


S. Tax.

	Govt. of India Office of the Commissioner of Central Excise 'Siddhi Sadan', Plot No. 6776/B-1, Narayan Upadhyay Road, Off Waghawadi Road, Bhavnagar
	Ph.No. : 0278- 2523627 Fax No.: 0278-2513086

By R.P.A.D.

F. No. V/15-40/Dem-ST/HQ/2010-11.

Date of Order: 13/01/2012

Date of Issue: 06/02/2012

Passed by

IMAMUDDIN AHMED
Joint Commissioner
Central Excise
Bhavnagar

Order-in-Original No: 11 / 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. Mahashakti Tours & Travels Pvt. Ltd.,
Jayshree Talkies Road,
Kalwa Chowk,
Junagadh - 362 001.

Subject: Show Cause Notice Number No. V/15-40/Dem-ST/HQ/2010-11 Dated 21.07.2011 issued to M/s. Mahashakti Tours & Travels Pvt. Lt., Junagadh demanding Service Tax of Rs.11,45,188/-.

BRIEF FACTS OF THE CASE

1. M/s. Mahashakti Tours & Travles Pvt. Ltd., Jayshree Talkies Road, Kalwa Chowk, Junagadh (herein after referred to as "the Noticee") have been engaged in the business of Travel Agent and are registered under the category of Travel Agent's Service with the Department.

2. During the course of audit of the records of the Noticee by the Audit Wing of Central Excise, H.Q. Office, Bhavnagar it was noticed that during the period from 2006-07 to 2008-09, the Noticee earned income through operating bus and car for tours. Whereas, Section 65 (105) (n) defines 'taxable service' as any service provided or to be provided "to any person, by a tour operator in relation to a tour". Therefore, it appeared that this activity of the Noticee is taxable under the category of Tour Operator's Service under Section 65 (105) (n) of the Finance Act, 1994 (herein after referred to as "the Act"). The Noticee has separately shown the income as 'Bus Income' & 'Car income' in their records. In terms of Notification No. 1/2006-Service Tax dated 01.03.2006, the income earned through operating bus and car for tours is exempted from so much of the service tax leviable thereon under Section 66 of the Act, as is in excess of the service tax calculated on a value equivalent to 40% of taxable value. Thus, the Noticee is eligible for abatement of 60% on taxable value earned through operating bus and car for tours for the purpose of service tax payment. The income earned from Bus is arrived at Rs.28,03,107/- and after abatement its taxable value is Rs.11,21,243/-. Similarly, income earned from Car is arrived at Rs.3,59,883/- and after abatement its taxable value is Rs.1,43,953/-.

3. Whereas during the course of audit it was also noticed that the Noticee is also engaged in business of Booking Agent and received commission on the tickets booked for various tour operators. Further, the Noticee has been authorized by M/s. Mahasagar Travels Ltd., Junagadh as their booking agent for Junagadh and its adjoining areas and for this purpose the Noticee has nominated certain persons for booking tickets for the areas outside Junagadh and pays commission to them.

4. Further, it appeared that the Noticee did not discharge service tax liability on the entire amount of commission received from the service recipients viz. tour operators and the amount of the commission paid to the booking agents nominated by the Noticee is discounted for the purpose of levy of service tax. The method adopted by the Noticee for arriving at the value of the taxable service is not consistent with the provision of Section 67 of the Act which is reproduced below for ready reference.

Valuation of taxable services for charging Service tax

(1) Subject to the provisions of this Chapter, service tax chargeable on any taxable service with reference to its value shall,—

(i) in a case where the provision of service is for a consideration in money, be the gross amount charged by the service provider for such service provided or to be provided by him;

(ii) in a case where the provision of service is for a consideration not wholly or partly consisting of money, be such amount in money, with the addition of service tax charged, is equivalent to the consideration;

(iii) in a case where the provision of service is for a consideration which is not ascertainable, be the amount as may be determined in the prescribed manner.

(2) Where the gross amount charged by a service provider, for the service provided or to be provided is inclusive of service tax payable, the value of such taxable service shall be such amount as, with the addition of tax payable, is equal to the gross amount charged.

(3) The gross amount charged for the taxable service shall include any amount received towards the taxable service before, during or after provision of such service.

