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

ST/40/2011 (By Assessee) and ST/68/2011 (By Dept.)

(Arising out of Order-in-Original No.11/2010 dated 29.10.2010 passed by the Commissioner of Customs, Central Excise and Service Tax, Coimbatore)

M/s. Artemis HR Services CBE (P) Ltd.
Commissioner of Central Excise, Coimbatore Appellants

Vs.

Commissioner of Central Excise, Coimbatore
M/s. Artemis HR Services CBE (P) Ltd. Respondents

ST/423/2012 (By Assessee) and ST/446/2012 (By Dept.)

(Arising out of Order-in-Original No. 2/2012 dated 30.3.2012 passed by the Commissioner of Customs, Central Excise and Service Tax, Coimbatore)

M/s. Artemis HR Services CBE (P) Ltd.
Commissioner of Central Excise, Coimbatore Appellants

Vs.

Commissioner of Central Excise, Coimbatore
M/s. Artemis HR Services CBE (P) Ltd. Respondents

Appearance

Shri M.N. Bharathi, Advocate for the Assessee
Shri A. Cletus, Addl. Commissioner (AR) for Revenue

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Hon'ble Ms. Sulekha Beevi C.S., Member (Judicial)
Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)

Date of Hearing :20.12.2018
Date of Pronouncement :14.01.2019

Final Order Nos. **40055-40058 / 2019**

Per Bench

The issue involved in all these appeals being the same, they are heard together and are disposed by this common order. The parties are referred to as assessee and department for sake of convenience.

2. Brief facts are that the assesse were issued show cause notices for different periods alleging short-payment of service tax under the category of Business Support Service. After due process of law, the original authority confirmed the demand, interest and penalties. Hence these appeals.

3. The details of the appeal, the period of dispute and the amount involved is given below as furnished by the assessee:-

Appeal No.	OIO No.	Period of dispute	Amount Involved
ST/40/2011 ST/68/2011	11/2010 dated 29.10.2010	April to Dec. 2008	Rs.2,59,20,009/- along with interest and penalties
ST/423/2012 ST/446/2012	02/2012 dated 30.3.2012	Jan. 2009 to March 2010	Rs.2,52,41,055/- along with interest and penalties

4. Appeal ST/446/2012 is filed by department against the order passed by Commissioner who imposed penalty only under section 76 and did not impose penalty under section 78 of Finance Act, 1994. Appeal No. ST/68/2011 is filed by department against Order-in-Original dated 29.10.2010

contending that Commissioner has appropriated Rs.2,59,20,009/- without proper verification.

5.1 On behalf of the assessee, ld. counsel Shri M.N. Bharathi submitted that the assessee has paid up the liability and is confining the contest in these appeals only on the penalties imposed under section 78 of the Finance Act, 1994. He submitted that the primary activity of the assessee was to release the salary payments and payments for the infrastructure bills incurred by companies like ICICI Bank Ltd., Cholamandalam DBF Finance Ltd. and Fullerton Credit India Ltd. The bills incurred by these companies are paid out by the assessee and later reimbursed by these companies to the assessee. Initially they had raised computerized bills for the amount reimbursed along with the service charges and applicable service tax thereon. The assessee met with financial crisis when one of the companies / clients M/s. Rank Investments and Credits (India) Ltd. defaulted their payments to the tune of Rs. One crore continuously which locked up paying the tax for a short period. The assessee has paid the entire tax demand along with interest in spite of their financial crunch. The delay in payment was only due to the financial constraints which occurred due to sudden plunge in the business during the year 2008 when the above said client defaulted to make payments to the assessee. The assessee has produced certificate from the statutory auditor to establish that M/s. Rank

Investments and Credits (India) Ltd. had defaulted in making the payments to the assessee. There is no suppression of any material fact with intention to evade payment of tax on the part of the assessee. Their books have been periodically audited and no unacounted information has been unearthed by the department from any source. Hence the imposition of penalty under section 78 of the Finance Act is not sustainable. He relied upon the following case laws:-

a. M/s. Sri Kalki Enterprises Vs. Commissioner of GST & Central Excise, Chennai Final Order No. 42768 & 42769/2018 dated 23.10.2018.

b. M/s. Jayem Automotive Ltd. vs. Commissioner of Central Excise, Coimbatore – Final Order No. 42481 & 42482/2018 dated 18.9.2018.

c. Collector Vs. Chemphar Drugs – 1989 (40) ELT 276 (SC)

d. M/s. Phawa Chemicals Vs. Commissioner of Central Excise – 2005 (189) ELT 257 (SC).

5.2 The ld. Counsel also submitted that their bonafide act stands substantiated by their conduct in paying up the service tax amount along with interest. He argued that the penalty imposed under section 78 may be set aside invoking section 80 of the Finance Act 1994.

