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

Appeal No.: ST/00280 & 00281/2011

Sl. No.	Appeal No.	Appellant	Respondent
1.	ST/280/2011	M/s. Jayem Automotive Ltd.	Commissioner of Central Excise, Coimbatore
Arising out of Order-in-Original C. No. V/CES-TICS/15/64/2009 ST-Adj. Order Sl. No. 02/2011-ST-Commr. dt. 27.01.2011 passed by the Commissioner of Central Excise, Customs and Service Tax, Coimbatore.			
2.	ST/281/2011	M/s. Jayem Automotive Ltd.	Commissioner of Central Excise, Coimbatore
Arising out of Order-in-Original C. No. V/CES-TICS/15/57/2010 ST-Adj. Order Sl. No. 03/2011-ST-Commr. dt. 28.01.2011 passed by the Commissioner of Central Excise, Customs and Service Tax, Coimbatore.			

Appearance:-
Shri. K. Rajendran, Consultant
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:29.08.2018

Date of Pronouncement:18.09.2018

Final Order No. *42481-42482 / 2018*

Per Bench :

The appellants, among other activities, are engaged in providing various services. On the strength of intelligence gathered, officers visited their premises and on verification of accounts, it was found that the appellants though collected service tax, had not deposited the same to the Government for the periods from 2006-07 to 2008-09 (up to December, 2008). Show Cause Notice was issued proposing to demand service tax along with interest and also for imposing penalties. After due process of law, the Original Authority confirmed the demand of Rs. 4,15,70,262/- along with interest and imposed penalty of Rs. 5,000/- under Section 77 and penalty equal to the tax demand under Section 78 of the Finance Act, 1994. Aggrieved, the appellant has filed Appeal No. 280/2011.

2. For the subsequent period, a separate Show Cause Notice was issued and after adjudication, Order-in-Original dated 28.01.2011 was passed wherein the Commissioner confirmed the service tax to the tune of Rs. 1,40,64,132/- along with interest and imposed penalty of Rs. 5,000/- under Section 77 and Rs. 1,40,64,132/- under Section 76 of the Act ibid. Aggrieved, the appellant has filed Appeal No. ST/281/2011.

3.1 On behalf of the appellant, Ld. Consultant Shri. K. Rajendran submitted that the appellant paid up the entire demand and therefore, is presently confining the contest in the appeal upon the penalties imposed under Sections 76 and 78 of the Finance Act, 1994. It is his case that the appellant could not discharge the service tax during the relevant period since the company was undergoing much financial crisis. There was frequent change of persons in Accounts Section and they could not make necessary arrangements so as to coordinate their accounts for filing the returns. There was no intention to evade payment of service tax and the delay occurred only because the appellant was unable to pay the amount since the company was facing much financial hardship; that they have deposited the entire service tax along with interest and therefore, pleaded that the penalties imposed may be set aside.

3.2 The appellants contended that they could not pay the service tax amount as they found it difficult to meet their day-to-day expenses including salary, electricity payment, etc. Such payments were given priority so as to sustain the business. There was no motive to evade payment of service tax and their only intention was to run the business so as to give salary to their workers. This was done purely on humanitarian grounds only to feed their workers. With much effort, they have raised the amount and paid a substantial part before passing of the adjudication Order.

3.3 It is also argued by them that there is no iota of evidence to show that appellants have suppressed facts with intention to evade payment of service tax for the reason that the demand has been raised on the basis of the figures maintained in the accounts of the appellant. The Department has no case that the appellants have hidden any transactions. The only reason for non-payment was due to lack of funds during the relevant period.

3.4 Ld. Consultant also pointed out that in Appeal No. ST/281/2011, the penalty is imposed under Section 76 of the Act ibid. An amount of Rs. 1,40,64,132/- has been imposed by the Commissioner. The said calculation is wrong and when calculated on the basis of the delay caused as provided under Section 76 ibid., the penalty would come only to Rs. 26,46,646/-. That, therefore, there is an error in calculating the penalty imposed under Section 76 ibid.

4.1 The Ld. AR Shri. K. Veerabhadra Reddy supported the findings in the impugned Order. He submitted that financial crisis cannot be a ground to set aside the penalties imposed invoking Section 80 of the Finance Act, 1994. The appellants had obtained the Service Tax Registration and were filing service tax returns up to 2005-06. After that they neither paid the service tax nor filed their returns. Though they collected service tax, the same was not deposited with the Government. This is a clear indication of suppression of facts and therefore, the penalty imposed under Section 78 of the Finance Act is legal and proper.

4.2 So also, since there is an admitted delay in paying the service tax, the penalty imposed under Section 76 ibid. is also legal and proper. However, the Ld. AR fairly conceded that there is error in calculation of the penalty imposed under Section 76 in Appeal No. ST/281/2011.

