



आयुक्त (आपीएच) का कार्यालय, नया दिल्ली एवं सेवा कर और अपील मुक्त  
 OFFICE COMMISSIONER (APPEALS) CENTRAL EXCISE OFFICE



द्वितीय मं. नं. १४ दी गवन / 2<sup>nd</sup> Floor, Gov. Secy. Bldg.  
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संबंधित नकल की प्रतियाँ :-

५	अ.पी.ओ. (आपीएच) कार्यालय Appeal Officer CPD, New Delhi	१	आयुक्त (आपीएच) कार्यालय ICE, 2 <sup>nd</sup> Flr CPD, New Delhi	१	दस्तावेज दस्तावेज 19.03.2015
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५ आदेश जारी का समय (Order in Appeal No. 268)

**REF V-EXCISE-006-APP-486-2014-19**

आदेश का दिनांक : 04.06.2015 जारी करने का तिथि : 14.05.2015  
 Date of Order : 04.06.2015 Issue of Order :

Forward to: Shri P. A. Vamsi, Commissioner, Excise & Central Excise, Mumbai/Quadrilateral

कार्यालय नया दिल्ली नया दिल्ली में एक नया नकल के साथ प्रेषित कर दिया जा रहा है।  
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As per request of Excise Commissioner, Mumbai dated 15.05.2015, the following goods are being  
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To the Deputy Commercial Director, Excise & Customs, Mumbai (ICE/CC) at 2<sup>nd</sup> Floor, 11th Flr, Gov. Secy Bldg., New Delhi. For the Excise Officer, Mumbai (ICE/CC) at 2<sup>nd</sup> Floor, 11th Flr, Gov. Secy Bldg., New Delhi.





**IN ORDER IN APPEAL:**

**1.0. BRIEF FACTS AND GROUNDS OF APPEAL:**

1.1. The subject appeal has been preferred by Mrs. Sun Adventure, S.A. Ratnam Complex, Above SICI Bank, Waglow Road, Dhawagor 034037 (hereinafter referred to as the appellant) against the Order-in-Original No. 28/AO/TAX/014/2016-17, dt. 10.02.2017 (hereinafter referred to as "the Impugned order") passed by the Assistant Commissioner (AC), Service Tax Division, Dhawagor (hereinafter referred to as the Adjudicating authority). The Appellant are engaged in providing taxable services or categories "Tour Operator" and they are not registered with service tax when the present matter was initiated, but now they are registered with Service Tax with registration No. NACAAAANUCSE001.

1.2. Intelligence gathering revealed that the Appellant are providing services as Tour Operator, which are taxable service in terms of section 66(b) of the Finance Act 1994 (herein after referred to as "the Act"), however the Appellant never obtained registration under section 66(b) for providing service tax on the services provided by them. Therefore, search was conducted at the office premises of the Appellant on 08.12.2015, during which incriminating documents were recovered.

1.3. In the course of investigation, statement of the Jaimin Chhajraj Dave Trustee of the Appellant was recorded on 12.12.2016 wherein he stated that Appellant is a Trust and facilitating teaching and learning activities to the students through their trust conducting tour programmes throughout country which theme is Nature and its surroundings; that trust has set up the camps to educate the students about Nature; that Appellant are organizing camps in two ways. One type of camps are organized solely by the Appellant, where they decide the venue of the camps and expenditure to be incurred and then send it to Press for publishing sources such as in the name of the Appellant. That after consulting and detailed inquiry if the parents/students agree with the program and ready to pay the expenses, then they apply. If on receipt of certain number of applications, the Appellant organize/conduct the camp at the decided venue and fix the amount of money in trust they keep the same with their trust. If the required number of applications are not received, the camp is canceled and accordingly the amounts are returned to the respective parents/students. The second type of camps are organized by the Appellant as per the camp schedule decided and provided by Mrs. ANALA Outdoors (hereinafter referred to as Mrs. ANALA); that the Appellant send the tour/camp program received from Mrs. ANALA to press for publishing the details in the name of the Appellant; that on consulting and detailed inquiry if parents/students agree with the program and ready to pay the expenses, then they apply. If on receipt of applications with the amount of tour/camp charges, they send the details of the students to Mrs. ANALA directly and the amount of tour/camp charge through Angedias after deducting their commission; that after the camp is organized at the decided venue; that he is one of the seven trustees; that after perusal of the documents, he confirmed the particulars of having received the fees for various camps organized during 2005-06 to 2017-18; that their fees are inclusive of accommodation, travelling from Ahmedabad, food, service charges and service tax and that they had collected service tax for the camps organized by them and that they had neither obtained service tax registration, nor also not had any service tax return or having paid any amount of service tax. That after examining the documents, calculation sheet for the correct amount of service tax was prepared, which indicated as follows:

