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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/129 /2005 - CU[DB] Date 12/11/2008

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

To :
M/S PUNJAB EX-SERVICEMEN CORPORATION
SCO 89-90, SECTOR 34-A, CHANDIGARH.

M/S PUNJAB EX-SERVICEMEN CORPORATION Appellant
Vs
THE COMMISSIONER OF CENTRAL EXCISE Respondent
CHANDIGARH

I am directed to transmit herewith a certified copy of **Final order No.** ST/337/08 **CU[DB]** dated 11.11.08 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 OF CENTRAL EXCISE CHANDIGARH
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2. Adv. / Consult
MR. Ashish Chopra & Ms. Rupa Pathania, Adv
112 Sector 16-A,CHANDIGARH.
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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 - 3
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
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-1
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Assistant Registrar
(Customs Appeal Branch)

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

COURT NO. II
Service Tax Appeal No. 129 of 2005

[Arising out of the Order-in-Appeal No. 142/CE/CHD/2005 dated 25/04/2005 passed by The Commissioner (Appeals), Central Excise, Chandigarh.]

For Approval and signature :
Hon'ble Shri S.S. Kang, Vice President
Hon'ble Shri 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 Punjab Ex-Servicemen Corporation — Appellant

Versus

CCE, Chandigarh — Respondent

Appearance

Shri Ashish Chopra and Ms. Rupa Pathania, Advocates – for the appellant.

Shri Amit Jain, Authorized Representative (DR) – for the Respondent.

CORAM:**Hon'ble Shri S.S. Kang, Vice President**
Hon'ble Sh. Rakesh Kumar, Member (Technical)

DATE OF HEARING : 22/07/2008.
DATE OF DECISION : 11-11-08 .

Final Order No. 57/337/08 Dated : 11/11/08

Per. Rakesh Kumar :-

The Appellant is a corporation established by the Government of Punjab under Punjab Ex-Servicemen Corporation Act, 1978 (hereinafter referred to as PESCO Act) for welfare and rehabilitation of ex-servicemen in the state. One of the activities of the Appellant is deploying ex-servicemen for providing security service to their clients. When the 'Security Agency Service' became taxable w.e.f. 16/10/98, the Appellant applied for service tax registration and were issued a registration certificate on 07/12/98. Since even after obtaining service tax registration, the Appellant neither paid service tax nor were they filing any returns, they were asked by the Revenue vide letter dated 29/07/99 to file the half yearly ST-3 returns, to which the Appellant, vide letters dated 04/08/99 and 28/03/03 replied that being an organization set up by the Punjab Government for welfare and rehabilitation of ex-servicemen, they, not having any profit motive, are not a 'commercial concern' and hence are not liable to pay the service tax. The Revenue, however, vide letters dated 30/04/03 and 14/07/03 clarified to the Appellant that they have to pay the service tax. The Appellant were asked by the Revenue vide letter dated 08/08/03 to pay the service tax for the past period from October 1998 to March 2003 with interest. In response to the Revenue's direction, the Appellant paid a total service tax of Rs. 1,41,06,096/- during September 2003 to 01/03/04 period for October 1998 – December 2002 period under five TR-6 challans. For ascertaining the correctness of the tax paid, the Revenue vide letters dated 02/12/03 and subsequently vide letter dated 17/03/04 asked the Appellant to furnish total amount received from the clients during October 1998 – March 1999, 1999-2000, 2000-2001, 2001-2002 and 2002-2003 (upto December 2002) period, which was supplied in April 2004. On the basis of the information supplied by the Appellant, the Revenue issued show cause notice dated 22/04/04 to the Appellant demanding short paid service tax amounting to Rs.

55,07,238/- (50,60,070 for October 1998 – March 1997 period and remaining amount for 2001-2002 and 2002-2003 period), alongwith interest and proposing imposition of penalty, under Section 76,77 and 78 of the Finance Act, 1994. The Deputy Commissioner vide order-in-original dated 29/11/04 confirmed the service tax demand of Rs. 55,07,238/- under Section 73 (2), alongwith interest and imposed combined penalty of Rs. 55,07,238/- under Section 76,77 and 78 of the Act. The Deputy Commissioner's order was upheld by CCE (Appeals) vide order-in-appeal dated 25/04/05 and CCE (Appeals)'s order was upheld by the Tribunal vide order-in-appeal No. 385/06-ST dated 06/10/06. The Appellant filed a civil writ petition before Hon'ble Punjab & Haryana High Court against the Tribunal's order dated 06/10/06 and among other points, one point raised was that the Tribunal, while considering their appeal, did not consider the ground of limitation which had been raised in the appeal. Hon'ble High Court, vide order dated 19/02/07 remanded the matter to Tribunal with the following directions –

"Therefore, we set aside the impugned order dated 06/10/06 and remand the matter back to the Tribunal with a direction to consider any other ground which might have escaped its notice. The Tribunal shall take a fresh decision after hearing both the parties afresh."

