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OFFICE OF THE COMMISSIONER OF CENTRAL EXCISE & SERVICE TAX
PLOT NO. 6776/B-1 "SIDDIH SADAN" BUILDING,
NARAYAN UPADHYAY MARG,
BHAVNAGAR 364 001.

F. No. V/15-61/Dem/HQ/2009.

Date of order :- 15.11.2011
Date of issue :- 15.11.2011

Passed by Shri Harcharan Singh, Additional Commissioner

Order-in-Original No. 12/BVR/ADC/2011

This copy is granted free of charge for private use of the person(s) to whom it is sent.

Any person(s) aggrieved by this Order may file appeal to Commissioner of Central Excise (Appeals), Central Excise Bhavan, Race Course Ring Road, Rajkot-360001 within 60 days from the date of its communication. The appeal should bear a court fee stamp of Rs 2.50/- paise only.

The appeal should be filed in Form EA 1 in duplicate, as per the provisions of Section 35(1) of the Central Excise Act, 1944 read with Rule 3 of the Central Excise (Appeals) Rules, 2002. It should be signed by the appellants in accordance with the provisions of sub-rule (2) of Rule 3 of the Central Excise (Appeal) Rules, 2002.

- It should be accompanied with the following:
- Copy of appeal in duplicate

Copies of the order, one of which shall be certified copy OR the other must bear a court fee stamp of Rs 2.50/- paise as per Schedule 1 to Article 6 of the Court Fee Stamp Act, 1870.

Sub :- Show Cause Notice Number F. No. V/15-61/Dem/HQ/2009 dated 6.10.2009 demanding Service Tax amounting to Rs.6,54,814/-. Reg :-

Brief Facts :

An intelligence passed on by Audit Branch of Central Excise Commissionerate, Rajkot revealed that M/s Kantilal Maganlal Shah, Main Road, Joravarnagar, Distt. Surendranagar- 363020 (hereinafter referred to as 'the said assessee') is engaged in the Business Auxiliary Service without having registered with the Service Tax Authorities and without paying Service Tax under the existing law.

2. The said assessee applied for registration with Service Tax in ST-I Form on 6.10.2008 and got allotted Service Tax Registration bearing No. ADRPS4497FST001 on 07.10.2008. On 22.10.2008, they approached the Range Superintendent and informed that they have made an agreement dated 17.11.2004 with M/s Surani Ceramic, Morbi for sale of goods to M/s Johnson India Ltd; that they have received income of commission during the year 2005-06 to 2007-08 towards the above said agreement; that they have not paid the Service Tax on the said amount received as commission. Therefore, the Service Tax Range, Surendranagar has called for the relevant documents and details in this regard.

3. The said assessee has submitted the following Debit Notes raised in favour of M/s. Surani Ceramic, Morbi:

S. No.	Date of Debit Notes	Amount (in Rs)
1.	01.11.2005	14,71,328/-
2.	28.01.2006	3,28,124/-
3.	31.03.2006	5,24,356/-
4.	10.06.2006	3,29,950/-
5.	01.10.2006	6,53,404/-
6.	15.01.2007	6,73,598/-
7.	31.03.2007	9,38,604/-
8.	20.07.2007	6,62,390/-

S. No.	Date of debit notes	Amount (in Rs)
9.	08.10.2007	5,95,662/-
	TOTAL	61,77,416/-

Further documents were called for from the said assessee and the same were submitted by them vide letters dated 04.06.2009 and 04.08.2009.

4. On scrutiny of the documents submitted by the said assessee, it was observed that the said assessee has received Service income of commission during the year 2005-06, 2006-07 and 2007-08; that the said income was also shown in their ledger account for the respective years in respect of M/s Surani Ceramic, Morbi; that the said amount was also shown in the Profit and loss account of the said assessee for the respective years; that the Income Tax Return filed by the said assessee in the respective financial year have been furnished; that the statement of bank account also confirmed that the said assessee has received the income of commission and deposited in the bank.

