FAX : 0532-2400149 REGISTERED / AD

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

Dated: 23/06/2017

To

Appellant as per address in table below

Respondent as per address in table below

Final Order No. ST/A/70576-70577/2017-CU[DB] dated 14/06/2017

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/MISC/70011/2016, ST/MISC/70010/2016	ST/890/2010	SHARMA FABRICATORS & ERECTORS PVT. LTD. C-27/273, PLOT NO. 11-12, SRI DAS NAGAR, MALDAHIYA, VARANASI.
2	ST/CROSS/35/2011	ST/949/2010	SHARMA FABRICATORS & ERECTORS PVT. LTD. C-27/273, PLOT NO. 11-12, SRI DAS NAGAR, MALDAHIYA, VARANASI
			Name and Address of Respondent
3			-C.C.E Allahabad 38,M.G.Marg, civil Lines, Allahabad
			-
4			C.C.E Allahabad 38,M.G.Marg, civil Lines, Allahabad

Other Appellants and Respondents as per Annexure

Copy To

5Advocate(s) / Consultant(s):

V. LAKSHMI KUMARAN, ALD
3/1A/3 OPP AUTO SALES,ABOVE
THE OFFICE OF BLUE DART/DHL
COURIER, COLVIN ROAD, LOHIA
MARG ALLAHABAD-211001

6 Bar Association, CESTAT, Allahabad

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

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

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

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

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-19,1st 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. I

APPEAL No. ST/890 & 949/2010-CU[DB] With
Cross Application No. ST/CROSS/35/2011 &
MISC Application No. ST/MISC/70011 & 70010/2016

(Arising out of Order-in-Original No. (S. Tax-36 & 57/09)17 & 18 of 2010 dated 31/03/2010 passed by Commissioner of Central Excise & Service Tax, Allahabad)

M/s Sharma Fabricators & Erectors Pvt. Ltd. (In Appeal No. ST/890/2010) &
Commissioner of Central Excise, Allahabad (In Appeal No. ST/949/2010)

Appellant

Vs.

Commissioner of Central Excise, Allahabad (In Appeal No. ST/890/2010) &
M/s Sharma Fabricators & Erectors Pvt. Ltd. (In Appeal No. ST/949/2010)

Respondent

Appearance:

Shri Atul Gupta, Advocate, for Assessee
Shri Mohammad Altaf, Assistant Commissioner (AR), for Revenue

CORAM:

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

Date of Hearing & Date of Decision : 14/06/2017

FINAL ORDER NO. 70576 - 70577/2017

Per: Anil G. Shakkarwar

Above stated two appeals are arising out of common impugned Order-in-Original No. (S. Tax-36 & 57/09)17 & 18 of 2010 dated 31/03/2010 passed by Commissioner of Central Excise & Service Tax, Allahabad.

2. The brief facts of the case are that M/s Sharma Fabricators & Erectors Pvt. Ltd. (hereinafter referred to as

"M/s Sharma") were registered with the Department for payment of Service Tax under Registration No. AADCS2882AST001 and were engaged in the service category of Erection, Commissioning & Installation Services. M/s Sharma used to undertake dismantling of paper plant in foreign country and Erection, Commissioning & Installation of the same in the taxable territory on India. They used to file their Service Tax Returns as provided by law. During the course of audit of the records conducted from 02.02.2009 to 04.02.2009, the audit team ~~noted~~ ~~taken~~ noticed that taking into account the amounts as indicated to have been paid to M/s Sharma by the customers/clients as per the certificate of deduction of charts at source under Section 203 of Income Tax Act, 1961 (for short "TDS Certificate") the amount received by M/s Sharma during the period from January, 2004 to March, 2008 amounted to Rs.45,94,48,238/- whereas total taxable value declared by M/s Sharma during the said period was totaling up to Rs.22,01,75,988/-. Therefore, M/s Sharma were issued with a Show Cause Notice dated 20.04.2009 wherein it was alleged that M/s Sharma short paid Service Tax as reflected ST-3 returns to the tune of Rs.2,67,78,854/-. Therefore, M/s Sharma were called upon to show cause as to why Service Tax amounting to Rs.2,67,78,854/- should not be recovered from them under the extended proviso to Sub-section (1) Section 73 of the Finance Act, 1994. The said Show Cause Notice has listed the documents relied upon for issue of Show Cause Notice as (1) copy of the draft Audit Report for the period January, 2004 to March, 2008, (2) letter dated 25.03.2009 of M/s Sharma along with enclosures & (3) Annexure – 'A' which was as follows:-

