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

Service Tax Appeal No. 56304 of 2013

[Arising out of Order-in-Original No. 51/2012/ST/JPR-II-Commissioner dated 27.11.2012 passed by the Commissioner of Central Excise, Jaipur II]

M/s. Babulal Parihar **Appellant**

Vs.

Commissioner of Central Excise Jaipur **Respondent**

Appearance:
Shri Vijayan Khongal, Company Secretary for the Appellants
Shri Ranjan Khanna, DR for the Respondent

CORAM:
Hon'ble Mr. D M Misra, Member (Judicial)
Hon'ble Mr. Ashok K Arya, Member (Technical)

Date of Hearing : 19.06.2017
Date of Decision : 28.7.2017

FINAL ORDER NO. 55617 /2017

Per: Ashok K Arya:

The appellant M/s. Babulal Parihar is in appeal against the order in original No. 51/2012 dated 27.11.2012 whereunder interalia recovery of service tax of Rs. 23,81,774/- along with interest has been confirmed; penalties under sections 76, 77 and 78 of the Finance Act have also been imposed on the appellant.

2.1 The brief facts are that:-

(i) M/s. Babulal Parihar (M/s. BP in short) were registered with Central Excise for providing rent a cab service. Later other services namely, manpower recruitment agency service, transport of goods by road service and works contract service were also added to the services registered.

(ii) Based on the intelligence, Department started investigation and found that appellant was providing services under the category of commercial or industrial construction service and supply of tangible goods service, and same were not included in their registered services.

(iii) The period involved in the present case is from April, 2007 to March, 2011. For this period the Department issued show cause notice dated 21.10.11 inter alia demanding service tax on services namely, commercial and industrial construction service and supply of tangible goods service totaling to Rs. 96,69,776/-

(iv) The show cause notice was adjudicated by the impugned order mentioned earlier which confirmed recovery of service tax of Rs.23,81,774/- along with interest and also imposed penalties on the appellant.

v) the appellant, therefore, is in appeal before the Tribunal against said impugned order.

3. With above background of facts, we have heard both the sides represented by Shri Vijayan Khongal, learned Company Secretary for the appellant and Shri Ranjan Khanna, learned AR for the Revenue.

4. We have carefully considered the facts of the case and the submissions made by both the sides.

5. The appellant is mainly contesting penalties imposed. The penalties have been imposed under both the Sections i.e. 76 and 78 of the Finance Act, 1994. Learned Company Secretary for the appellant pleads that the penalties under both Sections 76 and 78 cannot be imposed simultaneously for the period prior to 10.5.2008 when the amendment was made in the Section 78 of the Finance Act stating that where penalty is payable under Section 78, the provision of Section 76 shall not apply. Thus for the offence of evasion of service tax conducted after 10.5.2008 as per the CESTAT decision in the case of ***Board of Control for Cricket in India vs. CST, Mumbai [2015 (37)STR 785 (Tri-Mum)***] both the penalties i.e. simultaneous penalties under section 76 and section 78 of the Finance Act, 1994 are illegal. However, for the evasion of service tax prior to 10.5.2008 penalties under both sections 78 and 76 can be imposed. The Tribunal

in the case of ***Board of Control for Cricket in India*** (supra) has 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.

4.1 In the case of M/s. Bajaj Travels Ltd. vs. CST [2011-TIOL-896-HC-DEL-ST], the Hon'ble Delhi High Court on the same subject has observed as under:

"15. By their very nature, Section 76 and 78 of the Act operate in two different fields. In the case of Assistant Commissioner of Central Excise Vs. Krishna Poduval (2005) 199 CTR 58 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.

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 CEAC-06/2009 & CEAC-07/2009 Page 20 of 26 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 Vs. M/s Pannu Property Dealers, Ludhiana 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 CEAC-06/2009 & CEAC-07/2009 Page 21 of 26 amount involved is ` 51,026/- only." The Court, thus, chose not to interfere with the aforesaid discretion of the Tribunal.*
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> *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. 18. We, thus, answer question no.3 against the assessee and in favour of the Revenue holding that the aforesaid amendment to Section 78 by Finance Act, 2008 shall operate prospectively."*

4.2. Thus, for the offence of evasion of service tax for the period after cut off date of 10.5.2008, only one penalty i.e. under section 78 can be imposed. Therefore, the penalty imposed under section 76 for the tax evaded for the period post 10.5.2008 only is hereby dropped but for the period prior to 10.5.2008 penalties imposed under both Sections 76 and 78 are sustained.

4.3 As the facts do not make it clear that how much / what is exact quantification of the tax evaded separately for these two periods i.e.

prior to 10.5.2008 and post 10.05.08, the matter is remanded to the original adjudicating authority for quantification of the tax demand for these two periods after giving opportunity of personal hearing to the appellant and thereafter the penalty for the period post 10.5.2008 would accordingly be conveyed to the appellant M/s. BP.

5. In the result, the impugned order is modified to above effect and appeal partly allowed in above terms along with the remand to original adjudicating authority for quantifying the amount of penalties separately for the period prior to and post 10.5.2008 accordingly.

(Pronounced in the open Court on 28.7.2017)

(D M Misra)
Member(Judicial)

(Ashok K Arya)
Member (Technical)

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