had already paid State VAT is contrary to the principles of fiscal federalism adopted in the Constitution. In the circumstances, we find that the impugned demand of differential duty relating to value of materials supplied in the course of provision of construction of commercial or industrial buildings and construction of residential complex services is not sustainable. Consequently the demand of interest and penalty are also liable to be vacated. Accordingly, we G vacate the impugned order and allow the appeals filed by SDL. As the appeal

succeeds on this important legal question, we do not find it necessary to address other issues raised in the appeal.

8. As regards appeal No. ST/689/08, the order-in-original impugned deals with the same issue relating to the activities of the assessee in the jurisdiction of Pune Commissionerate as per the details given in the first para. This appeal is also allowed on the same grounds as discussed under appeal No. ST/690/08 (*supra*).

■■

[2010] 24 STT 434 (NEW DELHI - CESTAT)

CESTAT, NEW DELHI BENCH

Ghanshyam Lodhwal

v.

Commissioner of Central Excise*, Jaipur-I

D.N. PANDA, JUDICIAL MEMBER
AND RAKESH KUMAR, TECHNICAL MEMBER

FINAL ORDER NO. ST/208 OF 2009 (PB)
MISC. ORDER NO. ST/61 OF 2009 (PB)
APPLICATION NO. ST/MISC./380 OF 2009
APPEAL NO. ST/520 OF 2008
JUNE 17, 2009

Section 65(91) of the Finance Act, 1994 - Rent-a-cab scheme operator's service - Assessee had rented out a vehicle to a hirer - Vehicle was to be stationed at premises of hirer and was under his exclusive control - Whether it was a clear case of rent-a-cab service and, therefore, service tax demand confirmed by Commissioner (Appeals) could not be interfered with - Held, yes [Para 4.2]

Sansar Chand *for the Respondent.*

ORDER

D.N. Panda, Judicial Member - This appeal is lying from the year 2008 with extension of stay from time to time. When the Bench had earlier heard the stay application on 18-9-2008, it was of the view that the demand may be barred by limitation for which/waiver of pre-deposit was granted. It was quite probable that due to smallness of the demand involved, the small taxpayer was not insisted pre-deposit.

2. In view of the smallness of the demand involved and the matter not being that grave, we propose to dispose of the appeal instead of granting further stay.

*Partly in favour of assessee.

A However, we notice that there was none for the appellant today. Accordingly we proceed to examine the matter in detail because we are passing an order *ex parte.*

3. Learned DR submits that the vehicle that was rented out was in the control of the hirer. This is a clear case of rent-a-cab and that has been held by the learned Commissioner (Appeals) at page 12 of his order. He has given appropriate relief considering *cum*-duty aspect. But finding that the appellant B has not obtained registration and failed to comply with the law, levied penalty of Rs. 35,293. Therefore, he prays that order passed by the learned Commissioner (Appeals) may be confirmed.

4.1 Heard Revenue extensively.

4.2 We examined the documents under Annexure B to the appeal folder. As per the scope of the contract, the vehicle rented was to be stationed at the premises of the hirer and such vehicle was under exclusive control of the hirer. C To decide the time bar aspect, we examined page 14 of the appeal folder containing show-cause notice. We are satisfied that the proceeding was not time-barred. Therefore, we confirm the tax liability that was determined by the learned Commissioner (Appeals), without interference.

4.3 So far as penalty is concerned, the appellant appears to be innocent but come to the fold of law. There is nothing on record to show that the appellant has deliberately avoided registration. Looking to the perfect manner of filing D of documents by the appellants as apparent from pages 30 to 50 of the appeal folder, the appellant appears to have co-operated to the Department for completion of adjudication. Therefore in the fitness of circumstances, we do not consider levy of penalty on this appellant is desirable when the appellant has filed all the facts and figures before authority below. Therefore, we modify the first appellate order and waive the penalty imposed under sections 76 and 78 of the Finance Act, 1994 finding the case to be reasonable to do so. We make it clear that the penalty having been waived in the circumstances of the case, E this decision shall not be cited as a precedent one in view of its own distinct feature.

5. In the result, we allow the appeal partly waiving the penalty but confirming the tax demand.

6. In view of the order aforesaid, application filed by the appellant for extension of stay has become infructuous.

■■

F

G

[2010] 24 STT 436 (CHENNAI - CESTAT)(FB)

A

CESTAT, CHENNAI BENCH (FULL BENCH)

Commissioner of Central Excise

v.

Bhuwalka Steel Industries Ltd.