1.1 When the matter came up for hearing before the Tribunal on 11/04/07, the Departmental Representative pleaded that the Tribunal in terms of the Hon'ble High Court's order, is to decide only the question of limitation and other issues not considered in the Tribunal's order, while the Appellant's counsel pleaded that the Tribunal has to decide the matter afresh including the issue of valuation and whether or not the Appellant are a 'commercial concern'. The Tribunal, vide order dated 11/04/07, while expressing its view that the Hon'ble High Court has set aside the Tribunal's order with a direction to take a fresh decision not only on the question of limitation but also on other grounds raised, directed the Revenue to seek clarification in this regard from the Hon'ble High Court. On the Revenue's petition for clarifications, the Hon'ble High Court passed the following order on 03/08/07 –

"A perusal to para 2 of the order dated 11/04/07, passed by the Customs, Excise and Service Tax Appellate Tribunal, shows that the Tribunal has rightly understood the order passed by this Court on 19/02/07 when it observed that this Court has set aside the order of the Tribunal dated 06/10/06 which was passed earlier by the Tribunal. Accordingly, we find no further clarification would be necessary."

Accordingly the appeal is being take up for decision afresh.

2. Heard both the sides.

2.1 Shri Ashish Chopra, Advocate, the learned counsel on behalf of the Appellant, made the following submissions –

(1) The Appellant had obtained service tax registration on 07/12/98 and their activity was known to the Revenue. There was long correspondence between the Appellant and the Revenue regarding the Appellants liability to pay service tax. In view of this, there is no justification for invoking longer limitation period of five years for recovery of allegedly short paid tax. The show cause notice dated 22/04/04 for recovery of allegedly short paid tax during October 1994 to December 2002 period is, therefore, time barred. In this regard judgment

of Tribunal in case of **Dolphine Detective Agency vs. CCE, Belgaum** reported in **2006 (4) STT – 248 (Bang.)** was cited wherein the Tribunal held that show cause notice dated 22/01/04 demanding service tax on security agency's service from M/s Dolphine Detective Agency for period from 16/10/98 to 30/09/02, when all relevant facts were in knowledge of the authorities, is time barred. Judgment of Tribunal in case of **Surat Municipal Corporation vs. CCE, Surat** reported in **2006 (4) STR – 44** was cited wherein it was held that a statutory Government body cannot have a malafide intention to evade service tax.

(2) In any case, the October 1990 – March 1997 period is beyond even the five year's limitation period and therefore the tax demand in respect of this period is ,in any case, time barred.

(3) The Appellant are not a "commercial concern". Therefore, in terms of the definition of 'Security Agency', as given in Section 65 (94) during the period of dispute, the Appellant not being a commercial concern, were not a Security Agency and therefore were not liable to pay any service tax.

(4) For determining whether an entity is a commercial concern or otherwise, its objectives have to be seen. The objective of the Appellant corporation is welfare and rehabilitation of ex-servicemen, not earning profit.

Therefore, the Appellant cannot be called a commercial concern. In this regard reliance is placed on the Tribunal's judgment in cases of –

(i) Kerala State Ex-Service League vs. CCE, Thiruvananthapuram – 2006 (3) STR – 400 (Tri. – Bang.) ;

(ii) Ex-Services Security Cooperative Society vs. CCE, Belgaum – 2008 (86) RLT – 961 (CESTAT – Bang.) and

(iii) Board of Control for Cricket in India vs. CST, Mumbai – 2007 (7) STR – 384 (Tri. – Mumbai).

(iv) CCE, Jaipur-I vs. Sikar Ex-Servicemen Welfare Society Ltd. – 2006 (4) S.T.R. – 213 (Tri. – Del.)