Time in a Year	Service value	Service Tax liable
2011-12	20853	2733
2012-13	257436	31827
2013-14	348745	43134
2014-15	1318747	162204
2015-16 (upto November, 2015)	528831	65180
<b>Grand Total</b>		<b>106778</b>

1.4 In case regard, the DCN dtd. 5.08.2016 was issued to the Appellant asking them to show cause as to why the service tax of Rs.1,02,1,164 should not be demanded and recovered from the Appellant under Section 73(1) of the Act with interest as applicable thereon in terms of Section 75 of the Act. The Appellant were further asked to clarify why penalties under Section 77:1(a), 77(2) and 77(1) of the Act should not be imposed on them.

1.5 In reply to the notice dtd.15.08.2016, the Appellant submitted a Chalan to its 3% GST- payable towards their liability of service tax, interest and penalty. It was requested to drop the demand of Krishna Kalwan Cess made in the notice, as the said cess became inoperative with effect from 01.06.2016. They also requested to take lenient view since they have made payment of the dues as per the schedule rates.

1.6 After having considered the submission from the Appellant, the subject authority passed GO No. 35/ACIS/TAX/D/W/2016-17, dtd. 0.03.2017, confirming the demand of Rs. 1,91,65,117 under Section 73(1) of the Act with interest of Rs.98,01,86/- on the appealable service tax thereon in terms of Section 75 of the Act and also imposed penalties of Rs.1,91,65,117 under Section 73(1) of the Act with benefit of reduced penalty @25% of service tax remains confirmed i.e. Rs.47,91,42/-, Rs.15,075/- under Section 77:1(a) of the Act and Rs.10,000/- under Section 77(2) of the Act. The demand of Krishna Kalwan Cess of Rs.400/- as set in the GO was ordered to drop with which interest and penalties thereon. Since the Appellant had already made payment of the aforesaid vide Chalan dtd.22.02.2017, the same was ordered for appropriation against the amount of service tax, interest and penalties payable by the Appellant in terms of the aforesaid.

1.7 The Appellant filed appeal mainly on the following grounds:

(a) The Appellant is a registered charitable trust under the Public Charitable Trust Act, 1950 and activity of the Appellant is directly connected with the general public and animals. They were organizing various camps at various locations, for which they have to take assistance of the "transporters". They are not engaged in any kind of commercial activity and as per the Trust deed whatever the fund is received, the same is to be used for the aforesaid purpose only. They are thus not engaged in any kind of profit-making business or any kind of commercial business. The department initiated the inquiry and issued DCN dtd. 5.08.2016 with demand for service tax, interest and penalties. The Appellant and the Trustees of the Appellant were not aware about the provisions of the service tax law hence the compliance requirement remained out of their knowledge. They never received the letter about the fixing of personal hearing, but the Trustees of the Appellant had of his own visited the Central Excise office and in good faith agreed to make payment of the dues and accordingly made vide Chalan No. 63840, dtd.22.02.2017.

1.4 Being aggrieved by the OIO dtd.16.03.2017, the Appellant filed appeal before the Commissioner of C. Ex (Appeals), Rajkot on 12.05.2017. As they had received copy of the OIO on 14.03.2017.

1.5 Being aggrieved by the OIO dtd.10.01.2017 the Appellant has filed the present appeal, mainly containing the following grounds.

(i) The adjudicating authority has passed the OIO without giving any opportunity of hearing to the Appellant and hence the Order has been passed in gross violation of principles of natural justice.

(ii) The Appellant being Registered C.A. Ksh. Trust conducting activities not for the Commercial purpose.

(iii) It was admitted in the statement that the Appellant had managed tour on the basis of recruitment of M/s. ANALA and after deducting their commission, the fees recovered by the Appellant from the participants were sent to M/s. ANALA through Angara as. Therefore, the total amount shown in the Table given in the SOA dtd.15.09.2018 is not true and correct.

(iv) In terms of Explanation appended below the definition of 'Tour Operator' provided vide Section 65(15) of the Act, it does not include a journey organized or arranged for use by an occasional party other than a commercial carrying or coaching centre, in setting skill or knowledge or lessons on any subject or field.

