CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHENNAI

REGIONAL BENCH – COURT NO. I

Service Tax Appeal No. 42433 of 2018

(Arising out of Order-in-Appeal No. 119/2018-ST dated 23.07.2018 passed by the Commissioner of G.S.T. & Central Excise (Appeals), Coimbatore, Circuit Office @ Salem Commissionerate, No.1, Foulke's Compound, Anai Road, Salem – 636 001)

M/s. E3 Innovations, **: Appellant**
18-6A, Adaikala Nagar,
Hasthampatty,
Salem – 636 007

VERSUS

The Commissioner of G.S.T. & Central Excise, **: Respondent**
Salem Commissionerate,
No.1, Foulks Compound, Anaimedu,
Salem – 636 001

APPEARANCE:

Shri. Ganesh Prabhu, Consultant for the Appellant

Shri. B. Balamurugan, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. P. DINESHA, MEMBER (JUDICIAL)

FINAL ORDER NO. 40899 / 2019

DATE OF HEARING: 13.06.2019

DATE OF DECISION: **04.07.2019**

By this appeal, the assessee is questioning the issuance of Show Cause Notice invoking the extended period of limitation, apart from levy of penalty under Section 78 of the Finance Act, 1994.

2. Shri. Ganesh Prabhu, Ld. Consultant, appeared for the assessee and Shri. B. Balamurugan, Ld. AR, appeared for the Revenue.

3. Shri. Ganesh Prabhu, Ld. Consultant, made a number of submissions which in brief, are as under :

(i) The audit of accounts by the Revenue was conducted on 02.12.2015 for the period from July 2010 to September 2015 and the Show Cause Notice is dated 24.10.2016;

(ii) There is an assertion that the alleged non-payment/short payment was paid much before the issuance of Show Cause Notice and therefore, by virtue of Section 73 (1) and 73 (3) of the Finance Act, 1994, no Show Cause Notice ought to have been issued;

(iii) By the Order-in-Original, the Adjudicating Authority has appropriated the tax paid along with interest and therefore, what has remained is only the penalty imposed under Section 78 ibid.;

(iv) The Adjudicating Authority has relied on the Point of Taxation Rules ('POTR' for short), 2011, whereas the method of accounting followed (mercantile system) required the appellant to record in their books even the invoices raised, but the payment not received, which has been held to be the amount received, which *per se* would not amount to suppression, etc.

(v) There is a clear observation by the Adjudicating Authority that Service Tax was paid on bills raised, which was clearly the case of the appellant also because of the method of accounting followed and that in any case, the *bona fides* of the appellant have not been doubted;

(vi) The demand has been raised alleging non-payment/short payment based on the Revenue audit, which only went by the Books of Account, P&L Account and balance-sheet to be precise and hence, there was nothing that was suppressed, for invoking the larger period of limitation;

(vii) The Adjudicating Authority himself has, in the table at page 6 (paragraph 6.1) of the Show Cause Notice, recorded *inter alia* the gross receipts as per the P&L Account and gross receipts as per ST-3 and hence, there was no question of suppression;

(viii) In any case, the scope and applicability of Section 78 is governed and controlled by Section 80 ibid., which only indicates that the same is not mandatory in nature, etc.

And pleaded for setting aside the impugned order and deleting the penalty imposed by the Adjudicating Authority which has been confirmed, in appeal, by the Commissioner of G.S.T. and Central Excise (Appeals), Coimbatore, Circuit Office at Salem Commissionerate vide impugned Order-in-Appeal No. 119/2018-ST dated 23.07.2018.

4. Shri. B. Balamurugan, Ld. AR, on the other hand, supported the findings of the lower authorities.

5. I have considered the rival contentions and gone through the documents/orders of the lower authorities placed on record.

6. The Revenue has not disputed the assertion of the appellant that the tax portion was paid along with interest much before the issuance of Show Cause Notice and even the Order-in-Original has appropriated the Service Tax to the extent of Rs. 34,90,385/- as against the demand of Rs. 35,41,407/-.

7.1 In the Show Cause Notice, the Adjudicating Authority has after verification of records found that the Service Tax was not paid based on the bills raised, as per the provisions of POTR, 2011; some bills were raised without charging Service Tax and some payments were received without raising any bills, to which the Ld. Consultant for the appellant has answered stating that it was the method of accounting that was regularly followed by the appellant that required recording of the amounts in the bills raised and that in some cases, the appellant had not even charged Service Tax.

7.2 Further, at page 6 (paragraph 6.1) of the Show Cause Notice, while discussing the applicability of extended period, the Adjudicating Authority has *inter alia* apparently picked up the gross receipts as per the P&L Account and gross receipts as per ST-3 from the appellant's books and thereafter, has quoted Section 73 (1) ibid., but however, has not discussed anywhere as to the misconduct in the nature of fraud, collusion, wilful mis-statement, etc. It is a settled position of law that mere quoting of a Section or Sub-Section leads to nowhere unless the Revenue discharges the initial burden. Further, there is no doubt that the leviability of penalty under Section 78 is not mandatory and the same is controlled by Section 80 ibid. Even the Ld. Commissioner (Appeals) though recorded that Section 73 (4) prevails over Section 73 (1) and (3), but still, there is no recording of any finding as to the conduct of the appellant that could be termed as fraud, etc.

7.3 The Hon'ble jurisdictional High Court in the case of ***Commissioner of Central Excise, Puducherry Vs. M/s. Pondicherry Paper Ltd. reported in 2014 (1) E.C.S. (51) (HC – Mad.)*** has held that there is no justification for imposition of penalty especially when there is no allegation of fraud, mis-representation, etc., after following various judgements of the Hon'ble Apex Court which are referred to therein. I note that this above view of the Hon'ble High Court has also been reiterated in the case of ***M/s. Mahadev Logistics Vs. Cus. & C.Ex. Settlement Commission, New Delhi reported in 2017 (3) G.S.T.L. 56 (Chhattisgarh)***

8. In the light of the above discussions and for the above reasons, I am of the considered opinion that the penalty under Section 78 ibid could not have been levied and therefore, the impugned order to this extent is set aside.

9. The appeal is allowed by deleting the impugned penalty.

(Order pronounced in the open court on **04.07.2019**)

(P. DINESHA)
MEMBER (JUDICIAL)

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