

**Cce Vs. Ambuja Cement Eastern Ltd.**

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**Court :** Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

**Decided On :** Jul-03-2006

**Reported in :** (2006)(111)ECC287

**Judge :** M Ravindran

**Appellant :** Cce

**Respondent :** Ambuja Cement Eastern Ltd.

**Judgement :**

1. This appeal is directed against order in appeal dated 27/09/05 which allowed the appeal against the rejection of the refund claim.

2. The relevant fact that arise for consideration are the respondent sought services on a consulting engineer situated in Australia in respect of their plant at Raipur. The respondent paid the amount of service tax payable on such consultancy services received by them in April, 2004. Subsequently when they received communication from the consulting engineer that they have office in India, the respondent filed the refund claim with the authorities relying upon Rule 2(1)(d)(iv) of the Service Tax Rules 1994. The said refund claim was rejected by the adjudicating authority. On an appeal, Commissioner (Appeals) allowed the refund claim, hence revenue's appeal.

3. The learned DR submits that the refund claim is not liable to be sanctioned because the department has in their possession letter written by the Chennai

office of the foreign consultant indicating that they have not provided any services to the respondent. It is also his submission that the respondent failed to intimate the department regarding the existence of the office in India in order to recover the service tax same from the foreign consultant.

It is also his submission that if they would have been intimated in time they would have collected the service tax from the said consulting engineer.

3. Learned advocate appearing for the respondent submits that the department was aware of the existence of the office in September 1994 when they wrote a letter to the Chennai office of the foreign consulting engineer. Further it is his submission that the letter dated 22nd April, 2004 of the foreign consulting engineer confirms, they have an office in India and the address is the same address, where the authorities had corresponded.

4. Considered the submissions made by both sides and perused records.

The short issue which arises for consideration is whether the respondents are eligible for the refund as claimed by them or not. In order appreciate the fact reference to Rule 2(1)(d)(iv) is called for which reads as under: Definitions. - (1) In these rules, unless the context otherwise requires, - (b) "assessment" includes self assessment of service tax by the assessee, reassessment, provisional assessment, best judgment assessment and any order of assessment in which the tax assessed is nil; determination of the interest on the tax assessed or reassessed;] (cc) "Half year" means the period between 1<sup>st</sup> April to 30<sup>th</sup> September or 1<sup>st</sup> October to 31<sup>st</sup> March of a financial year;] (i) in relation to [a telephone connection or pager or a communication through telegraph or telex or a facsimile communication or a leased circuit] - (v) substituted regarding who will pay service tax on Transport Agency under Notification No. 35/04 ST dated 03/12/04 (applicable w.e.f. 01/01/05) (a) the Director General of Posts and Telegraphs, referred to in Clause (6) of Section 3 of the Indian Telegraph Act, 1885 (13 of 1885); or (b) the Chairman-cum-Managing Director, Mahanagar Telephone Nigam Ltd., Delhi, a company registered under the Companies Act, 1956 (1 of 1956); or (c) any other person who has been granted a licence by the Central Government under the first proviso to Sub-section (1) of Section 4 of the

Indian Telegraph Act, 1885 (13 of 1885); (a) the Chairman of the General Insurance Corporation of India, Mumbai; or (b) the Chairman-cum-Managing Director of the National Insurance Company Ltd., Calcutta; or (c) the Chairman-cum-Managing Director of the New India Assurance Company Ltd., Mumbai; or (d) the Chairman-cum-Managing Director of the Oriental Insurance Company Ltd., Delhi; or (e) the Chairman-cum-Managing Director of the United India Insurance Company Ltd., Madras; or (f) any other person carrying on general insurance business and who has obtained a certificate of registration under Section 3 of the Insurance Act, 1938 (4 of 1938); and (iii) in relation to insurance auxiliary service by an insurance agent, any person carrying on the general insurance business [or the life insurance business, as the case may be, in India.] (iv) In relation to any taxable service provided by a person who is a non-resident or is from outside India, does not have any office in India, the person receiving taxable service in India.] 5. It can be seen from the above re-produced Rule, liability to pay service tax on the services provided a non-resident or a resident from outside India falls from the person who receives the taxable services, if the foreign service provider does not have any office in India. From the correspondence produce before me, it is very clear that the foreign service provider had an office in India situated at Chennai. The department was in correspondence with such office in Chennai from September, 2004.

It is a situation, the department having received the service tax payment from the respondent, rightly or wrongly, hence did not issue any show cause notice to the service provider for liability to pay service tax. To my mind, Commissioner (Appeal) has correctly appreciated the provisions of Rule 2(1)(d)(iv) and the revenue has failed to explain the reasons for not issuing show cause notice to service provider, having failed to do so, revenue cannot hold on to the amount paid by the respondent by mistake.

6. Accordingly, I do not find any reason to interfere in the impugned order. Appeal filed by the department is dismissed, as it is devoid of merits.