

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 19.09.2017

CORAM

THE HONOURABLE MR.JUSTICE S.MANIKUMAR
and
THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

C.M.A.No.2028 of 2017
and
CMP.No.10894 of 2017

GE Info Tech Pvt. Ltd.,
32, East Jones Road, II Floor,
Saidapet, Chennai -15. ... Appellant/Appellant

Versus

1. The Customs Excise and Service Tax
Appellate Tribunal
South Zonal Bench, I Floor
Shastri Bhavan Annexe, Haddows Road
Chennai - 600 006.
2. Commissioner of Service Tax
MHU Complex, 692, Anna Salai
Nandanam, Chennai - 600 035.
... Respondents/Respondents

This Civil Miscellaneous Appeal is filed under Section 35-G of Central Excise Act, praying to set aside the final order No.42061 of 2016 dated 28.10.2016 passed in Appeal No.ST/40263/2016 on the file of the first respondent.

For Appellant : Mr.S.Venkatachalam
For Respondent -2 : Mr.A.P.Srinivas

ORDER

(Order of the Court was delivered by V.BHAVANI SUBBAROYAN,J.)
The appellant has preferred this Civil Miscellaneous Appeal under Section 35G of the central Excise Act, 1944 against the final order No.42061 of 2016 dated 28.10.2016 made in Appeal No.ST/40263/2016 on the file of the first respondent.

2. The brief facts of the case are as follows:

The appellant, holders of Service Tax Registration Certificate No.AACCG6156EST001, was providing taxable service under the category of "Consulting Engineer, Commercial Training or Coaching and Man Power Recruitment or Supply Agency Services" and discharging tax liability on the gross amount received for the taxable services rendered under the provisions of Chapter V of Finance Act, 1994. The Department has issued a Show Cause Notice vide C.No.IV/9/646/2010 STC adj. dated 29.09.2010 demanding service tax already paid along with interest with a proposal to impose penalty under Sections 76, 77 and 78 of Finance Act 1994. A reply was furnished by the appellant on 03.11.2010 informing the Adjudicating Authority that the appellant had paid service tax along with interest on various dates under Section 73(3) of Chapter V of Finance Act, 1994. However, the learned Additional Commissioner confirmed the demand and appropriated the service tax amount of Rs.13,36,869/- and interest of Rs.1,88,952/- already paid and imposed equal penalty of Rs.13,36,869/- under Section 78 of Finance Act, 1994 vide Order-In-Original No.STC/30/2012-ADC(LTU) dated 04.05.2012. Aggrieved by the said Order-In-Original passed by the learned Additional Commissioner, the appellant filed an Appeal before the learned Commissioner of Service Tax (Appeals), Chennai, who after due process of law rejected the Appeal vide Order-In-Appeal No.295/2015 (STA-II) dated 30.10.2015. Aggrieved by the said order of the Commissioner, the appellant filed an Appeal before the first respondent in terms of Section 86 of the Finance Act, 1994 on various grounds. But the first respondent / Appellate Tribunal, without recording any findings on the grounds raised by the appellant, dismissed the said Appeal. Against which, the appellant preferred this Civil Miscellaneous Appeal before this Court.

3. The learned counsel for the appellant would submit that the final order No.42061 of 2016 dated 28.10.2016 passed by the first respondent in Appeal No.ST/40263/2016 is contrary to law and liable to be set aside on the following grounds:-

(a) The order passed by the first respondent is without jurisdiction and in exercise of excessive jurisdiction.

(b) The act of first respondent in passing a non-speaking order, without considering the grounds of appeal raised by the appellant, is in complete violation of principles of natural justice.

(c) The first respondent ought not to have upheld the penalty imposed under Section 78 of the Finance Act, 1994 without recording any finding on invocation of extended period inasmuch as penalty under Section 78 of the Finance Act, 1994 can be imposed only if there is suppression of facts with intent to evade payment of service tax.

(d) There is no fraud or collusion or wilful mis-statement

or suppression of facts or contravention of any of the provisions of the Act or Rules made thereunder with intent to evade payment of service tax and under such circumstances, imposition of penalty is not warranted.

