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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/475 /2006 Date 27/08/2008

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

To :
M/S MANGALWARDHINI TRAVELS
674,GARHA BAZAR,JABALPUR(MP)

M/S MANGALWARDHINI TRAVELS Appellant
Vs
C.C.E.BHOPAL Respondent

I am directed to transmit herewith a certified copy of **Final order No.** ST/222 2008 **Customs** dated 30.07.08 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
   C.C.E.BHOPAL
   48,ADMINISTRATIVE AREA,AREA HILLS,BHOPAL.
2. Adv. / Consult
   MR.U.S.BHATT
   107,SANGAM COLONY,BALDEO BAG,JABALPUR.
3. S.R.
4. J.C.D.R.
5. Bar association, CESTAT, New Delhi
6. M/s. Deeparchi Publications, M-93, Marg. 46, Saket, New Delhi 110017
7. M/s Centax Publictions (P) Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi -
8. Excise & Customs cases, B-37, Sector -1, NOIDA - 201301 Gautam Budh Nagar, (U.P.)
9. Raghuraman's 44-B, Regal Flat,Shipra Suncity, Indirapuram - 201010,Ghaziabad, DT, U.P.
10. Nidheshak publications, I.P.Estate, new Delhi
11. Taxmann Allied Service Pvt Ltd., 21/35, West Punjabi Bagh, New Delhi - 110026
12. Commercial Laws of India Pvt Ltd Post Bag No. 1033, No.70(Old No. 88), Thyagaraya Road, T. Nagar,Chennai 60017
13. Taxindiaonline.com Pvt.Ltd, B-XI/8183,Vasant Kunj, New Delhi - 110070
14. Easy Service Tax Online Dot Com Pvt. Ltd. 407A, Iscon Mall, Above Star India Bazar, Satellite Road, Ahmedabad - 15
15. Office Copy
16. Guard file

Assistant Registrar
(Customs Appeal Branch)

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No.2, R.K.Puram, New Delhi-110066.
Principal Bench, New Delhi.

Service Tax Appeal No.475 of 2006

[Arising out of Order-in-Appeal No.63-ST/BP/06 dt.16.6.06 passed by the Commissioner(Appeals) Bhopal)

For approval and signature:

Hon'ble Mr. S.S.KANG, VICE PRESIDENT
Hon'ble Mr. RAKESH KUMAR, 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 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: :

M/s. Mangalwardhini Travels — Appellant

Versus

CCE, Bhopal — Respondent

Appearance

Shri Atul Gupta, Co. Secy. for appellant
Sh. Amit Jain, Authorised Departmental Representative(DR) For respondent

Coram: Hon'ble Mr. S.S.KANG, VICE PRESIDENT
Hon'ble Mr. RAKESH KUMAR, MEMBER TECHNICAL

Final

Date of decision: 30.7.08
Order No. 57/222/08

Per Rakesh Kumar:

The appellants have some vehicles for which the Regional Transport Authority has issued National permits for tour operations i.e. Tourist Permits. But due to some financial problem, the Appellants are not using these vehicles for operating tours, but are using these vehicles for transport of passengers from Jabalpur to various places upto Nagpur. One of the vehicles has even been granted permit as "Stage Carriage" as spare bus. According to the Appellants, during 2001-02 to 2003-04 period, these vehicles were being used as stage carriages, very often illegally and, therefore, they are not liable to pay any service tax. However according to Revenue, these vehicles have to be treated as "Contract Carriage" and since the Appellants have tourist permits in respect of these vehicles, they were operating tours in tourist vehicles and hence they were liable to pay service tax, and is it on this basis that the Joint Commissioner vide order-in-original dt.16.3.06 confirmed the service tax demand of Rs.9,13,642/- against the Appellant under Section 73 of the Act and besides this, imposed penalties on them under Section 75A, 76, 77 & 78 of the Act. The Commissioner(Appeals) vide the impugned order-in-appeal dt.19.6.06 upheld the Joint Commissioner's order.

