IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
EASTERN ZONAL BENCH: KOLKATA

S.Tax MA-(COD)-75033 of 2019
and
S.Tax Appeal No.75095 of 2019

(Arising out of Order-in-Appeal No.236/SKS/BOL/ST/2018-19 dated 08.06.2018 passed by Additional Director General (Taxpayer Services), Central Excise, Customs & Service Tax, Kolkata Zonal Unut, Kolkata)

M/s N.C.Dutta & Sons
Nachan Road,
Benachity,
Durgapur

Appellant

VERSUS

CGST & Central Excise, Bolpur
Satyajit Roy Sarani,
City Centre,
Durgapur-713216

Respondent

Appearance:

Shri Tarun Chatterjee, Advocate & Ms.Binita Pandey, C.S. for the Appellant (s)
Shri A. K. Biswas, Supdt. (A.R.) for the Revenue

CORAM:
HON'BLE SHRI P.K.CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE SHRI V. PADMANABHAN, MEMBER (TECHNICAL)

DATE OF HEARING : 25.03.2019
DATE OF DECISION : 25.03.2019

MISC.ORDER NO.75703/2019
FINAL ORDER NO.75497/2019

Per Shri P. K. Choudhary :

The present Miscellaneous Application has been filed by the Appellant/Applicant, seeking condonation of delay of 49 days in filing the appeal before this Tribunal.

2. The ld.Advocate appearing on behalf of the applicant/appellant, submits that the accountant, who was assigned for preparing of appeal papers for filing before the Tribunal in respect of this matter, met with an accident and could not attend to his duties for quite some time. In

absence of the concerned accountant, the appeal could not be filed within the due date. Hence the delay.

3. In view of the submissions as made by the ld.Advocate and the reasons as narrated in their application, the delay in filing the appeal before this Tribunal, is condoned. The Miscellaneous Application (COD) is allowed.

4. We find that the issue for determination lies in a narrow compass. Accordingly, with the consent of both sides, the present appeal filed by the appellant is being taken up for final disposal.

5. This appeal is filed by the Appellant against the Order-in-Appeal No.236/SKS/BOL/ST/2018-19 dated 08.06.2018.

6. The facts of the case in brief are that the appellant, M/s N.C.Dutta & Sons, is a partnership firm and are having rental income from immovable property. Show-cause notice dated 02.08.2010 was issued on the basis of ST-3 Returns filed for the period August, 2009 to March, 2010 for non-payment of service tax on renting of immovable property. The adjudicating authority confirmed the demand of service tax amounting to Rs.2,26,600/- and ordered for appropriation of the said amount since it was deposited by the appellant. However, penalties under Sections 76 and 78 were imposed. Assessee was in appeal before the lower appellate authority contesting the imposition of penalty under Sections 76 and 78 of the Finance Act, 1994. The lower appellate authority modified the adjudication order by setting aside the penalty imposed under Section 76. However, he upheld the penalty imposed under Section 78. Hence, the present appeal before the Tribunal.

7. The ld.Advocate appearing on behalf of the appellant, submits that the appellant had paid the entire service tax much before the issuance of show-cause notice under intimation to the Department. It is his submission that in view of the provision of Section 73(3) of the Finance Act, 1994 and Departmental Confirmation vide CBEC Letter No.137/167/2006-CX-4 dated 03.10.2007, show-cause notice ought not to have been issued, but in the instant case, show-cause notice has been issued for recovery of penalty. The ld.Advocate further

submitted that the taxability of "Renting of Immovable Property" admittedly have been a subject matter of substantial litigation in view of the decision of the Hon'ble High Court of Delhi in the case of Home Solutions Retail India Ltd. Vs. Union of India : 2009 (20) STT 129 (Delhi). In view of the aforesaid decision, tenants were not willing to pay service tax and the landlords were in jeopardy as regards compliance with the statutory liability is concerned. The ld.Advocate further submits that there is no *mens rea* on the part of the appellant and it is not the case of suppression of facts or mis-statement with an intent to evade payment of service tax.

8. The ld.D.R. for the Revenue reiterates the order of the lower authorities.

9. Heard both sides and perused the appeal records.

10. We find that the issue in the present appeal arose for non-payment of service tax under the category of "Renting of Immovable Property". We also observe that the service tax liability demanded by the show-cause notice is found to have been paid in full by the appellant-assessee. The appellants are not contesting the demand and only praying for setting aside the penalties. We also observe that the lower appellate authority has also set aside the penalty under Section 76 of the Finance Act, 1994. The appellants are before the Tribunal contesting the penalties imposed under Section 78 of the Finance Act, 1994. The appellants have deposited service tax on being pointed out by the Department. Regarding payment of service tax on rendering service of renting of immovable property, they expressed that they had bonafide belief that the service tax was not payable as Hon'ble Delhi High Court has stayed the provisions. It was through retrospective amendment only that the tax was made applicable. It is clear that the appellants have made a good case for waiver of penalty in respect of service of renting of immovable property.

11. On perusal of the records, we do not find any ingredients of mis-statement, suppression of facts etc. with an intent to evade payment of service tax. In respect of imposition of penalty relating to delay in payment of service tax on the service of renting of immovable

property, no mala fides are proved and the issue being of interpretational nature, penalty is not imposable. There is no case of leviability of penalty under Section 78 of the Finance Act, 1994. This was indeed a matter of substantial litigation in view of the decision of the Hon''ble Delhi High Court in the case of Home Solutions (supra), wherein it has been held that the renting of immovable property is not a service liable to tax and accordingly, the tenants were reluctant in making payment of the service tax as demanded by the Landlord.

12. We also observe that the services of Renting of Immovable Property services became taxable with retrospective effect pursuant to an amendment brought forth in Finance Act, 2010. The services thus became taxable with effect from 01.06.2007. The Finance Bill received the assent of the President on 08.05.2010.

13. In view of the above discussions, the penalty under Section 78 of the Finance Act, 1994, is set aside and the appeal filed by the appellant is allowed.

(Operative part of the order was pronounced in the open court)

Sd/	Sd/
(V.Padmanabhan)	**(P. K. Choudhary)**
Member (Technical)	**Member (Judicial)**

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