REGISTERED / AD

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
OLD RED BUILDING, 38,M.G.Marg,
~~Office Of Commissioner Of Central Excise,Customs,Service Tax,~~ Allahabad-211001

Dated: 05/10/2015

To

Appellant as per address in table below

Respondent as per address in table below

Final Order No. A/ 70016 /2015- dated 18/09/2015

I am directed to transmit herewith a certified copy of order passed by the Tribunal under section 35-C(1) of the Central Excise and Salt Act, 1944.

Asstt. Registrar

Application	Appeal	Name and Address of Appellant
	ST/1541/2010	AMIT PANDEY PHYSICS CLASSES 117/78, N BLOCK,KAKADEO, KANPUR

Name and Address of Respondent	COMISSIONER OF CENTRAL EXCISE, KANPUR 117/7, SARVODAYA NAGAR, KANPUR,(UP

Other Appellants and Respondents as per Annexure

Copy To

3Advocate(s) / Consultant(s): SH SHUBHAM AGRAWAL,ADV
CHAMBER NO 42, HIGH COURT,
ALLAHABAD

4 Bar Association, CESTAT, Delhi
5 Director Publications, Customs, Excise, I.P. Estate, Delhi
6 M/s Centax Publications Pvt. Ltd., 1512-B, Bhishm Pitamah Marg, New Delhi-3
7 Company Law Institute of India Pvt. Ltd., No.2 (old no.36), Vaithyaram Street, T. Nagar, Chennai-17
8 Taxmann Allied Service Pvt. Ltd., 59/32, New Rohtak Road, New Delhi-110005
9 Easy Service Tax Online Dot Com Pvt. Ltd., 407A, Iscon Mall, Satellite Road, Ahmedabad-15
10 LAWCRUX Advisors Pvt. Ltd., LAW House, 1-8, Sector-10, Faridabad 121003 (Haryana)
11 TaxIndiaOnline.com Pvt. Ltd., 2nd Floor, Vasant Arcade, Vasant Kunj, New Delhi – 110070

12 Mark Professional Services Pvt. Ltd., 108, Everest Block, Aditya Enclave, Hyderabad – 38

13 The ICFAI society, 52, Nagarjuna Hill,Panjagutta Hyderabad.-500082
14 C.D.R. 15 Office Copy 16 Guard File

Asstt. Registrar
Regional Bench, Allahabad

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CIRCUIT BENCH AT ALLAHABAD

APPEAL NO: ST/1541/2010

[Arising out of Order-in-Appeal No: 460/ST/APPL/KNP/2010 dated 10/09/2010 passed by the Commissioner of Customs & Central Excise (Appeals), Kanpur.]

For approval and signature:

Hon'ble Shri P. S. Pruthi, Member (Technical)
Hon'ble Shri S.S. Garg, Member (Judicial)

1.	Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	:	No
2.	Whether it should be released under Rule 27 of CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	:	No
3.	Whether Their Lordships wish to see the fair copy of the Order?	:	Seen
4.	Whether Order is to be circulated to the Departmental authorities?	:	Yes

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Amit Pandey Physics Classes ...*Appellant*

Versus

Commissioner of Central Excise & Service Tax
Kanpur ...*Respondent*

Appearance:

Shri Shubham Agrawal, Advocate for the appellant

Shri Rajeev Ranjan, Jt. Commissioner (AR) for the respondent

CORAM:

Hon'ble Shri P. S. Pruthi, Member (Technical)
Hon'ble Shri S.S. Garg, Member (Judicial)

Date of hearing:	**17/09/2015**
Date of decision:	**18/09/2015**

Final **ORDER NO:** 70016/2015

Per: P. S. Pruthi:

This appeal arises from the impugned of Order-in-Appeal No: 460/ST/APPL/KNP/2010 dated 10/09/2010 passed by the Commissioner of Customs & Central Excise (Appeals), Kanpur.

