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

Date of Hearing/Order: 27.4.2017

Appeal No. ST/3129/2012-SM with ST/CO/4426/2012

(Arising out of Order-in-Appeal No. 41(ST/RPR-I/2012 dated 9.8.2012 passed by the Commissioner (Appeals), Central Excise, Raipur)

CCE, Raipur Appellant

Vs.

M/s Godawari Power & Ispat Ltd. Respondent

Appearance

Shri Krishan Mohan Menon, Advocate - for the appellant

Shri K. Poddar, D.R. - for the respondent

CORAM: **Hon'ble Mr. Ashok K. Arya, Member (Technical)**

Final Order No. 53176/2017

Per Ashok K. Arya :

Revenue is in appeal against the Order-in-Appeal No. 41/2012 dated 9.8.2012 whereunder inter alia penalty imposed under Section 76 of Finance Act, 1994 on the respondent viz. Godawari Power & Ispat Ltd. has been dropped.

2. The brief facts are that :

(i) The respondent is engaged in the manufacturing of iron and steel products

(ii) Revenue started proceedings against the respondent demanding service tax not paid on External Commercial

Borrowings (ECB) under the category of Banking and Financial Service, falling under Section 65(105)(zm) of the Finance Act, 1994.

(iii) After receipt of the Show Cause Notice (SCN) the respondent deposited said service tax demand of Rs.8,52,299/- and interest of Rs.1,70,284/-

2.1 The Show Cause Notice was adjudicated by the Order-in-Original dated 25.10.2011 whereunder the demand of service tax of Rs.8,52,299/- along with equivalent penalty was sustained. The Order-in-Original dated 25.10.2011 also imposed separate penalty of Rs. 200/- for every day during which the failure to pay service tax continues or 2% of such tax per month whichever is higher under Section 76 of Finance Act, 1994.

(v) The penalty imposed under Section 76 by Order-in-Original was dropped by the impugned order-in-appeal. Therefore, the department is in appeal before the Tribunal.

3. Both sides represented by ld. Counsels, Shri K. Poddar and Shri Krishan Mohan Menon have been heard.

4. After perusal of the facts and submissions of both sides, it appears that simultaneous penalty under Section 76 and 78 of Finance Act, 1994 prior to 10.2.2008, the day when there was

amendment made in Section 78 of Finance Act, 1994 will be imposable. During the period after 10.5.2008 as per the amended provisions of Section 78 if penalty is payabvle under Section 78 penalty under Section 76 of Finance Act, 1994 is not to be imposed.

5. The period involved in this case is 2006-2007 to 2008-2009. Thus the period involves the duration both prior to 10.5.2008 and after 10.5.2008. Therefore , the penalty is liable to be imposed for the offence pertaining to the period prior to 10.5.2008 under both the sections i.e. Section 76 and 78 of Finance Act, 1993. But for the period after 10.5.2008, no penalty under Section 76 can be imposed as already penalty under Section 78 has been imposed.

6. Ld. Counsel for the respondent argues that penalty under Section 76 is not liable to be imposed as penalty under Section 78 has already been imposed. He cites the decision of Hon'ble Gujarat High Court in the case of *Raval Trading Company Vs. CST* - 2016 (42) STR 210 (Guj.) saying that if penalty was payable under Section 78, another penalty under Section 76 of the Finance Act shall not apply.

7. On the other hand, ld. Counsel for the Revenue submits that both penalties can be imposed and cites in support following decisions:

(a) *Bajaj Travels Ltd. Vs. CST* - 2012 (25) STR 417 (Del.)

(b) *Assistant Commissioner of Central Excise Vs. Krishna Poduval* – 2006 (1) STR 185 (Kar.).

(c) *Board of Control for Cricket in India (BCCI) Vs. CST, Mumbai-I* - 2015 (37) STR 785 (Tri.-Mumbai), (appeal against the said decision was dismissed by the Hon'ble Supreme Court in the case of *BCCI Vs. CST* – 2015 (37) STR J176 (SC).

7.1 The respondent is engaged in the manufacture of iron and steel products in the State of Chhattisgarh. However, there is no decision cited by the ld. Counsel for the respondent from Hon'ble Chhattisgarh High Court on the subject. Ld. Counsel for the respondent submits that in addition to Hon'ble Gujarat High Court decision (supra), there is decision of Hon'ble Karnataka High Court on the same subject in the case of *CST Vs. Motor World* - 2012 (27) STR 225 (Kar.) whereunder it has been held that penalties under both Section 78 and Section 76 of the Finance Act cannot be imposed simultaneously.

