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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **CEAC 8/2016 & CM Nos. 25173-25175/2016**

THE PRINCIPAL COMMISSIONER,
SERVICE TAX, DELHI-I ..... Petitioner
Through: Mr Pramod Kumar Rai, Sr. Standing Counsel and Mr Deepak Anand, Advocate.

versus

CREATIVE TRAVEL PVT. LTD. ..... Respondent
Through: Mr. J.K. Mittal and Mr. Rajveer Singh, Advocates.

**CORAM:**
**JUSTICE S.MURALIDHAR**
**JUSTICE NAJMI WAZIRI**

**O R D E R**

% **28.07.2016**

1. The challenge in this appeal by the Service Tax Department (Department) is to the order dated 6th October 2015 passed by the Central Excise Service Tax Appellate Tribunal (CESTAT) reversing an order dated 1st March 2012 passed by the Commissioner (Appeals), whereby it was concluded that the Show Cause Notice ('SCN') dated 20th October 2010, issued by the Department to the Respondent/Assessee was maintainable.

2. The brief facts are that, initially, on 8th April 2010 an SCN was issued to the Respondent by the Department for the period 2004-05 to 2008-09, categorizing the services provided by the Respondent/ assessee as "tour operator services" and "business auxiliary services". It is stated that for the

subsequent period, i.e., April 2009 to March 2010, the Respondent was asked to provide the details/ information by various letters, but the Respondent failed to do so. Citing the above failure of the Respondent to furnish the requisite information, and further stating that the Respondent failed to file returns under Section 70 of the Finance Act, 1994 ('the Act'), the impugned SCN dated 20th October, 2010 was issued invoking Section 72 of the Act.

3. For ready reference Section 72 of the Act reads as under:

> **"...72. Best Judgment Assessment –** If any person liable to pay service tax, -
>
> a. fails to furnish the return under Section 70;
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> b. having made a return, fails to assess the tax in accordance with the provisions of this Chapter or rules made thereunder.
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> 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 assessee on the basis of such assessment...."

4. Section 72, which is a provision permitting the Assessing Officer to resort to best judgment envisages two contingencies. One, under Section 72(a), where a person liable to pay service tax "fails to furnish the return under Section 70". The other under Section 72 (b), where the person liable to pay service tax files a return but "fails to assess the tax in accordance with

the provisions of this Chapter or rules made thereunder”.

5. In para 5 of the SCN dated 20th October 2010 it was stated that the Respondent failed to furnish returns in terms of Section 70 of the Act for the period in question. Further in para 9 of the SCN it was stated: "Whereas, having regard to all the evidences and chain of events as detailed in the preceding paragraphs, the invocation of the provisions of Section 72 (a) of the Act ibid requiring determination of the assessment of the Service Tax liability of the party appears justifiable."

6. The case of the Respondent was that it had filed a return in Form ST-3 for the period in question and, therefore, there was no basis for invoking Section 72 (a) of the Act. As regards the alleged failure to provide information, it was pointed out that the Department has issued letters dated 03.06.2010, 05.07.2010, 28.07.2010,03.09.2010 and 01.10.2010 by giving reference to the previous SCN and requested the Respondent to furnish "following month wise information/details/documents for the period from April 2009 to March 2010", without even mentioning the information/details required by the Department. In the circumstances, the Department was requested to send its audit team and prepare the details as required.

7. By an order dated 4th January 2011 in W.P. (C) No. 16 of 2011 a Division Bench of this Court directed the adjudication authority to first decide the preliminary objection raised by the Respondent that the SCN could not have been issued in the prevailing factual matrix.

