A-A-1

The West Regional Bench of Customs, Excise, Service Tax Appellate Tribunal (CESTAT) at O-20, Meghani Nagar, New Mental Hospital Compound, Ahmedabad – 380 016.

(ii) The appeal under sub section (1) of Section 86 of the Finance Act 1994 to the Appellate Tribunal Shall be filed in quadruplicate in Form S.T.5 as prescribed under Rule 9(1) of the Service Tax Rules 1994 and Shall be accompanied by a copy of the order appealed against (one of which shall be certified copy) and should be accompanied by a fees of Rs. 1000/- where the amount of service tax & interest demanded & penalty levied of Rs. 5 Lakhs or less, Rs.5000/- where the amount of service tax & interest demanded & penalty levied is more than five lakhs but not exceeding Rs. Fifty Lakhs, Rs.10,000/- where the amount of service tax & interest demanded & penalty levied is more than fifty Lakhs rupees, in the form of crossed bank draft in favour of the Assistant Registrar of the bench of nominated Public Sector Bank of the place where the bench of Tribunal is situated.
This order is being issued in accordance with Order No. A/10953/WZB/AHD/2013 & M/13763/WZB/AHD/2012 dated 06.08.2013 passed by the Customs, Excise & Service Tax Appellate Tribunal, West Zonal Bench, Ahmedabad (CESTAT) whereby the proceedings were remanded back to the Commissioner (Appeals) for reconsidering the issue after following the principles of natural justice, without insisting upon any pre-deposit. The Hon'ble CESTAT has passed the order while deciding the appeal & stay application filed by M/s Gujarat Energy Development Agency, 4th Floor, Block No. 11/12, Udyog Bhavan, Sector-11, Gandhinagar – 382047 (hereinafter referred to as ‘the appellant’ for sake of brevity) against Order-in-Appeal No. 132/2012(Ahd.-III)/SKS/Commr(A)/Ahd dated 28.09.2012 (hereinafter referred to as “the appellate order”) issued by Commissioner (Appeals-III), Ahmedabad. The Commissioner (Appeals) had dismissed the appellant’s appeal filed against Order-in-Original No. AHM-STX-003-ADC-083-11 dated 09.12.2011 (hereinafter referred to as ‘the impugned order’) passed by Additional Commissioner, Central Excise, Ahmedabad-III (hereinafter referred to as the ‘the adjudicating authority’) for non-compliance of the provisions of Section 35F of the Central Excise Act, 1994.

2. Brief facts of the case are that, the appellant have collected ₹2,85,12,500/- from their clients during the period 2006-07 to 2010-11 towards transfer fee and issuance of commissioning certificate. The appellant have collected ₹25,000/- per MW to maximum of ₹2.50 lacs towards transfer fee and for issuance of commissioning certificate to their client in respect of the wind mill. Before issuance of said commissioning certificates, the officers of the appellant have visited respective wind farm site to witness the generation of electricity from the wind turbine generators. It has been noticed that the appellant have provided taxable services, which fall under the category of “Technical Inspection and Certification Services”. On the basis of the above observations a Show Cause Notice was issued to the appellant demanding Service Tax of ₹33,10,323/- under Section 73 of the Finance Act, 1994 (hereinafter referred to as “the Act”) invoking
5. I have carefully gone through the grounds given in appeal and further submissions made by the appellant as well as the documents available on record. With regard to the directions given by the Hon'ble CESTAT, I find that the issue to be decided is whether the amount collected by the appellant from their clients towards transfer fee and issuance of commissioning certificate is liable for service tax or not.

6. I find that the appellant are collecting ₹ 25,000/- per MW to maximum of ₹ 2.50 lakhs towards transfer fee and for issuing commissioning certificate to their clients in respect of the wind mill. It is also admitted by the appellant that the electrical installations are inspected and verified by the Chief Electrical Inspector who permits the charging / connection of the wind turbine generators for generation of electricity to the grid and the GEDA officers then visit the site, witness the generation of the electricity from the wind turbine generators and then issues the appellant issues the certificate of commissioning of wind farm. Now let me peruse the definition of the "Technical Inspection and Certification Service" which is defined under Section 65(108) of the Act which reads as under:

"Technical Inspection and Certification" means inspection or examination of goods or process or material or information technology software or any immovable property to certify that such goods or process or material or information technology software or immovable property qualifies or maintains the specified standards, including functionality or utility or quality or safety or any other characteristic or parameters, but does not include any service in relation to inspection and certification of pollution levels.

