BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED:26.10.2015

Coram:

**THE HONOURABLE Mr.JUSTICE R.SUDHAKAR**
and
**THE HONOURABLE Ms.JUSTICE V.M.VELUMANI**

Civil Miscellaneous Appeal (MD)No.1229 of 2015

M/s.Professional Investment Corporation,
116/16-17, Pandyan Complex,
Sattur Road, Sivakasi ... Appellant/Appellant

vs.

1.The Customs, Excise and Service Tax
Appellate Tribunal,
South Zonal Bench,
26-Haddows Road,
Chennai-600 006.

2.The Commissioner of Central Excise,
Bibikulam
Madurai-625 002. ... Respondents

Civil Miscellaneous Appeal under Section 35G of the Central Excise Act,1944 made applicable to Section 83 of the Finance Act, 1994 against the Final Order No.40665/2015, dated 19.06.2015 in A.No.ST/221/2011-SM, passed by the First Respondent Appellate Tribunal.

For Appellant : Mr.S.Renganathan

**JUDGMENT**

(Judgment of the Court was delivered by **R.SUDHAKAR,J**)

The appellant is engaged in providing service falling under the category of Stock Broker Service to investors by raising bills for such services provided, as brokerage commission on trading under National Stock Exchange Futures, National Stock Exchange Capital, Multi Commodity Exchange and National Commodity Derivative and Exchange Commodity. The appellant holds Service Tax Registration Certificate No.AAGEP9643QST01.

2.While the Officers of 2nd Respondent Department visited the office of the appellant and during the course of audit and on verification of their ledger accounts, it was found that the appellant/assessee had received huge sums towards the services rendered by them in respect of stock broker services mentioned above and the assessee/appellant had neither paid service tax nor filed statutory ST-3 return for the half-year ended 30.03.2008. However, ST-3 returns for the Half Year ending September, 2008 and March, 2009 was filed much belatedly on 25.06.2009, along with mandatory penalty for late filing of returns. According to the 2nd respondent, it appeared from ST-3 returns filed that for the period 01.04.2008 to 31.03.2009, a sum of Rs.63,97,954/- has been received as brokerage and service tax has also been collected to be paid over to the Department but, they the assessee/appellant did not show the details of service tax payment. Therefore, for not filing ST-3 returns, within the stipulated time and not paying service tax, the department issued a show cause notice, *inter alia* demanding tax, interest and penalty, both under Sections 76 and 78 of the Finance Act, 1994, read with Rules 6 and 7 of the Service Tax Rules, 1994.

3.On receipt of the show cause notice, the assessee/appellant submitted its explanation pointing out the reason for non-payment of service tax, in time and that was attributed to the financial problem. The assessee/appellant admitted service tax liability demanded in the show cause notice and prayed for two months time to pay the service tax. After personal hearing, case was adjudicated by the Additional Commissioner (Adjudicating Authority) and gave a finding as under in his order, dated 05.05.2010:

> **"Findings**
>
> I have gone through the records of the case and written/oral submissions of the assessee. In the case the assessee has accepted the tax liability of Rs.7,83,263, and accepted to pay the same with interest and they have putforth that they could not pay the tax only because of financial problems and promised to pay the same very soon. As they have not contested the show cause notice, I am convinced with their reply/oral submissions made at the time of P.M. Accordingly I pass the following order.
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> ORDER
>
> (i)I demand an amount of Rs.7,83,263/- (Rupees seven Lakhs Eighty three thousand two hundred and sixty three only) (Rs.7,60,450/- towards Service Tax, Rs.15,210/- towards Education Cess and Rs.7,605/- towards Secondary & Higgher Education Cess) being the Service Tax, Education Cess and Secondary and Higher Education Cess payable for the period from April 2008 to March 2009 under proviso to Section 73(1) of the Finance Act, 1994.
>
> (ii)I demand interest at the appropriate rate from them under Section 75 of the Finance Act, 1994 on the amount of Service Tax as demanded in Sl.No.(i) above.
>
> (iii)I impose a penalty of Rs.7,83,263/- under section 78 of the Finance Act, 1944 (sic)".

4.The above order was taken on appeal by the assessee/appellant and the Appellate Commissioner, justified the penalty under Section 78, in paragraph 6 of the order, dated 14.02.2011, as under:

> "6.There is no substance in the argument of the appellants that they have voluntarily disclosed details of the non-payment of Service Tax to the department. It is only during the course of Audit that the non-payment has been detected. That they did not file the mandatory ST 3 Returns which they had been filing for the earlier periods clearly brings out the *mensrea* on their part. Hence, suppression of facts with intent to evade payment of tax is quite evident on the face of the records. Thus the imposition of penalty

under Section 78 of the Finance Act, 1994 is quite justified."

