IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, WEST ZONAL BENCH AT MUMBAI

Appeals No. ST/87832 & 86852/2014

(Arising out of Order-in-Original No. PUN-EXCUS-001-COM-055-13-14 dated 27th March 2014 passed by Commissioner of Central Excise, Pune I)

Kohinoor Properties **Appellant**
Gobind Builders & Developers

Vs.

Commissioner of Central Excise **Respondent**
Pune I

Appearance:

Shri Sagar Shah, C.A. for appellant
Shri M. Suresh, Asst. Commr (AR) with for respondent
Shri M.P. Damle, Asst. Commr (AR)

CORAM:

Hon'ble Mr. S.K.Mohanty, Member (Judicial)
Hon'ble Mr. C.J. Mathew, Member (Technical)

Date of Hearing: 20.04.2018
Date of Decision: 20.08.2018

FINAL ORDER NO. A/87116-87117/2018

Per: S.K.Mohanty

The issue involved in these appeals is identical and accordingly, the same are taken up for hearing together and a common order is being passed.

2. The appellants herein are engaged in the business of providing taxable service viz. "Construction of Residential

Complex Service", defined under the Finance Act, 1994. The appellants are also liable for payment of service tax on 'Goods Transportation Agency' Service, under reverse charge mechanism. For the disputed period, the appellants did not pay the service tax attributable to the above taxable services. During investigation, the service tax officers detected such non-payment of tax by the appellants. Thereafter, the appellants deposited the service tax amount along with interest on such taxable services provided by them. Upon payment of service tax and interest amount thereon, the department issued show-cause notices, seeking for confirmation of the said liabilities and for imposition of penalties on the appellants. The matter was adjudicated against the appellants, wherein the service tax demand along with interest was confirmed and the amount already deposited by the appellants was appropriated into the Central Govt. account under the respective heads. The impugned order also imposed penalties on the appellants under various provisions of the Finance Act, 1994. The appellants have assailed the impugned order on the ground that since they had already paid full amount of service tax along with interest before issuance of show-cause notices, the amount of penalties imposed are liable to be set aside. The appellants further contended that non-payment of service tax on construction of residential complex service was due to the bonafide belief that such services will not be leviable to service tax. Thus, they contended that the benefit of Section 80 of the Act should be extended for non-imposition of penalties on the appellants. To support the above stand, the appellants have relied upon the following decisions of the Tribunal:-

(i) S.P.Associates v. CCE Pune Order No. A/86494/16/SMB dated 11.03.2016.

(ii) Neev Sai Developers v. CCE Pune – 2014-TIOL-2197-CESTAT-MUM.

(iii) Devike Constructions & Developers Pvt. Ltd. v. CCE Daman - order No. A/30026/16/SMB dated 02.09.2016.

(iv) Trinity Developers v. CCE Pune - order No. A/88067/17/SMB dated 16.06.2017.

(v) Serene Developers v CCE Pune - order No. A/86832/17/SMB.

3. Heard both sides and perused the records.

4. It is an admitted fact on record that the entire adjudged service tax along with interest was deposited by the appellants before issuance of show-cause notices. The issue with regard to leviability of service tax on construction of residential complex was contentious and the said issue was resolved by the Hon'ble Bombay High Court in the case of *Maharashtra Chamber of Housing Industry, reported in 2012 (25) STR 305 (Bom.),* in favour of Revenue. Feeling aggrieved with the said judgment of

the Hon'ble Bombay High Court, the appellant therein had also preferred appeal in the Hon'ble Apex Court. Since non-payment of service tax was due to the genuine and bonafide belief that such service will not be excisable to service tax, the benefit of Section 80 of the Finance Act, 1994 can be extended in these cases, for waiver of penalties. We find that in an identical situation, this Tribunal in the case of *S.P.Associates (supra)* by invoking the provisions of Section 80 of the Act, has set aside the penalty imposed under Sections 77 and 78 of the Act. Relevant paragraph in the said order is extracted herein below:-

> *"5. I have carefully considered the submissions made by both the sides. I find that the issue relates to the penalties imposed under Section 77 & 78 of the Finance Act due to non-payment of service tax in time on the services of construction of complex. The appellant are not contesting the service tax liability, moreover they have paid the service tax along with interest before the issuance of show cause notice. I find that there is a force in the argument of the Ld. Counsel that the issue of taxability of construction of complex was under doubt right from beginning and various circulars were issued to clarify the position on taxability of the said services. I also observed that in the case of Magus Construction Pvt. Ltd. (supra), Sujal Developers (supra) and Maharashtra Chamber of Housing Industry (supra), the constitutional validity of the levy of construction of complex were challenged. It is also observed that even after 1.7.2010 the Maharashtra Chamber of Housing Industry filed writ petition in the Hon'ble Bombay High Court wherein a stay was granted on 23.10.2010 and finally judgment was passed by the Hon'ble High Court in January 2012 only. Even the said judgment was challenged by Maharashtra Chamber of Housing Industry (supra) which is pending in the Hon'ble Supreme Court. In view of this position, on the taxability of the services, the bona fide belief of the appellant in non payment of service tax in time, is established. It is not disputed that the appellant have*

recorded the entire transaction of their services in their books of accounts. In view of the above position, I find that the appellant have shown the reasonable cause for waiver of penalties invoking under Section 80 of the Finance Act. In various judgments this Tribunal has taken a consistent view, that penalty under similar fact is not imposable. Some of the judgments were relied upon by the appellant as cited in their submission made hereinabove. In the similar circumstances, the penalties should not be imposed invoking the provisions of Section 80 of the Act. The penalties imposed under Section 77 & 78 are waived, however the service tax and interest thereon paid by the appellant is upheld.

I, therefore set aside the impugned order and allow the appeal of the appellant."

5. In view of above position of law, we do not find any merits in the impugned orders, so far as imposition of penalties under Sections 77 and 78 of the Act on the appellants. Accordingly, after setting aside the same, we allow the appeals in favour of the appellants in respect of penalties imposed on them.

(Order pronounced in Court on 20.08.2018)

(C.J. Mathew)
Member (Technical)

(S.K.Mohanty)
Member (Judicial)

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