2. Heard both the sides.

2.1 Shri Atul Gupta, Company Secretary, the learned Counsel on behalf of the Appellants made the following submissions:

(1) The Appellants were not operating their vehicles as Contract Carriages. They were in fact, booking seats in buses for regular journey from Jabalpur to various cities upto Nagpur. Therefore, the Appellants were not engaged in the business of operating tours in tourist vehicles and their activity does not come within the purview of "tour operators" as defined under Section 65(52) of the Finance Act,1994.

(2) Hon'ble Madras High Court in the case of Secretary, Federation of Bus Operator Association of Tamil Nadu reported in 2001(134)ELT.618, in para 17 of the judgment has observed that while a "State Carriage" is meant for more than six passengers, where the fares are to be paid by individual passengers for the whole journey or for stage of journey, the "Contract Carriage" would mean a motor vehicle, which would carry the passengers for consideration and is covered under a contract for the use of such vehicles for the carriage of passengers, for which contract has been entered into by a person who holds the permit in relation to that vehicle or any other person authorized by him and such contract could be on time basis, with or without reference to the route or distance, or it could be from one point to another and the person not included in the contract would not be able to board into or get down from the bus anywhere

in the midway. None of the vehicles of the Appellants are being operated as Contract Carriage in the manner described above.

(3) The Appellants had intention to operate and organize tours to various places and therefore had obtained "tourist permits" as "tour operator" from Regional Transport Authority in respect of their vehicles. But due to financial difficulties the Appellants could not operate the tours. Mere obtaining "tourist permit" is not sufficient, in absence of business of operating tours, for being categorized as "tour operator". In this regard, reliance is placed on Hon'ble Andhra Pradesh High Court's judgment in the case of Karvy Consultant Ltd. vs CCE reported in 2006(1)STR.7.

(4) The Appellant have been penalized several to,es by the Regional Transport Authorities at Jabalpur and Nagpur for not organizing tours but carrying the passengers to various destinations.

(5) Only on three occasions i.e. from 7.11.03 to 9.11.03, 27.2.04 to 1.3.04 and 28.11.04 to 29.11.04 for vehicle No.MP 20 E 7202, MP 20 E 7202 and MP 20 E 9902 respectively, the Appellant obtained temporary permit for carrying marriage parties from Jabalpur to Bilaspur/Shahdol and back. On all other occasions Appellants used their vehicles as "Stage Carriage". Therefore, service tax can be charged, at the nest for the above three journeys. Moreover, the words – "engaged in" in the definition of tour operator imply continuous operation. Therefore, just because the

Appellants carried marriage parties in their vehicles on three occasions, they cannot be treated as "engaged in the business of operating tours in tourist vehicles".

(6) From various records seized by the Department from the Appellants' office such as conductor's diary, ticket books, cash books and balance sheets for the period from 1.4.01 to 31.3.04 and also the statement of Shri Prabhat Kumar Jain, Proprietor of the Appellant firm recorded on 25.2.05, it is clear that the Appellants had been issuing tickets from Jabalpur to various places upto Nagpur and Raipur. One of the Appellants' vehicles – MP 20E 9902 is engaged with State Road Transport Authority and is running between Jabalpur to Dindori as Stage Carriage. From these facts, it is clear that the Appellants have been operating stage carriages only.

(7) Even if it is held that the Appellants' activity is covered by the definition of "Tour Operator" under Section 65(52) of the Act, no penalty is imposable and duty demand has to be requantified in view of Notification No.15/2007-ST dt.4.4.07 issued by the Government under Section 83 of the Finance Act,1994 read with Section 11C of the Central Excise Act.

