

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

REGIONAL BENCH - COURT NO.2

**Service Tax Appeal No.79671 of 2018**

(Arising out of Order-in-Appeal No.91/ST/BBSR-GST/2018 dated 23.05.2018 passed by Commissioner(Appeals), CGST, CX & Customs, Bhubaneswar.)

**M/s. Prudential Security**

(Flat No.301, 3<sup>rd</sup> Floor, Acrux Radhagovinda Enclave, N-4/42F, IRC Village, Bhubaneswar-751015.)

**...Appellant**

*VERSUS*

**Commissioner of CGST & CX, Bhubaneswar Commissionerate**

**.....Respondent**

(C.R. Building, Rajaswa Vihar, Bhubaneswar-7, Odisha.)

**APPEARANCE**

Shri N.K.Chowdhury, Advocate for the Appellant (s)  
Shri A.Roy, Authorized Representative for the Revenue

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

**FINAL ORDER NO. 75884/2023**

DATE OF HEARING : 1 June 2023  
DATE OF DECISION : 30 June 2023

**P.K.CHOUDHARY :**

Briefly stated the facts of the case are that the appellant is engaged in providing taxable service under the category of 'Security Service'. The officers of the Department during EA-2000 audit found the following discrepancies:-

- (i) Short paid Service Tax amounting to Rs.4,449/- on the taxable value of Rs.1,08,000/- on Rent a Cab Scheme.
- (ii) Short payment of Service Tax amounting to Rs.9,582/- during January, 2009 to December, 2009 under the category of Security Agency Service on Rs.92,230/- and
- (iii) Short payment of Service tax to the tune of Rs.93,531/- on taxable value of Rs.9,08,065/-.

2. The said observation has been made on verification of P & L Account of the appellant for the year 2008-09 and 2009-10 comparing the figure with that of the ST-3 Return.
3. The appellant was issued with a show cause notice dated 21/08/2012. The calculation has been shown at Page 14 & 15. By the said show cause notice, the appellant was directed to show cause as to why Service Tax amounting to Rs.1,07,562/- should not be recovered from the appellant under the proviso to Section 73(1) of the Finance Act, 1994 along with interest in terms of Section 75 of the said Act. Proposal for imposition of penalty was also made.
4. The appellant submitted the reply contending that –
  - (i) The appellant's Agency is registered under the Director General Resettlement under the Ministry of Defence in order to rehabilitate ex-servicemen by engaging them up to the age of retirement.
  - (ii) The difference of figures between the Balance Sheet and the ST-3 Return cannot be the basis of demand.
  - (iii) The amount of rs.1,08,000/- as shown in the P & L Account refers to figures of vehicle subsidy provided by Mahanadi Coal Fields Ltd. which cannot come under the purview of any service since the subsidy was provided to patrol area of Mahanadi Coalfields for its security and not to carry any passenger. Therefore, demand of Rs.4,449/- cannot be made.
  - (iv) Regarding the amount of Rs.9,582/-, it was actually short paid due to arithmetical mistake. On pointing out by the audit, the appellant made payment of the said amount along with interest.
  - (v) Regarding the demand of Rs.93,531/- the appellant submits that the same is not payable in view of the fact that for the period 2008-09, on amount of Rs.12,70,446/- was more than that of the P & L Account and in the FY-2009-10, the ST-3 amount was less than the P & L Account to the extent of Rs.9,08,065/-. On comparison, it will be seen that appellant has deposited more

Service Tax of Rs.3,62,381/- [Rs.12,70,446/- (-) Rs.9,08,065/-] and the appellant is not liable for making payment of Service Tax, rather the appellant is eligible for getting refund for excess of Service Tax already paid. The question of charging interest and imposition of penalty does not arise.

