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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/440 /2006 - CU[DB] Date 23/06/2009
ST/111/2006

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

To :
BAJAJ TRAVELS LTD
S.C.O 96-97,SECTOR 17-C,CHANDIGARH.

BAJAJ TRAVELS LTD Appellant
Vs
C.C.E.CHANDIGARH. Respondent

I am directed to transmit herewith a certified copy of **Final order No. ST/198-199 2009 CU[DB]** dated 19.06.09 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.CHANDIGARH.
   PLOT NO 19,SECTOR 17-C,CHANDIGARH.
2. Adv. / Consult
   MR.K.K ANAND
   A-5,BASEMENT,LAJPAT NAGAR-III NEW DELHI-24
3. S.D.R
4. J.C.D.R.
5. Bar association, CESTAT, New Delhi
6. Director Publications, Customs, Excise. I.P. Estate, New Delhi
7. M/s Centax Publictions Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi - 3
8. Commercial Laws of India Pvt Ltd. Post Bag No. 1033, No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
9. Raghuraman's 44-B, Regal Flat,Shipra Suncity, Indirapuram - 201010,Ghaziabad, DT, U.P.
10. M/s Manupatra Information Solutions Pvt Ltd. Excise & Customs Cases B-37, Sector - 1, Noida - 201301, Gautam Budh Nagar, (UP)
11. M/s. Deeparchie Publications, M-93, Marg. 46, Saket, New Delhi 110017
12. Taxindiaonline.com Pvt.Ltd, B-XI/8183,Vasant Kunj, New Delhi - 110070
13. Taxmann Allied Service Pvt Ltd., 21/35, West Punjabi Bagh, New Delhi - 110026
14. Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road,Ahmedabad-15
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Assistant Registrar
(Customs Appeal Branch)

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI
COURT NO.II

ST/Appeal No. 440/2006 – Cus (Br)

(Arising out of order in Original No 23/CE 2006/ST/Chd dated 9.6.2006 passed by the Commissioner of Central Excise, Chandigarh)

M/s Bajaj Travels Ltd — Appellant

Vs

CCE, Chandigarh — Respondent

ST/Appeal No. 111/2006 – Cus (Br)

(Arising out of order in Original No.2/RK/2006 dated 31.1.2006 passed by Commissioner of Service tax, New Delhi)

M/s Bajaj Travels Ltd — Appellant

Vs

CCE, New Delhi — Respondent

Appeared for Appellant : Shri K.K. Anand, Advocate

Appeared for Respondent : Shri L.B. Yadav, DR

Coram: Sri D.N. Panda, Judicial Member
Si Rakesh Kumar, Technical Member

Date of Hearing: 19.2.2009, 19.3.2009
15.4.2009

Date of Pronouncement: 19 -06-2009

Final

Order No. ST/198-199/09/2009-Cus (BR)

Date:..

Per D.N. Panda

These two appeals arise out of common cause and facts relating to same appellant, in terms of two adjudications made by two different Jurisdictional Commissioners consequent upon discovery of certain materials in the course of search made on 05.09.2005 to its head office in Chandigarh and branch office in Delhi. Hence both the appeals were heard together and disposed by this common order. Although Appellant had made prayer in both the Appeal Memos for setting aside of order in original and grant of consequential relief if any, the appellant in the course of hearing before us confined its claim against penalty imposed without disputing tax liability arose under adjudication. Accordingly limited issue of penalty was pressed praying that penalties imposed u/s 76, 77 and 78 may be waived or in the alternative, penalty u/s 76 may be waived in toto and penalty u/s 78 may be reduced to a marginal amount in the interest of justice. Also, subsequent to hearing of the matter, learned counsel for the appellant filed written submissions on 24.2.2009, reiterating his stand on the above limited issue. In view of filing of written submission by the assessee, Revenue was given equal opportunity to file their submissions if any. Accordingly, Revenue also filed their submission on 09.04.2009. Both the appeals are accordingly considered taking written submission of both sides into consideration and decided together by this common order in view of analogous hearing granted for both the appeals to both sides.

