- S.TAX

केन्द्रीय उत्पाद शुल्क एवम सेवा कर आयुक्तालय , भावनगर
OFFICE OF THE COMMISSIONER OF CENTRAL EXCISE & SERVICE TAX

प्लॉट नं. 6776–बी / 1, 'सिध्धि सदन' बिल्डिंग,
PLOT NO. 6776/B-1, "SIDDHI SADAN" BUILDING,
नारायण उपाध्याय मार्ग, भावनगर–364001
NARAYAN UPADHYAY MARG, BHAVNAGAR-364 001.
दूरभाष : (0278) 2523627 फैक्स : 0278-2513086

रजिस्टर्ड डाक पावती द्वारा
By R.P.A.D.

फाईल सं. V/15-74/Dem/HQ/2009
F. No.

आदेश की तारीख : 12/01/2012.
Date of Order :
जारी करने की तारीख : 12/01/2012.
Date of Issue :

पारितकर्ता
Passed by
श्री एन के भुजबल
SHRI N. K. BHUJABAL
आयुक्त, केन्द्रीय उत्पाद शुल्क एवम सेवा कर, भावनगर
Commissioner, Central Excise and Service Tax, Bhavnagar

मूल आदेश संख्या Order-in-Original No : 2/BVR/Commissioner/2012

1. यह प्रति उस व्यक्ति को, जिसके लिए यह आदेश जारी किया गया है, उसके व्यक्तिगत उपयोग के लिए निःशुल्क प्रदान की जाती है।

2. इस मूल आदेश से असंतुष्ट कोई भी व्यक्ति उचित प्राधिकारी को अपील निम्नलिखित ढंग से कर सकता है ः

सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण को अपील ः

3. वित्त अधिनियम, 1994 की धारा 86 के अंतर्गत अपील निम्न को की जा सकती है।

1। पश्चिम क्षेत्रीय पीठ, सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) ओं 20, न्यू मेन्टल अस्पताल कंपाउन्ड, मेघाणीनगर, अहमदाबाद 380016।

2। अपीलीय न्यायाधिकरण का वित्त अधिनियम, 1994 की धारा 86 की उप धारा (1) के अंतर्गत अपील, सेवाकर नियमावली, 1994 के नियम 9(1) के अंतर्गत निर्धारित एस.टी.5 में, चार प्रतियों में आदेश प्राप्ति के दिनांक से तीन माह के भीतर की जा सकेगी एवं उसके साथ जिस आदेश के विरुद्ध अपील की गई हो उसकी प्रतियॉ भेजी जानी चाहिए (उनमें से एक प्रमाणित प्रति होगी) और वित्त अधिनियम, 1994 की धारा 86 के अंतर्गत निर्धारित किए अनुसार शुल्क लगा होना चाहिए। जिस स्थान पर न्यायाधिकरण की न्यायपीठ स्थित है, वहॉ के नामित सार्वजनिक क्षेत्रा बैंक के न्यायपीठ के सहायक रजिस्ट्रार के नाम से निर्धारित फीस रेखांकित बैंक ड्राफ्ट के रुप में भेजनी होगी।

3। वित्त अधिनियम, 1994 की धारा 86 की उपधाराओं (2) एवं (2ए) के अंतर्गत सेवाकर नियमावली, 1994 के नियम 9(2) के अंतर्गत निर्धारित किए गए फॉर्म एस.टी.7 में की जा सकेगी एवं उसके साथ आयुक्त, केन्द्रीय उत्पाद शुल्क या आयुक्त, केन्द्रीय उत्पाद शुल्क (अपील) के आदेश के प्रति (उनमें से एक प्रमाणित प्रति होगी) और आयुक्त/सहायक आयुक्त अथवा उपआयुक्त, केन्द्रीय उत्पाद शुल्क को अपीलीय न्यायाधिकरण में आवेदन करने के आदेश देते हुए सीमा एवं केन्द्रीय उत्पाद शुल्क बोर्ड / आयुक्त, केन्द्रीय उत्पाद शुल्क द्वारा पारित आदेश की प्रति भेजनी होगी।

4. यथासंशोधित न्यायालय शुल्क अधिनियम, 1975 की शर्तो पर अनुसूची1 के अंतर्गत निर्धारित किए अनुसार यथास्थिति मूल आदेश या न्यायनिर्णयनकर्ता प्राधिकारी के आदेश की प्रति पर रुपये 6.50/ का न्यायालय टिकट लगा होना चाहिए।

5. व्यौरापूर्ण करने हेतु सीमाशुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्यविधि) नियमावली, 1982 की ओर ध्यान आकर्षित किया जाता है।

To,
M/s. Rajdhani Travels,
53, Madhav Darshan,
Waghawadi road,
Bhavnagar – 364 001.

विषय : कारण बताओ नोटिस संख्या :

Subject: Show Cause Notice F. No. V/15-74/Dem/HQ/2009 dated 22.10.2009.

आयुक्त कार्यालय
भावनगर
केन्द्रीय उत्पाद शुल्क

BRIEF FACTS :-

M/s. Rajdhani Travels, 53, Madhav Darshan, Waghawadi Road, Bhavnagar (hereinafter referred to as the "Service Provider") had obtained Service Tax Registration Certificate under the category of "Travel Agent's Service" as defined under Section 65(115a) of the Finance Act, 1994 (hereinafter referred to as he "Act"). They were also providing 'Tour Operator's Service" which was taxable as defined under Section 65 of the Act.

