CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
BANGALORE

REGIONAL BENCH - COURT NO. 1

Service Tax Cross Application No. 00032 of 2010
in Service Tax Appeal No. 00710 of 2009
&
Service Tax Appeal No. 00710 of 2009

[Arising out of Order-in-Original No. 16/2009 dated 26/05/2009 passed by the Commissioner of Central Excise, Cochin]

C.C.,C.E.& S.T-Cochin-CCE
C R BUILDING,
I S PRESS ROAD, ERNAKULAM,
COCHIN,
KERALA
682018

Appellant(s)

VERSUS

BESL Infra- Projects Ltd,
1st Floor, Thykkoottathil Building Vazhakkala
Kakkanad Po, Kochin 0-682030
KOCHI
KERALA
682030

Respondent(s)

Appearance:

Sh. P.Gopakumar, Joint Commissioner (AR) — For the Appellant

None — For the Respondent

CORAM:
HON'BLE MR. ANIL CHOUDHARY, JUDICIAL MEMBER
HON'BLE MR. P. ANJANI KUMAR, TECHNICAL MEMBER

INTERIM **Order No. 32 /2020**

Date of Hearing: 19/02/2020
Date of Decision: 02/11/2020

PER : P. ANJANI KUMAR

This is the appeal filed by the Department against the OIO NO. 16/2008 dated 11.05.2009 passed by the Commissioner of Central Excise, Cochin wherein Commissioner has confirmed a demand of Service Tax against the respondents under the Head "Commercial or Industrial Construction Services" during the period 16.06.2005 to 30.09.2007. The

Commissioner has imposed penalty under Section 78 of Finance Act, 1994 and has refrained from imposing penalty under Section 76 ibid. Revenue is in appeal against such non-imposition of penalty. The respondents have also filed a cross-objection in this regard.

2. Learned AR for the Department submits that Section 78 of Finance Act, 1984 was amended w.e.f. 10.05.2008 only to provide that penalty under Section 76 need not be imposed if penalty under Section 78 is imposed; the Amendment was not with retrospective effect. Tribunal in the following cases has held that before 10.05.2008 penalty is imposable under both Sections:

- *Bajaj Travels Ltd. Vs CST, 2012 (25) STR 417 (Del.).*
- *CCE Vs Gondwana Engineers Ltd., 2018 (12) TMI 94- CESTAT MUMBAI.*
- *Kusalava Finance Ltd. Vs CCE, Guntur, 2018 (8) TMI 628-CESTAT HYDERABAD.*
- *CCE, Bhopal Vs Akansha Sales Promoters (I) Pvt. Ltd., 2018 (7) TMI 100 CESTAT NEW DELHI.*
- *CCE, Raipur Vs Navbharat Explosives Co. Ltd. and (Vice-Versa), 2018 (2) TMI 834 -CESTAT NEW DELHI.*

3. None for the respondents. However, we find, from the cross-objections, that the appellants have pleaded that even before the amendment w.e.f. 10.05.2008 penalties under Section 76 & 78 are not imposable. They relied upon the following cases:

- *The Financiers Vs CCE, Jaipur, 2007 (8) STR 7*
- *Opus Media Entertainment Vs CCE, Jaipur, 2007 (8) STR 368*

4. We have gone through the records of the case and rival submissions in this regard. In view of the case laws cited supra we find that Revenue has made a case for itself. We find that Hon'ble High Court of Kerala in the case of ACCE Vs Krishna Poduwal held that:

> "***11.*** *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 fails 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. Perhaps invoking powers under S. 80 of the Finance Act, the appropriate authority could have decided not to impose penalty on the assessee if the assessee proved that there was reasonable cause for the said failure in respect of one or both of the offences. However, no circumstances are either pleaded or proved for invocation of the said Section also. In any event we are not satisfied that an assessee who is guilty of suppression deserves such sympathy. As such, we are of opinion that the learned Single Judge was not correct in directing the 1st appellant to modify the demand withdrawing penalty under S. 76. Therefore, the judgment of the learned Single Judge, to the extent it directs the first appellant to modify Ext. P1 by withdrawing penalty levied under S. 76, is liable to be set aside and we do so. The cumulative result of the above findings would be that the Writ Petitions are liable to be dismissed and we do so. However, we do not make any order as to costs.

