
(2015) 10 CESTAT CK 0004

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Service Tax Appeal No. 707 Of 2012

M/s. Creative Travel Pvt. Ltd

APPELLANT

Vs

Commissioner Of Central Excise And ST, New Delhi

RESPONDENT

Date of Decision : 06-10-2015

Acts Referred:

Finance Act, 1994 — Section 65(105)(1), 65(105)(n), 65(105)(zzb), 66, 66A, 67, 68, 69, 70, 72, 72(a), 72(b), 73, 73(1), 75, 76, 77, 77(2), 78, 83
Service Tax Rules, 1994 — Rule 5, 5A
Central Excise Act, 1944 — Section 14
Finance Act, 2004 — Section 91, 95
Finance Act, 2007 — Section 136, 140
Service Tax Rules, 1994 — Rules 4, 4A, 6, 7

Citation : (2015) 10 CESTAT CK 0004

Hon'ble Judges : Ashok Jindal, J;R. K. Singh, Technical Member

Bench : Division Bench

Advocate : J K Mittal, Rajveer Singh, Amreesh Jain

Final Decision : Allowed

Judgement

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1. The appellant is in appeal against the impugned order wherein the show cause notice dated 12.10.2010 was held to be maintainable.

2. The facts of the case are that the appellant is registered with sales tax department for air travel agent service, tour operators service and business"

auxiliary service. Initially, the show cause notice issued to the appellant for the period 2004-2005 to 2008-2009 on 8.4.2010 under the category of tour"

operator service and Business auxiliary service. The said show cause notice is not the subject matter in this matter. But on the basis of said show,

cause notice, this show cause notice is issued. Before issuance of show cause notice, the appellant was asked to provide details/ documents/"

information for the period April, 2009 to March 2010 through various letters dated 3.6.2010, 4.7.2010, 28.7.2010, 3.9.2010 and lastly on 1.10.2010. But" ,,,,,,

the appellant did not provide any details to the department. Therefore, it was alleged in the show cause notice that the appellant has failed to furnish" ,,,,,,

the requisite information and also not furnished the returns under section 70 of the Act. Therefore, provisions of section 72 of the Act were attracted" ,,,,,,

on the basis of 'best judgment assessment' and the show cause notice was 'issued accordingly. The appellant challenged the issuance of show cause ,,,,,,

notice before the Hon'ble High Court of Delhi and Hon'ble High Court vide order dated 4.1.2011 directed the adjudicating authority to decide the ,,,,,,

matter with regard to jurisdiction tacit basis taking into consideration the stand and stances putforth by the appellant, whether the show cause notice" ,,,,,,

was issued correctly or not. The adjudicating authority held that show cause notice is maintainable and the same has been confirmed by the learned ,,,,,,

Commissioner (Appeals). Aggrieved from the said order, the appellant is before us." ,,,,,,

2. Shri J K Mittal, learned Counsel for the appellants appeared and submitted that in para 5 of the show cause notice it is alleged that the appellant" ,,,,,,

failed to furnish the return under section 70 of the Act and again it is alleged in para 12 (iii) of the show cause notice that appellant failed to furnish ,,,,,,

return under section 70 of the Act and in para 9 of the show cause notice, it is further alleged that determination of assessable liability under second" ,,,,,,

provision of 72(a) appeared to be justifiable. Whereas in para 13 of the show cause notice, it is alleged that the provision of section 73(1) of the Act" ,,,,,,

can be invoked and in para 4 of the show cause notice, it is proposed that why best judgment could not be made under section 72 of the Act and why" ,,,,,,

services tax should not be recovered under section 73 of the Act, which indicates that the show cause notice was issued on the parameters that" ,,,,,,

appellant has not filed service tax return, the proceedings under section 72 and 73 were simultaneously initiated. He further submits that the show" ,,,,,,

cause notice itself admitted that the appellant has replied the letters issued by the department and have not supplied the information. Whereas the ,,,,,,

letters clearly states that they have not been issued section 72 of the Act but were issued under section 14 of the Central Excise Act by specifically ,,,,,,

stating that it will attract penal provisions under section 77 of the Act and

nowhere it is stated in any one of said letter that the same are issued under,,,,,,
section 72 of the Act. Moreover, it was noted that in all the letters, it was stated
to furnish the following month wise details/ documents/information,",,,,,
but nothing was stated what are those information/ details/ documents, Whereas
the adjudicating authority has admitted that appellant has requested to",,,,,
the department ""to depute audit team to prepare desire details"". Whereas
there is no such allegation in the show cause notice that which record is",,,,,
required to be maintained under Rule 5 of the Service Tax Rules, 1994 have not
been prepared by the appellant. Despite the appellant request, the",,,,,
department did not depute any team to verify the records as required under Rule
5A of the Service Tax Rules, 1994.",,,,,

