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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/239 /2010 – SM[BR] Date 15/12/2010

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

To :
MOHAMMAND MUSTKEEN

ROOM NO.17, NAWANSHAHAR COOP. SUGAR MILLS
LTD. COLONY NAWANSHAHAR (PB)
MOHAMMAND MUSTKEEN Appellant

Vs

C.C.E. CHANDIGARH Respondent

I am directed to transmit herewith a certified copy of **Final order** No. 1440 / 2010-SM[BR] dated 28.10.2010 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. CHANDIGARH

C.R. BUILDING, PLOT NO. 19, SECTOR 17-C, CHANDIGARH 160017

2. Adv. / Consult

MR.G.S.BHANGOO

H.NO. 5, SECTOR-10A, CHANDIGARH.

5-1-10
ISSUED ON

SIGN. (DESPATCH SECTION)
CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL
NEW DELHI-110066

3 S.D.R
4 ~~J.C.D.R.~~
5 Bar association, CESTAT, New Delhi
6 Director Publications, Customs, Excise. I.P. Estate, New Delhi
7 M/s Centax Publictions Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi - 3
8 Company Law Institute of India Pvt Ltd.,No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
9 M/s. Deeparchie Publications, M-93, Marg. 46, Saket, New Delhi 110017
10 Taxmann Allied Service Pvt Ltd., 59/32, New Rohtak Road, New Delhi - 110005
11 Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road,Ahmedabad-15
12 LAWCRUX Advisors Pvt Ltd, LAW House,1-8,Sector - 10, Faridabad 121003 (Haryana)
13 TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor,Vasant Arcade,Nelson Mandela Road, Vasant Kunj, New Delhi - 110070
14 Office Copy
15 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. III

Service Tax Appeal No. 239 of 2010 (SM)

[Arising out of the Order-in-Appeal No. 51/CE/CHD-II/APPL/2009 dated 25/11/2009 passed by The Commissioner (Appeal), Central Excise & Service Tax, Chandigarh– II.]

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? :

Mohammad Mustkeen — Appellant

Versus

CCE, Chandigarh – II — Respondent

Appearance

Shri Vikrant Kakria, Advocate – for the appellant.

Shri R.K. Gupta, Departmental Representative (DR) – for the respondent.

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

DATE OF HEARING : 28/10/2010.

Final Order No. 1440/2010 SM(BR) Dated : ____________

Per. Rakesh Kumar :-

The facts leading to this appeal are in brief, as under.

1.1 The appellant during the period of dispute i.e. during the period from 16/06/2005 to March 2007 was providing the service of repair and maintenance to M/s Nawanshahr Coop Sugar Mills Colony, Nawanshahr. In March 2008, in course of audit of the records of M/s Nawanshahr Coop Sugar Mills Colony by the Jurisdictional Central Excise officers, the department came to know that the appellant had been providing the service of repair and maintenance to M/s Nawanshahr Coop Sugar Mills Colony. Since, the repair and maintenance service became taxable w.e.f. 1/7/03 and since it was found that the appellant had not taken any registration for service tax, the department conducted inquiry with the appellant and it was found that during the period from

16/6/2005 to 31/3/2007 the appellant had provided the services of repair and maintenance to M/s Nawanshahr Coop Sugar Mills Colony and had received an amount of Rs. 56,75,690/- on which the service tax chargeable was Rs. 5,90,015/-. Accordingly, a show cause notice was issued to the appellant on 01/10/08 for recovery of the allegedly non-paid service tax amounting to Rs. 5,90,015/- alongwith interest and also for imposition of penalty on him under Section 75A, 76, 77 and 78 of the Finance Act, 1994. However, prior to the issue of show cause notice, the appellant in March 2008 itself had paid an amount of Rs. 3,98,336/-.