2. During the course of audit of the Service Provider, it was noticed that they had obtained Service Tax Registration under the category of "Travel Agent's Service" till 31.03.2008. From 01.04.2008 onwards, they got themselves registered under the category of "Tour Operator's Service" and started paying Service Tax accordingly. The Service Provider carried out business under the brand name of 'Rajdhani Travels' which was a partnership firm and Shri Karsanbhai B Vegad, Shri Govindbhai B. Vegad, Shri Harishchandra R. Sodha and Smt. Manuben K. Vegad were partners. It was also noticed that for the period under which they had got themselves registered under "Travel Agent's Service", all the buses plying under the brand name of "Rajdhani Travels" were either owned by partners or others and the amount received by booking of tickets, which were issued under the brand name "Rajdhani Travels" from the offices of the "Rajdhani Travels", did not reflect in the Books of Accounts maintained by "Rajdhani Travels". In this regard, they explained that the tickets were booked and issued to the customers under the brand name "Rajdhani Travels" directly, by the staff employed in the offices of 'Rajdhani Travels', by the owners of the vehicles. They shown the commission income received from the owners of the vehicles in their Books of Account and the percentage of commission was fixed on the amount collected for booking of the tickets. They took credit on input service.

3. It was also observed that (1) Shri K. B. Vegad, (2) Shri G. B. Vegad, (3) Smt. M. K. Vegad, (4) Shri A. K. Vegad, (5) Shri B. K. Vaghani, (6) Shri H. R. Sodha, (7) Shri M. K. Vegad, (8) Shri P. B. Vaghani, (9) Smt. D. A. Vegad, (10) Smt. J. H. Sodha, (11) Smt. R. M Chudasama and (12) Shri M. K. Chudasama, (hereinafter referred to as 'the Noticees"), were the owners of the buses, which were being operated by the Service Provider.

4. It was further noticed that the ample of show cause notices were issued to the Service Provider by the Service Tax Division, Bhavnagar for the period from 01.04.2000 to March-2008, to get themselves registered under category of "Tour Operator" and to pay Service Tax. However, from April-2008 onwards, the vehicles were transferred under the name of 'Rajdhani Travels' and they started paying Service Tax under the category of "Tour Operator".

5. STATUTORY PROVISIONS OF 'TOUR OPERATOR'S SERVICE':

5.1 The 'Tour Operators' were brought into the Service Tax net for the first time with effect from 01.09.1997. Levy of Service Tax on Tour Operators was later discontinued during the period 18.07.1998 to 31.03.2000. The levy was reintroduced from 01.04.2000, after suitably amending the definition of 'tour operator'.

5.2 As per Section 65(115) w.e.f. 10.09.2004, 'Tour Operator' has been defined as a person engaged in the business of planning, scheduling, organizing or arranging tours (which may include arrangements for accommodation, sight seeing or other similar services) by any mode of transport, and includes any person engaged in the business of operating Tours in a tourist vehicle covered by a permit granted under the Motor Vehicles Act, 1988 or the Rules made there under. Thus, from 10.09.2004, the scope of the services provided by tour operator is substantially enhanced by including persons who are engaged in planning etc. also and earlier the taxability was restricted to tours provided only in a tourist vehicle.

5.3 The constitutional validity of levy of Service Tax on tour operators has been upheld in the case of Secretary, Federation of Bus Operators Association v. Union of India 2001(134) ELT 618 (Mad.), (2007) 6 STT 49 (Mad.) / L.V. Sankeshwar V. Superintendent of Central Excise (2007) 6 STT 31 (Kar.) (Affirmed in toto in Suresh Kumar Sharma V. Union of India (2007) 7 STT 249 (Kar.). Some of the relevant portion of the judgment, in the case of Secretary, Federation of Bus Operator Association, are as under :-

"II Contract Carriage Operators :

41. *We have already rejected that argument holding that a permit contemplated under Section 65(52) of the Finance Act need not necessarily be a "tourist permit". We have also clarified therein that the only condition is that the vehicle should be a "tourist vehicle" under Section 2(43) of the Motor Vehicle Act; it should be used by the concerned tour operator for the purposes of a "tour" and the said "tourist vehicle" should have been covered by any permit granted under the Motor Vehicles Act and / or the Rules framed there under. We do not see as to how the cases of the holders of contract carriage permits would be in any manner different from the holders of the stage carriage permits and the owners of the spare buses there under. The same rationale would apply even to the contract carriage vehicle es covered by the permit under Section 74 of the Motor Vehicles Act. In fact, the most of the petitioners, who are having the contract carriage, are having the permits under Section 88(9) of the Motor Vehicles Act read with Section 82, which are nothing but "tourist permit", issued to the tourist vehicles as contemplated under that section. Therefore, there will be not question of entertaining their objection and they will straight away be covered under Section 65(52) of the Finance Act. Such petitions, where the permits are under Section 88(9) of the Motor Vehicles Act, would be straightaway liable to be dismissed and are dismissed as such."*

5.4. The statutory definition of 'Tour Operator' from 16.05.2008 is any person engaged in the business of planning, scheduling, organizing or arranging tours (which may include arrangements for accommodation, sight seeing or other similar services) by any mode of transport, and includes any person engaged in the business of operating tours in a tourist vehicle or a contract carriage by whatever name called, covered by a permit, other than a stage carriage permit, granted under the Motor Vehicle Act, 1988 or the Rules made there under. Thus, the main change that has been made is that operating tours in a contract carriage covered by a permit, other than a stage carriage permit, has also been covered. Accordingly, the Service Provider started paying Service Tax under the category of 'tour operator' with effect from 01.04.2008.

6.1. In view of the above, it was clear that with effect from 10.09.2004, any person engaged in the business of planning, scheduling, organizing and arranging tours is a 'tour operator'. Also any person engaged in the business of operating Tours in a tourist vehicle covered by a permit granted under the Motor Vehicles Act, 1988 or the Rules made there under is 'tour operator'. The Show Cause Notices were issued to the Service Provider in the past. But looking to the arrangement in their books of accounts, it was noticed that the amount received towards booking of tours was not received by the service provider but went directly into the account of the owners (the Noticees). As per the statutory definition of Tour Operator, persons (i.e. owners of the vehicles) (herein the Noticees) engaged in the business of operating tours in the tourist vehicles covered by a permit granted under the Motor Vehicle Act, 1988 are covered as 'tour operator'.