6. The ld. AR Shri A. Cletus supported the findings in the impugned order. He stressed on the fact that the assessee has raised invoices / bills showing the service tax separately. When they have collected the service, they ought to have deposited

the amount to the Central Government. Therefore, there is suppression of facts on the part of the assessee and the penalty imposed under section 78 is legal and proper.

7. Heard both sides.

8. The ld. counsel has argued on the issue of imposition of penalty only. From the facts on records as well as the submissions made, it is seen that the assessee has discharged the service tax along with interest. The show cause notices have been issued invoking sections 73 and 73A of the Finance Act, 1994. As per Section 73A, the assessee is duty bound to deposit the amount collected as service tax with the Central Government. However, the said section does not provide for imposition of penalty for non-failure to comply with the said provision. The show cause notices have invoked section 73 also. Though the ld. AR has argued that there is suppression of facts on the part of the assessee, the impugned order or the show cause notice does not specifically state what is the particular act of suppression on the part of the assessee. In many cases, the Hon'ble Supreme Court has observed that 'fraud' appears along with willful suppression of facts and misstatements. Therefore there should be some deliberate and positive act on the part of the assessee with intention to evade payment of service tax in order to constitute willful suppression of facts for imposing penalty. We do not find any such positive act forthcoming from the facts of these appeals. In fact, it is brought out from the

records that the assessee had suffered huge financial hardships due to the default on the part of one of the clients to pay up an amount of Rs.1,44,04,726/- to the assessee. The statutory auditor has given certificate showing that this amount was outstanding from their client M/s. Rank Investments and Credits (India) Ltd. The assessee is engaged in the business of making payments of salaries and outstanding bills on infrastructure of these clients. Only if they receive the amounts from their clients, without any delay, they would be able to pay up or continue their business. It can be understood that their financial stability got locked up and they had to suffer financial hardships. The case of the assessee that they had delayed in paying the service tax only due to such financial crunch is established. The contention of the department that there is suppression of facts with intention to evade payment of service tax is not supported with any evidence. For these reasons, we are of the view that there are no grounds to impose penalty under section 78. In Order-in-Original No. 2/2012 dated 30.3.2012, the adjudicating authority has imposed penalty under section 76 and no penalty was imposed under section 78. In Appeal ST/446/2012 filed by department, penalty under section 78 also has to be imposed. This is against law. Further, we have already held that there are no ingredients to impose penalty under section 78. The appellants have established that the delay in payment of service tax was due to the default of one of the clients and consequent financial hardships. They have given reasonable cause for failure and we hold that it is a fit case for invocation of Section 80 to set aside the penalties. The Hon'ble jurisdictional High Court in the case of K. Gopalakrishnan Vs. Commissioner of Central Excise, Chennai – 2017 (7) GSTL 292 (Mad.) had occasion to analyze a similar issue with respect to imposition of penalty under section 78 and observed that bonafide omission will not lead to conclusion of suppression under section 78 of Finance Act. The Tribunal in the case of Jayem Automotive Ltd. vide Final Order referred supra had considered a similar issue of imposition of penalty under section 76 as well as 78 and held that when there is no sufficient evidence to prove that there has been deliberate act on the part of the assessee to suppress facts and to evade payment of service tax, penalty cannot be imposed. The relevant portion of the order is reproduced as under:-

> *"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.*
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> *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. Appeal No. ST/68/2011 has been filed by department contending that proper verification has not been done after appropriating the amount of Rs.2,59,20,009/- already paid by appellant. In the grounds of appeal, it is stated that during personal hearing, the appellants submitted details of payment of Rs.2,60,31,147/- towards service tax liability of Rs.2,59,20,009/-. In para 10 of show cause notice, the payments already made is shown as Rs.1,65,00,000/- from 2.1.2009 and 10.2.2009. As per para 8 of the impugned order, in order to verify correctness of service tax liability, the premises was visited by officers on 12.3.2009, 27.3.2009, 2.4.2009, 10.4.2009,22.4.2009, 27.4.2009 and 30.4.2009. Therefore, the contention of department that the payments made on 30.4.2009, 13.3.2009 and 26.5.2009 have not been verified and require verification is without any factual basis. The Commissioner having appropriated the amount of Rs.2,59,20,009/- already paid, we hold that the appeal filed by department on this ground is without any merits. Appeal No.ST/68/2011 is dismissed.

10. From the above discussions, we are of the view that the penalty imposed under sections 76 and 78 in these appeals

cannot sustain and requires to be set aside, which we hereby do. The impugned orders are modified to the extent of setting aside the penalties imposed under sections 76 and 78 of Finance Act, 1994 without disturbing the demand or interest thereon. We do not interfere with the penalty imposed under section 77. The appeals filed by assessee are partly allowed. The appeals filed by department are dismissed.

(Pronounced in court on 14.01.2019)

(**Madhu Mohan Damodhar**)
Member (Technical)

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

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