(vi) On 07/12/216, Order-in-Original was passed confirming the demand of Rs.1,03,113/-, appropriated the amount of Rs.9,582/- towards Service Tax and Rs.5,035/- towards interest and ordered for recovery of the balance Service Tax amounting to Rs.93,531/- under proviso to Section 73(1) of the Finance Act, 1994 and dropped the demand of Rs.4,449/-. He also imposed penalty of Rs.1,03,113/- under section 78 and separate penalty of Rs.1,000/- under section 77(2) of the Finance Act, 1994.

(vii) The appellant filed an appeal before the Commissioner(Appeals) who upheld the Order-in-Original and rejected the appeal.

(viii) The order passed by the authorities below is wholly erroneous and cannot be maintainable in law. The appellant submits that the order passed by the Adjudicating authority and the appellate authority reflects non-application of mind on the face of the order. While confirming the demand of Rs.93,531/-, penalty is being imposed to the tune of rs.1,03,000/- ignoring the submissions regarding the maintainability of demand. It was submitted that ST-3 Return figures are based on the actual amount paid and P & L Account and Balance Sheet was prepared on accrual/dual basis/mercantile basis. So, income calculated on that basis is totally incorrect. Apart from the above, the excess payment of Service Tax has not at all been considered. As already stated above that during the period 2008-09, the ST-3 figure was more than the P & L Account figure and in that view of the matter, excess payment of Service Tax was made which has not been considered. Prayer for adjustment was made with reference to the decision of the Tribunal which has not been considered by

the Commissioner(Appeals). The Ld.Commissioner(Appeals) though accepted the excess payment but denied adjustment for not following the procedure by intimating jurisdictional Superintendent within a period of 15 days. The order passed by the Commissioner(Appeals) on the basis of the finding at Page 5.1 cannot be maintainable in law, since the Balance Sheet figure shows the total amount of income and the ST-3 Return figure amount for which Service Tax is payable which has not been considered by the Appellate Authority.

(ix) The demand is also barred by limitation. The period of dispute is 2009-10 and SCN has been issued on 21/08/2012 on the basis of Audit Observation. The Audit found difference between Balance Sheet figure and ST-3 Return figure is not at all a suppression. The intention of the appellant to evade tax, the main ingredients is totally absent. Extended period cannot be invoked and hence penalty under section 78 cannot be imposed Point takne in Ground No.9.0 and 10.0 on limitation has not been considered by the Commissioner (Appeals). Penalty under Section 77(2) to the tune of Rs.1,000/- is also not maintainable.

5. I find that the Ld.Commissioner(Appeals) though accepted the excess payment made by the appellant, but denied adjustment for not following the procedure by intimating jurisdictional Superintendent within a period of 15 days. It has been time and again held by the Tribunal and the superior Courts that substantial benefit should not be denied to the assessee on account of procedural lapses. Accordingly, adjustment of excess amount paid by the appellant should be allowed to be adjusted in the subsequent returns. The question of charging interest on this account and imposition of penalty is not tenable and the same is set aside. It has also been established time and again that one to one co-relation is not required and any amount paid in excess is eligible to be adjusted against the demand of the subsequent period. Further, as regards penalty imposed under section 78 of the Finance Act, 1994. I find that the Adjudicating authority has categorically

recorded that the details were obtained from the ST-3 Returns and the financial accounts of the appellants. If the appellant had recorded the amount in their books of account and filed returns indicating therein it cannot be said that the provisions of section 78 of the Finance Act, 1994 would be applicable inasmuch as there is no intention to evade Service Tax liability. In my view the provisions of Section 78 do not get attracted in the case in hand. Accordingly, by invoking the provisions of Section 80 of the Finance Act, 1994, I set aside the penalty imposed by the Adjudicating authority under Section 78 of the Finance Act, 1994.

In view of the above discussions, the impugned orders are set aside and the appeal filed by the appellant is allowed with consequential benefit.

(Order pronounced in the open court on 30 June 2023.)

Sd/  
**(P.K.CHOUDHARY)**  
**MEMBER (JUDICIAL)**

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