CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH
BANGALORE

Appeal(s) Involved:

ST/174/2007-DB

[Arising out of Order-in-Revision No. 23/2007 dated 27/02/2007 passed by Commissioner of Service Tax, Bangalore]

VENKATARAMANAN ASSOCIATES
NO.10/2, 2nd FLOOR, LALBAGH ROAD,
BANGALORE

Appellant(s)

Versus

CCE, BANGALORE(ADJN) — Respondent(s)

Appearance:

Shri N. Anand, Advocate
K.S. RAVI SHANKAR
152, RACE COURSE ROAD,BANGALORE
BANGALORE
KARNATAKA
560001

For the Appellant

Dr. J. Harish, Dy. Commissioner(AR) — For the Respondent

Date of Hearing: 28/05/2018
Date of Decision:___________

CORAM:

HON'BLE MR. S.S GARG, JUDICIAL MEMBER
HON'BLE MR. P. ANJANI KUMAR, TECHNICAL MEMBER

Final Order No. ______________

Per : S.S GARG

The present appeal is directed against the impugned order passed in exercise of its revisionary power by the Commissioner dt. 27/02/2007 whereby the Commissioner has imposed a penalty of Rs.90 lakhs on the assessee under the provisions of Section 78 of the Finance

Act, 1994 and also imposed penalty under Sections 76 and 77 of the Finance Act, 1994.

2. Briefly the facts of the present case are that the appellant is a partnership firm and are engaged in providing architect service and are duly registered since 1998. The dispute is for the period 2000-01 to December 2004. On verification of the balance sheets and Profit and Loss Account and other documents, a show-cause notice was issued to the appellant demanding the service tax amounting to Rs.63,78,887/- and cess of Rs.60,274/- during the period from April 2004 to December 2004 under Section 73 of the Finance Act along with interest and penalty. After following the due process, the original authority confirmed the demand and appropriated the amount which was paid by the appellant along with interest to the Government. The Assistant Commissioner after recording the specific finding that the appellant had no intention to evade payment of service tax and that the appellant had earnestly made good the payment of service tax liability immediately on being pointed out by the Department and this action on the part of the appellant diluted the offence committed and there was no deliberate intention to evade the payment of service tax due to the Department. Further, the Assistant Commissioner by invoking the discretion under Section 80 of the Act, dropped penalty under Sections 76 and 77 but imposed Rs.20000/- under Section 78. The Order-in-Original was not challenged neither by the appellant nor by the Department and has attained finality. Further on 26/09/2006, the Commissioner of

Service Tax issued a review show-cause notice under Section 84 of the Act as it stood proposing to revise the Order-in-Original dt. 21/03/2005 (partly) only to impose penalty under Sections 76, 77 & 78 by making allegations which were not in the original proceedings. The appellant filed reply to the revised show-cause notice and pleaded that there was no intention to evade payment of service tax and also provided explanations for non-payment of service tax on time and also submitted that they have paid the service tax dues with interest before issuance of original show-cause notice. The Commissioner of Service Tax passed the impugned revision order imposing penalties under Sections 76, 77 and Rs.90 lakhs under Section 78 of the Act. Hence the present appeal.

3. Heard both sides and perused records.

4. Learned counsel for the appellant submitted that the impugned order passed by the Commissioner by invoking revisionary power under Section 84 of the Finance Act is not sustainable in law as the same is contrary to the facts and the decisions rendered by Tribunal and various High Courts. He further submitted that the respondent has invoked Section 84 only to revise the Order-in-Original partly and there is no confirmation of demand of service tax or interest by invoking extended period of limitation in the impugned order. He further submitted that without demanding service tax, the respondent could not have passed a revision order only to impose penalties. It is his further submission that adjudication order has to

be entirely or fully revised not partly. He further submitted that for imposing penalties under Section 76 and 78, there must be determination of service tax under Section 73(2) and in the absence of any determination of service tax under Section 73(2), no penalty is imposable. He further submitted that the impugned revision order under Section 84 has gone beyond the original proceedings and is passed on the findings which are beyond the original proceedings. There was no invocation of extended period as envisaged in proviso to Section 73(1) in the original proceedings and there was no allegations in spite of that the impugned order records finding that there was suppression of material facts resulting in evasion of service tax. It is his further submission that the adjudicating authority has invoked the discretion under Section 84 of the Act and after examining the records and evidence has specifically recorded the finding that there was no evasion of service tax on the part of the appellant and has refrained from imposing penalties except imposing penalty of Rs.20000/-. He further submitted that it is settled position that the revision power under Section 84 cannot be invoked by the Commissioner merely to enhance the penalty by substituting his discretion. For this submission, he relied upon the decision in the case of CCE Vs. Sunitha Shetty [2006(3) STR 404 (Kar.)] and CST Vs. Handimann Services Ltd. [2011(24) STR 641 (Kar.)] and in CST Vs. Motor World [2012(27) STR 225 (Kar.)].

