IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA

REGIONAL BENCH – COURT NO.2

S.Tax Appeal No.276 of 2009
& ST/CO-64 of 2010

(Arising out of Order-in-Original No.17/Commr./ST/Kol/2009-10 dated 31.08.2009 passed by Commissioner of Service Tax, Kolkata)

CST, Kolkata
Central Excise Bhavan,
180, Santipally,
Rajdanga Main Road,
3rd Floor,
Kolkata-700107.

Applicant (s)

VERSUS

M/s Kamrup Coke Industries
5F, Electronic Centre,
1/1A, Biplabi Anukul Chandra Street,
Kolkata-700072

Respondent (s)

WITH

(i) S.Tax Appeal No.277 of 2009
[CST, Kolkata Vs. M/s Parasnath Coke Industries]

(Arising out of Order-in-Original No.16/Commr./ST/Kol/2009-10 dated 31.08.2009 passed by Commissioner of Service Tax, Kolkata)

(ii) S.Tax Appeal No.278 of 2009 & ST/CO/63 of 2010
[CST, Kolkata Vs. M/s SKJ Coke Industries]

(Arising out of Order-in-Original No.15/Commr./ST/Kol/2009-10 dated 31.08.2009 passed by Commissioner of Service Tax, Kolkata)

APPERANCE :

Shri A.Roy, Authorized Representative for the Appellant
Shri N. K. Chowdhury, Advocate for the Respondent

AND

(i) S.Tax Appeal No.283 of 2009
(M/s SKJ Coke Indus.Ltd. Vs.CST, Kolkata)

(Arising out of Order-in-Original No.15/Commr./ST/Kol/2009-10 dated 31.08.2009 passed by Commissioner of Service Tax, Kolkata)

M/s SKJ Coke Industries
5F, Electronic Centre,
1/1A, Biplabi Anukul Chandra Street,
Kolkata-700072

Applicant (s)

VERSUS

CST, Kolkata
Central Excise Bhavan,
180, Santipally,
Rajdanga Main Road,
3rd Floor,
Kolkata-700107.

Respondent (s)

WITH

(ii) S.Tax Appeal No.284 of 2009
[M/s Kamrup Coke Industries Vs. CST, Kolkata]

(Arising out of Order-in-Original No.17/Commr./ST/Kol/2009-10 dated 31.08.2009 passed by Commissioner of Service Tax, Kolkata)

(iii) S.Tax Appeal No.287 of 2009
[M/s Parasnath Coke Industries Vs. CST, Kolkata]

(Arising out of Order-in-Original No.16/Commr./ST/Kol/2009-10 dated 31.08.2009 passed by Commissioner of Service Tax, Kolkata)

APPERANCE :

Shri N. K. Chowdhury, Advocate for the Appellant
Shri A.Roy, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. P.K.CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR.V. PADMANABHAN, MEMBER (TECHNICAL)

FINAL ORDER NO.77300-77305/2018

Date of Hearing : 29.11.2018
Date of Decision : 29.11.2018

PER P.K.CHOUDHARY :

The issue involved in all the appeals bearing nos. ST-283/2009, ST-284/2009 and ST-287/2009 filed by the assessee, is identical and hence, taken up together for disposal by this common order. Appeals filed by the Revenue bearing nos. ST-276/2009, ST-277/2009, ST-278/2009 against which Cross Objections bearing nos. 63/2010 and 64/2010 have been filed by the assessee, are also being disposed of by this order.

2. Briefly stated, the facts of the case are that the assessees herein are engaged in manufacture of coke which attracts central excise duty. In the course of said manufacture, they availed services of transportation of goods by road ('GTA service') on which service tax was made leviable under the provisions of the Finance Act, 1994, as amended, ('the Act') under reverse charge mechanism w.e.f. 1st January 2005 onwards. As per the law, the specified category of assessee (companies and partnership firms) receiving taxable service under the category of GTA service were made liable to pay tax directly to the credit of Central Government, instead of payment by the service provider i.e. goods transport agencies. The issue relating to applicability of service tax on GTA service is not in dispute in the present case.

3. During the period in dispute, i.e. January 2005 to March 2007, service tax amount was being reimbursed to the goods transport agencies (service provider) by the assessee (service recipient) instead of directly depositing with the service tax department. The service tax amount so collected by the transport agencies from the said assessees were duly deposited. Demand of service tax was accordingly raised by the Department under GTA service on the assessees, on the ground that tax was required to be deposited by them being the recipient of GTA service. Part of the service tax amount remaining short paid was deposited by the assessee on being pointed out by the Department but well before the Show Cause Notices. He also stated that detail calculation was submitted showing full discharge of service tax. The Ld. Commissioner in his impugned adjudication order on being satisfied that

the entire service tax amount stood deposited before the issue of Show Cause Notice, appropriated the same against the demand. However, he confirmed the imposition of penalty equal to service tax amount under Section 78 of the Act. He also imposed penalty under Section 77 of the Act on the service recipient i.e. the assessee manufacturer. In so far as demand of service tax and penalty proposed in the Show Cause Notice to the concerned goods transport agencies, he dropped the entire proceedings.

