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IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 14TH DAY OF DECEMBER, 2023

PRESENT

THE HON'BLE MR. JUSTICE P.S. DINESH KUMAR

AND

THE HON'BLE MR. JUSTICE V. SRISHANANDA

REVIEW PETITION No.384 OF 2022
IN C.E.A.No.21/2018

BETWEEN:

M/S. V.K. NIRANJAN AND CO,
REPRESENTED BY ITS
MANAGING PARTNER
SHRI NIRANJAN V.K
NO.202 & 204, KURUBARA
SANGHA BUILDING
KANAKADASA CIRCLE
KALIDASA MARG, GANDHINAGAR
BANGALORE
PIN:560009

...PETITIONER

(BY SHRI. S.S. NAGANAND, SENIOR ADVOCATE A/W
SHRI. VAIBAV M. IYENGAR, ADVOCATE)

AND:

THE COMMISSIONER OF
SERVICE TAX
BENGALURU SERVICE TAX-I
1ST TO 5TH FLOOR, TMC BUILDING
ABOVE BMTc BUS STAND, DOMLUR
BANGALORE
PIN:560 071

...RESPONDENT

(BY SHRI. JEEVAN J. NEERALGI, ADVOCATE)

THIS REVIEW PETITION IS FILED UNDER SECTION 114 R/W ORDER 47 RULE 1 OF CPC, PRAYING TO ALLOW THIS PETITION AND CONSEQUENTLY REVIEW THE ORDER DATED 11.02.2021 PASSED BY THIS HON'BLE COURT IN CEA No.21/2018 AND TO PASS SUCH OTHER SUITABLE ORDERS AS THIS HON'BLE COURT DEEMS FIT TO GRANTED IN THE FACTS AND CIRCUMSTANCES OF THE CASE IN THE INTEREST OF JUSTICE AND EQUITY.

THIS REVIEW PETITION, HAVING BEEN HEARD AND RESERVED FOR ORDERS ON 17.11.2023 COMING ON FOR PRONOUNCEMENT OF ORDERS THIS DAY, **V.SRISHANANDA, J.**, PRONOUNCED THE FOLLOWING:-

ORDER

The present Review Petition is filed by the appellant/petitioner under Section 114 r/w Order XLVII Rule 1 of the Code of Civil Procedure r/w Section 35G of the Central Excise Act, 1944, seeking review of the Order dated 11.02.2021 passed in C.E.A.No.21/2018.

2. The facts which are utmost necessary for disposal of the present Review Petition are as under:

The Review Petitioner is a registered Chartered Accountant firm and therefore, was required to adhere to the terms of the registration and responsibilities, thereof. The Review Petitioner was appointed as internal auditor for Karnataka State Financial Corporation ('KSFC' for short), a State Government undertaking vide work order dated 14.11.2005. Petitioner firm appointed 45

persons for carrying out the audit work with KSFC and KSFC were required to pay salary for 45 persons engaged in the said activity of audit work. KSFC delayed making the payment. During the period under consideration, which is subject matter of the present case, petitioner firm was required to pay service tax, only on receipt of service tax from KSFC.

3. The petitioner, in view of delay in receipt of payments from KSFC, made delayed payment of service tax with interest. However, the Department issued a show cause notice which was received by the petitioner on 08.08.2007 without there being any details of specific work attracting the service tax. The show cause notice was duly replied by letter dated 01.10.2007 and despite said reply, petitioner was served with the summons dated 18.09.2007 and the same was replied.

4. The show cause notice covered the period from April 2005 to September 2007. The Department acknowledged the payment of service tax by the petitioner on 16.08.2007 and 17.08.2007 and also acknowledged ST-3 returns on 20.08.2007 pertaining to the period from 2005-06 to 2006-07.

5. However, Department, not satisfied with the reply, a further show cause notice was issued by the Department invoking the proviso to Section 73(1) of the Finance Act, 1994 ('Act' for short), i.e., the extended period of limitation by stating that there was suppression of material facts by the petitioner and thereby, petitioner firm contravened the provisions of the Act and Rules with an intent to evade the payment of service tax, in time.

6. It is further contended by the petitioner that in the show cause notice, the Department was of the *prima facie* opinion that there was suppression of value of taxable services rendered with an intent to evade payment of service tax. Therefore, the assessee rendered themselves liable to imposition of penalty under Sections 76, 77 and 78 of the Act. The show cause notice also mentioned that there was payment of service tax in a sum of Rs.10,12,433/- and interest in a sum of Rs.78,205/-.