(4) Subject to the provisions of sub-sections (1), (2) and (3), the value shall be determined in such manner as may be prescribed.

Explanation.—For the purposes of this section,—

- (a) *“consideration” includes any amount that is payable for the taxable services provided or to be provided;*
- (b) *“money” includes any currency, cheque, promissory note, letter of credit, draft, pay order, travellers cheque, money order, postal remittance and other similar instruments but does not include currency that is held for its numismatic value;*
- (c) *“gross amount charged” includes payment by cheque, credit card, deduction from account and any form of payment by issue of credit notes or debit notes and book adjustment, and any amount credited or debited, as the case may be, to any account, whether called “Suspense account” or by any other name, in the books of account of a person liable to pay service tax, where the transaction of taxable service is with any associated enterprise.*

Thus, it appeared that Section 67 of the Act requires that the said value shall be the gross amount charged by the service provider and no deduction of any expenses incurred by the service provider is allowable. Accordingly, Service Tax short levied on account of undervaluation of the taxable service provided during the period from April-2006 to August-2009 aggregated to Rs.9,91,192/-, out of which, an amount of Rs.1,23,802/- has been paid by the Noticee.

5. Further, in the subject case it appeared that the Noticee have failed to discharge the service tax liability on the receipt of the payments as ‘Bus Income’ & ‘Car income’ and amount of commission received for services as Booking Agent provided to M/s. Mahasagar Travels Ltd., Junagadh by reason of suppression of facts from the department and contravened the provisions of the Act and Service Tax Rules 1994 (herein after referred to as “the Rules”) with intent to evade the payment of service tax, in as much as the Noticee never disclosed to the department the fact that they were providing service as ‘tour operator’ and has received consideration towards provision of such service, and also the fact that they were not discharging the Service Tax on the entire amount of consideration/commission received from the Service Provider. It also appeared that short levy of tax would have gone undetected but for the Audit of the records of the Noticee.

Section 73(1) of the Act which reproduced below provides for recovery of tax not levied or paid.

73. Recovery of Service tax not levied or paid or short levied or short paid or erroneously refunded – (1) *Where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the Central Excise Officer may, within one year from the relevant date, serve notice on the person chargeable with the service tax which has not been levied or paid or which has been short-levied or short-paid or the person to whom such tax refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice :*

Provided that where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of—

- (a) *fraud; or*
- (b) *collusion; or*
- (c) *wilful mis-statement; or*
- (d) *suppression of facts; or*
- (e) *contravention of any of the provisions of this Chapter or of the rules made there under with intent to evade payment of service tax,*

by the person chargeable with the service tax or his agent, the provisions of this sub-section shall have effect, as if, for the words "one year", the words "five years" had been substituted.

Explanation. — Where the service of the notice is stayed by an order of a court, the period of such stay shall be excluded in computing the aforesaid period of one year or five years, as the case may be.

It appeared from above that for the purpose of recovery of tax not levied and not paid extended period contemplated under proviso to Section 73(1) is invokeable.

6. Further, it appeared that by acting in the manner the Noticee has contravened the following provisions of the Act and the Rules in the manner described as under:

In terms of Section 68 – (1) Every person providing taxable service to any person shall pay service tax at the rate specified in section 66 in such manner and within such period as may be prescribed and Rule 6 of the Rules provides that—(1) The service tax shall be paid to the credit of the Central Government,-

(i) by the 6th day of the month, if the duty is deposited electronically through internet

banking; and

(ii) by the 5th day of the month, in any other case,

immediately following the calendar month in which the service is deemed to be provided as per the rules framed in this regard:

Provided that where the assessee is an individual or proprietary firm or partnership firm, the service tax shall be paid to the credit of the Central Government by the 6th day of the month if the duty is deposited electronically through internet banking, or in any other case, the 5th day of the month, as the case may be, immediately following the quarter in which the service is deemed to be provided as per the rules framed in this regard:

Since, the noticee failed to pay Service Tax, at the appropriate rate they have contravened Section 68 of the Act read with Rule 6 of the Rules.

