CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH AT HYDERABAD
Division Bench
Court – I

Appeal No. ST/407/2009

(Arising out of Order-in-Original No. 11/2009 – ST dated 10.02.2009 passed by Commissioner of Customs, Central Excise and Service Tax, Hyderabad-II)

State Bank of India **…..Appellant(s)**

Vs.

Commissioner of Customs, Central Excise
& Service Tax, Hyderabad - II **…..Respondent(s)**

Appeal No. ST/434/2009

(Arising out of Order-in-Original No. 11/2009 – ST dated 10.02.2009 passed by Commissioner of Customs, Central Excise and Service Tax, Hyderabad-II)

Commissioner of Customs, Central Excise
& Service Tax, Hyderabad - II **…..Appellant(s)**

Vs.

State Bank of India **…..Respondent(s)**

Appearance
Shri G. Prahalad, Advocate for the Appellant.
Shri P.S. Reddy, Assistant Commissioner (AR) for the Respondent.

Coram:
Hon'ble Mr. M.V. RAVINDRAN, MEMBER (JUDICIAL)
Hon'ble Mr. P. VENKATA SUBBA RAO, MEMBER (TECHNICAL)

Date of Hearing: 29/05/2018
Date of Decision: 16/07/2018

FINAL ORDER No. A/30715-30716/2018

[Order per: M.V. Ravindran]

These two appeals are filed against Order-in-Original No. 11/2009 – ST dated 10.02.2009.

2. Relevant facts that arise for consideration in short are whether the short payment made by the appellant assessee during the period September, 2004 to March, 2008 has to be recovered by them by invoking the extended period and demand of interest and also imposition of equivalent amount of penalty. During the pendency of the proceedings before the issuance of show cause notice the appellant assessee had discharged the amount of Rs. 68,08,639/- and balance amount prior to issuance of show cause notice along with interest. Show cause notice was issued for the confirmation of demand and appropriation of the amounts so paid by the appellant/assessee. Appellant/assessee contested the matter on limitation and argued that penalty should not be imposed as the short payment for the period involved was due to calculation error. The Adjudicating Authority did not agree with the contentions raised, confirmed the demands raised along with interest appropriated the amounts so paid and the imposed penalty of Rs. 56 lakhs under Section 78 of the Finance Act, 1994 and also penalty under Section 76 of the Finance Act, 1994. Appellant/assessee is aggrieved by the

said order and is in appeal, in appeal No. ST/407/2009, Revenue is aggrieved by the impugned order and is in appeal, in appeal No. ST/403/2009 seeking enhancement of penalty.

3. Learned Counsel submits that the entire demand along with interest is discharged by them before the issuance of the show cause notice and penalty also discharged as soon as the show cause notice was issued. However, it is his submission that they are contesting the demands raised on the ground that the extended period invoked in the show cause notice cannot be invoked as the appellant assessee was subjected to audit by Departmental officers multiple times and hence they were under a *bonafide* belief that there occurred no error in computation of commission income. It is his submission that there is no suppression with intention to evade payment of taxes and the short payment is due to clerical error that occurred in the books of accounts. It is his further submission that the Adjudicating Authority has correctly held that the part of the demand along with interest is paid prior to issuance of show cause notice and hence no penalty should be imposed to such extent. He would relied upon the decision of the Hon'ble High Court of Karnataka in the case of *Commissioner of Service Tax, Bangalore Vs. Motor World* [2012 (27) STR 225] for the proposition that non-obstante clause of Section 80 can be invoked if there is a reasonable cause. It is his submission that in the case in hand, there was reasonable cause as the entire demand is due to clerical error

occurred and can be set aside on the ground of limitation. He relies upon the decision of the Tribunal in the case of *Trans Engineers India Pvt. Ltd.,* [2015 (40) STR (490)] for the proposition that extended period cannot be invoked based upon the second audit report for the period in question, also relies upon *Garrison Polysacks P. Ltd.,* [2013 (292) ELT 513] and *Suvikram Plastex (P) Ltd.,* [2008 (225) ELT 282] for the same proposition.

