IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,

WEST BLOCK NO.2, R.K. PURAM, NEW DELHI-110066

BENCH-DB

COURT –IV

Service Tax Appeal No.ST/59686/2013-CU [DB]

[Arising out of Order-in-Original No.69-70/GB/2013 DATED 31.03.2013 passed by the Commissioner (Appeals), Service Tax, New Delhi]

C.S.T., Delhi …Appellant

Vs.

M/s.Kanwarji Construction Co. … Respondent

Present for the Appellant : Mr.Sanjay Jain, D.R.
Present for the Respondent: Mr.A.K.Batra, Advocate

Coram: HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)
HON'BLE MR. B.RAVICHANDRAN, MEMBER (TECHNICAL)

Date of Hearing / Decision : 21/11/2017

FINAL ORDER NO. __58138/2017___

PER: B.RAVICHANDRAN

This appeal by Revenue is filed against impugned order dated 31.03.2013 of Commissioner, Service Tax, New Delhi.

2. The brief facts of the case are that the respondent is engaged in construction activities. Proceedings were initiated against the respondent by way of issue of two show cause

notices to demand and recover of service tax mainly under the categories of construction of residential complex service and commercial and industrial construction service. After due examination, the original authority adjudicated the case and confirmed part of the Service Tax liability. He imposed penalty of Rs.5,000/- under Section 77 and no penalties were imposed under Section 76 and 78. He held that the case is fit for closure for the amount already paid in terms of Section 73 (3) of the Finance Act, 1994. The proceedings initiated in the 2nd show cause notice were dropped.

3. The Revenue is aggrieved only by the findings with reference to 2 issues:-

(a) Service Tax liability of Rs.30,50,811/- should have been confirmed by the original authority as the construction of School Building in the present case is not excluded from tax liability.

(b) Penalties under Section 76 and 78 should have been imposed as it is a fit case for such penalties.

4. The ld. AR elaborated the grounds of appeal and submitted that the school building which was constructed by the appellant was held to be on non-commercial nature by the original authority. Interpreting the term "commercial" as provided under tax entry "commercial coaching and training centre", the ld. AR submitted that as per the annual balance

sheet, the school is run on a commercial basis earning profit. As such, the building is not excluded from tax liability being involved in a commercial activity. Regarding non-imposition of penalties, it is submitted that the appellants did not disclose the consideration received for construction of building for CGEWHO, Bhopal. When the original authority held that there is a violation of Section 70 and imposed penalty under Section 77, he could not have arrived at different findings to close the case under Section 73 (3).

5. The ld. Consultant appearing for the respondent submitted that the initial demand was for Rs.5.25 Crores. The original authority agreed with the respondent for exclusion of value of land from the tax liability. Accordingly, demand for Rs.2.59 Crores was dropped. Further, the amount of Service Tax payable in terms of the demand notice was fully discharged prior to the issue of notice itself and accordingly, the case should have been closed even without adjudication by virtue of provisions of Section 73(3). However, keeping in view these facts the original authority arrived at a similar finding in the present proceedings. There is no infirmity in the decision of the original authority in not imposing the penalties under Section 76 and 78. He further submitted that penalties under Section 77 were also not liable. However, they have not preferred any appeal on this considering the amount is only Rs.5,000/-.

6. Regarding Service Tax liability on the building used for educational institutions, the ld. Consultant submitted that it is the nature and use of the building which is relevant for tax liability and not the commercial earning of the owner of the building. Admittedly, the building is used by a recognized educational institution to run the classes for the school. As such, the original authority is correct in holding the building as of non-commercial nature.

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

8. Regarding the tax liability of school building, we note the Revenue is contesting the finding only on the ground that M/s.Cambridge School who are running the educational institution in the said building were actually earning profit, which is transferred to the capital fund and accordingly, cannot be considered as non-commercial. We note that the nature and use of building being for school education managed by school recognized by the Government, the building is excluded from the tax liability under commercial or industrial construction service. It is very clear that the scope of Section 65 (25 b) is with reference to building or civil structure which is used or to be used primarily for commerce or industry or work intended for commerce or industry. In the present case, the building is primarily used for education and not for commerce

or industry. Accordingly, we are in agreement with the original authority regarding non-tax liability of the said building.

9. Regarding non-imposition of penalty under Section 76 and 78, we note that the original authority recorded as below:-

> *"70. Now, lastly I take the issue of penalties purposed in the SCN under Sections 76 & 78 of the Act liable to be imposed on the notice for the alleged Acts of omission & commission detailed in the SCN. To this I find in the present situation, where the notice has deposited the whole amount of service tax payable for the impugned period alongwith interest for delayed payment during the course of investigation itself and that too before issue of impugned show cause notice question of imposing proposed penalties do not arise in term of provision of Section 73(3) of the Act. Further, the Hon'ble Apex Court in the case of M/s. Rashtriya Ispat Nigam has held that once whole amount of duty is deposited before issue of show cause notice, no penalty is imposable on the party."*

10. In principle, we are in agreement with the general conclusion of the impugned order. We note that Section 73 (3) speaks about closure of case without further proceedings. In the present case, proceeding was continued, resulting in the impugned order. To that extent closure in adjudication proceeding is not contemplated in the said Section. However, the facts of the case as summarized in the impugned order clearly revealed that it is not a fit case for imposition of penalty under Section 76 & 78. Though, invocation of Section 73 (3) in

the impugned order may not be relevant, it would have been proper if the adjudicating authority invoked Section 80 to arrive at the same conclusion. However, the overall context, we note that the same cannot be the basis to reverse the said finding of the original authority. Accordingly, we find no merit in the appeal by the Revenue for imposition of penalty under Section 76 and 78.

11. In view of the above discussion and analysis, we find no merit in the appeal filed by the Revenue and accordingly, the same is dismissed.

[Dictated and pronounced in the open Court]

(B. RAVICHANDRAN)
MEMBER (TECHNICAL)

(S.K. MOHANTY)
MEMBER (JUDICIAL)

Anita