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CUSTOMS. EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066
SINGLE MEMBER APPEAL BRANCH

Appeal No. ST/280 /2008 - SM[BR] Date 10/09/2008

Assistant Registrar
C.E.S.T.A.T, New Delhi

To :
M/S BHAGWATI SECURITY SERVICES (REGD.)
1ST FLOOR, KAMAL MARKET,BRIJESH
NAGAR,PAPER MILL ROAD,SAHARANPUR (U.P.)

M/S BHAGWATI SECURITY SERVICES (REGD.) Appellant
Vs
C.C.E. MEERUT I Respondent

I am directed to transmit herewith a certified copy of **Final order No. 1302 /2008 –SM[BR]** dated **22.8.2008** passed by the Tribunal under Section 129, (B) of the Customs Act,1962 & Financial Act 1994 relating to Service Tax

Assistant Registrar
(SM Appeal Branch)

Copy to :
1. Respondent
C.C.E. MEERUT I
EXCISE CHOWK, UNIVERSITY ROAD, MANGAL PANDEY NAGAR, MEERUT - 250005.
2. Adv. / Consult
MR.AALOK ARORA, ADVOCATE
82-MISSION COMPOUND, SAHARANPUR-247001 (U.P.)
3. S.D.R.
4. ~~J.C.D.R.~~
5. Bar association, CESTAT, New Delhi
6. M/s. Deeparchi Publications, M-93, Marg. 46, Saket, New Delhi 110017
7. M/s Centax Publictions (P) Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi -
8. Excise & Customs cases, B-37, Sector -1, NOIDA - 201301 Gautam Budh Nagar, (U.P.)
9. Raghuraman's 44-B, Regal Flat,Shipra Suncity, Indirapuram - 201010,Ghaziabad, DT, U.P.
10. Nidheshak publications, I.P.Estate, new Delhi
11. Taxmann Allied Service Pvt Ltd., 21/35, West Punjabi Bagh, New Delhi - 110026
12. Commercial Laws of India Pvt Ltd Post Bag No. 1033, No.70(Old No. 88), Thyagaraya Road, T. Nagar,Chennai 60017
13. Taxindiaonline.com Pvt.Ltd, B-XI/8183,Vasant Kunj, New Delhi - 110070
14. Easy Service Tax Online Dot Com Pvt. Ltd. 407A, Iscon Mall, Above Star India Bazar, Satellite Road, Ahmedabad - 15
15. Office Copy
16. Guard file

Assistant Registrar
(SM Appeal Branch)

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, COURT No.I
NEW DELHI

Service Tax Appeal No. 280/2008/SM(BR)

(Arising out of order in appeal No.30/CE/MRT-I/2008 dated 31.1.2008 passed by the Commissioner of Central Excise (Appeals), Meerut-I)

For approval and signature:

Hon'ble Mr. Justice S.N. Jha, President

1	Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	No
2	Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	Yes
3	Whether Their Lordships wish to see the fair copy of the Order?	No Seen
4	Whether Order is to be circulated to the Departmental authorities?	Yes

Date of Hearing/ Decision: 22.8.2008

M/s Bhagwati Security Services — Appellant
(Rep. by Shri Alok Arora, Advocate)

Vs

CCE, Meerut-I — Respondent
(Rep. by Shri R.K. Verma, DR)

Coram: **Hon'ble Mr. Justice S.N. Jha, President**

Final **ORDER No.** 1302/08-SM(BR)

Per Justice S.N. Jha:

This appeal by the assessee is directed against the order- in-appeal upholding the order-in-original of the Assistant Commissioner with modification. The Assistant Commissioner had confirmed demand of service tax of Rs. 2,36,114 with interest thereon under Section 75 and imposed penalty at the rate of Rs.200 every day for default of payment of service tax under Section 76 (of Finance Act 1994) directing that the penalty shall not exceed the amount of service tax due from the appellant. Penalty of Rs.1,000 under Section 77 for non-filing of ST-3 return was also imposed. By the order-in-appeal, the Commissioner (Appeals) reduced the demand by Rs.11,244 directing that the same may be adjusted against interest and penalty. The penalty under Section 76 was also reduced to Rs.100 instead of Rs.200 per day. With these modifications, order of the Assistant Commissioner was upheld.

