IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 24.01.2018

CORAM:

THE HON'BLE MR.JUSTICE S.MANIKUMAR

AND

THE HON'BLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

CMA No.101 of 2018

The Commissioner of Central Excise,
O/o. the Commissioner of Central Excise,
Customs & Service Tax,
6/7, A.T.D.Street, Race Course Road,
Coimbatore - 641 018. ... Appellant

vs.

M/s. Sasi Advertising Pvt. Ltd.,
Damodar Centre, II Floor,
1050, Avanashi Road,
Coimbatore - 641 018 ... Respondent

Civil Miscellaneous Appeal filed under Section 35G(2) of the Central Excise Act, 1944) praying to set aside the Final Order No.40639 of 2015 dated 18.06.2015 passed by the Hon'ble Customs, Excise & Service Tax Appellate Tribunal, South Zone Bench, Chennai.

For Appellant : Mr.A.P.Srinivas

JUDGMENT

(Order of the Court was delivered by S.MANIKUMAR, J)

Instant Civil Miscellaneous Appeal is filed against the final order made in No.40639 of 2015 dated 18.06.2015, on the file of CESTAT, Madras by which the tribunal, dismissed the appeal filed by the revenue, on the issue of imposition of penalty.

2. Facts relating to the appeal are that M/s.Sasi Advertising Private Limited, Coimbatore, respondent herein, engaged in services taxable, under "Advertising Services" had not remitted, service tax dues of Rs.1,24,54,757/- within the stipulated dates, for the period from October 2002 to February 2009 and not paid the applicable interest for the delay in payment of service tax. A show cause notice was issued on

21.10.2009 to the respondent-company, proposing to demand interest of Rs.12,63,324/- for the period from October 2002 to February 2009. Penalty was also proposed to be imposed, on the respondent-company, under Sections 76 & 77 of the Finance Act, 1994.

3. The Commissioner, vide Order-in-Original No.05/2010 dated 12.05.2010 has upheld the demand of interest, Rs.12,63,324/- under Section 75 of the Finance Act, 1994 and appropriated sum of Rs.5,23,151/- already paid towards interest liability prior to issue of show cause notice and also the balance interest amount of Rs.7,40,163/- paid on 03.11.2009, after the issuance of show cause notice.

4. However, the Commissioner dropped the penal proceedings initiated in the show cause notice dated 21.10.2009 under Sections 76 & 77 of the Finance Act, 1994 on the grounds that (a) the service provider had discharged the outstanding service tax liability covered in the material period suo motto even before the issue of show cause notice and thus none of the circumstances envisaged under the relevant penal provisions is warranted for imposing penalty; (b) interest under Section 75 for delayed payment of service tax is mandatory; and (c) that the statute only provides power for imposition of penalty on service tax and not on interest. For the above conclusion, the Commissioner relied on various decisions of the Hon'ble Tribunal, including a decision of the Hon'ble Kerala High Court and a Board's Circular.

5. Aggrieved by the above order-in-original Sl.No.05/2010 dated 12.05.2010, an appeal was filed by the Commissioner of Central Excise, Coimbatore with CESTAT, Chennai, as per the Review Order No.01/ST/2010/CBE dated 23.07.2010 passed by the Committee of Chief Commissioners, Coimbatore. CESTAT, Chennai, vide final order No.40639/2015 dated 18.06.2015 dismissed the Revenue's appeal on merits, stating that on the grounds that imposition of penalty shall not serve useful purpose of law.

6. Being aggrieved by the abovesaid order, Revenue has filed the instant appeal on the following substantial question of law.

> "Whether the CESTAT is correct in holding that penalty u/s.76 & 77 of the Service Tax Act is not leviable when part of the service tax due and the interest is paid before the issuance of show cause notice."

7. Supporting the same, Mr.A.P.Srinivas, learned Senior Standing counsel for Customs, Central Excise and Service Tax submitted that in the order, the Commissioner has observed that there is considerable force and merit in the plea made by the respondent company regarding the financial constraint, as well as still business competition in advertising service, as seen from the truncating volume of business during the period from 2004-05 to 2008-09. Whereas, respondent company has defaulted in monthly payment of service tax for the period October 2002 to February 2009; the Commissioner has relied on the data as regards volume of business only from 2005-06 leaving out the period October 2002 to March 2005.