(5) As per Board's Circular No. 86/4/2006-ST dated 01/11/06, a commercial concern is an institution/ establishment, which is primarily engaged in commercial activities, having profit as the primary commercial, and that it is the totality of its activities and objective of its existence that determine the commercial nature of an institution as commercial concern. Looked at from this criteria, the Appellant corporation is not a commercial concern.

(6) Even if the Appellant are treated as a Security Agency, the service tax is not chargeable on the gross

amount charged from the clients which also includes the security personnel's salary, but is chargeable only on the commission which the Appellant get. In this regard, reliance is placed on Tribunal's judgment in case of **Malabar Management Services Pvt. Ltd. vs. CST, Chennai** reported in **2008 (9) S.T.R. – 483**.

(7) The Appellant being a State Government Undertaking, there is no question of intention to evade the tax. Therefore there is no justification for imposition of penalty on them.

2.2 Shri Amit Jain, the learned Departmental Representative made the following submissions :-

(1) The show cause notice dated 22/04/04 is not barred by limitation as during the period prior to 10/09/04, in Section 73 mere omission or failure to file the return under Section 70 was sufficient for invoking the longer limitation period of five years. In this regard, reliance is placed on Tribunal's judgments in cases of M/s **Eta Travel Agency Pvt. Ltd. vs. CCE, Chennai** reported in **2007 (7) STR – 454** and **Free look outdoor advertising vs. CCE, Guntur** reported in **2007 (6) STR – 153 (Tri. – Bang.).** Even the demand for October 1998 – March 1999 period is within time as the due date for filing return for the six monthly period October

1998 – March 1999 was 25/04/99 and show cause notice for recovery of short paid duty for this period, by invoking five years' limitation could be issued upto 25/04/2004. The entire demand raised vide show cause notice dated 22/04/04 is, therefore, within time.

(2) As per Section 15 (1) and 15 (2) of the PESCO Act, the Appellant corporation's functions are not limited to welfare and rehabilitation of ex-servicemen but also promote marketing, processing of agricultural produce and other business and trading activity, as may be approved by the Government and that the corporation has to have due regard to its solvency. In the Profit & loss Accounts of the Corporation, the various activities of the corporation are mentioned as commercial activities. Therefore, the Appellant is a commercial concern. Grant of income tax exemption to the Appellant under Section 26BBB of the Income Tax Act has nothing to do with its activity. Hon'ble Calcutta High Court in its judgment in case of **M.N. Dastur & Co. Ltd. vs. Union of India** reported in **2006 (4) STR – 3 (Cal)** has held that the expression – "Commercial concern" would include all concerns associated with commerce carrying on trade or profession or

any kind of commercial activity and include a company.

(3) For service tax, it is the activity of a concern which is relevant, not its objective and if the activity of a concern is a commercial activity, it will have to be treated as a commercial concern for purpose of service tax. The objectives – welfare or otherwise of a corporation or concern are not relevant for the purpose of service tax.

(4) Service tax is chargeable on the gross amount charged by the Appellant from their clients including the salary of security personnel. In this regard, reliance is placed on the Board's Circular No. B-11/3/98-TRU dated 07/10/98. As held by Hon'ble Supreme Court in case of **Commissioner of Trade Tax vs. Kajawa Ceramics** reported in **2005 (191) E.L.T. – 20 (S.C.)**, departmental circulars are contemporaneous exposition of the law. Tribunal in cases of **M/s New Industrial Security vs. CCE, Kanpur** reported in **2006 (3) STR – 197** and M/s **Panther Detective vs. CCE** reported in **2006 (4) STR – 116** has held that in case of Security Agency's service, the service tax is chargeable on the gross amount, including the salary of the security personnel,

(5) When the Appellant were collecting service tax from their customers, there is no question of bonafide belief for not being liable to pay the service tax. The Appellant, therefore, are liable for penalty under Section 76 and 78.