3. He further submits that the show cause notice is issued on the basis that
appellant has failed to furnish the return which is found to be false. As,,,,,
admitted by the adjudicating authority that the returns for relevant period were
filed on time. However, the adjudicating authority travelled beyond the",,,,,
allegation made in the show cause notice by alleging that the relevant
information required in ST 3 return has been left blank by the appellant
referring,,,,,

as per annexure attached. However, there is no such allegation in the show cause
notice. However, the returns filed by the appellant were in order. It",,,,,

is settled law that the adjudicating authority cannot travel beyond the allegation
made in the show cause notice. He submits that the appellant has,,,,,

periodically filed the service tax returns and the department has not alleged that
required information in the return has not be given. Infact, the",,,,,

department has accepted the return filed by the appellant in the manner in which
it has been filed for such several years. The learned Commissioner,,,,,

(Appeals) has confirmed the finding of the adjudicating authority by observing
that various column of form ST 3 return are blank by referring to,,,,,

annexure and thereafter given a contrary finding that appellant has failed to
furnish the return under section 70 of the Act to invoke extended period of,,,,,

limitation. Learned Commissioner (Appeals) further observed that ST 3 return
filed by the appellant are incomplete whereas there is no such allegation,,,,,

in the show cause notice. The learned Commissioner (Appeals) has gone beyond
the issue raised before him in the lis. Therefore, he has wrongly held",,,,,

that the show cause notice is maintainable. As both the authorities below have
travelled beyond the scope of show cause notice which is not,,,,,

permissible in law as held by Hon'ble Apex Court in the case of CC Mumbai vs. Toyo Engineering India Ltd. [2006 (201) ELT 513 (SC).] He further,,,,,,,,

submits that the provisions of Section 72 can be invoked in either of two situations â?"(a) When the assessee fails to furnish the information under,,,,,,,,

section 70 of the Act; and (b) Having made the return, fails to assess the tax in accordance with the law or Act or Rule made thereunder. In the",,,,,,,,,

present case, the allegation were made in the show cause notice that the appellant failed to furnish the return and also specifically stated that provision",,,,,,,,,

of clause (a) of section 72 of the Act is invoked. The provision of section 72(a) is applicable when return is not furnished whereas it is a clear finding,,,,,,,,

of the adjudicating authority that the appellant has filed return in time. Therefore, the show cause notice is not maintainable when the allegation of the",,,,,,,,,

department is failed. But, the adjudicating authority travelled beyond the allegation made in the show cause notice recording that party has failed to",,,,,,,,,

fulfill condition (b) inasmuch as the ST 3 were filed by them are incomplete. This was not the allegation in the show cause notice or in the letters,,,,,,,,

issued by the Department. The appellant has challenged such finding before the learned Commissioner (Appeals) on the ground that adjudicating,,,,,,,,

authority travelled beyond the allegation made in the show cause notice but the learned Commissioner (Appeals) wrongly stated that there is a specific,,,,,,,,

reference to section 72(a) and 72(b) in para 9 of the show cause notice, whereas para 9 of the show cause notice clearly states that provisions of",,,,,,,,,

section 72(a) of the Act are invoked. In the show cause notice, there is no allegation of violation of section 72(b) of the Act. Therefore, the impugned",,,,,,,,,

order is to be set aside.,,,,,,,,,

4. He further submits that it was held by the authorities below that the department has not received such information /figures from the appellant which,,,,,,,,

resulted in invocation of provisions of section 72 of the Act, but the letters issued by the department on various dates for sending information/ details",,,,,,,,,

were not issued under section 72 of the Act at all but same were issued under Section 14 of the Central Excise Act for invoking of penal provisions,,,,,,,,

under section 77 of the Act. And these letters does not specify any specific information to be furnished or the information furnished by the appellant in,,,,,,,,

the return are incomplete in any respect. The law does not permit for invocation of section 72 of the Act for non-furnishing of information but in the,,,,,,,,

show cause notice, section 72 was invoked either for non-furnishing of return or furnishing of incomplete report whereas the assessee has failed to" ,,,,,,,,,

assess tax in accordance with the law. Therefore, the adjudicating authority has drawn the wrong conclusion contrary to law and even if there would" ,,,,,,,,,

have been such allegation will not sustain in the show cause notice for invocation of section 72 of the Act for the said reason.,,,,,,,,,

