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

Service Tax Appeal No. 78542 of 2018

Arising out of Order-in-Appeal No. 279-280/S.Tax-I/Kol/2018 dated 05.04.2018 passed by the Commissioner of CGST & Central Excise (Appeal-I), Kolkata.

M/s Shyam Sel & Power Limited
S. S. Chembers, 5, C.R. Avenue,
Kolkata-700072.

….Appellant (s)

Vs.
Commissioner of CGST, Central Excise, Kolkata.
GST Bhawan (8th Floor),
Shantipally, Kolkata-700107.

….Respondent (s)

Appearance:
None, for the Appellant (s)
Shri S. S. Chattopadhyay, D. R. for the Respondent(s)

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

Final Order No.76581/2019

Date of Hearing:- 05.07.2019
Date of Decision:-05.07.2019

PER SHRI P.K.CHOUDHARY:

When the case was called, none appears on behalf of the appellants. However, an adjournment petition has been received. It is observed that on the last date of hearing i.e. on 21.06.2019 also, no one appeared. Since the issue in the present appeal lies in a narrow compass, the prayer for adjournment is not being accepted and the appeal is taken up for hearing with the consent of the Learned Authorized Representative for the Department.

2. The facts of the case in brief are that the appellant is engaged in providing the services of supply of tangible goods service as well as a recipient of services of rent -a-cab, security services, manpower supply services, legal services etc. During the verification of books of the Appellant for the period 2008-09 to 2011-12, the Appellant was served with a Show-cause notice dated 15/10/2013 demanding service tax of Rs 5,01,202/- along with interest and for imposition of penalty under section

78 of the Finance Act, 1994. It was also proposed to recover irregular Cenvat credit of Rs.21,522/- availed by the Appellant in terms of Rule 14 of the Cenvat Credit Rules, 2004 along with interest and to impose penalty under Rule 15 of the said Rules.

3. The Adjudicating Authority confirmed the entire demand of service tax along with consequential interest and imposed equivalent penalty under 78 of the Finance Act, 1994 and also ordered for recovery of the Cenvat credit as proposed in the SCN. On appeal before the Commissioner (Appeals), the demand of Rs. 4,41,874/- on supply of tangible goods service was set aside. Rest demand of Rs. 59,328/- under renting of immovable property service was confirmed along with demand of Rs. 21,522/- for recovery of Cenvat credit along with interest and penalty on both the above amounts under section 78 of the Finance Act, 1994. Hence, the present appeal before the Tribunal.

4. I observe from the grounds of appeal that the Appellant has availed the Cenvat credit of Rs.21,522/- on Ait tickets, travelling expenses and travel agency payments as the same was in relation to business expense of the Appellant and that they are rightly eligible for the said credit. As regards the demand of Rs. 59,328/- under renting of immovable property services, the Appellant states that it has already paid the entire amount with interest of Rs. 7190/- on 16/07/2013 i.e. much before issuance of the SCN and hence the penalty on the said amount cannot be sustained as there is no malafide intent at the end of the Appellant.

5. The ld. D.R. appearing on behalf of the Revenue, justified the impugned order.

6. Heard the Learned A. R. For the Revenue and perused the appeal records.

7. I find that two issues arise for my consideration in the given case. First eligibility of Cenvat credit on air ticket, and travel agency services as availed by the Appellant. Next, imposition of penalty of Rs.59,328/- under renting of immovable property on the Appellant.

As regards the issue of penalty under renting of immovable property service I find that the present issue involved in this appeal is no more res-integra in view of the decision of the Tribunal in the case of R.K.

