

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

**Application No. ST/Misc/CT/41605/2017
Appeal No.ST/251/2012**

[Arising out of Order-in-Original No.03/2012 S.Tax/Ch-IV dt. 27.01.2012 passed by Commissioner of Central Excise, Chennai-IV]

World Class Management Service

Appellant

Versus

Commissioner of GST & CE
Chennai South Commissionerate
Chennai

Respondent

Appearance :

Shri S. Sivaramakrishnan, Advocate
For the Appellant

Shri B.Balamurugan, AC (AR)
For the Respondent

CORAM :

Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)
Hon'ble Shri P. Dinesha, Member (Judicial)

**Date of hearing : 13.12.2018
Date of Pronouncement :28.01.2019**

FINAL ORDER No. 40170 / 2019

Per Shri Madhu Mohan Damodhar

The facts of the case are that appellants are engaged in the business of man power supply and registered with the department under "Man Power Supply Agency Service". Pursuant to audit, it appeared to the department that

appellants had not discharged service tax liability amounting to Rs.77,94,334/- for the period from April 2009 and March 2010, although they realized taxable value as well as service tax from their clients. After being pointed out by audit, it appeared that appellants paid part of the arrears and filed the ST-returns for half year ending 30.09.2009 on 27.08.2010. However, ST-3 returns for half year ending 31.03.2010 had not been filed by them. Accordingly, SCN dt. 11.10.2010 was issued to the appellants inter alia, demanding the said amount with interest thereon and also proposing imposition of penalties under various provisions of law. In adjudication, the Commissioner vide impugned order held that appellant was liable for discharge of service tax under 'Manpower Recruitment or Supply Agency Service' on the gross amount charged by them; that they are liable for imposition of penalty. The adjudicating authority confirmed the said amount of Rs.77,94,334/- with interest appropriated the like amount paid by the appellant with interest, and imposed penalties under Section 76 & 77 of the Finance Act, 1994. Hence this appeal.

2. When the matter came up for hearing on 13.12.2018, on behalf of the appellants, Ld.Advocate Shri Siva Ramakrishnan made oral and written submissions which can be broadly summarized as under :

i) Service Receivers of the Appellant Company were taking 5 to 6 months and some times more than 6 months for settling the bills of the Appellant. However, the Appellant was paying Service Tax in advance on billing basis to avoid confusion. Apart fro that, the Appellant had to pay PF and ESI to the Manpower Supplied, on a monthly basis, in addition to making salary payments to the Manpower supplied. This created a huge cash flow problem to the Appellant

and the Appellant were forced to borrow loan at high rates from private financial institutions apart from the bank loans to overcome this perennial problem.

ii) Immediately pursuant to Audit, appellant had arranged private loans and paid Service Tax of Rs.56,96,352/- and Interest of Rs.5,23,793/-. The Appellant was issued with a Show Cause Notice invoking Penalty under Section 76. Balance amount of Rs.20,97,982/- towards Service Tax and Rs.1,61,469/- towards Interest was paid after issue of Show Cause Notice. The Appellant paid the entire Service Tax of Rs.77,94,334/- along with interest of Rs.6,85,262/- by arranging funds from outside on a very high interest.

iii) The payment of the dues by the appellant shown his intention that they want to buy peace. Hence the penalty imposed under Section 76 of the Finance Act, 1994 is not sustainable in law.

iv) In any case the appellant has been paying Service Tax on billing basis and the amounts collected from the Appellant's customers 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) They place reliance on the decision of the Hon'ble Tribunal in Final Order No.41943/2018 in the case of Duster Total Solutions Pvt. Ltd.. Vs. Commissioner of GST & Central Excise, Chennai South; Final Order Nos.42768-42769 / 2018 in the case of M/s.Sri Kalki Enterprises Vs. Commissioner of GST & Central Excise, Chennai and Final Order No.42481-42482/2018 in the case of M/s.Jeyam Automotive Ltd., Commissioner of GST & Central Excise, Coimbatore.

3. On the other hand, Ld. A.R Shri A.R. Balamurugan supports the impugned order. He justifies the imposition of penalty. He also submits that appellant being partnership concern was required to pay service tax by the 5th month of the month immediately following quarter in which the payments towards the value of taxable value of services were received as per Section 68 (1) of the Finance Act, 1994. Appellants not only did not pay tax within the due dates but also withheld the above information by not disclosing to the department in the ST-3 returns. Hence for these reason, there is no ground to interfere with the imposition of penalty.

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

5.1 We find that the identical dispute involving non-discharge of service tax liability in spite of having collected the same from the service recipient had been addressed by CESTAT Chennai in the case of *Jeyam Automotive Vs CCE Coimbatore* vide Final Order No.42481-42482/2018 dt. 18.09.2018 wherein it was held when reasonable cause for the failure to discharge service tax liability was available, and especially there is no evidence to show that that the delay / default was due to any wilful act to evade payment of duty, it is a fit case for invocation of Section 80 of the Act. The relevant portions of the aforesaid decision are reproduced below :

“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.

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.

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.

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.*”

5.2 So also, in the case of *Sri Kalki Enterprises Vs CGST & CE Chennai* vide Final Order No.42768-42769/2018 dt. 23.10.2018, in a case where the appellant had pleaded that financial exigencies as a ground for non-payment of service tax in due time, this Bench held in favour of the appellant in the matter of invocation of imposition of penalty. The relevant portion of the aforesaid order is reproduced below :

“5. The appellant is contesting the penalties imposed only. In Appeal No. ST/300/2012, the adjudicating authority has imposed a penalty under section 76 and in Appeal No. ST/301/2012, the adjudicating authority has imposed penalty under section 78 of the Finance Act, 1994. The Id. consultant has furnished documents to argue that there was only delay in payment of service tax and there was no act of suppression of facts with intention to evade payment of service tax. On perusal of the documents such as the list of sundry debtors etc., it is seen that there was huge amount pending as receivables. So also they had to meet expenses for salary, accident compensation of employees provided under manpower supply service. The department does not have a case that any of the transactions were unaccounted or that they had been indulging in a parallel accounting. It is commonly understood that the employees supplied through manpower supply service have to be given the salaries within due time. If the service receivers delay the payment, it would cause much hardship to the service provider as they have to make the statutory payments such EPF, ESI etc. to the Government. Therefore, we find that the appellant has put forward reasonable cause for not paying the service tax within due time and is a fit case for invoking Section 80 of the Finance Act for setting aside the penalties. We hold that the impugned order is modified to the extent of setting aside the penalties imposed under sections 76 as well as 78 in these appeals. The appeals are partly allowed in the above terms, with consequential relief, if any.”

5.3 We find that the facts and circumstances of the above two decisions are *pari materia* and that of the appeal at hand. Applying the same ratio, we have no hesitation in holding that while the demand of tax liability is very much justified, imposition of penalty under Section 76 of the Finance Act, 1994 is not justified since there was reasonable cause for failure of the appellant to discharge tax liability. However, the penalty imposed under Section 77 *ibid* is fully justified and no interference is made with the same. So ordered.

6. Appeal is therefore partly allowed by way of setting aside of penalty imposed under Section 76 of the Finance Act, 1994. The MA filed by Revenue for change of cause title consequent to the introduction of GST and the resultant change in the jurisdiction, is allowed.

(Order pronounced in court on 28.01.2019)

(P. Dinesha)
Member (Judicial)

(Madhu Mohan Damodhar)
Member (Technical)

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