5. Heard both sides.

6. The appellant has confined the contest to the penalties imposed. In Appeal No. ST/280/2011, the penalty is imposed under Section 78 whereas in Appeal No. ST/281/2011 the penalty imposed is under Section 76 of the Finance Act, 1994.

7.1 The Ld. Counsel for appellant has submitted that their failure to make the payment was because the appellant was under much financial crisis during the disputed period. Even in the reply to the Show Cause Notice, they have stated that the delay/default was due to severe financial crisis. That they have given priority to the day-to-day expenses including salary, electricity payment, etc., so as to sustain the business. Though they made efforts to raise funds to run the company, it did not materialize due to different reasons. They were also expecting refund from income tax to the tune of Rs. 133 lakhs which also did not fructify during the disputed period due to certain procedural and administrative reasons. Immediately after they got the refund from the Income Tax Department, the same was used to pay the service tax liability.

7.2 It can be seen from the contentions put forward as well as the records that the appellants, though initially were paying service tax and were filing returns properly, had defaulted payment of service tax and filing of returns after 2005-06. The company was going through much financial hardship and it took some time for them to recover and for that reason, the service tax liability got accumulated. Nothing is brought out from evidence that there was any positive act of suppression with an intention to evade payment of service tax. Other than the delay caused due to financial crisis, we do not find any material to establish an intention to evade payment of service tax.

7.3 The Hon'ble jurisdictional High Court in the case of ***C.C.E., Coimbatore Vs. M/s. Sasi Advertising Pvt. Ltd. in C.M.A. No. 101/2018 dated 24.01.2018*** had occasion to consider the appeal filed by the Department against the Order passed by the Tribunal, upholding the Order passed by the Commissioner setting aside the penalties imposed. The ground raised by the assessee in that case was that the assessee was undergoing much financial hardship. The Hon'ble High Court held that the penalties imposed under Section 77 and 78 ibid., set aside by the Tribunal invoking Section 80, was correct and proper. The relevant portion of the judgment is reproduced as under :

> *"28. Though Mr. A. P. Srinivas, learned counsel appearing for Customs, Central Excise and Service Tax, reiterated the grounds of challenge, we are not inclined to accept the same for the reason that both the adjudicating authority viz., the Commissioner of Customs, Central Excise, and Service Tax, Coimbatore, as well as the final fact finding appellate authority, CESTAT, Madras, have categorically held that the assessee / respondent has discharged a portion of the interest liability prior to the issuance of the Show Cause Notice.*
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> *29. Perusal of the material on record discloses that the interest payable on the belated payment of service tax was Rs. 12,63,324/- and that even prior to the issuance of the Show Cause Notice, assessee / respondent paid interest amount of Rs. 5,23,151/-. The remaining amount of Rs. 7,40,163/- had been paid on 03.11.2009 immediately on receipt of Show Cause Notice dated 20.10.2009, i.e., within 13 days.*
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> *30. As per Section 80 of the Finance Act, 1994, notwithstanding anything contained in the provisions of Section 77 or 1st proviso to 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.*
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> *31. Going through the reasons assigned by the assessee, on belated payment, we are of the view that the assessee substantiated reasonable cause for the failure in payment of service tax, within the stipulated time and hence, he is entitled to the benefit under Section 80 of the Finance Act."*

7.4 In ***C.S.T., Chennai Vs. Lawson Travel & Tours (I) Pvt. Ltd. – 2015 (38) S.T.R. 227 (Mad.)***, the Hon'ble High Court held that when the assessee faced financial crisis due to criminal breach of trust committed by their sub-agent and thereafter, paid the service tax voluntarily, the penalties imposed have been rightly set aside invoking Section 80. The Tribunal in the case of ***M/s. Dusters Total Solutions Services Pvt. Ltd. Vs. C.S.T., Chennai vide Final Order No. 41943/2018 dated 28.06.2018*** had analysed the invocation of Section 80 to set aside the penalty imposed under Section 76, 77 and 78 of the Act, ibid. The appellant having paid entire demand of service tax along with interest, the prayer for setting aside the penalties, in our view, merits consideration, especially when there is no evidence to show that the delay/default was due to any wilful act to evade payment of duty.

8. From the above discussions and following the ratio laid down in the above case laws, we are of the opinion that this is a fit case to invoke Section 80 since the appellant has put forward reasonable cause for the failure to discharge the service tax liability. We therefore set aside the penalties imposed under Section 76 and 78 of the Finance Act, 1994 without interfering with the penalty imposed under Section 77 of the Act ibid.

9. The impugned Orders are modified to the extent of only setting aside the penalties imposed under Section 76 and 78 of the Act ibid. The appeals are partly allowed in above terms.

*(Pronounced in open court on **18.09.2018**)*

(Madhu Mohan Damodhar)
Member (Technical)

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

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