3. We have carefully considered the submissions from both the sides.

4. The first point of dispute is as to whether the demand for service tax for the period from October 1998 to December 2002 raised vide show cause notice dated 22/04/04 is within time or the same is time barred. The Appellant's contention is that since in this case the correspondence between the Appellant and the Revenue on the question as to whether the Appellant are liable to pay the service tax was going on since July 1999 and there has been a long correspondence on the question of Appellant's liability to pay the service tax between the Appellant and the Revenue, the conditions for invoking longer limitation period of i.e. wilful misstatement, suppression of fact, fraud etc. do not exist and therefore the longer limitation period under Section 73 is not applicable and as such the entire demand is time barred. We do not agree

with this contention of the Appellant. Section 73 (1), as it existed during the period of dispute i.e. during the period prior to 10/09/04 is reproduced below :-

"SECTION 73. Value of taxable services escaping assessment –

(1) If -

(a) The Assistant Commissioner of Central Excise or, as the case may be, the Deputy Commissioner of Central Excise *has reason to believe that by reason of omission or failure on the part of the assessee, to make a return under Section 70 for any prescribed period or to disclose wholly or truly all material facts required for verification of the assessment under Section 71*, the value of taxable service has escaped assessment or has been under-assessed or service tax has not been paid or has been short paid or any sum has erroneously been refunded, or

(b) x x x x x x x x x x x x x x x x x x x x x x x x x x x x

he may, in cases falling under clause (a), *at any time within five years*, and in cases falling under clause (b), at any time within one year, from the relevant date, serve notice on the person chargeable with the service tax, which has escaped assessment or has been under-assessed or has not been paid or has been short-paid, or to whom any sum has been erroneously refunded, requiring him to show cause why he should not pay the amount specified in the notice."

4.1 The Section 73 (1) was substituted by a new Section 73 w.e.f. 10/09/04 and the amended Section 73 (1) is as under :-

"73. Recovery of service tax not levied or paid or short-levied or short-paid or erroneously refunded.

(1) Where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the Central Excise Officer may, within one year from the relevant date, serve notice on the person chargeable with the service tax which has not been levied or paid or which has been short-levied or short-paid or the person to whom such tax refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice :

Provided that where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of –

(a) fraud ; or

(b) collusion ; or

(c) wilful mis-statement ; or

(d) suppression of facts ; or

> (e) *contravention of any of the provisions of this Chapter or of the rules made thereunder with intent to evade payment of service tax.*
>
> by the person chargeable with the service tax or his agent, the provisions of this sub-section shall have effect, as if, for the words "one year", the words "five years" had been substituted." (emphasis supplied).

4.2 From a reading of the provisions of Section 73 (1), as the same existed during the period of dispute i.e. during the period prior to 10/09/04, and as the same existed w.e.f. 10/09/04, it is clear that during the period of dispute, the existence for fraud, collision, wilful misstatement, suppression of fact, or contravention of the provisions of Finance Act, 1994 or of the Rules made thereunder with intent to evade the payment of tax, were not required for invoking the longer limitation period and all that was required for invoking the longer period was omission or failure on the part of the assessee to file return under Section 70 for any prescribed period or failure to disclose wholly or truly all the material facts required for verification of the assessment under Section 71 , resulting in certain value of taxable service having escaped assessment or the tax having been under assessed. In this case, in spite of the correspondence of the Appellant with the Revenue on the question of their liability to the service tax, it is not under dispute that even though the Appellant had obtained service tax registration on 07/12/98, that they did not file the prescribed six monthly returns in ST-3 form for October 98 to December 2002 period. The information about the value of taxable service provided by them during the period of dispute was furnished by the Appellant only in March 2004. We, therefore, hold that in view of these circumstances, the longer limitation period of five years provided under Section 73 (1) is available to the Revenue for recovery of the short paid service tax. We are supported in this view by the Tribunal judgment of Eta Travel Agency Pvt. Ltd. vs. CCE, Chennai (Supra) and Tribunal's judgment in case of Free Look Outdoor Advertising vs. CCE, Guntur (Supra).

4.3 It has been pleaded that in any case the October 1998 – March 1999 period is beyond the period is five years from the date of issue of show cause notice and, therefore, the service tax demand for this period is time barred. This contention is also not correct. The relevant date from which the limitation period of one year or five years, as the case may be, is to be reckoned, as defined under Section 73 (6), is, in a case where the prescribed periodical return has not been filed, the last date on which such return is required to be filed. The last date for filing the six monthly ST-3 return for October 1998 – March 1999 period, as per the provisions of Rule 7 (2) of the Service Tax Rules, 1994 was 25th April 1999 and, therefore, the show cause notice, for any short payment of service tax during this period could have been issued upto 25/04/04. In this case, the show cause notice was issued on 22/04/04. Therefore, the show cause notice is within time even for October 1998 – March 1999 period also.

