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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

Appeal No. ST/83-84 /2006 Date 04/04/2008

Assistant Registrar
C.E.S.T.A.T, New Delhi

To :
M/S MAGNUM INTERNATIONAL
1, VAISHALI NAGAR, KOTRA SULTANABAD,
BHOPAL
462003

M/S MAGNUM INTERNATIONAL Appellant

Vs

THE COMMISSIONER CENTRAL EXCISE, BHOPAL Respondent

I am directed to transmit herewith a certified copy of **Final order No.** ST/57-58/08 **Customs** dated 03.04.08 passed by the Tribunal under Section 129, (B) of the Customs Act,1962 & Financial Act 1994 relating to Service Tax

Assistant Registrar
(Customs Appeal Branch)

Copy to :

1. Respondent
   THE COMMISSIONER CENTRAL EXCISE, BHOPAL
   48, ADMINISTRATIVE AREA, AREA HILLS,
   HOSHANGABAD RAOD, BHOPAL
2. Adv. / Consult
   MR.Z. U. ALVI
   D-8,BDA COLONY, ADJACENT GARUDA TRAVELS. KOH-E-FIZA BHOPAL-01
3. S.D.R.
4. J.C.D.R.
5. Bar association, CESTAT, New Delhi
6. M/s. Deeparchi Publications, M-93, marg. 43, saket, New
7. M/s Centax Publictions (P) Ltd., 1512-E, Bhishm Pitamah
8. Excise & Customs cases, B-37, Sector -1, NOIDA - 201301
9. R.Venkatraman Constt. 44-B, S.Suncity, Ghaziabad -
10. Nidheshak publications, I.P.Estate, new Delhi
11. Taxmann Allied Service Pvt Ltd., 21/35, West Punjabi Bagh,
12. Co, Law Institution
13. TAX INDIA, B-XI/8183,Vasant Kunj, New Delhi - 110070
14. Office Copy
15. Guard file

Assistant Registrar
(Customs Appeal Branch)

M/S MAGNUM ENVIRONMENT MANAGEMENT PVT LTD
1 VAISHALI NAGAR KOTRA SULTANABAD BHOPAL

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH AT NEW DELHI
COURT NO. I

Appeal No. ST/83-84/2006

(Arising out of Orders-in-Appeal No. 10-ST/BPL/2006 and 11-ST/BPL/2006 dated 18.1.2006 passed by the Commissioner of Customs & Central Excise (Appeals), Bhopal).

For approval and signature:

Hon'ble Mr. Justice S.N. Jha, President
Hon'ble Mr. A.K. Srivastava, Member (Technical)

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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 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 Departmental authorities?	:	Yes

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M/s Magnum International
M/s Magnum Environment Managements Pvt. Ltd. — Appellants

Vs.

Commissioner of Customs & Central Excise, Bhopal — Respondent

Appearance:

Shri Z.U. Alvi	Advocate	for Appellant
Shri R.K. Verma	SDR	for Respondent

CORAM:

MR. JUSTICE S.N. JHA, PRESIDENT
MR. A.K. SRIVASTAVA, MEMBER (TECHNICAL)

Date of Hearing: 08.02.2008

Date of Decision: 03-04 2008

Final ORDER NO. ST/57-58/08

Per: A.K. Srivastava, Member (Technical)

These appeals have been filed by M/s Magnum International and M/s Magnum Environment Managements Pvt. Ltd. against the Orders-in-Appeal No. 10-ST/BPL/2006 and 11-ST/BPL/2006 dated 18.1.2006 passed by the Commissioner of Customs & Central Excise (Appeals), Bhopal.

2. The Assistant Commissioner vide Order-in-Original No. 35/AC-I/ADJ/ST/SA/05 dated 20.4.2005 in the case of M/s Magnum Environment Managements Pvt. Ltd. has ordered as under: -

(i) The amount of service tax for the period 16.10.98 to March, 2002 is assessed as Rs.3,87,672/- under Section 73 of Finance Act, 1994 on gross amount of Rs.77,53,441/- collected by the party M/s Magnum Security Pvt. Ltd. However, as the party has already paid an amount of Rs.48,184/- as service tax, the same is adjusted and an amount of Rs.3,39,488/- is determined as service tax short paid by the party on the escaped value of taxable services, which is recoverable from them.