The Appellate Commissioner also rejected the alternative plea. On appeal by the assessee before the Tribunal, a plea relating to exemption from levy of penalty, in terms of Section 80 of the Finance Act, 1994, was raised in the additional grounds. That was considered but, the plea of no penalty was rejected. However, the Tribunal accepted the plea that penalty under Section 78 is not attracted but penalty under Section 76 would be applicable. The said order, dated 14.02.2011, reads as under:

"5.After hearing both sides and considering all aspects of the case including the fact that the demands are for the normal period and that the original authority has been convinced about the genuineness of the replies and submissions made by the appellants before him, I am of the view that penalty under Section 78 of the ACT is not attracted in this case, which is meant for cases of frauds, suppression etc. Once penalty under Section 78 is ruled out, for non-payment of tax in time, penalty under Section 76 is attracted, which was incidentally invoked in the show-cause notice. Hence, I set aside the penalty imposed under Section 78 and order that the appellants shall pay penalty at the rate of 2% for each month of delay in payment of the tax. For the limited purpose of recalculation of the penalty amount, the matter is remitted to the original authority who shall communicate the requantified penalty amount to the appellants preferably within one month of receipt of this order.

The appeal is partly allowed in the above terms."

5.Against the above said order of the Tribunal, the assessee pursued the matter before this Court in C.M.A.(MD)No.868 of 2012 and this Court by judgment, dated 22.01.2014, came to hold that the plea of applicability of Section 80 has not been gone into by the Tribunal and remanded the matter to the Tribunal, observing as under:

"10.Now the Court has to look into the second point raised on the side of the appellant/assessee. The second point is that as per Section 80 of the Finance Act, 1994, if sufficient reason has been shown by an assessee, he is not bound to pay penalty.

11.As rightly pointed out on the side of the appellant/assessee, such opportunity has not been given by the Appellate Tribunal for coming to a conclusion as to whether the appellant/assessee is entitled to get such kind of benefit/exemption. Since sufficient opportunity has not been given for getting such kind of exemption, this Court is of the view to set aside the final order passed by the CESTAT and remit the matter to its file."

On remand, the Tribunal passed the following order, on 19.06.2015:

"Hon'ble High Court of Madras in CMA(MD)No.868/2012 disposed on 22.1.2014 remitted the matter to the Tribunal on the limited issue to examine whether provision of section 80 of Finance Act, 1994 shall be applicable insofar as the penalty under section 76 of the Act was imposed on the appellant.



2.The appellant could not bring out any cogent reason to consider whether there exists any reasonable cause to invoke section 80 of the Finance Act, 1994.

3.Record reveals that there was a default to make payment of tax due to the Government.

4.in absence of any reason to invoke section 80 of the act, appellant fails to succeed on the count of penalty imposed under section 76 of the act by Final Order No.241/2012 dated 12.2.2013 of the Tribunal. Accordingly, appeal is dismissed on the count of relief sought under section 76 of Finance Act, 1994."

Against the order on remand, the present appeal is filed.

6.Learned counsel for the appellant/assessee, primarily relied upon the Division Bench decision of this Court in **Commissioner of S.T., Chennai** vs. **Lawson Travel & Tours (I) Pvt.Ltd.**, reported in **2015 (38) S.T.R.227 (Mad.)**, to contend that Section 80 of the Act should be made applicable to the appellant when reasonable cause has been shown by the assessee and therefore penalty ought not to have been included. In the reported case of **Lawson Travel and Tours**, clear finding has been recorded in paragraphs 7 and 8 of the judgment as to how benefit under Section 80 of the Finance Act, 1994 would be applicable to the facts of that case and the same is set out hereunder:

"7.A careful perusal of the order of the Tribunal would reveal that 'reasonable cause' as provided under Section 80 of the Act has been recorded by the Tribunal stating that the respondent assessee had fallen into financial crisis on account of the criminal breach of trust committed by their sub-agent and criminal proceedings were initiated against such persons and the same are pending. In addition to the above, the Tribunal also came to hold that it is a case of payment of duty voluntarily at the time of investigation even prior to issuance of show cause notice. Therefore, the Tribunal went on to invoke the provisions of Section 80 of the Act on the ground of reasonable cause.

8.On a careful consideration of the documents as submitted by parties and also on a careful perusal of the reasoning of the Tribunal, the Court finds that the reasoning of the Tribunal is based on parameters of Section 80 of the Act and, therefore, this Court finds no necessity to interdict the decision of the Tribunal granting relief to the petitioner under Section 76 of the Act by invoking the provisions of Section 80 of the Act. In such view of the matter, the first substantial question of law is answered in favour of the assessee and against the Revenue."

7.In the present case, except stating that financial difficulty in the reply, a bald statement of that nature would not suffice and the Tribunal was justified in holding that no cogent reason has been given nor a reasonable cause exist for invocation of Section 80 of the Act. We also find merits in the order of the adjudicating authority, the appellant authority and the Tribunal that no material has been shown for invocation of Section 80, except a ground raised in the appeal and before the Tribunal. As in the reported case cited supra, there is no material to support the plea of reasonable cause and mere statement in this regard would not be sufficient. We find no merit in the appeal, warranting any interference in the order of the Tribunal. The appeal stands dismissed. No order as to costs.

Sd/-
Assistant Registrar (CSII)

/True Copy/

Sub Assistant Registrar



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To,

1.The Customs, Excise and Service Tax
Appellate Tribunal,
South Zonal Bench,
26-Haddows Road,
Chennai-600 006.

2.The Commissioner of Central Excise,
Bibikulam
Madurai-625 002.

Copy to,
The Section Officer, V.R.Section,
Madurai Bench of Madras High Court, Madurai.

+1CC to Mr.S.Renganathan Advocate Sr.No.62330

CSL/SKS/RR/17.11.2015-5P-5C

Judgment in
CMA(MD)No.1229/2015
Dated:26.10.2015