In terms of Section 70 -- (1) Every person liable to pay the service tax shall himself assess the tax due on the services provided by him and shall furnish to the Superintendent of Central Excise, a return in such form and in such manner and at such frequency and with such late fee not exceeding two thousand rupees, for delayed furnishing of return, as may be prescribed and Rule 7 of the Rules provides that—(1) Every assessee shall submit a half-yearly return in Form 'ST-3' or 'ST-3A', as the case may be, along with copy of the Form TR-6, in triplicate for the months covered in the half-yearly return.

(2) Every assessee shall submit the half yearly return by the 25th of the month following the particular half-year.

Since, the noticee failed to assess the Service Tax and prescribed Returns in form ST-3 in respect of such services they have contravened Section 70 of the Act read with Rule 7 of the Rules.

7. In view of above, it appeared that the Noticee is liable to pay interest at the appropriate rate and for penal action under the following provisions of the Act and the Rules in the manner described as under.

(i) *In terms of Section 75 of the Act – Every person, liable to pay the tax in accordance with the provisions of section 68 or rules made thereunder, who fails to credit the tax or any part thereof to the account of the Central Government within the period prescribed, shall pay simple interest at such rate not below ten per cent and not exceeding thirty-six per cent per annum as is for the time being fixed by the Central Government, by Notification in the Official Gazette for the period by which such crediting of the tax or any part thereof is delayed.*

Provided that in the case of a service provider, whose value of taxable services provided in a financial year does not exceed sixty lakh rupees during any of the financial years covered by the notice or during the last preceding financial year, as the case may be, such rate of interest, shall be reduced by three percent per annum.

Since, the noticee failed to pay Service Tax; they are liable to pay interest at the appropriate rate under Section 75 of the Act.

In terms of Section 76 of the Act -- Any person, liable to pay service tax in accordance with the provisions of section 68 or the rules made under this Chapter, who fails to pay such tax, shall pay, in addition to such tax and the interest on that tax amount in accordance with the provisions of section 75, a penalty which shall not be less than two hundred rupees for every day during which such failure continues or at the rate of two per cent. of such tax, per month, whichever is higher, starting with the first day after the due date till the date of actual payment of the outstanding amount of service tax:

Provided that the total amount of the penalty payable in terms of this section shall not exceed the service tax payable.

Since, the noticee failed to pay Service Tax, at the appropriate rate they are liable for penalty under Section 76 of the Act.

In terms of Section 77 of the Act -- Any person, who contravenes any of the provisions of Chapter V or any rules made thereunder for which no penalty is separately provided in this Chapter, shall be liable to a penalty which may extend to ten thousand rupees.

Since, the noticee failed to assess the Service Tax and prescribed Returns in form ST-3 in respect of such services they are liable for penalty under Section 77 of the Act.

In terms of Section 78 of the Act -- Where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, by reason of

- (a) fraud; or*
- (b) collusion; or*
- (c) wilful mis-statement; or*
- (d) suppression of facts; or*
- (e) contravention of any of the provisions of Chapter V or of the rules made thereunder with intent to evade payment of service tax,*

the person, liable to pay such service tax or erroneous refund, as determined under subsection (2) of section 73, shall also be liable to pay a penalty, in addition to such service tax and interest thereon, if any, payable by him, which shall be equal to the amount of service tax so not levied or paid or short-levied or short-paid or erroneously refunded.

Since, the noticee failed to discharge the service tax liability by reason of suppression of facts from the department with intent to evade the payment of service tax they are liable for penalty under Section 78 of the Act.

8. Therefore, M/s. Mahashakti Tours & Travles Pvt. Ltd., Jayshree Talkies Road, Kalwa Chowk, Junagadh were called upon to Show Cause to the Additional Commissioner, Central Excise & Service Tax, Plot No. 6776/B-1, "Siddhi Sadan" Building, Narayan Upadhyay Marg, Bhavnagar -364001 within 30 days of receipt of this Notice as to why:-

- (i) Demand of Service Tax amounting to Rs.9,91,192/- and Rs.1,53,996/- aggregating to Rs. 11,45,188/- should not be confirmed under Section 73 (1) of the Finance Act, 1994 and the amount of Rs.44,948/- and Rs.1,23,802/- aggregating to Rs. 1,68,750/- paid by the Noticee should not be appropriated towards the total service tax liability.
- (ii) Penalty should not be imposed upon them under Section 76, 77, 78 of the Finance Act, 1994.
- (iii) Interest at the appropriate rate should not be recovered in terms of Section 75 of the Finance act, 1994.