8. Learned counsel further submitted that financial constraint cannot be held as a reasonable cause for the delay in payment of service tax. As per Rule 6 of the Service tax Rules, 1994, service tax shall be paid immediately, following the calendar month in which payments are received towards value of taxable services rendered. Having received the payment towards taxable services rendered including service tax, taxpayer is not justified in withholding tax dues to the government on the grounds of financial constraint.

9. Learned counsel further submitted that the observation of the Commissioner, in the order that due weightage has to be given in the proceedings since th entire service tax liability along with a substantial portion of the interest amount involved was paid suo motu well before the visit of the Audit party and also before the issue of show cause notice, is not well founded.

10. Learned counsel drew the attention of this Court to the Annexure I to the show cause notice dated 21.10.2009, wherein the details, of the delay in payment of service tax, has been extracted,

Sl.No.	Service Tax amount (Rs.)	Service Tax		Delay in Payment (no. of days)
		Payable between / on	Paid on	
1	4,84,182	25.11.02 to 25.06.03	14.07.03	231 to 19
2	1,28,786	25.08.03 to 25.09.03	25.02.04	184 to 153
3	10,00,000	25.09.03 to 25.05.04	16.08.04	326 to 83
4	55,037	25.05.04	26.05.06	731
5	1,46,181	25.06.04	09.09.04 & 26.05.06	76 & 623

Sl .No.	Service Tax amount (Rs.)	Service Tax		Delay in Payment (no. of days)
		Payable between / on	Paid on	
6	1,58,048	25.07.04	09.09.04 & 06.05.06	46 & 623
7	2,23,586	25.08.04	09.09.04 & 06.05.06	15 & 623
8	16,67,148	25.09.04 to 25.05.05	26.05.06	608 to 366
9	5,00,000	25.05.05 to 25.07.05	02.02.07	618 to 557
10	19,15,640	25.07.05 to 25.04.06	13.02.07	568 to 294
11	18,84,360	05.05.06 to 31.03.07	03.04.07	333 to 3
12	2,50,571	31.03.07	25.02.08	331
13	6,49,129	05.05.07 to 05.09.07	22.03.08	322 to 199
14	5,00,000	05.09.07 to 05.12.07	25.03.08	202 to 111
15	5,00,000	05.12.07 to 05.03.08	29.03.08	115 to 24
16	2,37,729	05.03.08 to 31.03.08	31.03.08	26
17	5,00,000	05.05.08 to 05.07.08	25.02.09	296 to 235
18	13,83,946	05.07.08 to 05.03.09	26.03.09	264 to 21

11. Referring to the abovesaid table, he submitted that it is apparent that respondent company had been defaulting payment of service tax routinely, month after month. He further added that it is not factually correct to say that respondent company had paid interest suo motu or even before audit party visited, since respondent company had paid the first instalment of Rs.2,00,000/- towards interest only on 23.10.2008, whereas, the audit party pointed out the same, as early as 22.03.2008. Thus, according to the learned counsel, it is clear that respondent company had delayed payment of interest, even after the audit party pointed out the same. He further submitted that respondent company had delayed payment of service tax, for the months from April 2008 to February 2009, even after audit party paid a visit.

12. Learned Senior Standing counsel for Customs, Central Excise and Service Tax submitted that the observation of the Commissioner regarding regular payment of service tax by the respondent company for the year 2009-10 onwards, has no relevance to the issue on hand. Prompt payment of service tax during the year 2009-10 cannot be set right the record of chronic delay in payment of service tax by the respondent company, during the period October 2002 to February 2009, and also the delayed payment of interest, for the aforesaid period, paid only on 23.10.2008, 09.04.2009, 25.04.2009 and 03.11.2009, respectively.

13. Learned Senior Standing counsel for Customs, Central Excise and Service Tax submitted that the Commissioner has observed that the respondent company had suo motu discharged outstanding tax liability covered in the material period, before issue of show cause notice and none of the circumstances envisaged under the relevant penal provisions warrant imposition of penalty. According to the learned counsel, this is wholly misdirected, in as much the show cause notice dated 21.10.2009 was issued proposing a penalty under Section 76 of the Finance Act, 1994, on the respondent company for non-payment of service tax within the prescribed dates. Mere default in complying with the provisions of the statute itself is sufficient for imposing penalty and in support of the above, he placed reliance on the judgment of the Hon'ble Supreme Court in Gujarat Travancore Agency Vs. Commissioner of Income Tax reported in 1989 (42) ELT 350 (SC). Further, the Commissioner's observation that the statute provides for imposition of penalty only on service tax and not on interest, is not acceptable. When interest is held as mandatory, penalty imposable under Section 76 of the Finance Act, 1994 is also mandatory, as held by the Hon'ble High Court of Rajasthan in Union of India Vs. Aakar Advertising, reported in 2008 (11) STR 5 (Raj.). Referring to Section 76 of the Finance Act, 1994, he submitted that any person, liable to pay service tax in accordance with the provisions of person 68 or the rules made thereunder and who fails to pay such tax, shall, in addition to paying such tax, an interest on that tax in accordance with the provisions of Section 75, be liable to penalty which shall not exceed the amount of service tax, that he failed to pay.

