REGISTERED / AD

FAX : 011-26108426

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK NO.2, R.K.PURAM, NEW DELHI-110066
CUSTOMS APPEAL BRANCH

Dated: **07/10/2015**

To

Appellant as per address in table below

Respondent as per address in table below

Final Order No. **ST/A/53076/2015-CU[DB]** dated **06/10/2015**

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(CUSTOMS Appeal Branch)

Application	Appeal	Name and Address of Appellant
1	ST/707/2012	**Creative Travel Pvt Ltd** Creative Plaza, Anak Pura, Moti Bagh, Ew Delhi.
		Name and Address of Respondent
2		C.S.T.-Delhi 17-B, I.A.E.A.House,M.G.Road, I.P.Estate, New Delhi, Delhi-110002

Copy To
3Advocate(s) / Consultant(s):

J. K. Mittal & Co,Adv
A-15, THIRD FLOOR,
PRIYADARSHINI VIHAR,
DELHI-110092

4 Additional Party's Name & Address :
5 Bar Association, CESTAT, Delhi
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 C.D.R. 16 Office Copy 17 Guard File

Asstt. Registrar(CUSTOMS Appeal Branch)

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI
PRINCIPAL BENCH, COURT NO. II

Service Tax Appeal No. 707 of 2012

[Arising out of Order-In-Appeal No. 67/S.Tax/2012 dated 06.03.2012 passed by Commissioner (Appeals) Customs & Central Excise, Delhi II]

For approval and signature:
Hon'ble Mr Ashok Jindal, Member (Judicial)
Hon'ble Mr. R K Singh, Member (Technical)

1	Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	
2	Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	
3	Whether Their Lordships wish to see the fair copy of the Order?	
4	Whether Order is to be circulated to the Departmental authorities?	

M/s. Creative Travel Pvt. Ltd **Appellants**

Vs.

Commissioner of Central Excise & ST, New Delhi **Respondent**

Appearance:
Shri J K Mittal with Shri Rajveer Singh, Advocates for the Appellants
Shri Amreesh Jain, DR for the Respondent

CORAM:
Hon'ble Shri Ashok Jindal, Member (Judicial)
Hon'ble Mr. R K Singh, Member (Technical)

Date of Hearing : 14.8.2015
Date of decision : 06.10.2015

FINAL ORDER NO. A/ 53076 /2015-ST

Per Ashok Jindal :

The appellant is in appeal against the impugned order wherein the show cause notice dated 12.10.2010 was held to be maintainable.

2. The facts of the case are that the appellant is registered with sales tax department for air travel agent service, tour operators service and business auxiliary service. Initially, the show cause notice issued to the appellant for the period 2004-2005 to 2008-2009 on 8.4.2010 under the category of tour operator service and Business auxiliary service. The said show cause notice is not the subject matter in this matter. But on the basis of said show cause notice, this show cause notice is issued. Before issuance of show cause notice, the appellant was asked to provide details/ documents/ information for the period April, 2009 to March 2010 through various letters dated 3.6.2010, 4.7.2010, 28.7.2010, 3.9.2010 and lastly on 1.10.2010. But the appellant did not provide any details to the department. Therefore, it was alleged in the show cause notice that the appellant has failed to furnish the requisite information and also not furnished the returns under section 70 of the Act. Therefore, provisions of section 72 of the Act were attracted on the basis of 'best judgment assessment' and the show cause notice was issued accordingly. The appellant challenged the issuance of show cause notice before the Hon'ble High Court of Delhi and Hon'ble High Court vide order dated 4.1.2011 directed the adjudicating authority to

decide the matter with regard to jurisdiction tacit basis taking into consideration the stand and stances putforth by the appellant, whether the show cause notice was issued correctly or not. The adjudicating authority held that show cause notice is maintainable and the same has been confirmed by the learned Commissioner (Appeals). Aggrieved from the said order, the appellant is before us.