5. In view of the above and in view of the case laws cited above, we find that the Department has made a case for imposition of penalty both under Section 76 & 78 of the Finance Act, 1994. We also find from the impugned order that Learned Commissioner was categorical in holding that but for the intervention of the Preventive Section of the Commissionerate, the duty evasion would have remained not detected. We find that though the Learned Commissioner establishes *mens rea* on the part of the appellants refrained from imposing penalty under Section 76 citing the case law referred by the respondents as above. However, as we notice above, Courts and Tribunals have been consistently holding that separate penalties are imposable under both Sections. In view of the same, the Revenue's appeal is allowed and a penalty of Rs. 100 per day on the Service Tax confirmed on the respondents is imposed in terms of Section 76 of the Finance Act, 1994. The cross-objections filed by the respondents are also accordingly disposed of.

(Order pronounced in the open court on 2/11/2020)

Separate order

(ANIL CHOUDHARY)
JUDICIAL MEMBER

(P. ANJANI KUMAR)
TECHNICAL MEMBER

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Customs, Excise & Service Tax Appellate Tribunal

Anil Choudhary:

6. As I am unable to agree with the view of learned brother Shri P. Anjani Kumar, Member (Technical), I hereby record my separate order.

7. Considering the contentions of the parties in order to appreciate the facts and circumstances, I take notice of the provisions of Section 76, 78 and 80 of the Finance Act which are as under:

> "**76. Penalty for failure to pay service tax**
>
> Any person, liable to pay service tax in accordance with the provisions of Section 68 or the rules made under this Chapter, who fails to pay such tax, shall pay, in addition to such tax and the interest on that tax in accordance with the provisions of section 75, a penalty which shall not be less than two hundred rupees for every day during which such failure continues or at the rate of two percent of such tax, per month, whichever is higher, starting with the first day after the due date till the date of actual payment of the outstanding amount of service tax:
>
> Provided that the total amount of the penalty payable in terms of this section shall not exceed the service tax payable."
>
> "**78. Penalty for suppressing value of taxable service**
>
> **78.** (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 liable to pay such service tax or erroneous refund, as determined under sub-section (2) of section 73 shall also be liable to pay a penalty, in addition to such service tax and interest thereon, if any, payable by him which shall not be less than, but which shall not exceed twice, the amount of service tax so not levied or paid or short levied or short paid or erroneously refunded:
>
> "**Provided** that where such service tax as determined under sub-section (2) of Section 73, and the interest

payable thereon under Section 75 is paid within thirty days from the date of communication of order of the Central Excise Officer determining such service tax, the amount of penalty liable to be paid by such person under this section shall be twenty five per cent of the service tax so determined.

Provided further that the benefit of reduced penalty under the first proviso shall be available only if the amount of penalty so determined has also been paid within the period of thirty days referred to in that proviso:

Provided also that where the service tax determined to be payable is reduced or increased by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the court, then, for the purposes of this section, the service tax as reduced or increased, as the case may be, shall be taken into account:

Provided also that in case where the service tax determined to be payable is increased by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the court, then, the benefit of reduced penalty under the first proviso shall be available, if the amount of service tax so increased, the interest payable thereon and twenty five percent of the consequential increase of penalty have also been paid within thirty days of communication of the order by which such increase in service tax takes effect.

Provided also that if the penalty is payable under this section, the provisions of section 76 shall not apply. (Introduced w.e.f. 10.5.2008)

"***Explanation***.-For the removal of doubts, it is hereby declared that-

(1) The provisions of this section shall also apply to cases in which the order determining the service tax under sub section (2) of section 73 relates to notices issued prior to the day on which the Finance Bill, 2003 receives the assent of the President;

(2) Any amount paid to the credit of the Central Government prior to the date of communication of the order referred to in the first proviso or the fourth proviso shall be adjusted against the total amount due from such person.

