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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/483 /2008 – SM[BR]   Date 24/11/2008

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

To :
C.C.E. LUDHIANA
CENTRAL EXCISE HOUSE, 'F' BLOCK, RISHI NAGAR,
LUDHIANA 141001 (PUNJAB)

C.C.E. LUDHIANA   Appellant
Vs
M/S STAR CARGO CONSULTANT,   Respondent

I am directed to transmit herewith a certified copy of **Final order No.** 1501 / 2008 -**SM[BR]** dated **5.11.2008**

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
   M/S STAR CARGO CONSULTANT,
   58-R, INDUSTRIAL AREA-B,LUDHIANA. (PB.)
2. Adv. / Consult SHRI BIPIN GARG ADV.
   B-1 / 1289 –A, VASANT KUNJ NEW DELHI -70

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 - 3
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
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-1
15 Office Copy
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Assistant Registrar
(SM Appeal Branch)

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No.2, R.K.Puram, New Del
P[hi-110066.
Principal Bench, New Delhi.

ST/483/08-SM

[Arising out of Order-in-Appeal No.56/CE/Ldh/08 dt.25.3.08 passed by the Commissioner of Central Excise, Ludhiana)

For approval and signature:

Hon'ble Mr. RAKESH KUMAR, MEMBER (TECHNICAL)

1. Whether Press Reporters may be allowed to see: the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?
2. Whether it would be released under Rule 27 of : the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?
3. Whether their Lordships wish to see the fair copy of the order? :
4. Whether order is to be circulated to the Department Authorities: :

CCE, Ludhiana — Appellant

Versus

M/s. Star Cargo Consultant — Respondent

Appearance

Shri R.K.Verma, Authorised Departmental Representative(DR) For appellant
Shri Atul Gupta, CS for respondent

Coram: Hon'ble Mr. RAKESH KUMAR, MEMBER (TECHNICAL)

Date of decision: 5.11.08
Final Order No. 1501/08-SM(BR)

Per Rakesh Kumar:

The respondents have Service Tax Registration since 2003 for Cargo Handling Service which they are providing to their clients. On the scrutiny of the balance sheet for the year 2004-5, it was noticed by the officers that they showed the receipt of the amount of Rs.4,23,393/- as rebate. On enquiry with the respondent, it was found that this is the amount received from custodian/contractors as compensation for not performing certain jobs which ultimately had been performed by the respondents. The Department took the view that this amount has to be treated as their receipt for providing the taxable service of cargo handling and is liable to service tax. Accordingly, the respondent deposited the service tax amounting to Rs.43,187/- alongwith interest of Rs.6,585/- on 6.3.06. However, subsequently the Department issued a show cause notice on 4.1.07 for confirming the demand of service tax (which had already been paid by them and also for imposition of penalty on them under Section 76,77 & 78). The Dy. Commissioner vide order-in-original dt.9.1.08 besides confirming the service tax demand of Rs.43,187/- + interest of Rs.6,585/-, imposed penalty of Rs.43,187/- on the respondent under Section 76, penalty of Rs.1,000/- under Section 77 and penalty of Rs.43,187/- under Section 78. The Commissioner(Appeals) vide impugned order while upholding the service tax demand set aside the imposition of penalty under Section 76,77 and 78 on the ground that the entire amount of service tax had been paid prior to the issue of show cause notice. The Revenue has filed this appeal against the Commissioner(Appeals)'s order challenging setting aside of the order of penalty.

2. Heard both the sides.

2.1 The learned Departmental Representative pleaded that the only provision for waiving the penalty under Section 76 or 78 is Section 80 for which assessee has to show that there was genuine reason for delay in payment of service tax on non-payment of service tax against which has not been invoked in this case by the Commissioner(Appeals) and that payment of service tax prior to the issue of show cause notice cannot be the ground for setting aside the penalty. He emphasized that there is no automatic waiver of the penalty when the service tax has been paid prior to the issue of show cause notice. In this regard, he relied upon the Tribunal's order in the case of CCE, Ludhiana vs Silver Oak Gardens Resort reported in 2008(9)STR.481(Tri.-Del.).

2.2 Shri Atul Gupta, CS, Ld. Counsel on behalf of the respondent pleaded that in this case there was genuine reason on part of the respondent for non-payment of service tax on the amount of Rs.4,23,393/- received by them from the contractor/custodian. He pleaded that this amount had not been received from the client to whom the Cargo Handling Service was provided but had been received from the contractors custodian, as compensation for not doing certain jobs which they were supposed to perform, as a result of which those jobs had to be performed by the respondent and for this reason, only this amount had not been declared in the returns and no service tax has been paid. As soon as the Department pointed out that service tax is to be paid on this amount, they paid the same. He also pointed out that in course of hearing before the Asstt. Commissioner, the reason as to why the service tax has not been paid on the amount of Rs.4,23,393/- had been explained and it had been pleaded that in view of this, no penalty may be imposed. He emphasized that this is a fit case for invoking Section 80 of the Finance Act for waiving the penalty under Section 76, 78 and in this regard he relied upon the Tribunal's order dt.25.7.08 in the case of Krishna Satellite Cable Network in Appeal No.ST/546/06 wherein the Tribunal held that if the assessee proves that there was reasonable cause for the failure to pay the tax, no penalty under Section 76,77 or 78 is imposable in terms of the provisions of Section 80.

3. I have carefully considered the submissions from both the sides. The factual position that the amount of Rs.4,23,393/- had been received from the contractors/custodian and not from the clients is not in dispute. As per the Department interpretation, this amount has to be treated as amount received for taxable service provided by the respondent to their clients as when the respondent received this amount as compensation from the contractors/custodian for failure to perform certain jobs, those jobs had been performed by them. However, the Respondent's contention is that there was confusion as to whether this amount would

attract service tax or not and for this reason only they did not pay the service tax on this amount. In view of this, I am of the view that on this case waiver of penalty in terms of the provisions of Section 80 of the Finance Act,1994 should have been considered by the lower authority but there are no findings on this point in the impugned order. I agree that waiver of penalty cannot be granted just because the service tax had been paid prior to the issue of show cause notice. But if the non-payment of service tax was due to some bonafinde reason on the part of the assessee and the assessee on being pointed out paid the service tax, the waiver of penalty under Section 76,77 or 78 would be merited. But since the question as to whether in view of the facts of the case, waiver of penalty under Section 80 is warranted, has not been considered in the impugned order, the impugned order is set aside and the matter is remanded to the Commissioner(Appeals) for considering as to whether in view of the facts of this case, waiver of penalty under Section 76,77 & 78 was warranted under Section 80 of the Finance Act. The appeal is disposed off as above.

Order dictated in the open Court.

(Rakesh Kumar)
Member Technical

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