Defense Reply

9. The Noticee filed Defense Reply vide their letter dated 09.12.2011 wherein they have submitted that in relation to the demand of service tax on "bus income" & "car income" under "Tour Operator" service, vide Not. No. 20/2009-S.T., dated 07.07.2009, Tour Operator service is exempted from payment of service tax. The expression 'provided or to be provided to any person' contained in the said notification makes it clear that the exemption is having retrospective effect and is applicable to the service already provided. Therefore, it is submitted that demand of service tax amounting to Rs.153996/- on bus income and car income for the period from 2006-07 to 2008-09 as well as interest payable thereon is not sustainable in the eyes of law.

10. In relation to the demand of Service Tax on the income received on account of booking of tickets for M/s Mahasagar Travels Ltd., it is mentioned in the show cause notice that they did not discharge service tax liability on the entire amount of commission received from the service recipient i.e, tour operator and instead, for the purpose of paying service tax, they had deducted the commission paid to the booking agents nominated by the noticee. The SCN relies on Section 67 of the Finance Act, 1994 which contains the criteria for determination of the value of the taxable service. In this regard, it is submitted that as per the memorandum of Understanding dated 28.03.2006 entered between them and M/s Mahasagar Travels Ltd., (MTL), the noticee have been appointed by M/s. Mahasagar Travels Ltd. to act as booking agent for Junagadh District. A copy of the said MoU is enclosed herewith. As per condition No. 6 of the said MoU, they shall earn commission @ 15% of the booking solely done by them. Further, the MoU provides for appointment of sub agents by them with the approval of MTL. As per condition No.7 of the MoU, if the booking is done by the sub-agent, the commission that would be paid to them would be only 5% for managing the booking of sub-agent and the booking agent shall receive the lion share of commission @10%.

11. They further submitted that there is no dispute that they have regularly paid ST applicable on the commission @ 15% on booking solely done by them as well as commission @5% earned by them on the tickets booked by the sub-agents. However, the Department has issued the SCN on the ground that they are required to pay Service Tax on the total commission of 15% (which includes 10% received by the sub agents) and not 5% that they have actually received on the tickets booked by the sub-agents. For this purpose, the SCN relies on the provisions of Section 67 of the Finance Act, 1994.

12. The notice further submitted that the SCN is mis- directed so far as demand of Service Tax from them on the commission received by the sub-agent is concerned. They submitted that the provisions of Section 67 are qua provision of service, which, in the case is the booking of tickets by the sub-agents. Consequently, the provider of service tax in respect of the tickets booked by the sub- agents is the sub- agent and not the notice themselves. Therefore, service tax liability is of sub agent, who actually booked the tickets and thereby, provided the taxable service. They relied upon Circular No. 138/7/2011-ST dated 06.05.2011, wherein, it is clarified that a sub-contractor is essentially a taxable service provider. Thus the Assessee contended that they are not required to pay service tax for the commission received by the Sub-contractor.

13. The noticee explained the procedure of ticket booking and money collection by the sub agent as follows; The sub agent books the ticket and keeps his commission @ 10% and

pay the remaining amount to the Noticee which is 90% of the original amount of booking done by the sub agent. The noticee then keeps his commission @5% of the original amount and pass on the remaining amount of 85% to MTL. They interalia stated that they had done appointment of sub agent under the aegis of MTL and the cost of expenditure of the sub-agent was born by MTL. The noticee protested against inclusion of commission@ 10% into the calculation of their service Tax liability, by applying the provisions of Rule 5(2) of the Service Tax (Determination of Value) Rules, 2006. Thus, they submitted that demand of service tax on the commission earned by the sub-agents (which was already deducted by them from the fare collected from the passengers at the time of booking) and which, in any case, is acknowledged in condition No. 7 of the MoU as separate from the commission @5% received by them.

