CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH REGIONAL BENCH AT HYDERABAD
BENCH - SM
COURT - I

Appeal(s) Involved:

ST/31235/2017-SM

(Arising out of Order-in-Appeal No. HYD-EXCUS-004-APP-0117-17-18-ST dated 30/06/2017 passed by Commissioner of Service Tax(Appeals), Hyderabad)

Crown Solar Power Fencing Systems Appellant(s)

Versus

Commissioner of Central Tax, Hyderabad Respondent(s)

Appearance:

Mr. R. Narasimha Murthy, Consultant for the Appellant.

Mr. Dass Thavanam, A.R. for the Respondent.

CORAM:

HON'BLE Mr. P. K. Choudhary, MEMBER (JUDICIAL)

Date of Hearing: 04/10/2018

Date of Decision: 04/10/2018

Final Order No. A/ 31290 / 2018

[Order per: P. K. Choudhary]

The facts of the case in brief are that the appellants are engaged in providing solar fencing systems to their customers and have rendered "erection, commissioning and installation services" for installing solar fencing systems in 2009-10 and 2010-11 but did not pay service tax. On being pointed out by the audit, the appellants paid the service tax of Rs 2,07,426/- along with interest of Rs 1,52,508/-. Again for the period 2012-13, during the course of the audit of ST-3 returns, the appellant assessee were asked to pay service tax amounting to Rs 2,98,587/- along with interest. Show-cause notice dated 22.01.2016 was issued stating as under:-

> " (a) An amount of Rs 2,98,587/- (Rupees Two lakh Ninety Eight thousand Five Hundred and Eighty Seven only) should not be demanded from the assessee towards service tax (including cesses) on services rendered in 2012-13, as discussed supra;
> (b) An amount of Rs 2,98,587/- (Rupees Two lakh Ninety Eight thousand Five Hundred and Eighty Seven only) already paid should not be appropriated towards service tax on the amount demanded in (a) above;
> (c) Interest of Rs 55,938/- should not be demanded from the assessee under provisions of Section 75 of the Finance Act 1994 on the amount demanded in (a) above;
> (d) A penalty should not be imposed on them under Section 78 of the Finance Act 1994 on the amount demanded in (a) as discussed supra;
> (d) A penalty should not be imposed on them under Section 78 of the Finance Act 1994 for non-payment of Service Tax on 'erection and Commissioning Charges; received for the year 2009-10 and 2010-11 as discussed supra;
> (f) Late fee of Rs 82,200/- should not be demanded from the assessee under provisions of Section 70 of the Finance Act, 1994 read with Rule 7C(III) of Service Tax Rules, 1994"

The adjudicating authority upheld the demand of Rs 2,98,587/- and since the same was paid by the assessee, also appropriated the same. Confirmed the demand of interest of Rs 55,938/- and imposed equal penalty under Section 78 and also imposed a penalty of Rs 2,07,426/- for the service tax on erection, commissioning and installation service under Section 78 and further imposed a late fee of Rs 82,200/- under Rule 7C of Service Tax Rules 1994 read with Section 70 of the Finance Act 1994. On an appeal, the learned Commissioner (Appeals) rejected the appeal and upheld the adjudication order, hence the present appeal before the

Tribunal. The learned consultant appearing on behalf of the appellant filed written arguments along with copies of the statutory provisions and the relied upon case laws. It is his submission that the service tax amounting to Rs 2,07,426/- for the years 2009-10, and 2010-11 was paid by the appellants in the year 2014 along with interest amount of Rs 1,52,508/-. Learned counsel argued that the show-cause notice dated 22.01.2016 did not demand the service tax of Rs 2,07,426/- as the maximum stipulated period for demand is 5 years in terms of Proviso to Section 73(1) of the Finance Act 1994. He further argued that when there is no scope to demand service tax of Rs 2,07,426/- under Section 73 of the Finance 1994, there is no scope to impose any penalty under Section 78 of the Act as Section 78 *ibid* is a consequence of the provisions of Section 73(1) of the Act. It is his submission that the order imposing penalty under Section 78 *ibid* without any demand in terms of Section 73 is not proper and legal and accordingly cannot be sustained. Learned consultant also argued that once the service tax along with interest is paid, before issuance of show-cause notice, there is no scope for imposition of penalty under Section 78 of the Act. In support of his submissions, he relied upon the decision of the Tribunal in the case of M/s Manipal County Vs CST Bangalore as reported in 2010 (17)STR 474, which was further affirmed by the Hon'ble High Court of Karnataka as reported in 2014(36)STR J 188 (Karnataka). Regarding the imposition of penalty under Section 78 amounting to Rs 2,98,587/- for the period 2012-13, the learned consultant submits that the appellants paid the amount and filed ST-3 returns and the show-cause notice was issued on the basis of ST-3 returns filed. It is his submission that they are not contesting the demand of service tax and interest but are only contesting the penalties imposed under Section 78 of the Act. Learned Consultant also argued on the aspect of limitation and submitted that the cases is also hit by limitation as the audit was conducted in January 2014 and the show-cause notice was issued after a lapse of two years in 2016. The learned A.R. reiterates the orders of the lower authorities and referred to various decisions in supports of his submissions.

