

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/361 /2010 – SM[BR]

Date 09/11/2010

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

To :
M/S QUALITY WELDING WORKS,
139, BABA BALAK NATH NAGAR, BYE PASS,
JALANDHAR.
M/S QUALITY WELDING WORKS,

C.C.E. LUDHIANA

Appellant
Vs
Respondent

I am directed to transmit herewith a certified copy of **Final order No. 1195 / 2010-SM[BR]** dated 30.9.2010
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. LUDHIANA

CENTRAL EXCISE HOUSE, 'F' BLOCK, RISHI NAGAR, LUDHIANA 141001 (PUNJAB)

2. Adv. / Consult

MR.HARVINDER SINGH,ADV

34/10, RAJ NAGAR, KAPURTHALA ROAD, SUNNY BISTER BHANDAR, JALANDHAR.

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 Publications 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

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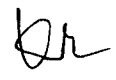
11 Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road,Ahmedabad-15

12 LAWCRUX Advisors Pvt Ltd, LAW House.1-8,Sector - 10, Faridabad 121003 (Harvana)

13 TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor,Vasant Arcade,Nelson Mandela Road, Vasant Kunj, New Delhi - 110070

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Assistant Registrar
(SM Appeal Branch)

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI**

PRINCIPAL BENCH - COURT NO. 1

SERVICE TAX APPEAL NO. 361 OF 2010-SM

(Arising out of Order-in-Appeal No. 257CE/LDH09 dated 22.12.2009 passed by the Commissioner (Appeals) Central Excise, Chandigarh).

DATE OF HEARING : 30.09.2010

DATE OF DECISION : 30.09.2010

FOR APPROVAL AND SIGNATURE :

HON'BLE MR. JUSTICE R.M.S. KHANDEPARKAR, PRESIDENT

1.	Whether Press Reporters may be allowed to see the order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982 ?	Yes
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 ?	See
4.	Whether Order is to be circulated to the Departmental Authorities ?	Yes

M/s Quality Welding Works

....

Appellants

(Rep by Sh Harinder Singh, Adv.)

VERSUS

CCE, Ludhiana

....

Respondent

(Rep by Sh. S.K. Bhaskar, DR)

CORAM : HON'BLE MR. JUSTICE RMS KHANDEPARKAR, PRESIDENT

Final

ORAL ORDER. 1195/2010 SM (Bx)

PER SHRI JUSTICE R.M.S. KHANDEPARKAR :

Heard both sides.

2 This appeal arises from order dated 22.12.2009 passed by the Commissioner (Appeals), Chandigarh. By the impugned order, the Commissioner (Appeals) refused to interfere in the order passed by the adjudicating authority in relation to the imposition of penalty under Section 76 as well as Section 78 of the Finance Act, 1994. The same is sought to be given challenge on two grounds – firstly, that there cannot be penalty under both the provisions simultaneously; and secondly, applying the provisions of Section 80 of the said Act, the authority could not have imposed penalty in the facts and circumstances of the case.

3. The appellants are engaged in the job work of erection/installation of pipelines and they had undertaken similar work on contract basis from M/s Jagatjit Industries Ltd., Hamira, Punjab. The same was revealed to the Department pursuant to the visit to the premises of M/s Jagatjit Industries Ltd. On perusal of the bills raised by the appellants against the said M/s Jagatjit Industries Ltd., it was revealed that no service tax was collected for the services rendered by the appellants. Consequently, pursuant to the investigation carried out in the matter, notice dated 10th October, 2007 came to be issued to the appellants. In response, the appellants admitted the fact of rendering of services and raising of bills on M/s Jagatjit Industries Ltd as also non-collection of the service tax. It was also admitted that the appellants were not registered with the Service Tax Department as well as that they were basically engaged in the work of erection and installation of the pipelines, involving the work of welding and fittings of the pipes with nuts and bolts. It was assured on behalf of the appellants that steps would be taken to charge the service tax and to pay the

same and to complete the registration formalities. It appears that subsequently the tax was paid. However, considering the fact of non-disclosure of rendering of taxable service, non-registration and non-payment of service tax, show cause notice dated 10th October, 2007 came to be issued requiring the appellants to show cause as to why the service tax and education cess paid subsequently should not be appropriated towards dues and why interest should not be recovered and penalty should not be imposed. Though the appellants sought time to file the reply, no such reply was filed to the show cause notice. After granting personal hearing, the adjudicating authority by his order dated 08th December, 2008 confirmed the demand of service tax to the tune of Rs. 4,80,957/- and further ordered appropriation of the said amount from the amount already deposited as also amount of Rs. 58,646/- was adjusted towards the interest amount. Further, penalty of Rs. 500/- was imposed under Section 75A of the Finance Act, 1944 for contravention of the provisions of Section 69 of the said Act. Penalty of Rs. 100/- per day during which the failure to pay the service tax had continued to the maximum of Rs. 4,80,957/- and penalty of Rs. 1,000/- under Section 77 for each default in submission of ST-3 Return on due date for the half year ending 09/2003 to 03/2006 and further penalty of Rs. 4,80,957/- was also imposed under Section 78 for suppression of value of taxable service from the knowledge of the Department.