14. They submitted that they have paid ST amounting to Rs.44948/- and interest of Rs.5380/- as interest payable thereon in respect of "car income". The noticee said that the above amount is in excess of Rs.17573/- demanded from them and Service Tax on car income may be adjusted and the balance amount may be refunded. They further stated that as they have paid the above amount before the issuance of the SCN, they are not liable for any penalty on this account, as provided in Rule 73 (3) read with Explanation 2 thereto, of the Finance Act, 1994.

15. The Noticee said that the issue whether service tax is required to be paid by the booking agent even on the amount of commission received by the sub-agent for the taxable service rendered by the said sub agent involves complex interpretation of the law. Therefore, in the facts and circumstances where they were formed a bona fide belief that they were not required to pay Service Tax on the service provided by the sub-agent nor had they collected any Service Tax from the service recipient on this account, they may be exonerated from the penal action by applying the provisions of Section 80 of the Finance Act, 1994.

16. In view of the above they requested Personal hearing to be given to them and to withdraw the SCN.

17. They filed further defence reply dated 12.01.2012 wherein they have re-iterated their earlier submissions and that "Tour Operator" service is exempted from payment of service tax vide Notification No. 20/2009-S.T., dated 07.07.2009 with retrospective effect and hence, demand of service tax amounting to Rs.153996/- is liable to be quashed and set aside.

18. They reiterated that the commission on which Service Tax of Rs.991192/- is demanded from them was directly received by the sub agent who had actually provided the taxable service of ticket booking. They interalia stated that as they have not received the amount of 10% on which service tax is payable so they are not liable to pay tax on that amount.

19. They relied upon the following circulars of CBEC and the judicial pronouncements to say that the demand is time barred,

- (i) CBEC Circular No. 268/102/96-CX, dated 14-11-1996.
- (ii) H.M.M. Ltd, 1995 (96) ELT 497 (S.C.)
- (iii) Godrej Foods Ltd. v/s UoI, 1993 (68) ELT 28 (M.P.)
- (iv) Ess Ess Engineering, 2010 (20) STR 669 (T)
- (v) Sands Hotel Pvt. Ltd., 2009 (16) STR 329 (T)

20. They further submitted that the demand of S.T. is not sustainable on merits and on limitation and they are not liable for penal action, Further, even if their arguments are not accepted, their liability is required to be computed by applying cum duty concept by applying the decision of Hon. Supreme Court in the case of M/S Maruti Udyog Ltd. 2002(141) ELT 3 (SC).

Personal Hearing

21. Personal Hearing was fixed on 15.11.2011 and on Noticee's request, re-fixed on 15/16.12.2011 and again on 11/12.01.2012 and the same was attended by their Advocate and

Authorised representative and filed additional submissions dated 12.01.2012 and re-iterated the written submissions and requested to decide the case accordingly.

Discussions and findings

22. I have carefully gone through the records of the case. I find that the demand was raised against the noticee on the "Car Income" and "Bus Income" under the taxable category of "tour operator" and under "travel agent service" on the gross amount received by them.

23. Regarding the demand under tour operator, the noticee has claimed that the said service is exempted vide Notification No. 20/2009-S.T., dated 07.07.2009. I find that Notifi. No. 20/2009-S.T., dated 07.07.2009 has exempted "Tour Operator" service provided or to be provided by a tour operator having a contract carriage permit for inter state or intra state transportation of passengers, excluding tourism, conducted tours, charter or hire service from the whole of service tax. Further, the Finance Act 2011 has given the retrospective effect to the said exemption i.e. it was made effective from the year 2000. I find that there is no absolute exemption in the said Notification and the noticee has not clarified as to how and why the said exemption is applied in their case. They have failed to explain that they are having contract carriage permit for inter state or intra state transportation of passengers, excluding tourism, conducted tours, charter or hire service and simply mentioning a Notification is not sufficient. I find that the onus is on the claimant to prove that they have rightly availed an exemption and in this case, they failed to do so. I rely on the following judgments of Hon. Supreme Court :