7. The second show cause notice was also duly replied by the petitioner on 20.12.2008 explaining the delay in payment of service tax and petitioner further submitted that there was no suppression of material facts and requested the Department not to take the extreme step of levying penalty under Section 78 of the Act. However, without appreciating the explanation offered by the

petitioner and without affording sufficient opportunity for the petitioner, learned Additional Commissioner of Service Tax decided the case *ex parte* and passed an Order in original vide C.No.IV/16/140/2008 ST Adj.20040/09 OIO No.141/2009 dated 30.10.2009.

8. In paragraph 9.3 of the said Order, learned Additional Commissioner of Service Tax has remarked that assessee has accepted the service tax liability and made payment of service tax and interest thereon before issuance of show cause notice.

9. Review Petitioner contended that, it is incorrect to state that evasion of service tax has come to the notice of the Department only after detailed investigation of the assessee account.

10. Petitioner further contended that when once the service tax with interest is paid, there is no scope for invoking the extended period. It is further contended that in the order in Original, penalty was levied on the ground that assessee has not filed ST-3 return nor paid service tax suppressing the very fact from the Department.

11. Petitioner also contended that the said statement in the order in original is incorrect inasmuch as in the very show cause notice

itself there is a mention that ST-3 returns has been filed by the petitioner and payment of service tax with interest. Therefore, it was the case of the assessee that levy of penalty under Section 78 of the Act is contrary to the facts of the case.

12. The Order levying the penalty was challenged before the Commissioner of Central Excise Appeals, Hon'ble Customs, Excise and Service Tax Appellate Tribunal. But the Review Petitioner failed to get the order of imposition of penalty, set aside. Ultimately, Review Petitioner challenged the order of imposition of penalty before this Court in CEA No.21/2018. This Court taking note of the fact that there was a letter issued by the KSFC, though the service tax was paid before issuance of show cause notice, it is the duty of the petitioner to pay the service tax in time, passed an order on 11.02.2021 whereby CEA No.21/2018 came to be dismissed and substantial questions of law framed by the Court were answered in favour of the Department and against the assessee.

13. Being aggrieved by the same, present Review Petition has been filed on the following grounds:

- *This Hon'ble Court in para 2 of the order recorded a finding that the Petitioner failed to respond to the notices and finally*

show cause notice was issued to the assessee on 18.09.2008 which is contrary to the facts of the case. In fact the Petitioner filed a reply to the communication of the department dated 08.08.2007 vide reply dated 01.10.2007 and in response to the summons dated 18.09.2007 the Petitioner filed the reply vide dated 01.10.2007.

- *The Petitioner respectfully submits that due to diverse reasons the decisions of the Hon'ble Supreme Court in the case of Kushal Fertilisers (P) Ltd Vs. Commissioner of Cus & C.Ex., Meerut 2009 (238) E.L.T. 21 (SC), this Hon'ble Court decisions in the case of CCE., Mangalore Vs. Shree Krishna Pipe Industries 2004 (165) ELT 508 (Kar), CCE., Vs. Geneva Fine Punch Enclosures Ltd 2011 (267) ELT 481 (Kar), CCE., Vs. Powerica Ltd 2012 (276) ELT 302 (Kar) which have not been informed to the Court and these decisions have a bearing on the case and thus they constitute formidable ground for review which may be considered for the advancement of substantial cause of justice and thus in our respectful submission it is well within the power of this court to recall the order dated 11.02.2021 for fresh hearing or modify the order for advancement of substantial cause of justice.*
- *Respectfully, this Hon'ble Court is erred in holding that the present case has a distinguishable feature and hence the decision of this Hon'ble Court relied by the Petitioner were not applied to the facts of the case of the petitioner.*
- *This Hon'ble Court is incorrect in holding that the assessee suppressed the facts and made willful-mis-statement before the Assessing Officer and in those circumstances the benefit*

of section 74, 78 was not extended to it. There is no allegation of willful-mis-statement in the show cause notice, order-in- original, Order-in-Appeal, Tribunal order and consequently this Hon'ble Court holding that the Petitioner has made willful mis- statement for the first time is beyond the scope of the allegation made in the show cause notice as well the authorities below. Consequently, the denial of benefit under section 73(4) of the Act on the ground that the Petitioner made willful mis-statement being one of the ingredients under section 73(4) of the Act is not in accordance with law.