14. Learned counsel further submitted that when there is belated payment of service tax, the assessee is liable to pay interest along with penalty. Interest and penalty, follows delay in payment of service tax. In the present case, the respondent company had not paid service tax within the stipulated time for over 5 years, month after month and in most of the cases paid such service tax, much later than the

prescribed due dates, without making payment of interest, at the applicable rates. In this context, he submitted that respondent company had obtained service tax registration, as early as 12.12.1996. It is also on record that respondent company had filed ST 3 returns due on 25th April and 25th October of the years 2003 to 2007 only on 23.04.2008, after the audit party's visit.

15. Learned counsel further submitted that Commissioner had relied on the decisions of the Hon'ble Tribunal, wherein it was held that when service tax along with interest is paid before issue of a show cause notice, no penalty can be imposed. In the present case, out of the total interest liability of Rs.12,63,324/- due for the period from October 2002 to February 2009, an amount totalling Rs.5,23,151/- has been paid on 23.10.2008, 09.04.2009 and 25.04.2009, respectively, i.e. prior to the issue of show cause notice. But the balance amount of Rs.7,40,173/- has been paid only on 03.11.2009 ie. after the issue of show cause notice. Learned counsel for the appellant submitted that Majestic Mobikes Pvt. Ltd., reported in 2008 (11) STR 609 (Tri.Bang.) relied on by the Commissioner, is a case, where only service tax and part of interest had been paid before issue of show cause notice, and the Hon'ble Tribunal, has upheld imposition of penalty under Section 76 of the Act. Other four decisions of tribunal, relied on by the Commissioner are not applicable to the present case, wherein service tax along with entire interest were paid before the issuance of show cause notice.

16. Learned counsel further submitted that Board's letter F.No.137/167/2006-CX4 dated 03.10.2007 and the provisions of Section 73 of the Finance Act, 1994 have not been correctly applied by the Commissioner to the present case. Section 73(3) of the Finance Act, 1994 provides for conclusion of adjudication proceedings on payment of service tax and interest before service of show cause notice. In the present case, major portion of the interest has been paid only after the issue of the show cause notice and as such, neither the provisions of sub-section (3) of Section 73 of the Finance Act, 1994 nor the instructions contained in Board's letter F.No.137/167/2006-CX.4 dated 03.10.2007 are applicable to the present case.

17. Learned counsel further submitted that the Commissioner has concluded that taking into consideration the facts and circumstances of the case and in the light of various judicial pronouncements and Bord's circular cited, that there is no case for imposition of penalty either under Section 76 or 77 of the Finance Act, 1994. In Commissioner of Central Excise, Jaipur-I Vs. Science Center reported in 2008 (9) STR 138 (Tri-Del.), it has been held that even if tax is deposited prior to issue of

show cause notice, there cannot be any automatic waiver of penalty. In the above case, for the delay in payment of service tax, penalty imposed under Section 76 has been upheld, even when service tax is paid before issue of show cause notice. While doing so, Hon'ble Tribunal has relied on the judgment of a Division Bench of the Hon'ble High Court of Punjab and Haryana in Machino Montell (I) Ltd reported in 2006(4) STR 177(P&H). The Hon'ble High Court of Rajasthan, in Union of India Vs. Aakar Advertising, reported in 2008 (11) STR 5 (Raj.) has held that penalty under Section 76 is mandatory and such penalty is not reducible below the minimum prescribed if reasonable cause for waiver is not shown. He reiterated that financial constraint cannot be a reasonable cause, for the failure to pay service tax within the stipulated date as held by the Hon'ble Tribunal in Golden Detective & Security Services Vs. Commissioner of Service Tax, Bangalore reported in 2009 (14) STR 474 (Tri.-Bang) and Yogi Auto Care Pvt. Ltd. Vs. Commissioner of Central Excise, Ahmedabad reported in 2009 (13) STR 428 (Tri.Ahmd.).