(v) The Appellant did not possess any vehicle for organizing such tour as contemplated in the said provisions. In terms of definition of 'Tour Operator' the department has to prove that whether the said disputed tour, if any, had been organized through a 'Tourist vehicle' in terms of Section 2(43) of the Motor Vehicle Act, 1988 read with Rule 12B of the Central Motor Vehicle Rules, 1988. As held by the Commissioner of C. Ex (Appeals), Indore in the case of M/s. Oxyd H. Deprise [2017] 14 STR 283 (Commissioner Appeal) that the amendment made in the definition of 'Tour Operator' in the budget of 2014 was with reference to exempting the levy of package tour operators and not with reference to the normal tour operators, where the conditions of use of tourist vehicle would continue to be operative. In other words, except for tour operators charging package tours, in respect of other tour operators, the levy would be operative from 01.04.2003 provided the vehicle used is a tourist vehicle and in case the vehicle used is not a tourist vehicle, there can not be a levy of service tax for the service rendered by using such non-tourist vehicles.

Thus, the requirement of use of the tourist vehicle, if any, has not at all been established by the adjudicating authority. Therefore, the OIO is not at all proper and legal.

(vi) They already stated that the 'Tour' was operated by M/s. ANALA and the Appellant were participating by sending the participants, but no such investment has been evidenced upto M/s. ANALA. Therefore, the order passed is in violation of statutory provision of Section 65(11) of the Act.

(vii) The Appellant were not at all required to make payment of service tax, but due to ignorance of law they paid the service tax. Since the Appellant has proved that they have made payment of service tax and there was no such requirement of levy of service tax on the activities being conducted by the Appellant, hence the payment of service tax with interest and penalties are to be treated as 'illegally collected from them.

*(Signature)*

1.10. The Central Board of Excise and Customs had vide Notification No. 28/2017-CEx (N1), dt. 17.10.2017 read with Board's Order No. 05/2017 ST, dt. 18.11.2017 has appointed the undersigned as appellate authority under Section 35 of the Central Excise Act, 1944 for the purpose of passing orders in the present appeal.

1.11. Accordingly the Appellant were granted opportunity of hearing on 02.10.2018, 03.02.2018 and 22.02.2018. None of the same were attended by anybody from the Appellant and they did not cause to produce their reply in response to the intimation of PH. Hence, in terms of the proviso to Section 35(1A) of the Central Excise Act, 1944 read with Section 35(3) of the Act, now I have no other option but to proceed ahead in the matter on the basis of the merits of the case and the appeal papers placed before me.

1.12. Copy of the appeal memo was provided to the Assistant Commissioner, Service Tax Division, Raebanagar vide letter dt. 28.05.2017 and they were also intimated about the hearing schedule accordingly has been received from them.

## 2.0. FINDINGS:

2.1. I have carefully gone through the appeal papers placed before me. I find that the Appellant has already made payment of service tax, interest and penalties during the time of adjudication and the said amount stands appraised in the OIO dt. 13.02.2017. Thus, I find that there is proper compliance to the requirement of pre-deposit as provided vide Section 35B of the Central Excise Act, 1944 read with Section 83 of the Act. Accordingly I proceed to decide this appeal.

2.2. Some facts, in brief that the Appellant had not made any submission before the adjudicating authority and at the time of personal hearing have provided a copy of Challan dt. 22.02.2017 evidencing the payment of service tax, interest and penalties by them which has been appreciated in the OIO issued by the adjudicating authority. The Appellant had requested to drop the demand of K. V. Kalyan Dass and also requested to take lenient view. Thus, there were no other merits or arguments made by the Appellant before the adjudicating authority to challenge the validity of demand itself in the context of non applicability or deemed non applicability of Section 35(1A) of the Act in their case. The said ground is apparently being raised by the Appellant before me for the first time, which is required to be decided on the merits of the provisions of Rule 5(1) of the Central Excise (Appeals) Rules, 2001. However, in view of the fact that the Appellant was prevented from making proper representation and the letter for hearing on 22.02.2017 was issued to them and accordingly the Appellants were not at all heard although there appears mention about the presence of the Appellant during hearing on 22.02.2017 in Para 5 of the impugned OIO. This itself is enough to make out a case of filing objection as provided in Rule 5(1) of the Central Excise (Appeals) Rules, 2001 and to allow the Appellant to present their case and arguments at this stage and in terms of Rule 5(2) (b); I allow the Appellants to produce their submission in this respect, with a view to extend them the benefits of natural justice, from which they were otherwise prevented during the adjudication proceedings.

