

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

**Application No. ST/MISC[CT]/41510/2017
Appeal No. ST/00090/2012**

(Arising out of Order-in-Original No. 39/2011 dated 28.09.2011 passed by the Commissioner of Service Tax, Chennai)

M/s. Dusters Total Solutions Services Pvt. Ltd. : Appellant

Vs.

Commissioner of Service Tax, Chennai : Respondent
[sought to be changed to
“The Commissioner of G.S.T & Central Excise
Chennai South Commissionerate”]

Appearance:-

Shri. J. Shankaraman, Advocate
for the Appellant

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

CORAM:

**Hon’ble Ms. Sulekha Beevi C.S., Member (Judicial)
Hon’ble Shri Madhu Mohan Damodhar, Member (Technical)**

Date of Hearing: **28.06.2018**

Date of Pronouncement:_____

Final Order No. 41943 / 2018

Per Bench,

The facts of the case are that the appellants are engaged in providing specialized professional cleaning services. During the course of verification of records, it was noticed that appellants had collected, from their clients,

apart from service charges, service tax liability, for the period August, 2008 to December, 2009, however, did not remit the same to the exchequer within the due date. It also emerged that appellants had not filed ST-3 returns within the due date. A Show Cause Notice dt. 12.05.2010 was issued to them, *inter alia*, proposing demand of service tax liability of Rs. 4,51,28,399/- under proviso to Section 73(1) of the Finance Act, 1994, appropriation of amounts totalling to Rs. 4,48,31,422/- paid up by the appellants on various dates, interest from due date of payment till the actual date of payment and imposition of penalties under Section 76 , 77 and 78 of the Finance Act, 1994. In adjudication, vide the impugned order 39/2011 dt. 28.09.2011, the Commissioner confirmed the service tax, appropriation of paid up amounts, imposition of penalties under Section 76 and 77, however, refrained from imposing penalty under Section 78 of the Act. Appellants are aggrieved by imposition of penalty under Section 76 and 77 *ibid.*, and have preferred this appeal.

2.1 Today when the matter came up for hearing, on behalf of the appellant, Ld. Advocate Shri J. Shankaraman, made oral and written submissions which can be broadly summarized as under:

- (i) The Service Receivers of the Appellant Company were taking more than six months for settling the bills of the appellant which caused

delay in discharging service tax liability. The appellant had to pay PF and ESI to the Manpower Supplied, on a monthly basis, apart from making payments to the Manpower supplied. This created a huge cash crunch problem to the appellant. During the visit of the Audit group of the Service Tax department, in the year 2006, it was noticed that the appellant had made part payment of Service Tax and there was a due for the period October 2006 to July 2008. The appellant was issued with a Show Cause Notice invoking suppression with intention to evade service tax and proposing to impose penalty under Section 78 of the Finance Act, 1994. The appellant paid the entire Service Tax of Rs. 3.53 crores along with interest of Rs. 52.46 lakhs by arranging funds from outside on very high interest. The Service Tax and interest payments were appropriated in the Order-in-Original No. 24/2009 dated 27.08.2009 and upon adjudication, the appellant availed the option payment of 25% of Penalty by paying Rs. 88.33 lakhs.

(ii) The payment of these tax due, interest and 25% penalty resulted in delay in paying tax for the subsequent period coupled with non-receipt of payments from the service receivers. The appellant paid entire demand of Rs. 4,48,35,145/- towards service tax even before issuance of present Show Cause Notice, for the period August, 2008

to December, 2009 and intimated the Department. They also paid interest of Rs. 37,27,677/- after issue of Show Cause Notice. The present Show Cause Notice dated 12.05.2010 is also issued alleging suppression and invoking extended period. The Department was fully aware that appellant was making sincere and earnest efforts to pay up earlier dues and, thereafter, the demand for subsequent period was also paid before SCN. There was delay to pay interest before SCN. The adjudicating authority in the impugned order held that there is no *mala fide* intention on the part of the appellant in not paying the service tax and, therefore, did not impose penalty under Section 78. However, he imposed penalty under Section 76 and 77.

