Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench At Ahmedabad

REGIONAL BENCH- COURT NO.3

Service Tax Appeal No. 252 of 2012

(Arising out of OIA-71/2012/COMMR-A-/RBT/RAJ dated 17/02/2012 passed by Commissioner of Central Excise-RAJKOT)

Colour Boy ......**Appellant**
Moti, 4, Sardarnagar, West,
Rajkot, Gujarat

VERSUS

C.C.E. & S.T.-Rajkot ....**Respondent**
Central Excise Bhavan,
Race Course Ring Road...Income Tax Office,
Rajkot, Gujarat -360001

APPEARANCE:
None appeared for the Appellant
Shri J.A Patel, Superintendent (AR) for the Respondent

CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
HON'BLE MEMBER (TECHNICAL), MR. RAJU

Final Order No. A/ 12173 /2022

DATE OF HEARING: 10.08.2022
DATE OF DECISION: 09.12.2022

RAJU

This appeal has been filed by M/s Colour boy against imposition of penalty under 76, 77 &78 of the finance Act, 1994.

2. Learned Counsel for the appellant pointed out that the appellant are engaged in providing services in category of CICS during the year 2006-2007, 2007-2008. The appellant had provided services in regard of construction work of stadium to M/s. Rajkot and not paid any service tax. The demand of service tax was confirmed by the original adjudicating authority. The original adjudicating authority also imposed penalty under Section 76, 77 and 78 of the Finance Act, 1994. The appellant are contesting imposition of penalty and seeking relief under section 80 of Finance Act, 1994.

2.1 Learned Counsel argued that the failure of service tax was not deliberate but only due to ignorance and confusion. He sought benefit under 80 of Finance act, 1994. Learned Counsel further argued that simultaneously penalty cannot be imposed under section 76 and 78 of Finance Act, 1994. He argued that though the said provision in the act introduced only in 10.05.2008. The Hon'ble High Court in the case of COMMISSIONER OF C. EX. Versus FIRST FLIGHT COURIER LTD. 2011 (22) STR 622 as held simultaneously penalty cannot be imposed.

2.2 As regard under section 77, Learned counsel pointed out that section 77 was amended with effect from 10.05.2008. Prior to 10.05.2008 the said section read as follows:-

> *"Whoever contravenes any of the provisions of this Chapter or any rule made thereunder for which no penalty is separately provided in this Chapter shall be liable to penalty which may extend to an amount not exceeding one thousand rupees."*

2.3 He argued that since the substantial period of dispute is prior to 10.05.2008, the penalty imposed under the provision of Section 77 post 10.05.2008 is not sustainable.

3. Learned AR relies on the impugned order.

4. We considered the rival submission. We find that the impugned order upholds the confirmation of demand of service tax however, directs the lower authority to grant the benefit of Notification No. 01/2006 as claimed by the appellant. The order with thr said direction to the lower authority has not been challenged by the appellant. The appellant has only challenged the imposition of penalty under Section 76,77 and 78 of the Finance Act, 1994. It is seen that the Hon'ble High Court of Punjab & Haryana in the case of COMMISSIONER OF C. EX. Versus FIRST FLIGHT COURIER LTD(Supra) has observed as follows:-

> ***"4.*** *Only point which has been urged by learned counsel for the appellant is that after 10-5-2008, there is an amendment providing that penalty under Section 76 could not be levied if penalty under Section 78 has been levied but for the period prior thereto, penalty could be levied under both Sections. The Commissioner (Appeals) as well as the Tribunal erred in deleting the penalty under Section 76 by assuming that simultaneously penalty under both the provisions could not be levied for the period in dispute.*
>
> ***5.*** *We are unable to accept the submission. Section 76 provides for penalty for failure to pay the amount while Section 78 provides for penalty for suppressing the taxable value. Section 78 is, thus, more comprehensive and provides for higher amount. Even if technically, the scope of Sections 76 and 78 is different, penalty under Section 76 may not be justified if penalty had already been imposed under Section 78. The matter was considered by this Court in STA No. 13 of 2010 (Commissioner of Central Excise v. M/s. Pannu Property Dealers, Ludhiana) decided on 12-7-2010, wherein it was observed:-*
>
>> *"We are of the view that even if technically, scope of sections 76 and 78 of the Act may be different, as submitted on behalf of the revenue, the fact that penalty has been levied under section 78 could be taken into account for levying or not levying penalty under section 76 of the Act. In such situation, even if reasoning given by the appellate authority that if penalty under section 78 of the Act was imposed, penalty under section 76 of the Act could never be imposed may not be correct, the appellate authority was within its jurisdiction not to levy penalty under section 76 of the Act having regard to the fact that penalty equal to service tax had already been imposed under section 78 of the Act. This thinking was also in consonance with the amendment now incorporated though the said amendment may not have been applicable at the relevant time."*
>
> ***6.*** *In view of the above, no substantial question of law arises. The appeal is dismissed.****"***

In view of that penalty under both Section 76 and Section 78 cannot be imposed simultaneously.

4.1 Moreover, it is seen that the penalty under section 77 has been imposed for an offence pertaining largely to period prior to removal of limit of Rs one thousand from Section 77 (w.e.f 10.05.2008. In view of this respect the penalty under section 77 is also not sustainable. It is also noticed that the appellant has paid service tax before issue of SCN. The issue of taxability of stadium under CICS The matter of dispute at the material time.

5. Keeping in view the above facts invoking Section 80, We set aside the impugned penalty under section 76,77 and 78. Appeal is allowed to that extent.

(Pronounced in the open court)

RAMESH NAIR
MEMBER (JUDICIAL)

RAJU
MEMBER (TECHNICAL)

geeta