APPEAL CASE NO. ST – 440/2006

2 The appellant being aggrieved by the impugned order of adjudication dated 12.06.2006 passed by learned Commissioner, Chandigarh relating to the period April 2000 to March 2005 against show cause notice dated 20.10.2005 giving rise to consequences as under, preferred appeal before the Tribunal praying for setting aside the same with consequential relief if any and that appeal was registered by Tribunal as Appeal Case No. APPEAL CASE No ST – 440/2006:

(1) Service tax and education cess aggregating Rs. 56, 84,980/- was demanded under The Finance Act, 1994 (hereinafter

referred to as "the Act") read with provisions of section 11 D of Central Excise Act, 1944 with interest on the tax so demanded.

(2) An amount of Rs. 45,00,000/- already deposited by the notice was directed to be appropriated against tax demanded as above.

(3) Penalty of Rs. 56, 84, 980/- was demanded under section 78 of the finance Act, 1944.

(4) Penalty of Rs. 200/- for every day of default to discharge tax liability under section 76 of the Finance Act, 1994.

APPEAL CASE NO. ST – 111/2006

3 Similarly an adjudication was made by order dated 25.01.2006 (issued on 31.01.2006) against show cause notice dated 17.10.2005 by the learned Commissioner, Delhi relating to the period April 2000 to March 2005 giving rise to consequences as under, preferred appeal before the Tribunal praying for setting aside the same with consequential relief if any and that appeal was registered by Tribunal as Appeal Case No. APPEAL CASE No ST – 111/2006:

(1) Service tax and education cess aggregating Rs. 86, 02,849/- was demanded under The Finance Act, 1994 (hereinafter referred to as "the Act") read with provisions of section 11 D of Central Excise Act, 1944 with interest on the tax so demanded. The assessee having paid entire service tax demand that was appropriated.

(2) Education Cess of Rs. 64,029/- was recoverable

(3) An amount of Rs.29,000/- already deposited by the notice was directed to be appropriated against interest demanded as above.

(4) Penalty of Rs. 86, 66,878/- was demanded under section 78 of the finance Act, 1944.

(5) Penalty of Rs. 100/- for every day of default to discharge tax liability under section 76 of the Finance Act, 1994 and penalty of Rs. 1,000/- was imposed u/s 77 of the Act.

BASIC FACTS

4 The Appellant is an Air Travel Agent, having its head office in Chandigarh and branch office in Delhi. It is an approved agent of International Air Ticketing Association (IATA). A Company called "Amadeus" had provided Central Reservation System (CRS) to the appellant to book air ticket of various Air Lines with which the former had business tie up. The Appellant was booking ticket for its clients as well as agents who were not members of IATA, under Billing Settlement Plan (BSP) of IATA. Under this plan, the appellant was getting tickets on line from various tied up Air Lines. Fortnightly statement was received by the Appellant under above Plan showing various details like basic fare, transaction value, tax values and commission on tickets. Due to stiff competition in the market, the appellant was merely able to retain approximately 1% of the commission earned by it parting with a part of commission to its customers and agents who are not members if IATA.

5 The Appellant was under belief that 10% of the 1% net commission retained by it was service tax payable for the financial years 2000-01 to 2004-05 in both the appeals on the ground that the appellant was not aware of any other method of determination of its service tax liability. Returns filed by the appellant under the Act disclosed basic fare while its calculation of service tax was based on the net commission retained by it.

INVESTIGATION AND CONSEQUENCE THEREOF

6 Consequent upon search to the premises of the appellant on 05.09.2005, the investigation team found that the appellant was receiving fortnightly statements from IATA in terms of Billing Settlement Plan (BSP) for the Air Tickets booked by it. The team noticed that the appellant had maintained ticket sale record relating to domestic tickets and international tickets showing all particulars relating the basic fare of tickets, tickets cancelled and refund thereof made. Similarly, Exchange Order of General Sales Agent register maintained showed details relating to basic fare of the tickets, tickets cancelled and refund thereof made. Value of taxable service was determined subtracting refund amount from total transaction value of each fortnight.

7 It was alleged by investigation that the appellant was collecting service tax from its customers on the basic fare method. But it was making short deposit of the amount so collected. There was unlawful gain made by the appellant understating "basic fare" figure in its returns and that was done to match tax paid figure on the basis of net commission retained by the appellant. Investigation therefore alleged that there was suppression of "basic fare" figure and incorrect particulars were furnished in the returns. This was done in violation of provision contained under Rule 6(7) of Service Tax Rules, 1994 (hereinafter referred to as "the Rules"), for the service provided as Air Travel Agent. It was also alleged that the appellant was aware of the options for paying service tax i.e., either on the basis of commission earned or on "basic price" of tickets, at the respective applicable rates but not in combination of these alternatives.