- (iii) Since the tax was paid much prior to the Show Cause Notice, there was no *mala fide* intention on the part of the appellant and the Department ought to have given a quietus to the issue by not issuing a Show Cause Notice in terms of Section 73(3) of the Finance Act, 1994. The payment of dues by the appellant shows his intention that they want to buy peace. Even before the interest could be paid the Department ought not to have issued a Show Cause Notice in the present case. This view is also supported by the judgment of the Hon'ble High Court of Karnataka in the case of *C.C.E. Vs. Adecco Flexione Workforce Solutions Ltd.* [2012 (26) S.T.R. 3 (Kar.)]. Hence, the

penalty imposed under Section 76 & 77 of the Finance Act, 1994 is not sustainable in law.

(iv) In any case, the appellant was wiping out the arrears of tax, interest and also penalty for the period prior to the present demand and it was not being used for furtherance of business and this resulted in belated payment of tax in the disputed period. Hence, the appellant prays that imposition of penalty under Section 76 is not proper and the Commissioner ought to have exercised his discretion in terms of Section 80 of the Finance Act, 1994.

(v) The appellant prays reliance on the decision of the Hon'ble Tribunal in the case of *Vista Infotech Vs. C.C.E. [2010 (17) S.T.R. 343 (Tri. – Bang.)]* and *C.C.E. Vs. J. K. Insulations [2017 (4) G.S.T.L. 282 (T)]* in support of waiver of penalty.

2.2 He relied upon the following decisions :

- (i) *C.C.E. & S.T., LTU, Bangalore Vs. Adecco Flexione Workforce Solutions Ltd., 2012 (26) S.T.R. 3 (Kar.)*
- (ii) *Commissioner of Cus. C. Ex. & S.T., Guntur Vs. Narasaraopet Municipality, 2015 (39) S.T.R. 800 (A.P.)*
- (iii) *Mount Housing & Infrastructure Ltd. Vs. C.C.E. & S.T., Coimbatore, 2014 (35) S.T.R. 389 (Tri. – Chennai)*
- (iv) *Commissioner of Cus., C. Ex. & S.T. Hyderabad – IV Vs. J. K. Insulations, 2017 (4) G.S.T.L. 282 (Tri. – Hyd.)*

3. On the other hand, on behalf of the Department, Ld. AR Shri A. Cletus made the following main submissions.

(i) Appellants had collected service tax component from their clients.

When this is so, the amounts representing tax should have been remitted to the Government within the due dates, which was not done by the appellant.

(ii) Appellants, instead of discharging their tax liability already collected

from their clients, intentionally utilized the said amounts for running the day-to-day business. They cannot take the plea that delay in discharging tax liability in time was due to they being required to pay older arrears first. Appellants cannot claim that there was reasonable cause for their failure to discharge their tax liability.

Mismanagement of funds, payment of older arrears on priority leading to financial hardship cannot be called "reasonable cause" for failure to discharge tax liability. Hence, financial hardship cannot be the ground for waiving penalty under Section 80 of the Finance Act, 1994. Even for the earlier period October, 2006 to July, 2008, appellants had made such delayed payments of service tax and penalty under Section 78 of the Finance Act had also been imposed on them in the adjudication order. In respect of the proceedings having been initiated for earlier period, the appellants continued to indulge in the same behaviour even for the present period of dispute. Imposition of penalty under Section 78 requires that certain

ingredients like suppression of facts, misstatement, etc., with intention to evade payment of duty are present. However, for imposition of penalty under Section 76, during the period of dispute, the law was that any person who fails to pay such tax shall pay a penalty which shall not be less than two hundred rupees for every day during which such failure continues, etc. Hence, imposition of penalty under Section 76 is automatic when there is non-payment of service tax liability even if ingredients of suppression of facts, fraud, etc., are not present.

4. Heard both sides and have gone through the facts.

5.1 The only issue that comes up for appellate decision is whether in the given facts of the case, the appellants can be extended the beneficial provision of Section 80 of the Act so as to waive the penalties imposed on them under Section 76 and 77 *ibid*.

5.2 To analyse this issue, it would be useful to properly interpret the provisions of erstwhile Section 80 of the Act as it stood during the period of dispute.

“80. Penalty not to be imposed in certain cases. – Notwithstanding anything contained in the provisions of Section 76, Section 77 or Section 78, no penalty shall be imposable on the assessee for any failure referred to in the said provisions, if the assessee proves that there was reasonable cause for the said failure.”

The important take-away from these provisions is that to be eligible under waiver of penalty under Section 80 *ibid.*, the assessee should prove “that there was reasonable cause for the failure to discharge service tax liability” in the manner as specified.