2. Shri J K Mittal, learned Counsel for the appellants appeared and submitted that in para 5 of the show cause notice it is alleged that the appellant failed to furnish the return under section 70 of the Act and again it is alleged in para 12 (iii) of the show cause notice that appellant failed to furnish return under section 70 of the Act and in para 9 of the show cause notice, it is further alleged that determination of assessable liability under second provision of 72(a) appeared to be justifiable. Whereas in para 13 of the show cause notice, it is alleged that the provision of section 73(1) of the Act can be invoked and in para14 of the show cause notice, it is proposed that why best judgment could not be made under section 72 of the Act and why services tax should not be recovered under section 73 of the Act, which indicates that the show cause notice was issued on the parameters that appellant has not filed service tax return, the proceedings under section 72 and 73 were simultaneously initiated. He further submits that the show cause notice itself admitted that the appellant has replied the letters issued by the department and have not supplied the information. Whereas the letters

clearly states that they have not been issued section 72 of the Act but were issued under section 14 of the Central Excise Act by specifically stating that it will attract penal provisions under section 77 of the Act and nowhere it is stated in any one of said letter that the same are issued under section 72 of the Act. Moreover, it was noted that in all the letters, it was stated to furnish the following month wise details/ documents/information, but nothing was stated what are those information/ details/ documents, Whereas the adjudicating authority has admitted that appellant has requested to the department "to depute audit team to prepare desire details". Whereas there is no such allegation in the show cause notice that which record is required to be maintained under Rule 5 of the Service Tax Rules, 1994 have not been prepared by the appellant. Despite the appellant request, the department did not depute any team to verify the records as required under Rule 5A of the Service Tax Rules, 1994.

3. He further submits that the show cause notice is issued on the basis that appellant has failed to furnish the return which is found to be false. As admitted by the adjudicating authority that the returns for relevant period were filed on time. However, the adjudicating authority travelled beyond the allegation made in the show cause notice by alleging that the relevant information required in ST 3 return has been left blank by the appellant referring as per annexure attached. However, there is no such allegation in the show cause notice. However, the

returns filed by the appellant were in order. It is settled law that the adjudicating authority cannot travel beyond the allegation made in the show cause notice. He submits that the appellant has periodically filed the service tax returns and the department has not alleged that required information in the return has not be given. Infact, the department has accepted the return filed by the appellant in the manner in which it has been filed for such several years. The learned Commissioner (Appeals) has confirmed the finding of the adjudicating authority by observing that various column of form ST 3 return are blank by referring to annexure and thereafter given a contrary finding that appellant has failed to furnish the return under section 70 of the Act to invoke extended period of limitation. Learned Commissioner (Appeals) further observed that ST 3 return filed by the appellant are incomplete whereas there is no such allegation in the show cause notice. The learned Commissioner (Appeals) has gone beyond the issue raised before him in the lis. Therefore, he has wrongly held that the show cause notice is maintainable. As both the authorities below have travelled beyond the scope of show cause notice which is not permissible in law as held by Hon'ble Apex Court in the case of ***CC Mumbai vs. Toyo Engineering India Ltd.*** [2006 (201) ELT 513 (SC)]. He further submits that the provisions of Section 72 can be invoked in either of two situations –(a) When the assessee fails to furnish the information under section 70 of the Act; and (b) Having made the return, fails to assess the tax in accordance with the law or Act or Rule made thereunder. In the present case, the allegation were made in the show cause notice that the appellant failed to furnish the return and also specifically stated that provision of clause (a) of section 72 of the Act is invoked. The provision of section 72(a) is applicable when return is not furnished whereas it is a clear finding of the adjudicating authority that the appellant has filed return in time. Therefore, the show cause notice is not maintainable when the allegation of the department is failed. But, the adjudicating authority travelled beyond the allegation made in the show cause notice recording that party has failed to fulfill condition (b) inasmuch as the ST 3 were filed by them are incomplete. This was not the allegation in the show cause notice or in the letters issued by the Department. The appellant has challenged such finding before the learned Commissioner (Appeals) on the ground that adjudicating authority travelled beyond the allegation made in the show cause notice but the learned Commissioner (Appeals) wrongly stated that there is a specific reference to section 72 (a) and 72(b) in para 9 of the show cause notice, whereas para 9 of the show cause notice clearly states that provisions of section 72 (a) of the Act are invoked. In the show cause notice, there is no allegation of violation of section 72(b) of the Act. Therefore, the impugned order is to be set aside.