B

JYOTI BALASUNDARAM, VICE PRESIDENT
DR. CHITTARANJAN SATAPATHY, TECHNICAL MEMBER
P.K. DAS, JUDICIAL MEMBER

MISC. ORDER NO. 591 OF 2009
APPEAL NOS. E/16 & 218 OF 2006
NOVEMBER 12, 2009

Rule 3 of the Cenvat Credit Rules, 2004 - Cenvat credit - General - Whether different types of shortages cannot be dealt with according to any inflexible and fixed standard for purpose of allowing credit under rule 3(1) and, therefore, each case has to be decided according to merit and no hard and fast rule can be laid down for dealing with different kinds of shortages - Held, yes [Paras 14 and 15]

C

FACTS

The question for consideration in the instant appeal was as to whether Cenvat credit could be denied to the assessee on the ground that the weight of the inputs recorded on receipt in the premises of the manufacturer of the final products showed a shortage compared to the weight recorded in the relevant invoice. The issue was initially before the Single Member who on finding of contrary decisions on the issue directed the matter to be placed before the Division Bench. Hence, the Division Bench had referred the above question for consideration.

D

E

HELD

The main ground of the appeal taken by the revenue was that the impugned goods were re-rollable steel items and, hence, there was no chance of natural loss during transit in respect of such goods. It was also the case of the revenue that the provisions of rule 3(1) would allow credit in respect of input or capital goods actually received in the factory of manufacturer of the final product. In a case where either the entire quantity of goods or part of the goods are diverted and not received in the factory of manufacturer of the final product, there cannot be any question of allowing any credit in respect of such goods not received. [Para 10]

F

It cannot be denied that some goods are susceptible to transit loss on account of such goods being of hygroscopic nature or of volatile nature. There can also be cases of difference in weight on account of difference in the weighing scales at both ends, i.e., *at the point of dispatch and at the point of receipt. [Para 11]*

G

A *Further, the different types of shortages cannot be dealt with according to any inflexible and fixed standard for the purpose of allowing credit under rule 3(1). Decision to allow or not to allow credit in any particular case will depend on various factors such as :–*

(i) *Whether the inputs/capital goods have been diverted en-route or the entire quantity with the packing intact has been received and put to the intended use at the recipient factory ?*

B (ii) *Whether the impugned goods are hygroscopic in nature or are amenable to transit loss by way of evaporation, etc. ?*

(iii) *Whether the impugned goods comprise of countable number of pieces or packages and whether all such packages and pieces have been received and accounted for at the receiving end ?*

(iv) *Whether the difference in weight in any particular case is on account of weighment on different scales at the dispatch and receiving ends and* C *whether the same is within the tolerance limits with reference to the Standards of Weights and Measures Act, 1976 ?*

(v) *Whether the recipient assessee has claimed compensation for the shortage of goods either from the supplier or from the transporter or the insurer of the cargo ? [Para 14]*

All these factors listed above and any other relevant factor have to be kept in view in deciding any particular case as to whether the entire consignment has D *been received at the end of the recipient assessee without any diversion. Tolerances in respect of hygroscopic, volatile and such other cargo have also to be allowed as per industry norms excluding, however, unreasonable and exorbitant claims. Similarly, minor variations arising due to weighment by different machines will also have to be ignored if such variations are within tolerance limits. Therefore, each case has to be decided according to merit and no hard and fast rule can be laid down for dealing with different kinds of* E *shortages. [Para 15]*

Therefore, the appeal was to be returned to the concerned Division Bench for decision on merits. [Para 16]

CASES REFERRED TO

Neera Enterprises v. *CCE* 1998 (104) ELT 382 (Delhi - Trib.) (para 6), *Bombay Dyeing & Mfg. Co. (P.) Ltd.* v. *CCE* 1999 (113) ELT 331 (Mum. - Trib.) (para 6), *CCE* v. *Sipta Coated Steel Ltd.* 2000 (125) ELT 578 (Mum. - Trib.) (para 6), *Mukand Ltd.* v. *CCE* 2002 (150) ELT F 168 (Trib. - Mum.) (para 6), *Mardia Chemicals Ltd.* v. *CCE* 2003 (158) ELT 378 (Trib. - Mum.) (para 6), *Gharda Chemicals Ltd.* v. *CCE* 2004 (167) ELT 359 (Mum. - Trib.) (para 6), *Gharda Chemicals Ltd.* v. *CCE* 2004 (176) ELT 296 (Mum. - Trib.) (para 6), *CCE* v. *Bombay Dyeing & Mfg. Co. Ltd.* 1998 (97) ELT 101 (Mum. - Trib.) (para 7), *Bhilwara Spinners Ltd.* v. *CCE* 2004 (177) ELT 597 (Trib. - Delhi) (para 7), *Tata Motors Ltd.* v. *CCE* 2005 (179) ELT 413 (Trib. - Kol.) (para 7), *CCE* v. *Nirma Ltd.* 2005 (192) ELT 304 (Trib. - Mum.) (para 7), *Estee Auto Pressings (P.) Ltd.* v. *CCE* 2007 (209) ELT 211 (Trib. - Chennai) (para 7) and *Union of India* v. *Bhilwara Spinning Ltd.* 2008 (222) ELT 362 (Raj.) (para 7).

