


S. 102

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By R.P.A.D.

F. No. V/15-01/STC (Adj) TOU/05-06.

Date of Order: 11/01/2012

Date of Issue: 11/01/2012

Passed by

IMAMUDDIN AHMED

Joint Commissioner

Central Excise

Bhavnagar

Order-in-Original No: 02 / BVR / Jt.Commr / 2012

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

Any person(s) deeming himself aggrieved by this Order may appeal against this order under Section 85 of Finance Act, 1994 to the Commissioner, Central Excise(Appeals), Rajkot, Central Excise Bhavan, Race Course Ring Road, Rajkot-360001 within three months 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 ST-4 in duplicate, as per the provisions of Section 85 of the Finance Act, 1994 read with Rule 8 of the Service Tax Rules, 1994. 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.

BY R.P.A.D.

To,
M/s.Sitaram Travels,
Near Madhav Jyot,
Kalanala,
Bhavnagar.

Subject: Show Cause Notice Number No. BVN / STAX / CITY / SUMMONS /
TOU-025 / 2003-04 Dated 30.03.2005 issued to M/s. Sitaram Travels,
Bhavnagar demanding Service Tax of Rs. 10,92,681/-.

BRIEF FACTS OF THE CASE :-

M/s. Sitaram Laxmi Travels (Prop. Ranjitsinh Gohil), Near Madhav Jyot, Kalanala, Bhavnagar (hereinafter referred to as "the Service Provider") are providing "Tour Operator Service" which is taxable as per Section 65 of Chapter V of the Finance Act, 1994 (32 of 1994) (hereinafter referred to as "Act").

2. The Service Provider was providing the 'Tour Operator Service' since 01.04.2000 without following the provisions of the Act viz.

- (1) did not pay the Service Tax as per Section 68 of the Act on the services rendered by them;
- (2) did not take the registration as per Section 69 of the Act;
- (3) did not file Returns as per Section 70 of the Act.

3. The Service Provider was requested by the department vide various letters / notices to get themselves registered and pay Service Tax as per the provisions of the Act, however, they did not follow the directives.

4. The Service Provider did not take registration and discharge their Service Tax liability as Tour Operator since 01.04.2000. Accordingly, it was gathered by the department that the said Service Provider had provided 'Tour Operator Service' of taxable value of Rs.1,99,29,000/- during the period from 01.04.2000 to 31.03.2004.

5. A Show Cause Notice No. BVN/STAX/CITY/SUMMONS/TOU-025/2003-04 dated 30.03.2005 was issued by the Assistant Commissioner, Central Excise (Service Tax Division), Bhavnagar asking as to why :-

- (1) the Service Tax amount should not be determined as per Section 73(2) of the Act on the taxable value of Rs. 1,99,29,000/- for rendering Tour Operator Service during the period from 01.04.2000 to 31.03.2004 at the appropriate rates provided under Section 66 of the Act along with Education Cess as provided under Section 91 read with Section 95 of the Finance Act, 2004 and should not be recovered from them,
- (2) interest at the appropriate rates on the above amount of Service Tax should not be recovered under Section 75 of the Act,
- (3) penalty should not be imposed upon them under Section 76, 77 & 78 of the Act.

6. The amount of Service Tax liable to be recovered on the taxable value of Rs. 1,99,29,000/- have been quantified and accordingly Service Tax of Rs. 10,92,681/- is liable to be recovered under this Show Cause Notice, as per calculation given herein below :-

Sr. No.	Year (Period covered)	Taxable Value declared	Rate of Service Tax	Service Tax payable / recoverable (Rs.)
1	2000-01	49,82,250/-	5%	2,49,112/-
2	2001-02	49,82,250/-	5%	2,49,112/-

3	2002-03	49.82,250/-	5%	2,49,112/-
4	2003-04			
(a)	01.04.2003 to 12.05.2003 (42 days)	5,73,300/-*	5%	28,665/-
(b)	13.05.2003 to 04.02.2004 (268 days)	36,58,200/-*	8%	2,92,656/-
(c)	05.02.2004 to 31.03.2004 (55 days)	3,00,300/-* (40% of 7,50,750/-)	8%	24,024/-
TOTAL SERVICE TAX PAYABLE / RECOVERABLE				Rs. 10,92,681/-

WRITTEN SUBMISSION:-

7.1 The Service Provider submitted written reply vide letter dated 13.01.2006 wherein it was inter-alia stated as under :-

7.2 They are owner of only one vehicle which was not a 'tourist vehicle' as provided u/s 2(43) of the Motor Vehicles Act, 1988. The said vehicle was Contract Carriage and was not constructed or adapted and equipped and maintained in accordance with such specification as provided vide Rule 128 of Central Motor Vehicles Rules, 1989. They submitted the copy of the Certificate obtained from the RTO, Bhavnagar showing that the vehicle was not a 'tourist vehicle' since it was not complying with the specification mentioned under Rule 128.