4. He further submits that it was held by the authorities below that the department has not received such information /figures from the

appellant which resulted in invocation of provisions of section 72 of the Act, but the letters issued by the department on various dates for sending information/ details were not issued under section 72 of the Act at all but same were issued under Section 14 of the Central Excise Act for invocating of penal provisions under section 77 of the Act. And these letters does not specify any specific information to be furnished or the information furnished by the appellant in the return are incomplete in any respect. The law does not permit for invocation of section 72 of the Act for non-furnishing of information but in the show cause notice, section 72 was invoked either for non-furnishing of return or furnishing of incomplete report whereas the assessee has failed to assess tax in accordance with the law. Therefore, the adjudicating authority has drawn the wrong conclusion contrary to law and even if there would have been such allegation will not sustain in the show cause notice for invocation of section 72 of the Act for the said reason.

5. He further submits that in the show cause notice, provisions of section 72 and 73 are invoked simultaneously whereas in the show cause notice, it is alleged that provisions of section 73(1) of the Act can be invoked and in the adjudication order, it has been specifically noted that the plea taken that provision of section 72 and 73 cannot be invoked simultaneously, which make the show cause notice bad in law. Such a plea was taken in brief submission filed before the adjudicating authority, but the same has not been dealt by both the authorities below.

He submits that 'best judgment assessment' under section 72 is a independent of the order passed under section 73 of the Act, therefore, simultaneously issuing the show cause notice for initiating proceedings under section 72 and 73 are bad in law and not maintainable. He further submits that in the show cause notice, the value of taxable service as well as service tax payable thereon has already been determined by specifying and stating therein whereas as per the provision of section72 of the Act, best judgment is made to arrive at the value of taxable service and determine sum payable by the assessee/Parties on such year-wise assessment, the value of service tax payable has already been determined in the show cause notice, then the show cause notice asking the appellant why section 72 should not be invoked is not maintainable. He further submits that this plea was taken by the appellant before the learned Commissioner (Appeals) on the ground that appellant has filed the return in time, therefore section 72(a) is not applicable and the allegation made for non-filing of return is proved false. He further submits that as there is no allegation in the show cause notice to invoke clause (b) of section 72 for failing to assess the tax in accordance with the law after filing the return therefore, the show cause notice is bad in the eyes of law and liable to be quashed. He also submits that show cause notice is apparently prepared by the AC whereas it has been signed and issued by the Joint Commissioner and the said infirmity was pointed out by them has not been dealt with by the both the authorities below. He further submits that there are difference in tax determined in figures mentioned numerically and in words which was pointed out but ignored by the adjudicating authority holding it as a typographical error without giving any reasons. In these terms, he prayed that impugned order is to be set aside.

6. On the other hand, learned AR supported the impugned order and submits that the show cause notice was issued in continuation of show cause notice dated 8.4.2010 and the charges and violations mentioned in the show cause notice dated 8.4.2010 shall apply to the impugned show cause notice. He further submits that the show cause notice dated 8.4.2010 was relied upon for issuance of the impugned show cause notice. He further submits that as the appellant has failed to specify the information under various sections of Finance Act, 1994, therefore, show cause notice is maintainable.

7. He also submits that show cause notice is clearly brings out the violation of section 66A, 67, 68, 69, 70 and 72 of Finance Act, 1994 and is in continuation of earlier show cause notice dated 8.4.2010, therefore, show cause notice is maintainable. In these terms, appeal is to be dismissed.

8. Heard the parties. Considered the submissions.

9. In this matter, the issue before us is that whether the show cause notice issued to the appellant is in accordance with the law and same is maintainable or not.

10. As the show cause notice is the issue before us, therefore, it would be in the interest of justice to incorporate the show cause notice herein as under:

34

Annexure A-III

OFFICE OF THE ASSISTANT COMMISSIONER OF SERVICE TAX, DIVISION II, 7TH FLOOR BLOCK No. 11, CGO COMPLEX, LODHI ROAD, NEW DELHI-03

C.No. DL-II/ST/R-17/SCN/Creative/497/09/ 24032 Dated: 20.10.2010

SHOW CAUSE NOTICE

Whereas M/s. Creative Travels Pvt. Ltd, having registered office at Creative Plaz, Nanak Pura, Moti Bagh(hereinafter referred to as "the Asseessee") are registered with Service Tax Commissionerate, Delhi vide STC No. AAACC0974DST003 dated 03.09.2009 for Air Travel Agents Services, ST-2 No. DLI/TO/340/ST/200 dated 27.04.2000 for Tour Operators Services and DL-II/ST/R-17/BAS/CTPL/969/05 for Business Auxiliary Services falling under the Section 65(105)(l), Section 65(105)(n)and Section 65(105)(zzb) respectively of the Finance Act, 1994 as amended (hereinafter referred to as the "ACT"). The assessee is obliged to comply with the provisions of the Finance Act, 1994(as amended) and Rules and notifications issued thereunder.