8 According to Investigation, service tax on Air Travel Agent service was imposed w.e.f. 01. 07. 1997. In terms of Rule 6(7) of Service Tax Rules, 1994 air travel agents were given option to discharge tax liability by an alternate method of calculating the tax on "basic fare" at the rate provided in that Rule instead of paying service tax at the general rate of service tax on commission, prescribed by section 66 of the Act . Following Rule 6(7) of the Rules and applying the following rates of tax prescribed under that Rule by Notification from time to time, Investigation worked out the value of taxable service and tax evaded as under:

Period	Rate of tax: International Bookings	Rate of tax: Domestic Bookings
Prior to 14.05.2003	0.5%	0.25%
15.05.2003 to 13.09.2004	0.8%	0.4%
13.09.2004 to 31.03.2005	1%	0.5%

In addition to the service tax payable, Education Cess was payable @ 2% on the service tax w.e.f. 10.09.2004.

Suppressed value of "basic fare" for the impugned period 01.04.2000 to 31.03.2005 relating Chandigarh jurisdiction was worked out as follows, which is subject matter of Appeal case No. 444/06:

	Domestic Tickets	International Tickets
Actual Value:	Rs. 12, 15, 54,633	Rs. 1, 15, 79, 20,542
Declared Value:	Rs. 9, 36, 05,770	Rs. 33, 16, 01,816
Suppressed value:	Rs. 2, 79, 48,863	Rs. 82, 63, 18,726
Service Tax evaded:	Rs. 56,84,980/-	

Similarly, for the self same period aforesaid, inference of investigation in respect of Delhi jurisdiction was that the appellant had suppressed "basic fare" as under, which is under Appeal case No. 111/06:

	Domestic Tickets
Actual Basic fare charged	Rs. 2,58,62,84,429
Basic fare shown in ST -3 Return:	Rs. 1,30,77,36,056
Suppressed Basic Fare:	Rs. 1,27,85,48,373
Service tax evaded: Rs. 86, 02,849	

ADJUDICATION

9 Show Cause Notices dated 20.10.2005 and 31.01.2006 were served by the learned Adjudicating Authorities of Chandigarh and Delhi jurisdiction respectively on the basis of result of Investigation. Both the learned Adjudicating Authorities, examining reply of the Appellant to show cause notice, statements recorded from Sri Kuldeep Singh, Manager Accounts on 05.09.2005 and Sri Mohinder Singh Bajaj, Director on 05.09.2005, 08.09.2005 and 07.10.2005, evidence before them and various pleadings made before them in the course of adjudication decided the matter against the appellant holding that service tax was payable at the rate prescribed under Rule 6(7) of the Rules, with penal consequences of law to follow as per order in original depicted hereinbefore.

10 Appellant's principal grievance before both the learned adjudicating authorities was that it was not aware of mode of calculation for which it was paying service tax on the net commission earned. But, on examination of evidence on record, the authority found that they were unable to notice any reason for misunderstanding of law by the appellant for calculation of quantum of service tax liability when the assessee was not new to the field being engaged in the business since 1965. Authorities also found that the appellant had made no attempt to consult the department or to understand the practice as prescribed under the law at any time. While it was collecting service tax from the customers on the "basic fare" mentioned on the sales bills of the impugned period, it was depositing lesser amount of service tax understating value of "basic fare" in its returns, calculating tax at the rate prescribed by section 66 of the Act on the net commission retained by it. It was therefore held by both the learned Adjudicating Authorities that the appellant had malafide in calculation of its tax liability to make undue gain by short payment of tax. Further, it was held by them that invoking of extended period was justified in view of suppression of facts and intentional violation of the provisions of law when tax was actually collected by the appellant on the basis of basic fare, but manipulating the basic fare, that was not deposited fully. It was also held that while tax actually collected was reflected in records, deposit thereof not being made to the treasury, that has resulted in violation of provisions of section 11D of Central Excise Act, 1944 read with provisions of section 83 of the Act. Above finding against the appellant made it liable to penal consequence of law as well recovery of tax evaded.

