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

Application No.: ST/Misc[CT]/41144/2017
Appeal No.: ST/00144/2012

(Arising out of Order-in-Original No. 04/2012 (C. No. IV/9/203/2010 – STC Adj.) dated 07.02.2012 passed by the Commissioner of Central Excise, Chennai IV Commissionerate)

M/s. Q Source Global Consulting Pvt. Ltd. : Appellant

Vs.

Commissioner of Central Excise, Chennai-IV : Respondent
[sought to be changed to:
"The Commissioner of G.S.T. & Central Excise, Chennai South Commissionerate"]

Appearance:-
Ms. L. Maithili, Advocate
for the Appellant

Shri. K. Veerabhadra Reddy, JC (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:**31.07.2018**

Date of Pronouncement: 06.08.2018

Final Order No. 42192 / 2018

Per Bench,

The appellants are engaged in recruitment of manpower for software companies and call centres. They are registered with the Service Tax Department. During the course of Audit of Accounts, it was noticed that the appellants had only partly discharged the service tax for the month of February, 2009. Further, no service tax was paid for the period from March, 2009 to December, 2009. They had also not filed ST-3 returns for the period ending March, 2009 and September, 2009. On being pointed out, the appellants admitted the liability and paid part of the service tax along with interest. Show Cause Notice dt. 12.04.2010 was issued proposing to demand service tax to the tune of Rs. 61,13,273/- along with interest and for imposing penalties. After due process of law, the Original Authority confirmed the demand, interest and imposed equal penalty under Section 78 and penalty under Section 77 also. Aggrieved, the appellants are now before the Tribunal.

2.1 On behalf of the appellant, the Ld. Counsel Ms. L. Maithili submitted that the appellant is not contesting the demand of service tax and is only contesting the penalty imposed under Section 78 of the Finance Act, 1994.

2.2 She argued that the appellant was registered with the Service Tax Department since 2007 and was filing ST-3 returns periodically and paying the service tax. However, during the period February, 2009 to December, 2009, the appellant was unable to discharge service tax promptly due to breakdown of administrative machinery coupled with severe financial crisis due to non-receipt of service charges. Howsoever, as soon as the appellant could arrange for funds, they discharged the entire service tax along with interest of Rs. 4,12,733/-. In the meanwhile, the Department has issued the Show Cause Notice for the whole amount for the period February, 2009 to December, 2009 and also imposing penalties from the date of receipt of the Show Cause Notice. The appellant had already paid a sum of Rs. 49,10,998/- along with interest. A balance amount of Rs. 12,02,174/- was paid prior to adjudication. Show Cause Notice has been issued invoking extended period alleging suppression of facts with intention to evade payment of duty. The appellant did not choose to resist the Show Cause Notice and instead had paid the entire service tax along with interest, even without weighing the adjudication order. It is very much clear that the appellant had no intention to evade payment of service tax and that it was only an instance of delayed payment of service tax.

2.3 She relied upon the decision of the Hon'ble High Court of Hyderabad for the State of Telangana and the State of Andhra Pradesh in ***C.C.E., Visakhapatnam Vs. M/s. Tirupathi Fuels Pvt. Ltd. reported in 2017-TIOL-1075-HC-AP-CX***. She also relied upon the decision in the case of ***Shridhar Castings Pvt. Ltd. Vs. Commissioner of Central Excise & Customs, Nagpur [2015-TIOL-1199-CESTAT-DEL], M/s. Jwalla Security Force Vs. Commissioner of Service Tax Cell, Nagpur [2015-TIOL-2397-CESTAT-MUM]*** and also a Final Order passed by this Tribunal (***Final Order No. 41943/2018 dt. 06.07.2018***).

3.1 The Ld. AR Shri. S. Govindarajan supported the findings in the impugned order. He submitted that the appellant has not paid the entire service tax before the issuance of Show Cause Notice and therefore, cannot seek relief under Sub-section 3 of Section 3 of the Finance Act, 1994. Further, the appellant has collected service tax and the same has not been deposited with the Government. This itself would show that the appellant is guilty of suppression of facts with intention to evade payment of service tax.