5.3 We note that the appellants, right from the stage of adjudication, have been submitting that the delayed payment of service tax is on account of the chain reaction caused by the delay in the prior period, which started from September, 2006; that the reason for delayed payment of tax was explained in detail to the Department in the reply dated 13.04.2009 to the earlier Show Cause Notice; that they have a Labour Force of around 3,500 to whom salaries are due to be paid by the first week of every month, irrespective of the fact whether all the clients have paid the service charges; that there was severe financial crunch in 2006 and delay in implementation of two projects caused idle labour and idle capital goods [dead investment] and there was difficulty in arranging external borrowing on account of economy slowdown and down trend in financial markets.

5.4 We find that the appellants have also represented that from August, 2008 they had to borrow funds externally at huge interest rates and started to discharge all their liabilities; that while they were

earnestly discharging all their liabilities for the period from September, 2006 to July, 2008 along with interest till 31.03.2009, the service tax payable from August, 2008 also got accumulated. However, in respect of the delayed payments, they have paid up the entire liabilities of Rs. 4.51 crores by March, 2010 including service tax payable up to the month of March, 2010, along with interest.

5.5 We note the appellants' submission that all the ST-3 returns were filed before issue of Show Cause Notice.

5.6 We also find that the Ld. Adjudicating authority in para 7.0 and para 7.1 of the impugned order, has analysed the allegation as to whether appellants had intention to evade payment of service tax. The adjudicating authority has found that except for the delay in payment of service tax and non-filing of ST-3 returns in time, there is no intention to evade payment of service tax on the part of appellant and, therefore, dropped the proposal to impose penalty under Section 78 of the Act *ibid*. The said para 7.1 of the impugned order makes for interesting reading :

"7.1 I have carefully examined the above arguments as well as other submissions put forth by them as detailed in paras 3.0 to 3.5 above and I find that as contended by the assessee the department had full knowledge about the non payment of service tax for the period from August 2008 when the first show cause notice was issued on 02.03.2009 wherein demand of service tax for the period from October, 2006 to July, 2008 was made which was subsequently adjudicated by the then Commissioner of Service Tax vide

Order-in-Original No. 24/2009 dated 28.07.2009. Further, it seen from the letter dated 26.02.2009 that the SIR Branch of Service Tax Commissionerate has visited the premises of the assessee on 26.02.2009 and advised them to pay service tax period upto January 2009. Further, there is a sufficient force in the argument of the assessee that if they had intention to evade payment of service tax they would have equated the payments from August 2008 to the respective future months and could have avoided being proposed for penalization for the second time. IT is also seen from the chain of events as narrated by the assessee that after wiping out the arrears of service tax of Rs. 3.53 crores, interest of Rs. 52.46 lakhs and penalty of Rs. 88.33 lakhs as per Order in Original No.24/2009 dated 28.07.2009, they have paid the current arrears of tax of Rs. 4.39 crores in instalments within a period of 6 months. Therefore, except for the delay in payment of service tax and non filing of ST-3 returns in time, there appears to be very little evidence by the department to allege that the assessee has intention to evade payment of service tax. Further, the intention to evade payment of tax or otherwise can be deciphered from the overall conduct of the assessee. As already seen, there is no mala fide intention on the part of the assessee in not paying service tax. Therefore, there appears a justification on the assessee's contention that proviso to Section 73(1) of the Act has been invoked without any evidence. However, the demand of Service Tax is not hit by time as the assessee filed the ST-3 returns for the period covered in the show cause notice on 27.04.2010 and the show cause notice has been issued within one year from the date of filing the ST-3 Returns."

5.7 We, thus, find that in the impugned order, a clear chit has been given to the appellant that there was no *mala fide* intention on their part and that proviso to Section 73(1) of the Act has been invoked without any evidence. As the Department has not come in appeal against this finding of the Commissioner and subsequent decision not to impose penalty under Section 78 *ibid.*, it would only be presumed that the Department has accepted the impugned order *in toto*, including the said findings.