6.2. The year-wise amount received by the owners was collected from the Service Provider and amount of Service Tax payable thereon as calculated at the appropriate rate is as under :-

Sr. No.	Name of the Owner / Noticee	2004-05	2005-06	2006-07	2007-08
1	Shri K. B. Vegad	10175625	10753395	7938610	6048620
2	Shri G. B. Vegad	9904290	9427700	9395899	3342745
3	Smt. M. K. Vegad	10800133	12283630	12636960	10292080
4	Shri A. K. Vegad	6840032	6739090	2160400	2994650
5	Shri B. K. Vaghani	1821100	1414985	1052575	
6	Shri H. R. Sodha	11699714	11101510	12973545	7591530
7	Shri M. K. Vegad		3006595	4792850	4929850
8	Shri P. B. Vaghani	2000500	2075210	1322600	
9	Smt. D. A. Vegad		2090555	3766020	5177650
10	Smt. J. H. Sodha,		745340	1841420	1962750
11	Smt. R. M. Chudasama	1792000	1225615	1796160	
12	Shri M. K. Chudasama		2355795	2337200	
13	OTHER	1372880			
	TOTAL	**56406274**	**63219420**	**62014239**	**42339875**
Rate of Service Tax (including Ed. Cess & S&H Ed. Cess		10.2%	10.2%	12.24%	12.36%
Service Tax payable		**5753440**	**6448381**	**7590543**	**5233209**
Total Service Tax (including Ed. Cess & S&H Ed. Cess) for the period from 2004-05 to 2007-08					**2,50,25,573/-**

7. The Service Provider started paying Service Tax under the category of 'Tour Operator' from 01.04.2008. The definition of 'Tour Operator' was changed with effect from 16.05.2008. Thus, the Service Provider had paid the Service Tax under the category of 'Tour Operator' from 01.04.2008 to 15.05.2008 willingly on the same buses which plied during the period from 2004-05 to 2007-08 for which they did not pay Service Tax during the period from 2004-05 to 2007-08. Only change occurred was the change of ownership of the buses. On being pointed out, the Service Provider contended that they were only 'Travel Agent' and receiving commission during that period and the vehicles were not 'tourist vehicles'.

8. It appeared that the Service Provider had collected an amount of ₹ 22,39,79,808/- during the period from 2004-05 to 2007-08 and was required to pay due Service Tax of ₹ 2,50,25,573/- under Section 68 of the Act which was not paid during the material time by suppressing the facts with an intent to evade the Service Tax. The Service Provider had also contravened various provisions of Section 68, 69 & 70 of the Act read with various provisions of Service Tax Rules, 1994 and rendered themselves liable for penal action under Section 76, 77 & 78 of the Act. Further, the buses of various owners (Noticees) were operated by the Service Provider and the said Noticees had in collusion with the Service Provider evaded the Service Tax liability by not showing the entire amount as the gross value for the purpose of discharging the Service Tax liability and thus have rendered themselves liable for penal provisions under Section 76, 77 & 78 of the said Act.

9. In the backdrop of the above facts and circumstances, the Service Provider as well as Noticees were issued with a Show Cause Notice F.No.V/15-74/HQ/Dem/HQ/2009 dated 22.10.2009 whereby –

(a) the Service Provider was asked to show cause as to why –

(i) Service Tax amounting to ₹ 2,50,25,573/- should not be demanded under Section 73(1) of the Act by invoking extended period for rendering Tour Operator Service during the period from 2004 to 2008;

(ii) interest at appropriate rates, as provided under Section 75 of the Act, on the amount of Service Tax should not be recovered till the actual payment,

(iii) penalty should not be imposed under Section 76, 77 & 78 of the said Act.

(b) the Noticees were asked to show cause as to why penalty should not be imposed upon them under Section 76, 77 & 78 of the said Act.

DEFENCE REPLY :-

10. The Service Provider submitted written submission vide letter dated 19.11.2009 in response to aforesaid Show Cause Notice and stated as under :-

10.1 The basic contention of the show cause notice was based on the observations that they were a 'Tour Operator'. They stated that in fact, they were not a 'Tour Operator" but a Commission Agent and earned only commission from the bus owners whose buses were run during the subject period and due amount of Service Tax was paid on the commission income received by them.

10.2 The Department has not rejected their application of registration as a 'Travel Agent' and they had paid Service Tax under the said category since 2004 to 2008. They cannot be 'Travel Agent' on their own 'Tour Operator' service if at all considered. In fact this is mutually exclusive in the nature. Under the banner of Rajdhani Travels, owners of the buses were providing point to point transportation

services to passengers in contract carriage vehicle and none of the vehicles which were run in the subject period was a tourist vehicle as defined under the Motor Vehicles Act, 1988 and Rules made there under. They had never collected any Service Tax from any passenger in the subject period of notice.

10.3 It was submitted that Service Tax liability as 'Tour Operator' in the subject period, on the transportation of passengers on point to point basis in the contract carriage – not a tourist vehicle, is not applicable. Further, when the owners of the buses have been treated as Tour Operator in this Show Cause Notice (vide SCN Para No. 10, Page-4), there was no question of treating the Service Provider also as the Tour Operator for the same period particularly when SCNs have been issued to owners of the buses also treating them the service provider and have been asked to make the tax payment on the collection. This amounts to duplication of tax which is not possible. In this regard, they drew attention to case of Shrinath Tourist Agency Vs. CCE (2007) 11 STT 193 (New Delhi – CESTAT) wherein it was held that since the assessee is agent and not operating tour, is not liable to pay Service Tax under the category of 'Tour Operator.