11 The Authorities found the appellant not innocent. Deliberate manipulation of record and suppression of taxable service having been found and finding the appellant had realised service tax due from its customers, but not deliberately deposited the same under law, it was held by both the authorities that penalty under section 76 and 78 of the Act was leviable. An additional liability of penalty u/s 77 was imposed by the learned Adjudicating Authority of Delhi.

**PLEAS OF APPELANT
BEFORE TRIBUNAL**

12 Learned Counsel Sri Anand appearing for the appellant in appeal case No. ST - 444/2006 and 111/2006 argued as under as well as reiterated in his written note submitting that both the cases were made by Revenue for similar reasons:

(1) That the whole proceeding was initiated under misconception of law when there was confusion in respect of manner of levy of service tax.

(2) The appellant from the beginning of search explained to the authorities that due to confusion and misunderstanding of the methodology of calculation of service tax, shortfall had occurred and there was neither malafide nor any deliberate breach of law.

(3) Whatever amount of service tax was received from the customers the same was paid to the department. The appellant did not retain even a single penny with it. Such fact is evident from the chart appended to show cause notice which is forming part of appeal record in appeal case No ST - 111/06-ST at page 28. The chart shows the manner of calculation of differential service tax for the period April 2000 to March 2005.

(4) It is relevant to find that during several months the appellant had paid almost the same amount of service tax which it was liable to pay.

(5) The chart referred to at page 28 of appeal folder in appeal case No. ST -111/2006 shows pageS 27, 28, 29, 30, 31, 32 and 33 exhibits that there was small differential amount of tax payable as compared to other months. This is only because of complication of law.

(6) The appellant acted bonafide and deposited shortfall in service tax as soon as pointed out by investigation. The shortfall arose because of the fact that the appellant was passing on almost their entire commission to their customers and service tax was discharged from the pocket of the appellant.

(7) The statements recorded from the Sales Manager Sri Harminder Singh, Sri Kuldeep Singh, Manager Accounts show that since the manner of calculation was not clear to them, service tax was deposited @ 10% of the commission retained after deduction/discount allowed to the customers.

(8) In the statement recorded from Sri Mohinder Singh Bajaj, Director of the appellant, he categorically stated that due to very stiff competition in the market, the appellant was able to retain approximately only 1% of the commission. He further stated that as was understood by them that service tax is payable @ 10% of commission, they have been depositing approximately 10% of the commission retained (after deducting the commission/discount passed on to the customers). Any other detail or method of calculation was not known or explained to them. Their returns for the period October 2004 to March 2005 shows payment of service tax @ 1.02% on the basic price of the tickets, but in reality their calculation of service tax is based on the net commission retained by

them, because of the reason that they were not aware of the method of calculation of the service tax.

(9) There was no intention to evade tax. But shortfall of tax paid is under bonafide mistake of law for which the interpretational error of law gives shelter to the appellant u/s 80 of the Act and such reasonable cause absolves the appellant from rigours of penalty u/s 76, 77 and 78 of the Act.

(10) Alternatively, in any event, penalty shall not exceed 25% of the tax liability and the appellant finds support from the decision of Hon'ble High Court of Delhi in the case of K. P. Pouches (P) Ltd. Vs. Union of India and Anr. – 2008 – TIOL-240- HC-DEL-CX.

(11) There cannot be two penalties. One under section 76 and the other u/s 78 of The Actwhich is also clear from the legislative mandate incorporating a provision in section 78 of the Finance Act, 1994.

(12) There is no question of recovery of education cess of Rs. 64,029/- in appeal case No. 111/2006 which has been erroneously made and this is subject to verification of record.

(13) That in following cases, Tribunal has set aside penalty invoking section 80 of the Act:

(i). Eta Engineering Ltd. V. CCE, Chennai – 2004 (174) ELT 19 (Tri – LB).

(ii). CCE, Merrut – II V. R. N. Katayal – 2006 (2) STR 77 (Tri – Del).

(iii). Urban Improvement Trust V. CCE, Jaipur – 2006 (3) STR 248 (tri-Del).

(iv). Sri Venkateswar Hi-tech Machiner V. CCE, Coimbatore – 2007 (6) STR 139 (T)

(v). Commr. S.T. Kol – I V. Pee Kay & Co. – 2007 (7) STR 540 (T- Kol).

(vi). CCE, Nashik V. Bapu Transport – 2007 (7) STR 581 (Tri - Mum).

