IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL
SOUTH ZONAL BENCH AT CHENNAI

ST/69/2011

(Arising out of Order-in-Original No. 49/2010 dated 25.10.2010 passed by the Commissioner of Service Tax, Chennaii).

M/s. Shreyans Builders : Appellant

Vs.

CC& ST, Chennai : Respondent

Appearance

Shri S. Viswanathan, Advocate,
for the Appellant

Shri A. Cletus, ADC (AR)
for the Respondent.

CORAM :

Hon'ble Ms. Sulekha Beevi, Member (Judicial)
Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)

Date of Hearing/Decision: **25.05.2018**

FINAL ORDER No. **41696/2018**

Per Bench

At the time of hearing the Ld. Counsel Shri S. Viswanathan appearing on behalf of the appellant submitted that the appellant is contesting the penalty imposed in the present appeal.

2. Brief facts are that the appellant was engaged in construction of commercial building and was issued SCN demanding service tax under "Commercial or Industrial Construction Service" for the period April 2007 to July 2008, along with interest and also

imposed penalties. Aggrieved, the appellant is now before the Tribunal.

3. The Ld. Counsel submitted that the appellant has paid the entire demand of service tax. During the relevant period the issue with regard to liability of paying service tax under the commercial construction service was contentious and there were various circulars issued by the Board. Though, it is stated in the OIO that the appellant collected service tax, the same has not been actually collected by raising any invoice/document by the appellant. The demand has been made by the department taking the consideration received by the appellant and shown in the agreement to be cum-tax value to which the appellant has conceded to get the benefit of cum-tax. That in reality the appellant has not collected any service tax separately. That the failure to discharge service tax was only because the issue was under much confusion and being an interpretational issue, he pleaded that the penalty imposed under Section 78 may be set aside.

4. The Ld. AR, Shri A. Cletus, ADC, supported the findings in the impugned order. He stressed that the appellant had collected the service tax and therefore failure to pay would attract penalty.

5. Heard both sides.

6. The Ld. Counsel had submitted that the appellant is contesting only the penalty imposed. It is argued by him that the failure to discharge was only because the issue was under

confusion and being interpretational one, the penalty may be waived. The CBEC Board vide Circular No. 96/7/2007-ST dated 23.08.2007 had clarified that if no person is engaged for the construction work and if the developer undertakes the construction work on his own without engaging the services of any other person, since there is no service provider and service recipient relationship, the activity would not attract levy of service tax. The appellant is a developer and there were other circulars No. 108/09-ST dated 29.01.2009 clarifying the aspect of liability to service tax in the case of Joint Development of land. The decision rendered by the Hon'ble Guwahati High Court in the case of *Magus Construction Pvt. Ltd. Vs. UOI* – 2008 (11) S.T.R. 225 (Gau.), was also prevailing the field. There is no evidence adduced by the department to establish that the appellants are guilty of suppression of facts with intention to evade payment of tax. Taking these aspects into consideration and the issue being an interpretational one, we are of the considered opinion that the imposition of penalty under Section 78 is unwarranted.

7. In the result, the impugned order is modified to the extent of setting aside the penalty imposed under Section 78 only without disturbing the demand of service tax or interest thereon and the penalty imposed under Section 77 ibid.

8. Appeal is partly allowed in above terms.

(Operative part of the Order pronounced in the open Court)

(MADHU MOHAN DAMODHAR)
MEMBER (TECHNICAL)

(SULEKHA BEEVI C.S.)
MEMBER (JUDICIAL)

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