- *This Hon'ble Court ought to have appreciated that the petitioner has not suppressed the facts of providing the services under the classification of practicing chartered Accountant. The Petitioner was registered with the department. The Service tax department is having knowledge about the activity of the Petitioner. Once if it is held that the petitioner has not suppressed the facts then the provisions of section 73(3) of the Act is applicable and the show cause notice cannot be issued in respect of the payments already made.*
- *The registration obtained by the Petitioner and the entire payment of Service tax along with interest for the dispute period is paid before issue of show cause notice. Consequently, there is no suppression of facts and there is no intention by the Petitioner to evade payment of tax. Even on this count the extended period of limitation cannot be invoked on the facts of the case of the Petitioner.*

- *The Petitioner places reliance on CCE vs. Triveni sheet glass works (2005) 5 RC 612(SC) for the proposition that in the event all the facts are disclosed to the department and brought to the knowledge of the department the extended period is not available.*
- *The Petitioner places reliance on the decision of the Hon'ble Supreme Court in the case of Kushal Fertilisers (P) Ltd Vs. Commissioner of Cus & C.Ex., Meerut 2009 (238) E.L.T. 21 (SC).*
- *The Petitioner has not suppressed the facts and consequently the proviso to Section 73(1) of the Act is not applicable on the facts of the case of the Petitioner and the show cause notice issued therefore is bad in law.*
- *The Petitioner places reliance on the decision of this Hon'ble Court in the case of CCE., Mangalore Vs. Shree Krishna Pipe Industries 2004 (165) ELT 508 (Kar), wherein the Hon'ble Court held that the disputed tax has been paid by the party even before the issue of show cause notice and this would show that there was no question of fraud, mis-representation or suppression of facts.*
- *The Petitioner has not suppressed the facts and not contravened the provisions of the Act and Rules, consequently the proviso to Section 73(1) of the Act is not applicable on the facts of the case of the Petitioner and the show cause notice issued is bad in law and liable to be quashed on the facts and circumstances of the case.*
- *The Petitioner is not liable to pay penalty under section 77 and 78 of the Act in view of reasonable cause as prescribed*

under section 80 of the Finance Act, 1994 on the facts and circumstances of the case.

- i. The Petitioner reproduced the provisions of section 80 of the Act as follows: "Notwithstanding anything contained in the provisions of section 76, section 77 or 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.*
 - ii. The Petitioner has collected the service tax with delay from the KSFC and the Petitioner is liable to pay service tax only after receipt of the service tax. The Petitioner, due to financial difficulty made the payment to salaries to the staff who are involved in the said KSFC work and later paid the service tax with interest voluntarily.*
 - iii. The Petitioner paid the entire service tax along with interest which only demonstrates the bona-fide conduct on the part of the Petitioner.*
 - iv. The entire payments were made along with interest 13 months prior to the issue of show cause notice.*
 - v. Without prejudice it is settled position of law that even in case where suppression is proved, the recourse to reasonable cause under section 80 is not prohibited.*
- *The authorities below failed to appreciate that issuing the show cause notice in respect of the service tax*

payments along with interest made by the petitioner before issue of show cause notice is not maintainable on the facts and circumstances of the case.

- a. The Petitioner has paid service tax and interest amount much before issue of show cause notice for the service rendered by the Petitioner and the details of payments are also intimated to the department.*
- b. As per legislative provisions, show cause notice can be issued ONLY & ONLY wherever the taxes have not been levied or not been paid or has been short levied or short paid or erroneously refunded. In the instant case of the Petitioner:
 - (i) The service tax has been paid much before the date of issue of notice;*
 - (ii) The amount paid is intimated to the department.**

And consequently the essential ingredients for issue of notice do not exist on the facts of the case.

- c. As per Section 73(3) of the Act the Petitioner paid the service tax on the basis of their own ascertainment before the Service of notice under sub-section (1) of section 73 of the Act and duly intimated the said facts to the Central Excise Officer. The fact that the notice is issued subsequent to the date of payment and due intimation by the Petitioner, the same is bad in law, in contravention of the provisions of Section 73(3) of the Act and is without jurisdiction.*
- d. Reliance is placed on the parity of reasoning of the following decisions for the proposition that a notice,*

when issued after the date of payment of service tax, is bad in law:

- i) *The decision of this Hon'ble Court in the case of CCE., Vs. Powerica Ltd 2012 (276) ELT 302 (Kar). "In other words, if duty and penalty is paid even before the issue of show cause notice and the said fact is informed to the proper Officer, he shall not initiate any proceedings to recover the duty and interest, much less for imposition of penalty. Therefore, the order imposing penalty is illegal."*

The Commissioner of Customs vs. Powerica Ltd. (22.09.2011 – KARHC) : MANU/KA/1230/2011

- ii) *CCE Vs. Galaxy Constructions Pvt Ltd 2017 (48) STR 37 (Bom).*

The issue before the Hon'ble Court was "The question that fell for consideration before the Tribunal and also falls for consideration in this appeal is whether the assessee was liable to pay the penalty on the delayed payment of service tax, when the assessee had discharged the entire liability of payment of service tax and interest thereon before issue of show cause notice".

The Hon'ble Court held that since no substantial question of law arises in this Central Excise Appeal, the same was dismissed.