1. 2009 (236) E.L.T. 625 (S.C.) in the case of *COMMISSIONER OF C. EX. & CUS., INDORE Versus PARENTERAL DRUGS (I) LTD. Wherein the Hon'ble Apex Court has held that "Exemption - Burden of proof - Exemption notifications to be interpreted strictly - Burden on assessee to prove that the item falls within four corners of exemption notification - Section 5A of Central Excise Act, 1944."*
2. 2009 (234) E.L.T. 389 (S.C.) in the case of *HOTEL LEELA VENTURE LTD. Versus COMMISSIONER OF CUS. (GEN.), MUMBAI "Burden of proof - Exemption notification - Burden on importer to prove satisfaction of terms and conditions of exemption notification - Section 25 of Customs Act, 1962. [para 2]"*

24. Therefore, I find that the benefit of exemption notification is not available to them and the demand of service tax on bus and car income for Rs.153,996/- is required to be confirmed under the taxable service of Tour Operator and the amount already paid by them is required to be appropriated.

25. I find that the noticee is an agent of M/S Mahasagar Travels Ltd. and is getting commission from them. The Noticee has further appointed sub-agents who also get certain commission. The booking of passengers is done by both the noticee and their sub-agents and regarding the direct booking by the noticee, they are getting 15% of booking amount as their commission and there is no dispute regarding the taxability of said commission income and the noticee is registered under "travel agent service" and paying S.T. on the said income. The contention is that the service tax is not discharged on the amount involved in the booking made through the sub agents. The noticee's claim is that they are receiving 5% of booking amount as commission and paying S.T. on that and 10% amount is retained by sub-agents and they are not liable to pay S.T. on that 10% amount.

26. I find that the transaction is that the principal (M/S Mahasagar) is paying 15% to the agent (noticee) and he is paying 10% to the sub agents if the booking is made by them. In practice, since the amount is collected by the sub agent himself, he keeps his 10% commission of the booking amount and remits the 90% of the proceeds. Further, the agent (Noticee) keeps his 5% commission and remits 85% amount to the principal. I find that service tax is required to be paid on the gross value of taxable service as per Section 67 of the Finance Act 1994 and in this case, the gross value for the taxable amount for the noticee is 15% of the booking amount as commission and not the 5% as claimed by them. 5% is only their income and it is not the gross amount. How much they are paying further to sub agents

is their expenditure and it is immaterial for the computation of their taxable liability. It is not the case, as explained by the noticee, of demand of S.T. on the amount of or on behalf of sub-agents from the noticee. However, if the sub-agents pay the S.T. on their taxable service, the said amount can be input service for the noticee and Cenvat credit is available, subject to prescribed terms and conditions.

27. Therefore, the demand of service tax of Rs.9,91,192/- is required to be confirmed and the amount already paid by them is required to be appropriated.

28. I find that the noticee has placed reliance on some of the judgments that the demand is hit by limitation of time bar. I examine these vis-à-vis the facts and circumstances of the case.

- (i) CBEC Circular No. 268/102/96-CX, dated 14-11-1996.
- (ii) H.M.M. Ltd, 1995 (96) ELT 497 (S.C.)
- (iii) Godrej Foods Ltd. v/s UoI, 1993 (68) ELT 28 (M.P.)
- (iv) Ess Ess Engineering, 2010 (20) STR 669 (T)
- (v) Sands Hotel Pvt. Ltd., 2009 (16) STR 329 (T)

29. I find that the above rulings say that the grounds for invoking extended period should be specifically mentioned in the SCN itself and that the extended period cannot be invoked in certain circumstances. I find that there is clear allegation in the SCN itself that the suppression of taxable value and resultant short/non-payment of service tax was never made known to the Department by the Noticee and it was only after the Departmental Audit was conducted, said suppression came to surface and that short levy of tax would have gone undetected but for the Audit of the records of the Noticee. Therefore, I find that it is an appropriate case for invoking of extended period as envisaged in the Section 73 (1) of the Finance Act 1994. Therefore, I find that the cited judgments are followed.

30. Further, I find that *since* the noticee failed to pay Service Tax, at the appropriate rate they have contravened Section 68 of the Act read with Rule 6 of the Service Tax Rules 1994. I further find that *since* the noticee failed to assess the Service Tax and prescribed Returns in form ST-3 in respect of such services they have contravened Section 70 of the Act read with Rule 7 of the Rules.