1.2 The show cause notice was adjudicated by the Joint Commissioner vide order-in-original No. 65/ST/JC/2008 dated 23rd December 2008 by which the service tax demand of Rs. 5,90,015/- was confirmed against the appellant alongwith interest under proviso to sub-Section (1) of Section 73 of the Finance Act, 1994 and the amount of Rs. 3,98,336/- deposited by the appellant was appropriated towards this demand. Beside this, penalty of Rs. 500/- under Section 75A, Rs. 1,000/- under Section 77 and Rs. 200/- per day for the for failure to pay the service tax by due date, under Section 76 and penalty of Rs. 5,90,015/- under Section 78 was imposed on the appellant. On appeal to Commissioner (Appeals), the Commissioner (Appeals) vide order-in-appeal No. 51/CE/APPL/CHD-II/2009 dated 27/11/09 set aside the demand for the period prior to 16/6/05 but upheld the penalty under Section 76 and 77 with direction that penalty under Section 76 and 77 would be in accordance with the reduced demand. In course of proceeding before the Commissioner (Appeals) the appellant pleaded for waiver of the penalty under Section 78 of the Finance Act on the ground that the appellant being illiterate was not aware of his service tax liability and thus non-payment of service tax was due to genuine reasons. But this plea was not accepted by the Commissioner (Appeals). Against the above order of the Commissioner (Appeals), the present appeal have been filed by the appellant challenging the imposition of penalty under Section 76 and 78. The service tax demand has not been challenged.

2. Heard both the sides.

2.1 Shri Vikrant Kakria, Advocate, the learned Counsel for the appellant, pleaded that the appellant is an illiterate person who was not aware that his activity attracted service tax, that w.e.f. 1/7/03, the service of repair and maintenance under Annual Maintenance Contract only was taxable and only w.e.f. 16/6/05 all sort of repair activity became taxable but still the Department initially demanded the duty for the entire period and only at the Commissioner (Appeals) level the duty demand for the period prior to 16/6/05 was set aside, which shows that during initial period, the Department itself was not clear about the scope of this service, that the appellant was neither informed by his client about the service tax liability nor any amount towards service tax was paid to him by his client, that non-payment of service tax by the appellant was due to genuine reasons and, therefore, the provisions of Section 80 of the Finance Act are applicable to the case of the appellant. He also pleaded that though the appellant is not contesting the service tax liability, from the perusal of the contract, it is clear that substantial activity was outside the repair and maintenance but still the appellant has paid the service tax for the period from 16/6/05. He also pleaded that in any case simultaneous penalty under Section 76 and 78 is not imposable and in this regard he cited judgment of Hon'ble Punjab & Haryana High Court in the case of **CCE, Chandigarh vs. City Motors** reported in **2010 (97) R.L.T. Online 291 (P&H)** and also of the Tribunal in the case of **Andhra Bank vs. CCE, Hyderabad** reported in **2010 (96) R.L.T. Online 561 (CESTAT-Ban.)**. He also pleaded that since the entire service tax demand which was upheld by Commissioner (Appeals) had been paid prior to the issue of show cause notice, in any case, in accordance with the judgment of Hon'ble Delhi High Court in the case of **K.P. Pouches (P) Ltd. vs. Union of India** reported in **2008 (228) E.L.T. 31 (Del.)** penalty of only 25% of the service tax demand should be imposed in terms the proviso to Section 78 (1).

2.2 Shri R.K. Gupta, the learned Departmental Representative, defended the impugned order by reiterating the Commissioner (Appeals)'s finding and pleaded that in this case, though the service tax on repair and maintenance service was introduced w.e.f. 1/7/03, the service tax registration was never been obtained by the appellant and as such no information had been given at any point of time by the appellant with regard to his activity, that the department came to know about the taxable service being provided by the appellant only in the course of audit of the records of his client M/s Nawanshahr Coop Sugar Mills Colony, that for invoking the provision of Section 80, the assessee has to prove that there was reasonable cause for failure to discharge the service tax liability that the burden of proving the existence of reasonable cause for failure to discharge of liability is on the assessee which has not been discharged, and that ignorance of the law is not an excuse for non-compliance. On the question as to whether penalty under Section 76 and 78 can be imposed at the same he 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.)** and of the Tribunal in the case of **Bajaj Travels Ltd. vs. CCE, Chandigarh** reported in **2009 (16) S.T.R. 183 (Tri. – Del.)**. On the question as to whether reduced penalty under first proviso to Section 78 (1) can be imposed, he pleaded that for giving the benefit of first proviso to Section 78 (1) in accordance with the Hon'ble Delhi High Court judgment in the case of K.P. Pouches (P) Ltd. (supra), it is necessary that the entire duty alongwith interest was paid prior to the issue of show cause notice, while in this case it is not known as to whether in addition to the duty, the interest had also been paid prior to the issue of the show cause notice.