(e) The first respondent ought to have noted that all the details based on which, the demand was made in the Show Cause Notice is from the statutory document maintained as per law by the appellant and submitted to the department and not from any suppressed document to invoke provisions of extended period of limitation to demand service tax.

(f) The first respondent ought to have noted that the appellant has paid service tax with interest though after the visit of the officers.

(g) The first respondent ought to have noted that the Show Cause Notice was issued for confirming the demand of service tax already paid and to impose penalty and not for recovery of any dues not paid.

(h) The first respondent ought to have noted that the provisions of Section 73(3) of Finance Act, 1994 allows waiver of Show Cause Notice, if service tax and interest paid prior to Show Cause Notice.

(i) The first respondent failed to note that the circular issued by Central Board of Excise and Customs allows non-imposition of penalty, when service tax and interest paid prior to Show Cause Notice.

4. The learned counsel for the second respondent would submit that this is a case, where the appellant had charged and collected service tax on their clients, but had not remitted the same to the Government and only when the Auditing Officials found the same, it was paid. There is suppression of facts by the appellant. Therefore, the department imposed penalty.

5. Heard the learned counsel for the appellant and the learned counsel for the second respondent and also perused the materials available on record.

6. On perusal of the records, it is seen that the appellant herein was rendering the services of 'Consulting Engineer, Commercial Training or Coaching and Man Power Recruitment or Supply Agency Services' to various IT and Engineering Companies, like Satyam Computer Services, Titan Industries, various divisions of Ashok Leyland etc., and were registered with the Service Tax Department with Registration No. AACCG6156EST001. They also provide service of recruitment of skilled manpower to their clients and also provide training to various professionals in engineering related fields. They also undertake Engineering Project Consultancy for corporate. However, for both project consultancy and manpower supply, the appellant have paid Service Tax dues under the head 'Consulting

Engineer Services'.

7. The company's accounts were audited by scrutinizing their records by the officials of the Internal Audit Group of Chennai Service Tax Commissionerate. During the said audit, it has been found that they have not remitted the service tax amount of Rs.13,36,869/- collected from their customers into the Central Government account for the period from April 2008 to December 2009 and has withheld the same. The appellant has pleaded that due to financial crisis, they were not in a position to pay the tax within the prescribed due dates. It has also been found that for the period from May 2007 to March 2008, the appellant has made belated payments of service tax, for which interest short paid by the appellant, which works out to Rs.1,00,820/-.

8. In such circumstances, the Additional Commissioner observed that the appellant has contravened the following provisions of Finance Act, 1994 and Service Tax Rules, 1994:-

(i) Section 68 of the Finance Act, 1994 read with Rule 6(1) of the Service Tax Rules 1994, inasmuch as they withheld the service tax amount collected from the customers and did not remit the Service Tax amount into the Government account during the period from April 2008 to December 2009.

(ii) Section 70 of the Finance Act, 1994 read with Rule 7 of Service Tax Rules, 1994 inasmuch as they have not indicated the taxable value realized by them in their ST-3 Returns filed during the material period.

9. Since the appellant has contravened the above provisions, a Show Cause Notice has been issued on 29.09.2010 by the Additional Commissioner of Service Tax, calling upon the appellant to show cause within 30 days from the date of receipt of a copy of the order as to why:-

"(a) Service Tax of Rs.13,36,869/- (Rupees thirteen lakhs thirty six thousand eight hundred and sixty nine only), as detailed in Annexure A to this notice, should not be demanded from them under proviso to Section 73(1) of Finance Act, 1994 pertaining to the period from April 2008 to December 2009;

(b) The amount of Rs.13,00,146/- (Rs. Thirteen lakhs one hundred and forty six only) paid by them vide challans dated 31.12.2009, 06.01.2010, 07.01.2010, 11.01.2010 and 19.02.2010 and through Cenvat account should not be adjusted and appropriated against the demand made at clause a) above;

(c) Interest should not be demanded from them under Section 75 of Finance Act, 1994 on the demand made at clause a) above;

