FAX : 0532-2400149 REGISTERED / AD

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
38,MG Marg Civil Lines,Old Red Building,Allahabad-211001
CUSTOMS APPEAL BRANCH

Dated: 20/06/2016

To

Appellant as per address in table below

Respondent as per address in table below

Final Order No. ST/A/70274-70276/2016-CU[DB] dated 01/06/2016

I am directed to transmit herewith a certified copy of order passed by the Tribunal under section 01(5) of the **Finance Act, 1994 relating to Service Tax Act, 1994.**

Asstt. Registrar

Application	Appeal	Name and Address of Appellant
1	ST/50752/2015 &ST/51100/2015	VISHNU SHREE ENTERPRISES 1G-2, SHYAM SEVA MANDAL ROAD, RENUSAGAR COLNY, P.O. RENUSAGAR, SONEBHADRA,UP 231218
ST/MISC/51242/2014, ST/MISC/51359/2015	ST/59670/2013	

Name and Address of Respondent

2 C.C. & C.E. & S.T.-ALLAHABAD
38,,M G MARG,,CIVIL LINES,
ALLAHABAD,
UTTAR PRADESH-211001

Other Appellants and Respondents as per Annexure

Copy To

3Advocate(s) / Consultant(s):

K. S. Gupta,Consultant
A-97, ANAND VIHAR,
VIKAS MARG EXTENSION,
DELHI

4. R. K. Tewari
B-67, FLATTED FACTORY COMPLEX,
OKHLA PHASE-III,
NEW DELHI,110020

5 Bar Association, CESTAT, ALLAHABAD

6 Director Publications, Customs, Excise, I.P. Estate, Delhi

7 M/s Centax Publications Pvt. Ltd., 1512-B, Bhishm Pitamah Marg, New Delhi-3

8 Company Law Institute of India Pvt. Ltd., No.2 (old no.36), Vaithyaram Street, T. Nagar, Chennai-17

9 Taxmann Allied Service Pvt. Ltd., 59/32, New Rohtak Road, New Delhi-110005

10 Easy Service Tax Online Dot Com Pvt. Ltd., 407A, Iscon Mall, Satellite Road, Ahmedabad-15

11 LAWCRUX Advisors Pvt. Ltd., LAW House, 1-8, Sector-10, Faridabad 121003 (Haryana)

12 TaxIndiaOnline.com Pvt. Ltd., 2nd Floor, Vasant Arcade, Vasant Kunj, New Delhi - 110070

13 Mark Professional Services Pvt. Ltd., 108, Everest Block, Aditya Enclave, Hyderabad - 38

14 The ICFAI society, 52, Nagarjuna Hill, Punjagutta Hyderabad.-500082

15 M/S Knowledge Processing Pvt. ltd.(taxmanagementindia.com),FF-19,Ist Floor,Cross River Mall,CBD Ground,Near Karkardooma Court,Delhi-110032

16 C.D.R. 17 Office Copy 18 Guard File

Asstt. Registrar

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

REGIONAL BENCH : ALLAHABAD

COURT No. 1

ST/Misc/51242/14 & 51359/15-AL &

APPEAL No.ST/59670/13 & 50752,51100/15 (DB)

(Arising out of Order-in-Appeal No. 17/ST/ALLD/2013 dated 12/06/2013 & 74/ST/ALLD/2014 dated 04/12/2014 both passed by Commissioner of Central Excise & Customs (Appeals), Allahabad)

For approval and signature:

Hon'ble Mr. Anil Choudhary, Member (Judicial)

and

Hon'ble Mr. Anil G. Shakkarwar, Member (Technical)

1.	Whether Press Reporter may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	No
2.	Whether it would be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	Yes
3.	Whether their Lordships wish to see the fair copy of the order?	Seen
4.	Whether order is to be circulated to the Department Authorities?	Yes

Vishnu Shree Enterprises

Commissioner of Central Excise & S.T., Allahabad **Appellants**

Vs.