7.2 The subject matter has been discussed in detail by the Tribunal in the case of BCCI (supra). The Tribunal in the said case observed as under:

> **6.11** The appellant has also raised a contention as to whether penalties can be imposed both under Sections 76 and 78 of the Finance Act, 1994, simultaneously. Reliance has been placed on the decision of *Industrial Security & Protection Services* (supra) wherein a Single Member Bench has referred the matter to a Larger Bench in view of the conflicting decisions by the Hon'ble Kerala and Karnataka High courts. The Hon'ble High Court of Kerala in the case of *ACCE* v. *Krishna Poduval* reported in 2006 (1) S.T.R. 185 (Ker.) held as foliows :-
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> "11. The penalty imposable under Section 76 is for failure to pay Service Tax by the person liable to pay the same in accordance with the provisions of Section 68 and the rules made thereunder, whereas Section 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."**
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> The Hon'ble High Court of Delhi in *Bajaj Travels Ltd.* [2012 (25) S.T.R. 417] also concurred with the view taken by the Hon'ble Kerala High Court and held that **Sections 76 and 78 operated in two different fields and penalty was imposable under both separately, even if offences were committed in course of the same transaction or arose out of the same act.** However, since the law has been amended prospectively w.e.f. 10-5-2008 so as to bar the imposition of penalties simultaneously, only one of the penalties would survive and not both after the amendment. As regards the reference made by a Single Member to the Larger Bench of the Tribunal in this regard, we note that the decision on penalties has been rendered by a High Court and this Tribunal does not have jurisdiction to sit on judgment over a decision rendered by a High Court. Therefore, the reference made by a Single Member to a Larger Bench of the Tribunal is of no consequence for imposition of penalties unless and until the decision of the Hon'ble High Court is overruled by

> the Hon'ble Supreme Court. **Further we note that in the decision rendered by the Hon'ble Karnataka High Court, no reasons have been given as to why penalty is not imposable under both Sections 76 and 78 for the period prior to 10-5-2008.** The Hon'ble High Court of Karnataka has merely observed that - "it is now well settled that the liability cannot be imposed both under Sections 76 and 78" [2012 (26) S.T.R. 304 (Kar.)]. This is only an *obiter dictum* and does not lay down any ratio. In these circumstances, we do not find any infirmity in the imposition of penalties both under Sections 76 and 78 of the Finance Act on the appellant for the period prior to 10-5-2008.

(Emphasis Supplied)

This decision of the Tribunal was appealed before the Hon'ble Supreme Court. However, Hon'ble Supreme Court after going through the material on record observes that there is no infirmity in the impugned order passed by the Tribunal and there is no reason to interfere in these matters. Thus, by dismissing the appeal, Hon'ble Apex Court endorses the view that for the period prior to 10.5.2008 (before there was amendment in Section 78 of the Finance Act 1994), penalty is imposable under both the sections i.e. 76 and 78 of the Finance Act, which operate in two different fields.

7.3 Hon'ble Delhi High Court in the case of *Bajaj Travels Ltd.* (supra) inter alia observed as under:

> "**15.** By their very nature, Sections 76 and 78 of the Act operate in two different fields. In the case of *Assistant Commissioner of Central Excise* v. *Krishna Poduval* - (2005) 199 CTR 58 = 2006 (1) S.T.R. 185 (Ker.) the Kerala High Court has categorically held that instances of imposition of penalty under Section 76 and 78 of the Act are distinct and separate under two provisions and even if the offences are committed in the course of same transactions

> or arise out of the same Act, penalty would be imposable both under Section 76 and 78 of the Act. We are in agreement with the aforesaid rule."

7.4 In the light of the above discussions, there is no doubt that for the period prior to 10.5.2008, the penalty under both the Sections 76 and 78 of Finance Act, 1994 are imposable. Therefore, both the penalties under Section 76 and Section 78 of Finance Act imposed for the period prior to 10.5.2008 on the respondent are sustained.

8. However, the penalties imposed do not give separate component in the case of these periods i.e. for prior to 10.5.2008 and after 10.5.2008. Therefore, the matter is remanded to the original adjudicating authority to decide the quantum of penalty under Sections 76 and 78 for the contraventions pertaining to the period prior to 10.5.2008 as well as for the contraventions pertaining to the period after 10.5.2008. In case of contraventions post 10.5.2008 penalty under Section 76, when penalty under Section 78 has already been imposed, cannot be imposed against the respondent.

9. Ld. Counsel for the respondent submits that they were given option by the impugned order in appeal to pay 25% of the penalty imposed under Section 78 within one month of passing the said Order and they have complied with the same. He therefore, submits that they are entitled to the benefit of waiver of remaining of 75%

penalty as per First Proviso of the then Section 78 of the Finance Act, 1994. The ld. Counsel for the Revenue however submits that this facility of penalty of 25% is available only at the first level of adjudication and not at the appeal stage. After perusal of the appeal, it is noticed that on the issue of 25% penalty, there is no plea and no prayer by the Revenue. Therefore, at this stage this cannot be taken up. Therefore, the option of payment of 25% penalty in favour of the respondent cannot be denied when it has already been given by the impugned order.

10. In view of above discussions, the impugned order is modified to above effect and the matter on deciding the quantum of penalty under Section 76 of the Finance Act, 1994 is remanded to the original adjudicating authority, who shall in the light of discussions and findings given above decide the same afresh after giving necessary opportunity of personal hearing to the respondent.

11. In the result, appeal partly allowed by way of remand in above terms. Cross objections stand also disposed of.

(Dictated & pronounced in open Court)

(Ashok K. Arya)
Member (Technical)

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