

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

Appeal No. ST/262 /2008 - CU[DB]

Date 15/07/2011

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

To :
M/S S.K. JALENDRA & ASSOCIATES
D-238, GULAB RESIDENCY,
BIHARI MARG,
BANIPARK, JAIPUR.
M/S S.K. JALENDRA & ASSOCIATES

Appellant
Vs
Respondent

C.C.E. JAIPUR I

I am directed to transmit herewith a certified copy of **Final order No.ST/282 2011 CU[DB]** dated 13.07.11
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. JAIPUR I
N.C.R.BUILDING, STATUE
CIRCLE, "C" SCHEME, JAIPUR
302005.
2. Adv. / Consult
MR.NARESH GUPTA
374,SURYANAGAR,GOPAL
PURA BYPASS JAIPUR
3. C.D.R
4. Bar association. CESTAT, New Delhi
5. Director Publications. Customs, Excise. I.P. Estate, New Delhi
6. M/s Centax Publications Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi -
7. Company Law Institute of India Pvt Ltd.,No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
8. Taxmann Allied Service Pvt Ltd., 59/32, New Rohtak Road, New Delhi - 110005
9. Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road,
Ahmedabad-15
10. LAWCRUX Advisors Pvt Ltd, LAW House,1-8,Sector - 10, Faridabad 121003 (Harvana)
11. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor,Vasant Arcade,Nelson Mandela Road,
Vasant Kunj, New Delhi - 110070
12. Office Copy
13. Guard file


Assistant Registrar
(Customs Appeal Branch)

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

Date of Hearing : 28.6.2011

Service Tax Appeal No. 262 of 2008-Cus.

[Arising out of Order-in-Appeal No. 6(RKS)/ST/JPR-I/2008 dated 24.1.2008 passed by the Commissioner (Appeals), Central Excise & Customs, Jaipur]

Coram:

Hon'ble Shri D.N. Panda, Member (Judicial)
Hon'ble Shri Mathew John, Technical Member

1.	Whether Press Reporter may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	
2.	Whether it would be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	
3.	Whether their Lordships wish to see the fair copy of the order?	
4.	Whether order is to be circulated to the Department Authorities?	

M/s S.K. Jalendra & Associates

Appellant

Vs.

CCE, Jaipur-I

Respondent

Appearance:

Appeared for Appellant : Shri Naresh Gupta, Advocate
Appeared for Respondent : Shri K.K. Jaiswal, SDR

Coram:

Hon'ble Shri D.N. Panda, Member (Judicial)
Hon'ble Shri Mathew John, Technical Member

Final Order No. S.1/282/11.....dated.....13.7.11

Per **D.N. Panda** :

Against the Appellate order passed on 23.1.2008 upholding the Adjudication resulting in service tax demand of Rs.3,23,789/- with interest and penal consequences of law under various

provisions of the Finance Act, 1994 (hereinafter referred to as "the Act"). The Appellant came in Appeal on the following four issues :-

- (1) Whether service provided by the Appellant can be classified under the category of 'Business Auxiliary Service' and tax and penalty leviable.
- (2) Whether amendment made by Finance Act 2004 coming into force with effect from 10.9.2004 read with Notification No.14/2004 dated 10.9.2004 granted immunity to the Appellant from levy.
- (3) Whether Show Cause Notice issued on 22.8.2006 for the period from 1.7.2003 to 31.3.2005 is time-barred.
- (4) Whether the Appellant is entitled to double taxation relief.

2. Ld. Counsel appearing on behalf of the Appellant submitted that the Appellant arranges documents from prospective buyer of the bank and submits profile basing on those documents to the bank which results in disbursement of the loan to the borrower. There is no relationship between the Appellant and the borrower to provide any service to call that service as 'Business Auxiliary Service' provided and taxable. Only because there was a visit by investigating officers on 20th Jan. 2005, a Show Cause Notice was issued making allegation that the Appellant received commission

amounting to Rs.41,34,000/- and that has escaped levy of service tax of Rs.3,64,801/-.