4. Placing reliance in the decisions in the matter of **Martial Security & Detective Service (P) Ltd. vs CCE, Meerut-I**, reported in 2008 (12) STR 157; **Price Water House Coopers Dev. Associates Ltd. vs CST, Bangalore**, reported in 2008 (11) STR 43; and **Remac Marketing (P) Ltd. vs Commissioner of Service Tax, Kolkata**, reported in 2009 (13) ELT 658, the learned advocate for the appellants submitted that, the law on the point that there cannot be penalty under Section 77 and 78 of the said Act at one and the same time has been well settled and followed by the Tribunal and,

therefore, the authorities below erred in imposing the penalty under both the provisions simultaneously. Further, drawing attention to letter dated 24th August, 2006 written by the appellants to the Central Excise Commissioner, Jalandhar, it was submitted that the failure on the part of the appellants to pay the service tax in time or non-registration with the authorities was not intentional and was on account of absence of knowledge about the same. Being so, according to the learned advocate for the appellants, provisions of Section 80 of the said Act are squarely applicable and the benefit under the same should be given to the appellants.

5. The Departmental Representative, on the other hand, drawing attention to the decision of the Kerala High Court in the matter of **Assistant Commissioner of Central Excise vs Krishna Poduval**, reported in 2006 (1) STR 185 (Ker.) and of the Tribunal in **Bajaj Travels Ltd vs CCE, Chandigarh**, reported in 2009 (16) STR 183, submitted that, when the penalty imposable under Section 77 is on a count different from the reason for which the penalty can be imposed under Section 78, the High Court has clearly held that the penalty under both the provisions can be imposed simultaneously.

6. The Tribunal in **Remac Marketing (P) Ltd.'s** case (supra); **Price Water House Coopers Dev. Associates Ltd.'s** case (supra); and **Martial Security & Detective Service (P) Ltd.'s** (supra), has, undoubtedly, held that imposition of the penalty under Section 76 and 77 at one and the same time amounts to double penalty and is, therefore, not permissible.

7. The Kerala High Court in **Krishna Poduval's** case (supra) after considering the scope of the provisions of law comprised under Section 76 and 78 of the said Act has held thus :

"11. The penalty imposable under S. 76 is for failure to pay service tax by the person liable to pay the same in accordance

with the provisions of S. 68 and the Rules made thereunder, whereas S. 78 relates to penalty for suppression of the value of taxable service. Of course these two offences may arise in the course of the same transaction, or from the same act of the person concerned. But we are of opinion that the incidents of imposition of penalty are distinct and separate and even if the offences are committed in the course of same transaction or arises out of the same act, the penalty is imposable for ingredients of both the offences. There can be a situation where even without suppressing value of taxable service, the person liable to pay service tax fails to pay. Therefore, penalty can certainly be imposed on erring persons under both the above Sections, especially since the ingredients of the two offences are distinct and separate. Perhaps invoking powers under S. 80 of the Finance Act, the appropriate authority could have decided not to impose penalty on the assessee if the assessee proved that there was reasonable cause for the said failure in respect of one or both of the offences. However, no circumstances are either pleaded or proved for invocation of the said Section also. In any event we are not satisfied that an assessee who is guilty of suppression deserves such sympathy. As such, we are of opinion that the learned Single Judge was not correct in directing the 1st appellant to modify the demand withdrawing penalty under S. 76. Therefore, the judgment of the learned Single Judge, to the extent it directs the first appellant to modify Ext. P1 by withdrawing penalty levied under S. 76, is liable to be set aside and we do so. The cumulative result of the above findings would be that the Writ Petitions are liable to be dismissed and we do so. However, we do not make any order as to costs."

8. The Tribunal in **Bajaj Travels Ltd.**'s case (supra) with reference to the said provisions of law comprised under Section 76 and 78 has held thus :

"17. As regards penalty under Section 76, the same is attracted if a person liable to pay service tax in accordance with the provisions of Section 68 of the Finance Act, 1994 or the Rules made thereunder, fails to pay such tax. Since in this case the Appellant, during each month of the period of dispute have

failed to discharge full service tax liability by due date resulting in huge short payment, the provisions of Section 76 would be attracted. It has been pleaded by the appellant that penalty under Section 76 as well as under Section 78 cannot be imposed when the offence is same. Such plea is untenable in view of Hon'ble Kerala High Court's judgment in case of Asstt. Commissioner, Central Excise v. Krishna Poduval reported in 2006 (1) S.T.R. 185 (Ker.). It was held in that case that incidents of imposition of penalty under Sections 76 and 78 are distinct and separate under two provisions and even if the offences are committed in the course of the same transaction or arise out of the same act, penalty would be imposable both under Section 76 as well as Section 78. In view of this, the penalty under Section 76 is upheld. However, the same is reduced to Rs. 100 per day in appeal No. ST/440/06.