5. He further submits that in the show cause notice, provisions of section 72 and 73 are invoked simultaneously whereas in the show cause notice, it is" ,,,,,,,,,

alleged that provisions of section 73(1) of the Act can be invoked and in the adjudication order, it has been specifically noted that the plea taken that" ,,,,,,,,,

provision of section 72 and 73 cannot be invoked simultaneously, which make the show cause notice bad in law. Such a plea was taken in brief" ,,,,,,,,,

submission filed before the adjudicating authority, but the same has not been dealt by both the authorities below. He submits that 'best judgment" ,,,,,,,,,

assessment' under section 72 is a independent of the order passed under section 73 of the Act, therefore, simultaneously issuing the show cause notice" ,,,,,,,,,

for initiating proceedings under section 72 and 73 are bad in law and not maintainable. He further submits that in the show cause notice, the value of" ,,,,,,,,,

taxable service as well as service tax payable thereon has already been determined by specifying and stating therein whereas as per the provision of,,,,,,,,

section 72 of the Act, best judgment is made to arrive at the value of taxable service and determine sum payable by the assessee/Parties on such" ,,,,,,,,,

year-wise assessment, the value of service tax payable has already been determined in the show cause notice, then the show cause notice asking the" ,,,,,,,,,

appellant why section 72 should not be invoked is not maintainable. He further submits that this plea was taken by the appellant before the learned,,,,,,,,

Commissioner (Appeals) on the ground that appellant has filed the return in time, therefore section 72(a) is not applicable and the allegation made for" ,,,,,,,,,

non-filing of return is proved false. He further submits that as there is no allegation in the show cause notice to invoke clause (b) of section 72 for,,,,,,,,

failing to assess the tax in accordance with the law after filing the return therefore, the show cause notice is bad in the eyes of law and liable to be" ,,,,,,,,,

quashed. He also submits that show cause notice is apparently prepared by the AC whereas it has been signed and issued by the Joint Commissioner,,,,,,,,

and the said infirmity was pointed out by them has not been dealt with by the both the authorities below. He further submits that there are difference,,,,,,,,

in tax determined in figures mentioned numerically and in words which was pointed out but ignored by the adjudicating authority holding it as a,,,,,,,,

typographical error without giving any reasons. In these terms, he prayed that impugned order is to be set aside.",,,,,,,,

6. On the other hand, learned AR supported the impugned order and submits that the show cause notice was issued in continuation of show cause",,,,,,,,

notice dated 8.4.2010 and the charges and violations mentioned in the show cause notice dated 8.4.2010 shall apply to the impugned show cause,,,,,,,,

notice. He further submits that the show cause notice dated 8.4.2010 was relied upon for issuance of the impugned show cause notice. He further,,,,,,,,

submits that as the appellant has failed to specify the information under various sections of Finance Act, 1994, therefore, show cause notice is",,,,,,,,

maintainable.,",,,,,

7. He also submits that show cause notice is clearly brings out the violation of section 66A, 67, 68, 69, 70 and 72 of Finance Act, 1994 and is in",,,,,,,,

continuation of earlier show cause notice dated 8.4.2010, therefore, show cause notice is maintainable. In these terms, appeal is to be dismissed.",,,,,,,,