(ii) Interest at the appropriate rate is also recoverable under Section 75 of Finance Act, 1994 for the period of default.

(iii) A penalty of Rs.1,66,600/- is imposed under Section 76 of Finance Act, 1994.

(iv) A penalty of Rs. 3,39,488/- is imposed under Section 78 of Finance Act, 1994.

(v) A penalty of Rs. 33,949/- is imposed upon them under Section 79 of Finance Act, 1994.

Similarly, the Assistant Commissioner vide Order-in-Original No. 36/AC-I/ ADJ/ST/SA/05 dated 20.4.2005 in the case of M/s Magnum International has ordered as under: -

(i) The amount of service tax for the period 16.10.98 to March, 2002 is assessed as Rs.19,89,148/- under Section 73 of Finance Act, 1994 on gross amount of Rs.3,97,82,951/- collected by the party M/s Magnum International. However, as the party has already paid an amount of Rs.1,82,964/- as service tax, the same is adjusted and an amount of Rs.18,06,185/- is determined as service tax short paid by the party on the escaped value of taxable services, which is recoverable from them.

(ii) Interest at the appropriate rate is also recoverable under Section 75 of Finance Act, 1994 for the period of default.

(iii) A penalty of Rs.1,66,600/- is imposed under Section 76 of Finance Act, 1994.

(iv) A penalty of Rs. 18,06,185/- is imposed under Section 78 of Finance Act, 1994.

(v) A penalty of Rs. 1,80,619/- is imposed upon them under Section 79 of Finance Act, 1994.

3. Against the above Orders-in-Original passed by the Assistant Commissioner, the appellants filed appeals before the Commissioner (Appeals), who has upheld the orders passed by the Assistant Commissioner and rejected the appeals by Orders-in-Appeal dated 18.1.2006 referred to para-1 above.

4. Heard both the sides and perused the records.

5. The appellants are registered with the Central Excise Department for collecting service tax on Security Agency w.e.f. 24.11.99

6. The appellants have not disputed the Service Tax liability on merits i.e. the payment of the Service Tax on the gross amounts received. However, they stated that the demand is barred by limitation as the show cause notice has been issued in the case of M/s Magnum International on 24.02.03 for the period for 16.10.98 to 31.03.02 and in the case of M/s Magnum Environment Managements Pvt. Ltd. (Magnum Security Services Pvt. Ltd), the show cause notice has been issued on 7.3.03 for the identical period i.e., from 16.10.98 to 31.03.02.

7. The appellants have contended that their contracts with the clients were for providing security guards (un-skilled/ Semi-skilled), Supervisor etc. The contractual payments were on the basis of reimbursement at actual per-diem rate per to unskilled/semi-skilled security guard or supervisors for days worked + Appellant's Supervision/Service Charges varying from 5% to 15% of the actuals reimbursement. The per day rates in turn were based on Minimum Wages Act, EPF & ESIC contributions. They paid service tax on the percentage service charges received by them.

8. The appellants stated that they honestly believed that it is their service of providing personnel to clients which was liable to Service Tax and accordingly they paid Tax on Service/Supervision Charges computed as percentage of – reimbursement of actuals of statutory Minimum Wages, EPF & ESIC contribution etc. According to them, the same was truly and honestly disclosed to the Department. They stated that the bills showing the gross amount and their percentage service Charges and Service Tax computation on such charges were furnished to the Superintendent (T)/ Service Tax for the month of March, 99 in February and March 2000, for April 2000 vide their letter delivered on 13.05.2000 and 21.06.00 and to Deputy Commissioner (alongwith the bills of August 2000) on 22.09.2000. Thus all the primary material facts stood furnished as required under Section 73 of the Finance Act, 1994. They also stated that in regard to M/s Magnum Security Services also the gross payments received stood furnished to the Department on13.10.2000, 30.10.2000 from M/s Satyam, ACC and Sharma Engine Valves, besides through the appellant's letters of identical dates.