(d) The amount of Rs.1,72,273/- (Rs. One lakh seventy two thousand two hundred seventy three only) paid by them towards interest vide challans dated 31.12.2009, 06.01.2010, 07.01.2010, 11.01.2010 and 19.02.2010 for the period April 2008 to December 2009 as detailed in Annexure-A to this notice should not be adjusted and appropriated against the demand of interest made at clause c) above;

(e) Interest of Rs.1,00,820/- (Rs. One lakh eight hundred and twenty only) should not be demanded from them under Section 75 of the Finance Act, 1994 for the belated payment of Service Tax for the period May 2007 to March 2008 as detailed in the Annexure-B to this notice; and

(f) Penalty should not be imposed on them under Section 76, 77 & 78 of the Finance Act, 1994 for the contraventions mentioned supra."

10. The appellant filed a reply on 03.11.2010, in which they have contended that they were regularly paying service tax and sometimes, they paid the service tax belatedly along with interest due to paucity of funds and promised to pay the amount as early as possible. The appellant also contended that as per Section 73(3) of Finance Act, if there is any shortage of payment, the officer can initiate recovery proceedings within one year from the date of receipt of such information of payment and as there is no short payment for the period by the appellant, the Show Cause Notice ought not to have been issued and is liable to be dropped. It is also contended that the Show Cause Notice did not allege any fraud, collusion, wilful mis-statement or suppression of facts. The service tax and interest have been paid on various dates in terms of above said provision and there is no circumstances of facts involved for the alleged commission of fraud, collusion, wilful mis-statement or suppression of facts. The delay in payment of service tax was due to unavoidable circumstances and cannot be equated with fraud, collusion, wilful mis-statement or suppression of facts or contravention of any provisions of Section 5 of the Finance Act and Service Tax Rules made thereunder with intention to evade payment of tax.

11. In the said reply, the appellant further stated that the Show Cause Notice was issued invoking provisions to Section

73(3) of the Finance Act, but the amendment to said Section grants benefit to the assessee under the Section. It is further averred by the appellant in the reply, which reads as under:-

"6.1 Further, we would like to draw the learned Assistant Commissioner's kind attention to a decision of the tribunal in the case of BHORUKLA ALUMINIUM LTD. versus COMMR. OF C. EX., MYSORE reported in 2008(11) S.T.R. 163 (Tri. - Bang.) where in the Tribunal held as under:

"6. On a very careful consideration of the entire issue, we find that the contention of the learned Advocate is that the Service Tax itself is not liable to be paid in respect of the services rendered by the foreign agent abroad for procuring orders for export prior to insertion of Section 66A which came into force only w.e.f. 18-4-2006. He also relied on number of case laws which are cited supra. In any case, in this appeal, the main contention is with regard to the penalty imposed. Therefore, we are not going into the question of leviability of Service Tax as the appellants had already paid the same and they are mainly challenging the imposition of penalty. The appellants have drawn our attention to Section 73(3) of the Finance Act which is reproduced herein below:

Section 73(3): Where any Service Tax has not been levied or paid or has been short levied or short paid or erroneously refunded, the person chargeable with the Service Tax, or the person to whom such tax refund has erroneously been made, may pay the amount of such Service Tax, chargeable or erroneously refunded, on the basis of his own ascertainment thereof, or on the basis of tax ascertained by a Central Excise Officer before service of notice on him under Sub-Section (1) in respect of such Service Tax, and inform the Central Excise Officer of such payment in writing, who, on receipt of such information shall not serve any notice under sub-section (1) in respect of the amount so paid:

Explanation:- For the removal of doubts, it is hereby declared that the interest under Section 75 shall be payable on the amount paid by the person under this sub-section and also on the amount of short payment of

Service Tax or erroneously refunded Service Tax, if any, as may be determined by the Central Excise Office, but for this sub-section.