10.4 It is submitted that they were running the buses on point to point basis in contract carriage and since none of the bus was a tourist vehicle as per the provisions of the Motor Vehicles Act, 1988 and rules made there under, hence, they were certainly not a Tour Operator as defined in Section 65(115) of Chapter V of the Finance Act, 1994 (32 of 1994). In support of their view, they requested to consider the following facts :-

(a) Ministry Circular/Letter D.O. F.No..334/1/2008-TRU dated 29/02/08 :-

It is instructed that the services provided in relation to a journey from one place to another in a tourist vehicle having contract carriage permit is leviable to Service Tax under tour operator service. Tour in a vehicle covered by the following categories of permits granted under the Motor Vehicles Act, 1988 and Rules made there under are clearly leviable to service tax under tour operator services (i) Contract Carriage permit granted under Section 74 of the MVA,1988 and authorization certificate issued under Motor Vehicles (All India Permit for Tourist Transport Operator) Rules, 1993; and (ii)Permit granted under Section 88(9) in accordance with the provisions of Section 74 of the Motor Vehicle Act ,1988 in respect of tourist vehicles, for the purpose of promoting tourism. Since the permits under above two categories are granted only for tourist vehicle, service tax is leviable if the tour is provided in the above categories of vehicles. Field formations may verify the nature of permits issued to the vehicles from transport authorities and collect service tax from vehicles having the above two types of permits.

They confirmed that a vehicle run under the subject period was not a tourist vehicle and enclosed copies of the certificates issued by RTO authority confirming their claim.

(b) The statutory definition of 'Tour Operator' has further undergone changes from 16/05/08 and now the definition of 'Tour Operator', apart from the category as mentioned in the definition effective from 10/09/04, shall include a contract carriage by whatever name called covered by a permit other then stage carriage permit granted under the Motor Vehicles Act, 1988 or the rules made there under. The main change that has been made is that operating tours in a contract carriage covered by a permit, other than a stage carriage permit, has also been covered. On 29/02/2008, the Budget was presented by Honorable Finance Minister and as per the said Budget proposals there was an amendment in Section 65(115) defining 'Tour Operator' so as to now include contract carriage by whatever name called covered by a permit, other then a stage carriage permit granted under the MVA, 1988 or rules made there under and responding to this Budget proposals under Para 5.3.2 in the above referred circular/letter D.O.F No. 334/1/2008- TRU, it has been instructed that the definition of 'Tour Operator' is being amended to include service provider in relation to journey from one place to another, generally known as point to point tour in a vehicle having contract carriage permit even if the vehicle does not meet the criteria specified for tourist vehicle.

Thus it is quite clear that only from 16/05/08, the service provided in relation to journey from one place to another, generally known as point to point tour in a vehicle having contract carriage permit, even if the vehicle does not meet the criteria specified for tourist vehicle, has been brought under the tax net.

(c) With effect from 10/09/04, the definition of 'Tour Operator' has been changed and as defined Under Section 65(115), 'Tour Operator' is a person engaged in the business of planning, scheduling, organizing or arranging tours (which may include arrangements for accommodation, sight seeing, or other similar services) by any mode of transport and includes any person engaged in the business of operating Tours in a tourist vehicle covered by a permit granted Under the Motor Vehicles Act, 1988 or Rules made there under. From 10/09/2004, the scope of the services provided by the 'Tour operator' is substantially enhanced by including persons who are engaged in planning, scheduling, organizing or arranging tours also. Earlier the taxability was restricted to tours provided in a tourist vehicle. The above amendment has been misinterpreted by the department and because of that only, service of transporting passengers on point to point basis in contract carriage vehicles, which is other wise not a tourist vehicle, is being treated as taxable tour operator services in the period 2004 to 2008. The above amendment was basically for a package tour operator who was covered under tax net up to 10/09/2004 if the tour services were provided by them in mode of transport other than road. Now, by virtue of the amendment effective from 10/09/04, such package tour operators were covered under the tax net irrespective of mode of transportations, which now included by road also. So far as 'Tour Operator' engaged in tourist vehicle is concerned, there is no change

because of the amendment. They referred to Para 20 of Circular No. 80/10/2004-ST dated 17/09/2004, the relevant extract is as under :-

> Extract of Para 20 of Circular No. 80/10/2004 ST Dated 17/09/2004.
>
> *At present, tour operator service covers package tour operators also. However under the present definition, such package tours attract service tax only if such tours involve modes of transport other than road (Say a combination of air-rail-cab travel). The definition of tour operator has been suitably expanded. While the existing levy on tour operators engaged in operating tours in a tourist vehicles remains as such, in case of a package tour (which are planned, scheduled, organized or arranged by tour operators), the scope of the levy is being extended by removing the limitation regarding transportation by tourist vehicles only. Such tourist operators would be subjected to service tax irrespective of the mode of transport used during such tours. The abatements (Notification Bo. 39/97 – S.T.) in case of package tour operators (providing transportation and accommodation) would remain at 60 %.*

They categorically confirmed that they are not package tour operator.

(d) The amendment made in the definition of tour operator with effect from 10/09/04 had created few problems in the interpretations and because of that at various levels, a few cases have arisen about the levy of the Service Tax in case of transportations of passengers on point to point basis in contract carriage vehicles which is otherwise not tourist vehicle. By realizing this ambiguity, vide F.No.354/180/2005-TRU, dated 13/04/2007 an instruction has been issued by the department that pending examination of the representation received from tour operators, who operate regular point to point services between different cities or towns in tourist buses, having contract carriage permit, to levy Service Tax only on the net value of the services i.e. to the extent of commission earned, instead of gross amount charged, no coercive recovery action may be taken and that while show cause notices (SCN) already issued may be kept pending, measures to protect revenue may be taken by issuing protective demands which may not be adjudicated. Due to the changes made in the definition of tour operator with effect from 16/05/08 in the statute, the Government of India has put an end to any kind of ambiguity. As per the said amendment, now with effect from 16/05/2008 only, the tour operator services will include service provided in relation to journey from one place to another, generally known as point to point tour in a vehicle having contract carriage permit even if the vehicle does not meet the criteria specified for tourist vehicle. Since the amendment is effective from 16/05/08 only, there is no question of treating the services as taxable services provided by them in a contract carriage vehicle which is otherwise not a tourist vehicle so far it relate to point to point tour. So to say

journey from one place to another for the period 2004 to 2008 which is the subject period of the show cause notice. If the services provided in contract carriage vehicle for point to point journey was already covered under the tax net with effect from 10/09/04, why this amendment has been done by the Government in the statute? Hence any move to invoke the effect of amendment from 10/09/2004 and not from the actual date of amendment i.e. 16/05/2008 is illegal and is ultra vires of powers and is injustice to the assessee.