3. It was also submitted by the learned Counsel that the Appellant did not prefer to litigate as a peace loving and bonafide assessee but on protest, paid the service tax, interest element and 25% of the penalty, if any, imposable before Adjudication was completed. Law being newly introduced bringing the provision of certain services to be called as 'Business Auxiliary Service' for taxation under the Act, the Appellant deserves to be exonerated from penalty if any imposable ^{and} tax liability, if any arises.
4. He further submitted that Section 78 of the Act grants concession in penalty when dues to the Government is discharged within 30 days of intimation to the assessee and such period having been extended up to 90 days by the Finance Act, 2011, the Appellant also deserves consideration when 25% of penalty was paid within 35 days of service of Adjudication order. The Appellant therefore should not be denied of concession in levy of penalty when the tax dues to the Government has been discharged prior to Adjudication except the penalty element discharged within 35 days of the receipt of Adjudication order. Tribunal has ample power to condone the five days delay to consider the case of the Appellant for the concessional penalty. However, even such a penalty is not

impossible in absence of essential ingredients relating to loss of revenue.

5. On the other hand, Id. DR supports the first Appellate order. But disputes the quantum and payment of tax and penalty element submitting that the same is subject to verification, since he does not have information about such payment. It was also submitted by Id. DR that at page-7 of the written submissions filed by the Appellant having described the nature of activity carried out, that fulfils the requirement of the taxing entry bringing the Appellant to the fold of business auxiliary service. Id. DR inviting attention to para-3 of the Show Cause Notice submits that intelligence was also gathered to put to test with the proprietor of the Appellant concerned to find out what the Appellant understood about the liability. Para-4 indicates about the exercise of the Authorities demonstrating their mind for issuance of the summons calling for information. The proprietor of the Appellant concerned in his statement recorded under Section 14 of the Central Excise Act, 1944 admitted that they are not registered with the department nor paid service tax due to ignorance of law. Therefore for the clear cut admission of the liability which of course is subject to provisions of law, the Appellant was fairly dealt in Adjudication.

6. Heard both sides and perused the record.

7.1 There is nothing to dispute that the Appellant was service provider to the financing bank arranging documents for the bank to

evaluate creditability, eligibility and financial status^{of} the prospective customer for funding by the bank. We enquired as to whether any letter of appointment or agreement, if any, exists between the bank and the Appellant to examine the locus standi of the Appellant in the triangular deal. But neither the document is presented today nor that is apparent^{from} record. Therefore, in absence of any cogent evidence, role of the Appellant as taxable service provider^y as recorded by first Appellate Authority remained unchallenged. Accordingly, the Appellant's contention that it was providing service to the prospective buyers is unsustainable.

7.2 We examined the nature of service provided by the Appellant and the remuneration paid for the service so provided in terms of the fact recorded in para-2 of the Appellate order. There is no dispute of receipt of an amount of Rs.41,34,000/- by the Appellant from the bank for the nature of service provided to enable the bank to consider the funding proposal. The remuneration paid to the Appellant was not for any other purpose but for promoting the funding business of the banker. The role of the Appellant was a catalyst to connect funding agency with the borrower. The fact on record discloses that the Appellant was only serving the bank in terms of orders passed^{by} authorities below (in absence of agreement or appointment letter produced) to fulfil his contractual obligation. He was remunerated by the bank. This clearly establishes that

there was a live link well integrated by the understanding of the bank and the Appellant to achieve common object of funding.

7.3 The Appellant promoted the funding business of bank gathering documents and preparing profiles to enable the bank to consider its funding activity. All these facts and attendant circumstances bring the ^{Appellant}~~bank~~ and the ^{bank}~~Appellant~~ to the understanding as taxable service provider and recipient of such service. The recipient being identified by the understanding of the parties in accordance with recorded fact, no plea contending that the Appellant has not served the bank is ^{unavailing}~~unavailing~~. Therefore, deciding the first issue raised by the Appellant, we hold that the Appellant provided 'Business Auxiliary Service' to the bank as is concluded by the Appellate order resulting in liability to service tax under the Act. Adjudication therefore resulted in levy of tax of Rs.3,23,789/-. We deal the penalty aspect separately. This calls for confirmation of the tax demand raised.