2.2 Shri Amit Jain, the learned Departmental Representative reiterating the points raised by the CCE(Appeals) in the impugned order in appeal pleaded that the Appellants' activity is covered by the definition of "Tour Operators" in view of Hon'ble Madras High

Court's judgment in the case of Shri Pandyan Travels vs CCE, Chennai-II reported in 2004(163)ELT.409(Mad.) wherein the Hon'ble High Court, rejecting the Appellant's plea that since the vehicles used by them are not tourist vehicles, service tax is not payable, held that contract carriage vehicles are covered by the definition of "Tour Operator". He also cited the Tribunal's judgment in the case of Pandit Motor Service vs CCE, Jaipur reported in 2007(8)STR-344 wherein the Tribunal has held that once the concerned authorities have permitted a person for using a particular vehicle as a "tourist vehicle", having verified the various parameters, such a vehicle by virtue of its being used otherwise cannot be declassified and treated as a 'non-tourist vehicle'.

3. We have carefully considered the submissions from both the sides and have gone through the records of the case. The point of dispute is as to whether during 2001-02 to 2003-04 period, the Appellants' activity was covered by the definition of 'tour operators' as given in Section 65(52) of the Act. There is no dispute about the fact that during the period of dispute, "tourist permit" had been issued by the Regional Transport Authority to the Appellants' vehicle under Rule 83(2) & 87(2) of the Central Motor Vehicle Rules,1989 Rule 73(1)(g) of MP Motor Vehicle Rules,1994 and as per Rule 82 of the Central Motor Vehicle Rules, tourist permit is given only to "Tourist Vehicles". The contention of the Appellants

is that though "tourist permits" for operating tour all over India had been issued in respect of their vehicles, on account of financial difficulties, they were not operating any tour and instead were using their vehicles as "stage carriages", for which they have been penalized several times by the Transport authorities. It has, therefore, been pleaded that since the vehicles were not used as contract carriages for operating tour, their activity is not covered by the definition of 'tour operator'.

4. During the period of dispute, the definitions of "tour", "tour operator", tourist vehicle" and "taxable service with regard to tour", in the Finance Act,1994 were as under:

"65(50) "Tour" means a journey from one place to another irrespective of the distance between such places"

"65(51) – Tourist vehicle has the same meaning assigned to it as in clause (43) of Section 2 of Motor Vehicle Act,1988".

"65(52) – Tour Operator means any person engaged in the business of operating tours in a tourist vehicle covered by a permit granted under Motor Vehicle Act,1988 of the Rules made thereunder".

4.1 The term "tourist vehicle" as defined under Section 2(43) of Central Motor Vehicles Act,1988 is "a Contract Carriage' constructed or adopted and equipped and maintained in accordance with such specifications, as may be prescribed in this, behalf"

Rule 128 of the Central Motor Vehicles Rules,1989 give the detailed specifications for a tourist vehicle.

4.1.1 A Contract Carriage has been defined in Section 2(7) of the Motor Vehicles Act, as under -

"Contract Carriage means a motor vehicle which carries a passenger or passengers for hire or reward and is engaged under a contract, whether express or implied for the use of such vehicle as a whole for the carriage of passengers mentioned therein and entered into by a person with holder of a permit in relation to such vehicle or any person authorized by him in his behalf, on a fixed or an agreed rate of sum-

(a) on a time basis, whether or not with reference to any route or distance; or

(b) from one point to another, and in either case, without stopping to pick up or set-down passengers not included in the contract any where during the journey, and includes –

i) a maxi cub, and

ii) a motor cab, notwithstanding that separate fare are charged for its passengers";

4.1.2 A "Stage Carriage" as defined under Section 2(40) of the Motor Vehicle Act - means a Motor Vehicle constructed or adapted to carry more than six passengers excluding the driver for hire or reward at separate fares paid by or for individual passengers for the whole journey or for stages of the journey.