(e) The proposal to levy the Service Tax on contract carriage despite the same not being a tourist vehicle was announced in the Budget which was announced on 29/02/2008. It was advised by the deptt. vide letter F. No. BVN/STAX/CITY/misc-tour/07-08/7584 dated 03/03/2008 wherein it was confirmed that the definition of tour operator is being amended to now include point to point tour in a vehicle having contract carriage permit even if the vehicle does not meet this criteria specified for tourist vehicle and with this amendment journey from one place to another place conducted in a vehicle having contract carriage permit shall be leviable to Service Tax under tour operator service. They preferred to pay the tax as applicable with effect from 01/04/08 instead of making the payment from 16/05/2008 to avoid any litigation and for administrative convenience and their this act is no way detrimental to the interest of the Revenue and in no case it should be considered as a base to frame a case against them assuming that since they had voluntarily paid tax with effect from 01/04/2008, they were also bound to give the same tax treatment from 2004. At the most it can be treated as excess payment of tax and in that they reserve their right to claim appropriate refund as per the provisions of the law.

11. They stated that the changes in the definition of tour operator with effect from 10/09/04 has not dispensed the condition for identifying a person as a tour operator, so far the vehicle is concerned, it has to be a 'tourist vehicles' and same should be backed up by a permit which should be granted under the rules made under the Motor Vehicles Act, 1988 or the Rules made there under. As per Section 65 (114) of the Finance Act, tourist vehicle has the meaning assigned to it in clause 43 of Section 2 of Motor Vehicles Act, 1988. Thus for the identification of a Vehicle as a tourist vehicle, the Finance Act has resorted to the Motor Vehicles Act, 1988. As per the provisions of Section 2 (43) of the Motor Vehicles Act, 1988, a 'tourist vehicle' means a contract carriage constructed or adapted and equipped or maintained in accordance with such specifications as may be prescribed in this behalf. Thus the vehicle should be a contract carriage and further it has to be constructed, equipped and maintained with such specification as may be prescribed in this behalf. Thus there is a specific requirement of construction / equipments / maintenance as per the specification and the specification is to be prescribed. The specification for a 'tourist vehicles' has been prescribed under rule 128 of the Central Motor Vehicle Rules, 1989. Thus if a vehicle, though is a contract carriage, if not constructed as per the specification mentioned under Rule 128 of the Central Motor Vehicle Rules, 1989, the subject vehicle can not be classified as a tourist vehicle. It is quite clear that a 'tourist vehicle' should always be a contract carriage but vise-versa is not necessary.

12. They relied on the following case laws :-

(i) Secretary, Federation of Bus Operators' Association of Tamil Nadu Vs. Union of India – 2001 (134) ELT 618 (Madras) [Para - 14, 24 and 36]

14. At this juncture, it will be seen that as per Section 2(43) of the Motor Vehicles Act, the Motor Vehicles Rules specifically provide the conditions for a vehicle being recognized as a "Tourist Vehicle" under Sec. 2(43). We can conveniently refer to Rule-128 of the Motor Vehicles Rules, which provides the conditions for a tourist vehicle other than motor cabs, maxi-cab, camper's van, house trailer, which a tourist vehicle shall conform to. Number of specifications are given in that rule in respect of dimension, structure, door arrangement, ventilation, luggage space, seating arrangement, painting, furnishing, lighting, fitting and accessories etc. in short, Rule-128 specifies the standard of comforts, which are required to be there in a vehicle for being recognized as the "tourist vehicle" under the Central Motor Vehicles Rules. We have, therefore, no hesitation first to hold, that the first and foremost condition for a person be held as a "Tour Operator" within the meaning of Section 65(52) of the Finance Act, is that he must be engaged in the business of operating tours in a "tourist vehicle" in terms of sec. 2(43) of the Motor Vehicles Act and in no other type of vehicle, and therefore, necessarily such vehicle must conform to the conditions prescribed under Rule-128 of the Central Motor Vehicles Rules.

24. However, it must be remembered that in the present case, we are not concerned with the two kind of permits. The question posed before us, is whether a vehicle covered under Section 72 (2) (xvii) of the Motor Vehicles Act can be viewed as a tourist vehicle. The question is not as to whether a permit under Section 88(8) would ipso facto become a permit covering a contract carriage. It has to borne in mind, that a tourist vehicle as defined under Section 2 (43) of the Motor Vehicle Act, which definition has been picked up as it is by the Finance Act, means a Contract Carriage constructed or adapted and equipped or maintained in accordance with such specifications as may be prescribed, more particularly, the specifications prescribed under Rule-128 of the Motor Vehicles Rules. Therefore, this ruling will not help the petitioners to suggest, that a vehicle covered under Section 72(2)(xvii) merely for the reason or merely because it is having permit under Section 88 (8) of the Motor Vehicles Act for its occasional use can never become a Tourist Vehicle. A Plain reading of the provisions of the Motor Vehicles Act says, that any such vehicle, which answers the description of the tourist vehicle under Rule-128 and which would runes under a contract, would become a tourist vehicle and once it becomes a tourist vehicle, so long as it is being used under any permit under the Motor Vehicles Act, by a person who is engaged in

the business of operating the tours then, the requirement of the Finance Act would be complete.

36. At this stage, all the learned counsels pointed out, that the petitioners' spare buses may not be "tourist vehicles" within the meaning of Section 2(43) of the Motor Vehicles Act and therefore, they are not liable. Indeed, if the vehicles owned by the petitioners are not the "tourist vehicle" within the meaning of Section 2(43) of the Motor Vehicles Act, read with Rule-128 of the rules framed there under then such petitioner would not be required to be registered under the Finance Act. The learned Senior Counsel for the Department very fairly accepted this position. However, he pointed out that it would be for the petitioners to raise their objections before the concerned authorities under the Finance Act and their objections would be decided upon. Therefore, the petitioners are permitted to raise the objections before the concerned authorities issuing the notices and the authorities will decide, as to whether the petitioner's vehicles are the "tourist vehicles" as contemplated under Section 2(43) of the Motor Vehicles Act, which is sine qua non for the application of the Finance Act. Needless to mention, that if they are not the "tourist vehicle", the provisions of the Finance Act would not apply and more particularly, the provisions of section 65(51) and the other allied sections like Section 66(3), etc."