5. On the other hand, the learned AR defended the impugned order and submitted that the appellant has collected the service tax but did

not deposit the same and therefore the Commissioner has rightly invoked his revisionary power and imposed the penalty after upholding that there was a suppression of facts with intention to evade payment of tax.

6.1. After considering the submissions of both sides and perusal of material on record, we find that the original authority has specifically recorded the findings that there was no intention to evade the payment of service tax and the service tax was paid along with interest before the issuance of show-cause notice and by exercising his discretion as provided under Section 80 of the Finance Act, the original authority has dropped the penalty under Sections 76 and 77 and only imposed Rs.20,000/- penalty under Section 78. Further we find that the appellant as well as the respondent has not challenged the said Order-in-Original. Thereafter the Commissioner under his revisionary power issued the show-cause notice by invoking the extended period and recorded findings that there was suppression of material facts resulting in evasion of service tax. Further, we find that this issue was considered by the Hon'ble High Court of Karnataka in the case of Motor World (supra) wherein the Hon'ble High Court after considering the scope of revision power of the Commissioner to impose penalty which was dropped by the original authority in exercise of his discretion under Section 80 has finally held as under:-

> ***33.*** *In the light of the foregoing discussion and for the reasons stated above, we answer the substantial questions of law as under :-*

(1) The imposition of penalty under the Act is not automatic. The ingredients mentioned in the Section should exist. In respect of Sections 76, 77 and 78 of the Act, not only the ingredients of those Sections should exist, but also there should be absence of reasonable cause for the said failure.

(2) Sections 76 and 78 are mutually exclusive. If penalty is payable under Section 78, Section 76 is not attracted. Therefore, no penalty can be imposed for the same failure under both the provisions.

(3) Even if the ingredients stipulated in Sections 76 and 78 of the Act are established, if the assessee shows reasonable cause for such failure, then the authority has no power to impose penalty in view of Section 80 of the Act.

(4) Even after holding that the ingredients stipulated in Sections 76 and 78 exist, and there is no reasonable cause shown for failure to comply with the said provisions, the authority has the discretion regarding the quantity of the penalty to be imposed. However, the penalty to be imposed cannot be less than the minimum or more than the maximum prescribed under the statute.

(5) The minimum penalty to be imposed is Rs. 100/- and not Rs. 100/- per day.

(6) If the penalty imposed is not less than the minimum prescribed under law, the revisional authority has no power to enhance the amount of penalty on the ground that it is less.

(7) When the assessing authority, in its discretion has held that no penalty is leviable, by virtue of Section 80 of the Act, the revisionary authority cannot invoke its jurisdiction and impose penalty for the first time.

6.2. Further we find that the Punjab & Haryana High Court in the case of CCE, Jalandhar Vs. Darmania Telecom [2009(14) STR 145 (P&H)] has held as under:-

> ***3.*** *Having heard learned Counsel for the Revenue we are of the view that the provisions of Section 80 of the Act in un-mistakable terms provide that despite the provisions of Section 78, no penalty should be imposed on the assessee for any failure referred in that section if the assessee has shown that there was reasonable cause for the said failure. The provision under Section 78 of the Act is required to be acted upon in the absence of finding of fraud, collusion, wilful mis-statement, suppression of facts etc., as envisaged by Section 78 of the Act. The order-in-original dated 15-6-2005 (A-1) does not record any finding of fraud, mis-statement etc., which could have been the basis for acquiring jurisdiction to impose the penalty. Accordingly, the Assessing Authority exercised the power under Section 80 of the Act and decided not to impose any penalty under Section 78. There was no basis for the Revisional Authority-cum-Commissioner to acquire the jurisdiction to impose penalty. There is no evidence produced before the revisional authority or any other authority to prove fraud, collusion, misrepresentation etc. so as to attract the application of Section 78 of the Act. In our view, the Tribunal has rightly restored the order of the Assessing Authority. Therefore, no question of law much less any substantial question of law would arise for determination of this Court.*
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> ***4.*** *As a consequence, the appeal fails and the same is dismissed.*

6.3. Further this Tribunal in the case of S-Mac Security Services Pvt. Ltd. Vs. CST, Bangalore [2016(45) STR 209 (Tri. Bang.)], after relying upon the judgment of the Hon’ble Karnataka High Court and after noting the fact that the service tax along with interest has been voluntarily paid by the appellant before issuance of show-cause notice, has set aside the penalty imposed by Revisionary Authority under Sections 76 to 78.

7. In view of the various decisions relied upon by the appellant, we

are of the considered view that this issue is no more res integra and has been settled in favour of the assessee by the decisions relied upon by the appellant. In view of this, we hold that imposing penalty by exercising revisionary power is not sustainable in law and therefore we set aside the impugned order by allowing the appeal of the appellant.

(Order was pronounced
in Open Court on **..........................**)

P. ANJANI KUMAR
TECHNICAL MEMBER

S.S GARG
JUDICIAL MEMBER

Raja...