9. The appellants submitted that an assessee is under legal obligation to disclose only Primary Material facts and not the Inferential Facts. That they were receiving specified fixed percentages of the actual reimbursement on personnel as Service/Supervision Charges whereon Service Tax was paid was the primary material facts wherefrom the gross billing figure could be inferred-computed by simple arithmetic calculations. Non-disclosure of Inferential Facts does not give jurisdiction to authorities to issue Show Cause Notice for an extended limitation period. They relied upon the following rulings in this regard: -

(i) Calcutta Discount Co. Vs. ITO – 1961 AIR 372 (SC)
(ii) Municipal Corpn. of Delhi Vs. CCE – 2006 (4) STR 571
(iii) Scot Wilson Kirkpatrick Vs. CCE – 2007 (5) STR 118
(iv) Dolphine Detective Agency Vs. CCE – 2006 (4) STR 25

10. The appellants contended that the Show cause notice under Section 73(1) of the Finance Act, 1994 is issueable where the Service Tax has escaped assessment. Section 73 is a *pari materia* with Section 147 of the Income Tax Act and the erstwhile Section 34(1) of the Income Tax Act, 1922. The Hon'ble Supreme Court, while interpreting these provisions, has held that escaping assessment postulates culmination of normal assessment proceedings. Where voluntary assessments are pending assessments, the show cause notice under Section 147 or erstwhile Section 34(1) for extended limitation period is not valid in law. They relied upon the following rulings in this regard:-

(i) CIT Vs. Ranchoddas Karsondas - Manu/SC/0097/1959
(ii) Ghanshyamdas Vs Regional Asst. Commr– 1964 AIR 766 SC
(iii) N. Nagnath Iyer Vs. CIT – 1996 (60) ITR 647 SC
(iv) Harish Agarwal Vs. ITO – 1983 (14) Taxman 462 (MP)

11.1 As regards penalty, the appellants maintained that there has been judicial opinion of considerable high weightage to the effect that only service charges and not gross amount of billing in deployment of security personnel were liable to Service Tax: -

(i) New Indl. Security Vs. CCE – 2006 (4) STR 66
(ii) Magnum International Vs. CCE – 2006 (4) STR 299

11.2 Thus, they stated, the issue of valuation of the taxable services was a debatable point of law and their contention and conduct would not constitute suppression of fact with an intent to evade payment of Service Tax. Hence, they argued that the extended period of limitation would not be invokable nor penalties imposable legally. They prayed for setting aside the impugned orders passed by the Commissioner (Appeals).

12. The learned DR reiterated the contents of the orders passed by the Commissioner (Appeals) and the Assistant Commissioner and prayed for upholding these orders.

13. We have examined the position. We find that the Half Yearly returns from October, 98 onwards were filed for the first time on 1.2.2000. When returns themselves for the first time were filed in February, 2000 and the Department became aware of the service tax being paid by the appellants, the Department could only thereafter proceed further to call for information under Section 71(2) for finalization of assessments. A reading of these returns would reveal that in the returns, under the heading, "Value of Taxable Services Charged or Billed", certain amounts have been shown. Similar amounts have been shown under the heading, "Value of Taxable Services Realized". What these amounts really are could only be verified if the appellants furnished complete and true details of the amounts realized from their clients for the said periods. This can be done by furnishing, if not original, at least photocopies of the bills/invoices raised on their clients

and the amounts received against each of them. Since no such details or documents were made available to the Department, the Superintendent, Central Excise wrote to the appellants vide his letter dated 15.2.2000, asking the appellants to submit bills raised on their customers and the gross amounts collected monthwise. The details were again called on 29.3.2000. Although the appellants have claimed to have filed replies to these letters on 30.3.2000 and 15.5.2000 yet the Department has contested the receipts of the same. Even if these letters are presumed to have been received by the Department, we feel that it would have served little purpose as under the cover of these letters abstracts of service charges were furnished. The assessments cannot be finalized on the basis of the abstracts of service charges. Vide their another letter dated 13.5.2000, the appellants submitted a few sample bills that too for the month of April, 2000. They also discussed the abatement of the statutory levies and taxes. The Supdt., vide his letter dated 26.7.2000, asked the appellants to submit all the bills from October, 98 to March, 99 and April, 99 to Sept., 99. The appellants' third letter dated 22.9.2000 addressed to the Deputy Commissioner was only the reiteration of the letter dated 13.5.2000. The appellants even though kept on filing returns but submitted one or two bills and the abstract of it, from which the gross amount collected by them from all their customers could not be ascertained. Therefore, it was never possible for the Supdt. to determine the gross value of the taxable services and consequently to determine the amount of service tax due on them. The photocopy of the register showing all the details including gross amount charged were submitted by the appellants only on 26.6.2002. We find that the information furnished by the appellants vide their various letters in the year 2000, as referred to above, was very scanty and it would not have enabled the