6.2. Further, in case of M/s. Tidewater Shipping (P) Ltd vs. Commissioner of Service tax, Bangalore, reported in 2008(11) STR 475 (Tri.Bang) the Tribunal held as under:

4. On a very careful consideration of the entire issue, we find that in respect of each of the cases, due to bonafide belief, the appellants did not discharge the Service Tax liability in time. But, as soon as the lapse was pointed out by the departmental authorities, they remitted the Service Tax much before the issue of Show Cause Notice as given in detail in the above tabular column. This bench has held in large number of cases that if duty is paid before the issue of Show Cause Notice, no penalty and interest can be levied. In the present case it is seen that even the interest which is due from the appellants has been paid. Our attention was also invited to Section 73

(3) of the Finance Act and also a Board Circular based on that. The Circular and also the Section 73(3) provides that if the assessee cleared the Service Tax due along with interest on his own and even on the insistence of the departmental authority, then no penalty proceedings can be taken against them. In other words, all the proceedings against the appellants will be deemed to have been concluded. In view of the above position, we are of the view that the impugned revisionary orders, enhancing the penalties and imposing penalties under section 78, are not in order. Further, the impugned order in Sl.No.4 is also very harsh especially when the appellants had paid the entire amount of Service Tax and interest even before the issue of Show Cause Notice. In such circumstances, we allow the appeals with consequential relief, if any. The impugned orders are set aside.

6.3. Further, in case of Commissioner of Central Excise, Kolkata I 2006(4) STR 37 (Tri. Kol.) the Tribunal held as under

4. I find from Section 73 that if the amount is paid by the assessee before issuance of the show cause notice, there is no need to issue any show cause notice to the assessee.

5. To my mind, the Order of the Commissioner (Appeals) is a well-reasoned one and setting aside the penalty under Section 76, is correct and does not require any interference. The Departmental appeal is dismissed.

6.4. Further, in case of M/s.Auto Transport Services Vs. Commissioner of Central Excise, Jaipur II 2006(3) STR 330 (Tri.Del.) the Tribunal held as under:

5. Considered the submissions of both sides and perused the record. It is not in dispute that the appellants have discharged their service tax liability and the interest leviable thereon before the issuance of show cause notice.

Sub-section (2) A of Section 73 of Finance Act, 1994 as it stood during the relevant period reads as under:-

"(2A) Where any service tax has escaped assessment or has been under-assessed or service tax has not been paid or has been short-paid or erroneously refunded, the person chargeable with the service tax, may pay the amount of tax on the basis of his own ascertainment of such tax or on the basis of tax ascertained by a Central Excise Officer before service of notice on him under sub-section (1) in respect of service tax, and inform the Assistant Commissioner of Central Excise or, as the case may be, the Deputy Commissioner of Central Excise of such payment in writing, who, on receipt of such information shall not serve any notice under sub-section (1) in respect of service tax so paid :"

.....

From the above it is very clear that there need not be any show cause notice issued to the appellants even when the service tax has escaped assessment, and if the same has been paid by the appellants on his own ascertainment. In this case the

appellants have ascertained the service tax liability on their own and paid it off which is admitted by the department in Order-in-Original. Further, the said provisions also state that even the service tax is ascertained by the Central Excise officers and if it is paid or by the assessee in that case also the appellants should not be served upon any notice under sub-section (1) Considering both the situations, the appellants case is covered under the provisions of sub-section (2A) of Section 73 for non-issuance of show cause notice to the appellants. When the provisions themselves do not contemplate issuance of show cause notice when tax liability is discharged to my mind, the issuance of show cause notice in this case by the department is beyond the provisions of the Act."

12. The appellant also stated that the service tax and interest had been deposited prior to issuance of Show Cause Notice and Adjudication Order; the penalty under Sections 76 and 77 of the Finance Act is not mandatory and in view of the above, they requested the Additional Commissioner to drop the proceedings.