"80. Penalty not to be imposed in certain cases

Notwithstanding anything contained in the provisions of section 76, section 77 or section 78, no penalty shall be imposable on the assessee for any failure referred to in the said provisions, if the assessee proves that there was reasonable cause for the said failure."

8. As far as my appreciation on the plain reading of Section 76 and 78, I find that:

(i) Time limit for issue of show cause notice from the relevant date is 18 months or normal period for Section 76 whereas extended period of limitation of five years is available for Section 78;

(ii) Section 76 provides for imposition of penalty where an assessee liable to pay tax in accordance with Section 68 or the rules made thereunder fails to pay such tax. Section 68 provides that every person providing taxable service shall pay service tax at the rate specified in such manner and within such period as may be prescribed. Whereas Section 78 provides for penalty where any service tax has not been paid or levied or short paid etc by reason of fraud or collusion or wilful mis-statement or suppression of facts or contravention of any of the provisions of the Act or the rules made thereunder, with intent to evade payment of service tax. Thus Section 76 provides for failure to pay tax in normal circumstances as required under Section 68 read with the Service Tax Rules as to timely payment of tax, whereas Section 78 provides for penalty for fraud etc. with intent to evade tax;

(iii) For penalty under Section 76 mala fide intention may not be present and simple penalty of

Rs. 100 per day extendable to Rs. 200 per day or 2% of the tax for the period of default is provided whichever is higher, whereas Section 78 provides for levy of penalty which shall not be less than the amount of tax but shall not exceed twice the amount of tax;

(iv) Further, Section 80 provides that no penalty for any failure as referred in Section 76, 77 and 78, if the assessee proves there was reasonable cause for the said failure.

9. Revenue relied on the ruling of Hon'ble Kerala High Court in **ACCE Vs. Krishna Poduwal** (supra) (pronounced prior to Amendment in Section 78, addition of proviso w.e.f. 10.5.2008) wherein it have been held that simultaneous penalty under both the Sections 76 and 78 ibid can be imposed if the conditions for imposition are satisfied. However, I find Hon'ble Kerala High Court have also observed that the assessing officer may in his wisdom has discretionary power not to impose penalty under Section 76 where penalty under Section 78 have been imposed.

10. I further find that Hon'ble Karnataka in **CST, Bangalore Vs. Motor World - 2012 (27) STR 225**

considered the issue of imposition of simultaneous penalty under Section 76 and 78 of the Finance Act, have held that once the ingredient of Section 78 has been established and there is no reasonable cause for failure, then the authority has to impose a minimum penalty equal to the amount of service tax sought to be evaded. Here there is no discretion which is vested with the authority. The discretion is only confined to impose penalty above the minimum limit and less than the maximum provided. In the light of the scheme of the provisions of Section 76 and 78, they operate in mutually exclusive area, for the same reason, the question of imposing penalty both under Section 76 and 78 would not arise. The penalty is to be imposed either under Section 78 or under Section 76 and certainly not under both the provisions. The Karnataka High Court differed with the view taken by the Hon'ble Kerala High Court in the case of **Krishna Poduwal** (supra). It was further observed that the said judgment of Kerala High Court runs counter to the express provisions contained in Section 76 and 78, taking notice of the amendment brought by Finance Act 2008 (18 of 2008) which came into force with effect from 10 May, 2008, whereby Parliament has made legal position clear by introducing proviso to Section 78, which reads as under : " *provided also that if the penalty is payable in this Section (Section 78), the provisions of Section 76 shall not apply."* The Karnataka High Court further observed that while imposing penalty under Section 76, the question of imposing penalty under Section 78 also will not arise, because Section 76 applies to a case where the person has not either registered himself under the Act or having registered himself has not filed the return and not paid tax for the activity which he is carrying on. In such circumstances, the question of finding fault with the returns which are containing inaccurate particulars or suppression or concealment of value of taxable service would not arise. The amendment brought in Section 78 with effect from 10.5.2008 is only clarificatory nature. That was the position even before the amendment, as is evident from the express provisions of Section 76 and 78 ibid.