5. The said assessee was engaged in providing the service in sale of the goods produced by M/s Surani Ceramics Ltd, Morbi and received commission for the said service. It was found from the definition of the Business Auxiliary Service that the service provided by the said assessee was classifiable under the category of Business Auxiliary Service as defined under Section 65 (19) of the Finance act, 1994, 1994 and the said assessee have not applied for the registration for taxable service namely Business Auxiliary Service in the year 2005-06 onwards when they crossed the exemption limit for registration. They have also not paid the Service Tax including Education Cess and Higher Education Cess. Thus, they have suppressed the material information regarding providing the taxable service from the department i.e. from Revenue. Further, the said assessee failed to file returns in Form ST-3 in respect of taxable service rendered for the period from 2005-06 to 2007-08, thereby exhibited their intention to evade payment of Service Tax in contravention of Service Tax laws.

6. In view of the above, the said assessee has contravened the provisions of Chapter V of the Finance act, 1994, 1994 and Rules related to Service Tax matter with intent to evade the payment of duty:

- i. Section 69 of the Finance Act, 1994 read with Rule 4 of the Service Tax Rules, 1994 in as much as they failed to apply to the Service Tax department for registration under the category of Business Auxiliary Service in the year 2005-06 when they crossed the exemption limit for registration.
- ii. Section 68 of the Finance Act, 1994 read with Rule 6 of the Service Tax Rules, 1994 in as much as they have failed to pay Service Tax on the commission income which is taxable value recovered by them from M/s Surani Ceramics Ltd Morbi during the period 2005-06 to 2007-08.
- iii. Section 70 of the Finance Act, 1994 read with Rule 7 of the Service Tax Rules, 1994 in as much as they have failed to assess and pay the Service Tax and failed to file returns in form ST-3 in respect of taxable service rendered for the period from 2005-06 to 2007-08.

7. In view of the facts stated above, the said assessee was liable to pay Service Tax totally amounting to Rs. 6,54,814/-, Education Cess amounting to Rs. 13096/- and Secondary & Higher Secondary Education Cess amounting to Rs. 1510/- along with interest at the appropriate rate. Further, the said assessee has suppressed the material and relevant information in respect of taxable service provided by them and the said assessee has also contravened the provisions of Section 68, 69 and 70 of the Finance Act, 1994 and Rule 4, 6 and 7 of the Service Tax Rules, 1994 which attracts for invocation of the larger period of five years for issuance of Show Cause Notice in this case as envisaged under Section 73 of the Finance Act, 1994 They were also liable for penalty under Section 76, 77 and 78 of the Finance Act, 1994 for contravention of provisions of above stated Section of Finance Act, 1994 and Service Tax Rules, 1994.

8. Further, the said assessee has paid the Service Tax amounting to Rs. 6,64,443/-, Education Cess Rs. 13,290/-, Secondary & Higher Secondary Education Cess Rs. 4623/- and interest Rs. 1,57,693/-. This payment was required to be confirmed and appropriated towards Service Tax payable by them under the relevant Section of the Finance Act, 1994 read with relevant Rule of the Service Tax Rules, 1994.

9. Therefore, Show Cause Notice was issued to the said assessee M/s Kantilal Maganlal Shah, Main Road, Joravarnagar, Distt. Surendranagar- 363020 requiring to show cause as to why:-

- i. Service Tax amounting to Rs. 6,54,814/-, Education Cess Rs. 13,096/- and Secondary & Higher Secondary Education Cess to Rs. 15,10/- (Total Rs. 6,69,420/- (Rupees Six lacs, sixty nine thousand, four hundred and twenty only as per Annexure-'A' attached to Show Cause Notice) should not be demanded and recovered under proviso to Section 73(1) of the Finance Act, 1994 and the amount of Service Tax of Rs 6,64,443/-, Education Cess Rs. 13290/-, Secondary & Higher Secondary Education Cess Rs. 4623/- (Total Rs. 6,82,356/- (Rupees Six lacs, eighty two thousand, three hundred and fifty six only) already paid by the said assessee should not be confirmed and appropriated under Section 68 of the Finance Act, 1994 read with Rule 6 of the Service Tax Rules 1994.
- ii. Interest at the appropriate rate as applicable till the date of payment of Service Tax should not be charged and recovered under Section 75 of the Finance Act, 1994 and the amount of Rs. 1,57,693/- (Rupees One lakh, fifty seven thousand, six hundred and ninety three only) paid by the noticee towards interest accrued should not be appropriated .
- iii. Penalty should not be imposed upon them under Section 76 of the Finance Act, 1994 for failure to assess Service Tax as required under Section 70 of the Act and make the payment of Service Tax within the period and in the manner prescribed under Section 68 of the Act read with Rule 6 of the Service Tax Rules, 1994;
- iv. Penalty should not be imposed upon them under section 77 of the Finance Act, 1994 for the failure to obtain Service Tax Registration under Section 69 of the Act read with Rule 4 of the Rules and for the failure to file the prescribed Service Tax returns under Section 70 of the Act read with Rule 7 of the Rules.
- v. Penalty should not be imposed upon them under Section 78 of the Finance Act, 1994 for suppressing of facts and contravention of provision of the Act and Rules made there under with intend to evade payment of duty.