7.4 In the third issue, the grievance of the Appellant is that Show Cause Notice was time barred. We proceeded to enquire the date of visit by the investigating agency and date of issuance of the Show Cause Notice. Being guided by the Apex Court's judgement in **CCE, Visakhapatnam Vs. Mehta & Co.** reported in 2011 (264) ELT 482 (SC), we are able to find that when investigation was made ^{ment of} escape of tax/levy come to the knowledge of the department from

the documents and information gathered during investigation on 20.1.2005. That date is material date since that was date of knowledge, to decide the issue of limitation following Apex Court decision cited above. We examined the case of the Appellant in that light. The Appellant having been issued Show Cause Notice on 22.6.2006 i.e. after a year of the visit by the investigating agency the proceeding is not time-barred for escapement of levy and for the reasons attributable to the Appellant who made a gross receipt of Rs.41,34,000/- during the impugned period. There is no provision in law prescribing time limit for issuance of the Show Cause Notice except law stating that the Show Cause Notice in normal cases is issued within one year of the relevant date (relevant date explained in law) and in cases of subterfuge ^{to} Revenue within five years of the relevant date. Apex Court in para-24 of the judgment dealt the cause of action in the case of **Mehta & Co.** in the decision supra. The Appellant falls within the ^{fold} of para-24 of the judgment of the Apex Court. Therefore issuance of the Show Cause Notice dated 22.6.2006 is well within time for the period escaping levy. In the present case, limitation can be ^{reckoned} from the date of knowledge of the department on 20.1.2005 giving rise to cause of action. Following the ratio laid down by the Apex Court, we hold that the Adjudication is not time-barred. Issue No. 3 is thus answered as above ^{having relevance to issue No. I.}

8. The second issue raised was that the amendment by the Finance Act, 2004 read with Notification No. 14/2004 grants immunity to the Appellant from taxation. The period of Adjudication is 1.7.2003 to 31.3.2005. If the service is provided by the Appellant to the borrower, in that circumstance, it can be said that service was provided to such borrower on behalf of the client of the Appellant and notification applies to such case. But service provided by the Appellant in the present case was to the financing bank but not to the borrower. Relation between the Appellant and the bank proves that there was quid pro quo between the Appellant and the bank to meet the requirement of funding. The Appellant had only served the bank but not acted on behalf of the bank. Borrower was not ^{party} to the contract between the Appellant and the bank. So also in absence of any letter of appointment and agreement, we are unable to extend the benefit of Notification No. 14/2004 dated 10.9.2004 to the Appellant and that issue is answered negatively. The Appellant has no scope to be benefited by the amendment of law.

9. Fourth issue raised was that if at all an attempt is made to tax the service provided by Appellant, the processing fee recovered by the bank having included the commission paid to the Appellant and tax thereon having been paid by the bank, such attempt will amount to double taxation and no tax can be collected from the Appellant. There is no evidence produced to appreciate pleading of

the Appellant on such count. Also in absence of the appointment letter we are unable to understand how the processing fees collected by the bank included commission paid to the Appellant and that has suffered tax. Therefore, the plea of double taxation being unsound is unsustainable and decided against the Appellant.