2. Heard both sides and perused the appeal records. I find that the appellants are engaged in providing solar fencing systems to their customers and owing to some tax concessions, available to the solar power sector they were under the bonafide belief that their activities are not subject to audit of their accounts, it was pointed out that they are liable to service tax under the category of maintenance or repair services. The appellant/assessee being a proprietary concern immediately paid the entire liability of service tax along with interest and filed ST-3 returns though belatedly. I find from the records that the appellants are not disputing their liability of service tax and have paid the entire amount of service tax along with interest which has also been appropriated in the adjudication order but are only before the Tribunal contesting the imposition of penalties. I also observe that the entire proceedings were initiated based on the final audit report and the ST-3 returns and hence, do not find any element of suppression of facts mis-

statement etc. with an intent to evade payment of service tax. I find that the Board Circular No. 137/167/2003-CX4 dated 03.10.2007 is very clear and categorical on this issue. The same is being reproduced.

Payment of Service tax/interest/penalty-issuance of show-cause notice and conclusion of proceedings-clarifications

C.B. E & C Letter F No. 137/167/2006-CX.4, dated 3-10-2007
Government of India
Ministry of Finance (Department of Revenue)
Central Board of Excise & Customs, New Delhi

"Sub: Issuance of SCNs for levy of penalty in the cases where service tax is paid *suo motu* by the assessee

Section 73(1A) of the Finance Act, 1994 provides for conclusion of adjudication proceeding in the cases of wilful suppression/fraud/collusion if the taxpayer pays service tax liability along with interest and a penalty equal to 25% of service tax amount, within a period of one month from the date of issue of SCNs. Similarly, section 73(3) provides conclusion of adjudication proceedings in other cases on payment of service tax and interest.

2. A question has been raised as to whether the conclusion of proceedings in such cases is limited to the action taken under section 73 of the Act or all proceedings under the Finance Act, 1994, including those under sections 76,77 and 78, get concluded.

3. The issue has been examined. The intention of section 73(1A) has already been explained *vide* para 8(g) of the post budget instructions issued by TRU *vide* D.O.F. No. 334/4/2006-TRU, dated 28-2-2006, wherein it has been clarified that this sub-section provides for conclusion of adjudication proceedings in respect of person who has voluntarily deposited the service tax.

3.1 The relevant portion of section 73 is reproduced below,-

"**Provided** further that where such person has paid service tax in full together with interest and penalty under sub-section (1A), the proceeding in respect of such person and other person to whom notices are served under sub'-section (1) shall be deemed to be concluded."

Thus, law prescribes conclusion of proceedings against such person to whom SCN is issued under sub-section (l) of section 73. Therefore, it is not merely a conclusion under sub-section (1), but conclusion of all proceeding against such person. Similar is the position in respect of sub-section *(3)* of section 73.

4. Accordingly, conclusion of proceeding in terms of sub-sections (1A) and (3) of section 73 implies conclusion of entire proceedings under the Finance Act, 1994."

3. In view of the above discussions, the impugned orders are set side and the appeal filed by the appellant is allowed with consequential relief if any.

(Order pronounced and dictated in open court)

P. K. Choudhary
MEMBER (JUDICIAL)

M.V.Ravindran
MEMBER (JUDICIAL)

Neela Reddy