G

V.V. Hariharan *for the Appellant.* **A.S. Monappa** *for the Respondent.* A

ORDER

Dr. Chittaranjan Satapathy, Technical Member - Heard both sides.

2. This matter was initially heard by the Single Member Bench on 19-9-2008 when the learned Single Member noted the conflicting decisions of the Tribunal on the issue *vide* his Misc. Order No. 389/2008, dated 19-9-2008. The relevant extract of the learned Single Member's order is reproduced below:– B

> "In these appeals of the revenue, the short question arising for consideration is whether CENVAT credit can be denied to the respondents for the period of dispute on the ground that there was a shortage of inputs covered by the relevant invoices *vis-a-vis* weighment slips. The learned SDR has relied on the following decisions of the West Zonal Bench (Mumbai):–
>
> (*i*) *Bombay Dyeing & Mfg. Co. (P.) Ltd.* v. *CCE* 1999 (113) ELT 331 (Mum. - Trib.).
>
> (*ii*) *Mukand Ltd.* v. *CCE* 2002 (150) ELT 168 (Mum. - Trib.). C
>
> In these cases, it was held by the Division Bench that any quantity of inputs not physically received in factory was not eligible for MODVAT credit. On the other hand, the learned counsel for the respondents has claimed support from the following decisions of the Tribunal :
>
> (*i*) *Neera Enterprises* v. *CCE* 1998 (104) ELT 382 (Delhi - Trib.).
>
> (*ii*) *CCE & C* v. *Sipta Coated Steel Ltd.* 2000 (125) ELT 578 (Mum. - Trib.).
>
> (*iii*) *Mardia Chemicals Ltd.* v. *CCE* 2003 (158) ELT 378 (Mum. - Trib.). D
>
> (*iv*) *Gharda Chemicals Ltd.* v. *CCE* 2004 (167) ELT 359 (Mum. - Trib.).
>
> (*v*) *Gharda Chemicals Ltd.* v. *CCE* 2004 (176) ELT 296 (Mum. - Trib.).
>
> In these cases, it was held to the contrary. One of the decisions cited by the learned counsel was given by a Division Bench (West Zonal Bench, Mumbai)."

3. After noting the conflicting decisions of the Tribunal as above, the learned Single Member observed that the conflicting decisions require to be resolved by a Larger Bench but the reference can be made by the appropriate Division Bench only. He, therefore, directed to place the records before the Division Bench. E

4. The Division Bench heard the matter on 21-1-2009 and after noting the conflicting decisions of the Tribunal as observed by the learned Single Member Bench, referred the matter to be resolved by a Larger Bench *vide* Misc. Order No. 45/2009, dated 21-1-2009.

5. Accordingly, this Larger Bench has been constituted by the Hon'ble President. The issue referred to the Larger Bench is as to whether CENVAT credit can be denied on the ground that the weight of the inputs recorded on receipt in the premises of the manufacturer of the final products shows a shortage compared to the weight recorded in the relevant invoice. F

6. Briefly, the gist of the above cited decisions is reproduced below for ready reference :–

G

A

(*i*) *Neera Enterprises* v. *CCE* 1998 (104) ELT 382 (Delhi - Trib.) :

"Credit is available when the weight of input in receipt is not substantially different from the weight of input actually received - Merely 2 per cent difference in weight is not significant to deny credit and may be on account of different scales. . . ." (p. 382)

(*ii*) *Bombay Dyeing & Mfg. Co. (P.) Ltd.* v. *CCE* 1999 (113) ELT 331 (Mum. - Trib.).

B

". . . Duty paid as indicated in the covering document not to be taken as credit if the quantity received on weighment is found to be less than quantity indicated in document...." (p. 331)

(*iii*) *CCE* v. *Sipta Coated Steel Ltd.* 2000 (125) ELT 578 (Mum. - Trib.)

". . . Difference in weighment on inputs at place of procurement and place of usage in factory of assessee not a ground for disallowance of MODVAT credit. . . ." (p. 578)

C

(*iv*) *Mukand Ltd.* v. *CCE* 2002 (150) ELT 168 (Mum. - Trbi.) :

". . . Difference in quantity of scrap imported as weighed on Bombay Port Trust weighbridge and as weighed on factory weighbridge - Quantity of inputs not physically received in factory not eligible for MODVAT credit. . . ." (p. 168)

(*v*) *Mardia Chemicals Ltd.* v. *CCE* 2003 (158) ELT 378 (Mum. - Trib.) :

". . . Short receipt of inputs - Shortage too meagre - such variation in weight occurs due to weighment at various weighbridges. . . ." (p. 379)