(vii). Niki Associates V. CCE, Nasik - 2007 (7) STR 662 (Tri – Mum).

(viii). Tele Tech Communications V. CCE, Kanpur – 2007 (7) STR 695 (Tri – Del).

(ix). CCE, Bhopal V. Mahastra Samaj Bhawan trust – 2007 (7) STR 651 (Tri – Del).

(x). Lakmichand Dharshi V. CCE, Mumbai – 2007 (5) STR 128 (Tri – Mum).

(xi). CCE, Bhopal V. Bharat Security Services & Workers's Cont. – 2006 (3) STR 703 (Tri – Del).

(xii). CCE, Bhopal V. R. K. Electronic Cable Network – 2006 (2) STR 153 (Tri – Del).

(xiii). CCE & C V. Mukul S. Patil – 2008 (10) STR 115 (Bom).

(xiv). A. R. Ashish V. Patil V. CCE, Nashik – 2006 (3) STR 184 (Tri – Mum).

(14) That in following cases it has been held that if the tax and interest has been paid before the issuance of the show cause notice, no penalty should be imposed:

(i). Union of India V. TPL Industries Ltd. – 2007 (214) ELT 506 (Raj).

(ii). CCE, Ludhiana V. Sigma Steel Tubes – 2007 (82) RLT 361 (p & H).

(iii). Union of India V. Perfect Thread Mills Ltd. – 2009 (234) ELT 49 (Raj).

(iv). CCE, Bangalore – II V. Toyota Kirloshar Motors Ltd – 2006 (206) ELT.

(v). Kawson Travel & Tour (I) Pvt Ltd. V. Commr. Of S. T. , Chennai – 2008 (12) STR 572 (Tri – Chennai).

PLEAS OF REVENUE BEFORE TRIBUNAL

13 Learned DR Sri Yadav appearing on behalf of Revenue in appeal case No. ST - 440/2006 and 111/2006 pleaded as under and reiterated in the written note filed on 09.04.2009 as under:

(1) That upon search to the premises of the appellant, various documents were seized which gave rise to the order of adjudication.

(2) The assessee was collecting service tax from Airlines on the basis of basic fare as per sample invoice No. 450 dated Nil, invoice No. 4502 & 4503 dated 16.04.2002 and Invoice No. 569 & 570 both dated 02.04.2002. But it was paying service tax on the basis of net commission retained by it and this amount of service tax was shown in their service tax returns, while a different value of the service was shown in the service tax returns.

(3) That, Director of the Appellant Sri Mohinder Singh Bajaj in his recorded statement on 05.09.2005 stated that the company is depositing service tax on calculation of net commission retained by it but this figure on service tax return (ST - 3) is different because of mistake in their calculation and misunderstanding of the calculation method.

(4) That, Sri Kulwant Singh, Accountant in his statement recorded on 05.09.2005 stated that he is preparing accounts since last 13 years and prepares service tax return for the appellant which is calculated @ 10% of the commission/profit retained by the appellant company.

(5) That, the appellant was paying service tax on the basis of commission retained by them while the service tax was to be paid on the basis of commission received from the airlines. On the other hand they were showing in their service tax returns payment of service tax on the basis of basic fare.

(6) The appellant was not showing the correct figure of basic fare and to retain the service tax amount they were back calculating the basic fare from the tax amount already paid on the basis of commission retained by them.

(7) That they were not reflecting the correct amount of the basic fare in their service tax returns.

(8) That Sri Mohinder Singh Bajaj, Director in the statement recorded from him clearly stated that they were aware of option available for payment of service tax on basic fare at the prescribed rate. However he stated that they were not aware whether a combined procedure for calculating tax liability shall be followed. That was not clear to them and also nobody ever guided them about the system.

(9) They wilfully misstated the incorrect amount of basic fare in ST -3 returns. Therefore extended period of limitation of five (5) years is clearly invokable. Revenue relies on M/S Digilink India Ltd. V. CCE Jaipur – 2006 (3) STR 386 (Tri – Del).

(10) The appellant is not entitled to the benefit of reduced penalty for not satisfying the provision of second proviso to section 78 of the Act. Hence benefit of decision in K. P. Pouches Pvt. Ltd. – 2008 – TIOL – 240 – HC – DEL –CX is not available to the appellant since the appellant has failed to deposit tax on the date of search.

