

Cce Vs. Orient Abrasives

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Tamil Nadu

Decided On : Dec-07-2006

Reported in : (2007)6STR259

Judge : P Chacko

Appellant : Cce

Respondent : Orient Abrasives

Judgement :

1. One of the appeals is by the department challenging an order of the Commissioner (Appeals) setting aside the demand of service tax on Goods Transport Operators' (GTO) service received by the respondents during the period 16.11.97 to 1.6.98 and vacating the penalties imposed on them by the original authority. The remaining appeal is by another assessee challenging the order of the Commissioner demanding service tax on similar services received by the party during the above period and imposing penalties on them. As the issue is common, both the appeals are taken up for disposal.

2. After examining the records and hearing both sides, I find that M/s.

Orient Abrasives (respondents in the department's appeal) and M/s.

Jayalakshmi Exports (appellants in the other appeal) had received GTO service during 16.11.97 to 1.6.98, but they had not paid tax on such service during that period. Later on, M/s. Orient Abrasives paid the tax on 13.9.2004 and M/s.

Jayalakshmi Exports paid it on 8.8.2006.

3. During the aforesaid period, the assesseees were not liable to pay service tax on GTO service as held by the apex court in the case of *Laghu Udyog Bharthi v. Union of India*, wherein the provision of Service Tax Rules 1994, which made GTO service recipients liable to pay service tax was struck down as ultra vires Section 66 of the Finance Act, 1954. Subsequently, the Finance Act 1994 was amended by the Finance Act, 2000 (which came into force on 12.5.2000) so as to make GTO service beneficiaries liable to pay service tax with retrospective effect from 16.11.97 to 1.6.98. In view of the amended provisions of law, the department issued show-cause notices to M/s.

Orient Abrasives and M/s. Jayalakshmi Exports on 12.11.2004 and 12.11.2002 respectively. In the case of M/s. Orient Abrasives, who had paid service tax for the aforesaid period prior to issue of show-cause notice, the notice proposed to appropriate the payment as also to impose penalties. In the case of the other party, the notice demanded service tax for the above period and proposed to impose penalties. In the former case, the Assistant Commissioner appropriated the payment made by the party towards service tax for the above period and imposed on them penalties, while in the latter case, the jurisdictional Commissioner demanded service tax from the party for the above period and imposed penalties on them. Both the parties preferred appeals. The appeal of M/s. Orient Abrasives was allowed by the Commissioner (Appeals) and hence the present appeal of the department. Appeal of M/s. Jayalakshmi Exports is presently under my consideration. *L.H. Sugar Factories Ltd. v. CCE, Meerut - II*, the Tribunal held that GTO service recipients were not covered by the provisions of Sections 70 and 73 of the Finance Act, 1994 and further that show-cause notices issued under Section 73 to such persons were not maintainable as those persons, though brought under Section 71A, were still not covered under Section 73.

Contextually, it may be mentioned that Section 71A was inserted in the Finance Act 1994 by the Finance Act, 2003.

Thus, according to the decision of the Tribunal in *L.H. Sugar Factories (supra)*, service tax was not recoverable from the above persons under Section 73 even

after the amendments brought to the 1994 Act by the 2003 Act. The Tribunal's decision was affirmed by the Supreme Court in CCE, Meerut -II v. L.H. Sugar Factories Ltd. 2005-TIOL-105-SC-ST.5. In the present appeal, it is stated that after the decision of the apex court in L.H. Sugar Factories (supra), the Commissioners of Central Excise, Vadodara and Chennai - III filed civil appeals in the Supreme Court against similar decisions of the Tribunal and that those appeals have been admitted. However, there is no claim that the said decisions of the Tribunal have been stayed by the apex court.

6. The settled legal position is the one which is obtaining in the case of L.H. Sugar Factories (supra). Accordingly, the department's appeal is dismissed and the assessee's appeal is allowed.

7. In the Revenue's appeal, the respondents have filed "cross-objections", wherein there is a prayer for refund of the service tax and interest paid by them. Learned Counsel has reiterated this prayer today. This prayer cannot be acceded to for two reasons.

Firstly, no such prayer was made before the lower appellate authority by the party. Secondly, the payment of tax with interest thereon was voluntary and not under protest and no claim for refund thereof was ever filed. Amounts so paid by the assessee are not refundable as held in Final Order No. 823/2006 dated 30.8.2006 by the Tribunal in Appeal No. S/6/2006 [Commissioner of Central Excise v. EID Parry India Ltd.].

In the case of M/s. Jayalakshmi Exports, appellants in Appeal No.S/186/2006, there is no claim for refund. In the circumstances, the decision in the two appeals would not entitle the assessee to refund.

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