2. The facts are that the appellant was registered under the category of "Commercial Coaching and Training Institute" as a proprietory firm. They realized ₹ 19,90,000/- and ₹ 14,62,005/- in the financial years 2007-08 and 2008-09 respectively but did not declare the facts in their ST-3 returns nor paid the service tax. The appellant accepted the mistake in his statements recorded under Section 14 of

the Central Excise Act, 1944. In adjudication proceedings a demand of ₹ 4,26,667/- was confirmed along with interest. Equivalent penalty of ₹ 4,26,667/- was imposed under Section 78. Penalties were also imposed under Sections 76 and 77.

3. The contention of the appellant is that they had deposited ₹ 3,27,787/- before the issue of the show cause notice and the same was appropriated under the order-in-original. They deposited ₹ 98,880/- after the issue of order-in-original. However, this amount as well as 25% of this amount as penalty was deposited within 30 days of the communication of the order in terms of proviso to Section 78(1) of the Finance Act, 1994. The contention is that in terms of Section 78(1) proviso, if the service tax as determined under Section 73(2) is paid within 30 days of the receipt of the order, the penalty payable shall be 25% of the service tax so determined, provided the reduced penalty is also paid within such period. The contention is that since the amount of ₹ 3,27,787/- was paid before issue of show cause notice, the tax determined under Section 73(2) is ₹ 98,880/- and, therefore, penalty payable will be only 25% of ₹ 98,880/-. The appellant relied on the Hon'ble High Court of Allahabad decision in the case of *H.M. Singh & Company vs. Commissioner of Customs, Excise & Service Tax* (2014) ISI E-191 All. (HC).

4. Heard both the sides and considered the submissions. The issue

to be considered is whether in applying the provisions of Section 78 proviso, the amount of service tax to be considered for calculation of 25% of penalty should exclude the service tax paid before issue of show cause notice.

5. We find that the proviso refers to "Central Excise Officer determining such service tax under sub-section (2) Section 73". We do not find from the records that the service tax determined did not include the amount already paid before the issue of show cause notice. When tax is not paid on due date, the service tax which is determined by the Central Excise Officer in terms of the legal provisions is the total service tax which is payable. Even if a part of the service tax is paid before the issue of show cause notice, the fact remains that the same has to be determined under the legal provisions and confirmed under the adjudication order. If some amount of tax is paid before the issue of show cause notice it does not mean that it is not to be assessed or determined under an order. However, the same may be appropriated under the order. The adjudication order refers to the tax which needs to be confirmed and the amount of tax (already paid) which is appropriated after the total tax is confirmed. Therefore, the contention of the appellant cannot be accepted. The appellant was aware of the obligations under the Service Tax law because initially he had taken registration from the department but had surrendered the same in April 2008 on the belief that the gross receipts were less than

the registration limit. This plea cannot be a *bona fide* belief because it has come on record that during the year 2007-08 he had realized an amount of ₹ 19,90,000/-. The mistaken belief now expressed by him, therefore, has no basis.

6. We have seen the judgment of the Hon'ble High Court of Allahabad. The facts in that case are different. It was a case where there was confusion in the interpretation of the taxable service of "Manpower Recruitment and Supply". The appellant in that case was providing service to M/s. Hindalco Industries Ltd. and the question was whether the gross receipts were to be charged to service tax. In the present case, as we have observed above, the appellant seem to be well aware of the provisions of service tax law having taken the registration earlier, which was surrendered. The receipts for the years 2007-08 and 2008-09 were recovered from him in the form of computerized sheets to which there is no denial.

7. In the circumstances, we find no merit in the appeal and the same is dismissed.

(Pronounced in Court on 18/09/2015)

Sd/-
(S.S. Garg)
Member (Judicial)

Sd/-
(P.S. Pruthi)
Member (Technical)

प्रमाणित प्रति / Certified True Copy
14.10.15
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

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