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

4. There is no dispute about the fact that for the period from 16/6/05 to 31/3/07, the appellant was liable to pay service tax in respect of the repair and maintenance service being provided by him. But neither the service tax was paid nor at any point of time, the appellant obtained service tax registration. In fact, the appellant in this case has not challenged his service tax liability. The appeal is only on the question of imposition of penalty under Section 76 and 78.

5. First plea of the appellant is that he is eligible for waiver of penalty in view of the provision of Section 80. As per the provisions of Section 80 of the Finance Act, 1984 notwithstanding anything contained in 76, 77 and 78, no

penalty shall be imposable on the assessee for any failure referred to in the said provisions, if the assessee proves that there was reasonable cause for the said failure. From the language of this Section, it is clear that it is the assessee who has to prove the existence of reasonable cause for failure to obtained the service tax registration, file the return and discharge the service tax liability. In this case other than the ignorance of the law no other reason for failure to obtain service tax registration and discharge the service tax liability has been given. I also find that while the appellant's activity had come within service tax net w.e.f. 16/6/05 even till March 2008, when the Department came to know about the appellant's activity, he had not obtained service tax registration. Therefore, in view of the circumstances of the case, it cannot be said that the appellant was prevented from obtaining service tax registration and discharging the service tax liability due to any reasonable cause and hence, the Commissioner (Appeals)'s order denying the benefit of Section 80 of the Finance Act is correct.

6. As regard the other plea of the appellant is that penalty under Section 76 as well as 78 cannot be imposed, on this

point Hon'ble Kerala High Court in the case of Assistant Commissioner of Central Excise vs. Krishna Poduval (supra) has held that simultaneous penalty under Section 76 as well as 78 is imposable and following the judgment of Hon'ble Kerala High Court, same view has been taken by the Division Benches order in the case of Bajaj Travels Ltd. vs. CCE, Chandigarh (supra). In view of this, the appellant's plea that simultaneous penalty cannot be imposed under Section 76 and 78 is not acceptable.

7. The appellant has pleaded that since the service tax liability upheld by the Commissioner (Appeals) is only w.e.f. 16/6/05 and the service tax liability for the period from 16/6/05 to 31/3/07 has already been discharged by him in March 2008 itself i.e. prior to the issue of show cause notice as at that time he had paid an amount of Rs. 3,98,336/- as against service tax liability of Rs. 3,20,467/-, in accordance with the judgment of Hon'ble Delhi High Court in the case of K.P. Pouches (P) Ltd. vs. Union of India (supra), penalty of only 25% of the service tax demand can be imposed. However, I find that for giving the benefit of reduced penalty under proviso to Section 78 of the Finance Act, it is necessary

that in addition to service tax, the interest on service tax should also have been paid prior to the issue of show cause notice and only in that situation in accordance with Hon'ble Delhi High Court's judgment in the case of K.P. Pouches (P) Ltd., the benefit of reduced penalty can be extended. But in this case while the duty liability of the appellant, as upheld by the Commissioner (Appeals) is Rs. 3,20,467/- the amount deposited in March 2008 was Rs. 3,98,336/- and there is no finding as to whether the amount already deposited by the appellant prior to the issue of show cause notice also covered interest on service tax. If the amount already deposited by the appellant in March 2008 also covered the interest on service tax, the benefit of reduced penalty under first proviso to Section 78 in accordance with the judgment of Hon'ble Delhi High Court in the case of K.P. Pouches (P) Ltd. would be available, as in this case, the original adjudicating authority had not given the Appellant the option of paying reduced penalty under 1st proviso to Section 78. However, for this purpose, the matter would have to be remanded to the Commissioner (Appeals).

8. Accordingly, while appellant's plea for setting aside the penalty as per the provisions of Section 80 of the Finance Act, as well as his plea that simultaneous penalty under Section 76 and 78 cannot be imposed is not accepted and the impugned order on these points is upheld, the matter is remanded to the Commissioner (Appeals) for deciding the question of reduced penalty under first proviso to Section 78 of the Finance Act, in accordance with the ratio of Hon'ble Delhi High Court judgment in the case of K.P. Pouches (P) Ltd. vs. UOI (supra) after ascertaining as to whether the appellant had discharged their entire tax liability alongwith interest prior to the issue of show cause notice. The appeal is disposed of in these terms.

(Dictated and pronounced in open court)

(Rakesh Kumar)
Member(Technical)

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