4. Learned Departmental Representative submits that as regards the invocation of extended period and demand thereof, it was correctly done so. It is his further submission that because the audit party have visited does not being that the audit parties to give an opportunity to inspect actual inspect of duty paid nature hence the mere fact audit was conducted in the records that there was suppression of the facts. He relies upon the judgment of Hon'ble High Court of Bombay in the case of *Tirgania Metal & Steel Industries P. Ltd.,* [2015 (326) ELT 650] for this proposition also relies upon in the case of *Chemfab Alkalis Ltd.,* [2010 (251) ELT 264], *Bharti Cellular Ltd.,* [2005 (179) ELT 334].

5. We have considered the submissions made by both sides and perused the records.

6. On perusal of records, it transpires that the issue is regarding demand of differential service tax liability for the period

2004-2005 to 2007-2008. It is undisputed that the service tax liability is on the commission and exchange received by the appellant assessee. The procedure followed by the appellant assessee in the books of records seems to be the closing balance minus opening balance on the commission and exchange received records for calculation of tax liability, accordingly discharged. The entire case of the Revenue is that due this kind of erroneous method of calculation followed month after month and differential service tax liability remained evaded and is correctly confirmed by the lower authorities by invoking extended period.

7. We find from the records, that the appellant assessee had contested only warrant to impose penalties in case of incorrect calculation of service tax before the Adjudicating Authority. The Adjudicating Authority has proceeded ahead on the ground that the appellant assessee being in an organized sector should not have maintained the records in the form in which they are to be maintained are left to the assessee and error in calculating the tax liability has to be construed as willful mis-statement and suppression with intention to evade payment of service tax that because audit of the records has taken place does not mean that the intention to evade duty was nullified and it cannot be presumed that this in itself would justified for non-invoking of longer period.

8. On careful considerations submissions and we do find audit of records, took place multiple times, Lower Authorities are noting and recording the audit of the records of the appellant assessee to place on 13.08.2007, 17.08.2007 again in September, 2008. The copy of the audit report filed by the appellant in appeal memorandum clearly indicates that the entire records were made available to the audit party and audit record specifically states that the service tax of audit is of the Branch accounts and they had pointed out same discrepancy of non-payment of tax on foreign exchange remuneration and income received from the Government transactions, syndication fees, etc. These details indicate that the appellant assessee had in fact produced all the records before the authorities to check and come to a conclusion, whether the tax liability was correctly discharged or otherwise. We find that the Tribunal in the case of Trans Engineers India Pvt. Ltd., (supra) had followed the decision of the Hon'ble High Court of Karnataka in the case of *Commissioner of Vs. MTR Foods Ltd.,* [2012 (282) ELT 196] and the decision of the Hon'ble High Court of Bombay in the case of *Rajkumar Forge Ltd., Vs. Union of India* [2010 (262) ELT (155)] wherein, Hon'ble High Court came to a conclusion that extended period cannot be invoked for demanding service tax if the audits have taken place. The findings of the Bench in the case of Trans Engineers India Pvt. Ltd., would apply in full force in these cases also. We find strong force and contentions raised by the Learned Counsel that though they have not contested the tax liability before

the Adjudicating Authority they had taken the point of limitation for setting aside the penalties so imposed, this is an acceptable point as, if the tax liability itself cannot survive on limitation the question of penalty does not arise. In view of the authoritative judicial pronouncements, the penalty imposed on the appellant assessee are liable to be set aside; as also on the ground that the appellant assessee has not been able to discharge the tax liability during the period in question due to clerical error is an accepted position, hence this calls for setting aside the penalty of Section 80 of the Finance Act, 1994 invoking the provisions of Section 80 of the Finance Act, 1994. We set aside the penalties imposed on the appellant assessee for the State Bank of India.

9. As regards the appeal filed by the Revenue, since we have invoking the provisions of Section 80 for setting aside the penalties imposed an acceptable justifiable reason, we find that the Revenue's appeal is liable to be rejected and we do so.

10. Assessee's appeal allowed and Revenue's appeal rejected.

(Order pronounced on 16/07/2018 in open court)

P. VENKATA SUBBA RAO
MEMBER (TECHNICAL)

M.V. RAVINDRAN
MEMBER (JUDICIAL)

Lakshmi….