The ratio established in the above case by the Honorable High Court is very clear and it says that for treating a vehicle as a tourist vehicle, the vehicle must conform to the norms as prescribed under Rule 128 of the Central Motor Vehicle Rules, 1989 and only then and then the tour conducted in that vehicle will be treated as provision of taxable service by the tour operator.

(ii). Usha Braco Ltd. Vs. CCE (2007) 8 STT 191 (CESTAT):-

It was held that statutory definition of tour does not confer an entirely artificial meaning on the commonly understood word 'tour'. The word irrespective of distance in the definition of tour only means there could be no argument that the tour should be to a distance place. The Law only seeks to remove such ambiguity. It does not give such artificial meaning to the word Tour as to make any movement in a tourist bus a tour.

They drew the attention to the fact that as per Compact Oxford reference Dictionary 'Tour' means (1) A journey for pleasure in which several different places are visited; (2) a short trip to view or inspect some thing.

(iii). Praseetha Suresh Vs. Commissioner of Central Excise 2006 (3) STR 777 (Tri.)

The activity of contract carrier do not fall within the category of tour operator. Also same view has been taken in case of Roy Son Joseph Vs. Commissioner of Central Excise 2007 (8) STR 245 (Tri. Bang).

(iv). Commissioner Vs. Ramsons Travels & Tours 2009(14)STR 372(Tri. Delhi)

The activity is not covered under tour operator service since no evidence is available that the vehicles are tourist vehicle. In the said case there is a case of transportation of employee of the company from one place to another and vice versa and no package tour offered – impugned service not liable to Service Tax.

(v). Gayatri Enterprise 2007(6) STR 280) (Commr Appl) :-

The tour operator service provided only if vehicle used is tourist vehicle- amendment in definition of tour operator with effect from 10/09/04 removing limitations regarding transportation by tourist vehicle is with reference to package tour operators - levy on tour operator engaged in operating tour in tourist vehicle as such.

(vi). TN State Transport Corporation (Kumbakonam) Limited VS. CCE Trichy -2009(14) STR 760 (TRI. Chennai) :-

The department clarified that by virtue of amendment in 2004, the levy on tour operator engaged in operating tour in tourist vehicle not changed by amendment – tour operator service clarified as expanded to include package tour operator – amended provisions also covering person involved in planning, scheduling, organizing or arranging tours – Appellant transporting employees to factory and transport of groups to choice destination can not be held as conducting package tour-Transport alone provided and no planning etc. undertaken – service tax liability absent-Section 65(115) of the Finance Act, 1994.

(vii). Comm. Vs. Highway Motors 2009(14) STR 31(Tri. Delhi) :

A tourist vehicle means a contract carriage constructed and maintained in accordance with prescribed specification - evidence to show that the buses are tourist vehicle as provided u/s 2(43) of the Motor Vehicles Act, 1988 absent - person not liable under tour operator service if vehicle not covered by description of tourist vehicle.-Sec 65(115) of Finance Act, 1994. Same view has been taken in Ashok Travels Vs. CCE (2009) 18 STT 391(CESTAT) and Binu John Vs. CCE 2008 STT 99(CESTAT).

(viii). Gatulal V. Patel Vs. Comm. 2007(7) STR426 (Tri. Ahmd.):-

When registration of the vehicle is as contract carriage – tourist vehicle to be read in line with provisions of Motor Vehicle Act,1988 and rules there under and when vehicle not covered by the description of tourist vehicle and not run as a tourist vehicle persons concerned not covered under tour operator.

(ix). Shri Pandyan Travels Vs. Comm. Of Central Excise, Chennai 2006(3) STR 151(MAD.) :-

The contract carriage vehicle is covered under definition of tourist vehicle and Service Tax is payable - it seems that the distinction was not brought to the notice of Honorable Court because the decision is based on Division Bench Judgment of the same High Court in case of Secretary, Federation of Bus Operator's Association of Tamilnadu, Chennai Vs, Union of India, can not be in contravention, since the Division Bench has decided, that if the Contract Carriage does not comply Section 2(43) read with Rule – 128 of the said Rules, such vehicles are not required to pay Service Tax.

(x). Hansa Travels Vs. Comm. of Central Excise 2008 (11) STR 366 (Tri. Mumbai):

The Service Tax not applicable for the period April 2001 to 10/09/2004 when vehicle not registered as tourist vehicle and with effect from 10-09-2004, because of change in the scope the definition may include within its purview services rendered by the assessee but here nowhere it has been held that because of the change in the scope a person running buses on point to point basis under a contract carriage and the said buses even though are not meeting the specifications of a vehicle being capable of identifying the same as tourist vehicle is covered under the purview of tour operator.

(xi). Parveen Travels P.Ltd. Vs. Comm. Of Central Exicse, Chennai 2008(11) STR 357(Tri. Chennai) :

There is no specific finding that a contract carriage running on point to point service is also covered as tour operator. Here the judgment is on the non requirement of specification which is required to identify a vehicle as a tourist vehicle.

13. They submitted that they were engaged in transporting of the passengers in the manner same as the State Road Transport Corporation i.e. carrying passengers from one place to another by charging separate fares from each passenger. Also there is a time wise service. They were not conducting / organizing tour for any group of person by giving on hire the bus as a whole. In fact they were merely a Commission Agent in this regards. They referred the decision taken by the Deputy Commissioner, Service Tax and Central Excise Division, Agra by an order dated 31/03/2004 in case of Amar Travels wherein it was held that though the operator had obtained a permit for contract carriage, he was using his bus as a State Carriage for carrying passengers from one place to another on payment of separate fare and therefore such operation of a vehicle will not fall within the definition of a 'Tour Operator'.