- *The authorities below failed to appreciate that the petitioner is not liable to pay penalty under section 78 of*

the Act a sum of Rs.10,12,433/- on the facts and circumstances of the case.

- a) The Petitioner has not suppressed the facts and consequently the levy of penalty under section 78 of the Act is bad in law on the facts and circumstances of the case.*
- b) Without prejudice, the Petitioner submits that the entire payment of service tax and interest was paid before issue of show cause notice and consequently no demand exists and levy of penalty of Rs.10,12,433/- is not in accordance with law.*
- c) The department is having knowledge about the activities of the Petitioner when the Petitioner got registered with the service tax department for the services under the classification of Practising Chartered Accountant services. Consequently, the Petitioner has not suppressed the facts.*
- d) In support of this submission the Petitioner places reliance on the decisions of the Hon'ble Supreme Court in the case of Kushal Fertilisers (P) Ltd Vs. Commissioner of Cus & C.Ex., Meerut 2009 (238) E.L.T. 21 (SC).*
- e) The authorities below erred in imposing the penalty under section 78 of the Finance Act, 1994 and failed to consider that there is a reasonable cause for waiver of penalty as per provisions of section 80 of the Act. Consequently, the Petitioner is not liable for*

penalty under section 78 of the Finance Act, 1994.

- f) The Petitioner places reliance on the decision of this Hon'ble Court in the case of Commissioner of Service tax Vs. Motor world & Ors (2012) 79 DTR (Kar) 151.*
- g) The Petitioner places reliance on the decision of the Hon'ble Supreme Court in the case of Hindustan Steel Limited Vs. State of Orissa (1972) 83 ITR 26 (SC). The Hon'ble Court observed that "even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute". There is a total absence of the requisite conditions in the Petitioner's case, in order to levy penalty.*
- h) As per Section 78 of the Act, the penalty arises only after determination of service tax liability under section 73(2) of the Act. In the instant case the Petitioner has paid the service tax 13 months before determination of service tax payable under section 73(2) of the Act and hence to that extent no demand is payable by the Petitioner, the question of determination under Section 73(2) of the Act does not arise.*

- i) *The Petitioner places reliance on the decision of this Hon'ble Court in the case of CCE., Vs. Geneva Fine Punch Enclosures Ltd 2011 (267) ELT 481 (Kar). The Hon'ble Court observed as follows:*

The determination of liability to pay duty is a condition precedent for imposing penalty. If after demand of duty if the assessee without contesting the claim voluntarily pays the duty and interest payable thereon for the delay in payment of duty on the stipulated day, the question of officer determining the duty payable would not arise.

The Tribunal held that the entire duty and interest was paid voluntarily on being pointed out in the investigation, no case for imposing the penalty is made out.

The Hon'ble Court also held that no substantial question of law involved in this appeal that arises for consideration.

- j) *In the instance where there is no demand payable to that extent of service tax paid by the Petitioner the question of penalty proceedings does not survive.*
- k) *The Petitioner places reliance on the decision of this Hon'ble Court in the case of CCE., Mangalore Vs. Shree Krishna Pipe Industries 2004 (165) ELT 508 (Kar).*

- *Without prejudice, the penalty under section 78 of the Act shall be levied only 25 percent of the service tax determined i.e., Rs.2,53,108/- (25 percent of Rs.10,12,433/-) as per first proviso to section 78 of the Act on the facts and circumstances of the case.*
- i) As per proviso to section 78(1) of the Act where such service tax as determined under sub section (2) of section 73, and interest payable thereon under section 75 is paid within thirty days from the date of communication of order of the Central Excise Officer determining such service tax, the amount of penalty liable to be paid by such person under this section shall be twenty five percent, of the service tax so determined.*
- ii) In the present case the entire service tax and interest as determined under section 73(2) of the Act in the Order- In-Original is paid much before issue of show cause notice itself and consequently the above first proviso to section 78 of the Act is applicable on the facts and circumstances of the case.*
- iii) The learned Additional Commissioner has not intimated the availability of the said benefit to the Petitioner in the order-in-Original passed vide dated 30.10.2009. The Petitioner respectfully states that it can produce any number of order-in-original wherein the adjudicating authority specifically mentioned about this in the order- in-original. Consequently, the present order-in-original passed is bad in law.*
- iv) As per the second proviso to section 78 of the Act the benefit of the reduced penalty under the first*

proviso shall be available only if the amount of penalty so determined has also been paid within the period of 30 days referred to in that proviso. Without prejudice, the Petitioner submits that if the same was mentioned in the order-in-original the Petitioner ought to have availed the said benefit by paying only 25 percent of the penalty.

v) Without prejudice the matter may be remitted back to the Adjudicating authority to give opportunity to the Petitioner since the order-in-original was passed ex-parte and the benefit of the second proviso has not been considered in the order-in-original.

vi) In view of above submissions, without prejudice to the contention of the Petitioner that the petitioner is not liable to pay penalty under section 78 of the Act, the penalty under section 78 of the Act shall be restricted to 25 percent i.e., a sum of Rs. 2,53,108/- on the facts and circumstances of the case.