13. The matter was adjudicated on 04.05.2012 and the Additional Commissioner has found that the assessee furnished payment details in respect of the differential service tax of Rs.36,723/- and interest of Rs.16,679/- (total of Rs.53,402/-) as detailed in Annexure 'A' to the notice, which is extracted hereunder:-

S.No	Challan No & Date	Service Tax	Interest	Total	Period
1	6/31.12.2009	2575	192	2767	2009-10 (I half-yearly Return)
2	4/31.12.2009	10266	1331	11597	2008-09 (II half-yearly Return)
3	3/31.12.2009	23305	4633	27938	2008-09 (I half-yearly Return)
4	15/27.03.2012	4944	-	4944	E-payment

S.No	Challan No & Date	Service Tax	Interest	Total	Period
5	159/27.03.2012	6156	-	6156	E-payment
	Total			53402	

14. The Additional Commissioner has also found that in respect of the interest amount of Rs.1,00,820/- pertaining to the period from May 2007 to March 2008 as demanded in Annexure 'B' to the notice, the assessee has paid Rs.1,00,820/- vide challan No.01022 dated 25.04.2012 and 0031 dated 27.04.2012 and that amount is required to be appropriated towards the demand of interest. The details of payments in respect of Annexure 'A' to notice, are as follows:-

Sl.No	Challan Date	Service Tax (Rs)	Interest (Rs)	
1	31/12/09	356754	69956	2 challans
2	06/01/10	591375	82767	7 challans
3	07/01/10	73633	8077	1 challans
4	11/01/10	157149	10403	6 challans
5	19/02/10	49669	1070	2 challans
6	31/12/09(*)	36146	6156	3 challans
7	27/03/12	577	10523	2 challans
8	Cenvat payment	71566	-	-
	Total	1336869	188952	-

- Payments made earlier in respect of Commercial Training and Coaching, not proposed for appropriation in the notice.

. Payment details in respect of Annexure 'B' to notice, are as under:-

Sl.No	Challan Date	Interest
1	25/04/12	40820
2	27/04/12	60000
	Total	100820

15. The Additional Commissioner also found that there was no dispute regarding payment of service tax and the interest as demanded in the notice, but the appellant has pleaded that due to financial crisis, they were not in a position to pay the tax within the prescribed time and hence, they paid the tax along with interest and they would be eligible for the benefit under

Section 73(3) of Finance Act 1994, and that they had no intention to evade tax.

16. In the finding of the order, it has been decided by the Additional Commissioner that the assessee cannot invoke the provisions of Section 73(3), which were not applicable to the case where Show Cause Notice has been issued invoking Section 73(1). The provisions of Section 73(4) clearly make it clear that nothing contained in sub-section (3) shall apply to a case, where any service tax has not been levied or paid or has been short-levied or short-paid erroneously refunded by reason of fraud or collusion or wilful mis-statement or suppression of facts etc., The Additional Commissioner also held that in the present case, notice has been issued under the provisions of Section 73(1) alleging that the assessee has suppressed the facts of actual value of the taxable service and the amounts collected as service tax have also not been paid to the Government Exchequer for long time and the amounts have been paid only in March and April 2012 and therefore, the Show Cause Notice was in order.

17. Before the Additional Commissioner, the appellant sought for invoking the discretionary power under Section 80 of the Finance Act, 1994 to waive the entire penalty proposed to be imposed on them. In this regard, the Additional Commissioner held that as per Section 80 of the Finance Act, the Department has got power not to impose any penalty if the assessee proves that there is reasonable cause for the failure to comply with the provisions of the Act. But the appellant was aware that they are liable to pay service tax on the income received for services rendered, within a prescribed date and they have also collected the service tax amounts from their customers. The tax amount collected for a long period and remitting the same after the advice of the audit authorities cannot be accepted as a reasonable cause for failure of remitting the amount and further, the appellant has filed ST-3 Returns for the said period, which did not reflect the actual taxable value, which is a deliberate suppression of information. In such circumstances and also considering the fact that the appellant has paid entire tax and interest, the Additional Commissioner has passed an order, by reducing the penalty amount to 25%, if the appellant pays the same within 30 days. The said order is extracted hereunder:-

"8.4. The assessee has requested to invoke the discretionary power under Section 80 of the Finance Act, 1994 to waive the entire penalty proposed to be imposed on them. Section 80 of the Finance Act, 1994 provides for not imposing penalty if the assessee proves that there is a reasonable cause for the failure to comply with the

provisions of the Act. In the present case, however, the assessee know that they are liable to pay Service tax on income received for services rendered within the prescribed dates and they have also collected the Service tax amounts. Non payment of the tax amount collected for a long time and paying the same after pointing out by audit cannot be held to be reasonable cause for failure. Further, the assessee has not reflected the actual taxable value in the ST3 Returns, thus deliberately suppressing this information. Hence, I hold that penalty under Sec.78 is leviable on the assessee as they deliberately breached the law with conscious suppression of material facts with intent to evade tax. However, as they have paid the entire tax and interest, if the assessee pays 25% of the penalty amount imposed under Sec. 78, within thirty days of communication of this order, the penalty under Sec.78 shall be restricted to the said 25% amount.