2.3. In view of the facts and circumstances stated above, the points for determination in the present appeal in terms of Section 35A (f) of the Central Excise Act, 1944 read with Section 92 of the Act are the following:

- (a) Whether the services provided by Appellant will be appropriately classifiable as "Tour operator" in terms of Section 85(15) of the Act or otherwise?
- (b) What should be the amount of service tax demand to be continued? Under which provisions of the Act such demand may be continued? Is there any case for levy of interest under Section 75 of the Act on such continued demand? Is there any case for imposing penalty on the Appellant under Section 77(1)(a), 77(2) and 78 of the Act and what should be the quantum of such penalties?
- (c) What should be the order which is just and proper, in the context of the grounds of appeal and merits of the case aforesaid?

2.4. As regards the point (a), I find an undisputed fact that at the relevant time, the Appellant was engaged in providing services, i.e. a case of the department, that the services provided by the Appellant were taxable services of the category of "Tour Operator services" as defined under Section 85(15) of the Act, covering the provisions of Section 85(15) of the Act, as they were made after 16.06.2003, which are as follow:

"Tour operator means any person engaged in the business of planning, scheduling, organizing or arranging tours (which may include arrangements for accommodation, sightseeing, or other similar services) by any mode of transport, and includes any person engaged in the business of operating tours in a tourist vehicle or a contract carriage by whatever name called, covered by a permit, other than a stage carriage permit, granted under the Motor Vehicles Act, 1988 or the rules made thereunder.

Explanation. For the purpose of this clause, the expression "tour" does not include a journey organized or arranged for use by an educational body, other than a commercial training or coaching centre, imparting skill or knowledge or awards in any school or institution."

Apparently the definition of "Tour Operator" requires involvement of a tourist vehicle with a permit granted under the MV Act, 1988. In the entire case, it is evident from the narration made by the Appellant and also by the adjudicating authority that impugned OIO that the Appellant never own any vehicle. Leave apart the issue of a vehicle with the permit granted under the MV Act. In this Indian context, the submission made by the Appellant regarding sufficient ground. It is very well explained by the Appellant, about the involvement of Mrs. ANSALA, but no attempt was made to check whether Mrs. ANSALA had such permit, or otherwise. In the absence of such basic ingredient the statement made in the ROK and the OIO to get the services provided by the Appellant, a colour of taxable services in the context of Section 85(15) of the Act fails. I find support of my view from the case law pronounced in the form of OIA passed by the Commissioner of C.E. (Appeals) Mysore in the case of Mrs. Gayatri Enterprises (2017(2) STR 260 (Comm. App.), which OIA has been further upheld by the CESTAT, Principal Bench, New Delhi vide Order no. D2/11/2008 (13/013) STR 630 (Trib. Co.) and for all reasons, have to concede the point (a) in favour of the Appellant.

2.5. When the services provided by the Appellant is not classifiable under Section 85(15) of the Act, the entire demand of service tax under Section 78(1) of the Act becomes not sustainable and the OIO passed by the adjudicating authority deserves to be set aside and accordingly I do so. When there is no demand for service tax, consequently the case remains for demand of interest under Section 75 of the Act and also for imposing penalties on the Appellant under Section 77(1)(a).



77(2) and 79(1) of the Act. Thus, the C.O. tant la ser ex de with consequential benefits in favour of the Appellant. By way of answering to the point (a) accordingly.

26 In the context of the above, while dealing with point (a), I find that the ends of justice may be met with upon issuing order for setting aside the impugned OIO dtd.10.03.2017 with consequential benefits in favour of the Appellant and I do so.

27 In above terms, I dispose the appeal by way of allowing the appeal filed by the Appellant and setting aside the impugned Order with consequential relief in favour of the Appellant.



(P. A. Vasave)  
Commissioner (Appeals)  
Commissioner  
CGST & Central Excise  
Mumbai (Central Office)

F. No. 02/141/DVT/2017

Date: 04.05.2018

By R.C.A.J.

To,  
M/s. Sun Adventures,  
304, Haina Coop. (Opp. Sat Reservoir),  
Waghawadi Road, Dhule (Dist. Dhule)  
Email: info@sunadventures.org

Copy to:-

1. The Chief Commissioner, CGST & C. Ex. Ahmednagar Zone, Ahmednagar.
2. The Commissioner, CGST & C. Ex., Dhule (Dist. Dhule).
3. The Additional Commissioner, CGST & C. Ex. (System), Bhavnagar.
4. Joint Commissioner, CGST & C. Ex., Dhule (Dist. Dhule).
5.  Closure