IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI
PRINCIPAL BENCH, COURT NO. III

Service Tax Appeal No. ST/123-124/2012-ST[DB]
[Arising out of Order-In-Appeal No. 15-16/AKM/CST(Adj.)/2011, dated 21.10.2011 passed by Commr.(Adj.) Delhi]

For approval and signature:
Hon'ble Mr. S.K. Mohanty, Member (Judicial)
Hon'ble Mr. B. Ravichandran, Member (Technical)

M/s. Woolmark Service India Pvt. Ltd. ...Appellant

Vs.

C.S.T. Delhi …Respondent

Appearance:
Ms. Pravesh Khandelwal (Advocate) for the Appellant
Mr. Sanjay Jain, (DR) for the Respondent

CORAM:
Hon'ble Mr. S.K. Mohanty, Member (Judicial)
Hon'ble Mr. B. Ravichandran, Member (Technical)

Date of Hearing/ Decision.06.01.2017

Final Order No. 52297-52298 /2017

Per S.K. Mohanty:

These appeals are directed against the impugned order dated 21.10.2011 passed by the Commissioner (Adjudication) Service Tax, New Delhi, whereby service tax demand of Rs. 1,12,54,068/- along with interest was confirmed against the appellant. Penalty of Rs. 2 crore was imposed under Section 78 and other penalties were also imposed under Section 76 and 77 of the Finance Act, 1994. The appellant is not contesting the service tax demand confirmed by the adjudicating authority. However, the grievance of the appellant in this appeal is that simultaneous penalty cannot be imposed under Section 76 and 78 ibid.

2. The ld. Advocate appearing for the appellant submits that the entire amount of service tax along with interest and 25 % of penalty imposed under Section 78 ibid was deposited by the appellant. He, further submits that since 25% penalty has been deposited under Section 78, the balance amount of penalty should be waived. With regard to imposition of penalty both under Section 76 and 78, the Ld. Advocate submits that simultaneous penalty under both the provisions cannot be imposed and to support such stand the Ld. Advocate has relied on various decisions by the Tribunal.

- CCE Chandigarh vs Patiala Marketing Services Pvt. Ltd.
  [2016 (42) STR 507 (Tri. Del.)
- Skylark Fiscal Services (P) Ltd. vs CST Kolkata
  [2016 (42) STR 509 (Tri. Kol.)
- Chansama Taluka Sarvoday Mazoor Kamdar Sahakari Mandli Ltd.
  [2012 (25) STR 444(Tri. Amd.)
- Raval Trading Co. vs CST
  [2016 (42) STR 210 (Tri. Guj.)
- Commr. of Customs (I&G) vs Loveleen Sawhney
  [2016 (42) STR 218 (Tri. Del.)

3. On the other hand, Ld. DR appearing for the respondent reiterates the findings recorded in the impugned order and further submits that penalty under both section 76 & 78 can be imposed prior to the amendment of Section 78 upto 10.05.2008. The Ld. DR has relied on the judgment of Hon'ble Delhi High Court in the case of Bajaj Travels Ltd. vs CST 2012 (25) STR 417 (Del.) and the decision of this Tribunal in the case of Board of Control for Cricket in India vs CST Mum-I 2015 (37) STR 785 (Tri-Mum.) to state that prior to 10.05.2008 penalty can be imposed under both Section 76 and 78 simultaneously.

4. We have heard the Ld. Counsel for both the side and perused the records.

5. The period involved in this case is from 01.07.2003 to 31.03.2009. Section 78 ibid was amended w.e.f. 10.05.2008 wherein the 5th proviso was appended thereto providing that if the penalty is payable under Section 78, provisions of Section 76 shall not apply. The effect of such amendment is that simultaneous penalty under both section 76 and 78 ibid cannot be imposed. The short question involved in this appeal for consideration by the Tribunal is as to whether the amendment in Section 78 vide Finance Act, 2008 w.e.f. 10.05.2008 should have retrospective application or should apply prospectively. With regard to applicability of the said amendment prospectively the Hon'ble Delhi High Court in the case of Bajaj Travels Ltd. (supra) have held that such amendment cannot have the retrospective application in absence of any specific stipulation of that effect. Relevant paragraph in the said judgment is extracted herein below.

> **"16.** No doubt, Section 78 of the Act has been amended by the Finance Act, 2008 and the amendment provides that in case where penalty for suppressing the value of taxable service under Section 78 is imposed, the penalty for failure to pay service tax under Section 76 shall not apply. With this amendment the legal position now is that simultaneous penalties under both Section 76 and 78 of the Act would not be levied. However, since this amendment has come into force w.e.f. 16th May, 2008, it cannot have retrospective operation in the absence of any specific stipulation to this effect. Going by the nature of the amendment, it also cannot be said that this amendment is only clarificatory in nature. We may mention that Punjab and Haryana High Court in its decision dated 12th July, 2010 in STA 13/2010, entitled *Commissioner of Central Excise* v. *M/s. Pannu Property Dealers, Ludhiana* [2011 (24) S.T.R. 173 (P & H)] has taken the view that even if the scope of two sections of the Act may be different, the fact that penalty has been levied under Section 78 could be taken into account for levying or not levying penalty under Section 76 of the Act. However, that was a case where the appellate authority had exercised its discretion not to levy the penalty under Section 76 of the Act, when the larger penalty had already been imposed under Section 78 of the Act. In this scenario, the appeal of the Revenue against the said view taken by the appellate authority was dismissed holding that "appellate authority was within its jurisdiction not to levy the penalty under Section 76 of the Act having regard to the fact that penalty equal to service tax had already been imposed under Section 78 of the Act. This thinking was also in consonance with the amendment now incorporated though the said amendment may not have been applicable at the relevant time. Moreover, the amount involved is ₹ 51,026/- only." The Court, thus, chose not to interfere with the aforesaid discretion of the Tribunal."

6. Further by relying on the judgment of Hon'ble Delhi High Court in the case of Bajaj Travels (supra), this Tribunal in the case of Board of Control for Cricket in India (supra) has also held that simultaneous penalties under Section 76 & 78 ibid are imposable for the period prior to 10.05.2008. The decision of this Tribunal in the case of Patiala Marketing Services Pvt. Ltd. (supra) relied on by the appellant is not relevant for consideration of the issue inasmuch as the Tribunal while passing the said decision has not referred to the judgment of Hon'ble Delhi High Court in the case of Bajaj Travels (surpa).

7. Since the jurisdictional Delhi High Court in the case of Bajaj Travels have specifically held that the amendment in Section 78 will not have any retrospective application, we have no hesitation to follow that judgment in view of the fact that both the appellant as well as this Tribunal fall under the jurisdiction of the Hon'ble Delhi High Court.

8. Therefore, penalty levied under both Section 76 & 78 upto 10.05.2008 is sustainable and thereafter from 10.05.2008 to 31.03.2009, penalty under Section 76 is not sustainable. The appellant has already deposited 25% of the penalty under Section 78 ibid. The remaining 75% of penalty shall stand waived. The appeals are disposed of in above terms.

(Dictated and pronounced in the open court)

(**B. Ravichandran**)
Member(Technical)

(**S. K. Mohanty**)
Member (Judicial)

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