Commissioner of Central Excise & S.T., Allahabad

Vishnu Shree Enterprises **Respondents**

Appearance:

Shri R.K.Tewari, Advocate
Shri K.S. Gupta, Consultant for assessee
Shri Rajeev Ranjan, Joint Commissioner (AR), for Revenue

CORAM:

Hon'ble Mr. Anil Choudhary, Member (Judicial)
Hon'ble Mr. Anil G. Shakkarwar, Member (Technical)

Date of Hearing : 26/05/2016
Date of Decision : 01/06/2016

Final ORDER NO. 70274-70276/2016

Per: Anil G. Shakkarwar

These are two miscellaneous applications and three Appeals.

2. Miscellaneous application No. ST/Misc/51242/14 was filed in appeal No. ST/59670/13 (DB), requesting for early hearing of the Appeal and miscellaneous application No. ST/Misc/51359/15 was filed in the same appeal, requesting for clubbing. Appeal No. ST/59670/13 with appeal No. ST/50752/15 and appeal No. ST/51100/15, and stay application No. ST/Stay/50808/15 was filed in appeal No. ST/51100/15 (DB).

3. The miscellaneous application No. ST/Misc/51242/14 was taken up for hearing. Heard both the sides. Since the matter is of recurring nature, E.H. application is allowed, and appeals taken up for final hearing with the consent of parties.

4. The miscellaneous application No. ST/Misc/51359/15 was taken up for hearing. Heard both the sides. It was found that all the appeals mentioned in the application with a request to club them were involving same issue for the same appellant for the same service provided having some common period in the show cause notices therefore clubbing of appeal stated in para No.2 was allowed to be clubbed.

5. Stay application No. ST/Stay/50808/15 in appeal No. ST/51100/15 (DB) was filed by the Revenue, requesting to stay the operation of impugned Order-in-Appeal No.74/ST/ALLD/2014 dated 04/12/14. Since the concern appeal was taken up for hearing, the said stay application become in-fructuous and was dismissed.

6. Appeal No. ST/59670/13 was filed by M/s Vishnu Shree Enterprises (hearing after referred as VSE) against Order-in-Appeal No. 17/ST/ALLD/2013 dated 12/06/2013. The brief facts of the case are that VSE are service providers and registered for Cargo Handling Service, Maintenance and Repair Service, Manpower Recruitment Agency Service and Erection, Commissioning and Installation Service. Assessee have filed the statutory returns and paid the admitted tax as per returns. During the period from June, 2005 to March, 2010 VSE provided taxable Services to M/s Hindalco Industries Ltd. VSE was issued with a show cause notice dated 06.10.2010 demanding Service Tax of Rs.5,87,899/- on amount of Bonus and PF contribution of Rs.50,79,855/- received by VSE from M/s Hindalco Industries Ltd. during the period from June, 2005 to March, 2010 for deploying manpower. The said show cause notice was adjudicated through Order-in-Original dated 11/08/11 wherein the said demand of Service Tax was confirmed equal penalty under Section 78 of the Finance Act, 1944 and penalty of Rs.5000/- under Section 77 with the said act were imposed. VSE preferred an appeal before the Commissioner (Appeals) who disposed the said appeal through the Order-in-Appeal No. 17/ST/ALLD/2013 dated

12/06/2013 which is impugned order wherein the appeal was dismissed as time barred without going into merits of the case. Through letter dated 11.03.2013 issued by Assistant Commissioner, Mirzapur to M/s Hindalco Industries Ltd. under Section 87 (b) of the Finance Act, 1994, Assistant Commissioner requested service receiver to pay to the exchequer Rs.11,80,798/-which includes Service Tax demand and penalty imposed out of the amount due to be paid to VSE. M/s Hindalco Industries Ltd. Credited Rs.12,24,891/- to exchequer through chalan dated 22.07.2013 by deducting from the amount payable to VSE.