14. They submitted that they have not suppressed the facts with an intent to evade Service Tax. The taxable value of Services on which the Service Tax is leviable as per show cause notice is ₹ 22,39,79,808/-. In the said show cause notice, it has been confirmed that for the subject period, various show cause notices have been given by the department and answered for about the non

applicability and the said SCNs are pending adjudication. Since they were not providing any taxable service as tour operator, there was no requirement to provide all the figures every year to the department. However, whenever the department has asked by way of SCN or otherwise, they always supplied all the required information and believed that the allegation of suppressing the facts with an intention to evade the Service Tax in no way is correct and hence acceptable to them.

15. It was submitted that they never provided any taxable service as tour operator and never collected any Service Tax from the passengers, thus there is no case to make any payment towards the subject notice and accordingly amount toward interest and penalty.

16. It was submitted that they deny the accuracy of figure of so called taxable service as worked out in the show cause notice. The said show cause notice should cover the taxable value of services from 10/09/2004 to 31/03/2008 however it was observed that the figure has been ascertained with effect from 01/04/2004 and not from 10/09/2004. Further, abatement available has not been given while ascertaining the tax liability despite the fact that in the audit report dated 10/08/2009, the abatement has been worked out. The tax liability ascertained as per audit report is of ₹ 1,42,50,432/- whereas SCN is proposed for ₹ 2,50,25,573/-. The CENVAT credit availed by them is against the Service Tax liability ascertained and paid as a 'Travel Agent'.

17. They denied the allegation that Mr. K.B.Vegad, Mr. G.B.Vegad, Smt. M.K.Vegad, Mr. A.K.Vegad, Mr. B.K.Vaghani, Mr. H.R. Sodha, Mr. M.K. Vegad, Mr. P.B. Vaghani, Smt. D.A. Vegad, Smt. J.H.Sodha, Smt. R.M. Chudasam and Mr. M.K. Chudasama, owners of the buses during the period from 2004-05 to 2007-08 have colluded with the Service Provider and evaded the Service Tax liability by not showing the entire amount as gross value for the purpose of discharging the Service Tax liability. Thus, they were not liable for penal provisions under Section 76, 77 and 78 of the said Act. Further, as the services provided are not at all taxable as discussed above at length, there was no need for them to get themselves registered as tour operator and hence there was no case for attracting any penal provision u/s 76, 77 & 78 of the Act. It was also submitted that they were treated as the Service Provider since the buses were running under their banner and issued the show cause notice for recovery of tax. They questioned how the department on one hand can treat them as the service provider and for the same act the owners also can be treated as the service provider. Their contention was that for the same service, how two different entities can be considered as service provider. They stated that when they are only commission agent and accordingly paying the Service Tax and when owners were considered as tour operator by the department, they are therefore in no case liable for any Service Tax liability under the category of tour operator.

18. The Noticee submitted that based on above facts/submission, they were not a service provider and not provided taxable service of tour operator as envisaged under section 65 of Chapter V of the finance Act, 1994 so far as it related to the period 2004 to 2008 (period of SCN) and therefore not to levy and raise any demand of Service Tax and interest and / or penalty under the provisions of the Act.

PERSONAL HEARING :-

19. The Service Provider and 12 Noticees were granted personal hearing on 09.12.2011. Shri Anil Mandera, Chartered Accountant appeared for personal hearing on behalf of all thirteen (13) Noticees. During the course of personal hearing, he reiterated the written submission dated 19.11.2009. He also drew attention to Notification No. 20/2009-ST dated 07.07.2009 which has been given retrospective effect from 01.04.2000 vide Section 75 of the Finance Act, 2011. He requested to drop the proceedings initiated vide SCN dated 22.10.2009.

20. A certificate dated 07.12.2011 issued by A.J. Mandera & Co., Chartered Accountant (M.No. 40753) has been submitted wherein it has been certified that during the Financial Year 2004-05 to 2007-08, M/s. Rajdhani Travels has been engaged in point to point transportation of passengers in the vehicles having a contract carriage permit for inter state or intrastate transportation of passengers and during the said period viz. Financial Year 2004-05 to 2007-08, they have not provided any service in the nature of tourism, conducted tours, charter or hire services.

DISCUSSION & FINDINGS :-

21. I have carefully gone through the show cause notice, record of the case, written and oral submissions made by the Service Provider and Noticees and documentary evidences produced in support of their submissions.

22. I find that the issues involved in this Show Cause Notice are:-

(a) Whether the Service Provider is covered within the ambit of 'Tour Operator' as defined under Section 65(115) of the Finance Act, 1994 during the relevant period and if so whether Service Tax of ₹ 2,50,25,573/- calculated at appropriate rate on taxable value of ₹ 22,39,79,808/- received towards services rendered during the period from 2004-05 to 2007-08 is payable by the Service Provider;

(b) Whether the Noticees are liable for penal action u/s 76, 77 & 78 of the Act for their alleged act of collusion with the Service Provider to evade the Service Tax liability by not disclosing gross value received for providing 'Tour Operator's Service';

23.1 I find that the definition of 'Tour Operator' has undergone many changes over a period of time since Service Tax on Tour Operator's Service was introduced with effect from 1-9-1997.

23.2 The word 'Tour Operator' was originally defined as 'Tour Operator' means a person who holds a tourist permit granted under the rules made under the Motor Vehicles Act, 1988 (59 of 1988).