➤ It is submitted that as substantial question of law has been answered by this Hon'ble Court, in our respectful view without taking note of the above submissions and the Petitioner case falls within order 47 rule 1, the Petitioner is preferring this review for the advancement of substantial cause of justice."

14. Sri S.S.Naganand, learned Senior Advocate representing the Review Petitioner by reiterating the grounds urged in the Review Petition, contended that the petitioner tried to lay hands on to the alleged letter issued by the KSFC, whereunder, KSFC having

confirmed the payment of service charges whereby, there was an obligation on the part of the petitioner to pay the service taxes. But, despite best efforts made by the petitioner, no such correspondence has been traced by the petitioner company nor there was any payment made by the KSFC in time so as to fasten the liability on the petitioner in willfully evading the timely payment of service tax.

15. Sri S.S.Naganand, also contended that when once the service tax with interest is paid before issuance of show cause notice, which is an admitted fact in the case, penalty proceedings under Section 78 of the Act would be *per se* not maintainable and sought for allowing the Review Petition.

16. In support of his arguments, he has placed reliance on the following judgments:

Power of review may be exercised on the discovery of new and important evidence which was not within the knowledge of the party seeking review.

1. *State of West Bengal and others v. Kamlesh Sengupta and another, (2008) 8 SCC 612.*
2. *District Board, Muzaffarnagar v. The upper India Sugar Mills Limited, Khatauli, AIR 1957 AII 527.*

3. *Commissioner of C. Ex., Mangalore v. Shree Krishna Pipe Industries, (2004) 165 ELT 508."*

17. The contentions urged on behalf of the petitioner was emphatically denied by the respondent and contended that the factual aspects cannot be gone into by this Court, that too, in the review jurisdiction and sought for dismissal of the Review Petition.

18. The Department maintained their stand that the Order came to be passed by the Additional Commissioner of Service Taxes on appreciating the material facts in a proper manner and the letter issued by the KSFC clearly mentions that service charges were paid by KSFC to the petitioner firm in time and therefore, there is willful evasion of payment of service tax in time, resulting in the Department initiating action as is contemplated under the provisions of the Act and levied penalty in accordance with law. Therefore, sought for rejection of review petition.

19. After hearing the parties, this Court granted time for the Department to place on record the correspondence made by the KSFC whereby, service charges payable to the petitioner firm for the internal audit work carried out by petitioner firm has been paid in time.

20. Sri Neeralgi, learned counsel representing the Department submitted before the Court that despite best search, said correspondence is not available having regard to the time lapse.

21. Sri S.S.Naganand, learned Senior Advocate submitted in writing that despite best efforts including filing an application under Right to Information Act, KSFC is unable to place on record the correspondences whereby KSFC has paid the service charges to the petitioner firm, in time.

22. As an alternative submission, petitioner has filed an affidavit on 26.10.2023. Relevant portion of the contents of the said affidavit is culled out herein for ready reference:

"2. For purported delay in payment of service tax, a show cause notice was issued by the Commissionerate of Service Tax, Bengaluru proposing inter alia to levy a penalty under Section 76 of the Finance Act, 1994 for failure to pay service tax in time. Even before the said notice was issued, the Petitioner had paid service tax and education cess of Rs.10,12,433/-. By order dated 30.10.2009, the Adjudicating Authority appropriated the payment of Rs.10,12,433/- made by the Petitioner towards service tax and also appropriated Rs.78,205/- towards interest already paid by the Petitioner. In addition, penalties were imposed under Sections 76, 77, and 78 of the Finance Act amounting to Rs.10,12,433/-.

The said order having been affirmed by the Commissioner of Central Excise Appeals, Hon'ble Customs, Excise and Service tax Appellate Tribunal and by this Hon'ble Court in C.E.A. No.21/2018, this review petition is filed.