2. A Show Cause Notice was issued to the assessee by Additional Commissioner, Service Tax, New Delhi under "Business Auxiliary Service" vide C.No. I-26(494)ST/AMR/Gr.IA/153/Creative/2009 dated 08.04.2010 for non payment of Service Tax during the period 2004-05 to 2008-09 to pay Service Tax of Rs. 23,47,010/-(including Cess)(RUD-I).

3. This show cause Notice is being issued in continuation on the above mentioned show cause notice which has been made as one of the RUD. The charges and violation therein apply to the present show cause notice.

4. The assessee, vide this office letter C. No. DL/ST/R-17/SCN/Creative/497/09 dated 03.06.2010 (RUD-II) was asked to provide the details/documents/information for the period April 2009 to March 2010 for issuance of subsequent show cause notice and also this office letter of even no. 1247 dated 04.07.2010(RUD-III) & even no. 1277 dated 28.07.2010 (RUD-IV) & even no. 30429 dated 03.09.2010(RUD-V) & even no. 110(RUD-VI). Assessee has replied vide their letter dated 13th August, 2010,(RUD-VII) regarding the previous show cause notice issued by the Additional Commissioner for the period 2004-05 to 2008-09 but has not supplied the month wise information for the period April 09 to March 2010. Again, this office letter even no. 30249 & even no.110 dated 01.10.2010 were also issued to assessee to furnish month wise details for the said period but no reply has been received so far.

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5. Whereas, it is evident that the assessee has replied to the said letters but has not supplied the requisite information sought by this office. Further, they have also failed to furnish the return under Section 70 of Act ibid.

6. Whereas, non-submission of the information by the party has resulted into hampering of determination of Service Tax liability of the party.

7 Whereas the provisions of Section 72 of the Act ibid provides for determination of Service Tax liability of the party/assessee on the basis of "Best Judgment Assessment" of the proper officer in the event of party's failure to produce the records/information as required by the proper officer.

8 Whereas as per provisions of Section 14 of Central Excise Act, 1944 as amended as made applicable to Service Tax vide Section 83 of the Act ibid, the obligations was cast on the party to furnish information called for by an officer. Section 72 of the Act ibid read as "Best judgment assessment" means if any person, liable to pay Service Tax.

(a) fails to furnish the return under Section 70;

(b) Having made a return, fails to assess the tax in accordance with the provisions of this Chapter or rules made there under,

the Central Excise Officer, may require the person to produce such accounts documents or other evidence as he may deem necessary and after taking into account all the relevant material which is available or which he has gathered, shall by an order in writing, after giving the person an opportunity of being heard, make the assessment of the value of taxable service to the best of his judgment and determine the sum payable by the assessee or refundable to the assessee on the basis of such assessment.

9 Whereas, having regard to all the evidences and chain of events as detailed in the preceeding paragraphs, the invocation of the provisions of Sections 72 (a) of the Act ibid requiring determination of the assessment of the Service Tax liability of the party appears justifiable.

10 Whereas, the party submitted the details of payment received on a/c of services rendered by them during the preceeding years to the Additional Commissioner (Service Tax) upon which the Service Tax was computed is as under:

(Amt. in Rs)

Period	Total taxable amount	Service Tax rate	Service Tax payable	Education Cess Payable	Sec & Higher Education Cess	Total Service Tax payable

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2005-06	16,04,368	10.20%	1,60,437	3209	0	1,63,646
2006-07	0	12.24%	0	0	0	0
2007-08	13,05,233	12.36%	1,56,628	3,133	1566	161,327
2008-09	50,26,635	12.36%	6,03,196	12,064	6032	6,21,292
Total	79,36,236		9,20,261	18,405	7,598	9,46,264

The service tax liability on the total amount received on this account after abatement of 60% in terms of Notification No. 39/97-ST dated 22.08.1997and Notification No. 1/2006-ST dated 01.03.2006 works out as under:- (Amt. in Rs).