18. Learned counsel also relied on the decision of the Hon'ble Supreme Court, in the case of UOI Vs. Dharamendra Textile Processors, reported in 2008 (231) ELT 3 (SC), wherein it is held that where the penalty is mandatory, there is no scope for any discretion. He therefore submitted that the Commissioner ought to have imposed minimum penalty for non-payment of service tax within the due date as worked out in the show cause notice which amounted Rs.19,75,894/- under Section 76 and appropriate penalty under Section 77 of the Finance Act, 1994.

19. Learned counsel submitted that the payment of Service Tax and interest is not covered under Section 73(3) of Finance Act, 1994 and as such there was no discretion in the Act or Rules to waive mandatory penalty. According to the learned counsel, when the revenue has raised such a ground, the tribunal ought to have considered the issue and rendered a finding on the same. Without doing so, the tribunal, merely observed that the respondent had rendered cooperation to the department to discharge not only tax liability but also interest liability. Law provides mandatory penalty equal to unpaid service tax which also covers unpaid intent and there is no discretion vested with the authority to reduce the quantum of penalty. The order passed by the tribunal without considering the grounds raised by the revenue and the above legal position is erroneous, and therefore, liable to be set aside.

20. Heard Mr.A.P.Srinivas, learned counsel for the appellant and perused the material available on record.

21. Before adverting to the above submissions, let us have a cursory look at the relevant provisions in the Finance Act, 1994. Section 76 of the Finance Act, 1994, reads thus.

Penalty for Failure to Pay Service Tax:

(1) Where service tax has not been levied or paid, or has been short-levied or short-paid, or erroneously refunded, for any reason, other than the 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 there under with the intent to evade payment of service tax, the person who has been served notice under 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 not exceeding ten per cent. of the amount of such service tax :

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

i) the date of service of notice under sub-section (1) of section 73, no penalty shall be payable and proceedings in respect of such service tax and interest 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 penalty imposed in that order, only if such reduced penalty is also paid within such period.

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

22. Section 77 of the Act, is extracted hereunder:

Penalty for contravention of rules and provisions of Act for which no penalty is specified elsewhere. — (1) Any person, — (a) who is liable to pay service tax or required to take registration, fails to take registration in accordance with the provisions of section 69 or rules made under this Chapter shall be liable to a penalty which may extend to ten thousand rupees;]

(b) who fails to keep, maintain or retain books of account and other documents as required in accordance with the provisions of this Chapter or the rules made there under, shall be liable to a penalty which may extend to [ten thousand rupees];

(c) who fails to — (i) furnish information called by an officer in accordance with the provisions of this Chapter or rules made there under; or

(ii) produce documents called for by a Central Excise Officer in accordance with the provisions of this Chapter or rules made there under; or

(iii) appear before the Central Excise Officer, when issued with a summon for appearance to give evidence or to produce a document in an inquiry, shall be liable to a penalty which may extend to [ten thousand rupees] or two hundred rupees for everyday during which such failure continues, whichever is higher, starting with the first day after the due date, till the date of actual compliance;

(d) who is required to pay tax electronically, through internet banking, fails to pay the tax electronically, shall be liable to a penalty which may extend to [ten thousand rupees];

(e) who issues invoice in accordance with the provisions of the Act or rules made there under, with incorrect or incomplete details or fails to account for an invoice in his books of account, shall be liable to a penalty which may extend to [ten thousand rupees].

2. Any person who contravenes any of the provisions of this Chapter or any rules made there under for which no penalty is separately provided in this Chapter, shall be liable to a penalty which may extend to ten thousand rupees.

23. Relevant period for payment of service tax under consideration is between October 2002 and February 2009, to the tune of Rs.83,74,35,992/-. Service tax was not paid in time, which is a contravention of Section 68 of the Finance Act, 1994. Thus, invoking Sections 75 & 76 of the Finance Act, 1994, Commissioner of Central Excise, Customs and Service tax, Coimbatore, issued a show cause notice dated 21.10.2009 as to why,

a) an amount of Rs.12,63,324/- (Rupees Twelve lakhs sixty three thousand three thousand three hundred and twenty four only) being the interest on belated payment of Service Tax should not be demanded under Section 75 of the Finance Act, 1994.
b) an amount of Rs.5,23,151/ paid towards interest should not be appropriated for the interest payable.
c) penalty amount of Rs.19,75,894/- as detailed in Annexure III to the SCN should not be imposed on them under Section 76 and 77 of the Finance Act, 1994 for the Contravention of the provisions of the Finance Act, 1994, as amended.