3. *It is pertinent to state herein that I am a senior citizen and in order to give a quietus to the dispute as I am a senior citizen, invoking the provisions of Section 76 of the Finance Act, as amended on 14.05.2015, I am agreeable to pay a sum of Rs.2,53,109/-, being 25% percent of the penalty of Rs.10,12,433/-. I pray that TARY this Hon'ble Court may kindly take into consideration the extenuating circumstances and the fact that tax and interest was paid even before the issuance of the show cause notice and accordingly modify the order levying penalty."*

23. The said affidavit was opposed by the Department by filing counter, which reads as under:

The Respondent submits as follows:

1. *The Respondent submits that the affidavit filed by the petitioner is legally and factually untenable. The Final Order No.22268/2017 dated 25/09/2017 passed by the CESTAT and the Order-In-Appeal No.168/2012 and the Order-In-Original No.141/2009 have clearly brought out the circumstances for levy of penalty and confirmed by this Hon'ble Court in CEA No.21/2018. Neither there is a factual error nor has legal infirmity in passing the orders been demonstrated by the petitioner to entertain the present Review Petition.*

2. The Respondent submit that the penalty was imposed under the provisions of Section 78 of the Finance Act, 1994 as existing in the statute at the relevant point of time. The Petitioner after having collected the service tax from his clients neither discharged nor declared the same to the Department by filing ST-3 Returns before initiation of proceedings by the Respondent/Revenue. The undisputed facts clearly demonstrate that the petitioner has deliberately suppressed the fact of collection of service tax from the Department and the service tax evasion has come to the notice of the Department only after detailed investigation was conducted. If the Department had not initiated the proceedings, the petitioner would have been successful in evading the service tax. Hence, the imposition of penalty is wholly justified under the circumstances of the present case.

3. The contention of the petitioner that no penalty shall be levied on persons who pay the service tax with applicable interest before issuance of Show Cause Notice under Section 73(3) of the Finance Act is not applicable to the case of the petitioner. The petitioner falls under the exceptions contained in Section 73(4) of the Finance Act, 1994 which contemplates that in case of fraud or collusion or willful misstatement or suppression of facts or contravention of any of the provisions of this chapter or of the rules made thereunder with intent to evade payment of service tax. The facts and circumstances established these ingredients in the case of the petitioner. Hence, the benefit of Section 73(3) of the Finance Act, 1994 are not available to the petitioner. In the instant case the

petitioner after having collected the service tax did not remit the tax collected to the Department and did not file the statutory returns. Hence, the suppression on the part of the petitioner with an intent to evade service tax is quite evident from the conduct of the petitioner.

4. The Respondent submits that the Adjudicating Authority, Appellate Authority and this Hon'ble Court have taken all the factors in to consideration and passed the orders dismissing the claim of the petitioner. This Hon'ble Court was conscious of the legal position and discussed the statutory provisions in the Order under Review.

5. The Final Order of the CESTAT at paragraph 6.2 gives reasons why the penalty imposed by the Adjudicating Authority is sustainable and the same is confirmed by this Hon'ble Court in the Order under Review. The undertaking of the petitioner in paragraph 3 of the affidavit that he is agreeable to pay 25% of the penalty in accordance with the amended provision contained in Section 76 of the Finance Act, 1994 is not legally permissible as the said amendment came into effect from 14/05/2015 which is prospective in nature. The said amendment is only in respect of penalty under Section 76 of the Finance Act and is not applicable to the provisions contained in Section 77 and 78 of the Finance Act, 1994. The penalty is levied by invoking Section 78 of the Finance Act, 1994. Therefore, the petitioner agreeing to pay penalty under amended provision of Section 76 of the Finance Act, 1994 cannot be legally acceptable.

6. The petitioner being a practicing Chartered Accountant has not demonstrated valid and cogent reason

in his support during the proceedings before the Adjudicating Authority and Appellate Authorities. The CESTAT has observed that the petitioner has not contested the findings of the lower authorities and even before this Hon'ble Court during the pendency of the CEA No.21/2018. Therefore, there is no scope to raise new factual and legal contentions in the Review Petition. The conduct of the petitioner has to be viewed seriously particularly taking into consideration that he is a practicing Chartered Accountant and is completely aware of his tax obligations compared to a layman. The acceptance of the plea of the petitioner would amount to allowing the Review Petition as the petitioner is indirectly seeking for quashing of Penalty order passed under Section 78 of the Finance Act and confirmed by this Hon'ble Court which is not permissible under the provisions of the Finance Act, 1994.

WHEREFORE, the Respondent prays that this Hon'ble Court may be pleased to reject the present Review Petition in the interest of justice and equity."

24. In view of the above peculiar facts and circumstances of the case, this Court bestowed its attention to the relevant material on record, meticulously.

25. Admittedly, the order that is assailed by the Review Petitioner in CEA No.21/2018 came to be passed on 11.02.2021. There is some force in the arguments put forth on behalf of the

Department that due to lapse of time, correspondence of KSFC as sought by the Review Petitioner cannot be placed before the Court.