23.3 The said definition of 'Tour Operator' was amended w.e.f. 01.04.2000 as 'Tour Operator' means any person engaged in the business of operating tours in a tourist vehicle covered by a permit granted under the rules made under the Motor Vehicles Act, 1988 (59 of 1988) and the rules made there under. The important change made was that the tourist vehicle must be covered by

a permit and the person / operator need not hold the permit in his name. Thus, to identify the person as 'tour operator', he should have been engaged in the business of operating tours in a 'tourist vehicle' backed by a permit granted under the rules made under the Motor Vehicles Act, 1988. As per Section 65(51) of the Act (as it stood then), tourist vehicle has the meaning assigned to it in Clause 43 of Section 2 of Motor Vehicles Act, 1988. Accordingly, a 'tourist vehicle' means a contract carriage constructed or adapted or equipped or maintained in accordance with such specifications as may be prescribed in this behalf. Therefore, the vehicle should be a contract carriage and should be constructed, adapted, equipped and maintained with such specification as may be prescribed in this behalf.

23.4 The definition of 'Tour Operator' was further amended with effect from 10.09.2004. It has been provided that 'Tour Operator' means any person engaged in the business of planning, scheduling, organizing or arranging tours (which may include arrangements for accommodation, sight seeing, or other similar services) by any mode of transport, and includes any person engaged in the business of operating Tours in a tourist vehicle covered by a permit granted under the Motor Vehicles Act, 1988 or rules made there under. Thus, from 10.09.2004, the scope of the services provided by the 'Tour Operator' was substantially enhanced.

23.5 The statutory definition of 'Tour Operator' has further undergone the changes form 16.05.2008. It has been provided that 'Tour Operator' means any person engaged in the business of planning, scheduling, organising or arranging tours (which may include arrangements for accommodation, sightseeing or other similar services) by any mode of transport, and includes any person engaged in the business of operating tours in a tourist vehicle or a contract carriage by whatever name called, covered by a permit, other than a stage carriage permit, granted under the Motor Vehicles Act, 1988 (59 of 1988) or the rules made thereunder.

24. I find that the period covered in this Show Cause Notice is from 01.04.2004 to 31.03.2008. Thus, definition described at para 23.3 and 23.4 above are relevant in the present case to consider whether the Service Provider is covered within the ambit of definition of 'Tour Operator' or otherwise. The said definition envisages that the persons engaged in the business of operating tours in a 'Tourist Vehicle' are covered as 'Tour Operator' to attract levy of Service Tax.

25.1 The Service Provider mainly pleaded that the services provided by them do not fall within the ambit of the term 'Tour Operator' in as much as they earned only commission from the bus owners and appropriate Service Tax has been paid on the commission income received by them as Commission Agent and the Department has not rejected their registration as 'Travel Agent'. As such, they simultaneously cannot be 'Travel Agent' and 'Tour Operator'. The owner of buses are plying their buses under the banner of 'Rajdhani Travels' and the vehicles owned by them are registered as Contract Carriage Vehicles under the Motor Vehicles Act, 1988 but are not covered under the definition of 'Tourist Vehicle' within the meaning of Section 2(43) of the Motor Vehicles Act, 1988 read with Rule 128 of the Central Motor Vehicle Rules, 1989 and certificates issued by the Registering Authority also prove this fact.

25.2 The Service Provider has produced the copies of certificates issued by the Regional Transport Authority, Bhavnagar in respect of 36 passenger buses, wherein it has been certified as follows :-

> *"Certificate is hereby given that passenger bus no. _____ is registered as a Contract Carriage Omnibus under Clause 2(7) of the Motor Vehicles Act, 1988 which is not covered as Tourist Vehicle defined under Clause 2 (43) of the Motor Vehicles Act, 1988 read with Rule 82 to 85 and 128 framed under Central Motor Vehicles Rules, 1989."*

26.1 I find that 'Tour Operator' was defined during the period from 01.04.2000 to 09.09.2004 as any person engaged in the business of operating tours in a tourist vehicle covered by a permit granted under the rules made under the Motor Vehicles Act, 1988. With the amendment in definition of 'Tour Operator' with effect from 10.09.2004, while the existing levy on tour operators engaged in operating tours in tourist vehicles remained as such, in case of a package tour (which are planned, scheduled, organized or arranged by tour operators), the scope of the levy was extended by removing the limitation regarding transportation by tourist vehicles only. I find that there is no allegation in the show cause notice that the Service Provider was engaged in providing services in the nature of packaged tours. Service Provider has submitted that vehicles owned/ used by them are not 'Tourist Vehicle' within the meaning of Section 2(43) of the Motor Vehicles Act, 1988 read with Rule 128 of the Central Motor Vehicles Rules, 1989. Therefore, it is required to be ascertained whether the vehicles used by the Service Provider can be termed as 'Tourist Vehicle'. Hon'ble High Court of Madras in the case of Secretary, Federation of Bus – Operators' Association of Tamilnadu V/s. Union of India [2001 (134) E.L.T. 618 (Mad.)] has discussed various provisions of Finance Act, 1994, Motor Vehicles Act, 1988 and Central Motor Vehicles Rules, 1989 and held which vehicles can be recognised as 'Tourist Vehicles' under the Motor Vehicles Act, 1988 and rules framed there under. Relevant paras of the said judgement reads as follows :-

> *14. At this juncture, it will be seen that as per Section 2(43) of the Motor Vehicles Act, the Motor Vehicles Rules specifically provide the conditions for a vehicle being recognised as a "tourist vehicle" under Section 2(43). We can conveniently refer to Rule 128 of the Motor Vehicles Rules, which provides the conditions for a tourist vehicle other than motor cabs, maxi-cab, camper's van, house trailer which a tourist vehicle shall conform to. Number of specifications are given in that rule in respect of dimension, structure, door arrangement, ventilation, luggage space, seating arrangement, painting and furnishing, lighting, fitting and accessories, etc. In short, Rule 128 specifies the standard of comforts which are required to be there in a vehicle for being recognised as the "tourist vehicle" under the Central Motor Vehicles Rules. We have, therefore, no hesitation first to hold that the first and foremost condition for a person to be held as a "tour operator" within the meaning of Section 65(52) of the Finance Act is that he must be engaged in the business of operating tours in a "tourist vehicle" in terms of Section 2(43) of the Motor Vehicles Act and in no other type of vehicle and, therefore, necessarily such vehicle must conform to the conditions prescribed under Rule 128 of the Central Motor Vehicles Rules.*
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