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

<u>Appeal(s) Involved:</u>

**ST/21601/2014-DB**

[Arising out of Order-in-Appeal No. 186/2014 dated 28/02/2014 passed by the Commissioner of Central Excise and Service Tax, Bangalore]

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| **Force 18 Security And Allied Services**<br>Marathhalli, Outer Ring Road<br>Bangalore – 560 037<br>Karnataka | **Appellant(s)** |

**Versus**

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| **C.C.E & C.S.T.-Bangalore Service Tax- I**<br>1st To 5th Floor,<br>TTMC Building, Above BMTC Bus Stand, Domlur<br>Bangalore – 560 071,<br>Karnataka | **Respondent(s)** |

**<u>Appearance:</u>**

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| Shri. Rohitesh Bhauwala, CA | For the Appellant |
| Smt. C.V. Savitha, Supdt. (AR) | For the Respondent |

Date of Hearing: 28/10/2019
Date of Decision: 14/11/2019

**CORAM:**
**HON'BLE SHRI. S.S GARG, JUDICIAL MEMBER**
**HON'BLE SHRI. P. ANJANI KUMAR, TECHNICAL MEMBER**

**<u>Final Order No. 21006 / 2019</u>**

**Per : S.S GARG**

The present appeal is directed against the impugned order dated 28/02/2014 passed by the Commissioner (Appeals) whereby the Commissioner (Appeals) has accepted the Department's appeal and modified the order of the original authority by imposing equivalent penalty of Rs. 49,49,612/- (Rupees Forty Nine Lakhs Forty Nine Thousand Six Hundred and Twelve only) under Section 78 of the Act. Penalty under Section 76 was not imposed.

2. Briefly the facts of the present case are that the appellant is a proprietary concern engaged in Security Agency Service. During the audit of the accounts of the appellant, it was noticed that the appellant had shown the liabilities towards service tax in their Audited Financial Statement for the period 2006-07 to 2009-10. The amount of service tax collected was not paid to the Department amounting to Rs. 49,49,612/- (Rupees Forty Nine Lakhs Forty Nine Thousand Six Hundred and Twelve only). The appellant paid the tax as pointed out by the audit along with interest before the issue of show-cause notice. Thereafter, a show-cause notice dated 18/05/2011 proposing to demand service tax along with interest and also proposed to impose penalty under various provisions of the Act. After following the due process, the original authority confirmed the demand of service tax and also appropriated the service tax already paid and confirmed the demand of interest and appropriated the interest amount of Rs. 21,67,375/- (Rupees Twenty One Lakhs Sixty Seven Thousand Three Hundred and Seventy Five only) already paid by the appellant and also imposed penalty of Rs. 10,000/- (Rupees Ten Thousand only) under Section 77 of the Finance Act, 1994 for contravention of various provisions of Service Tax Act/Rules but did not impose penalty under Section 76 and 78 of the Finance Act, 1994 by giving the benefit under

Section 80 of the Finance Act. Aggrieved by the said order, the Revenue filed appeal before the Commissioner against the dropping of penalty under Section 76 and 78 and the Commissioner (Appeals) accepted the Department's appeal and held that the dropping of penalty under Section 78 is not sustainable in law but he maintained the dropping of penalty under Section 76.

3. Heard both the parties and perused the records.

4. Learned counsel for the appellant submitted that the appellant has paid all the taxes along with interest before the issue of show-cause notice. He further submitted that the original authority after considering all the facts and circumstances has come to the conclusion that in the present case there was no intention to evade payment of service tax and the party has deposited the entire amount as soon as the Department appraised them. He further submitted that the original authority has also observed in para 16 that it will be harsh to impose penalty on the appellant who is tax compliant assessee and therefore by invoking the discretionary power under Section 80 of the Act, the original authority refrained from imposing the penalty under Section 76 and 78 of the Act by relying upon the ratio of the judgments in the case of ***K.S. Murali Mohan Vs. CST, Bangalore – 2011 (21) S.T.R. 512 (Tri.-Bang.)*** and ***P. Jani & Co. Vs. CST, Ahmedabad – 2010 (20) S.T.R. 701 (Tri.-Ahmd.).*** He further submitted that adjudicating authority has imposed a penalty under Section 77 of the Finance Act towards contravention of various provisions of Service Tax Act/Rules 1994. The learned counsel further submitted that *prima facie* appeal filed by the Department before the Commissioner (Appeals) was barred by limitation of time because as per Section 85 of the Finance Act, 1994 appeal ought to have been presented before the First Appellate Authority within three months