7. Heard the Learned Advocate, he has contended that if the total amount received of Rs.50,75,855/- on which cum tax benefit was required to be extended by the Original Authority and Appellate Authority which may be allowed by this Tribunal. The penalty may be waived in view of the Ruling of Hon'ble Delhi High Court in the case of M/s International Consultants and Technocrats Pvt. Ltd. Vs. Union of India (2012-TIOL-966-ST-Del-ST). In the said case Hon'ble High Court has held that Rule 5(1) of Service Tax (determination of value) Rule 2006 is ultra virus the charging provisions under Section 66 and Section 67 of the Finance Act, 1944. Since the issue of valuation was a matter of interpretation and subjudice penalty under Section 78 of the Finance Act, may be waived. The Revenue contented that the impugned order is just and fair.

8. Appeal No. ST/50752/15 was filed by VSE against Order-in-Appeal No.74/ST/ALLD/2014 dated 04/12/14. VSE were issued with

a show cause notice dated 08.10.12 alleging that during the period from 2007-08 to 2011-12 VSE received total consideration of Rs.10,13,34,280/- from M/s Hindalco Industries Ltd. who is the same service recipient dealt that in appeal in the foregoing paragraph and short paid Service Tax of Rs.26,93,163/-. The allegation in the show cause notice is that on the gross receipt of Rs.10,13,34,280/- received from service recipient VSE should have paid the Service Tax of Rs. 98,28,425/- during the period from 2007-08 to 2011-12, but paid Rs.71,35,262/- as Service Tax and differential Service Tax of Rs.26,93,163/- was demanded. The show cause notice was decided through Order-in-Original dated 18.03.14 through which the entire demand of Service Tax was confirmed, equal penalty was imposed and another penalty .of Rs.10,000/- was imposed. VSE preferred appeal before the Commissioner (Appeals) to decided the appeal through impugned order dated 04.12.14 wherein he has modified the said Order-in-Original dated 18.02.14 by reducing the demand for over-lapping period and set it aside, and penalty is waived. Against the impugned order VSE is before us contenting that for same services provided by them to the service receiver the demand for the period for 2005-06 to 2009-10 was already raised and confirmed. Therefore, for the said same period another demand for the same activity cannot be raised and the show cause notice dated 08.10.12 is barred by limitation due to the issue of show cause notice dated 06.10.10 dealt with in appeal no. ST/59670/13. Therefore, the impugned order may be set aside applying the Ruling of the Hon'ble Apex Court in the case of Nizam Sugar Factory Vs CCE (AP) 2006 (197) E.L.T. 465 (SC). Heard both the parties, learned Advocated for VSE contended that show cause notice dated 08.10.12 is bad in Law in view of the fact that for providing Services by the same assessee to the same service receiver a demand of extended period from 2005-06 to 2009-10 was already raised through said show cause notice dated 06.10.10. Therefore, as ruled by Hon'ble Supreme Court in the said case of Nizam Sugar Factory the entire show cause notice at 08.10.12 is to be treated as bad in Law and demand and penalty needs to be dropped.

9. Learned A.R. reiterated the findings in Order-in-Appeal.

10. Appeal No. ST/51100/15 is filed by Commissioner of Central Excise, Allahabad against Order-in-Appeal No.74/ST/ALLD/2014 dated 04/12/14 which is also impugned order, in the above referred appeal No. ST/50752/15. Commissioner of Central Excise, Allahabad has contended that appellate authority has committed a mistake by reducing the amount of tax liable to confirmed by the amount of Rs.17,47,913/- being an amount confirmed and paid with respect to above show cause notice dated 06.10.10 and appellate authority could have reduced the figure of Rs 26,93,163/- only by Rs.05,87,899/- and not by Rs.17,47,913/-. They have also contended that the appellate authority have erred in holding that there is no suppression so for as the show cause notice dated 08.10.12 is concerned. Heard both the parties Learned A.R. reiterated the grounds of appeal. Learned Advocate for VSE has contended that in view of the Ruling by Hon'ble Supreme Court in the case of Nizam Sugar Factory the show

cause notice dated 08.10.12 which is issued for extended period wherein suppression is alleged is bad in Law and cannot survive.

