

**Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench At Ahmedabad**

REGIONAL BENCH- COURT NO. 3

Service Tax APPEAL NO. 11352 of 2018-SM

(Arising out of OIA-RAJ-EXCUS-000-APP-160-2017-18 Dated 08/01/2018 passed by Commissioner (Appeals) Commissioner of Central Excise, Customs and Service Tax-RAJKOT)

Jayhind Buildcon Pvt Ltd

101 First Floor, G.k. Complex,
Khodiya Colony,
Jamnagar, Gujarat

.....Appellant

VERSUS

Commissioner of C.E. & S.T.-Rajkot

Central Excise Bhavan,
Race Course Ring Road...Income Tax Office,
Rajkot, Gujarat- 360001

.....Respondent

APPEARANCE:

Shri Vikas Mehta, Consultant appeared for the Appellant

Shri Prashant Tripathi, Superintendent (AR) appeared for the Respondent

CORAM: HON'BLE MR. RAMESH NAIR, MEMBER (JUDICIAL)

FINAL ORDER NO. 13175/2024

DATE OF HEARING: 10.12.2024

DATE OF DECISION: 12.12.2024

RAMESH NAIR

The brief facts of the case is that the officers of the audit wing on 06.08.2015 conducted the audit of record maintained by the appellant for the period 2010-11 to 2014-15. In their tax audit report for the financial year 2014-15, the appellant had shown service tax liability of Rs. 42,92,189/-. On 01.09.2015. Officers of anti-evasion wing, Rajkot initiated an inquiry and recorded statements of director of appellant. The same documents that were produced before audit officers were produced before the anti-evasion wing officers. Based on the same documents, the audit officer issued final audit report dated 03.11.2015 inter alia observing that there was short payment of service tax of Rs. 43,07,981/-. A show cause notice dated 31.08.2018 demanding the service tax of Rs. 40,65,565/-, for the same period as audit, by invoking extended period of limitation, was issued. The appellant had already deposited service tax amounting to Rs. 40Lakh as duty noted in the show cause notice and interest amounting to Rs. 6,34,560/- before issuance of show cause notice. The adjudicating authority has confirmed demand of Rs. 46,65,565/- and have also imposed mandatory penalty of Rs. 40,65,565/- under Section 78 of the Finance Act, 1994, against which the appellant filed

an appeal before the Commissioner (Appeals) who has rejected the appeal. Therefore, the present appeal filed by the appellant only contesting the penalty imposed under Section 78.

2. Shri Vikas Mehta, Learned Consultant appearing on behalf of the appellant submits that the non-payment of service tax was on account of financial difficulty and not on account of any mala fide in as much as the same was not only duly accounted in the final tax report, the liability was also discharged and service tax returns were also filed before the issuance of show cause notice. On this basis he argued that a lenient view may be taken in penalty under Section 78 and the same may be set aside.

2.1 He further submits that as regard the invoice dated 05.06.2013 issued to M/s Kalpataru Power Transmission Ltd for an amount of Rs. 9,84,270 +VAT @ 4% (Rs. 39370.80) + additional VAT @ 1%(Rs. 9,842/-) totally amounting to Rs. 10,33,483 on which the appellant had duly paid VAT as per the VAT form-201A as well as certificate of chartered accountant M/s Sunecha and Amlani. Therefore, the demand of service tax amounting to Rs. 1,13,687/- (Sr. No. 2 of year 2013-14 of annexure B to the show cause notice) is not tenable. Consequently net service tax liability of appellant is Rs. 39,51,878/- (Rs. 46,65,565- Rs. 1,13,687). He submits that against this amount, the appellant has already deposited Rs. 40Lakh toward service tax liability along with interest before issuance of show cause notice.

3. Shri Prashant Tripathi, Learned Superintendent (AR) appearing on behalf of the Revenue reiterates the findings of the impugned order.

4. On careful consideration of the submission made by both the sides and perusal of record, I find that the appellant is contesting only penalty amount. However, there is some discrepancy in the calculation. As regard the invoice issued by the Kalpataru, the same can be reconsidered by the adjudicating authority. Therefore, we are addressing the issue only of penalty imposed under Section 78. We find that the appellant is seeking waiver of penalty under Section 80 prevailing at relevant time, which reads as under:-

"80. Penalty not to be imposed in certain cases.

80. (1) *Notwithstanding anything contained in the provisions of section 76, ⁴[or section 77], 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.*

³*[(2) Notwithstanding anything contained in the provisions of section 76 or section 77 or section 78, no penalty shall be imposable for failure to pay service tax payable, as on the 6th day of March, 2012, on the taxable service referred to in sub-clause (zzzz) of clause (105) of section 65, subject to the condition that the amount of service tax along with interest is paid in full within a period of six months from the date on which the Finance Bill, 2012 receives the assent of the President.]"*

From the plain reading of the above Section, the penalty under Section 78 can be set aside when a sufficient cost for non-payment of service tax is shown by the assessee. In the present case it is undisputed fact that the entire transaction was recorded by the appellant in the books of account and the service tax liability has been admitted by the appellant which was discharged well before the issuance of show cause notice and interest was also paid. In this fact, we are of the view that since the appellant did not have mala fide intention to evade service tax, the case is clearly covered under Section 73(3) of Finance Act, 1994 which reads as under:-

"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:

Provided that the ⁶*[Central Excise Officer] may determine the amount of short payment of service tax or erroneously refunded service tax, if any, which in his opinion has not been paid by such person and, then, the ⁷[Central Excise Officer] shall proceed to recover such amount in the manner specified in this section, and the period of ¹⁷[thirty months] referred to in sub-section (1) shall be counted from the date of receipt of such information of payment.*

Explanation 1: *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 ⁸[Central Excise Officer], but for this sub-section.*

⁹**Explanation 2:** *For the removal of doubts, it is hereby declared that no penalty under any of the provisions of this Act or the rules made thereunder shall be imposed in respect of payment of service-tax under this sub-section and interest thereon.]"*

As per the above Section, it is clear that if the assessee pays the tax liability along with interest before issuance of show cause notice, the entire case stand closed and no show cause notice should be issued. As I discussed above, since, the appellant did not have mala fide intention, their case is not hit by section 73 (4) also. Therefore, considering the overall facts and circumstances of the case, we are of the view that the appellant has been able to show the reasonable cause for nonpayment of service tax. Therefore, penalty Imposed under Section 78 can be set aside, invoking section 80 as well as invoking Section 73(3) of the Finance Act. Therefore, I set aside the penalty imposed under Section 78.

5. Appeal is allowed in the above terms.

(Pronounced in the open court on 12.12.2024)

Raksha



**(RAMESH NAIR)
MEMBER (JUDICIAL)**