

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

Appeal(s) Involved:

ST/21206/2017-SM

[Arising out of Order-in-Appeal No. 573/2017 dated
24/05/2017 passed by Commissioner of Service Tax ,
Bangalore Service Tax(Appeals)]

M/s. Trackon Courier Pvt Ltd

No 219 1st Main 5th Cross, Domlur Layout
BANGALORE
KARNATAKA
560071

Appellant(s)

Versus

**C.C.,C.E.& S.T -Bangalore Service
Tax-ii**

4TH FLOOR, T.T.M.C. -B.M.T.C. BUS STAND
BUILDING, OLD AIRPORT ROAD
BENGALURU
KARNATAKA
560071

Respondent(s)

Appearance:

PRADYUMNA G.H. ADVOCATE

NO.371, 8TH MAIN
SADASHIV NAGAR
Bangalore
Karnataka
560080

For the Appellant

**Dr. J.Harish, Deputy
Commissioner, AR**

For the Respondent

Date of Hearing: 27/12/2018

Date of Decision:31/12/2018

CORAM:

HON'BLE SHRI S.S GARG, JUDICIAL MEMBER

Final Order No.21948/2018

Per : S.S GARG

The present appeal is directed against the impugned order dated 24.05.2017 passed by the Commissioner (Appeals) whereby the Commissioner (A) has upheld the Order-in-Original and also imposed penalty under Section 78 to the tune of Rs.22,47,125/-.

2. Briefly the facts of the present case are that the appellants are registered as service provider for rendering 'Courier Agency Service' classifiable under Section 65(105)(f) read with Section 65B(44) of the Finance Act, 1994. Consequent to the audit conducted on the records of the appellant by the officers of the Service Tax Audit Commissionerate during the month of June 2015 for the period April 2010 to March 2015 and on verification of the records the Department found that the appellants are liable to pay the following Service Tax:

(i) Service Tax for the period from April 2014 to March 2015 - Rs.22,47,125/-.

(ii) Service Tax under partial reverse charge on Manpower/Security Supply Service received covering the period from April 2013 to March 2015 - Rs.51,170/-.

(iii) Excess availment of CENVAT credit on input invoices pertaining to March 2012 & August 2012 - Rs.13,797/-.

(iv) Non-inclusion of stationary charges in the taxable value covering the period April 2013 to April 2014 – Rs.2,38,814/-.

2.1 The appellant accepted all the objections raised by the Audit Party except Service Tax demand of Rs.2,38,814/- pertaining to non-inclusion of stationary charges. Thereafter, the appellant paid the following amounts:

(i) Service Tax liability of Rs.22,47,125/- for the period April 2014 to March 2015.

(ii) Service Tax of Rs.51,170/- under 'Reverse Charge Mechanism' in respect of Manpower Supply Services received by them for the period April 2013 to march 2015.

(iii) CENVAT credit of Rs.13,797/- irregularly availed during 2012.

(iv) Service Tax of Rs.2,38,814/- short-paid due to non-inclusion of stationery charges reimbursed by the clients during the years 2013-14 and 2014-15 (covering only April 2014).

2.2 Thereafter a SCN was issued proposing to demand the above amounts along with interest and penalty under Section 76, 77 & 78. During the pendency of the adjudication, the appellant paid further Service Tax amount of Rs.11,83,250/- during the period August 2015 to January 2016 amounting to total Rs.22,47,125/- payable for the period April 2014 to March 2015. The Assistant Commissioner after following the due process confirmed the demand and also appropriated the amount already paid. Aggrieved by the said order, the appellant filed appeal before the Commissioner (A) and the Commissioner (A) confirmed the imposition of penalty of Rs.22,47,125/- under Section 78 of the Finance Act which is under challenge in the present appeal.

3. Heard both sides and perused the records of the case.

4. The learned counsel for the appellants submitted that the impugned order is not sustainable in law as the same has been passed without properly appreciating the facts and the law. He further submitted that the appellant has not disputed their

liability to Service Tax of Rs.22,47,125/- and as soon as non-payment was pointed out, an amount of Rs.10,63,875/- payable for the period April 2014 to September 2014 was paid and ST-3 Return for the said period was filed on 13.07.2015. He further submitted that the issuance of SCN as far as Service Tax of Rs.10,63,875/- paid and reflected in ST-3 Returns was not legal and proper inasmuch as sub-section 1B inserted in Section 73 of the Act enjoins that **“Notwithstanding anything contained in sub-section (1), in a case where the amount of Service Tax payable has been self-assessed in the return furnished under sub-section (1) of Section 70, but not paid either in full or in part, the same shall be recovered along with interest thereon in any of the modes specified in Section 87, without service of notice under sub-section (i)”**