Period	(TDS Income) payment received (Rs.)	Taxable value realized as per ST-3 (Rs.)	Difference (Rs.)	S. Tax (Rs.)	Ed. Cess (Rs.)	S. H. E. Cess (Rs.)
Jan, 04 to Mar, 04	2,92,70,667	---	(-) 2,92,70,667	23,41,652	---	---
2004-05	1,68,38,247	7,73,850	(-) 1,60,64,397	6,36,459 8,10,866	16,217	---
2005-06	10,05,45,110	1,93,53,397 (+) 3,93,28,089 (5,86,81,486)	(-) 4,18,63,624	41,86,362	83,727	---
2006-07	13,35,38,417	2,01,15,033 (+) 3,60,79,515 (5,61,94,548)	(-) 7,73,43,869	92,81,264	1,85,625	---
2007-08	17,92,55,797	5,70,30,582 (+) 4,74,94,792 (10,45,25,374)	(-) 7,47,30,423	89,67,651	1,79,353	89,677
Total	**45,94,48,238**	**22,01,75,258**	**23,92,72,980**	**2,62,24,255**	**4,64,922**	**89,677**

M/s Sharma were issued ~~under~~ with another Show Cause Notice dated 13.10.2009 wherein it was mentioned that on examination of records during the course of audit of the unit conducted by the Officers of Central Excise Commissionerate, Allahabad it was noticed that as per certificate of deduction of Service Tax under Section 203 of Income Tax Act, 1961(for short "TDS Certificate") issued by the clients during the Financial Year, M/s Sharma were paid the amount which were more than the taxable value declared to have been received by M/s Sharma in the ST-3 returns submitted. It was further alleged that M/s Sharma mis-declared the taxable value in the ST-3 returns and they did not pay Service Tax that duty to be paid by them on the basis of actual amount received by them. The said Show Cause Notice dated 13.10.2009 stated that computation of amount from the details submitted by M/s Sharma through letter dated 10.09.2009 it appeared to Revenue that M/s Sharma had received total taxable amount of Rs.25,20,59,862/- during the Financial Year 2008-09 but declared the taxable value as Rs.17,81,03,827/- in the ST-3 returns filed during the year. Therefore, it was alleged that on the basis of TDS Certificate issue by the clients of M/s Sharma, the taxable amount that M/s Sharma received was Rs.25,20,59,862/- but they have declared less value and short paid Service Tax. Therefore, through the said Show Cause Notice dated 13.10.2009 M/s Sharma were called upon to show cause as to why Service Tax amounting to Rs.91,40,965/- should not be recovered from them. The relied upon documents for issue of said Show Cause Notice were stated to be (1) Letter dated 29.05.2009 & 16.07.2009 issued by the Range Superintendent, (2) Letter dated 10.09.2009 & details dated 21/22.09.2009 submitted by M/s Sharma & (3) Sample copy of the invoice issued by M/s Sharma & the corresponding TDS Certificate issued by clients of M/s Sharma. Both the said Show Cause Notices were contested by M/s Sharma. M/s Sharma elaborately explained the reasons for difference in the taxable value arrived at on the basis of TDS Certificate issued by the third party and actual consideration received by them. They further contested that the first Show Cause Notice dated 20.04.2009 was hit by limitation. The Original Authority decided the said two Show Cause Notices together through Order-in-Original No. (S. Tax-36 & 57/09)17 & 18 of 2010 dated 31/03/2010. The Original Authority confirmed the demand of Service Tax of Rs.1,16,64,955/- and set aside the demand of Service Tax amounting to Rs.2,42,54,864/-. The Original Authority also imposed penalty. M/s Sharma was aggrieved by the said confirmation of demand of Service Tax of Rs.1,16,64,955/- and Revenue was aggrieved by setting aside the demand of Service Tax amounting to Rs.2,42,54,864/-. Therefore, M/s Sharma file appeal bearing No. ST/890/2010 and Revenue file appeal bearing No. ST/949/2010.

