IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI, PRINCIPAL BENCH NEW DELHI

Date of Hearing:16.03.2017
Date of Decision:12.05.2017

Service Tax Appeals Nos.863/2010 & 2749/2012

[Arising out of Order-in-Original No.2/2010 ST/JPR-II-Commr. dated 31.03.2010 in Appeal No.863/2010 and Order-in-Original No.17/2012/ST/JPR-II dated 16.03.2012/25.04.2012 in Appeal No.ST/2749/2012, passed by the Commissioner of Central Excise-II, Jaipur]

M/s.Ramawat Construction Co. Appellant

Vs.

CCE, Jaipur-II Respondent

Appearance

Rep. by Ms. Rinki Arora, Advocate for the appellants.
Rep. by Mr.Ranjan Khanna, DR for the respondent.

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

Final Orders Nos.53206-53207/2017

Per B. Ravichandran:

These two appeals are dealing with identical issues and hence are taken up together for disposal.

2. The appellants are engaged in construction work and are registered with the Service Tax Department for payment of tax on services rendered by them. Certain inquiries were conducted by verification of records of the appellant as well as during the course of audit of the accounts of the appellant by the officers. The Revenue entertained a view that the appellants did not discharge service tax liability properly for the period 10.09.2004 to 31.03.2008 and also for the year 2008-09. Two separate show cause notices were issued to demand and recover service tax liabilities and also to impose penalties on the appellants. The

appellants have paid the service tax liability and are not contesting the case on merits. In both the appeals, the appellants contested the imposition of penalties under both the Sections 76 and 78 for the period upto 9.5.2008.The appellants contested the denial of cenvat credit of Rs.12,27,678/- vide impugned order dated 31.03.2010.

3. Ld. Counsel for the appellant submitted that they are not contesting the demands for service tax on merit. Their main submission is with reference to imposition of penalties under Section 76 of the Finance Act, 1994 when the Original Authority imposed penalties under Section 78 of the Act. It is the submission of the ld. Counsel that the penalties under Section 76 and 78 are mutually exclusive. The amendment carried out in Section 78 w.e.f. 10.05.2008 is only clarificatory and penalties under both sections cannot be imposed even prior to such amendment. Reliance was placed on the decision of the Hon'ble Gujarat High Court in the case of **Rawal Trading Company – 2016 (42) STR 210 (Gujarat)** and also Hon'ble Punjab & Haryana High Court decision in **First Flight Courier – 2011 (22) STR 622 (P&H).** The said decisions have been followed by the Tribunal in subsequent cases. Ld. Counsel further submitted that the show cause notice issued on 13.02.2009 cannot invoke the penalty both under Sections 76 and 78 as the law applicable at the time of issue of show cause notice should be considered. Reliance was placed on the decision of the Hon'ble Karnataka High Court in the **People's Choice – 2014 (36) STR 10 (Karnataka).**

4. Ld. AR contested the submissions of the appellants on the point of imposition of penalties under both the Sections 76 and 78 in the same case. He relied on the decision of the Hon'ble Delhi High Court in the case of **Bajaj**

Travels Ltd. – 2012 (25) STR 417 (Delhi). It was further submitted that the Tribunal in the case of **BCCI – 2015 (37) STR 785 (Tribunal-Mumbai)** held that prior to 10.05.2008, penalty under both Sections 76 and 78 can be imposed in the same case. The said decision of the Tribunal has been affirmed by the Hon'ble Supreme Court reported in **2015 (37) STR J-176 (SC),** by dismissing the civil appeal filed by BCCI. Regarding issue of show cause notice proposing penalties under both sections, ld. AR submitted that legal provisions, as available during the period of offence, are rightly invokable as the amendment in the provisions of Section 78 is prospective from 10.05.2008 and prior to that, the provisions, as applicable, are righty invoked by the lower authorities. Ld. AR referred to the provisions of Section 6 of General Clauses Act, 1997 to submit that a change in the legal provision will not affect the past liability.

