IN THE HIGH COURT OF BOMBAY AT GOA

SERVICE TAX APPEAL NO.2 OF 2014

M/s. Phil Corporation Limited,
(Former M/s. Gokhatak Enterprises
Ltd. Has amalgamated with
Appellant)
The Hub,
Tivim Industrial Estate,
Mapusa, Goa. (Through his Manager) ... Appellant

V/s.

Commissioner of Customs, Central
Excise and Service Tax,
ICE House, Patto, Panaji,
Goa- 403 001. ... Respondent

Mr. Rajiva Srivastava, Advocate for the Appellant.

Ms. Priyanka Kamat, Central Government Standing Counsel for the Respondent.

Coram :- M.S. SONAK &
BHARATI DANGRE, JJ.

Date :- 9th March, 2021.

JUDGMENT: (Per **BHARATI DANGRE,J)**

1. Heard Mr. Rajiva Srivastava, learned Counsel for the

Appellant and Ms. Priyanka Kamat, learned Central Government Standing Counsel for the respondent.

2. Rule. Rule made returnable forthwith with the consent of the learned Counsel for the parties.

3. Appeal came to be admitted on 01/12/2014 on the following substantial question of law:

> *"Whether the Tribunal, after holding that reasonable ground exists for non-payment of service tax justified in imposing penalty under Section 76 of the Act when Section 80 of the Finance Act, 1994 starting with the non obstante clause that "not withstanding anything contained in the provisions of section 76, section 77 or 78" emphatic in terms of text states that no penalty shall be imposable on the assessee, if the assessee proves that there was a "reasonable cause" for the said failure ?"*

4. The appellant is in the business of producing or printing photographs registered under the Service Tax category of "Photography Services" and render services to the customers who want their photographs to be taken in its studio or to bring the film rolls for development and printing. The appellant is stated to have 42 outlets where the cameras, films, photo frames, albums etc. are available for sale. Admittedly, the appellant is liable to pay Service Tax and accordingly file the ST-3 return for the period of 01/04/2003 to 30/09/2003, the

appellant disclosed receipt of an amount and paid Service Tax. He was served with summons, seeking information whether service tax is paid on entire amount of invoice.

5. The appellant was visited with a Show Cause Notice on 17/03/2005 by the Deputy Commissioner of Central Excise, Service Tax, Panaji. A duty of ₹9,05,523/- was alleged to be not paid on the material sold during the rendering of service and the said amount was demanded under Section 68 r/w. Section 73(1) of the Finance Act along with interest imposed under Section 75 and also penalty levied under Section 76, 77 and 78 of the Finance Act,1994. The demand notice was confirmed by the Joint Commissioner vide Order in Original passed on 18/02/2006 and further in a appeal, by the Commissioner (Appeals) Goa. Subsequent thereto an appeal is instituted before the Tribunal and which was registered as Appeal No.ST/97/2007. The Tribunal set aside the penalty imposed under Section 78 of the Act to the tune of ₹9,05,523/- but refused to entertain the appeal qua the penalty imposed under Section 76. By relying upon the decision of the High Court of Kerala in the case of **Assistant Commissioner v/s. Krishna Poduval** [2006(1) S.T.R. 185 (Ker.)] wherein it is held that for imposition of penalty under Section 76 of the Finance Act, no mens rea is required to be established and penalty is imposed in default in payment of tax, the appellant was held to be liable for penalty under Section 76 and the

Appellate Court partly allowed the appeal.

6. We have perused the order passed by the Appellate Tribunal. While setting aside the penalty imposed under Section 78 of the Finance Act, the Appellate Tribunal record that penalty under Section 78 is imposable when any of the element such as collusion, fraud, willful mis-statement of facts and contravention of the provisions of the Act or Rules made thereunder with intent to evade payment of tax is present. Holding that during the impugned period, a number of decisions were holding the field to the effect that the cost of goods/ material consumed in rendering of photography service cannot be included in the taxable value. The Tribunal was therefore satisfied that there was a reasonable ground for believing that the assessee was not liable to pay service tax on the cost of such materials. Convinced that there was no intention to evade the payment of tax and laying of reasonable ground for the belief, the appellant succeeded and the penalty levied under Section 78 was set aside.