Defence Reply :

10. The assessee vide his letter dated 083.04.2011 submitted written explanation to the Show Cause Notice dated 06.10.2009 wherein interalia stated as under :-

- 10.1 The show cause notice was time barred as the same was issued after one year from the date of knowledge of the department. It was not mentioned in the show cause notice that when the Audit was conducted by the Audit Branch officers of the Central Excise Commissionerate, Rajkot and show cause notice was issued only on 6/10/2009 after lapse of more than one year. Therefore, the show cause notice is time-barred and the extended period for demanding tax was not available. For this argument, they relied on Hon'ble Supreme Court's decision in M/s. Nizam Sugar Factory case as reported in 2006(197) E. L. T. 465 (S.C.)
- 10.2 Without prejudice to the above submission, they submitted that they have paid in full the Service Tax of Rs.6,64,443/- and education cess of Rs.13,290/- and Secondary & Higher Education cess of Rs.4,623/- vide GAR-7 challans listed in the work sheet attached with this reply as determined in the notice. They have also paid interest to the tune of Rs.1,57,593/- at the appropriate rate on the Service Tax of Rs.6,64,443/- vide GAR-7 challans listed in the work sheet attached with this reply.
- 10.3 The above said payment of tax and cess is in excess when compared to tax and cess determined in the show cause notice. Therefore, it requested to grant permission for transfer of amounts deposited under minor head- Service Tax - 00440245 to another minor head - Interest on Service Tax -00440246 -Rs.2,134/- and carry out the necessary adjustment in accounts.
- 10.4 Since, as per the requirement of the provisions of sub section (1A) of Section 73 of the Finance Act, 1994 (Hereinafter referred to as "the Act"), they had paid Service Tax in full and the interest payable thereon under Section 75 of the Act and hence request the

department to kindly grant the immunity from payment of any further amount towards the notice under subject and close this matter.