5. Next plea taken by the Appellant is that they are not a 'commercial concern' and, therefore, they are not covered by the definition of 'security agency service' as defined under Section 65 (94) of the Finance Act, 1994 during the period of dispute. It has been pleaded that the Appellant corporation is a corporation set up under PESCO Act for welfare and rehabilitation of ex-servicemen and it has no profit motive.

First of all, this contention of the appellant is not factually correct. As per the provisions of Section 15 (2) of the PESCO Act, under which the Appellant corporation was constituted, its main charter of function is to "plan, promote and undertake, on its own or in collaboration with or through such ex-servicemen organizations or other agencies, as may be approved by the corporation, programmes of agricultural development, marketing, processing supply and storage of agricultural produce, small scale industry, building construction, transport and such other business, trade or activity, as may be approved in this behalf by the Government." As per sub-Section 3 of Section 15 of PESCO Act, the corporation in discharging its functions, shall have due regard to public interest, its solvency and welfare of ex-servicemen. Under Section 16 (1) of PESCO Act, the Appellant Corporation can raise money by borrowing from Bank or other Financial institutions, issue of bonds and debentures etc. and under Section 17 (2) of the PESCO Act, the Corporation shall deploy the funds at its disposal for carrying out its functions as mentioned under Section 15 (2). From the above, it is clear that the function of the appellant corporation is promoting welfare of ex-servicemen and their rehabilitation by engaging in various business activities and it functions like any other commercial entity. It is also seen that the corporation every year prepares a profit and loss account wherein income from its activities like 'Security project', 'Stitching project', "construction", "vocational courses" etc. is mentioned as income for "commercial activities". Thus the Appellant Corporation itself treats its Security Service project as commercial activity. Hon'ble Calcutta High Court in the case of M.N. Dastur & Co. Ltd. vs. Union of India (Supra) has observed that :-

> "a 'concern' without any qualification can include any business or professional establishment and the "commercial concern" would include all concerns connected with commerce carrying on trade or profession or any kind of commercial activities and includes a company."

Since as per its charter of the Appellant corporation it has to engage in various activities like marketing, supply and storage of Agricultural produce, small scale industry, building construction and other business, trade or activity as approved by the Punjab Government, for promoting the welfare and rehabilitation of ex-servicemen and since like any other commercial, concern every year it prepares a balance sheet, and profit and loss account in which the income from its various commercial activities is declared, it conforms to the criteria for "commercial concern", as prescribed in the above-mentioned judgment of the Hon'ble Calcutta High Court.

5.1 It has been pleaded that since the Appellant corporation has been granted income tax exemption under Section 26 BBB of the Income Tax Act, it cannot be treated as a commercial concern. Section 26 BBB of the Income Tax Act exempts from income tax, any income of a corporation established by a Central, or State Government Act for the Welfare and Economic up-liftmen of the ex-servicemen. The income tax exemption to a income of such a corporation established by a Central or State Government for welfare or economic up-liftmen of ex-servicemen has nothing to do with question as to whether the corporation is a commercial concern or a non-commercial concern. An organization may be a charitable organization established for some charitable purposes, but it may still engage in commercial activities, as without any commercial activities, the income required for charitable purposes cannot be generated. For levy of service tax, it is the activity of an organisation which is relevant, not is objective. This principle was upheld by Hon'ble Supreme Court in the context of income tax in case of **The Commissioner of Income Tax, Punjab vs. Shri Thakur Das Bhangava** reported in **1960 – (SC 2) – GJX – 0135 – SC** wherein it was held that the amount received by the Respondent attracted tax as soon as it was received by him as his professional income and its future destination or application was irrelevant for taxing purposes.

5.2 The Appellant have cited the Tribunal's judgments in the cases of **CCE, Jaipur-I vs. Sikar Ex-servicemen Welfare Society Ltd.** reported in **2006 (4) S.T.R. – 213 (Tri.-Del.), Kerala State Ex-service League vs. CCE, Thiruvananthapuram** reported in **2006 (3) S.T.R. 400 (Tri. – Bang.), Board of Control for Cricket in India (BCCI) vs. CST, Mumbai** reported in **2007 (7) STR 384** and **Ex-**

services Security Cooperative Society Ltd. vs. CCE, Belgaum reported in **2008 (86) RLT 961**.