9.

10. In view of the foregoing, I pass the following order:

ORDER

10.1 I confirm the demand of Rs.13,36,869/- (Rupees thirteen lakhs thirty six thousand eight hundred and sixty nine only), being the service tax payable by the assessee during the period from April 2008 to December 2009, under Section 73(2) of the Finance Act, 1994.

10.2 I order recovery of interest at the appropriate rates payable on the tax amount mentioned at 10.1 above from the assessee under Section 75 of the Finance Act, 1994.

10.3 I order appropriation of Rs.13,36,869/- paid by the assessee vide challans dated 31.12.09, 06.01.10, 07.01.10, 11.01.10, 19.02.10 and 27.03.2012 (amounting to Rs.12,65,303/-) and in cenvat account (Rs.71,566/-), towards the demand at para 10.1 above.

10.4 I order appropriation of Rs.1,00,820/- paid vide challans dated 31.12.09, 06.01.10, 07.01.10, 11.01.10, 19.02.10, and 27.03.2012 towards the interest payable as per para 10.2 above.

10.5 I further order appropriation of Rs.1,00,820/- paid by the assessee vide challans No.1022 dated 25.04.12 and 0031 dt. 27.04.12 towards interest for the belated payment of Service tax for the period from May 2007 to March 2008.

10.6 I impose a penalty of Rs.13,36,869/- (Rupees Thirteen lakhs thirty six thousand eight hundred and sixty nine only) under Section 78 of the Finance Act, 1994 on M/s.GE Infotech Pvt. Ltd. However, the penalty amount shall stand reduced to 25% of the said amount, if the same is paid within thirty days from the date of communication of this order in terms of proviso to Section 78 of the Finance Act, 1994.

10.7 I drop the penal proceedings initiated under Sec.76 and 77 of the Finance Act, 1994."

18. The appellant reiterated the same grounds before the Commissioner of Central Excise (Appeals) and the Commissioner upheld the orders of the Additional Commissioner in toto and aggrieved against the same, the appellant appealed before the CESTAT and by citing various decisions, raised the ground that if duty is paid before the issue of Show Cause Notice, no penalty and interest can be levied.

19. The CESTAT passed the impugned order on 28.10.2006 dismissing the appeal by holding that it is not in dispute that the appellant paid short-payment after being pointed out, however, they charged and collected service tax, which they have not remitted to the Government Exchequer and further, short payments were not made in one go, but over a period of four months. Challenging the same, the appellant is before this Court.

20. The point to be decided in the present appeal is whether the Show Cause Notice dated 29.09.2010 and the Order-in-Original dated 04.05.2012, wherein the Additional Commissioner reduced the penalty to 25% of the imposed penalty of Rs.13,36,869/-, if the same is paid within 30 days, which came to be confirmed by the order impugned in the present appeal, are sustainable.

21. As per Section 68 of the Finance Act, 1994, read with Rule 6(1) of the Service Tax Rules, 1994, service tax shall be paid to the credit of the Central Government by the:-

- (i) 6th day of the month, if the duty / service tax is deposited electronically through internet banking; and
- (ii) 5th day of the month, in any other case,

immediately following the calendar month, in which, the payments are received, towards the value of taxable services:

Provided that where the assessee is an individual or proprietary firm or partnership firm, Service Tax shall be paid to the credit of the Central Government by the 6th day of the month, if the duty is deposited electronically through internet banking, or, in any other case, the 5th day of the month as the case may be, immediately following the quarter in which the payments are received, towards the value of the taxable services. In respect of payments received for the month of March or the quarter ending in March, as the case may be, Service Tax shall be paid to the credit of the Central Government by the 31st day of March of the calendar year. Any failure on the part of the service provider in adhering to the dates prescribed for the payment of Service Tax to the credit of Central Government shall attract interest clause under Section 75 and penal provisions under Section 76 of the Finance Act, 1994.

