CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
<u>ALLAHABAD</u>

REGIONAL BENCH - COURT NO.I

Service Tax Appeal No.70202 of 2021

(Arising out of Order-in-Appeal No.100/ST/ALLD/2021 dated 15.03.2021 passed by Commissioner (Appeals) CGST & Central Excise, Allahabad)

M/s RSPL Ltd., **.....Appellant**
(119-121 (Part), Kalpi Road
Fazalganj, Kanpur-208012)

VERSUS

Commissioner of CGST &
Central Excise Audit, Kanpur **....Respondent**
(Kanpur-208005)

<u>APPEARANCE:</u>

Shri Vishnu Dutt Trivedi, Consultant for the Appellant
Shri Santosh Kumar, Authorized Representative for the Respondent

CORAM: HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO<u>.- 70277/2024</u>

DATE OF HEARING : 28 May, 2024
DATE OF DECISION : 28 May, 2024

<u>SANJIV SRIVASTAVA:</u>

This appeal is directed against Order-in-Appeal No.100/ST/ALLD/2021 dated 15.03.2021 passed by Commissioner (Appeals) CGST & Central Excise, Allahabad. By the impugned order learned Commissioner (Appeals) has held as follows:-

> *"4.1 I have gone through the records of the case, the averments made at the time of the personal hearing and the material/documents available on records. The sole issue in the present appeal is as to whether the appellant was liable for penalty under section 78 of the Act even if the appellant has voluntarily paid the amount of service tax along with interest before issuance of show cause notice.*
>
> *4.2 After going through case records, I find that appellant has not challenged the levy of the service tax and interest in the appeal and appellant is only challenged the levy of*

penalty under the provision of Section 78 of the Act. I find that there is no dispute that Appellant has discharged the amount of service tax along with interest before the issuance of show cause notice. It is the contention of the appellant that since service tax amount and the interest is paid before the issue of Show Cause Notice no penalty can be imposed under Section 78 of the Finance Act. It is also a fact that appellant did not discharge service tax liability under reverse charge mechanism under Manpower Recruitment Services, Legal Consultancy Services & Works Contract Services by self assessment procedure & also did not file any service tax return. I observe that under the self-assessment procedure specified in the statute, the appellant was required to assess & pay their Service Tax liability correctly, on their own. The short payment of Service Tax could be detected only during the course of audit conducted by the Department. Thus, it is a clear case of suppression of facts and contravention of the statutory provisions, with intent to evade payment of Service Tax. In such a situation, I am in agreement with the findings of the adjudicating authority that the appellant deliberately evaded the service tax. Accordingly, penalty imposed under section 78 of the Act is justified

4.3 The appellant has contended that since service tax along with interest has been paid there was no need of issuance of Show Cause Notice. I do not agree with this contention of the appellant by relying upon decision of the Hon'ble CESTAT New Delhi in case of M/s British Airways Plc. Vs. Commissioner of Service Tax, New Delhi as reported in 2012 (29) S.T.R. 177 (Tri-Del) wherein it was held that Show Cause Notice can be issued in such cases.

4.4 It is also observed that though the appellant have relied upon a number of case laws that imposition of penalty is not justified in their case but they have not given any justification as to how these decisions are applicable to the facts of their case, especially when circumstances, transactions, events of each case, are required to be considered, analyzed and weighed against the circumstances at all to be the same in the referred cases. I also find that the Hon'ble Supreme Court in the case of Punjab National Bank vs. R.L. Vaid 2004 (172) E.LT. 24 (S.C.), has held at Para 5, as under:

> *5. We find that the High Court has merely referred to the decision in R.K. Jain's case (supra) without even indicating as to applicability of the said decision and as to how it has any relevance to the facts of the case. It*

> *would have been proper for the High Court to indicate the reasons and also to spell out clearly as to the applicability of the decision to the facts of the case. There is always peril in treating the words of a judgment as though they are words in a Legislative enactment and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case. Circumstantial flexibility, one additional or different fact may make a difference between conclusions in two cases.-----------.*

4.41 Similarly, the Hon'ble Supreme Court in the case of CCE, Bangalore vs. Srikumar Agencies 2008 (232) E.L.T. 577 (S.C.), inter alia, held, as under:

> *Precedents - Court decision not statute - Reliance thereon without discussion of facts - Decisions not to be relied upon without discussing similarity of facts - Judgments of courts not to be construed as statutes - Circumstantial flexibility, additional or different fact may make a world of difference between conclusions in two cases."*

2. The Appellant is engaged for providing various taxable services. During course of audit it was observed that Appellant has not paid service tax required to be paid under reverse charge mechanism on the following services during the period October, 2013 to June, 2017 as detailed in table below:-

Sr. No.	**Description**	**Amount (Rs.)**
1.	Director Sitting Fee	Rs.1,08,630/-
2.	Legal fee paid to advocate under Legal Consultancy Services	Rs.3,06,924/-
3.	Manpower Supply Services	Rs.3,26,239/-
4.	Works Contract Services	Rs.3,80,329/-

2.1 On being pointed out by the audit, Appellant deposited the entire service tax amounting to Rs.11,22,122/- alongwith interest of Rs.5,81,256/-.

2.2 Show cause notice dated 28.08.2019 was issued to the Appellant for confirmation & appropriation of service tax and interest into Government account for imposition of penalty under Section 78 of the Act. Adjudicating Authority confirmed and appropriated the service tax and interest paid and imposed penalty equivalent to the penalty under Section 78.

2.3 Appellant filed an appeal before the learned Commissioner (Appeals) which have been dismissed as per the impugned order hence this appeal.

3.1 I have heard Shri Vishnu Dutt Trivedi learned Consultant appearing on behalf of the Appellant and Shri Santosh Kumar learned Authorized Representative appearing for the Revenue.

4.1 I have considered the impugned order along with the submissions made in the appeal during the course of argument.

4.2 In the present case the fact of payment of service tax prior to issuance of show cause notice is not in dispute. The show cause notice in para 3 records as follows:-

> *"3. …….On being pointed out, the party agreed with the view of the audit team and deposited Service Tax amounting to Rs.47,461/- alongwith interest amounting to Rs.36,697/- (total Rs.84,158/- vide challan No.00251 dated 11.02.2019) for the period 2014-15, Service Tax amounting to Rs.75,758/- alongwith interest amounting to Rs.44,943/- (total Rs.1,20,701/- vide challan No.00250 dated 11.02.2019) for the period 2015-16, Service Tax amounting to Rs.1,20,465/- alongwith interest amounting to Rs.50,348/- (total Rs.1,70,813/- vide challan No.00248 dated 11.02.2019) for the period 2016-17 and Service Tax amounting to Rs.63,240/- alongwith interest amounting to Rs.17,777/- (total Rs.81,017/- vide challan No.00104 dated 23.02.2019) for the period 2017-18 (upto June 2017)."*

2.7 As per Section 73 of Service Tax Act provides as follows:-

> ***"73. Recovery of service tax not levied or paid or short-levied or short-paid or erroneously refunded***
>
> (1) *X x x x x x x x x x*
>
> (2) *X x x x x x x x x x*
>
> (3) *Where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the person chargeable with the service tax, or the person to whom such tax refund has erroneously been made, may pay the amount of such service tax, chargeable or erroneously refunded, on the basis of his own ascertainment thereof, or on the basis of tax ascertained by a Central Excise Officer*

before service of notice on him under sub-section (1) in respect of such service tax, and inform the [Central Excise Officer] of such payment in writing, who, on receipt of such information shall not serve any notice under sub- section (1) in respect of the amount so paid.

PROVIDED that the [1][Central Excise Officer] may determine the amount of short payment of service tax or erroneously refunded service tax, if any, which in his opinion has not been paid by such person and, then, the [Central Excise Officer] shall proceed to recover such amount in the manner specified in this section, and the period of [2][[3][thirty months]] referred to in sub-section (1) shall be counted from the date of receipt of such information of payment.

[4][Explanation 1]: For the removal of doubts, it is hereby declared that the interest under section 75 shall be payable on the amount paid by the person under this sub-section and also on the amount of short payment of service tax or erroneously refunded service tax, if any, as may be determined by the [1][Central Excise Officer] but for this sub-section.