24. Respondent/assessee has submitted a reply dated 14.12.2010 as well as additional written submissions dated 09.03.2010. During the course of personal hearing held on 09.03.2010, oral submissions were also made.

25. After considering the rival submissions and statutory provisions, vide order dated 12.05.2010, Commissioner of Customs, Central Excise & Service Tax, Coimbatore, ordered as hereunder

"(i) I confirm the proposal to demand interest of Rs.12,63,324/- under Section 75 of the Finance Act, 1994 and I order recovery of the same under Section 75 of the Finance Act, 1994.

(ii) I order appropriation of Rs.5,23,151/- already paid by them towards part of the interest liability prior to issue of show cause notice and also the balance interest amount of Rs.7,40,163/- paid by M/s.Sasi Advertising Private Ltd on 3.11.2009.

(iii) The penalty proceedings proposed in the impugned show cause notice under Sections 76 and 77 of the Finance Act 1994 are dropped."

26. Being aggrieved by the order dropping penalty proceedings, Commissioner of Customs, Central Excise and Service Tax, Coimbatore, has filed an appeal in ST/522/2010-SM.

27. Having regard to the contentions made therein, vide Final order No.40639/2015 dated 18.06.2015 in appeal No.ST/522/2010-SM, CESTAT, Madras has ordered, as hereunder

"Revenue is in appeal praying for imposition of penalty which was not done by the adjudicating authority. Perusal of the adjudication order discloses that there was no service tax liability demand to be discharged at the time of adjudication. The respondent has also discharged interest liability prior to issuance of show-cause notice partly. The rest of that was discharged within few days of issuance of show cause notice. This is apparent from para 4.12 of the adjudication order.

2. The conduct of the respondent does not appear to be questionable in view of cooperation rendered to the Department to discharge not only tax liability but also interest liability. Accordingly, imposition of penalty shall not serve useful purpose of law for which revenue's appeal is dismissed."

28. Though, Mr.A.P.Srinivas, learned counsel appearing for Customs, Central Excise and Service Tax, reiterated the grounds of challenge, we are not inclined to accept the same for the reason that both the adjudicating authority viz., the Commissioner of Customs, Central Excise, and Service Tax, Coimbatore, as well as the final fact finding appellate authority, CESTAT, Madras, have categorically held that the assessee / respondent, has discharged a portion of interest liability prior to the issuance of the show cause notice.

29. Perusal of the material on record discloses that interest payable on the belated payment of service tax was Rs.12,63,324/- and that even prior to issuance of the show cause notice, assessee/respondent paid interest amount of Rs.5,23,151/-. The remaining amount of Rs.7,40,163/- had been paid on 03.11.2009 immediately on receipt of show cause notice dated 20.10.2009, i.e., within 13 days.

30. As per Section 80 of the Finance Act, 1994, notwithstanding anything contained in the provisions of Section 77 or 1st proviso to Section 78, no penalty shall be imposable on the assessee for any failure referred to in the said provisions, if the assessee proves that there was reasonable cause for the said failure.

31. Going through the reasons assigned by the assessee, on belated payment, we are of the view that the assessee has substantiated reasonable cause for the failure in payment of service tax, within the stipulated time and hence, he is entitled to the benefit under Section 80 of the Finance Act.

32. In the light of the above discussion and statutory provisions, we are of the view that no manifest error is committed by the CESTAT, Madras. Thus we answer to the substantial question of law against revenue. Civil Miscellaneous Appeal is dismissed. No Costs.

Sd/-
Assistant Registrar(CS-VII)

//True Copy//

Sub Assistant Registrar

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1 THE JUDICIAL MAGISTRATE,
THE CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
SOUTH ZONAL BENCH, CHENNAI.

2. THE COMMISSIONER OF CENTRAL EXCISE,
6/7, A.T.P. STREET, RACE COURSE ROAD,
COIMBATORE 641 018.

+1cc to Mr.A.P.SRINIVAS, Advocate, S.R.No. 6035

CMA No.101 of 2018

KJI(CO)
TR(21/02/2018)