11. Similar view was taken by Punjab & Haryana High Court in **CCE, First Flight Courier - 2011 (22) STR 622** (P&H) wherein the High Court held that imposition of penalty under both Section 76 and 78 amounts to double zeopardy more so in view of the clarificatory amendment with effect from 10.5.2008.

12. Further I find that Hon'ble Bombay High Court in **CCE & C Vs. Vinay Bele Associates – 2008 (9) STR 350** by judgment dated 17.8.2007 considered the contention of Revenue that the adjudicating authority had to impose penalty under Section 76 and there was no discretion to impose lesser penalty. The Hon'ble High Court held that in view of Section 80, there is discretion vested in the authority and accordingly dismissed the appeal of Revenue.

13. The Hon'ble Gujarat High court in the case of **Raval Trading Company Vs. CST - 2016 (42) STR 210 (Guj.)** by judgement dated 7.1.2016 held that addition of proviso to Section 78 made it clear that if penalty was held payable under Section 78, then penalty is not imposable under Section 76. The proviso introduced with effect from 10.5.2008 was clarificatory amendment in nature and did not create liability for the first time. Even without its aid, it was plausible view that situation envisaged under Section 76 ibid, exclude cases covered under Section 78. The Gujarat High Court also considered the ruling of Hon'ble Delhi High Court in **Bajaj Travels Ltd.** (supra) and held that simultaneous penalty

under Section 76 is not imposable along with penalty under Section 78.

14. I further find that the wisdom of learned Commissioner in not imposing penalty under Section 76, in view of penalty having been imposed under Section 78 cannot be questioned, in view of the provisions of Section 80 of Finance Act, 1994. I further hold that penalty is not imposable simultaneously under Section 76 and Section 78 as both the Sections are mutually exclusive dealing with different types of default. Accordingly, I uphold the impugned order in original and dismiss this appeal by Revenue. Cross objections filed by respondent also stands disposed of. The respondent- assessee shall be entitled to consequential benefit, if any in accordance with law.

(Anil Choudhary)
Member (Judicial)

DIFFERENCE OF OPINION

15. In view of the difference of opinion, the following questions arise for consideration by the learned 3rd Member:-

(1) Whether penalty under Section 76 and 78 are prescribed for different type of violations and are mutually exclusive as held by Member (Judicial)

OR

that both the penalties can be imposed simultaneously as held by Member (Technical).

(2) Whether the amendment brought in Section 78 by Finance Act, 2008 by addition of proviso (w.e.f. 10.5.2008) providing that where penalty is imposed under Section 78 no penalty is imposable under Section 76, is clarificatory in nature, have got retrospective effect, as held by Member (Judicial) or whether the aforementioned amendment is not retrospective but prospective and hence the simultaneous penalties can be imposed for the period prior to 10.5.2008 as held by Member (Technical).

(3) As held by Member (Judicial) in view of Section 80 of the Finance Act, 1994, dropping of penalty under Section 76 by the adjudicating authority is not questionable or as held by Member (Technical), the penalty under Section 76 dropped

by the adjudicating authority should have been imposed?

(4) As held by Member (Judicial) that the ruling of Kerala High Court in the case of **ACCE Vs. Krishna Poduwal** (supra) is not applicable in the present case as that ruling is prior to the amendment dated 10.5.2008 in Section 78 or as held by Member (Technical) that the aforementioned ruling is applicable and simultaneous penalty under Section 76 and 78 are imposable?

16. Registry is directed to put up the appeal record before Hon'ble President for nomination of 3rd Member to consider the aforementioned questions and difference of opinion for his opinion.

(Anil Choudhary)
Member (Judicial)

(P. Anjani Kumar)
Member (Technical)

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