7.3 The Central Government vide clause (g) of Notification No 25/2004-Service Tax dated 10.09.2004 exempted the services provided by 'Tour Operator' other than a Tour Operator engaged in business of operating tours in a Tourist Vehicle covered by the permits granted under Motor Vehicles Act, 1988 or rules made there under in relation to a tour from levy of Service Tax prior to period 10.09.2004 and amended the definition of 'Tour Operator' so as to include a person engaged in the business of planning, scheduling and organizing or arranging tours by any mode of transportation including 'tourist vehicles'.

7.4 The major point involved in this case was whether the services provided by them is taxable service within the ambit of the 'Tour Operator' defined u/s 65 of Chapter-V of the Finance Act, 1994 in the perspective of definitions of 'Tourist Vehicle' and 'Tour Operator'. The Service Provider described the definition of 'Tour', 'Tourist Vehicle', 'Tour Operator' and 'Taxable Service' and stated that following three criteria should be satisfied for the purpose of levy under 'Tour Operator'.

- (i) the person should be engaged in the business of operating tour in a 'tourist vehicle',
- (ii) Tourist Vehicle should be covered by a permit granted under the Motor Vehicles Act, 1988 (59 of 1988) or the rules made there under;
- (iii) Tourist Vehicle should be within the meaning of Section 2(43) of the Motor Vehicles Act, 1988;

Thus, it is important that the vehicle should be 'Tourist Vehicle' as contemplated under Section 2(43) of the Motor Vehicles Act and covered by a permit granted under the Motor Vehicles Act, 1988 or the rules made there under.

This permit need not be a Tourist Permit under the Motor Vehicles Act, 1988. In other words, what is required is not a Tourist Permit but vehicle should be Tourist Vehicle within the meaning of Section 2(43) of the Motor Vehicles Act, 1988 by the Tour Operator in his business.

7.5 The definition of 'Tourist Vehicle' as defined in Section 2(43) of the Motor Vehicles Act, 1988 reads as under :

'Tourist Vehicle' means a contract carriage constructed or adopted and equipped or maintained in accordance with such specifications as may be prescribed in this behalf.

It reveals that a 'tourist vehicle' must be a contract carriage, which should be constructed or adapted and equipped or maintained in accordance with such specification as may be prescribed in this behalf. The specifications of a Tourist Vehicle have been prescribed under Rule 128 of the Central Motor Vehicle Rules, 1989. Thus, any vehicles which answers the description of a tourist Vehicle u/s 2(43) of Motor Vehicle Act, 1988 read with Rule 128 of Central Motor Vehicle Rules, 1989 and used under a contract would become a 'Tourist Vehicle'. Once vehicle become a 'Tourist Vehicle' so long as it is used under any permit under the Motor Vehicle Act, by a person who is engaged in the business of operating tours, then the requirement of Finance Act under taxable service within the scope of Tour Operator would be complete. The Contract Carriage vehicles covered under Service Tax provided constructed or adapted and equipped or maintained in accordance with such specifications specified under Rule 128 of the Central Motor Vehicle Rules, 1989.

7.6 They stated that the Certificates issued by the Registering Authority, Bhavangar in respect of Vehicles owned by them under dispute were produced before the Superintendent of Central Excise which reads as under :-

"Hereby certified that passenger buses owned by the appellant are registered as a Contract Carriage 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 Rules 82 to 85 and 128 framed under Central Motor Vehicles Rules, 1989."

It will be seen from the said Certificate that the said vehicles in dispute are registered as Contract Carriage Vehicles under the Motor Vehicles Act, 1988 but do not cover under the definition of 'Tourist Vehicle' within the meaning of Section 2(43) of the Motor Vehicles Act, 1988 read with Rules 82 to 85 and 128 of Central Motor Vehicles Rules, 1989.

7.7 It was submitted that the department had erroneously held that vehicles though not constructed or adapted and equipped or maintained in accordance with such specifications specified under Rule 128 of the Central Motor Vehicles Rules, 1989 are 'Tourist Vehicle'. In this context, they placed reliance on Para 1, 24 and 36 of the judgement and order of Hon'ble High Court of Madras in case of **Secretary, Federation of Bus Operators' Association of Tamil Nadu Vs. Union of India - 2001 (134) ELT 618 (Madras)**.

7.8 The decision of Shri Pandiyan Travels Vs. CCE, Chennai-II is not correct since it is based on Division Bench judgment in the case of Secretary, Federation of Bus Operators' Association of Tamilnadu, Chennai Vs. Union of India cannot be in contravention. 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 the Service Tax.

