

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

REGIONAL BENCH- COURT NO. 1

Service Tax Appeal No. 11044 of 2019

(Arising out of Order in Appeal No. VAD-EXCUS-002-APP-675-2018-19 dated 29.03.2019 passed by the Commissioner (Appeals)- Vadodara)

M/s Quilon Real Industries Pvt. Ltd.

...Appellant

102-106, 1st Floor Western Plaza Complex,
Dahej Bypass Road, Dahej, Bharuch, Gujarat
VERSUS

CGST & Central Excise- Vadodara-II

...Respondent

CGST Bhawan, Arkee Garba Ground, Nr. Telephone
Exchange, Subhanpura, Vadodara-Gujarat-390023

APPEARANCE:

Shri Vinay Kansara, Advocate appeared for the Appellant
Shri M. P. Solanki, Assistant Commissioner
(AR) appeared for the Respondent

**CORAM: HON'BLE MR. SOMESH ARORA, MEMBER (JUDICIAL)
HON'BLE MR. SATENDRA VIKRAM SINGH, MEMBER (TECHNICAL)**

FINAL ORDER NO. 10670 /2025

DATE OF HEARING: 06.08.2025

DATE OF DECISION: 28.08.2025

SATENDRA VIKRAM SINGH:

M/s Quilon Real Industries Private Limited, Dahej Bypass Road Bharuch (appellant) were issued a show cause notice dated 26.06.2018 for demanding service tax of Rs. 1,60,72,428/- under proviso to Section 73(1) of the Finance Act, 1994 along with interest and penalty under Section 78 of the Finance Act, 1994. The show cause notice also proposes recovery of late fee in filing service tax returns for the period October 2015 to March 2016 and April 2016 to September 2016 out of which Rs. 20,000/- had already been paid by the appellant during investigation.

1.1. The matter arose when the officers visited the registered premises of the appellant on 05.09.2016 and collected relevant document like sales ledger for the period October 2015 to August 2016, 26 AS return and trial balance as on 31.03.2016. The officers found that the appellant was already audited upto October 2015 and the audit report No. 727/2015-16 dated 30.03.2016 had been issued. The appellants

are engaged in erection, commissioning and installation service, maintenance or repair service, manpower recruitment/ supply agency service and supply of tangible goods service. They had also provided service to M/s Samsung Engineering Co. Ltd. which is located in SEZ but they neither charged any service tax from them nor submitted A-2 form as required under Notification No. 12/2013-ST dated 01.07.2013. The officers also observed that the appellant had, during the period, collected/ charged service tax from the clients but did not pay to the government. They had also received several services on which they were liable to pay service tax under reverse charge mechanism.

1.2. The officers recorded the statements of Shri S. Ebrahim Mohamed, Managing Director of the appellant on 23.04.2018, wherein he accepted the service tax liability of Rs.2,43,09,900/- upto July 2016. He also accepted the service tax liability on value of service of Rs.12,85,569/- rendered to M/s Samsung Engineering Co. Limited. Sri Mohamed also admitted service tax liability of Rs.5,62,927/- on reverse charge basis. The investigation completed by the officers culminated into issuance of above show cause notice dated 26.06.2018.

1.3. The above show cause notice was decided by the Additional Commissioner who confirmed the Service Tax demand of Rs. 1,60,72,428/- along with interest upon the appellant. Since the service tax amount was already paid vide various GAR-7 challans, he appropriated the deposited amount towards the confirmed demand. He also appropriated an amount of Rs.11,88,199/- paid by the appellant towards interest during investigation. Equal penalty under Section 78 was imposed on the appellant besides late fee of Rs. 33,900/- under Section 70 of the Finance Act, 1994. Aggrieved with the above order, the appellant filed appeal before the Commissioner (Appeals) who rejected the appeal and confirmed the order of the lower authority. Hence, the present appeal.

2. The appellant has taken the following grounds:

- They do not dispute the demand of service tax and accordingly, have paid the entire amount of service tax along with interest. They are only disputing imposition of penalty under Section 78 of the Finance Act, 1994.