8. Heard the parties. Considered the submissions.,",,,,,

9. In this matter, the issue before us is that whether the show cause notice issued to the appellant is in accordance with the law and same is",,,,,,,,

maintainable or not.,",,,,,

10. As the show cause notice is the issue before us, therefore, it would be in the interest of justice to incorporate the show cause notice herein as" ,,,,,,

under:,",,,,,

Annexure A-III,",,,,,

OFFICE OF THE ASSISTANT COMMISSIONER OF SERVICE TAX, DIVISIOtNh -FIIL,
O7OR BLOCK No. 11, CGO COMPLEX, LODHI" ,,,,,,

ROAD, NEW DELHI-03" ,,,,,,

C. No. DL-II/ST/R-17/SCN/Creative/497/09/248 to 252, Dated : 20.10.2010" ,,,,,,

SHOW CAUSE NOTICE,",,,,,

Whereas M/s. Creative Travels Pvt. Ltd., having registered office at Creative Plaz,
Nanak Pura, Moti Bagh (hereinafter referred to as" ,,,,,,

the Assessee) are registered with Service Tax Commissionerate, Delhi vide STC No. AAACC0974DST003, dated 03.09.2009 for Air" ,,,,,,

Travel Agents Services, ST-2 No.DLI/TO/340/ST/2000, dated 27.04.2000 for Tour Operators Services and DL-II/ST/R-17/BAS/CTPL/969/05" ,,,,,,

for Business Auxiliary Services falling under the Section 65(105)(1), Section 65(105)(n) and Section 65(105)(zzb) respectively of the" ,,,,,,

Finance Act, 1994 as amended (hereinafter referred to as the "ACT"). The assessee is obliged to comply with the provisions of the" ,,,,,,

Finance Act, 1994 (as amended) and Rules and notifications issued thereunder." ,,,,,,

2. A Show Cause Notice was issued to the assessee by Additional Commissioner, Service Tax, New Delhi under "Business Auxiliary" ,,,,,,

Service vide C.No.I-26(494)ST/AMR/Gr.IA/153/Creative/2009, dated 08.04.2010 for non-payment of Service Tax during the period 2004-" ,,,,,,

05 to 2008-09 to pay Service Tax of Rs.23,47,010/- (including Cess)(RUDI)." ,,,,,,

3. This show cause Notice is being issued in continuation on the above mentioned show cause notice which has been made as one of the" ,,,,,,

RUD. The charges and violation therein apply to the present show cause notice." ,,,,,,

4. The assessee, vide this office letter C. No. DL/ST/R-17/SCN/Creative/497/09, dated 03.06.2010 (RUD-II) was asked to provide the" ,,,,,,

details/documents/information for the period April 2009 to March 2010 for issuance of subsequent show cause notice and also this office" ,,,,,,

letter of even No.1247, dated 04.07.2010 (RUD-III) & even No.1277, dated 28.07.2010 (RUD-IV) & even No.30429, dated 03.09.2010" ,,,,,,

(RUD-V) & even No.110 (RUD-VI). Assessee has replied vide their letter dated 13th August, 2010, (RUD-VII) regarding the previous show" ,,,,,,

cause notice issued by the Additional Commissioner for the period 2004-05 to 2008-09 but has not supplied the month wise information for" ,,,,,,

the period April 2009 to March 2010. Again, this office letter even No. 30249 & even No.110, dated 01.10.2010 were also issued to" ,,,,,,

assessee to furnish month wise details for the said period but no reply has been received so far" ,,,,,,

5. Whereas, it is evident that the assessee has replied to the said letters but has not supplied the requisite information sought by this office." ,,,,,,

Further, they have also failed to furnish the return under Section 70 of Act
ibid." ,,,,,,

6. Whereas, non-submission of the information by the party has resulted into
hampering of determination of Service Tax liability of the" ,,,,,,

party.,,,,,,

7. Whereas the provisions of Section 72 of the Act ibid provides for determination
of Service Tax liability of the party/assessee on the basis,,,,,,

of "Best Judgment Assessment" of the proper officer in the event of party's
failure to produce the records/information as required,,,,,,

by the proper officer.,,,,,,

8. Whereas as per provisions of Section 14 of Central Excise Act, 1944 as
amended as made applicable to Service Tax vide Section 83 of" ,,,,,,

the Act ibid, the obligations was cast on the party to furnish information called
for by an officer. Section 72 of the Act ibid read as "Best" ,,,,,,

judgment assessment" means if any person, liable to pay Service Tax." ,,,,,,

(a) fails to furnish the return under Section 70;,,,,,,

(b) Having made a return, fails to assess the tax in accordance with the
provisions of this Chapter or rules made there under, the Central" ,,,,,,