from the date of receipt of the decision or the order of adjudicating authority. However, the order of such adjudicating authority was passed on 02/05/2012 and communicated on 08/05/2012 and appeal was filed before the Commissioner (Appeals) on 24/08/2012 resulting in a delay of 16 days. He further submitted that once the appellant has paid the service tax along with interest and has not suppressed any material fact from the Department and disclosed their liability to pay the service tax in their Books of Accounts from where only the audit pointed out, suppression of fact with intent to evade payment of tax cannot be alleged against the appellant. He further submitted that the adjudicating authority has observed that appellant could not pay the service tax on account of financial difficulties. In support of his submission, he relied upon the decision of Punjab & Haryana in the case of ***Commr. of Central Excise, Rohtak Vs. Dhillon Kool Drinks & Beverages Ltd. reported in [2010] 3 taxmann.com 452*** wherein the Honb'ble High Court has held that penalty is not leviable for delay in payment of duty on account of financial constraints as it is not an act of fraud or willful evasion. The learned counsel also relied upon the decision of ***Commr. of Central Excise, Noida Vs. Delphi Automotive Systems Ltd. reported in [2013] 30 taxmann.com 639*** wherein it has been held that for imposition of penalty under Section 11AC of the Central Excise Act, 1944 *mens rea* is an essential part for levy of penalty. He has also relied upon the decision of the Karnataka High Court in the case of ***Commr. of Service Tax Vs. Motor World [2012] 22 taxmann.com 35*** wherein it has been held in the conclusion by the Hon'ble High Court in para 33 ***"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."***

5. On the other hand, the learned AR defended the impugned order

and submitted that the appellant failed to file the returns and also did not disclose to the Department the short payment of service tax which was detected by the Department during audit.

6. After considering the submissions of both the parties and perusal of the material on record, we find that the appellant did not pay the service tax and also did not file the return and short payment of service tax was detected by the Department during the audit from the Books of Accounts of the assessee or the appellant wherein the appellant has shown the duty liability of service tax payable to the Department. Further we find that as soon as the Department audit pointed out the short payment of duty, the appellant along with interest has paid the duty before the issue of show-cause notice. Further we find that the original authority after considering all the evidences has confirmed the duty along with interest and also appropriated the amount of duty and interest paid by the appellant but the original authority dropped the penalty under Section 76 and 78 by exercising their discretion under Section 80 after observing that there was no *mens rea* on the part of the appellant not to pay the service tax. Further we find that the original authority has imposed a penalty of only Rs. 10,000/- (Rupees Ten Thousand only) under Section 77 for violation of various provisions of Finance Act and the Rules of 1994. Further we find that once the appellant has shown the duty liability in their Books of Accounts which clearly means that there was no suppression of material fact to evade the payment of tax and non-payment was on account of financial difficulties which has been proved by the assessee on record by producing sufficient documentary evidence. In view of our discussion above, we are of the view that the ratio of the judgment relied upon by the appellant clearly establishes that no penalty is imposable under Section 76 and 78 if there is a reasonable cause for not paying the service tax as held by the Hon’ble

High Court of Karnataka in the case of **Motor World** cited supra. Consequently, we set aside the penalty imposed under Section 78 but upheld the penalty of Rs. 10,000/- (Rupees Ten Thousand only) imposed under Section 77 of the Finance Act 1994 for contravention of various provisions of Service Tax. Appeal is partly allowed.

(Order Pronounced in Open Court on **14/11/2019**)

**(S.S GARG)**
**JUDICIAL MEMBER**

**(P. ANJANI KUMAR)**
**TECHNICAL MEMBER**

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