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

Appeal(s) Involved:

ST/399/2008-DB

[Arising out of Order-in-Original No. 14/2008 dated 22/02/2008 passed by Commissioner of Central Excise & ST, LTU, Bangalore]

ST/455/2008-DB

[Arising out of Order-in-Original No. 32/2008-Commr. LTU dated 17/04/2008 passed by Commissioner of Central Excise & ST, LTU, Bangalore]

ST/466/2008-DB

[Arising out of Order-in-Original No. 48/2008-Commr. LTU dated 20/06/2008 passed by Commissioner of Central Excise & ST, LTU, Bangalore]

ST/467/2008-DB

[Arising out of Order-in-Original No. 43/2008-Commr. LTU dated 04/06/2008 passed by Commissioner of Central Excise & ST, LTU, Bangalore]

M/s. ADECCO FLEXI ONE WORK FORCE SOLUTIONS LIMITED
REGENT COURT, 1ST AND 2ND FLOOR, PLOT NO.17, 80 FT ROAD, KORMANGALA, BANGALORE - 34

Appellant(s)

Versus

C.C.E. & S.T.-BANGALORE-LTU
100 FT RING ROAD JSS TOWERS,
BANASHANKARI-III STAGE,
BANGALORE,
KARNATAKA
560085

Respondent(s)

Appearance:

Mr. Natarajan & Mr. K.S. Ramesh, Advocate
Swami Associates & Co.
G-8, FORTUNA ICON APARTMENTS,
JODIDHAR ASWATHAPPA FARM,
BEHIND NAGARJUNA NAGAR, SAHKAR NAGAR,
BANGALORE- 560092

For the Appellant

Dr. J. Harish, Joint Commissioner, AR

For the Respondent

Date of Hearing: 04/12/2018
Date of Decision:18/01/2019

CORAM:

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

Final Order No.20066-20069/2019

Per : P. ANJANI KUMAR

The appellants, Adecco Flexi One Work Force Solution Ltd. (presently known as Adecco India Pvt. Ltd.) are engaged in supply of manpower services and they have been issued SCNs for non-payment/delayed payment of Service Tax for the period 10/2002 to 2/2009. In some cases, appeals have reached this Bench and Final Orders have been passed. The present set of four appeals ST/399/2008, ST/455/2008, ST/466/2008 & ST/467/2008 are for consideration.

2. The appellants submitted that in all the cases, Service Tax has been paid, along with interest, but in a delayed manner. Penalties have been imposed on the appellants under Section 76 and under Section 78 of Finance Act, 1994. The appellants are contesting the penalties on the grounds that:

(i) Their customers were deducting TDS for Income Tax on the total remuneration including Service Tax and there was delay in getting Income Tax refunds which sometimes took as long as three to four years.

(ii) The appellants were using the available resources for discharging previous month’s liability along with interest for delay as they had cash flow constraints.

(iii) As the Department was issuing continuous SCNs, it cannot be alleged that there is suppression of facts etc. with intent to evade payment of duty and therefore, the conditions for imposing penalty under Section 78 are not satisfied.

(iv) As the appellants had a reasonable cause in failing to deposit Service Tax in time, penalty under Section 76 was also not invokable in view of the Karnataka High Court judgment in the case of CCE Vs. Motor World, 2012 (27) STR 225 (Kar.).

(v) With reference to the provisions of Section 76, the same was substituted in Finance Act, 2011 wherein the penalty of Rs.200/- per day was substituted as Rs.100/- and 2% was substituted with 1%. The Hon’ble High Court of Karnataka in the case of Fosroc Chemicals India Pvt. Ltd., 2015 (318) ELT 240 (Kar.) held that substitution had retrospective effect.

(vi) In the event, Hon’ble CESTAT does not consider the benefit of Section 80, CESTAT may reduce the penalty as applicable.