4. Sri N. K. Chowdhury, Advocate, appeared on behalf of the assessee and Sri. A. K. Roy, appeared on behalf of the Department.

5. The Ld. Advocate for the assessee submitted that the subject matter of service tax on GTA service was completely new as it was introduced in the January 2005 which is the period in dispute herein. Entire payment of service tax has been made before the issuance of Show Cause Notice, either through the goods transport agencies or by the assessee themselves of the remaining amount. Though the payment has been made belatedly, in the course of enquiry initiated by the Department, they have also paid applicable interest. There is no evidence on record to show that there was an element of fraud or wilful suppression inasmuch as all the payments of the freight amount with service tax charged thereon were duly recorded in the books of accounts. He emphasised that since the service tax amount was already paid through the transporters, they could not be again asked to deposit the same amount as the same would lead to double taxation, the fact which has been admittedly appreciated by the Ld. Commissioner in his impugned order, wherein he has placed reliance on the CBEC Instruction no. 341/18/2004-TRU(Pt) dated 17.12.2004. It has been clarified therein that if service tax due on transportation has been paid, though payable by the person liable to service tax the same should not be charged for the same amount from any person to avoid double taxation. The Ld. Advocate for the assessees further submitted that the Ld. Commissioner in his order committed a serious error while imposing penalty equal to the service tax amount under Section 78 of the Act, when admittedly the tax amount stood deposited before issue of Show

Cause Notice. He relied on the decision of the Hon'ble Karnataka High Court in the case of CCE, Bangalore vs. Pushpadeep Enterprises 2012 (279) ELT 503 (Kar.) wherein the imposition of penalty has been set aside when duty amount was deposited before the issue of Show Cause Notice. He also stated that since the levy was new, coupled with the fact that the large portion of the tax amount stood deposited through the transporters, there could not be any reason of wilful suppression with intent to evade payment of tax. On this count, he further added that they are entitled to complete relief from imposition of penalty by virtue of Section 80 of the Act, inasmuch as there was a 'reasonable cause' for non payment of service tax during the period in dispute under the aforesaid circumstances.

6. Ld. Departmental Representative (DR) supports the findings made by the Ld. Commissioner in the impugned adjudication order inasmuch as penalty u/s 78 is concerned. He, however, stated that penalty under the provisions of Section 76 of the Act were also imposable on the assessee, alongwith penalty u/s 77 on the concerned transporters who rendered GTA service to the assessee, for which the Revenue has filed the appeals. In the said Department appeals, the assessees have filed Cross Objections wherein, amongst other grounds, they have contended that penalty is not imposable when the tax amount has been deposited before issuance of the Show Cause Notice.

7. We have heard both sides and perused the appeal records in detail. It is not the case of the Revenue that liability to pay service tax amount under reverse charge mechanism has been disputed by the assessee, but the case of imposition of penalties under Section 76, 77 and 78 of the Act. Though the Ld. Commissioner has confirmed penalty u/s 78 for which assessee is in appeal, the Department has filed appeals for further imposition of penalty u/s 76 on the assessee (service recipients) and further penalty under Section 77 of the Act on the concerned transport agencies rendering GTA services. The Ld. DR does not dispute the fact which is on record, that service tax amount has been duly deposited, either by the transport agencies or by the assessee for the remaining portion, well before the issue of Show Cause

Notice though belatedly for which interest has also been paid. It is also not the case of the Revenue that they are seeking double payment of tax which stood deposited by the transport agencies as reimbursed and borne by the assessee manufacturers receiving transport service which fact has also been appreciated by the Ld. Commissioner in the impugned Original Order. We agree with the submissions made by the assessee that when service tax amount has been deposited before the Show Cause Notice, no penalty should be imposed in view of the law as laid down by the Hon'ble Karnataka High Court in case of Pushpadeep Enterprises (Supra) relied upon by the assessee, which is squarely applicable to the facts of the present case. We also find force in the argument of the assessee that in terms of the provisions of Section 80 of the Act, they are entitled to full waiver of penalty under Section 78 as well as Section 76 and 77 of the Act, inasmuch there was a reasonable case for non payment of tax as the very levy of service tax on GTA service under reverse charge was a new concept. In view of the above, we do not find any reason to burden the assessee with penalty under Section 78 of the Act and the same is therefore set aside. On the same count, since penalty under Section 76 and 77 are not imposable, the appeals filed by the Revenue are rejected being devoid of any merits. Cross objections filed by the assessee also stand disposed of.

8. In the result, the appeals filed by assessee are allowed whereas the appeals filed by the Revenue are rejected. Ordered accordingly.

(Operative portion of the order was pronounced
in the open court on **28.11.2018**)

Sd/
(P. K. Choudhary)
Member (Judicial)

Sd/
(V.Padmanabhan)
Member (Technical)

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