REFRESHMENT & ENTERPRISES (P) LTD. Versus COMMR. OF C. EX., RAIPUR reported in 2018 (14) G.S.T.L. 281 (Tri. - Del.). The relevant paras of the said decision are reproduced below:-

> *"7. Other than above points, we note that there is a demand for Rs. 11,47,291/- under the category of renting of immovable property service. The appellants are not contesting the tax liability. They only requested for waiver of penalty invoking provisions of Section 80. The original authority declined to waive penalty on the ground that the appellants have not paid the Service Tax within the time mentioned under Section 80(2). We note that though the said sub-section was basically with reference to renting of immovable property service, the main Section 80 is still available to the appellant considering that the tax liability under renting of immovable service was subject matter of various disputes, amendments, including retrospective amendment. As such, the penalty imposed on this service is waived invoking provisions of Section 80."*

The Tribunal in the case of SREE KANYACOMBINES Versus COMMISSIONER OF C. EX., VISAKHAPATNAM-II reported in 2016 (43) S.T.R. 604 (Tri. - Hyd.) also decided as follows : –

> "*5. I have heard the rival submissions. Undeniably the issue whether activity of renting of immovable property is subject to levy of service tax was a contentious one. In the present case, the value of taxable service of 'sale of space or time for advertisement' for the respective period is less than the threshold of exemption. The contention of the appellant that they bonafide believed that their services would not be taxable as renting of immovable property services was subject matter of litigation pending before the Apex Court is acceptable. It is also correct that sub-section (2) of Section 80 was inserted to avoid penalizing the assessees as the matter was contentious one and there were several judgments in favour of assessees also. The relevant portion of the Finance Bill in introducing sub-section (2) of Section 80 as quoted in the appeal is as under……6. It is seen that if the assessee fails to avail the benefit of sub-section (2) of Section 80, then the assessee has to be treated as though sub-section (2) of Section 80 did not exist.* ***It nowhere says that in case of failure to avail benefit under subsection (2) of Section 80, the benefit under sub-section (1) of Section 80 will be taken away. As per sub-section (1) of Section 80 if the assessee proves reasonable cause for failure, then no penalty shall be imposable****……………….. In the case of Mahesh Vakatawarmal Rathod (supra), the Tribunal in a similar set of facts has set aside the penalty imposed under Section 76 of the Finance Act, 1994. In the present case, there is no allegation of fraud, suppression of facts or wilful misstatement. The service tax on renting of immovable property was not paid as the issue was contentious an there were decisions in favour of assessee also. Following the judgment laid in the case of Mahesh Vakatawarmal Ratho (supra), I hold that the penalty imposed under Sections 77 and 78 is not sustainable as the*

> *appellant has succeeded in establishing reasonable cause for the failure. In view thereof, the impugned order is modified to the extent of setting aside the penalties imposed without disturbing the confirmation of demand of service tax and interest thereon."*

8. I find that the facts of the present case are squarely covered by the aforesaid decision of the Tribunal. Thus, the penalty of Rs.59,328/- is set aside.

9. As regards the issue of availment and utilization of CENVAT Credit amounting to Rs.21,522/-, on travel expenses, I observe that the actual amount of CENVAT Credit was Rs.21,552/- and the credits were taken basically against 'Travelling Agency Service' and such services were basically used/consumed by an individual in personal capacity and were not related with the main business activity of the assessee either on the count of manufacturing activity or provision of output service. Such services cannot be included to be 'input services' within the meaning of Rule 2(1) of CENVAT Credit Rules, 2004. From the available records, I further observe that the assessee had reversed / paid CENVAT Credit to the extent of Rs.566/- alongwith interest of Rs.111/- vide entry serial No. 412 dated 01.07.2013, i.e. before issuance of the Show Cause Notice, against such wrong availment and utilization of total credit of Rs.21,552/-. In other words, the assessee were rather agreeing to the contentions of audit as well as demands raised in the Show Cause Notice. On this count, I hold that the differential CENVAT Credit to the tune of Rs.21,522/- was inadmissible, recoverable from the assessee.

10. In view of the above, the impugned orders are set aside to the extent of imposition of penalty on the Appellant and the appeal filed by the appellant is thus partly allowed.

(Operative portion of the order already pronounced in the Open Court)

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

T.K.