5. We have heard both the sides and perused the appeal records.

6. As noted earlier in this order, the appellants are not contesting the service tax liability on merit. During the course of argument, ld. Counsel for the appellants made it clear that they are only contesting the imposition of penalty under Section 76 and also denial of cenvat credit by the Original Authority. In the second appeal, the appellants only prayed for setting aside the penalty imposed by the Original Order dated 16.03.2012. As such, we are not examining the service tax liability or connected issues in these appeals.

7. Regarding imposition of penalty under both Sections 76 and 78, we note that the provisions of Section 78 have been amended w.e.f. 10.05.2008. The last proviso in the said section, inserted on that day stipulates that if the penalty is payable under this Section, the provisions of Section 76 shall not apply.

Admittedly, this is statutory amendment and applicable prospectively. The Hon'ble Delhi High Court in the case of **Bajaj Travels Ltd. (supra)** categorically held that Section 76 and 78 operate in two different fields. The relevant portion of the order of the Hon'ble High Court is reproduced below:-

> **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.
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> **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.

17. However, in the instant case, the appellate authority, including the Tribunal, has chosen to impose the penalty under both the Sections. Since the penalty under both the Sections is imposable as rightly held by Kerala High Court in *Krishna Poduval* (supra), the appellant cannot contend that once penalty is imposed under Section 78, there should not have been any penalty under Section 76 of the Finance Act.

8. Further, we also note that similar view taken by the Tribunal in the case of **BCCI (supra)** was affirmed by the Hon'ble Supreme Court as mentioned earlier in this order. As such, following the said ratio, we find no infirmity in the order of lower authority in imposing penalties under Section 76 and 78 in the same case. Regarding the contention of the appellant that the show cause notice issued after the amendment of Section 78 cannot invoke the provisions existing prior to the

amendment, we note that the liability for any violation of law is governed by the law applicable at the time of such violation. The amendments carried out in the statutory provisions of Finance Act, 1994 are prospective in nature unless otherwise stated. We note that the reliance placed by the appellant on the decision of the Hon'ble Karnataka High Court in the **People Choice – 2014 (36) STR 10 (Kar.)** is not appropriate. The Hon'ble High Court upheld the Tribunal's order. The Tribunal examined the demand raised after amendment of Section 73(1)(a).

9. Hon'ble Supreme Court in the case of **Shree Bhagwati Steel Rolling Mills Vs. CCE – 2015 (326) ELT 209 (SC)** has held that

> "From this it is clear that when Section 6 speaks of the repeal of any enactment, it refers not merely to the enactment as a whole but also to any provision contained in any Act. Thus, it is clear that if a part of a statute is deleted, Section 6 would nonetheless apply".

Thus, if the effect of the amendment is omission of penalty in certain cases, the general clauses Act would still be operative and penalty would be liable as per the provisions at the time of offence and not at the time of issuance of notice.

10. The Supreme Court in **Garikapatti Veeraya (AIR 1957 SC 540)** held that as per Golden Rule of construction, the essential idea of a legal system is that **current law should govern current activities". The Hon'ble apex court held that "We hold that the rate of compensation shall have to be determined in accordance with the provisions of the act which was in force at the time of compensation was payable i.e. un-amended section (4) of Section 25 of the act would apply."**

11. Regarding denial of cenvat credit, we have perused the findings as recorded in para-13 of the impugned order dated 31.03.2010. The denial of credit has been made as no supporting documents for receipt of duty paid inputs have been submitted by the appellant. We note credit can be availed only on the basis of

valid documents. In the present appeal, there is nothing to controvert the findings on facts as recorded in the impugned order.

12. In view of the above discussion, we find no merit in these appeals and accordingly dismiss the same.

[Order pronounced on 12.05.2017]

(S.K. Mohanty)
Member (Judicial)

(B. Ravichandran)
Member (Technical)

Ckp.