Excise Officer, may require the person to produce such accounts documents or
other evidence as he may deem necessary and after taking" ,,,,,,

into account all the relevant material which is available or which he has
gathered, shall by an order in writing, after giving the person an" ,,,,,,

opportunity of being heard, make the assessment of the value of taxable service
to the best of his judgment and determine the sum payable" ,,,,,,

Period,"Amount

Received

towards

Outbound

Tours","Amount

received

towards tours

to

Neighbouring

countries","Taxable

value after

allowing

60%

abatement","Service

Tax","Education

Cess","SHE

Cess","Total

Service

Tax

Payable

2004-

05","1,69,200",0,"67,680","6,768",135,0,"6,903

2005-

06","14,12,656","1,32,47,630","5,65,062","56,506","1,130",0,"57,636

2006-

07","24,80,402","1,07,47,898","9,92,161","1,19,059","2,381",0,"1,21,441

2007-

08","1,13,91,469","1,44,80,270","45,56,584","5,46,790","10,936","5,468","5,63,
194

2008-

09","1,31,79,075","2,20,57,276","52,71,630","6,32,596","12,652","6,326","6,51,
573

Period,"Amt.

received

towards

outbound

Tours","Amt.

received

towards

tours to

Neighboring

countries", "Taxable

value

after

allowing

60%

abatement", "Service

Tax", "Edu.

Cess", "S & H

Education

Cess", Total Tax

2009-

10", "1,64,73,844", "2,75,71,595", "1,76,18,176", "17,61,818", "35,236", "17,618", "18,14,672

Encl. : All relied upon documents (RUD I to VII),,,,,,,

Sd/-JOINT COMMISSIONER SERVICE TAX,,,,,,,

11. Now on perusal of the show cause notice, we find that in para 5 of the show cause notice, the case of the Revenue proceeded on the fact that" ,,,,,,

appellant has failed to furnish the return under Section 70 of the Finance Act, 1994. The non-submission of information by the appellant has resulted" ,,,,,,

into hampering of determination of service tax liability. Therefore, provisions of Section 72 of the Act were attracted, as the appellant has failed to" ,,,,,,

produce records/information as required by the proper officer. Further, in para 9 of the show cause notice, the provision of Section 72(a) of the Act" ,,,,,,

were sought to be invoked for determination of the assessment of service tax liability of the appellant which was found to be justified. Thereafter, in" ,,,,,,

the show cause notice, the quantification table of service tax liability has been incorporated on the basis of previous years turnover of the appellant" ,,,,,,

for enhancement of 25% of turn over of the previous year was sought to be assessed. On perusal of the show cause notice, nowhere it is mentioned" ,,,,,,

that whatever information, the appellant has supplied are not sufficient and what are the deficiencies in these informations." ,,,,,,

12. To invoke provisions are of Section 72 of the Act, it is proper to incorporate the provisions of Section 72 of the Act." ,,,,,,

13. For better appreciation, the same are reproduced as under:" ,,,,,,

Section 72 of the Act ibid read as ""Best judgment assessment"" means if any person, liable to pay Service Tax." ,,,,,,

(a) fails to furnish the return under Section 70; ,,,,,,

(b) Having made a return, fails to assess the tax in accordance with the provisions of this Chapter or rules made thereunder, The Central" ,,,,,,

Excise Officer, may require the person to produce such accounts documents or other evidence as he may deem necessary and after taking" ,,,,,,

into account all the relevant material which is available or which he has gathered, shall by an order in writing, after giving the person an" ,,,,,,

opportunity of being heard, make the assessment of the value of taxable service to the best of his judgment and determine the sum payable" ,,,,,,

by the assessee or refundable to the asses see on the basis of such assessment. "" " ,,,,,,

14. As per the abovesaid provisions, the provisions are attracted in a case the assessee has failed to furnish the return under section 70 of the Act and" ,,,,,,

if he has made the return fails to assess the tax in accordance with the provisions of this chapter or Rules made thereunder. ,,,,,,