22. From the perusal of records, it is seen that the appellant had contravened the above said provisions and short-paid the interest for the earlier period also. The appellant has collected the tax amount from their customers, but had not paid the same to the Government Exchequer and only after pointing out by the Audit authorities, they have paid Service Tax vide five challans dated 31.12.2009, 06.01.2010, 07.01.2010, 01.01.2010 and 19.02.2010 along with Rs.1,72,273/- towards interest and a sum of Rs.71,566/- through utilization of CENVAT Credit towards their service tax dues.

23. Moreover, though the appellant has collected the service charges along with the service tax amount during the period April 2008 to December 2009, appellant had not deposited such service tax into the Government Exchequer in time nor had intimated the department the details of such receipts in their ST3 Returns filed during the material period, which is not disputed by the appellant herein. Therefore, the appellant has contravened Section 70 of the Finance Act, 1994 read with Rule 7 of Service Tax Rules, 1994.

24. From the foregoing, it is clear that the appellant has intentionally suppressed the service tax collected from its customers and failed to remit the same in the Central Government's Account for the period 2008-09, with an intention to evade payment of tax.

25. On perusal of records, it is seen that the categorical and undisputed facts are that having collected service tax from its customers, the appellant failed to remit the same in the Central Government's Account for the period 2008-09, but during the Audit, they pleaded that due to financial crisis, they were

not in a position to pay the tax within the prescribed due dates. From which, it is clear that the appellant has intentionally failed to remit the service tax amount of Rs.13,36,869/- collected from the customers into the Central Government Account for the year 2008-2009. Whatever reasons stated in the appeal before the authorities, the fact remains that the appellant has failed to remit the said tax into the Central Government Account that too, when the statute mandates such remittance within the specified period, the question of pleading paucity of funds or financial problem in the company, cannot be accepted. Having received the service tax from their customers, the moment such amount was received, the person who receives such amount, as a custodian of the Government amount, ought to have remitted the same in the Government Account and he is not expected to utilize the same for his own purpose or business and later on plead that due to paucity of funds, they were not able to remit the same before the authorities, that too, only when the authorities have found that the appellant had escaped their liability of remitting, which, in the opinion of this Court, amounts to suppression of facts. Hence, the act of the authorities in issuing Show Cause Notice on such non-remittance, is found correct and supported by the strength of such provisions under which the Show Cause Notice was issued.

26. Further, in the Order-in-Original, the Additional Commissioner, only on the fact that the appellant herein have made payments during different periods within a span of four months that too, after the audit conducted by the Officers of the Internal Audit, Commissionerate of Chennai, had taken a lenient view by reducing the penalty to 25% of the imposed penalty amount of Rs.13,36,869/- if the same is paid within 30 days. The Additional Commissioner has used his discretionary power, which he is empowered under Section 78 of the Act, which reads as under:-

Penalty for failure to pay service tax for reasons of fraud, etc.

"78. (1) Where any service tax has not been levied or paid, or has been short-levied or short-paid, or erroneously refunded, by reason of fraud or collusion or wilful mis-statement or suppression of facts or contravention of any of the provisions of this Chapter or of the rules made thereunder with the intent to evade payment of service tax, the person who has been served notice under the proviso to sub-section (1) of section 73 shall, in addition to the service tax and interest specified in the notice, be also liable to pay a penalty which shall be equal to hundred per cent of the amount of such service tax:

"Provided that in respect of the cases, where the details relating to such transactions are recorded in the specified record for the period beginning with the 8th April, 2011 upto the date on which the Finance Bill, 2015 receives the assent of the President (both Days inclusive), the penalty shall be fifty per cent of the service tax so determined."