2. It may be stated here that the duty demand was earlier adjudicated by the Deputy Commissioner vide order dated 24.9.2002 holding the appellant liable to pay service tax of Rs. 2,36,114 under Section 68 and penalty of Rs.4,000/- under Section 77, besides interest in the manner detailed in the order. On appeal by the assessee-appellant, the Commissioner (Appeals) vide his order dated 30.7.2003 reduced the penalty to Rs.20,000/- under Section 76. The impugned order of the Deputy Commissioner was otherwise upheld. The appellant filed appeal in the Tribunal bearing Appeal

No.38/2003-SM(BR) which was decided by a Single Member Bench vide order dated 12.6.2006. The Tribunal found force in the appellant's contention that the service tax is to be worked out on the amount received by them inclusive of service tax. The Tribunal passed the following order:-

"5. *Considered the submissions made by both sides and perused the record. I find that the appellants have been taking a stand consistently, before the lower authorities that they have realized only the gross amount charged by them in the invoices, though they have paid service tax calculated on these invoices they have not received any payment of this from their client. I find there is a force in the appellants' contention that if service tax is to be paid, it has to be worked out on the basis of gross amount received by them as being inclusive of service tax. Since this has not been considered by lower authorities the matter should be remanded back to the adjudicating authority.*

6. *Accordingly, the impugned order is set aside and the matter is remanded back to the original adjudicating authority to consider the plea of the appellant as regard gross amount received by them being inclusive of service tax component. The original adjudicating authority will decide the mater afresh including the imposition of penalty and interest after granting the appellant an opportunity of personal hearing. Appeal is allowed by way of remand."*

3. The appeal was thus allowed by way of remand. On remand, the Assistant Commissioner passed the impugned order which was upheld by the Commissioner (Appeals) with modification indicated above. Learned Counsel for the appellant submitted that in view of the finding by the authorities below the appellant do not wish to raise any contention on merit. The question which they wish to raise is with respect to the quantum of penalty. Counsel submitted that penalty having been earlier imposed by the Assistant Commissioner under Section 76 of the Act, which was reduced to

Rs.20,000/- by the Commissioner (Appeals) on remand, the only issue which was required to be considered was whether the gross amount received by the appellant was 'cum-tax' amount i.e. inclusive of service tax. Counsel pointed out that the revenue did not challenge the decision of the Commissioner (Appeals) dated 30.7.2003 which attained finality and no further adverse order on the point of penalty could be passed.

4. On behalf of the Revenue, the learned DR submitted that the entire order of the authorities below stood set aside by the Tribunal with direction to decide the matter of penalty afresh including imposition of penalty, and therefore, the issue was wide open and as such, the authorities below were fully justified in passing the impugned orders.

5. The only point for consideration is whether the imposition of penalty in the manner stated above is proper and justified. I find force in the submission of the appellant that having not challenged the earlier order of the Commissioner (Appeals) dated 30.7.2003, the quantum of penalty as ordered by the Commissioner became final, so far as the Revenue is concerned. Failure to challenge any order amounts to acquiescence or acceptance of correctness of the decision. It is true that the Tribunal had directed to consider the matter afresh including imposition of penalty but this only means that the appellant – the person aggrieved before the Tribunal – was entitled to challenge the imposition of penalty altogether and seek its waiver. It may be mentioned that under Section 80 of the Finance

Act, notwithstanding the provisions of Sections 76,77 or 78, penalty may not be imposed for failure referred to in those provisions if the assessee proves that there was reasonable cause for the failure. In terms of the remand order it was thus open to the adjudicating authority not to impose penalty on the appellant, but it was not open to him to pass a more disadvantageous or onerous order so far as the quantum of penalty is concerned. Surely, the appellant did not come to the Tribunal for enhancement of the amount, and the remand of the case did not give the authorities the liberty to do so. That would be going beyond the spirit of the remand order. I accordingly, direct that the penalty imposed on the appellant shall not exceed Rs.20,000/-.

6. Counsel submitted that as the appellant was held entitled to refund of the amount of Rs.11,244/-, the same may be adjusted against penalty. I find that such a direction has already been issued by the Commissioner (Appeals) in the present. In any case, the appellant is at liberty to seek consequential relief in this regard in accordance with law. The appeal is disposed of in the above terms.

(Order dictated and pronounced in the open Court).

(Justice S.N. JHA)
President