3.2 That they have not filed ST-3 returns and therefore, the ingredients of Section 78 are attracted and the penalty imposed is legal and proper.

4. Heard both sides.

5.1 The appellant is contesting only the equal penalty imposed under Section 78 of the Finance Act, 1994. In page 29 of the Appeal

Memorandum, the appellants give the details of the payments made, which is reproduced as under :

Date	**Service Tax (in Rs.)**	**Interest (in Rs.)**	**Remarks**
--	1,23,267/-		Through CENVAT Credit
1-6-2009	3,00,000/-		By GAR 7
27-1-2010	13,61,501/-	1,39,844/-	--do--
20-2-2010	2,55,000/-	26,248/-	--do--
22-2-2010	5,29,359/-	49,397/-	--do--
22-2-2010	3,96,614/-	32,772/-	--do--
22-2-2010	5,07,195/-	36,310/-	--do--
24-2-2010	2,73,350/-	16,745/-	--do--
24-2-2010	4,69,560/-	23,747/-	--do--
24-2-2010	6,95,152/-	27,482/-	--do--
24-2-2010	5,16,741/-	25,766/-	--do--
27-5-2010	6,85,434/-	34,422/-	--do--
TOTAL	**61,13,273/-**	**4,12,733/-**	

5.2 The Show Cause Notice was issued on 12.04.2010. It can be seen that the appellant has paid a substantial amount prior to issuance of Show Cause Notice. The Ld. Counsel submitted that the short payment was because of financial shortage of funds and due to administrative difficulties. It is her case that in the Manpower Supply Recruitment Services, there is much problem of receiving the payments in due time and therefore, the appellants could not discharge the service tax within time. That on being pointed out, the appellant has made all efforts to raise funds and pay up the entire service tax liability. The Hon'ble High Court of Hyderabad for the

State of Telangana and the State of Andhra Pradesh in the case of *M/s. Tirupathi Fuels Pvt. Ltd. (supra)* has observed that the law does not treat all cases of suppression of facts alike. This indicates that when the short payment is due to some wilful act of suppression, fraud or collusion only the penalty would be attracted.

5.3 Apart from non-filing of ST-3 returns and non-payment of service tax, the Department has not been able to point out any deliberate act on the part of the appellant to evade payment of service tax. The Ld. Counsel has submitted that due to shortage of funds and due to non-availability of details, they were not able to file the ST-3 returns and discharge the service tax. That apart from a mere sentence that there is *prima facie* case of suppression of facts and intention to evade payment of service tax, there is no evidence discussed in the impugned order as to what is the suppression on the part of the appellant. The Tribunal in a similar set of facts in Final Order cited *supra* had discussed the imposition of penalty and has observed as under :

> *"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 assessees 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."*

5.4 Following the decisions relied on by the Ld. Counsel for the appellant, we are of the view that the imposition of penalty under Section 78 is unwarranted and 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 78 without disturbing the remaining part of the order.

6.1 The Department has filed Miscellaneous Applications ST/Misc[CT]/41144/2017 for change in the name of the respondent in the cause title of Appeal Nos. ST/00144/2012 consequent to the introduction of G.S.T. and the resultant change in jurisdiction. It is prayed that the name and address of the respondent be changed to :

"The Commissioner of G.S.T. & Central Excise,
Chennai South Commissionerate,
MHU Complex, 692, Anna Salai,
Nandanam, Chennai 600035"

6. M.A. filed by the Department for change in cause title is allowed. Registry is directed to amend the cause title as prayed for. The appeal is thus partly allowed in the above terms, with consequential reliefs, if any.

*(Pronounced in open court on **06.08.2018**)*

(Madhu Mohan Damodhar)
Member (Technical)

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

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