11. We have taken all the contentions in all the appeals into consideration. In appeal No. ST/59670/13 the demand is raised on the amount of bonus and PF contribution paid by service receiver M/s Hindalco Industries Ltd. to service provider i.e. VSE, in respect of individual manpower employed by VSE for attending to the work of M/s Hindalco Industries Ltd. The appellant VSE have requested for benefit of cum duty value. We find that they are entitled for benefit of cum duty value. Therefore, we hold that Rs. 50,79,855/- received by VSE should be treated as cum duty value and accordingly, Service Tax payable on assessable value needs to be worked out. Further, we find that in the case of M/s International Consultants and Technocrats Pvt. Ltd. referred to in forgoing paras the issue of valuation in Service Tax matters was issue of interpretation of statute under litigation. Therefore, we set aside the penalty of Rs. 5,87,899/- imposed under Section 78 of the Finance Act, ~~1944~~ 1994. In respect of appeal No. ST/50752/15, we find that the show cause notice dated 08.10.12 was issued on the same set of facts for the period from 2007-08 to 2011-12. The facts of the case were known to the department and on the basis of facts show cause notice dated 06.10.10 was issued. Therefore, contention in the show cause notice dated 08.10.12 that there was suppression of material facts is not tenable in Law. The Hon'ble Supreme Court in the above ~~sighted~~ stated case of Nizam Sugar Factory ~~is~~ has held as follows.

"9. Allegation of suppression of facts against the appellant cannot be sustained. When the first SCN was issued all the relevant facts were in the knowledge of the authorities. Later on, while issuing the second and third show cause notices the same/similar facts could not be taken as suppression of facts on the part of the assessee as these facts were already in the knowledge of the authorities. We agree with the view taken in the aforesaid judgments and respectfully following the same, hold that there was no suppression of facts on the part of the assessee/appellant.

10. For the reasons stated above, Civil Appeal Nos. 2747 of 2001 and Civil Appeal No. 6261 of 2003 filed by the assesses are accepted and the impugned orders are set aside on the question of limitation only. The demands raised against them as well as the penalty, if any, are dropped. Civil Appeals @ Special Leave Petition © Nos. 9271-9278 of 2003 filed by the department are dismissed. Questions of classification and marketability are left open. Parties shall bear their own costs."

Following the said Ruling, we hold that show cause notice dated 08.10.12 is bad in law. Therefore, all the proceedings initiated through that show cause notice are set aside. As a result, appeal No. ST/51100/15 filed by Revenue is dismissed. Appeal No. ST/50752/15 is allowed and appeal No. ST/59670/13 is remanded to original authority to re-determined Service Tax payable by VSE treating the amount of Rs.50,79,855/- paid as cum duty value. Appellant to appeal No. ST/59670/13 are directed to cooperate with the original authority who shall re-determine Service Tax payable as directed above within a period of 6 month from the date of receipt of this order. VSE is entitled to consequential relief. No Costs.

(Order is pronounced in open Court on 01/06/2016)

Sd/-
(Anil G. Shakkarwar)
Member (Technical)

Sd/-
(Anil Choudhary)
Member (Judicial)

प्रमाणित प्रति / Certified True Copy
8.7.16
सहायक पंजीकार / Asstt. Registrar
सीमाशुल्क, उत्पादशुल्क एवं सेवा कर अपील अधिकरण / (C.E.S.T.A.T.)
38, एम. जी. मार्ग, इलाहाबाद-211001
38, M. G. MARG, ALLAHABAD-211001