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

Dated: **05/05/2015**

To

Appellant as per address in table below

Respondent as per address in table below

Final Order No. **ST/A/51458-51459/2015-CU[DB]** dated **26/03/2015**

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/111/2009	**APSARA RESTAURANT,** 1, R.N.T. MARG, INDORE.
2	ST/368/2009	**C.C.E. INDORE** Manik Bagh Palace, Post Box No. 10, Indore 452001 (M.P.)

Name and Address of Respondent

3 APSARA RESTAURANT, 1, R.N.T. MARG,INDORE (M.P.),

4 C.C.E. INDORE Manik Bagh Palace, Post Box No. 10, Indore 452001 (M.P.)

Other Appellants and Respondents as per Annexure

Copy To

5Advocate(s) / Consultant(s):

Krishan Garg & Co. C. A
409-411, CHETAK CENTRE,
12/2,
RNT MARG, INDORE,
MADHYA PRADESH

6 Additional Party's Name & Address :
7 Bar Association, CESTAT, Delhi
8 Director Publications, Customs, Excise. I.P. Estate, Delhi
9 M/s Centax Publications Pvt. Ltd., 1512-B, Bhishm Pitamah Marg, New Delhi-3
10 Company Law Institute of India Pvt. Ltd., No.2 (old no.36), Vaithyaram Street, T. Nagar, Chennai-17
11 Taxmann Allied Service Pvt. Ltd., 59/32, New Rohtak Road, New Delhi-110005
12 Easy Service Tax Online Dot Com Pvt. Ltd., 407A, Iscon Mall, Satellite Road, Ahmedabad-15
13 LAWCRUX Advisors Pvt. Ltd., LAW House, 1-8, Sector-10, Faridabad 121003 (Haryana)
14 TaxIndiaOnline.com Pvt. Ltd., 2nd Floor, Vasant Arcade, Vasant Kunj, New Delhi - 110070
15 Mark Professional Services Pvt. Ltd., 108, Everest Block, Aditya Enclave, Hyderabad – 38
16 C.D.R. 17 Office Copy 18 Guard File

Asstt. Registrar(CUSTOMS Appeal Branch)

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi – 110 066.

Date of Hearing/Order : 26.3.2015

For Approval & Signature :

Hon'ble Mr. Justice G. Raghuram, President
Hon'ble Mr. R.K. Singh, 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?	
2.	Whether it would 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 Department Authorities?	

No. ST/111/2009-CU(DB)

M/s Apsara Restaurant — Appellant

Vs.

CCE, Indore — Respondent

No. ST/368/2009

[Arising out of common Order-in-Appeal No. IND-I/19/2009 dated 5.2.2009 passed by the Commissioner (Appeals), Customs & Central Excise, Indore]

CCE, Indore — Appellant

Vs.

M/s Apsara Restaurant — Respondent

Appearance:

Shri Krishan Garg, Apellant - for the Assessee

Shri Devender Singh, Jt. CDR - for the Respondent
Shri M.R. Sharma, D.R.

Coram : **Hon'ble Mr. Justice G. Raghuram, President**
Hon'ble Mr. R.K. Singh, Member (Technical)

F. Order No. 51458-51459/2015.

Per **R.K. Singh :**

The appellant, an assessee, has filed appeal against Order-in-Appeal No. IND-I/19/2009 dated 5.2.2009 which upheld the order in original dated 19.12.2008 to the extent of confirming the demand along with interest and penalties except that the penalty under Section 76 of Finance Act, 1994 was not upheld in view of the fact that penalty under Section 78 ibid had been imposed. Revenue is also in appeal against the said order-in-appeal on the ground that during the relevant period, penalties under Sections 76 and 78 were not mutually exclusive and therefore the Commissioner (Appeals) order setting aside the penalty under Section 76 is not legal and proper and sought restoration of penalty under Section 76.

2. The appellants-assessee is providing Mandap Keeper service during which they also provided food/beverages. As the appellant-assessee was not able to provide evidence with regard to the value of the goods sold, the service tax demand was confirmed by giving 40% abatement. It is also seen that the appellant-assessee had not claimed the benefit of Notification No. 12/2003-ST in their ST-3 returns. The appellant-assessee contended that the benefit of Notification No. 12/2003-ST dated 20.6.2003 was incorrectly denied and cited several judgements to the effect that value of goods cannot be included in the assessable value for the purpose of charging Service Tax. During the hearing, the appellant-assessee contended that while 40% abatement was allowed to them under Notification No. 1/2006-ST, they are entitled to the benefit of Notification No.

12/2003 up to the extent of the value of the goods sold by them. They also contended that explanation in the definition of Mandap in Section 65(66) ibid to the effect that 'social function' includes marriage was inserted on 1.6.2007 and therefore prior thereto property let out for a consideration for a marriage function would not be covered under Mandap Keeper Service.

3. We have considered the contentions of the appellant-assessee Mandap in Section 65(66) ibid is defined as under:

> "Mandap" means any immovable property as defined in Section 3 of the Transfer of Property Act, 1882 and includes any furniture, fixtures, light fittings and floor coverings therein let out for a consideration for organising any official, social or business function."