D

(*vi*) *Gharda Chemicals Ltd.* v. *CCE* 2004 (167) ELT 359 (Mum. - Trib.) :

"After considering the plea made of the fluctuation permissible as per the weighbridge in question as provided under the Standards of Weights and Measures Act, 1976 and the Rules framed thereunder and on perusal of a chart indicating that in all cases the losses were within this permissible approximate 1 per cent error in the weighbridge weighments, it is to be held that the shortages are accounted for. In fact, in some cases the receipt of excess goods have not been objected to which itself goes to prove that the weighbridge, which the appellant was using, was not giving the correct weighment reports." (p. 360)

E

(*vii*) *Gharda Chemicals Ltd.* v. *CCE* 2004 (176) ELT 296 (Mum. - Trib.) :

". . . Shortage in inputs received in factory merely 0.5 per cent and attributable to difference in calibration of weigh-bridges - Appellant not paying any lesser amount, for shortages, to their buyers - MODVAT credit admissible in respect of whole amount. . . ." (p. 296)

F

7. The gist of some of the other decisions cited in the course of hearing is as follows:–

(*i*) *CCE* v. *Bombay Dyeing & Mfg. Co. Ltd.* 1998 (97) ELT 101 (Mum. - Trib.) :

". . . Difference of weight of input due to loss of moisture during transit - Loss not on account of any deliberate act or omission on the part of the manufacturer or recipient nor the value of the goods or their length is diminished - MODVAT credit of the entire duty paid calculated on the gross weight available. . . ." (p. 101)

G

(*ii*) *Bhilwara Spinners Ltd.* v. *CCE* 2004 (177) ELT 597 (Trib. - Delhi) :

A

"... Short quantity of HFO received by appellants less than half per cent of the total quantity imported and occurred as a result of natural evaporation and leakage of oil from containers during transit from place of importation to appellant's factory - MODVAT credit on quantity of short oil eligible especially when countervailing duty paid by appellants on full quantity of oil imported." (p. 598)

(*iii*) *Tata Motors Ltd.* v. *CCE* 2005 (179) ELT 413 (Kol. - Trib.) :

B

"...Inputs LDO and FO procured in sealed railway rakes and measured through manual measurement process - Difference between consigned quantity and quantity received found on an average 2.42 per cent - Oil is highly volatile in nature and minor shortage of inputs caused due to drayage and handling - Duty credit taken not exceeds duty paid on invoices, after receipt it was found that certain small percentage of inputs subjected to transit/handling losses - MODVAT credit allowed. . . ." (p. 413)

(*iv*) *CCE* v. *Nirma Ltd.* 2005 (192) ELT 304 (Mum. - Trib.) :

C

"...Shortage very very minimal being only 0.01 per cent - Variation in weight due to weighment at different weigh-bridges and also because of evaporation during transit and well within permissible limit of fluctuation as per weigh-bridge provided by Standards of Weights and Measures Act, 1976 and Rules made thereunder - MODVAT credit admissible." (p. 304)

(*v*) *Estee Auto Pressings (P.) Ltd.* v. *CCE* 2007 (209) ELT 211 (Chennai - Trib.) :

D

"Short receipt of inputs due to weighbridge differences - Where shortages observed are not significant (within 1 or 2 per cent range) and supplier is not debited for the proportionate price, these quantities not to be considered as short receipt of inputs. . . ." (p. 211)

(*vi*) *Union of India* v. *Bhilwara Spinning Ltd.* 2008 (222) ELT 362 (Raj.) :

"Having considered the rival contentions, we are inclined to agree with the view taken by the Tribunal that in the facts and circumstances, when it is not in dispute that there is no diversion of the goods covered under the invoices in question and entire goods received under consignment has not been put to any use other than as input in the end product manufactured by the assessee and the transit loss was found by the Tribunal to be normal loss due to evaporation, it must be held that the CVD paid by the consigner/importer was paid in respect of the goods entirely used by the assessee as inputs in the manufacture of end product.

E

Moreover, Rule 57(9) envisages that such amount of Modvat credit availed by the assessee, which is evidenced by the invoices, has inherent co-relation with the payment of duty with goods covered by such invoices. Where the CVD, Customs or Excise duty on the inputs received by the assessee in the factory and used by him in manufacturing of end product has correlation with the evidence of the payment about the duty on the entire goods received and used in the factory, no curtailment of Modvat credit as evidenced by the invoices is permissible. The mode of proof of quantity and payment of duty on inputs received and used as input is by producing the invoices. Unless the invoices are found to be wrong or diversion of inputs received under invoice to any other use is found, there is no provision to avail lesser Modvat credit than what has been proved to have been paid on the entire goods received and used in factory of manufacturer." (p. 363)

F

G