- 10.5 Further, it was also submitted that they have obtained Service Tax registration on 6/10/2008 and have paid the Service Tax alongwith interest after they came to know that they have to pay Service Tax. Moreover, before initiating any action against them, they have suo moto got the registration and paid the Service Tax voluntarily on 10/10/2008. On intimation of payment of Service Tax, the Range Superintendent has raised some queries and the same was also clarified and no short payment or non-payment of service tax was found by them. Whatever information given by them vide their letter dated 22/10/2008, department had proposed the demand of Service Tax and the same was issued. Therefore, they have no intention to evade Service Tax and hence, the allegation regarding suppression of facts is not correct. They requested to invoke the provision of Section 80 of the Act.
- 10.6 They further submitted that Section 76 of the Act provides that if any person, liable to pay Service Tax fails to pay it, he will have to pay in addition to the tax and interest thereon, a penalty which shall not be less than Rs.100/-, but which may extend to Rs.200/- for every day during which such failure continues subject to the maximum of service tax that he failed to pay. Section 76 of the Act, therefore, is a provision which does not require a guilty mind and deals with a case where the liability to pay Service Tax is not discharged under the provisions of the Act. In contrast, Section 78 of the Act specifically deals with the cases of evasion of payment of Service Tax with a guilty mind. Under the said provision, if any person has, with intent to evade payment of Service Tax suppressed or concealed the value of taxable service or has furnished inaccurate value of taxable service, such person shall pay by way of penalty in addition to Service Tax and interest thereon, a sum which shall not be less than, but shall not exceed twice the amount of Service Tax sought to be evaded by reason of suppression or concealment of the value of taxable service or furnishing of inaccurate value of such taxable service. Cases in which penalties are imposed under Section 78 of the Act cannot fall in respect of the same Service Tax evaded, under Section 76 of the Act. These two provisions are mutually exclusive and the cases where guilty mind does not exist will fall under Section 76 of the Act while those where such mens rea is required will fall under Section 78 of the Act. Therefore, there is no scope for imposing double penalty, i.e., both under Section 78 and Section 76 of the Act when a person is found guilty of evasion by reason or suppression or concealment etc. and penalty is imposed under Section 78 of the Act. In cases where penalty under Section 78 of the Act is imposed, therefore, no penalty can be imposed also under Section 76 of the Act. The show cause notice does not have any evidence to show that we had suppressed any information with an intention to evade payment of Service Tax. Section 78 of the Act can be invoked only where there is suppression. Since, there is no evidence of suppression, penalty under Section 78 of the Act is not imposable. It is also well settled position that two penalties under Section 76 and 78 cannot be simultaneously imposed in view of the Tribunal judgment rendered in the case of Opus Media and Entertainment v. Commissioner of Central Excise, Jaipur [2007 (8) S.T.R. 368 (Tri. - Del.)]. It has been consistently viewed by the Tribunal that there should not be double penalty. Hence, they requested to invoke the provision of Section 80 of the Act and grant immunity from the penalty.
- 10.7 They requested to allow them an opportunity to be heard in person.

Personal Hearing :

11. The assessee was granted personal hearing on 22.02.2011 but no one appeared to attend the same. However, assessee vide letter dated 22.02.2011 requested to grant another date of personal hearing. Accordingly, the personal hearing was re-fixed on 16.03.2011 still no body appeared on the said date. Further, as per telephonic request made by the assessee to grant Personal Hearing in April-2011, same was again fixed on 04.05.2011. Shri M. Rafik Sheikh, C. A., appeared for personal hearing on behalf of M/s. Kantilal Maganlal Shah on 04.05.2011 and submitted written reply. In the said written submission, they interalia stated that:

- 11.1 They have already submitted written reply vide letter dated 08.04.2011 and what is stated therein may kindly be perused.
- 11.2 The show cause notice demanding the tax is not sustainable as their client had obtained Service Tax registration on 6/10/2008 and made the payments suo moto on 14/10/2008,

16/2/2009 and 25/3/2009 and informed the same to the Range Superintendent vide letter dated 22/10/2008 and 27/4/2009. The said fact is also mentioned in para-2 of the show cause notice. Thereafter, during the course of the scrutiny, further documents were called for from their client for the first time on 16/6/2009 vide letter F. No. SNR/STAX/BAS/KMS/08-09. Before that neither any case had been booked by the department nor any inquiry had been initiated by the department against their client. From the above, it is crystal clear that their client has on its own had obtained Service Tax registration and paid the tax with interest and informed the department and thereafter the Range Superintendent has proposed the show cause notice and the same was issued by the department. Hence, there is neither any suppression of facts and nor any *mala fide* intention to evade the Service Tax. Moreover, in *The Financiers v/s. CCE, Jaipur (2007) 8 STR 7 (Tri.-Del)*, it was held that Section 78 of the Act requires *means rea* which is absent in our case. Moreover, there is no such allegation in the show cause notice that their client had intentionally suppressed the facts. Therefore, penalty under Section 78 of the Finance Act, 1994, 1994 (hereinafter referred to as "the Act") is not imposable on our client.