26. However, the review petitioner has placed before this Court the reply received by the Review Petitioner from KSFC along with memo dated 02.02.2023. The reply received by the Review Petitioner reads as under:

"To,

Date:02.02.2023

*Shri Niranjana V.K.,
1049, Maria Arcade, Dr.Rajkumar Road,
4th M Block, Rajajinagar,
Bengaluru-560 010.*

*Sub: Information sought under RTI Act-2005 RTI application under
Registration No.CCEBL/R/E/22/00093 dated 14.12.2022-Reg*

*Please refer to the above. Your RTI Application was transferred to
this office by the CPIO, PrCCO vide letter
GCCO/RTI/APP/1377/2022-TECH dated 14.12.2022.*

*02. Attempt was made to elicit the information/record, sought
by you vide your RTI Application, from the Anti-Evasion Section
where the information was likely to be available. The Deputy
Commissioner (Anti-Evasion Section) has reported that the letter
dated 19.12.2007 sought vide your RTI Application could not be
traced inspite of putting all out efforts. Further, an attempt was
made with the Adjudication Section to obtain a copy of the said. It
has been reported by the Adjudication Section that the Show Cause
Notice referred in the RTI application issued to M/s LSG Sky Chefs
India Pvt Ltd was not received by the Adjudication Section, as seen
from the SCN register maintained in the Section, for
Commissioner/ADC/JC level Show Cause Notices.*

03. *If you are not satisfied with the above reply, you may prefer an appeal before the first Appellate Authority, Shri H. Soikhanthang, Additional Commissioner, HMT Bhavan, Bellary Road, Bengaluru-560032, within a period of 30 days from the date of receipt of this letter."*

27. As could be seen from the reply, the letter said to have been issued by KSFC is made as basis for the Department to commence the penalty proceedings against the review petitioner. It is pertinent to note that KSFC has now not been able to furnish copy of the said letter.

28. The scope of Review Petition is no longer *res integra*. The Hon'ble Apex Court, in the case of the **S. Madhusudhan Reddy Vs. V. Narayana Reddy and Others** reported in **2022 SCC Online SC 1034**, after taking into consideration catena of judgments of the Apex Court on the point, has held as under:

"31. *As can be seen from the above exposition of law, it has been consistently held by this Court in several judicial pronouncements that the Court's jurisdiction of review, is not the same as that of an appeal. A judgment can be open to review if there is a mistake or an error apparent on the face of the record, but an error that has to be detected by a process of reasoning, cannot be described as an error apparent on the face of the record for the Court to exercise its powers of review under Order XLVII Rule 1 CPC. In the guise of exercising powers of review, the Court can correct a mistake but not substitute the view taken earlier merely because*

there is a possibility of taking two views in a matter. A judgment may also be open to review when any new or important matter of evidence has emerged after passing of the judgment, subject to the condition that such evidence was not within the knowledge of the party seeking review or could not be produced by it when the order was made despite undertaking an exercise of due diligence. There is a clear distinction between an erroneous decision as against an error apparent on the face of the record. An erroneous decision can be corrected by the Superior Court, however an error apparent on the face of the record can only be corrected by exercising review jurisdiction. Yet another circumstance referred to in Order XLVII Rule 1 for reviewing a judgment has been described as "for any other sufficient reason". The said phrase has been explained to mean "a reason sufficient on grounds, at least analogous to those specified in the rule" (Refer: Chajju Ram v. Neki Ram, AIR 1922 PC 112, and Moran Mar Basselios Catholicos v. Most Rev. Mar Poulouse Athanasius, 1955 SCR 520)."

29. Keeping in mind the legal principles enunciated in the *Madhusudhan Reddy*, supra, when the material on record is analyzed in the instant case, it emerges that the Review Petitioner has sought for review of the Order in CEA No.21/2018 dated 11.02.2021, on the aforesaid grounds.

30. The principle ground on which the Review Petitioner is seeking for review of the Order in CEA No.21/2018 is that, the authorities have proceeded on the basis of the letter issued by KSFC whereby, KSFC said to have paid the service charges to 45

persons who have been employed by the Review Petitioner for carrying out internal audit work in KSFC and failed to pay the service tax. But, according to Review Petitioner, no such letter has been issued by KSFC as per the reply obtained by filing an application under Right to Information Act.

31. Whether at all the KSFC has issued such a letter or not, therefore, assumes significance in adjudicating the grounds urged in the Review Petition. Time was granted by this Court to both the parties to place the said letter before the Court. Sri Jeevan J. Neeralgi, learned counsel for the Department has stated that due to lapse of time, such a letter could not be produced before this Court. The Review Petitioner has placed the reply received by KSFC. Irrespective of the letter that has been issued by KSFC, since KSFC is a State Government undertaking, accounts of KSFC would be available to establish that all payments have been made by the KSFC for 45 persons who had been deputed for carrying out the internal audit work. According the Review Petitioner, he came to know about the fact that no such letter has been addressed by KSFC only recently and said letter is the basis on which the entire proceedings against Review Petitioner has been commenced and therefore, he can maintain the Review Petition.