Period	Amount Received towards Outbound Tours	Amount received towards tours to Neighbouring countries	Taxable value after allowing 60% abatement	Service tax	Education Cess	SHE Cess	Total Service Tax Payable
2004-05	169200	0	67,680	6,768	135	0	6,903
2005-06	14,12,656	1,32,47,630	5,65,062	56,506	1,130	0	57,636
2006-07	24,80,402	1,07,47,898	9,92,161	1,19,059	2,381	0	1,21,441
2007-08	1,13,91,459	1,44,80,270	45,56,584	5,46,790	10,936	5,468	5,63,194
2008-09	1,31,79,075	2,20,57,276	52,71,630	6,32,596	12,652	6,326	6,51,573

11 Whereas from the above, it appears that M/s. Creative Travels Pvt. Ltd. registered office at Creative Plaza, Nauk Pura, Moti Bagh New Delhi, has contravened the provisions of Sections 66A, 67, 68 69 and 70 read with Section 66 of Chapter V of the Finance Act, 1944 (32 of 1994) as amended and Section 91 & 95 of the Finance (No.2) Act 2004 and Section 136 & 140 of Finance Act, 2007 and further read with Rule 4, 4A, 6 and 7 respectively of the Service Tax Rules, 1994 and not submitted the desired details therefore by invoking Section 72 of the Finance Act, 1994 and keeping in mind that the receipts in respect of above mentioned services would have increased by 25% from the last year, the figures on the said Accounts for the purpose of computation of Service Tax during the period

37

01.04.2009 to 31.3.2010 are taken as under the head of Business Auxiliary Service& the category of "tour operator"

Under the category of" Business Auxiliary Service"

(In Rupees)

Period for Services rendered/received on pro-rata basis	Taxable value (Pro-rata basis + 25%)	Service Tax payable			Total Service Tax payable
		Service Tax @ 10%	Education Cess @ 2%	S & H Edu. Cess @ 1%	
April 2009 to March 2010	62,83,294/-	6,28,329/-	12,567/-	6,284/-	6,47,180/-

Under the category of "tour Operator Services" (Amt. in Rs)

Period	Amt. received towards outbound Tours	Amt. received towards tours to Neighboring countries	Taxable value after allowing 60% abatement	Service Tax	Edu. Cess	S & H Educati n Cess	Total Tax
2009-10	16473844	27571595	17618176	1761818	35236	17618	1814672

From above, it appears that party has failed to pay Service Tax amounting to Rs. 2461852/- (including Education Cess and Secondary Higher Educations Cess) on the value realized during the period 01.04.2009 to 31.3.2009 under category of 'Business Auxiliary Services' & 'Tour Operator Services' as required under Section 68 of the Finance Act.

12 Whereas from the above, it appears that M/s Creative Travels Pvt. Ltd. Registered office at Creative Plaza, Nanak Pura, Moti Bagh, New Delhi, has contravened the provisions of Sections 66A, 67, 68 69 and 70 reads with Section 66 of Chapter V of the Finance Act, 1944 (32 of 1994) as amended and Section 91 & 95 of the Finance (No.2) Act 2004 and further read with Rule 4, 4A, 6 and 7 respectively of the Service Tax Rules, 1994 in as much as:

38

(i) they have failed to pay Service Tax amounting to Rs. 2390147/- on the taxable value realized during the period 01.04.2009 to 31.03.2010 under category of Business Auxiliary Services & Tour Operators Services.

(ii) they have failed to pay Education Cess amounting to Rs. 47803/- and Secondary and Higher Education Cess amounting to Rs. 23902/- under Section 91 & 95 of the Finance Act (No.2) 2004 levied w.e.f. 10.09.2004 and Section 136 & 140 of Finance Act, 2007 levied w.e.f. 11.05.2007 read with Section 66 of the Finance Act, 1994 (32 of 1994).

(iii) they have failed to file ST-3 returns under Section 70 of the Act, 1994 read with Rule 7 of Service Tax Rule 1994.

13 Whereas it further appears that M/s Creative Travels Pvt. Ltd. has intentionally and willfully suppressed the facts of payment of taxable service rendered, and did not pay the service tax as applicable on such services and did not pay any interest. Thus they have escaped the assessment of service tax liability and subsequent payment thereof to the credit to the Government account. All these actions of M/s Creative travels pvt. Ltd. amount to *suppression of facts* from the department, resulting in contravention of various provisions of the said Act and the said Rules with intent to evade payment of Service Tax as applicable. Thus, it appears that the provision of Section 73(1) of the said Act can be invoked. Party is also liable for Penalty under Section 78 of Act ibid for above contravention.

