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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/582 /2010 – SM[BR]** Date **14/06/2011**

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

To :
M/S VICKY ENTERPRISES,
64-MOTI NIWAS, RAMCHANDRAPURA, CHHAWANI,
KOTA (RAJ.)

M/S VICKY ENTERPRISES, Appellant
Vs
C.C.E. JAIPUR I Respondent

I am directed to transmit herewith a certified copy of **Final order No. 314 /2011-SM[BR]** dated 31.5.2011 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. JAIPUR I
N.C.R.BUILDING, STATUE
CIRCLE, "C" SCHEME, JAIPUR
302005.

2. Adv. / Consult
MR.BIPIN GARG
B-1/1289,A-VASANT KUNJ, NEW DELHI

3. C.D.R
4. Bar association, CESTAT, New Delhi
5. Director Publications, Customs, Excise. I.P. Estate, New
6. M/s Centax Publictions Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi -
7. Company Law Institute of India Pvt Ltd.,No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
8. Taxmann Allied Service Pvt Ltd.,,59/32, New Rohtak Road, New Delhi -
9. Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road, Ahmedabad-15
10. LAWCRUX Advisors Pvt Ltd, LAW House,1-8,Sector - 10, Faridabad 121003 (Haryana)
11. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor,Vasant Arcade,Nelson Mandela Road, Vasant Kunj, New Delhi - 110070
12. Office Copy
13. Guard file

Assistant Registrar
(SM Appeal Branch)

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi – 110 066.
Principal Bench, New Delhi

COURT NO. IV
Service Tax Appeal No. 582 of 2010 (SM)

[Arising out of the Order-in-Appeal No. 17 (DK) ST/JPR-I/2010 dated 25/01/2010 passed by The Commissioner (Appeals-I), Customs & Central Excise, Jaipur.]

For Approval and signature :
Hon'ble Shri 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?	:

M/s Vicky Enterprises — Appellant

Versus

CCE, Jaipur — Respondent

Appearance

Ms. Sukriti Das, Advocate – for the appellant.

Mrs. Rimjhim Prasad, Authorized Representative (SDR) – for the respondent.

CORAM : **Hon'ble Shri Rakesh Kumar, Member (Technical)**

DATE OF HEARING : 31/05/2011.

Final Order No. 314/2011 SM (Br) Dated :

Per. Rakesh Kumar :-

The appellant is a proprietorship concern of Shri Gobind Singh Parmar and during period of dispute i.e. during period from 16/8/02 to 31/12/06, they were providing the service of loading of urea to M/s DSCL, Shriram Nagar, Kota, which according to the department was covered by the service tax entry "cargo handling service" and was taxable w.e.f. 16/8/02. However, they were not paying the service tax and this non-payment was detected only in course of scrutiny of records of M/s DSCL. When this non-payment was pointed out to the appellant, they voluntarily paid an amount of Rs. 2,77,657/- towards service tax and an amount of Rs. 75,000/- towards interest, as according to them, this was ~~from~~ their service tax liability alongwith interest. However, subsequently a show cause notice dated 10/7/07 was issued for demand of service tax of Rs. 2,86,691/- alongwith interest and appropriation of the amount already paid by them and also imposition of penalty on them. The Assistant Commissioner vide order-in-original dated 9/7/08 confirmed the service tax demand of Rs. 2,86,691/- alongwith interest, appropriated the amount already paid by them and imposed penalties on them under Section 76, 77, 75A and 78 of the Finance Act, 1994. According to the appellant, the balance amount of service tax of Rs. 1905/- and has also been paid by them. On appeal to Commissioner (Appeals), the Commissioner (Appeals) vide order-in-appeal dated 25/1/10 upheld the order-in-original. Before the Commissioner (Appeals), the appellant pleaded that during the period of dispute there was doubt as to whether the individual providing the cargo handling service were liable to pay service tax or not and for this reason only the service tax was not paid and prayed for waiver of the penalty under Section 80 of the Finance Act, but this plea was not accepted. Against this order of the Commissioner (Appeals), the present appeal has been filed for setting aside the penalty on the appellant under Section 75A, 76, 77 and 78 of the Finance Act, 1994.

2. Heard both the sides and have perused the records.

2.1 Mrs. Sukriti Das, Advocate, the learned Counsel for the appellant, pleaded that the appellant are only contesting the penalty imposed on them, that the entire amount of service tax alongwith interest has been paid by them, that non-payment of service tax by the due date was for the reason that during the period of dispute on account of Board Circular No. B 11/1/2002-TRU dated 1/8/02, wherein it had been clarified that the cargo handling service provided by a person in individual capacity would not be taxable and since the appellant are a proprietorship concern, they were under belief that they are not liable to pay the service tax and for this reason no service tax registration has been obtained, that in these circumstances, the Tribunal in the case of **Jagdeep Singh Saluja vs. CCE, Bhopal** reported in **2008 (12) S.T.R. 309 (Tri. – Del.)** and also in the case of **Kannappa Corporation vs. CCE, Trichy** reported in **2010 (19) S.T.R. 768 (Tri. – Chennai)**, has set aside the penalty on the individuals/ proprietorship concern providing cargo handling service, and that in view of this, the impugned order upholding the penalty on the appellant is not correct.

2.2 Mrs. Rimjhim Prasad, the learned Departmental Representative defended the impugned order by reiterating the findings of the Commissioner (Appeals) and pleaded that no satisfactory reason has been given by the appellant for failure to discharge their service tax liability and hence the provisions of Section 80 of the Finance Act cannot be invoked. The learned DR also cited the judgment of Hon'ble Kerala High Court in the case of **Assistant Commissioner of Central Excise vs. Krishna Poduval** reported in **2006 (1) S.T.R. 185 (Ker.)**, wherein it was held that separate penalty under Section 76 and 78 of the Finance Act, 1994 is imposable even if the offences committed in one course of same transaction or arise out of the same Act.

3. I have carefully considered the submissions from both the sides and perused the records.

4. There is no dispute about the fact that the appellant is a proprietorship concern of Shri Gobind Singh Parmar, who was providing the cargo handling service. I find that the Board vide Circular No. 11/1/2002-TRU dated 1/8/2002 had clarified as under :-

"Another doubt raised in relation to cargo handling services is that whether individuals undertaking the activity of loading or unloading of cargo would be leviable to service tax. For example, if someone hires labour/labourer for loading or unloading of goods in their individual capacity, whether he would be liable to service tax as a cargo handling agency. It is clarified that such activities will not come under the purview of service tax as a cargo handling agency."

In this case, the appellant by hiring labourers provided cargo handling service to its employees. It is, however, pleaded that since the appellant being proprietorship concern being an individual, according to the above-mentioned circular of the Board they were under impression that they were not liable to pay the service tax. It is in view of this circular, that the Tribunal in the case of **Jagdeep Singh Saluja vs. CCE, Bhopal** (supra) and **Assistant Commissioner of Central Excise vs. Krishna Poduval** (supra) has set aside the penalty on the individuals/ proprietorship concerns providing cargo handling service. In view of this position, I am of the view that there was justification for invoking Section 80 of the Finance Act, 1994 and waiving the penalty imposed on the appellant under

Section 75A, 76, 77 and 78 of the Finance Act, As the above-mentioned Circular of the Board gives an impression that an individual providing cargo handling service would not be covered under the service tax. In view of this, the impugned order upholding the penalty on the appellant is not correct, the same is set aside. The appeal is allowed.

(Dictated and pronounced in open court.)

(Rakesh Kumar)
Member (Technical)

PK