17.1 As regards penalty under Section 78, the same is attracted wherever any service tax has not been levied or paid or has been short levied or short paid or erroneously refunded by the reasons of fraud, suppression of facts, wilful misstatement or contravention of any provisions of Finance Act, 1994 or of the rules made thereunder with intent to evade the payment of service tax and this penalty shall not be less than the duty evaded but shall not exceed two times the amount of service tax evaded/refunded. However, as per the first and second proviso to Section 78, where the service tax as determined under Section 73(2) along with interest and penalty is paid within 30 days from the date of communication of the order, the amount of penalty would be reduced to 25% of the service tax so determined."

9. The law on the point regarding imposition of penalty under Section 76 and 78 of the said Act, therefore, has been sufficiently explained by the Kerala High Court. The imposition of penalty under Section 76 is for failure to pay the service tax by the person liable to pay the same in accordance with the provisions of Section 78 of the said Act. Penalty provided under Section 78 is for suppression of the value of the taxable service.

10. In the case in hand, the authorities below have arrived at a clear finding that the appellants had suppressed the fact that they had rendered taxable service for the period from 01st July, 2003 to 31st March, 2006 and they had failed to pay the tax during the said period. They had also suppressed the fact that they were rendering the taxable service by not registering themselves with the Department. Thereby they also suppressed the value of the services rendered by them during the relevant period. Taking into consideration all these aspects, the authorities below have arrived at a finding that the appellants were liable to pay the penalty under both the provisions of law. Considering the law laid down by the Kerala High Court, I, therefore, do not find any fault with the impugned order.

11. As regards the second ground of challenge is concerned, Section 80 of the said Act provides that, "Notwithstanding anything contained in the provisions of Section 76, 77 or 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." In other words, the assessee has to establish reasonable cause for the failure which could otherwise attract penalty under the said provisions of law. The letter dated 24th August, 2006 merely informs the Department that the appellants were not aware of the statutory provisions. Ignorance of law can never be an excuse. Besides, the provisions of law are in force since 1994. No doubt there were some amendments to Section 78 in the year 2004, but that was not relating to the main substance of the said provision of law which deals with the penalty aspect. Besides, the records nowhere disclose that in the statement dated 13th September, 2005 of Shri Balwinder Singh, Proprietor of the appellant firm, had disclosed about absence of knowledge of law to him. Obviously, the letter dated 24th August, 2006 appears to be an afterthought. Even otherwise, as observed above, mere ignorance of law cannot be an excuse.

12. Obviously, the learned advocate for the appellants placed before me an order passed by the Punjab & Haryana High Court in the matter of **Commissioner, Central Excise vs Ms City Motors**, reported in 2010-TMI-75950. The order reads thus :

“There is delay of 85 days in refiling the present appeal. For the reasons mentioned in the application, the delay is condoned.

Main Case

The Revenue has filed this appeal impugning the orders passed by the Commissioner (Appeals) as well as by the Customs, Excise & Service Tax Appellate Tribunal, New Delhi (for short 'the Tribunal'), vide which it has been held that imposition of penalty under Section 78 of the Finance Act, 1994 (for short 'the Act') is sufficient to meet the ends of justice.

The respondent was levied penalty under Section 76 and Section 78 of the Act for the same cause of action by the adjudicating authority. In appeal, the Commissioner reduced the penalty under Section 78 of the Act and set aside the penalty under Section 76 of the Act. The Revenue challenged the order passed by the Commissioner (Appeals) which has been dismissed.

A perusal of the impugned order shows that the penalty imposed under Section 78 of the Act was sufficient to cover the default of service tax. Moreover, two penalties for the same default could not be imposed upon the respondent. Apart from the above, even the amount involved in the present appeal is very less, i.e. only Rs.56,024/-.

Resultantly, we find no merit in this appeal and the same is accordingly dismissed in limine.”

13. The reasonable cause which is contemplated as justifiable ground for non-imposition of penalty under Section 80 cannot, in my considered opinion, relate to the absence of knowledge of statutory provisions. Besides, in order to avail the benefit of Section 80, it is necessary

for the assessee to make out a case to that effect before adjudicating authority by producing sufficient material in support of such contention which is required to be raised specifically in response to the show cause notice. Admittedly, the appellants had not even filed reply to the show cause notice.

14. Bare perusal of para 4 of the order would disclose that imposition of penalty under Section 78 of the Act was sufficient to cover the default in question and, therefore, the penalty under Section 76 was not necessary. Undoubtedly, there is an observation in the 4th para which reads thus :

“Moreover, two penalties for the same default could not be imposed upon the respondent.”

Obviously, it refers to ‘same default’. Question of imposing penalty for the same default under Section 76 as well as under Section 78 cannot arise. However, when same facts can disclose two types of default, certainly penalty under two provisions can be imposed. The order is not in relation to the second type of the matter and, therefore, not relevant for the decision in the case in hand.

15. For the reasons stated above, I do not find any case for interference in the impugned order and hence the appeal fails and is dismissed.

**(JUSTICE R.M.S. KHANDEPARKAR)
PRESIDENT**