- The learned adjudicating authority as well as the appellate authority have erred in imposing equal penalty upon them. They had short paid the service tax for a very small period on account of financial crunch. This situation cannot be equated with evasion of duty and therefore, allegations regarding suppression of facts etc. with intent to evade payment of service tax cannot be leveled against them.
- Charges of suppression are not sustainable as it is an admitted fact that they had issued invoices and charged the service tax from the clients and also recorded the transactions in their books of accounts. Annexure to the Show Cause Notice itself shows that the appellant had made some payment of service tax during the relevant period.
- They had provided services to M/s Inox Wind Limited, Noida. During the period April 2014 to May 2015, they issued the invoices of Rs. 131.42 Lakhs but received only Rs. 42.62 Lakhs from the client. This was the major cause for financial crunch. Infact, they had to file claim before Insolvency & Bankruptcy Board of India and only, they received payment of Rs. 40 Lakhs in August 2017. Still an amount of Rs. 48.79/- Lakhs is to be paid by their client. Similarly their another client M/s Aneja Constructions India Limited had to pay an amount of Rs. 48.11/- Lakhs to them for the services.
- Before the search carried out by the officers, they had paid service tax of Rs. 90.17 Lakhs which shows their intent to pay the pending tax. They have not acted dishonestly or contumaciously and therefore, not even a tax penalty could be justified. For imposition of penalty under Section 78, intention to evade payment of service tax should be established whereas in their case, it is only delayed payment of service tax and that too, on account of financial crunch.
- As regards non-payment of service tax on reverse charge basis, it is also their loss as if they had paid the service tax amount, they could have availed the cenvat credit.
- Regarding services provided to M/s Samsung Engineering Co. Limited, they could not procure form A-2 from the SEZ but still the

benefit cannot be denied when there is no dispute about the company to whom services have been provided, being situated within the SEZ.

- As per section 80 of the Finance Act, 1994, penalty under Section 76 and 77 is not to be imposed if assessee proves that there was reasonable cause for the failure of payment of service tax. They rely on the decision of M/s ETA Engineering Limited Vs CCE reported at 2004 (174) ELT 19 (LB).
- As per first proviso to Section 78(1) of the Finance Act, 1994, in cases where details and transactions were recorded in the specified records for the period beginning 8th April 2011, upto date on which Finance Bill 2015 receives the assent of the President, penalty shall be 50% of the Service Tax so determined. They should have been given the benefit of first proviso to sub-section 1 of section 78. Considering ratio of the judgments referred to by them, they request to set aside the impugned OIA passed in their case.

2. During hearing, learned Advocate reiterated the grounds taken by them in their appeal. He mentioned that they have already paid the service tax of Rs. 1,60,72,428/- and partial amount of interest of Rs.11,88,199/- before the issue of show cause notice. The remaining interest of Rs. 16,21,966/- was paid vide different challans which were intimated to the Joint Commissioner, Bharuch vide letter dated 14.07.2018. After issuance of OIO dated 20.12.2018, they had paid the penalty of Rs. 40,18,107/- vide challan no. 83 dated 15.02.2019 which is equal to 25% of the demand confirmed. They have also paid the late fee of Rs. 33,900/- in two parts i.e. 20,000/- before issuance of show cause notice and the remaining 13,900/- vide challan dated 15.02.2019. He relied on the judgment of Hon'ble Bombay High Court in the case of Tulip Star Vs CCE reported at 2017 (48) STR 133 to plead his case for not imposing penalty under section 78 of the Finance Act, 1994.

3. Learned AR reiterates the findings of the lower authorities and mentions that benefit of penalty (i.e. 25% of the penalty imposed under Section 78) is admissible to the appellant only if whole of the tax amount along with interest as well 25% of the penalty is deposited within one month from the date of the order. In this case, the appellant

has paid the remaining amount of interest as well as penalty after more than 30 days from the date of order and therefore, such reduction in penalty is not admissible to them. He also emphasizes that the entire amount of service tax was not paid by them on their own for the disputed period nor did the appellant file ST-3 returns assessing their service tax liability which amounts to suppression of facts and shows mens rea on their part attracting penalty under section 78 of the Finance Act, 1994. He prayed for dismissing the appeal.