31. I find that the noticee failed to pay Service Tax, therefore, they are liable to pay interest at the appropriate rate under Section 75 of the Act.

32. I further find that the noticee failed to pay Service Tax, at the appropriate rate they are liable for penalty under Section 76 of the Act.

33. I further find that the noticee failed to assess the Service Tax and prescribed Returns in form ST-3 in respect of such services they are liable for penalty under Section 77(2) of the Act.

34. I further find that the noticee failed to discharge the service tax liability by reason of suppression of facts from the department with intent to evade the payment of service tax they are liable for penalty under Section 78 of the Act.

35. Regarding the contention of the noticee to consider the value as cum duty and thereafter their liability should be calculated, I find that they were paying service tax already and accordingly the demand of service tax was made in the SCN. Further, I find that the benefit of cum-tax-price should not be allowed in Central Excise and Service Tax cases involving the elements of fraud, collusion, wilful mis-statement, suppression of facts or contravention of any of the provisions of the Act or Rules made thereunder with intent to evade payment of duty. In this regard, I rely on the judgement of the Hon'ble Supreme Court in the case of M/s. Amrit Agro Industries Ltd Vs. CCE, Ghaziabad [2007 (210) ELT 183 (SC)] and the decision of Hon'ble CESTAT, Principal Bench, New Delhi in the case of Dhillon Kool Drinks and Beverages Ltd Vs. CCE, Jalandhar [2011 (263) ELT 241 (Tri. Del)]. Since, the Noticee has evaded the payment of Service Tax by way of suppression of

facts and with intent to evade payment of duty, as discussed hereinabove, is not entitled to benefit of cum-tax-value.

36. I view of the above, I pass the following Order :

ORDER

- (i) I confirm the demand of Service Tax amounting to Rs.9,91,192/- and Rs.1,53,996/- aggregating to Rs.11,45,188/- under Section 73 (2) of the Finance Act, 1994 and the amount of Rs.44,948/- and Rs.1,23,802/- aggregating to Rs. 1,68,750/- paid by the Noticee shall be appropriated towards the total service tax liability.
- (ii) I confirm the demand of Interest at the appropriate rate in terms of Section 75 of the Finance act, 1994.
- (iii) I impose penalty of Rs.200/- (Rupees two hundred only) per day or 2 (two) percent per month whichever is higher, under Section 76 of the Finance Act, 1994 for failure to 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 Rules, during the period upto 10.05.2008, provided that the total amount of penalty payable in terms of this account shall not exceed the service tax payable upto 10.05.2008.
- (iv) I impose penalty of Rs.5,000/- (Rupees Five Thousand only) under Section 77(2) of the Finance Act, 1994 upon Noticee, for failure to file prescribed return, under section 70 of the Finance Act, 1994 read with Rule 7 of the Rules.
- (v) I impose penalty of Rs. Rs.11,45,188/- (Rupees Eleven lakh Forty Five thousand One Hundred Eighty Eight only) under Section 78 of the Finance Act, 1994. If the amount as determined under serial number (i) above is paid within 30 days from the receipt of the order alongwith the interest payable then as per proviso to section 78 of the Finance Act, 1994, the penalty will be only 25% of the Service Tax determined at serial number (i) above. The benefit of reduced penalty shall be available only if the amount of penalty so determined has also been paid within the period of thirty days from the receipt of this order.



(Imamuddin Ahmad)
JOINT COMMISSIONER
Central Excise, Bhavnagar

F. No. V/15-40/Dem-ST/HQ/2010-11
By Registered Post A. D.

Date: - 06.02.2012

To,
M/s. Mahashakti Tours & Travles Pvt Ltd.,
Jayshree Talkies Road,
Kalwa Chowk,
Junagadh-362001.

Copy to: -

1. The Commissioner, Central Excise, Bhavnagar (RRA Section),
2. The Assistant Commissioner (Recovery), Central Excise, HQ Office, Bhavnagar
3. The Assistant Commissioner, Service Tax Division, Bhavnagar.
4. The Assistant Commissioner (Audit), Central Excise, HQ Office, Bhavnagar.
5. The Superintendent, Service Tax Range, Junagadh.
6. Guard File.