7.9 They also submitted that they are transporting passengers in the manner same as State Road Transport Corporation i.e. carrying passengers from one place to another by charging separate fares from each passenger, therefore, not conducting, organizing tour for group of persons by giving on hire the bus as a whole. In this regard, they placed reliance on the decision of Deputy Commissioner, Service Tax & Central Excise, Agra dated 31.03.2004 wherein it was held that though the operator had obtained a permit for contract carriage, the bus was used as a State Carriage for carrying passengers from one place to another on payment of separate fares and such operation of vehicle will not fall within the definition of 'Tour Operator'.

7.10 They are not aware regarding the amount of taxable value of Rs. 1,99,29,000/- has been derived. They are the owner of only one vehicle and otherwise working as a booking agent in relation to the tours organized by other operators. Such activity cannot be included in the definition of a Tour Operator. No material has been provided regarding fixing of taxable value for the purpose of Service Tax.

7.11 The Service Provider placed reliance on order of Commissioner (Appeals) of Baroda in case of M/s. Ghanshyam Travels Vs Deputy Commissioner (Service Tax), Central Excise Vadodara wherein it was stated that the vehicles owned by them do not fall within the meaning and scope of 'Tourist Vehicle' as defined u/s 65 of the Finance Act, 1994 and therefore the services provided by them do not fall within the meaning of 'Tour Operator'. They requested that the notice under reference may be filed. The Service Provider submitted further written submission dated 17.01.2006 wherein reiterated earlier submission dated 13.01.2006.

PERSONAL HEARING :-

8. The Personal Hearing in the matter was held on 10.01.2012 wherein Shri R. P. Langalia, Chartered Accountant appeared for personal hearing and submitted written submission dated 10.01.2012 and reiterated the same. He further submitted that the Service Tax demand in the Show Cause Notice needs to be dropped since CBEC has already exempted the Service Tax on Tour Operator Service with retrospective effect and accordingly requested to drop the proceedings initiated by the Show Cause Notice.

FURTHER WRITTEN SUBMISSION :-

9 The Service Provider submitted written submission dated 10.01.2012 during the course of personal hearing wherein reiterated their earlier submissions. Apart from this, they submitted that the Central Government vide Notification No. 20/2009 has exempted the taxable service referred to in sub-clause (n) of clause (105) of Section 65 of the Finance Act, whereby service provided or to be provided to any person, by a tour operator having contract carriage or tourist vehicle with a permit for inter-state or intra state transportation of passengers, excluding tourism, conducted tours, charter or hire service from the whole of the service tax leviable thereon under Section 66 of the said Finance Act, 1994. Further, vide Section 75 of the Finance Act, 2011; exemption under the said Notification has been given with retrospective effect from 01.04.2000 and hence validity of exemption comes into force from 01.04.2000. In context of the above

both notifications, none of the allegations levelled against him are sustainable in law. When there is no liability to pay service tax in respect of demands raised in Show Cause Notice, no amount of interest u/s 75 or penalty under section 76, 77 & 78 can be levied. They prayed that there is no case for levying service tax, interest and penalty and proceedings initiated may please be dropped.

DISCUSSION & FINDINGS :-

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

11. I find that the issue involved in this Show Cause Notice is whether the Service Provider is covered within the ambit of 'Tour Operator' as defined under Section 65(52)/ 65(115) of the Finance Act, 1994 during the relevant period and if so whether Service Tax of Rs. 10,92,681/- calculated at appropriate rate on taxable value of Rs. 1,99,29,000/- received towards services rendered during the period from 01.04.2000 to 31.03.2004 is payable by the Service Provider.

12. The said definition of 'Tour Operator' relevant for the period from 01.04.2000 to 31.03.2004 covered by the SCN is '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. Thus, 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 and 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.

13. 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 only one vehicle owned/ used 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 Vehicles Rules, 1989 and certificates issued by the Registering Authority (Regional Transport Officer) also proves this fact. The Tour Operators, other than those engaged in business of operating tours in a tourist vehicle covered by permit granted under the Motor Vehicles Act, 1988 or rules made thereunder in relation to a Tour, are exempted from levy of Service Tax for the period prior to 10.09.2004 vide Notification No. 25/2004-Service Tax dated 10.09.2004.