It is thus evident that even before the explanation was added from 1.6.2007 Mandap meant inter alia immovable property etc. let out for a consideration for organizing any official, social or business function. A marriage function is also a social function. Thus we are in no doubt that the said explanation added on 1.6.2007 was merely in the nature of ex abundante cautela and therefore has retrospective applicability.

4. As regards the contention of the appellant-assessee that benefit of Notification No. 12/2003-ST should have been extended to them, we would like to reproduce the said provision hereunder :

> "In exercise of the power conferred by Section 93 of the Finance Act, 1994 (32 to 1994), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts so much of the value of all the taxable services, as is equal to the value of goods and materials sold by the service provider to the recipient of service, from the service tax leviable thereon under Section (66) of the said Act, subject to condition that there is documentary proof specifically indicating the value of the said goods and materials."

It is evident from the wording of the above notification that benefit thereof can be granted only if the assessee is able to produce documentary evidence showing the value of the goods sold. As has been brought out by the original adjudicating authority as well as by the appellate authority, the appellant-assessee was not able to provide documentary evidence regarding the value of such goods and therefore benefit of the said notification was rightly denied to them. Indeed the lower authority in the absence of the documentary evidence of the value of the goods sold allowed 40% abatement in terms of notification 1/2006-ST which the assessee had itself claimed and paid service tax accordingly. Thus there is no infirmity as far as the confirmation of the impugned service tax demand is concerned.

5. We however notice that impugned demand was in respect of three show cause notices as under:

Period of demand	SCN No.	SCN date	Remark
July 2005 to	V(ST)3-	2.3.2007	First SCN

Sept. 2006	84/NJ/06-07		
October 2006 to March 2007	V(ST)3-24/MK/07-08	18.10.2007	Recurring nature
April 2007 to March 2008	V(ST)3-102/SCN/MK/08-09	15.9.2008	Recurring nature

The show cause notices dated 18.10.2007 and 15.9.2008 were merely recurring in nature for the periods subsequent to period covered by the first show cause notice dated 2.3.2007 and therefore in the given circumstances in the light of the Supreme Court judgement in the case of ***Nizam Sugar Factory Vs. CCE*** – 2006 (74) RLT 564 (SC), the allegation of wilful mis-statement or suppression of facts on the part of assessee in respect of the two Show Cause Notices dated 18.10.2007 and 15.9.2008 cannot be sustained and consequently penalty under Section 78 of Finance Act, 1994 in respect of the said two Show Cause Notices cannot be sustained. As the Commissioner (Appeals) had set aside the penalty under Section 76 on the ground that the penalty under Section 78 has been imposed, the impugned order will therefore be required to be modified to the extent that the penalty under Section 76 ibid in respect of the said two show cause notices is to be restored and penalty under Section 78 ibid set aside.

6. Regarding Revenue's appeal that penalty under Section 76 ibid should not have been dropped even in respect of the first show cause notice because during the relevant period penalties under the said two Sections were not mutually exclusive we agree that during the

relevant period (prior to 16.2.2008) there was no legal bar against imposing penalties under both the said Sections simultaneously as has been held by Delhi High Court in the case of ***Bajaj Travels Ltd. Vs. CST*** - 2012 (25) STR 417 (Del.) and also in effect by Supreme Court in the case of ***BCCI Vs. CST, Mumbai*** - 2015-TIOL-04-SC-ST. However, the fact that the penalties under Section 76 and Section 78 ibid were made mutually exclusive with effect from 16.2.2008 is indicative of refinement of the penal provisions. Indeed in the case of ***CCE Vs. Pannu Property Dealers, Ludhiana*** - 2011 (24) STR 173 (P&H), the Punjab & Haryana High Court in effect held that *"even if technically, scope of sections 76 and 78 of the Act may be different, as submitted on behalf of the revenue, the fact that penalty has been levied under section 78 could be taken into account for levying or not levying penalty under section 76 of the Act. In such situation, even if reasoning given by the appellate authority that if penalty under section 78 of the Act was imposed, penalty under section 76 of the Act could never be imposed may not be correct, the appellate authority was within its jurisdiction not to levy penalty under section 76 of the Act having regard to the fact that penalty equal to service tax had already been imposed under section 78 of the Act. This thinking was also in consonance with the amendment now incorporated though the said amendment may not have been applicable at the relevant time."* Similarly, in the case of ***CCE Vs. First Flight Courier*** - 2011-TIOL-HC-P&H-ST, the Punjab & Haryana High Court in effect held that penalty under Section 76 may not be justified if penalty had already been imposed under Section 78 even if technically the scope of Sections 76 & 78 is different.

7. In view of the foregoing, the appeals of both sides are disposed of as under :

(i) The impugned demand of service tax along with interest is sustained.

(ii) Penalty under Section 76 in respect of show cause notices dated 18.10.2007 and 15.9.2008 is restored while penalty under Section 78 in respect of said two show cause notices set aside.

(iii) As regards Show Cause Notice dated 2.3.2007, penalty under Section 76 is not restored in view of the fact that the penalty under Section 78 in respect of the said show cause notice has been sustained.

(Justice G. Raghuram)
President

(R.K. Singh)
Member (Technical)

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