10. Prayer of the Appellant in part of Issue No. 1 was that he had paid tax and interest before Adjudication and paid penalties amounting to 25% of the tax due within 30 days of service of the Adjudication order for which that entitles the Appellant to the concessional penalty. This prayer was subjected to further prayer that the Tribunal has power to condone the delay of five days when 30 days period is extended up to 90 days in terms of amendment made to Section 78 of the Act, 1994. According to the Id. Counsel the periodicity prescribed by law by Finance Act 2011 relates to procedure and shall be read as retrospective. When the averment is that tax and interest were paid, the Appellant may deserve to be dealt under the provisions of law relating to concessional penalty. There was five days delay in payment of 25% of tax demanded as penalty after adjudication order was served. Prayer for condonation of delay of five days is not entertainable because Tribunal has no power to exercise any discretion in absence of statutory mandate in that regard before enactment of Finance Act, 2011. Neither by implication nor by necessary expression, law enables Tribunal to consider such prayer. Whenever legislature intend the Tribunal to

be vested with discretionary power they prescribe. Section 78 of the Finance Act 1994 does not have such mandate. Therefore we decline to condone the delay of five days as prayed for by the Appellant. But we tried to find out whether the Appellant can get any relief of reduction of penalty to 25% of the tax demanded following the decision of the Hon'ble High Court of Delhi in **K.P. Pouches (P) Ltd. Vs. UOI** reported in 2008 (228) ELT 31 (Del.). We are guided by the rationale behind prescription of the time of 30 days. The Hon'ble High Court held that the Adjudicating Authority should indicate in the Adjudication order that assessee shall have option to pay taxes within 30 days of the receipt of such order. There is no such whisper about the option being granted in the Adjudication order. Following the ratio laid down by Hon'ble High Court of Delhi, we are of the view that the Appellant shall be entitled to the concession in penalty limiting that to 25% of the tax demanded. On such count, the Appellant gets partial relief.

11./ Ld. Counsel contended that it is to be dealt by the decision of the Apex Court in the case of **Nizam Sugar Factory Vs. CCE** reported in 2006 (197) ELT 465 (SC) for no levy of penalty because the notice was not issued within limitation. So also he says that he should be given benefit of the order passed by the Bangalore Bench of Tribunal in the case of **Bridgestone Financial Services Vs. CST** in Appeal No. ST/91/06 decided on 4.1.2007. We have no difficulty to say that had the case of the Appellant fallen within the fold of

Nizam Sugar Factory case the Appellant would have been benefited by that judgment. Here is a case where levy of service tax by law is already nine years old. The Appellant was aware that certain services were taxable. He was a service provider to the bank and an amount of Rs.41,34,000/- was also received. Plea of innocence does not appear to be sound in absence of evidence showing sincere efforts of the Appellant to seek clarification from the department as to whether its service shall be taxable. There is nothing on record to show that till investigation was done, the Appellant made efforts to be registered. Without registration, the Appellant kept the department in dark to know his affairs. When the investigation found that there has arisen a liability, Show Cause Notice was issued.

11.2 There is no material to appreciate that the Appellant ^{is} innocent for the other reasons that the Appellant is capable of preparing the profile of the borrowers studying their various documents provided by borrowers. There is no element of illiteracy of the Appellant coming out to say that the Appellant was not literate. This handicaps to grant any immunity from penalty for the suppression of the fact made to the department and contravention of law made consciously. When nothing was within the knowledge of the department before 20.1.05 till investigation was conducted, penal consequences of law followed and that has rightly been adjudicated by Authorities below invoking Section 76 and 78 of the

Finance Act, 1994. We do not find any reasonable cause on the part of the Appellant to grant it immunity under Section 80 of the Act, But while appreciating the levy was new imposition of penalty under Section 78 and 76 of the Act, simultaneously shall be harsh. Therefore levy of penalty under Section 78 shall be proper dose to prevent the Appellant from recurrence of the contravention of law and ~~to cause~~ loss of revenue. We therefore uphold the penalty under Section 78 as has been imposed by the Adjudication order.

12. Having answered all the issues aforesaid this appeal is disposed granting relief to the Appellant to the extent indicated above. We have confirmed the first Appellate order in relation to the tax and interest and except penalty is to be reduced to 25% of the tax demand ^{as stated in para-1) aforesaid}. Thus, the Appellant gets partial relief and Appeal is partly allowed.

(Dictated & pronounced in open Court)

(D.N. Panda)
Member (Judicial)

(Mathew John)
Member (Technical)

RM