14. The Service Provider has submitted the copies of certificates issued by the Regional Transport Authority, Bhavnagar wherein it has been certified as follows :-

"Hereby certified that passenger Omni Bus No. GJ-8U-9944 owned by Shri S. S. Gohil c/o M/s. Sitaram Travels Agency is registered as a Contract Carriage (PCOP) Permit No. 4-BN-1115 for the period from 21.06.2001 to 20.06.2006 which is not covered as Tourist Vehicle"

15.1 The Hon'ble CESTAT vide Order No. A/328-329/WZB/AHD/2011 dated 18.02.2011 in the case of Commissioner of Central Excise, Bhavnagar V/s. Gujarat Travels [2011 (22) S.T.R. 558 (Tri. – Ahmd.)] has held as follows :-

"4. It is seen that during the course of proceedings, the respondents also produced copies of the certificates issued by the Regional Transport Office in respect of the vehicles being used by them certifying that the same are not tourist vehicles, since the same do not comply with the specifications mentioned under Rule 128. The said certificate issued by the registered authority stands reproduced by Commissioner (Appeals) in his impugned order and is being reproduced below for ready reference :-

"Hereby certificate that passenger bus no. _____ is registered as a Contract Carriage 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 Act, 1989."

5. The appellate authority has held that in as much as the vehicles used by the respondents were not tourist vehicles, they cannot be held to be covered within the ambit of the term Tour Operators, as defined in Section 65(115) of the Finance Act, 1994, prior to 10.09.2004, when the ambit was expanded and made plenary to include "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 Motor Vehicles Act, 1988 or the Rules made there under. Accordingly, by taking note of certificate issued by the Regional Transport Office and the law declared by the Hon'ble Madras High Court in the above referred case of Secretary, Federation of Bus Operators Association of Tamilnadu, Chennai, he concluded that the certificate being provided by the respondents were not covered by the Tour Operator services. The said order of Commissioner (Appeals) is impugned before us.

6. On going through the grounds of appeal, we find that the gist of the same is that the vehicles being used by the respondents were covered by a permit given by the transport authorities and as such, they have to be treated as Tour Operators. However, we find that the certificate given by the Regional Transport Office, as produced above, who is the proper authority to give decision on the said dispute, is clear that the vehicle being used by the respondents cannot be held to be tourist vehicles. The appellate authority has rightly relied upon the same. The Revenue has nowhere disputed the applicability of the Hon'ble Madras High Court judgment. As such, we find no reason to interfere in the order of the Commissioner (Appeals). Revenue's appeal is accordingly, rejected."

15.2 The aforesaid order of the Hon'ble CESTAT has been accepted by the department as communicated vide letter F.No. V/2-11/Misc/RRA/2010 dated 02.06.2011 of the Deputy Commissioner, Central Excise (RRA), Bhavnagar.

15.3 I find that the ratio of aforesaid judgment of Hon'ble Madras High Court and decision of Hon'ble CESTAT is squarely applicable in the present case. The Service Provider has submitted certificates given by the Regional Transport

Officer, Bhavnagar certifying that vehicles being used by the Service Provider cannot be held to be tourist vehicles.

15.4 In view of the above. I hold that as the vehicles used by the Service Provider were not tourist vehicles, they were not covered within the ambit of the term 'Tour Operator' as defined in the Act, prior to 10.09.2004. Therefore, the Service Provider is not liable to pay Service Tax under the category of 'Tour Operator Service' during the period covered by the SCN.

16. I also find that the taxable services referred to in section 65(105)(n) of the Act, provided or to be provided to any person, by a tour operator having a contract carriage permit for inter-state or intrastate transportation of passengers, excluding tourism, conducted tours, charter or hire service, have been exempted vide Notification No. 20/2009-S.T. dated 07.07.2009. The said Notification has been given retrospective effect from 01.04.2000 vide Section 75 of the Finance Act, 2011.

17. In view of the foregoing, I hold that the Service Provider do not fall within the ambit of 'Tour Operator' and Service Tax under the category of 'Tour Operator Service' is not leviable on the value of Rs. 1,99,29,000/- received towards services provided by them during the period from 01.04.2000 to 31.03.2004. As the Service Tax is not leviable, the question of recovery of interest under Section 75 of the Act and imposition of penalty under Section 76, 77 and 78 of the Act does not arise.

18. I, therefore, pass the following order.

ORDER

I drop the proceedings initiated against M/s. Sitaram Travels, Bhavnagar vide Show Cause Notice No. BVN/STAX/CITY/SUMMONS/TOU-025/03-04 dated 30.03.2005 issued by the Assistant Commissioner of Central Excise (Service Tax Division), Bhavnagar.



**(Imamuddin Ahmed)
COMMISSIONER**

BY REDG. POST A.D.

F.No. V/15-01/STC(Adj.)/TOU/2005-06

Date : 11/01/2012.

To,
M/s. Sitaram Travels,
(Prop. Ranjitsinh Gohil)
Near Madhav Jyot,
Kalanala,
Bhavnagar.

Copy to :-

1. The Commissioner, Central Excise, Bhavnagar (RRA Section).
2. The Assistant Commissioner, Service Tax Division, Bhavnagar.
3. The Superintendent, Service Tax Range, AR-Bhavnagar.
4. Guard File.

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