5.2.1 In the Tribunal judgment in the case of CCE, Jaipur-I vs. Sikar Ex-servicemen Welfare Society Ltd. (Supra), the issue involved was as to whether the respondent M/s Sikar Ex-servicemen Welfare Society Ltd. was liable to penalty or not and the question as to whether or not it was a 'commercial concern' was not before the Tribunal. The Tribunal in this case, upheld the Commissioner's orders setting aside the penalty on the ground that there were two ways of interpreting the word "commercial concern" and since in this case, the respondents were registered as cooperative society for welfare of ex-servicemen, as per their interpretation, they were not covered by the definition of 'security agency service' and for this reason the penalty was set aside. But the Tribunal, in this case, did not go into the question of as to what is a "commercial concern". Therefore, this judgment does not help the Appellant.

5.2.2 In case of ex-Servicemen Security Cooperative Society Ltd. vs. CCE, Belgaum (Supra), the Tribunal decided that it is not a "commercial concern" on the ground that as per the provisions of Section 4 of the Karnataka Cooperative Act, 1954, a "commercial concern" is debarred from being registered as a cooperative society and from this, the Tribunal concluded that since it is a cooperative society, it cannot be a "commercial concern". In the present case, the Appellant are a corporation and not a cooperative society and there is nothing in the PESCO Act, under which the corporation was established, providing that the Appellant corporation cannot have a profit motive or cannot function as commercial concern – in fact the charter of its functions and its actual functioning indicates to the contrary. Therefore, this judgment of the Tribunal also does not help to the Appellant.

5.2.3 In the case of BCCI vs. CST, Mumbai, the question to be decided by the Tribunal was as to whether BCCI is a "commercial concern" and hence covered by the definition of advertising agency. The Tribunal's decision in this case holding that BCCI is not a "commercial concern" is based on the Hon'ble Supreme Court's judgment in case of **Secretary, Ministry of Information and Broadcasting (I&B) vs.**

Cricket Association of Bengal and others reported in **1995 – 2 SCC 161**, wherein the Hon'ble Supreme Court held that BCCI is not a "commercial concern". The Tribunal's decision in the case of BCCI vs. CST, Mumbai being based on Hon'ble Supreme Court's judgment in the case of Secretary, Ministry of I&B vs. Cricket Association of Bengal and ors. (Supra) holding that BCCI is not a commercial concern, cannot be applied to the present case.

5.2.4 In the case of Kerala State Ex-Service League vs. CCE, Thiruvananthapuram (Supra) issue was as to whether the Appellant, a charitable society registered under Travancore Cochin Societies Registration Act, 1955 and whose objective is to look after the economic and welfare matters of ex-servicemen and their families, is a commercial concern. In this case, the appellant relying upon the Hon'ble Supreme Court's judgment in case of Commissioner of Service Tax vs. Sai Publication Fund and State of Tamilnadu and another vs. Board of Trustees of the Port of Madras pleaded that a "commercial concern" is a concern which should earn profits, that the appellant are not a commercial concern and are not earning profits, that they are not preparing balance sheet and profit and loss account, and that as per the above judgments of the Hon'ble Supreme Court, in order to hold a concern to be a "commercial concern", it has to have profit motive, which is relevant where the person carries on trade, commerce or manufacture. The Tribunal in this case accepting the contention of the appellant remanded the matter to the original adjudicating authority for denovo adjudication of the question as to whether or not the appellants are a commercial concern in the light of Hon'ble Supreme Court's judgments. This judgment also does not help the Appellant. On the contrary, this judgment supports the Revenue ,as in the present case, as the profit motive of the Appellant corporation is clear from the facts that they are preparing annual balance sheet and profit and loss account and in the profit and loss account, the income from various activities including security projects, is mentioned as income from 'commercial activities' and they have been earning profit.

5.3 Hon'ble Supreme Court in its judgment in the case of **Indian Chamber of Commerce and others vs. Commissioner of Income Tax, West Bengal – II (Calcutta)** reported in **1976 (1) SCC 324** while examining the scope of the term "charitable purpose" in Section 2 (15) of the Income Tax Act has observed as under :-

> "The definition of 'charitable purpose' in that clause is at present so widely worded that it can be taken advantage of even by commercial concerns which, while ostensibly serving a public purpose, get fully paid for the benefits provided by them, namely, the newspaper industry, which while running its concern on commercial lines, can claim that by circulating newspapers it was improving the general knowledge of the public. In order to prevent the misuse the definition in such cases, the Select Committee felt that the words "not involving the carrying on of any activity for profit" should be added to the definition.