8. By the order-in-original dated 31st March 2011, the adjudicating authority i.e. the Joint Commissioner, Service Tax Commissionerate, New Delhi held that although "it is a fact that the department has called for information from the party without specifically mentioning the nature of information required. However, it is also a fact that the said letters issued to them clearly mention about the earlier SCN dated 08.4.10 for which subsequent information for the period 2009-10 was called for. The party was well aware of the Issues raised in the SCN dated 08.4.10, therefore, the contention of the party that the letters do not mention about the information required by the department is not tenable in as much as they deliberately and knowingly avoided to give the information. The Joint Commissioner further held: "Though the party has contended that they had already filed ST-3 returns of the said period but the same was also discussed and provided to audit officers during the course of audit. I find that it is a mere excuse taken by the party instead of providing information sought relief by filing writ petition before the Hon'ble High Court after issue of present SCN without waiting for adjudication proceedings which are quasi judicial in nature." Further it was held that since the Respondent had failed to furnish the information sought, the Department was justified in invoking Section 72 "to protect the Govt. revenue." The SCN dated 20th October 2010 was accordingly held to be maintainable.

9. It has been noted by the Commissioner (Appeals) in the order dated 1st March, 2012 that in the letters sent by the Department to the Respondent calling for information, the specific nature of the information required was not mentioned. Yet, it was held that since the second SCN was in

continuation of the first SCN dated 8th April 2010, it could not be said that the Department had not called for specific information. Further according to the Commissioner (Appeals) the returns filed in ST-3 did not contain the full particulars and various columns were left blank. Alternatively it was held:
"...for the sake of discussion, even if we presume that the second SCN is not maintainable because the department has assessed the tax liability of the appellant on the basis of Best judge assessment, then the duty liability on the appellant still remains. The non issuance of second SCN does not absolve the appellant of their tax liability demanded in the 1st SCN and more so since the same stands confirmed by the original authority." Accordingly the appeal was dismissed.

10. In the impugned order, the CESTAT noted that in the SCN there was no allegation that in terms of Section 72 (b) of the Act, the Respondent had filed a return and failed to assess tax in accordance with the provisions of law. The SCN entirely proceeded on the basis that the Respondent had failed to file a return which was factually incorrect. Further the letters by which information was asked for the period in question failed to specify what information was to be provided. Consequently the SCN was "only on the basis of assumption and presumption." Consequently, the CESTAT held the SCN to be not maintainable.

11. Mr. Pramod Rai, learned counsel for the Department, was unable to point out how Section 72 (a) could possibly be invoked when a admittedly the return for the period April to September, 2009 had been filed on 22nd October 2009 and for the period October 2009 to March 2010 on 22nd April

2010 with the jurisdictional service tax office. Therefore, the factual basis on which the SCN was issued invoking Section 72(a) of the Act was non-existent. Secondly, the SCN does not make out a case for invoking Section 72 (b) of the Act. Consequently, the question of adopting best judgment assessment did not arise. Thirdly, there could be no failure by the Respondent to provide information when the letters of the Department failed to specify the specific information that was to be provided.

12. In ***Mega Cabs Pvt. Ltd. v. Union of India 2016 (43) STR 67 (Del.)***, a Division Bench of this Court observed in the context of the applicability of Section 72 as follows:

> "17. Under Section 72 of the FA, one scenario is where a person who is liable to pay service tax fails to furnish a return under Section 70. The second is where such person has filed a return but "fails to assess the tax in accordance with the provisions of this Chapter or rules thereunder‖. The Assessing Officer (AO) is in the either scenario empowered to require the production of 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, give an order in writing after complying with the rules of natural justice. The assessment in such circumstance is made on the value of the taxable service ―to the best of his judgment. The AO determines the sum payable by the Assessee or refundable to the Assessee on the basis of such assessment. Therefore, even for the purpose of Section 72 a prima facie satisfaction is to be arrived at that the return filed by the Assessee fails to assess the tax in accordance with law. Even in such an instance the calling for the accounts, documents and other evidence is not to be undertaken by an AO mechanically."

13. Consequently, the CESTAT was right in concluding that the second SCN dated 20th October 2010 was not maintainable.

14. No substantial question of law arises for consideration of this Court from the impugned order of the CESTAT. The appeal and pending applications are dismissed.

**S.MURALIDHAR, J**

**NAJMI WAZIRI, J**

**JULY 28, 2016**
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