5. Since the State Transport authority has issued "tourist permits" in respect of the vehicles of the Appellants and as per Rule 82 of the Central Motor Vehicle Rules,1989, and such permits are issued only in respect of "Tourist Vehicles", the vehicles of the Appellants have to be treated as tourist vehicles. After all, the transport authorities have issued tourist permits in respect of their vehicles after verifying all the parameters in this regard. Therefore, the Appellants who operate "tours" as defined under Section 65(50) in tourist vehicles covered by a permit granted under Motor Vehicle Act,1988, satisfy the definition of tour operator as given in Section 65(52) and have to be treated as "tour operator". Just because the Appellants are using their 'tourist vehicles' covered by tourist permits as stage carriage, they will not cease to be tour operators. The Tribunal in the case of Pandit Motor Service vs CCE, Jaipur reported in 2007(8)STR.344(Tri.-Del) has held that once the authorities concerned have permitted a person for using a particular vehicle as a "tourist vehicle", having verified the various parameters, such a vehicle, by virtue of its being used as stage carriage, cannot be declassified and treated as a non-tourist vehicle. We also find that Hon'ble Madras High Court in the

case of Secretary Federation of Bus Operator Association of Tamil Nadu vs UOI reported in 2001(134)ELT.618(Mad.) has held that stage carriage operators having reserve vehicle under stage carriage permit, capable of being used as contract carriage by special permission and termed as "tourist vehicle', are covered by the definition of 'tour operators' under Section 65(52) of the Act.

6. In view of the above discussions, notwithstanding the Appellant's claim that they are running their vehicles as stage carriages, since the Regional Transport Authority has issued tourist permits in respect of their vehicles, under the Central Motor Vehicle Rules,1989, the same have to be treated as Tourist Vehicles and the Appellants have to be treated as Tour Operators under Section 65(52) of the Act.

7. It has, however, been brought to our notice during the hearing that the Central Govt. has issued a notification No.15/07-ST dt.4.4.07 under Section 83 of the Finance Act,1994 read with Section 11C of the Central Excise Act by which the Govt. acknowledging the fact that during the period from 1.4.2000 to 4.2.04, there was a generally prevalent practice regarding levy of Service Tax(including non-levy thereof) under Section 66 of the Finance Act,1994, on services provided in relation to transport of passengers from one place to another (other than service provided in relation to package tour), operating under Contract Carriage permits issued by appropriate transport authority and that such services were liable to service tax under Section 65(105)(n) of the Act, which was not

being levied according to general practice during that period, has directed that, for this period, the service tax payable on services provided by a tour operator in relation to transport of passengers from one place to another (other than services provided in relation to package tour) operating under a Contract Carriage permit issued by the appropriate authority, as is in excess of the tax calculated on a value, which is equivalent to 40% of the gross amount charged by such service provider for providing the said taxable service, shall **not** be required to be paid in respect of such taxable service on which the service tax was not being levied during the aforesaid period in accordance with the said practice. The service tax demand in this case pertains to period from 1.4.01 to 31.3.04 and therefore, the above mentioned notification is applicable to this case. Since the Government itself in this notification has acknowledged the practice of non-levy of service tax during period from 1.4.2000 to 4.2.04 on the service provided by tour operators operating under Contract Carriage permits, in relation to transport of passengers from one place to another (other than package tour services), there will be no justification for holding the Appellant guilty of wilful suppression of relevant information with intent to evade the service tax. Since in this case, the service tax for the period from 1.4.01 to 31.3.04 has been demanded by show cause notice dt.13.6.05, longer limitation period can not be invoked. Since under Rule 7(2) of the Service Tax Rules,1994, the service tax return for the six months period ending on 31.3.04 was due on 25.4.04, the show cause notice for service tax demand for period from 1.4.01 to 31.3.04 should have been issued by 25.4.05, but since the same was issued on 13.6.05, the entire demand is time barred. In view of this, the impugned order is not sustainable and the same is set aside. The appeal is allowed.

(S.S.Kang)
Vice President

(Rakesh Kumar)
Member Technical

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