4.1 He further submitted that the SCN issued to the appellant was within the normal period of limitation and there was no requirement of invoking the extended period of limitation. He also submitted that in the present case, the Service Tax of Rs.22,47,125/- pertained to April 2014 to March 2015 covering two half-years viz. April 2014 to September 2014 and October

2014 to March 2015. As per Section 73 (1) of the Act amended vide Finance Act, 2012 the normal period for demanding Service Tax not-levied or short-levied or not paid or short-paid or erroneously refunded was 18 months from the relevant date. He also submitted that once the SCN dated 18.02.2016 was within the normal period of limitation of 18 months from the relevant date, there was no requirement of invoking proviso to Section 73 (1) of the Act and imposing penalty under Section 78. He further submitted that the appellant is not disputing their liability to pay Service Tax of Rs.22,47,125/- and had paid the entire Service Tax with interest and therefore the imposition of penalty under Section 78 is not legal and proper. He also submitted that as per amended Section 78, it is provided in the proviso that in respect of cases where details relating to such transactions are recorded in the specified records for the period beginning with 8th April, 2011 up to the date on which Finance Bill, 2015 receives the assent of the President (both days inclusive), the penalty shall be 50% of the Service Tax so determined. He also produced the copies of order passed by the Commissioner of Central Tax on record wherein penalty imposable under Section 78 of the Act has

been restricted to 50% of the Service Tax for the period till March 2015.

5. On the other hand, the learned AR defended the impugned order and submitted that in the present case, the appellants have collected the Service Tax and not paid the same in the Government treasury which itself tantamount to malafide on the part of appellant. He further submitted that the appellant also did not file the Return in time and the same was filed much after the audit was conducted and it was found that the appellant has not paid the Service Tax in spite of the fact that they have collected the same from the customers. He further submitted that the Tribunal by catena of decisions has held that where the Service Tax is collected and not paid, the penalty under Section 78 can be imposed by invoking the extended period alleging suppression with intent to evade payment of tax. In support of his submission, he relied upon the following decision:

(i) *Commr. of C.Ex., Mangalore Vs. K. Vijaya C.Rai, 2011 (21) STR 224 (Kar.).*

(ii) *United Communication Udupi Vs. Commr. of C.EX., Mangalore-III, 2012 (281) ELT 168 (Kar.).*

(iii) Ketan Engineering Services Pvt. Ltd. Vs. Commr. of C.Ex. & S.T., Surat, 2014 (36) STR 196 (Tri.-Ahmd).

(iv) Mohtamaan Industries s. Commr. of C.Ex., Cus. & S.T., Pune-I, 2016 (42) STR 568 (Tri. Mumbai).

(v) Tops Security Ltd. Vs. Commr. of C.Ex., New Delhi, 2016 (41) STR 634 (Tri. Del.).

(vi) Shayna Construction Vs. Commr. of C.EX., Rajkot, 2010 (262) ELT 1006 (Tri. Ahmd.).

(vii) Inma International Security Academy P. Ltd. Vs. CCE Chennai, 2006 (1) STR 289 (Tri. Chennai).

(viii) Final Order No. 22185/2017 in the Case of Malayalam Telenet Pvt. Ltd. Vs. CCE, Cochin.

(ix) Final Order No. 22285/2017 in the case of Polyworld Vs. CCE, Calicut.

6. After considering the submissions of both the parties and perusal of the material on record, I find that the appellants have collected the Service Tax and not paid the same to the Government treasury and also filed late Return for the impugned period. Further, I find that when the audit was conducted and the Audit Party found that the appellants are liable to pay Service

Tax, the appellant conceded his liability and paid a part of the amount and thereafter filed the Return on 13.07.2015. I also find that subsequently before adjudication he paid the remaining amount but did not pay the interest which was paid subsequently. Further, I find that in view of the various decisions cited by the learned AR wherein it has been consistently held that penalty under Section 78 can be imposed if the assessee collects the Service Tax but does not deposit the same in the Government treasury. Further, I find that during the relevant period as per Section 78 the penalty shall be 50% of the Service Tax for the period beginning from 8th April, 2011 up to the date on which the Finance Act, 2015 receives the assent of the President. Further, I find that as per the provision of Section 78 prevailing till March 2015 in respect of accounted transactions penalty imposable under Section 78 of the Act was 50% of the Service Tax. I also find that by following the said provision, the Commissioner of Central Tax has held that penalty imposable under Section 78 has been restricted to 50% of the Service Tax for the period till March 2015 and the said decisions have also been placed on record by the appellant. Therefore, in view of my discussion above, I am of

the opinion that the appellants are liable to pay 50% of the Service Tax as penalty under Section 78 of the Act. Accordingly, I allow the appeal partly and restricted the penalty to 50% of the duty demand.

(Order was pronounced
in Open Court on **31/12/2018**)

S.S GARG
JUDICIAL MEMBER

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