- 11.3 He further submitted that the penalty under Section 76 may please be waived as provided under Section 80 of the Act. Their client was not having any knowledge of the laws of Service Tax as the same was recently introduced and neither the department nor the company had informed him regarding Service Tax. Therefore, non-payment of tax was due to ignorance of law and there was no intention to evade duty. Hence, there was reasonable cause for non-payment of Service Tax. Also, their client had paid the tax with interest before show cause notice. Therefore, he requested to waive the penalty as provided under Section 80 of Finance Act, 1994. They relied on the judgment in the case of *CCE v. Busy Bee (2009) 18 STT 392 (Chennai- CESTAT) = 2007(7) STR 195 (Tri.-Chennai)*.
- 11.4 He further submitted that Service Tax being a new concept, procedural lapses were bound to occur due to lack of understanding and his client deserves sympathetic treatment as regards penal action proposed on him. They rely on the ratio of the decisions of the Tribunal indicated below :
- (1) *Flyingman Air Courier (P) Ltd. v. CCE, 2006 (3) S.T.R. 283 (Tri.) = 2004 (170) E.L.T. 417 (Tribunal)*
 - (2) *ETA Engineering Ltd. v. CCE, 2006 (3) S.T.R. 429 (T) = 2004 (174) E.L.T. 19 (Tri. - LB)*
 - (3) *Mass Marketing & Adv. Services (P) Ltd 2006 (3) S.T.R. 333 (T).*
- 11.5 He further submitted that the show cause notice was barred by limitation as the demand was raised on the basis of scrutiny of record which is submitted by their client to the Range Office and there was no suppression of facts. It is seen from the show cause notice in question that their client themselves provided the data on 22/10/2008 and the demand was raised after the payment of Service Tax. There was no suppression of facts with intent to evade payment of tax. The demand of tax was not sustainable on limitation. For this argument, they relied on the judgment in the case of *Patro Carbon Industries v. Commr. of C. Ex., Allahabad 2008 (228) ELT 458 (Tri.-Del.)*.
- 11.6 Having regard to above submission, he prayed that the show cause notice may please be dropped.

Discussion & Findings:

I have carefully gone through the notice, records of the case, written submissions and submission made at the time of personal hearing.

12. The impugned notice seeks to demand Service Tax on commission received by the Noticee from M/s Surani Ceramic, Morbi for sale of their goods to M/s Johnson India Ltd considering this as taxable service under "Business Auxiliary Service" within the meaning of Section 65(19) readwith Section 65(105) (zzb) the Finance act, 1994, 1994. I find that levy of Service Tax has not been challenged by the Noticee, therefore taxability of the services provided by them is not under dispute.

13. However, the Noticee have challenged the demand on the grounds of limitation and proposal to impose penalty. The Noticee submits that audit was conducted by the officers of Central Excise Commissionerate, Rajkot and the notice was issued on 6.10.2009 i. e. after one year from the date of knowledge of the department, therefore the notice is barred by limitation. They have relied upon decision in case of M/s Nizam Sugar factory reported in 2006 ELT 465 (S.C.). I find that period for issue of the notice under Section 73 of the Act which is analogous to Section 11A of the Central Excise Act, 1944 is to be calculated backward from the date of issue of the notice and not from the date of knowledge. I rely upon judgement of Hon'ble Supreme Court in case of Mathania Fabrics vs. CCE, Jaipur reported at 2008 (221) ELT 481 (S.C.) wherein it has been held that coming to the period of limitation, the five years period had to be reckoned backward from 8.02.1989 when the show cause notice was issued. Therefore, this plea of the Noticee is not acceptable.

14. The Noticee further submits that they had obtained registration and paid Service Tax on coming to know that they have to pay tax. They also submits that department was informed of such payment on 22/10/2008 and the demand was issued thereafter. Therefore, there was no intention to evade tax, hence the allegation of suppression of facts is not correct and requested to invoke Section 80 of the Act. It is true that the Noticee had taken registration and paid tax before issue of the notice but the same cannot be considered as *suo-moto* payment as the present issue arose on audit of the records of recipient of the service viz. M/s Surani Ceramics, Morbi by the department. Had audit been not conducted, the Noticee would not have paid the Service Tax not levied and paid. Therefore, the plea that the payment of Service Tax was suo-moto and there was no suppression of facts is not tenable and the case laws relied upon by the Noticee in this regard are not relevant in so far as the facts of the case are concerned.