14 Now, therefore, M/s Creative Travels Pvt. Ltd. , having registered office at Cretive Plaza, Nank Pura, Moti Bagh, New Delhi, is required to show cause to the Joint Commissioner, Service Tax, 17-B,IAEA House, Mahatma Gandhi Marg, I.P.Estate, New Delhi-2, within 30 days of the receipt of this notice as to why:-

(i) Provision of Section 72 of Act ibid should not be invoked and method of Best Judgment be not resorted in the event of party's failure to produce records/information to Service Tax Department.

(ii) Service Tax amounting of Rs. 2390147/- (Rs. Seventeen Lakh Sixty One Thousand Eight Hundred and Eighteen only) as detailed should not be demanded and recovered from them under Section 73 of Finance Act, 1994 read with Section 68 and Section 66 of the Finance Act,1994.

(iii) Education Cess amounting of Rs. 47803/- (Rs Thirty Five Thousand Two Hundred and Thirty Six only) & Secondary and Higher Education Cess amounting of Rs. 29802/- (Rs. Seventeen Thousand Six Hundred and

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Eighteen only) as detailed should not be demanded and recovered from them under Section 73 of the Act ibid read with Section91 & Section 95 of chapter VI of the Finance Act, 2004 as amended and Section 136 read with Section 140 of chapter VI of the Finance Act, 2007 respectively.

(iv) Interest on the above amount under the provision of the Section 75 should not be charged and recovered from them.

(v) Penalty in terms of Section 76 of the Finance Act, 1994 should not be imposed upon them for failure to pay Service Tax in accordance with the provision of Section 68 read with Rule 6 of Service Tax Rules 1994.

(vi) Penalty under Section 77(2) of the Finance Act 1994 should not be imposed upon them for contravention of section 70 of the said Act by way of not filing the periodical ST-3 returns in proper manner of the relevant period.

(vii) Penalty under Section 78 of the Finance Act, 1994 should not be imposed upon them for deliberately suppressing of the facts with the intention to evade payment of Service Tax.

15 M/s. Creative Travels Pvt.Ltd. having registered office at Creative Plaza, Nanak Pura, Moti Bagh,New Delhi, is required to produce at the time of showing cause, all evidence upon which they intend to rely in support of their defence. They are also required to indicate in their written reply as to whether they wish to be heard in person before the case is adjudicated failing which it would be construed that they do not wish to be heard in person

16. If no cause is shown against the action proposed to be taken, within the stipulated period and /or don't seek personal hearing and/or they do not appear before the adjudicating authority when the case is posted for hearing the case will be decided on the basis of evidence available on records.

17. This show cause notice is being issued without prejudice to any other action that may be taken against the party under provision of the Finance Act 1994, and the Rules made there under or any other law for the time being in force in India.

Encl: All relied upon documents (RUD I to VII)

21.X.2010

JOINT COMMISSIONER
SERVICE TAX

11. Now on perusal of the show cause notice, we find that in para 5 of the show cause notice, the case of the Revenue proceeded on the fact that appellant has failed to furnish the return under section 70 of the Finance Act, 1994. The non-submission of information by the appellant has resulted into hampering of determination of service tax liability. Therefore, provisions of section 72 of the Act were attracted, as the appellant has failed to produce records/ information as required by the proper officer. Further, in para 9 of the show cause notice, the provision of section 72(a) of the Act were sought to be invoked for determination of the assessment of service tax liability of the appellant which was found to be justified. Thereafter, in the show cause notice, the quantification table of service tax liability has been incorporated on the basis of previous years turnover of the appellant for enhancement of 25% of turn over of the previous year was sought to be assessed. On perusal of the show cause notice, nowhere it is mentioned that whatever information, the appellant has supplied are not sufficient and what are the deficiencies in these informations.

12. To invoke provisions are of section 72 of the Act, it is proper to incorporate the provisions of section 72 of the Act.

13. For better appreciation, the same are reproduced as under :

> *"Section 72 of the Act ibid read as "Best judgment assessment" means if any person, liable to pay Service Tax.*
>
> *(a) fails to furnish the return under Section 70;*

(b) Having made a return, fails to assess the tax in accordance with the provisions of this Chapter or rules made thereunder,

The Central Excise Officer, may require the person to produce such accounts documents or other evidence as he may deem necessary and after taking into account all the relevant material which is available or which he has gathered, shall by an order in writing, after giving the person an opportunity of being heard, make the assessment of the value of taxable service to the best of his judgment and determine the sum payable by the assessee or refundable to the assessee on the basis of such assessment. "

14. As per the abovesaid provisions, the provisions are attracted in a case the assessee has failed to furnish the return under section 70 of the Act and if he has made the return fails to assess the tax in accordance with the provisions of this chapter or Rules made thereunder.

