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

## Appeal No. ST/167/2009

(Arising out of Order-in-Original No.8/2008-S.Tax (De Novo) (Commnr), dated 26.11.2008 passed by CCCE & ST, Guntur)

Kusalava Finance Ltd ….. Appellant(s)

Vs.

CC, CE & ST, Guntur ….. Respondent(s)

Appearance
Shri B. Seetharamaiah, Consultant to the Appellant.

Smt B. V. Siva Naga Kumari, 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: 24.07.2018
Date of Decision: 06.08.2018

## FINAL ORDER No. A/30831/2018

[Order per: P.V. Subba Rao.]

1. The appellant herein obtained Service Tax Registration Certificate from the Central Excise authorities under the category of banking and financial services. A show cause notice dated 09.01.2006 was issued demanding service tax along with interest. It also proposed to impose penalties on them under Sections 76 & 78. The original authority vide the impugned Order-in-Original confirmed the demand of Rs.30,95,926/- and appropriated the amounts already paid by the appellant and demanded the remaining amount to be paid along with interest. Aggrieved by the order, the appellant

approached the CESTAT, Bangalore who remanded the matter back to the original authority. In the denovo adjudication order No.8/2008 dated 26.11.2008, the Learned Commissioner confirmed the demand of Rs.78,398/- (+) Cess of Rs.692/-. He also imposed penalty of Rs.1,00,000/- under section 78 and penalty of Rs.1,47,500/- under section 76 of the Finance Act, 1944. The appellant filed this appeal seeking to set aside the penalties imposed by the Learned Commissioner. Learned Counsel for the appellant reiterated the submissions made in the appeal and requested that the penalties under sections 76 and 78 may be waived. It is his submission that the penalties cannot be imposed simultaneously under section 76 and section 78. It is also his submission that the learned Commissioner has erred in imposing penalty of Rs.1,00,000/- under section 78 when the entire confirmed demand was only Rs.79,090/-. Section 78 has a provision to impose penalty equal to the amount of service tax but not in excess of it. It is his further contention that the penalty under section 76 cannot be imposed since penalty has already been imposed under section 78 as has been well established.

2. Learned Commissioner (AR) contended that penalties can be imposed both under section 76 and under section 78 during the relevant period i.e., before May, 2008. He brings to our attention the judgment of Hon'ble High Court of Kerala in the case of Krishna Poduval [2006 (1) STR 185 (Kerala)] in which it was held that the incidents of imposition on penalties are distinct and separate under section 76 and section 78 even if the offences are committed in the course of same transaction or arise out of the same act. She also relies on the case of Pannu Property Dealers, Ludhiana [2011 (24) STR 173 (P & H)] in which the Hon'ble High Court has held that

simultaneous penalties can be imposed under section 76 and section 78. She further draws our attention to the order of the Tribunal in the case of BCCI [2015 (37) STR 785 (Tri.-Mumbai)] in which simultaneous penalty under sections 76 and 78 was held to be imposable for the period prior to 10.05.2008. With effect from 10.05.2008 the law has been amended prospectively imposing bar on imposition of penalties simultaneously under sections 76 & 78. While passing the above order, the Hon'ble Tribunal Mumbai held that the remark of the Hon'ble High Court of Karnataka in the case of World View Vision [2012 (26) STR 304 (Kar.)] that, "It is now well settled that the liability cannot be imposed both under section 76 and 78, is only an *obiter dictum* and does not lay down any ratio". This order of the BCCI was appealed before the Hon'ble Supreme Court who vide judgment reported in [2015 (37) STR J176 (SC)] dismissed Civil Appeal Diary No.39331/2014 holding as follows:

> *"1. Delay condoned.*
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> *2. These appeals are directed against the judgment and order passed by the Customs, Excise & Service Tax Appellate Tribunal, Mumbai in Order No.A/1395-1396/2014/CSTB/C-I in Appeal Nos.ST/32 & 300/2012-Mumbai, dated 26.08.2014.*
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> *3. On hearing Shri V. Lakshmikumaran, learned counsel for the appellant and after going through the materials on record, we see no infirmity in the order passed by the Tribunal and there is no reason to interfere in these matters.*
>
> *4. Accordingly, the appeals stand dismissed."*

3. It is the contention of the learned Commissioner (AR) that even though the Hon'ble Apex Court had dismissed the appeal without giving detailed reasons, the doctrine of merger applies as it has been held by the Hon'ble Supreme Court in the case of Medley Pharmaceuticals Ltd [2011 (263) ELT 641 (SC)]:

> *".... this Court, in a catena of cases, has opined that in case, the appeal has been dismissed in the absence of detailed reasons or without reasons, such order will entail the application of the doctrine of merger, wherein the superior court upholds the decision of the lower court from which the appeal has arisen."*

4. Therefore, the issue has now been put to rest and it is established finally by the Hon'ble Supreme Court that for the period prior to 10.05.2008, simultaneous penalties can be imposed under section 76 and 78 and therefore the impugned Order-in-Original does not require any intervention and the same may be upheld and the appeal may be rejected.

5. We have considered the arguments on both sides. The only issue under consideration is the penalties imposed by the Learned Commissioner in the Order-in-Original. Firstly, it needs to be considered whether penalties can be imposed simultaneously under section 76 and 78. There have been different views by different High Courts in this regard. However, the order of the CESTAT-Mumbai in the case of BCCI, which was upheld by the Supreme Court, puts the matter to rest. It is now a settled law that for the period prior to 10.05.2008 simultaneous penalties can be imposed under section 76 and 78 in view of the judgment of the Hon'ble Supreme Court. We therefore, find no infirmity in the Order-in-Original on this ground. The second issue to be decided is whether penalty imposed under section 78 is in excess of the demand and we find it so. Section 78, as it stood during the period, provided for a penalty equal to the amount of service tax levied or paid or short levied or short paid. There is a mandatory penalty and this cannot be either increased or reduced. Learned Commissioner has while confirming the demand of Rs.79,090/- imposed penalty of Rs.1,00,000/- under section 78

which is in excess of the duty confirmed. We therefore find that this penalty needs to be reduced to Rs.79,090/- and we do so.

6. The appeal is partly allowed to the extent of reducing penalty imposed under section 78 to Rs.79,090/-. The rest of the Order-in-Original is upheld.

(Pronounced in the Open Court on 06.08.2018)

(P.VENKATA SUBBA RAO)
MEMBER (TECHNICAL)

(M.V. RAVINDRAN)
MEMBER (JUDICIAL)

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