(11) While appellant was collecting correct service tax amount from the customers based on the basic fare percentage method, basic fare was manipulated to pay lesser amount of service tax.

(12) Penalty u/s 76 and 78 are leviable without absolving the assessee from the liability u/s 80 of the Act.

OBSERVATIONS OF TRIBUNAL ON TAX DEMANDED

14 Heard both sides and perused the records and gone through various documents to which our attention was drawn in the course of hearing as well citations made by both sides.

15. The services provided by air travel agents were taxable since 1/7/97 and as per the provisions of Section 67 of the Finance Act, 1994, the tax on the services provided by an Air Travel Agent was payable at the prevailing rate of Service tax under Section 66, on the gross amount of commission received by the agent from the airlines. However, sub-rule (7) of Rule 6 of the Service Tax Rules, 1994 provided an option to the Air Travel Agents to pay Service Tax on the "basic fare" as defined in this sub-rule, at the rate specified under that sub-rule. The term 'basic fare' defined for the purpose of this rule as that part of the air fare on which commission was payable to the agent by the airline. The option under Rule 6(7) once exercised was to apply uniformly in respect of the bookings of air travel by the air travel agent and could not be changed during the financial year under any circumstances.

15.1 What has happened in this case is that throughout during the period of dispute, the appellant was actually paying the service tax at the prevailing rate under Section 66 on the net commission instead of on the gross commission. That has resulted in short payment of tax. While doing so, in the ST-3 returns, instead of showing the gross and net commission and calculation of service tax on that basis, the tax payment shown was as if it was on the 'basic fare' basis at the rate appearing under Rule 6 (7) of the Rules. 'Basic fare' shown in the ST-3 returns was not the actual 'basic fare'. Those were much lower amount which were being determined by the back calculation so that the tax on the same at the rate mentioned in Rule 6 (7) matches the service tax paid by the appellant on the net commission at the normal rate. The difference between the basic fare declared and the actual basic fare on which the tax was to be paid at the rate prescribed under Rule 6 (7) was to the tune of about Rs. 213 crores in aggregate. Since in the ST-3 returns, the tax payment was being done on basic fair basis under Rule 6 (7), though no formal declaration of option in this regard had been made, the Commissioner has rightly held that the appellant had opted to pay tax on the 'basic fare' and having done so, they should pay the tax on the actual 'basic fare' instead of tax on much lower amount declared in the returns. There is, thus, short payment of service tax whether calculated on basic fare basis under Rule 6 (7) at the rate prescribed thereunder or calculated at the normal rate on the gross commission and from the conduct of the appellant it is clear that they have suppressed this huge short payment of tax. While they were actually paying the tax on net commission but not on gross commission at the normal rate, in the returns they were showing the tax payment made as if on basic fare basis under Rule 6 (7) while the basic fare declared in returns were understated. The amount determined by back calculation was in such a manner so that the tax on the declared basic fair at the rates prescribed under Rule 6 (7) matched the actual tax payment. This *modus operandi* was discovered only on scrutiny of the records recovered from the appellant's premises. Therefore, extended period has been rightly invoked for confirming the service tax demands. In view of the above discussion, the tax demands in both the appeals are upheld.

FINDING ON PENALTIES

16. As regards penalty, we find that penalty has been imposed on the appellant under Section 76, 77, 78 of the Finance Act. Since no instance of non-filing of return has been brought to record by the authorities, we hold that no penalty is imposable under Section 77 and the same is set aside.

17. As regards penalty under Section 76, the same is attracted if a person liable to pay service tax in accordance with the provisions of Section 68 of the Finance Act, 1994 or the Rules made thereunder, fails to pay such tax. Since in this case the Appellant, during each month of the period of dispute, have failed to discharge full service tax liability by due date resulting in huge short payment, the provisions of Section 76 would be attracted. It has been pleaded by the appellant that penalty under Section 76 as well as under Section 78 cannot be imposed when the offence is same. Such plea is untenable in view of Hon'ble Kerala High Court's judgment in case of **Asstt. Commissioner, Central Excise vs. Krishna Koduval** reported in **2006 (1) S.T.R. 185 (Ker.)**. It was held in that case that incidents of imposition of penalty under Section 76 and 78 are distinct and separate under two provisions and even if the offences are committed in the course of the same transaction or arise out of the same act, penalty would be imposable both under Section 76 as well as Section 78. In view of this, the penalty under Section 76 is upheld. However, the same is reduced to Rs. 100 per day in appeal No. ST/440/06.