15. The Noticee have also contested proposed imposition of penalty under Section 76 and Section 78 of the Act contending that simultaneous penalties under section 76 and 78 cannot be imposed and have relied upon judgement in case of Opus media and Entertainment vs. CCE, Jaipur-2007 (8) STR 368 (Tri-Del). They have also requested to invoke section 80 of the Act relying upon the judgement in case of CCE v. Busy Bee (2009) 18 STT 92 (Chennai-CESTAT). In case of Assistant Commissioner of Central Excise vs. Krishna Poduval, Hon'ble High Court of Kerala while setting aside order of single Judge withdrawing penalty, has held that incidents of imposition of penalty are distinct and separate under two provisions and even if offences are committed in course of same transaction or arise out of the same act, penalty is imposable for ingredients of both offences and that person who is guilty of suppression deserve no penalty under section 80 of the Act. Relying upon this judgement, I hold that the Noticee are liable for penalty both under Section 76 and Section 78 of the Act and since there was suppression of facts as discussed earlier, I am not inclined to invoke Section 80 in this case either.

The Noticee have pleaded for sympathetic treatment as regards penal action stating that procedural lapses occur due to lack of understanding and have relied upon the decisions of the Tribunal in case of Flyingman Air Courier (P) Ltd. V. CCE 2006 (3) STR 283, ETA Engineering Ltd. V. CCE, 2006 (3) STR 429 (T) and Mass Marketing & Adv. Services (P) Ltd- 2006(3) STR 333(T). In this case, non payment of Service Tax cannot be said to be procedural lapses occurring due to lack of understanding. As discussed earlier, the Noticee paid tax as the non-levy was detected in audit of the records of the recipient of the service and hence there was clearly suppression of facts. Therefore, this plea is also not acceptable and above case laws are not applicable in this case as distinguishable on facts.

In view of the above, I pass the following order:

ORDER

1. I confirm Service Tax amounting to Rs.6,54,814/-, Education Cess Rs. 13,096/- and Secondary & Higher Secondary Education Cess to Rs. 15,10/-, total Rs. 6,69,420/- (Rupees Six lacs, sixty nine thousand, four hundred & twenty only) as the tax not levied and paid under proviso to Section 73(2) of the Act and the amount of Service Tax of Rs 6,69,420/- out of total amount of Rs. 6,82,356/- (Rupees Six lacs, eighty two thousand, three hundred and fifty six only) already paid by the Noticee is appropriated under Section 68 of the Finance Act, 1994 read with Rule 6 of the Service Tax Rules 1994 towards aforesaid dues.
2. The Noticee shall also pay interest at the appropriate rate as applicable till the date of payment of Service Tax under Section 75 of the Finance Act, 1994 and the amount of Rs.

1,57,693/- (Rupees One lakh, fifty seven thousand, six hundred and ninety three only) paid by the noticee towards interest accrued is appropriated towards such interest.

3. I impose penalty of Rs.200/- (Rupees Two Hundred only) upon the Noticee under Section 76 of the Act, for every day during which the Noticee failed to pay Service Tax starting with the first day after the due date till the date of actual payment of the Service Tax.
4. I impose penalty of Rs. 200/- (Rs. Two hundred only) upon the Noticee under section 77 of the Act read with Rule 7 c (iii) of the Service Tax Rules, 1994 for every day during which the Noticee failed to file returns and obtain registration as required under the Act till the date of actual compliance.
5. I impose penalty of Rs. 6,69,420/- (Rupees Six lacs, sixty nine thousand, four hundred & twenty only) upon them under Section 78 of the Act.

The Noticee shall forthwith pay the aforementioned amount.

scf/ -
(HARCHARAN SINGH)
ADDL. COMMISSIONER

By Register Post A.D.

To,
M/s Kantilal Maganlal Shah
Main Road, Joravarnagar
District: Surendranagar
PIN-363 020.

Copy to:-

1. Commissioner, Central Excise, Bhavnagar.
2. Assistant Commissioner, Service Tax Division Bhavanagar
3. Superintendent, Service Tax Range, Surendranagar.
- ✓ 4. Guard File.

scf/ -
15/11/2011
ADDL. COMMISSIONER