Now on comparing the above definition with the activities performed by the appellant with regard to Inspection, Commissioning and Examination of the generation of electricity from the wind turbine generators, I find that the same is squarely falls under the above said definition. Hence, the amount received for the said activities performed by the appellant obviously taxable in terms of Section 65(105)(zzi) of the Act.

6.1 Further, it is an admitted fact that the appellant has collected the fee from the client in the capacity of an authority to issue a certificate for verification of the transfer documents and checking the working condition of the machines. The definition of Taxable Service "Technical Inspection and Certification" as stipulated under Section 65(108) of the
this proves the intention of the appellant. Further, I find that the discrepancies were noticed only at the time of audit therefore, the argument put forth by the appellant is not justifiable as in the present system of self-assessment, documents like invoices and other transaction details are not supplied to the Department. Moreover, it is on record that the appellant have never disclosed the said income to the department, as the appellant is registered with the service tax department and therefore well aware with the legal responsibilities lies on them. Had the audit been not conducted, such non-payment of Service Tax has been gone unnoticed. Therefore, I find that the extended period of five years under proviso to sub-section (1) of Section 73 of the Act is correctly invoked by the adjudicating authority. I find support from the decision of Hon’ble Tribunal in the case of State Bank of India reported in 2011 (22) STR 638 wherein the Tribunal, while deciding the issue of suppression of facts has observed that:

"The pleas that the SBI has issued an internal circular, (a copy of which is not made available), that the SBI is a Govt. Bank, that it is collecting service tax for the department etc., are extraneous to determine limitation under Section 73 of the Finance Act, 1994. On the other hand, the SBI should be a model tax payer and to prove their bona fides, they should have promptly paid up the small amount of tax not paid by it once the audit pointed it out, which I find they have not done. But for the detection by audit, the tax-evasion by SBI would have gone undetected".

It is manifestly clear from this that intention to evade payment of service tax is implied in the suppression of facts. Since the appellant was liable to self assess the liability to pay service tax, they had an obligation to furnish the correct and complete information about the nature of services as well as value of services whether taxable or otherwise. I uphold that the adjudicating authority has correctly invoked the extended period since this is a case of improper assessment amounting to deliberate non-declaration and suppression of vital information with a willful intention to evade payment of service tax.

9. I also hold that as the lapse on the part of appellant only came to light consequent to departmental intervention by way of audit of their records. I find that penalty under Section 78 of the Act has been imposed on the appellant for suppressing and not disclosing the value of taxable services with an intent to evade duty. The adjudicating authority
"The penalty imposable under S. 76 is for failure to pay service tax by the person liable to pay the same in accordance with the provisions of S. 68 and the Rules made thereunder, whereas S. 78 relates to penalty for suppression of the value of taxable service. Of course these two offences may arise in the course of the same transaction, or from the same act of the person concerned. But we are of opinion that the incidents of imposition of penalty are distinct and separate and even if the offences are committed in the course of same transaction or arises out of the same act, the penalty is imposable for ingredients of both the offences. There can be a situation where even without suppressing value of taxable service, the person liable to pay service tax is not to pay. Therefore, penalty can certainly be imposed on erring persons under both the above Sections, especially since the ingredients of the two offences are distinct and separate."

10. Hence, the appeal is dismissed in above terms.

(SUNIL KUMAR SINGH)
COMMISSIONER (APPEAL-III),
CENTRAL EXCISE,
AHMEDABAD.

Attested,

(Y.N. Raipura)
Superintendent (Appeal-III)
Central Excise, Ahmedabad.

BY R.P.A.D.
To,
M/s Gujarat Energy Development Agency,
4th Floor, Block No.11/12, Udyog Bhavan,
Sector-11, Gandhinagar -382047.

Copy to:-
1. The Chief Commissioner of Central Excise, Ahmedabad.
2. The Commissioner of Central Excise, Ahmedabad-III.
3. The Additional Commissioner of Central Excise, Ahmedabad-III.
5. The Asstt. Commr. (Systems), Ahmedabad-III for uploading the order on the Website.