17.1 As regards penalty under Section 78, the same is attracted wherever any service tax has not been levied or paid or has been short levied or short paid or erroneously refunded by the reasons of fraud, suppression of facts, wilful misstatement or contravention of any provisions of Finance Act, 1994 or of the rules made thereunder with intent to evade the payment of service tax and this penalty shall not be less than the duty evaded but shall not exceed two times the amount of service tax evaded/refunded. However, as per the first and second proviso to Section 78, where the service tax as determined under Section 73 (2) alongwith interest and penalty is paid within 30 days from the date of communication of the order, the amount of penalty would be reduced to 25% of the service tax so determined.

17.2 In both the appeals, as discussed above, while the appellant was liable to pay service tax on the gross commission received by it, ~~it~~ has paid the tax on the net commission and in the ST-3 returns filed by ~~it~~, instead of truthfully declaring the payment of service tax on the commission received, the appellant declared the payment of service tax on basic fare basis under Rule 6 (7) of the Service Tax Rules. By declaring much lower figure of 'basic fare' than the actual 'basic fare' on which the commission has been received, the under statement of the basic fair in both the appeals was to the tune of about Rs. 213 crores in aggregate. Appellant's plea is that it was aware of both the methods of payment of service tax but nobody advised them that a combination of the two cannot be adopted. This is totally a baseless plea as discussed above. This is nothing but deliberate misdeclaration for suppression of measure of levy. We, therefore, hold that the elements for imposition of penalty under Section 78 are present in this case and the same would be attracted.

QUANTUM OF PENALTY

17.3 Now coming to the quantum of penalty under section 78 of the Act, it was pleaded by the appellant that in both the cases, entire amount of service tax alongwith interest had been paid even before the issue of adjudication order. Therefore, in accordance with the ratio laid down by the Hon'ble Delhi High Court in case of **K.P. Pouches P. Ltd. vs. Union of India** reported in **2008 (228) E.L.T. 31 (Del.)**, the benefit of first proviso to Section 78 should be extended to the appellant. Accordingly penalty is required to be confined to 25% of the service tax and not equal to the service tax. Appellant also pleaded that the benefit of this provision has not been allowed by the Commissioners.

17.4 It may be stated that an explanation added under Section 78 of the Act by Finance Act, 2003 expressly made clear that provisions of Section 78 with above concessional approach shall even be applied to cases in which notices were issued prior to the day on which the Finance Bill 2003 received assent of the President. Therefore this appellant cannot be denied such concessional approach of law. We find that in both the cases, entire amount of service tax alongwith interest had been paid prior to the issue of adjudication order. In view of these circumstances, we hold that the ratio of Hon'ble Delhi High Court's judgment in the case of K.P. Pouches P. Ltd. (supra) is applicable to both the appeals of the appellant and accordingly penalty in both the cases is reduced to 25% of the service tax.

18. On the basis of our above observations and findings, we, therefore, hold as under :-

(i) The service tax demand alongwith interest in both the cases is upheld.

(ii) While the penalty under Section 77 of the Act is set aside, imposition of penalty under Section 76 of the Act is upheld.

(iii) In appeal case No. ST/440/06, the penalty under Section 76 of the Act is reduced from Rs. 200/- per day to Rs. 100/- per day while in the appeal case No. ST/111/06, the imposition of penalty at Rs. 100/-under Section 76 of the Act per day is upheld.

(iv) As regards penalty under Section 78 while holding that the penalty under this Section is attracted in both the appeal cases, the benefit of first proviso to Section 78 would be available to the appellant in accordance with the ratio laid down by Hon'ble Delhi High Court in the case of K.P. Pouches P. Ltd. (supra), since the appellant in both the cases has paid entire service tax alongwith interest even prior to the issue of adjudication order, and accordingly the penalty in both the appeals is reduced to 25% of the service tax demand.

19. In the result, both the appeals are partly allowed.

(Order pronounced on 19 ~~18~~.6.09)

Sd/-

(D.N. Panda)
Judicial Member

Rakesh Kumar
(~~R.K. Kumar~~)
Technical Member