Provided further that where service tax and interest is paid within a period of thirty days of --

(i) the date of service of notice under the proviso to sub-section (1) of section 73, the penalty payable shall be fifteen per cent of such service tax and proceedings in respect of such service tax, interest and penalty shall be deemed to be concluded;

(ii) the date of receipt of the order of the Central Excise Officer determining the amount of service tax under sub-section (2) of section 73, the penalty payable shall be twenty-five per cent of the service tax so determined:

"Provided also that the benefit of reduced penalty under the second proviso shall be available."

"Explanation.-For the purposes of this sub-section, "specified records" means records including computerised data as are required to be maintained by an assessee in accordance with any law for the time being in force or where there is no such requirement, the invoices recorded by the assessee in the books of accounts shall be considered as the specified records."

"(2) Where the Commissioner (Appeals), the Appellate Tribunal or the court, as the case may be, modifies the amount of service tax determined under sub-section (2) to section 73, then the amount of penalty payable under sub-section (1) and the interest payable thereon under section 75 shall stand modified accordingly, and after taking into account the amount of service tax so modified, the person who is liable to pay such amount of service tax, shall also be liable to pay the amount of penalty and interest so modified.

(3) Where the amount of service tax or penalty is increased by the Commissioner (Appeals), the

Appellate Tribunal or the court, as the case may be, over and above the amount as determined under sub-section (2) of section 73, the time within which the interest and the reduced penalty is payable under clause (ii) of the second proviso to sub-section (1) in relation to such increased amount of service tax shall be counted from the date of the order of the Commissioner (Appeals), the Appellate Tribunal or the court, as the case may be.".

. Insertion of transition provision by way of section 78B

After section 78A of the 1994 Act, the following section shall be inserted, namely:-

Transitory provisions

"78B. (1) Where, in any case,--

(a) service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded and no notice has been served under sub-section (1) of section 73 or under the proviso thereto, before the date on which the Finance Bill, 2015 receives the assent of the President; or

(b) service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded and a notice has been served under sub-section (1) of section 73 or under the proviso thereto, but no order has been passed under sub-section (2) of section 73, before the date on which

the Finance Bill, 2015 receives the assent of the President, then, in respect of such cases, the provisions of section 76 or section 78, as the case may be, as amended by the Finance Act, 2015 shall be applicable.

(2) In cases where show cause notice has been issued under sub-section (1) of section 73 or under the proviso thereto, but no order has been passed under sub-section (2) of section 73 before the date on which the Finance Bill, 2015 receives the assent of the President, the period of thirty days for the purpose of closure of proceedings on the payment of service tax and interest under clause (i) of the proviso to sub-section (1) of section 76 or on the payment of service tax, interest and penalty under clause (i) of the second proviso to sub-section (1) of section 78, shall be counted from the date on

which the Finance Bill, 2015 receives the assent of the President."

26. The reduction of penalty from the original amount to 25% is not contrary to the above Section and hence, it is valid. The appellant's suppression has been condoned to certain extent by the authorities and the same requires no modification. The grounds raised in this appeal have already been raised before the Additional Commissioner, Commissioner and the CESTAT. All the grounds have already been analysed by the Authorities below. It is needless to say, where suppression etc., is invoked, penalty is imposable under Section 78 of the Act. It is also evident that where Section 73(4) and Section 78 are involved, the Board's Circular and the case laws are not applicable, as rightly held by the Adjudicating Authority. Hence, the Civil Miscellaneous Appeal fails and accordingly, dismissed thereby confirming the orders passed by the authorities below. The appellant is directed to remit 25% of Rs.13,36,869/- within 30 days from the date of receipt of this order, failing which interest of 12% p.a should be levied till the date of payment. Consequently, connected Miscellaneous Petition is closed. No costs.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

mra

To

1. The Customs Excise and Service Tax
Appellate Tribunal
South Zonal Bench, I Floor
Shastri Bhavan Annexe, Haddows Road
Chennai - 600 006.
2. Commissioner of Service Tax
MHU Complex, 692, Anna Salai
Nandanam, Chennai - 600 035.

+1 cc to M/s.A.P.Srinivas Advocate sr 69563

C.M.A.No.2028 of 2017
and
CMP.No.10894 of 2017

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