7. This benefit however was not granted while determining the validity of the penalty imposed under Section 76. Section 76 of the Act reads that:

> *"Any person, liable to pay service tax in accordance with the provisions of section 68 or the rules made under this Chapter, who fails to pay such tax, shall pay, in addition to*

> *such tax and the interest on that tax amount in accordance with the provisions of section 75, a penalty which shall not be less than (one hundred rupees) for every day during which such failure continues or at the rate of [two per cent]. of such tax, per month, whichever is higher, starting with the first day after the due date till the date of actual payment of the outstanding amount of service tax:*
>
> *Provided that the total amount of the penalty payable in terms of this section shall not exceed the service tax payable in terms of this section shall not exceed [fifty per cent of] the service tax payable."*

8. The Tribunal has however lost sight of a relevant provision in form of Section 80 in the said Act which contain a non-obstante clause, which exempt levy of penalty, being imposed on the assessee, if the assessee demonstrate a reasonable cause for the said failure. Section 80 reads thus :

> *"SECTION 80. Penalty not to be imposed in certain Cases - standing anything contained in the provisions of section 76, section 77, section 79, 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."*

9. The said Section begin with a non-obstante clause and nevertheless anything contained in Sections 76, 77, 78 and 79, preclude imposition of penalty on the assessee if he prove that he was reasonably justified for the failure, contemplated under the foregoing Sections. The

necessary ingredients of the said Section being, demonstrating a reasonable cause for the assessee not to pay the tax. This would necessarily cover and contemplate an honest plea founded upon reasonable grounds of existence of state of circumstances, assuming them to be true and it is for the adjudicating authority to then determine whether the grounds cited is the substance of foundation and on satisfied that there exists such a foundation, penalty may not be imposed.

10. As far as the present case is concerned, the case of the appellant is that he had a bonafide belief that for the purpose of Section 67 of the Finance Act the value of services in relation to the photography would be the gross amount charged excluding the cost of goods and material used and consumed in rendering of such services. It is only when the larger Bench of Tribunal in case of **Agarwal Colour Advance Photo System v/s. Commissioner of Central Excise, Bhopal** [2011(23) STR 608 (trilb)] held that the value of the service in relation to the photography, would be the gross amount charged including the cost of goods and materials used and consumed in rendering such services for the purpose under Section 67 of the Finance Act,1994, the divergence of opinion of the point was straightened out. It was categorically held that the cost of photo paper, chemical etc. would be included.

11. The position of law was crystallized by the larger Bench decision as there was a large number of decisions holding that the cost of material consumed in process of rendering service is to be excluded from the total amount of charge and this was projected to be the basis of the bonafide belief based on the uncertainty on the position of law is that aspect, the appellant attempt to invoke Section 80. He aver that there was no mens rea to evade the tax but it was the uncertainty in the law which has been projected as a reasonable cause for failure to pay the duty.

12. On perusal of the decision in case of **Agarwal Colour Advance Photo System**(supra) which has crystallized the position of law, we find that the appellant is justified in his belief and he was supported by a reasonable ground to the effect that he was not liable to pay the service tax on cost of such material. The benefit of this belief for him is receiving a favourable consideration at the instance of the Tribunal while granting the relief qua the penalty imposed under Section 78. We see no reason why the said benefit cannot be extended to the penalty imposed under Section 76, since both the Sections are to be read along with Section 80, which gives an overriding effect over Sections 76 to 78. The impugned order passed by the Tribunal which denied the said benefit to the petitioner qua the penalty imposed under Section 78 to the tune of ₹1,00,000/-, is therefore a gross injustice and deserve to be set aside on account of non-consideration of Section 80 of the Act. No doubt

penalty can be imposed under the Act, for contravention of the law, if law provides and no mens rea need to be established, the effect of Section 80, has been completely overlooked.

13. Resultantly, Writ Petition is allowed. The impugned order passed by the Tribunal, to the extent which debar the appellant from payment of penalty under Section 76 is therefore quashed and set aside. Resultantly, the penalty imposed on the appellant under Section 76 of the Finance Act, in the assessment proceedings is set aside.

14. The Rule is made absolute in the above terms. No order as to costs.

BHARATI DANGRE,J. **M.S. SONAK,J.**

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MEENA VISHAL BHOIR Digitally signed by MEENA VISHAL BHOIR Date: 2021.03.11 16:53:06 +05'30'