Supdt. to verify the correctness of the tax, assessed by the appellants on the services provided. Nowhere in the ST3 returns was it stated that these were supervision charges. Thus by just looking at the returns no one can state whether the appellants were paying tax on the gross amounts or supervision charges. The appellant's contention that the Supdt. could have easily completed assessments as the supervision charges they were collecting were 10% of the total amounts and all that was required to do was to multiply this amount by 10 so as to workout the gross amount received, is devoid of any substance. Tax cannot be assessed on assumptions and presumptions. By appellants' own admission, their supervision/service charges were varying from 5% to 15%. If that be so, it would not have been correct on the part of the Supdt. to multiply the supervision/service charges by flat 10 to work out the gross amounts in the absence of full details. To verify the correctness of the tax assessed by the appellants, they are required to produce any accounts, documents or other evidence as the Supdt. deems necessary for such verification. In the facts of the present case, we find that the appellants have failed to disclose wholly or truly all material facts required for verification of the assessment under Section 71 of the Act with the result the value of taxable service has escaped assessment and, therefore, five years period is rightly invokable in terms of Section 73(1)(a) of the Act for demanding the balance service tax amount. Therefore, the differential amounts between the gross amounts and the supervision charges were the values of taxable services, which had escaped assessment, for the reason that the appellants never truly or wholly declared all the material facts. It is not a case of non-disclosure of the inferential facts but a case of non-disclosure of the primary material facts, which handicapped the Supdt. to verify the correctness of the tax assessed. We are, therefore, not inclined to accept the plea of the appellants that the jurisdiction to issue the Show Cause Notice under Section 73 of the Finance Act, 1994 was contingent on completion of assessment and thereafter alone an issue or question of Service Tax escaping assessment or under-assessed or short paid could be raised. The appellants cannot expect the Department to complete the assessment without providing the material particulars.

14. In the light of the above factual position, the ratio of the various case laws cited by the appellants is not applicable to the present case.

15. Since the appellants have not disputed the demand of Service Tax on merits, we uphold the orders of lower authorities confirming the demand of service tax together with interest.

16. As regards the imposition of penalties under Section 76, 78 and 79 of the Finance Act, 1994, we find that the appellants have paid service tax amounting to Rs.48,184/- and Rs.1,82,964/- as per their understanding of the law. We also note that this understanding of law was *prima facie* found to be appealing to the Tribunal in the appellants' own case and, accordingly, after taking a *prima facie* view, the pre-deposit of the balance amount of service tax was waived and stay granted vide the Stay Order dated 26.4.2006 passed by the Tribunal as reported in 2006 (4) STR 299 (Tri-Del). We further find that the demand in this case relates to the period from 16.10.98 onwards, when the service tax on the Security Agencies was just introduced and it was at the nascent stage and nitty-gritty as regards the method and manner of computation of service tax were still to be ironed out. This is also manifest from the

correspondence the appellants had at the various levels of the Department. We are, therefore, of the opinion that the appellants have proved that there was reasonable cause for the failure referred to in Section 76, 78 and 79 of the Finance Act, 1994 and, therefore, in terms of Section 80 of the Finance Act, 1994, no penalty is imposable on them. We accordingly set aside the penalties imposed on the appellants under Section 76, 78 and 79 ibid.

17. The impugned orders passed by the lower authorities are modified to the extent indicated above. The appeals filed by the appellants are disposed of in the above terms.

(Dictated and pronounced in Court)

(Justice S.N. Jha)
President

(A.K. Srivastava)
Member (Technical)

Vks/