[5][Explanation 2: For the removal of doubts, it is hereby declared that no penalty under any of the provisions of this Act or the rules made thereunder shall be imposed in respect of payment of service-tax under this sub-section and interest thereon]"

4.3 In case of Pepsico India Holdings Pvt. Ltd. [2109-TIOL-1646-CESTAT-Bang] following has been held:-

"6. After considering the submissions of both sides and perusal of material on record, I find that as soon as the Audit pointed out the wrong availment of CENVAT credit by the appellant, the appellant reversed the same along with interest before issuance of show-cause notice. Further I find that the appellant vide their letter dt. 13/03/2012 informed the Department that they have taken the credit by mistake and there was no intention to avail excess credit. Further I find that the Tribunal in various decisions cited supra has held that once the duty is paid along with interest before the issuance of the show-cause notice and there is no suppression of fact with intent to evade payment of duty, then the assessee is not liable to pay penalty. In this regard

it is pertinent to refer the decision of this Tribunal in the case of Bhoruka Aluminium Ltd. wherein in para 7, the Tribunal has held as under:

> *7. After considering the submissions by both the parties and perusal of the provisions of Sections 73, 76 and 78 of the Finance Act, 1994 and the judgements relied upon by the appellant cited supra, I find that Section 73(3) is very clear as it says that if tax is paid along with interest before issuance of the show cause notice, then in that case, show cause notice shall not be issued. In this case, I find that the contention of the appellant that he bonafidely believed that he is not liable to pay service tax but during the audit, the audit party informed him that he is liable to pay service tax, then he immediately paid the entire service tax along with interest. Except mere allegation of suppression, the Department did not bring any material on record to prove that there was suppression and concealment of facts to evade payment of tax. Consequently, in my opinion, the imposition of penalty under Section 78 of the Act is not justified and bad in law. Moreover, in the impugned order, the learned Commissioner (Appeals) has not recorded any finding on suppression of facts by the appellant with an intention to evade tax. In view of the above discussion, I set aside the impugned order by allowing the appeal of the appellant."*

4.4 Same view has been expressed by this Bench in case of Gardenia India Ltd. [2019-TIOL-1428-1646-CESTAT-BANG]]observing as follows:-

"3. We note that the ld. Representative of Revenue has agreed that the entire amount confirmed was paid before issue of show cause notice and has been appropriated through the Order-in-Original. We find that the original

authority is silent on the contention of the appellant that in view of the payment of entire amount before issue of show cause notice there was no need for issue of show cause notice. We find that sub-section 3 of section 73 of the Finance Act, 1994 has provided if service tax is paid before issue of show cause notice, the proceedings get concluded. We, therefore, hold that there was no need for issue of show cause notice in respect of the demands confirmed in the Order-in-Original. We set aside the penalties imposed under section 77 and 78 of Finance Act, 1994 read with Rule 15 of Cenvat Credit Rules. In above term, appeal is allowed."

4.5 In case of Venu Enterprises [2019-TIOL-2726-CESTAT-BANG] following has been held as under:-

"3. Admittedly, the tax as well as the interest has been paid much before the issuance of SCN; even the SCN does not point out to suppression of fact, fraud or mis-statement etc. to fasten the liability of penalty under Section 78. In fact, the alleged activity was observed by the Audit Party from the appellant's ST-3 returns only and it is not the case of the Revenue that there was gross violation by act of suppression, etc. In this background and on the above factual position, I am of the opinion that the bonafides of the appellant could not be doubted and hence, it is a fit case to invoke Section 80 of the Finance Act."

4.6 In case of V3 Engineers Pvt. Ltd. [2019-TIOL-2726-CESTAT-BANG] Bangalore bench has held as follow:

"5. After considering the submissions of both the parties and on perusal of the material on record, I find that in the impugned order, the Commissioner (A) has set aside the demand of Rs.50,43,406/- on the ground that the appellant has been paying the service tax by debiting their CENVAT account every month. Further, the Commissioner (A) has also found that the appellant has paid Rs.7,69,433/- being the short-paid service tax for the month of October 2014 and December 2014 along with interest in May 2015 but

still the Commissioner (A) imposed the penalty of Rs.3,84,717/- under Section 78. Further, I find that once the appellant has paid the service tax along with interest and in view of decisions cited supra, is not required to pay penalty under Section 78. This Tribunal in the case of Krishna H.T. vs. CCT cited supra, has held in para 6 as under:

> *"6. After considering the submissions of both sides and perusal of material on record, I find that it is an admitted fact that the appellant had paid the service tax along with interest much before the issuance of the show-cause notice. I also find that after payment of service tax and the interest, the appellant ide the letter dated 22/01/2013 informed the Assistant Commissioner regarding the said payment of service tax and interest and requested not to issue show-cause notice under Section 73(3) of the Finance Act, 1994. Further, I find that the case of the appellant is squarely covered by Section 73(3) of the Finance Act, because after the payment of service tax along with interest before issuance of show-cause notice, he informed the authorities for not issuing the show-cause notice. Further, the decisions relied upon by the appellant are squarely applicable in the present case and therefore, the decisions relied upon by the appellant are squarely applicable in the present case and therefore, following the ratio of the said decisions, I am of the view that the impugned order is not sustainable in law. Accordingly, I set aside the impugned order by allowing the appeal of the appellant."*

5.1 Further, the Division Bench of this Tribunal in the case of Calderys India Refractories Ltd. vs. CCE (supra) in para 6.3 has held as under:

> *"6.3 As regards the penalty imposed under Section 77 and 78, in the present case, it is evident from the records that the appellant discharged the service tax liability along with interest, thereon as soon as the short payments was pointed out to them and they also intimated the same to the department vide letter dated 22/06/2011 under the provisions of Section 73(3) of the*

> *Finance Act, 1994, much before the show-cause notice. It is also a fact that these transactions were reflected in the balance sheets of the appellant for the relevant years. These evidences available on records indicate that the appellant had no intention to suppress any information or withhold any information from the department with an intention to evade payment of service tax. In any case, the appellant was eligible for CENVAT credit of service tax paid and there was no need for him to evade any payment of tax. In these facts and circumstances, the decision of the Tribunal in the case of Essar Ltd., cited supra squarely applies. Accordingly, we are of the view that the penalty is not imposable on the appellant under the provisions of Section 77 and 78 of the Finance Act, 1994, in view of the Section 73(3) of the Finance Act, 1994 read with Section 80. Accordingly, we allow the appeal. The appellant has not disputed service tax and interest liability and therefore, the appropriation of the same by the adjudicating authority is upheld."*

> *6. Therefore, by following the ratio of the above decisions cited supra, I am of the view that the impugned order is not sustainable in law ….”*

4.7 In case of Adecco Flexione Workforce Solutions Ltd. [2011-TIOL-635-HC-KAR-ST], Karnataka High Court has held as follows:-

> *“2. Facts are not in dispute. The assessee has paid both the service tax and interest for delayed payments before issue of show cause notice under the Act. Sub-Sec. (3) of the Finance Act, 1994 categorically states, after the payment of service tax and interest is made and the said information is furnished to the authorities, then the authorities shall not serve any notice under Sub-Sec.(1) in respect of the amount so paid. Therefore, authorities have no authority to initiate proceedings for recovery of penalty under Sec. 76 of the Act.*

3. Unfortunately the assessing authority as well as the appellate authority seem to think, if an assessee does not pay the tax within the stipulated time and regularly pays tax after the due date with interest is something which is not pardonable in law. Though the law does not say so, authorities working under the law seem to think otherwise and thus they are wasting that valuable time in proceeding against persons who are paying service tax with interest promptly. They are paid salary to act in accordance with law and to initiate proceedings against defaulters who have not paid service tax and interest in spite of service of notice calling upon them to make payment and certainly not to harass and initiate proceedings against persons who are paying tax with interest for delayed payment. It is high time, the authorities will change their attitude towards these tax payers, understanding the object with which this enactment is passed and also keep in mind the express provision as contained in sub-Sec. (3) of Sec. 73. The Parliament has expressly stated that against persons who have paid tax with interest, no notice shall be served. If notices are issued contrary to the said Section, the person to be punished is the person who has issued notice and not the person to whom it is issued. We take that, in ignorance of law, the authorities are indulging in this extravaganza and wasting their precious time and also the time of the Tribunal and this Court. It is high time that the authorities shall issue appropriate directions to see that such tax payers are not harassed. If such instances are noticed by this Court here after, certainly it will be a case for taking proper action against those law breakers."

4.8 In view of the decisions as referred above, I do not find any merits in the impugned order upholding the penalties imposed under Section 78.

5.1 Appeal allowed.

(Dictated and pronounced in open court)

(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

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