15. Therefore, section 72 ibid has two limbs:" ,,,,,,

A. Fails to furnish the return, ,,,,,,

or, ,,,,,,

B. If return has been filed in that case, he fails to assess the tax in accordance with law." ,,,,,,

In this case, the allegation against the appellant is that they have not filed their ST 3 return under section 70 of the Act. If that is so, then the provision" ,,,,,,

of section 72(a) are attracted. But it is a fact on record that the appellant has filed their return regularly under section 70 of the Act. Therefore, the" ,,,,,,

foundation of the show cause notice that the appellant has not filed their return is incorrect. If the case of the Revenue is that appellant has not filed ,,,,,,

the return, the provision of section 72 are attracted. The said allegation against the appellant stand disapproved as the appellant has filed their return" ,,,,,,

regularly. ,,,,,,

16. Now, we analyse the clause (b) of section 72. If the appellant has filed the return, and fails to assess the tax in accordance with the provisions of" ,,,,,,

this Chapter or rules made thereunder in the show cause notice, there is no allegation against the appellant that they have filed the return and failed to" ,,,,,,

assess the tax in accordance with the provisions of law.,,,,,,

17. Therefore, we hold that provrsion of section 72(b) are not attracted in the show cause notice and the show cause notice has been issued without" ,,,,,,

appreciating the facts that the appellant have been filing the return regularly. The show cause notice has travelled on the premise that appellant has,,,,,,

not filed return under section 70 of the Act which is incorrect.,,,,,,

18. In the paragraph 4 of the show cause notice, it is mentioned that appellant were asked to provide details /documents/ information for issuance of" ,,,,,,

the show cause notice, through various letters. We have also seen list of the letters and a copy of such letter is incorporated herein as under:" ,,,,,,

OFFICE OF ASSISTANT COMMISSIONER SERVICE TAX DIVISION-II 7th FLOOR,
BLOCK No. 11, CGO COMPLEX LODHI ROAD NEW" ,,,,,,

DELHI-110003,,,,,,

C. No. DL-II/ST/R-17/SCN/Creative/497/09 Dated 05.07.2010,,,,,,

To," ,,,,,,

M/s. Creative Travels Pvt. Ltd.,,,,,,

Creative Plaza, Nanakpura," ,,,,,,

Moti Bagh, New Delhi" ,,,,,,

Sub : Show Cause Notice follow up for subsequent period-reg.,,,,,,

In continuation to the Show Cause Notice issued by the Additional Commissioner Service Tax, Service Tax Commissionerate, New Delhi, vide" ,,,,,,

C. No.I-26(494)ST/AMR/Gr.A1/153/Creative/2009, dated 8.4.2010 for non-payment of Service Tax and Education Cess, amounting to" ,,,,,,

Rs.23,47,010 Payable on taxable value paid/commission received for the period 2005-06 to 2008-09." ,,,,,,

In this connection, your proper reply has not been received by the office inspite of letter issued of even No.30165, dated 03.06.2010. Hence" ,,,,,,

you are requested to furnish the following monthwise information/details/ documents for the period April, 2009 to March, 2010 to this office" ,,,,,,

within 10 days of receipt of this letter to enable this office to process the

subsequent show cause notice.

If you are already discharging appropriate Service Tax and Education Cess on the above services, the details thereof may also be furnished"

to this office urgently.

These information's are sought by this office under Section 14 of Central Excise Act, 1944 and non- submission of the information by"

the stipulated date may attract penal action under Section 77 of Finance Act, 1994 as applicable to Service Tax under Section 83 of the"

Finance Act, 1994."

Yours faithfully,

Sd/- SUPERINTENDENT (RANGE-17) SERVICE TAX, DIVISION-II"

19. On examination of those letters, we find that in para 2 of the same, it is alleged that the appellant has not filed proper reply inspite of letters issued"

to them. Hence, he was requested to furnish following information/ details/ documents for the period April, 2009 to March, 2009. But, what as the"

documents /information and details as required is not been mentioned in these letters. For that, appellant has specifically asked the department to tell"

what information they require, hut despite the appellant's request, it was not informed what information /details /documents were required for by the"

department to issue the show cause notice. In the absence of any document, nature of details which was sought to be asked from the appellant"

specifically, in that case, the show cause notice is only on the basis of assumption and presumption."

20. As discussed above and on analyzing the same, we hold that the show cause notice is deficient, therefore, the same is not maintainable."

21. With these observations, we set aside the impugned order and allow the appeal with consequential relief, if any."

(Pronounced in the open court on 06.X.2015),