5.8 Once it has been held that service tax has not been paid on account of fraud or collusion or wilful misstatement or suppression of

facts, etc., with intention to evade payment of service tax, the provisions of Section 73(3) of the Act would hold sway in the case of the appellant and, in fact, as per the provisions of that Section, on the basis of tax ascertained by the Department Officer, if the amount is paid up by the appellant before service of a notice on him, there shall not be served any notice under Sub-section 1 of Section 73 *ibid.*

5.9 Viewed in this context, once no notice was required to be issued, there would be no question of imposition of any penalties on the appellant. True, at the time of issue of Notice, the competent authority may have taken the view that the provisions of Sub-section 4 of Section 73 *ibid.* are present in the case and, hence, Show Cause Notice will require to be issued. In fact, we are not finding fault with the issue of the Show Cause Notice in this case. But once it has been found, albeit by hindsight and pursuant to adjudication proceedings, that the ingredients of Section 73(4) *ibid.* are not present, and the notice would otherwise not have been required to be issued, this by itself, in our view, is a reasonable cause to invoke the provisions of Section 80 *ibid.* for waiver of any remaining penalties that may have been issued by the adjudicating authority. The Ld. AR had argued that financial hardship cannot be taken as a “reasonable cause” for the purposes of Section 80. In the peculiar facts of this case, the appellants, for the disputed period,

were always one step behind in paying up their tax liabilities, since they were paying up the arrears built up for the previous periods. This is the fact which has been taken cognizance of and found correct by the adjudicating authority also. The Department has also not called any evidence that the appellant had sufficient financial reserves and were not monetarily strained. In any case, one must take into account the mitigating factor that appellants have paid up the tax liability in full, although belatedly. The assessee who has paid up the tax liability, even if belatedly, should surely be treated differently and on a different pedestal than another assessee who has not discharged such liability even after being pointed out by the Department and instead, has chosen to litigate the matter. It has also to be considered that in case there is a positive finding under Section 78 of the Act *ibid.* (fraud, collusion, suppression of facts), the assessee has an option to pay reduced penalty of 25% within one month of the date of the order. Thus, an assessee on whom the penalty under Section 76 is imposed for mere delay in payment of service tax is put in a more disadvantageous position than a person who is imposed penalty for suppression of facts with intention to evade payment of tax. The Tribunal in the case of *Mount Housing & Infrastructure Ltd. Vs. C.C.E. & S.T., Coimbatore, (supra)* has occasion to analyse a similar issue. The relevant paragraph is noticed as under :

“6. I have considered submissions on both sides. Imposing penalty equivalent to Service Tax paid belatedly in this case will amount to putting the appellant who paid tax before issue of SCN and interest before adjudication at a more disadvantageous position as compared to an assessee who would not have paid any tax and did not file any return. In latter type of cases penalty under Section 78 would be applicable and the assessee gets concession in paying 25% of duty as penalty if such payment is made promptly. The argument raised by Revenue can be canvassed even in a situation wherein an assessee pays both tax and interest before issue of SCN. That is, the interpretation canvassed by Revenue is to the effect that anybody who pays Service Tax along with interest before issue of SCN will be liable to pay penalty under Section 76 putting such assesseees at a disadvantageous position as compared to an assessee who does not make payments at all before issue of SCN. No benefit would accrue to an assessee who makes such payment if this argument is accepted. C.B.E. & C. vide letter F. No. 137/167/2006-CX-4, dated 3-10-2007 has clarified that Section 73(3) cannot be interpreted in the way it is canvassed now by Revenue. However, since there is decision of the Single Member of the Tribunal in another case, a final view in this matter can be taken in another case where a Larger Bench may be deciding the matter.”

5.10 The appellant has paid up the service tax belatedly before issuance of SCN. The interest which is in the nature of compensation for the delay in payment, was also paid after issuance of SCN and much before issuing the Order-in-Original. The conduct of the appellant in paying up service tax and interest, and the categorical finding of the Commissioner that there is no intention to evade tax, persuades us to hold that appellant has established reasonable cause for invoking Section 80 of the Act *ibid*. The Hon'ble High Court for the State of Telangana and State of Andhra Pradesh in *Commissioner of Cus., C. Ex. & S.T., Guntur Vs. Narasaraopet Municipality (supra)* held that Section 80 begins with a *non obstante* clause and, hence, has overriding effect on Sections 76, 77 and 78 of the Act *ibid*.

5.11 From the above discussions and the decisions cited *supra*, we are of the considered opinion that the penalty imposed under Section 76 requires to be set aside which we hereby do. The impugned order is modified to the extent of setting aside the penalty imposed under Section 76 only.

6. The appeal is allowed partly in above terms, with consequential reliefs, if any.

(Pronounced in open court on_____)

(Madhu Mohan Damodhar)
Member (Technical)

(Sulekha Beevi C.S.)
Member (Judicial)

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