15. Therefore, section 72 ibid has two limbs:

A. Fails to furnish the return

or

B. If return has been filed in that case, he fails to assess the tax in accordance with law.

In this case, the allegation against the appellant is that they have not filed their ST 3 return under section 70 of the Act. If that is so, then the provision of section 72(a) are attracted. But it is a fact on record that the appellant has filed their return regularly under section 70 of the Act. Therefore, the foundation of the show cause notice that the appellant has not filed their return is incorrect. If the case of the Revenue is that appellant has not filed the return, the provision of section 72 are attracted. The said allegation against the appellant stand disapproved as the appellant has filed their return regularly.

16. Now, we analyse the clause (b) of section 72. If the appellant has filed the return, and fails to assess the tax in accordance with the provisions of this Chapter or rules made thereunder in the show cause notice, there is no allegation against the appellant that they have filed the return and failed to assess the tax in accordance with the provisions of law.

17. Therefore, we hold that provision of section 72(b) are not attracted in the show cause notice and the show cause notice has been issued without appreciating the facts that the appellant have been filing the return regularly. The show cause notice has travelled on the premise that appellant has not filed return under section 70 of the Act which is incorrect.

18. In the paragraph 4 of the show cause notice, it is mentioned that appellant were asked to provide details /documents/ information for issuance of the show cause notice, through various letters. We have also seen list of the letters and a copy of such letter is incorporated herein as under:

79

OFFICE OF ASSISTANT COMMISSIONER SERVICE TAX DIVISION-II
7TH FLOOR, BLOCK No. 11, CGO COMPLEX LODHI ROAD NEW DELHI-110003

C. No. DL-II/ST/R-17/SCN/Creative/497/09 Dated: -0[illegible].07.2010

To.

M/s Creative Travels Pvt Ltd.
Creative Plaza. Nanakpura.
Moti Bagh. New Delhi

Sub: Show Cause Notice follow up for subsequent period-reg

In continuation to the Show Cause Notice issued by the Additional Commissioner, Service Tax, Service Tax Commissionerate, New Delhi, vide C. No. I-26(494)ST/AMR/Gr.A1/153/Creative/2009 dated 08.04.2010 for non payment of Service Tax and Education Cess amounting to Rs. 23,47,010 Payable on taxable value paid/commission received for the period 2005-06 to 2008-09.

In this connection, your proper reply has not been received by the office inspite of letter issued of even No. 30165 dated 03.06.2010. Hence you are requested to furnish the following monthwise information/details/documents for the period **April-2009 to March 2010** to this office within 10 days of receipt of this letter to enable this office to process the subsequent Show Cause Notice.

If you are already discharging appropriate Service Tax and Education Cess on the above services, the details thereof may also be furnished to this office urgently.

These information's are sought by this office under Section 14 of Central Excise Act 1994 and non-submission of the information by the stipulated date may attract penal action under Section 77 of Finance Act 1994 as applicable to Service Tax under Section 83 of the Finance Act 1994.

Yours faithfully

[illegible] 07/10

SUPERINTENDENT (RANGE-17)
SERVICE TAX, DIVISION-II

[illegible]

19. On examination of those letters, we find that in para 2 of the same, it is alleged that the appellant has not filed proper reply inspite of letters issued to them. Hence, he was requested to furnish following information/ details/ documents for the period April, 2009 to March, 2009. But, what as the documents /information and details as required is not been mentioned in these letters. For that, appellant has specifically asked the department to tell what information they require, but despite the appellant's request, it was not informed what information /details /documents were required for by the department to issue the show cause notice. In the absence of any document, nature of details which was sought to be asked from the appellant specifically, in that case, the show cause notice is only on the basis of assumption and presumption.

20. As discussed above and on analyzing the same, we hold that the show cause notice is deficient, therefore, the same is not maintainable.

21. With these observations, we set aside the impugned order and allow the appeal with consequential relief, if any.

(Pronounced in the open court on 06. X. 2015)

(**Ashok Jindal**)
Member(Judicial)

(**R K Singh**)
Member(Technical)

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