4. We have heard the rival submissions. We find that in this matter, liability to pay service tax and interest thereon is not in dispute. As per the appellant, entire service tax liability along with interest has been paid by them, some before the investigation began and rest post issuance of show cause notice/ issuance of OIO. The party has also paid the late fee of Rs. 33,900/- on account of delayed filing of ST-3 returns for the period October 2015 to March 2016 and from April 2016 to September 2016. Therefore, the issue of imposition of equal penalty under Section 78 of the Finance Act, 1994 remains to be decided.

4.1 The provisions of Section 78(1) as existed during the material time are reproduced below:

“78. Penalty for failure to pay service tax for reasons of fraud, etc. (1) Where any service tax has not been levied or paid, or has been short-levied or short-paid, or erroneously refunded, by reason of fraud or collusion or wilful mis-statement or suppression of facts or contravention of any of the provisions of this Chapter or of the rules made thereunder with the intent to evade payment of service tax, the person who has been served notice, be also liable to pay a penalty which shall be equal to hundred per cent of the amount such service tax:

PROVIDED that in respect of the cases where the details relating to such transactions are recorded in the specified records for the period beginning with the 8th April, 2011 upto the date on which the Finance Bill, 2015 receives the assent of the President (both days inclusive), the penalty shall be fifty per cent of the service tax so determined:

PROVIDED FURTHER that where service tax and interest is paid within a period of thirty days of-

- (i) the date of service of notice under the proviso to sub-section (1) of section 73, the penalty payable shall be **fifteen per cent.** of such service tax and proceedings in respect of such service tax, interest and penalty shall be deemed to be concluded;

- (ii) the date of receipt of the order of the Central Excise Officer determining the amount of service tax under sub-section (2) of section 73, the penalty payable shall be **twenty-five per cent.** of the service tax so determined:

PROVIDED ALSO that the benefit of reduced penalty under the second proviso shall be available only if the amount of such reduced penalty is also paid within such period.

Explanation: For the purposes of this sub-section, "specified records" means records including computerised data as are required to be maintained by an assessee in accordance with any law for the time being in force or where there is no such requirement, the invoices recorded by the assessee in the books of accounts shall be considered as the specified records."

4.2 For imposition of penalty under Section 78, it has to be established that non-payment of short payment or service tax is by reasons of fraud or collusion or willful misstatement or suppression of facts or contravention of any of the provisions of this Chapter or of the Rules made there under with intention to evade payment of service tax. It is not in dispute that the case was made out on the basis of documents provided by the appellant. It is also not in dispute that the appellant had issued invoices to their clients showing service tax amount therein. The Annexure A-1 to the show cause notice shows that the appellant had already paid service tax for the months of October, November and December 2015 even before the search of their premises by the officers. Also there was no short payment of service tax to be paid by the appellant under reverse charge mechanism for these three months as is clear from Annexure-A2. The reason for including these three months in the show cause notice are therefore, not very clear where there was no short payment. From the above, it is clear that there was no suppression or misstatement on the part of the appellant to pay service tax during the period indicated in the show cause notice. The appellant has clearly made out a case that they could not pay the service tax during the period because of financial crunch as two of their clients namely M/s Inox Wind Limited, Noida and M/s Aneja Constructions India Limited did not clear their bills. We therefore feel that ingredients to invoke provisions of section 78 in this case for imposing equal penalty are not present. Accordingly, imposition of equal penalty upon the appellant under Section 78(1) of the Finance Act, 1994 is not justified. However, there is no doubt about failure on part of the appellant to pay the service tax in time for which they are

liable to penalty under section 76 of the Finance Act, 1994. Section 76 of the Finance Act 1994 which is reproduced below:

“76 Penalty for failure to pay service tax

1) Where service tax has not been levied or paid, or has been short-levied or short-paid, or erroneously refunded, for any reason, other than the reason of fraud or collusion or wilful misstatement or suppression of facts or contravention of any of the provisions of this Chapter or of the rules made thereunder with the intent to evade payment of service tax, the person who has been served notice under sub-section (1) of section 73 shall, in addition to the service tax and interest specified in the notice, be also liable to pay a penalty **not exceeding ten per cent.** the amount of such service tax:

PROVIDED that where service tax and interest is paid within a period of thirty days of-

- (i) the date of service of notice under sub-section (1) of section 73, no penalty shall be payable and proceedings in respect of such service tax and interest shall be deemed to be concluded;
- (ii) the date of receipt of the order of the Central Excise Officer determining the amount of service tax under sub-section (2) of section 73, the penalty payable shall be twenty-five per cent. of the penalty imposed in that order, only if such reduced penalty is also paid within such period.”

Under this sub-section, a maximum penalty not exceeding 10% of the amount of such service tax can be imposed upon the appellant.

4.3 The appellant has placed reliance on the decision in the case of Tulip Star (cited supra) for waiver of penalty on them under section 80 of the Finance Act, 1994. We find that the party has not made proper case for waiver of penalty under the said section as delayed/ non-payment of service amount by one or two clients is a normal feature in the business. Therefore, this is not a proper and strong ground for waiver of penalty under Section 80 as claimed by them. We hold that they are liable to penalty under section 76 of the Finance Act, 1994. We rely on the decision of Hon’ble Supreme Court in the case of Collector of Central Excise, Calcutta vs Pradyumna Steel Limited reported at 1996 (82) ELT 441 (SC) wherein it is held that mere mention of wrong provision of law when power exercised is available even though under a different provision, is by itself not sufficient to invalidate exercise of that power. Similar view was held by Hon’ble Bombay High Court in the case of CCE Aurangabad vs India Containers Ltd. reported at 2017 (355) ELT 326 (Bom.). Para 23 & 24 of the said decision is reproduced below:

“23.The learned Counsel for the petitioner cited the judgment in the case of *J.K. Steel Ltd. v. Union of India*, [1978 \(2\) E.L.T. J 355](#) (S.C.), wherein it has been held that if the exercise of a power can be traced to a legitimate source, the fact that the same was purported to have been exercised under a different power does not vitiate the exercise of the power in question. The learned Counsel for the petitioner further cited the judgment in the case of *Collector of Central Excise, Calcutta v. Pradyumna Steel Ltd.*, (2003) 9 SCC 234 = [1996 \(82\) E.L.T. 441](#), wherein it has been held that mere mention of a wrong provision of law when the power exercised is available even though under a different provision, is by itself not sufficient to invalidate the exercise of that power.

24.Thus, mention of wrong Rule in the demand notice would not be an impediment in the way of the petitioner in inflicting penalty under the correct Rule though the said Rule was not quoted in the demand/show cause notice. From the contents of the show cause notice, it is clear that Respondent No. 1 was made aware that it would be liable to pay penalty for obtaining MODVAT credit wrongly. Respondent No. 1 has put forth its defence against the demand for penalty and has got an opportunity to contest that claim. As such, no prejudice can be said to have been caused to Respondent No. 1 because of wrong mention of Rule in the show cause notice under which, penalty was sought to be imposed on Respondent No. 1.”

4.4 As pleaded by the appellant, they have already paid a penalty of Rs.40,18,107/- vide challan No 83 dated 15.02.2019 which is equal to 25% of the demand confirmed on the appellant. As discussed above, a penalty of Rs. 16 lakhs (which is approximately 10% of the service tax amount) would be sufficient on the appellant under section 76(1) of the Finance Act 1994 for failure to pay service tax in time. However, since till now there is no order of penalty under section 76 of Finance Act, 1994 option is afforded as per proviso (ii) of Section 76 to pay 25% of the penalty so imposed under Section 76(1) within 30 days of this order either through actual payment or by seeking appropriation of penalty already paid. The appeal is partly allowed with consequential relief, if any, to the appellant.

(Order Pronounced in the open court on 28.08.2025)

(SOMESH ARORA)
MEMBER (JUDICIAL)

(SATENDRA VIKRAM SINGH)
MEMBER (TECHNICAL)