

**IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL, CHENNAI**

Service Tax Appeal No.40764 of 2013

(Arising out of Order-in-Appeal No. MAD-CEX-000-APP-313-12 dated 21.12.2012 passed by the Commissioner of Central Excise (Appeals), Madurai)

M/s. Susee Auto Sales & Service (P) Ltd.

Appellant

Theni Main Road
Kalavasal, Madurai – 625 016.

Vs.

Commissioner of GST & Central Excise

Respondent

Central Revenue Buildings
Bibikulam, Madurai – 625 002.

APPEARANCE:

Shri S. Ramamurthy, Advocate for the Appellant
Shri N. Satyanarayanan, AC (AR) for the Respondent

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Hon'ble Shri M. Ajit Kumar, Member (Technical)

Final Order No.40619/2023

Date of Hearing : 25.07.2023

Date of Decision: 31.07.2023

This appeal is filed by the appellant against Order-in-Appeal No. 313/2012 dated 21.12.2012 passed by the Commissioner of Central Excise (Appeals), Madurai.

2. Brief facts of the case are that the appellants herein who are registered with the Service Tax Department are engaged in providing 'Authorized Service Station' and 'Business Auxiliary Service'. They are providing services on repair and reconditioning of two-wheeler motor vehicles and the motor cars manufactured by M/s. Bajaj Auto Ltd. and M/s. Mahindra & Mahindra through their authorized service stations and also are providing 'Business Auxiliary Services' to various bank and financial institutions. During the course of verification of accounts of

the appellant by the Department, it revealed that the staff of the appellant were carrying out the functions / activities like processing of purchase orders, distribution and logistics, accounting and processing of transactions for on behalf of their sister concerns and that the above charges were debited in the accounts of the sister concerns and credited to the accounts of the appellant at the end of each financial year. Hence the department came to the conclusion that the appellant was not discharging service tax on the amounts collected as 'Administrative and Handling Charges' from their sister concerns as the services fall under 'Business Support Services' as defined under section 65(104)(c) r/w section 65(105)(zzzq) of the Finance Act, 1994 for the period 2006-07 to 2007-08. On being pointed out by the department that the appellants are liable to pay service tax on the services provided to their sister concerns with effect from 1.5.2006, the appellant before issue of Show Cause Notice had voluntarily paid the service tax amount of Rs.6,76,675/- on 19.5.2009 and interest of Rs.1,83,385/- on 3.3.2010 and 4.3.2010. However, Show Cause Notice dated 28.12.2010 was issued to the appellant proposing to recover the service tax demand along with interest and for imposing penalty and to appropriate the amounts already deposited by the appellant towards service tax demand and interest. After due process of law, the original authority confirmed the demand along with interest and imposed equal penalty of Rs.6,76,675/- under section 78 of the Finance Act, 1994 besides imposition of penalty under sec. 77 of the Act *ibid*. In appeal, Commissioner (Appeals) upheld the adjudication order. Hence this appeal.

3. No cross-objections were filed by the respondent-department.

4. Shri S. Ramamurthy, learned counsel appeared for the appellant and Shri N. Satyanarayanan, learned AR (AC) appeared for the respondent.

5. The learned counsel for the appellant submitted that the appellant is not contesting either the service tax demand nor the interest. He confined the contest only to imposition of penalty imposed under sections 77 and 78 of the Finance Act, 1994. He submitted that the appellants on being pointed out that their activities to their sister concern would attract levy of service tax under 'Business Support Service', discharged the service tax demand along with interest much before issue of Show Cause Notice. Since the appellants were under financial difficulty, they could not deposit the monies immediately but they made good before issue of Show Cause Notice. He submitted that the appellant was under bonafide belief that they are not liable to service tax for the services rendered to their sister concerns. They have also not collected the service tax amount from their sister concerns. A mere averment in the Show Cause Notice that the appellant had suppressed the fact cannot mean that mens rea is established. Section 73(3) of Finance Act, 1994 imposes a bar on the issuance of a Show Cause Notice where an assessee has voluntarily paid the service tax demand along with interest. The expression 'shall not service any notice' imposes an absolute bar against the issue of any notice or initiation of any proceedings in relation to the amount which has been deposited by the assessee. He relied on the decision of the Tribunal in the case of Hospitech Management Consultants Pvt. Ltd. Vs. CST (2023) 7 CENTAX 134 (Tri. Del.) to submit that extended period of limitation for raising demand under proviso to section 73(1) of Finance

Act, 1994 could not be invoked if alleged suppression of facts was not willful with an intent to evade payment of service tax. He therefore pleaded that the penalty imposed under sections 77 and 78 may be set aside.

6. The learned AR Shri N. Satyanarayanan reiterated the findings in the impugned order and submitted that but for audit, the demand would have not come to light and the appellants would have escaped from paying service tax. He also submitted that the appellants after repeated reminders by the department vide letters dated 13.7.2009 and 2.12.2009 had deposited the interest amount on 3.3.2010 and 4.3.2010. Hence extended period was rightly invoked and the penalty under section 78 is imposable as suppression by the appellant was unearthed only by the department on verification of accounts.

7. I have heard both sides and perused the records. I find that the appellant is not contesting either the service tax demand nor the interest. He confined the contest only to imposition of penalty imposed under sections 77 and 78 of the Finance Act, 1994. On being pointed out by the department that they are liable to pay service tax, the appellant before issue of Show Cause Notice, had voluntarily paid the service tax amount of Rs.6,76,675/- and interest of Rs.1,83,385/-. They had also not collected service tax on the services rendered.

7.1. Service tax on "Support Services of Business or Commerce" came into force from May 2006. In the initial period there was some confusion on the nature of services covered by the said declared service. Of the service tax amount paid, Rs 6,41,376/- was paid for the period 2006-07 and only Rs 35,300/- pertained to 2007-08. With the appellant accepting and paying tax with interest before issue of SCN,

the matter should have been closed and allowed to rest in terms of section 73 (3) of the Finance Act, 1994. The action would have been seen in the spirit of the department being facilitators of trade.

7.2 While there is no discretion in the imposition of mandatory penalties, the adjudicating authority has to examine whether the situation calls for such a penal provision to be invoked once duties along with interest were also seen to be safeguarded as per the voluntary action of the appellant. Penalties need not be imposed merely because a legal provision provides for it. It is the discretion of the authority to examine whether the law requires the provision to be enforced. It has to be exercised judicially and in consideration of all the relevant circumstances, bound by the rules of reason and law. In the peculiar circumstances of this matter, the appellant should have been given the benefit of doubt, if any.

8. Based on the discussions above I find that the penalty imposed and upheld under sections 77 and 78 of the Finance Act 1994, by the impugned order, merits to be quashed and is so ordered. The impugned order is modified accordingly. The appeal succeeds with consequential relief, if any, as per law.

(Pronounced in open court on 31.07.2023)

(M. AJIT KUMAR)
Member (Technical)