3. Heard the ld. Counsel for M/s Sharma he has basically argued that the said Show Cause Notices were not issued by examining the books of account maintained by M/s Sharma. The Show Cause Notices were based on the presumptions and third party information. He has argued that even when the payments were not made by the clients but the clients booked the expenditure in their books of account they were required to pay the related tax deducted at ~~same~~ source to the exchequer and issue a certificate of TDS and incorporate the same in the return called 26AS filed with the Income Tax Authorities and such information cannot be the basis for arrival of the consideration received by the service provider. He has submitted that both the Show Cause Notices were issued without examining the books of account maintained by M/s

Sharma and were issued on the basis of presumptions about the consideration received by M/s Sharma. The considerations taken into account for issue of Show Cause Notices was in no way near to the actual consideration received by M/s Sharma during the relevant period which should be the basis for arriving at the assessable value. He has stated that they had elaborated before the Original Authority various reason for discrepancies in the figures arrived at presuming the considerations received by M/s Sharma on the basis of such TDS Certificates and the figures in the returns. He has further relied upon this Tribunal's Final Order in the case of Alpa Management Consultants P. Ltd. *Versus* Commissioner of Service Tax, Bangalore reported at 2007 (6) S.T.R. 181 (Tri. - Bangalore). He submitted that this Tribunal in the said case has held that demands, solely based on the Income Tax returns for liability of Service Tax under Finance Act, 1994 is not sustainable. In respect of appeal filed by Revenue ld. counsel for M/s Sharma has contended that the grounds of appeal are travelling beyond the Show Cause Notice and therefore that is not sustainable. He has further elaborated that cargo handling was brought in as ground by Revenue in the appeal filed by Revenue whereas that issue was not at all dealt with in the Show Cause Notices dated 20.04.2009 & 13.10.2009.

4. Heard the ld. D. R., who has presented the grounds of appeal in appeal filed by Revenue.

5. Having considered the rival contentions and on perusal of record, we find that in the cases of both the Show Cause Notices dated 20.04.2009 & 13.10.2009 there is no whisper of examination of books of account maintained by M/s Sharma to arrive at the value of consideration received by them. Surprisingly the draft audit report was the relied upon document~~s~~. It may be worth mentioning here that the purpose of audit report is to point out any discrepancy to the notice for examination by the executive and it is the duty of executive to examine the records and examine the objection raised with reference to the records and facts of the case and take a view whether there is a sustainable case for issue of Show Cause Notice. Such vital aspects of framing of charges have been missing in the present case. The charges in the Show Cause Notice have to be on the basis of books of account and records maintained by the assessee and other admissible evidence. The books of account maintained by M/s Sharma were not looked into for issue of above stated two Show Cause Notices. Therefore, the transactions ~~received~~ recorded in the books of account cannot be held to be contrary to the facts. Therefore, we hold that the said Show Cause Notices are not sustainable. Since the said Show Cause Notices are not sustainable, appeal bearing No. ST/890/2010 filed by M/s Sharma is allowed and appeal bearing No. ST/949/2010

filed by Revenue is dismissed. Miscellaneous Applications are also stands disposed of. Cross Objection also disposed of.

(Dictated and pronounced in Court)

-Sd/-	-Sd/-
(ANIL CHOUDHARY)	(ANIL G. SHAKKARWAR)
Member (JUDICIAL)	Member(TECHNICAL)

Ansari