3. The appellants further submitted that in respect of

previous SCN vide Order No. 57/2007 dated 25.07.2007, the Ld. Commissioner had held that "*late filing of ST 3 Returns alone cannot be a ground to invoke suppression of facts/extended period unless such demand was resulted in recovery of Service Tax in excess of taxable value that is indicated in the ST 3 Returns. Apparently, there is no difference in taxable value/tax declared and paid by the assessee as indicated in ST 3 Returns and taxable value/tax as indicated in investigation report.*"

4. Ld. AR for the Department has reiterated the findings of OIO and submitted that this Bench in Final Order 21066-21068/2018 dated 31.07.2018 has dismissed the appellant's appeal.

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

6. We find that the appellant has been continuously defaulting the payment of Service Tax over the years and periodical SCNs have been issued. The Ld. Commissioner observed that "*the appellants lapse continuous to be a wilful default in paying the Service Tax. Since the default is deliberate with intent to evade payment of Service Tax, they are liable to pay penalty under Section 76. The appellants have admitted that they have already recovered the Service Tax but failed to remit the taxes…. This*

clearly establishes the intent to evade payment of Service Tax".

6.1 We find that the appellants have submitted that the ingredients of Section 78 like –

(a) fraud; or

(b) collusion; or

(c) wilful mis-statement; or

(d) suppression of facts; or

(e) contravention of any of the provisions of this Chapter or of the rules made thereunder with intent to evade payment of Service Tax.

6.2. It is the case of the department that the assessee has been regularly defaulting on the payment of Service Tax. The appellants have submitted that there was delay in the payment of Service Tax; the delay occurred as they were facing financial difficulties and had to pay the salary to their employees first; there was no intention to evade payment of Service Tax; they were in LTU and have been paying huge amount of Service Tax to the Government.

6.3. We find that as submitted by the appellants, delay in payment of Service Tax by itself would not reveal intent to evade payment of duty and for the reason that there has been a delay in payment of Service Tax, fraud, suppression, collusion, etc. cannot be alleged. The statute has provided for payment of interest for delayed payment of Service Tax. It means that statute has provided for cases/situations where there is a possibility of payment of Service Tax. Moreover, there is a penalty under Section 76 for delayed payment. Therefore, invoking of Section 78 for delayed payment in itself is not acceptable. As submitted by the appellants, we find that the penalty under Section 78 for the period 10/2002 to 8/2007 was either not proposed or dropped by Commissioner and for the period 5/2008 to 2/2009, penalty under Section 78 has not been proposed at all in the SCN. This being the situation, proposal and confirmation of penalty under Section 78 during the period 9/2007 to 10/2007 alone defies logic as there was no change in the circumstances or the procedure adopted by the appellants.

6.4. We find that Hon'ble High Court of Karnataka, in the case of Motor World, 2012 (27) S.T.R. 225 (Kar.), 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 revisional authority cannot invoke its jurisdiction and impose penalty for the first time.

6.5. Therefore, we find that the ingredients of Section 78 are not fulfilled as no suppression, fraud etc. can be alleged where the Department is well aware of the practice adopted by the appellants and SCNs have been issued continuously. As discussed above, penalty under Section 78 was not even proposed in the subsequent SCNs. The Ld. AR has relied upon the decision of this Bench in appellant's own case (supra) and submitted that the Bench has dismissed the appeal of the appellants. We find that in the case cited by the Ld. AR, penalty under Section 78 was not proposed or confirmed by the impugned order. The Bench has thus upheld duty demanded and penalty under Section 76 only. Therefore, we hold that penalty under Section 78 is not imposable. To that extent, the appellants succeeds. However, due to continuous default in payment of Service Tax, the appellants are liable to pay penalty imposed under Section 76.

7. In view of the above, the appeals are partly allowed by confirming duty demanded and penalty imposed under Section 76. However, penalty imposed under Section 78 of the Finance Act, 1994 is set aside.

(Order was pronounced
in Open Court on **18/01/2019**)

P. ANJANI KUMAR
TECHNICAL MEMBER

S.S GARG
JUDICIAL MEMBER

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