CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No.2, R. K. Puram, New Delhi, Court No. II

Date of hearing: 21.06.2018
Date of pronouncement: 02.08.2018

S. T. Appeal No. 60538 of 2013

(Arising out of order in original No. 27/COMMR/ST/BPL-I/2013 dated 17.09.2013 passed by the Commissioner of Customs, Central Excise & Service Tax, Bhopal).

CCE, Bhopal Appellant –Revenue

Vs.

M/s Akansha Sales Promoters (I) Pvt. Ltd., Respondent-assessee

Appearance:

Sh. G. R. Singh, AR for the Revenue
None for the Respondent-assessee

Coram:

Hon'ble Mr. V. Padmanabhan, Member (Technical)
Hon'ble Ms. Rachna Gupta, Member (Judicial)

Final Order No. 52378 / 2018

Per: **V. Padmanabhan**:

The present appeal is filed by Revenue against the Order-in-Original No. 27/2013 dated 17.09.2013.

2. The respondent is engaged in providing various services and for payment of Service Tax they had obtained registration on 19.03.2007. Revenue investigated into the affairs of the appellant and came to the conclusion that they have failed to pay Service Tax for the period 01.10.2004 to 31.03.2010. Accordingly, show cause notice dated 20.04.2010 was issued to the respondent. The adjudicating authority, on conclusion of adjudication

proceedings passed the impugned order in which he ordered for payment of Service Tax amounting to Rs. 54,27,859/- alongwith interest. He also imposed penalties under Sections 69, 70 and 78 of the Finance Act, 1994. But, he refrained from imposition of penalty under Section 76. Revenue has filed the present appeal on the limited ground that the adjudicating authority should have imposed penalty under Section 76 also in addition to the other penalties.

3. When the case was called for hearing today, Sh. G. R. Singh, ld. AR is present for the Revenue. None appeared for respondent.

4. We have perused the appeal record. The impugned order has not been challenged by the respondent. The only limited ground on which the order has been challenged by Revenue is regarding the liability to penalty in terms of Section 76 of the Finance Act. On going through the impugned order, it is noted that the adjudicating authority has refrained from imposing penalty under Section 76, since penalty under Section 78 has already been imposed.

5. The Revenue has relied on the Tribunal decision in the case of ***Ramawat Construction Co. v****s*. ***CCE, Jaipur-II*** (Final Order Nos. 53206 – 53207/2017 dated 12.05.2017). The Tribunal in the said case has ordered that penalties under both Sections 76 and 78 can be imposed for the period prior to the amendment in Section 78 carried out w.e.f. 10.05.2008. The observation of the Tribunal in the above case is reproduced below:-

> "*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.

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."

6. From the record of the case, we find that the demand stands raised for the period 01.10.2004 to 31.03.2010. The amendment in Section 78 was carried out w.e.f. 10.05.2008. Hence, in the light of the Tribunal decision above, penalty under Section 76 is imposable for the period 01.10.2004 to 09.05.2008. The lower authority is directed to quantify and impose the penalty under Section 76 for the above period. We make it clear that we have not interfered with the impugned order, but have ordered for payment of penalty under Section 76 in addition.

7. In the result, appeal filed by Revenue is allowed as above.

(Pronounced on 02.07.2018).

(Rachna Gupta)
Member (Judicial)

(V. Padmanabhan)
Member (Technical)

Pant