CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH - COURT NO. 1

Service Tax Appeal No. 60539 of 2013

(Arising out of order-in-original No. 28/COMMR/ST/BBPL-I/2013 dated 19.09.2013 passed by the Commissioner of Customs, Central Excise & Service Tax, Bhopal)

DATE OF HEARING : 02.03.2017
DATE OF DECISION : 02.03.2017

CCE&ST, Bhopal …. **Appellant**
(Rep by Sh. Sanjay Jain, DR)

VERSUS

M/s Akansha Sales …. **Respondents**
(Rep. by NONE)

CORAM : **HON'BLE MR. JUSTICE (DR.) SATISH CHANDRA, PRESIDENT**
HON'BLE MR. ASHOK K. ARYA, MEMBER (TECHNICAL)

FINAL ORDER NO. 52169/2017

PER JUSTICE (Dr) SATISH CHANDRA:

The present appeal is filed by the Department against the order-in-original no. 28/COMMR/ST/BBPL-I/2013 dated 19.09.2013 passed by the Commissioner of Customs, Central Excise & Service Tax, Bhopal.

2. The brief facts of the case are that, during the period under consideration (01.10.2004 2006 to 31.03.2010), the assessee-

Respondents were engaged in the design, fabrication, supply and erection of canopies for petroleum companies and factory sheds for industrial concerns. These services appeared to fall under 'Commercial or Industrial Construction Service' which was taxable since 10.09.2004. However, the assessee-Respondents have taken the Service Tax registration on 19.03.2007 under 'Erection, Commissioning and Installation Service'. The Department has opined that the assessee-Respondents are liable to pay the Service Tax. By the impugned order, following demands have been confirmed :

(i) Confirm the demand of service tax Rs. 50,70,677/- including Education Cess and Higher Education Cess under the provisions of Section 73(1) of the Finance Act, 1994;

(ii) Confirm charge and recovery of interest on service tax amount in terms of Section 75 of the Finance Act, 1994;

(iii) Impose penalty of Rs. 50,70,677/- equal to the amount of service tax under the provisions of Section 78 of the Finance Act, 1994. In case of payment of service tax amount with interest and penalty within 30 days of receipt of this order, the amount of penalty shall be 25% of service tax amount as per the provisions of Section 78 of the Finance Act, 1994;

(iv) Penalty of Rs. 200/- per day from 10.09.2004 to 19.03.2007 till the date of obtaining registration in contravention of Section 69(1) under Section 77(1)(a) of the Finance Act, 1994; and

(v) Penalty of Rs. 10,000/- in contravention of Section 70 read with Rule 7(c)(iii) of Service Tax Rules, 1994 under Section 77(2) of the Finance Act, 1994.

The sole grievance of the Department is that, the adjudicating authority has dropped the penalty under Section 76 of the Finance Act, 1994. Hence, the present appeal.

3. List revised. None appeared on behalf of the assessee-Respondents. We have heard Shri Sanjay Jain, learned DR for the Department.

4. After considering the totality of the facts and circumstances of the case, it appears that the penalties under Section 77 and 78 of the Finance Act, 1994 have also been levied. It is not fair on the part of the Department to file the Appeal for the reason that the penalty under Section 76 was not levied, especially when the penalties under Section 77 and 78 of the Finance Act, 1994 were also levied. Further, it may be mentioned that as far as the imposition of penalty under Section 76 and 78 of the Finance Act, 1994 is concerned, the provisions are mutually exclusive. Where conditions warranting imposition of penalties under Section 78 exist, penalty under Section 76 cannot be levied. This view is supported by the Hon'ble High Court of Punjab & Haryana at Chandigarh in the case of **Commissioner of Central Excise vs First Flight Courier Ltd.,** 2011 (22) STR 622 (P&H), wherein it was held that :

> *"Penalty - Double jeopardy - Penalty under Sections 76 and 78 of Finance Act, 1994 mutually exclusive from 10-5-2008 - Penalty under said provisions whether simultaneously not imposable for period before 10-5-2008 - Section 76 ibid providing for penalty for failure to pay tax while Section 78 ibid providing for penalty for suppression of taxable value - Section 78 ibid providing for higher amount of penalty is more comprehensive - Penalty under Section 76 ibid not justified if penalty already imposed under Section 78 ibid - High Court order dated 12-7-2010 on similar issue holding penalty under Section 76 ibid not imposable when the same imposed under Section 78 ibid, applicable - Question of law not arises - Appeal dismissed - Sections 76 and 78 ibid".*

In view of the above, we find no reason to interfere with the impugned order. Hence, the order passed by the Commissioner (Appeals) is hereby sustained along with the reasons mentioned therein.

6. In the result, the appeal filed by the Department is dismissed.

(Pronounced in the open court on 02.03.2017)

(ASHOK K. ARYA)
MEMBER (TECHNICAL)

(JUSTICE Dr. SATISH CHANDRA)
PRESIDENT

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