The above observations of the Hon'ble Supreme Court, though with regard to the scope of the term "charitable purpose", also throw light on the question as to what is a "commercial concern" and according to the above-mentioned observations of the Hon'ble Supreme Court,a "commercial concern" is the one which get fully paid for the services provided by it. Therefore, in our view, the test for determining as to whether a concern is a "commercial concern" would be as to whether it charges fully commercial price for the goods or services sold by it and monitors its commercial performance by preparing annual balance sheet and profit and loss account. From mere objectives of an organization – like welfare of ex-servicemen or other sections of the society requiring help, promotion of sports etc. it cannot be concluded that it is not a commercial concern. The Appellant corporation is charging fully commercial price from its clients, - which includes besides the salaries of the security personnel, its commission to cover the administrative expenses and profit. It prepares annual profit and loss account and balance sheet. It is expected to generate resources to sustain itself and not fall into insolvency. It is free to deploy its funds in carrying out its functions which include marketing, processing, supply and storage of agricultural produce, small scale industry, building construction, transport and other business, trade or activity, as approved by the Government and it can invest the surplus funds generated in Government securities or in such other manner as it may decide. The Appellant corporation, therefore, functions like a 'commercial concern'.

5.4 In view of the above, we do not accept the Appellant's contention that they are not a 'commercial concern'.

6. The next question to be decided is as to whether the service tax is to be charged on the gross value including the salary of the security personnel provided or only on the commission. Tribunal in the case of **New Industrial Security vs. CCE** reported in **2006 (3) S.T.R. 197** and **Panther Detective vs. CCE** reported in **2006 (4) S.T.R. 116** and Hon'ble Madras High Court in the case of **GDA Security Private Ltd. vs. Union of India** reported in **2002 (140) E.L.T. 332 (MAD.)** has held that the assessable value of the security agency services provided by a security agency is the gross amount charged including the salary of the security personnel provided. Hon'ble Madras High Court in the case of GDS Security Pvt. Ltd. (Supra) ,in para 10 of its judgment, while upholding the constitutional validity of the inclusion of expenditure incurred while providing taxable service, in Section 67 (5) of the Finance Act, 1994, observed that nature

of the tax is not to be ascertained on the basis of its measure and no fault can be found with the taxing provision with reference to the measure of the tax.

6.1 We, therefore, do not find merit in the Appellant's contention that the service tax is payable only on the commission amount received by them and not on the gross amount.

7. The last question to be decided is as to whether the Appellant company is liable to penalty under Section 76, 77 and 78 of the Finance Act. So far as, penalty under Section 76 is concerned, the same gets attracted when an assessee delays the payment of the tax. Penalty under Section 77 is attracted for not obtaining service tax registration or not filing the service tax returns. As regards the penalty under Section 78, the same would be attracted when there is deliberate and wilful evasion of the tax. Since, the Appellant corporation is a corporation set up by the State of Punjab and is a Government organization, it is inconceivable that it would have an intention to evade the tax. From the long correspondence of the Appellant with the Department , it is clear that though

they had obtained service tax registration on 07/12/98, they had doubt as to whether they are covered by the definition of 'Security Agency Services' and it is for this reason that the service tax, though collected in some cases from the customers ,was not paid and the ST-3 returns were not filed. But from the circumstances of the case, it cannot be said to be a deliberate act with intention to evade the service tax. The Tribunal in the case of Surat Municipal Corporation vs. CST, Surat (Supra), has held that the appellant being a statutory Government body, there cannot be any malafide intention to evade the payment of service tax – it is only a case of omission on the part of the Appellant, who were under belief that they were not liable to pay the service tax, being a statutory Government body and on this ground in this case the Tribunal set aside the penalty. Following the above judgments of the Tribunal, we hold that in view of the provisions of Section 80, no penalty is imposable under Section 76, 77 or 78 of the Finance Act, 1994.

8. In view of our above findings, while upholding the impugned order confirming the demand of service tax

alongwith interest, we, for the reasons given above, set aside the adjudicating authority's order imposing penalty on the Appellant under Section 76, 77 & 78 of the Finance Act, 1994. The impugned order stands modified, as above.

(Pronounced in the open court on 11/11/08

(S.S. Kang)
Vice President

(Rakesh Kumar)
Member (Technical)

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