32. In the light of the above factual aspects, this Court bestowed its attention to Section 78 of the Finance Act, whereunder, penalty proceedings has been commenced and review petitioner has been penalized to pay Rs.10,12,433/-. For ready reference, Section 78 of the Finance Act is culled out hereunder:

"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 shortlevied 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. only if the amount of such reduced penalty is also paid within such period.*

"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.]

33. On careful perusal of the above provisions, it is crystal clear that as per second proviso, if the tax is paid within a period of 30 days, the penalty payable would be within a period of 30 days of the date of service of the notice under proviso to sub Section (1) of Section 73, the penalty payable shall be 15% of such service tax and proceedings in respect of such service tax, interest and penalty shall be deemed to be concluded.

34. In the case on hand, notice under Section 73(1) of the Act came to be issued by the authorities, the first show cause notice issued by the authorities is on 08.08.2007. Again, the second show cause notice was issued on 18.09.2008.

35. As per the first proviso to Section 73, the penalty payable was 50% and as per second proviso, penalty payable is 15%. As per second proviso (ii), the penalty payable will be 25%. The show cause notice dated 08.08.2007 and 18.09.2008 is duly replied on 01.10.2007. The service tax with interest along with ST-3 returns were filed on 20.08.2007 pertaining to the period 2005-06, 2006-07. In other words, before issue of second show cause notice on 18.09.2008, there was already payment of service tax with interest. Therefore, second proviso would be applicable and authorities could not have imposed the penalty of 100% on the assessee. The explanation to said Section would make it clear as to what the Section means by specified records.

36. In fact, it is the specific case of the Review Petitioner that the first show cause notice acknowledges the payment of service tax and the interest thereon and therefore, the Additional Commissioner of Service Taxes, at the first instance who passed the order in original ought not to have saddled 100% penalty on the Review Petitioner. The said aspect of the matter is ignored by subsequent authorities in the appeals filed by the Review Petitioner. Before this Court also, said aspect of the matter is not urged by the Review Petitioner, as he was not having the

knowledge that KSFC has not issued letter to Department that it had paid service charge to 45 persons, in time.

37. The order passed by the Additional Commissioner, which came up to this Court in CEA No.21/2018 and confirmed was based on the said letter issued by KSFC whereby, KSFC has categorically stated that entire service charges has been paid well in time and it is the default on the part of the review petitioner to pay the service tax in time.

38. The material on record would also disclose that the service tax has been paid subsequently with accrued interest even before the show cause notice has reached the review petitioner. Surprisingly, the Additional Commissioner has observed in his order that the service tax has not been paid. The show cause notice itself shows that there was a payment of service tax along with interest by the review petitioner. Therefore, the order of the Additional Commissioner is factually incorrect.

39. Further, order imposing Rs.10,12,433/- as penalty under Section 78 of the Act, itself needs to be set-aside, if there is factual error especially in the absence of department making available copy of the letter issued by the KSFC. The affidavit filed by the

Review Petitioner clearly mentions that he is intending to put *quietus* by paying 25% of the penalty.

40. In the absence of the parties placing the letter said to have been issued by KSFC which is the sole basis for passing the order imposing 100% penalty on the review petitioner, the order passed by the respective authorities which came to be confirmed in CEA No.21/2018 needs a relook.

41. Taking note of these peculiar facts and circumstances of the case, this Court is of the considered opinion that instead of directing the parties to one more round of litigation by allowing the review petition and setting aside the order passed in CEA No.21/2018 and remitting the matter for fresh consideration in accordance with law, if the matter is put to rest by accepting the affidavit filed by the review petitioner and directing the review petitioner to pay Rs.2,50,000/- would meet the ends of justice. Furthermore, at this distance of time, it would be a futile exercise for both the parties to re-agitate the issues from square one.

42. In view of the foregoing discussion, this Court is of the considered opinion that a case is made out by the Review Petitioner

to pay a sum of Rs.2,50,000/- towards penalty proceedings initiated by the Department and put an end to the litigation.

43. Accordingly, the following:

ORDER

- (i) Review Petition stands ***disposed of.***
- (ii) Review Petitioner is directed to pay Rs.2,50,000/- (Rupees Two lakhs fifty thousand only) to the Department as agreed in the affidavit dated 26.10.2023.
- (iii) On payment of said sum of Rs.2,50,000/-, as agreed, the proceedings in respect of service tax, interest and penalty shall be deemed to be concluded.
- (iv) No order as to costs.

**Sd/-
JUDGE**

**Sd/-
JUDGE**

