IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL
SOUTH ZONAL BENCH AT CHENNAI

ST/41914/2016

(Arising out of Order-in-Appeal No. 308/2016 (STA-I) dated 06.06.2016 passed by the Commissioner of Service Tax (Appeals-I), Chennai).

M/s. S. Albert& Co. Pvt. Ltd. — Appellant

CST, Chennai — Respondent

Appearance

Shri J. Shankarraman, Advocate
for the appellant

Shri K.P. Muralidharan, AC (AR)
for the Respondents

CORAM :

Hon'ble Smt. ARCHANA WADHWA, JUDICIAL MEMBER

Date of Hearing: **03.07.2017**
Date of Pronouncement : 06.07.2017

FINAL ORDER No . 41141 **/2017**

After hearing both sides I find that the appellant is engaged in providing Stevedoring/Customs House Agent and other connected services related to import/export of goods and was duly registered with the Central Excise Department. It is seen that a Show cause notice dated 21.10.2010 was issued alleging non-

payment of service tax to the extent of around Rs. 1.29 Crores, which stands adjudicated and is not the subject matter of the present proceedings. As the appellant continued not to pay service tax in respect of various services undertaken by them, a subsequent show cause notice dated 25.11.2011 was issued to them raising demand of duty of Rs. 15,72,641/- for the period April 2010 to September 2010. The notice also raised demand of Rs. 2,81,446/- for the earlier period on the ground that the same was not included in the earlier show cause notice dated 21.10.2010 and as such was missed out. Further, notice also proposed to deny the cenvat credit of Rs. 79,218/- availed by the appellant on 'Car Hire Charges/Air Travels' etc.

2. The said show cause notice culminated into an order passed by the Addl. Commissioner confirming demand of Rs. 15,72,641/- along with demand of Rs. 2,81,446/- which according to the Revenue was missed out in the first show cause notice. Further, the demand of interest was also confirmed and penalty of Rs. 200 per day or @ 2% of such tax, per month, whichever is higher, was confirmed by the original authority. Appeal against the said order did not succeed before the Commissioner (Appeals). Hence the present appeal.

3.1 Ld. Advocate Shri J. Shankaraman appearing for the appellant fairly agrees that the demand of Rs. 15,72,641/- not paid by them during the period April 2010 to September 2010, is not being challenged by them as they are required to pay the same.

The challenge in respect of such demand is confined only to imposition of penalty in terms of the provisions of section 76 of the Finance Act, 1994. Challenging the penalty, he submitted that the service tax was not paid by them as they were facing financial difficulties in which case the provisions of Section 80 would come to their rescue. He also relied upon various precedent decisions of the Tribunal for the purpose of seeking relief in respect of penalty.

3.2 In respect of confirmation of demand of Rs. 2,81,446/- he submits that they have been issued earlier show cause notice for the earlier period and it was not permissible for the Revenue to raise the said demand in the subsequent show cause notice on the ground that the same has escaped in the earlier show cause notice issued on 21.10.2010. He submitted that complete adjudication is required to be done by the officers and raising of demand subsequently by way of another show cause notice is neither proper nor judicious.

3.3 As regards Cenvat credit of Rs. 79,218/- availed in respect of car hire charges and air travel charges, he submitted that the same has been held to be input services eligible for the purpose of cenvat credit by various decisions of the Tribunal.

4.1 After hearing the Ld. DR I find that the appellant is not disputing the confirmation of demand of tax of Rs. 15,72,446/- and the show cause notice is also within the period of limitation and the said demand relates to non-payment of service tax on the appellant's taxable output services. The only challenge is to

imposition of penalty under Section 76 of the Act and the ld. Advocate sought the relief in terms of Section 80.

4.2 I have gone through the provisions of Section 80 which are to the effect that no penalty would be imposed under Section 76,77, or 78 of the Finance Act, if the noticee proves that there was reasonable cause for the said failure. What is a reasonable cause has to be seen and examined in each and every case. Admittedly, such reasonable cause has to be a bonafide cause and must not be burdened with appellant assessee's intentions. The Hon'ble Karnataka High Court in the case of *CST, Bangalore Vs. Motor World* – 2012 (27) STR 225 (Kar.) has elaborately examined the said section and has observed that the initial burden of proof that there was reasonable cause is on the assessee, which was the reason for failure to follow the law. The authorities have to consider and examine the explanation offered by the assessee for such failure. "Reasonable cause means, an honest belief founded upon reasonable grounds, of the existence of a state of circumstances, which assuming them to be true, would reasonably lead any ordinarily prudent and cautions man, to come to the conclusion that the same was the right thing to do." Only if it found to be frivolous, without substance or foundation, the question of imposing penalty would arise.

4.3 When the appellant's present case is viewed in the light of the above observations of the Hon'ble Karnataka High Court, it is seen that the appellant was admittedly liable to pay the service tax

in respect of services provided by him. Prior to the present proceedings, a show cause notice for the earlier period was issued to them. As such they were aware of their liability to discharge service tax and it cannot be said that they were entertaining any bonafide belief about their service tax liability. On further being questioned, Ld. Advocate has fairly agreed that they were not, during the period involved in the present appeal, filing any ST-3 returns so as to let the Revenue know about their tax liability. Only if the appellant would have filed the ST-3 returns and was not actually paid the service tax, their plea about the financial difficulties would have been appreciated as in that case it was only an issue of late payment of duty. In cases where such returns are not being filed, the plea of the assessee as regards financial difficulty for payment of duty cannot be appreciated in as much as it is not a case of delayed payment but a case of non-payment and non-intimation to the Revenue about their liability to pay. In any case, it stands observed by the lower authority that the appellant was recovering the said tax amount from their customers, in which case again their plea of financial difficult cannot be appreciated. In these circumstances, the applicability of Section 80 is ruled out. The law provides for imposition of penalty, which stands rightly imposed by the adjudicating authority.

4.4 As regards the confirmation of service tax to the extent of Rs. 2,81,446/-, I find that admittedly the same falls within the realm of the earlier show cause notice issued on 21.10.2010, for the earlier period. The said confirmation is on the sole ground that

the service tax amount got escaped from the earlier show cause notice. Such piecemeal adjudication is not permissible. Even if there was some calculation mistake in the earlier show cause notice, Revenue was within its rights to issue corrigendum instead of including the said deficiency in the subsequent show cause notice. As such, I am of the view that confirmation of demand of Rs. 2,81,446/- is neither appreciated nor justified. The same is accordingly set aside.

4.5 As regards Cenvat credit of Rs.79,218/-, it is a well settled law that the car hire charges and air travel charges incurred by the assessee in connection with their business are cenvatable input services and are available as Cenvat credit. Reference can be made to Tribunal decisions in the case of *Indian Hotels Co. Ltd. Vs. CST, Bangalore* – 2014 (36) STR 1268 (Tri.-Bang.) and *Godrej & Boyce Mfg. Co. Ltd. Vs. CCE,Chennai*-2017 (48)STR 88 (Tri.-Chen.). As such I set aside this part of the order denying the credit.

5. Appeal is allowed in the above terms.

(Order pronounced in the open Court on 6/7/17

5/7/17.

(ARCHANA WADHWA)
JUDICIAL MEMBER

BB

Customs, Excise & Service Tax Appellate Tribunal

प्रमाणित प्रति/Certified True Copy
31/7
सहायक पंजीकार/Asst. Registrar
सीमाशुल्क उत्पादशुल्क एवं सेवा कर
अपील अधिकरण/(CESTAT)
चेन्नै/Chennai