
(2023) 12 CESTAT CK 0041

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Service Tax Appeal No.779 Of 2012

M/S Dhanuka Laboratories Ltd

APPELLANT

Vs

Commissioner Of Service Tax, Delhi

RESPONDENT

Date of Decision : 13-12-2023

Acts Referred:

Finance Act, 1994 — Section 65(105)(zzb), 76, 77, 78

Citation : (2023) 12 CESTAT CK 0041

Hon'ble Judges : S. S. Garg, Member (J); P. Anjani Kumar, Member (T)

Bench : Division Bench

Advocate : Krati Singh, Aman Singh, Shivam Syal

Final Decision : Allowed

Judgement

S. S. Garg, Member (J)

1. The present appeal is directed against the impugned order dated 15.03.2012 passed by the Commissioner (Appeals) of Central Excise, Gurgaon whereby the Commissioner (Appeals) has imposed the penalty under Section 76 and 77 of the Finance Act, 1994 but the amount of penalty has not been quantified.

2. The brief facts of the case are that the appellant is registered with the Service tax department for goods transport agency service only. During the course of Audit, it was observed that Appellant was liable to pay Service tax of Rs. 7,31,324/- on commission paid to commission agents in foreign currency for promoting the sale outside India under 'Business Auxiliary Service' under Section 65(105) (zzb) of the Finance Act, 1994.

2.1 On these allegations, a show cause notice was issued to the appellant for proposing to demand the entire amount as mentioned in the audit notice. The Appellant in compliance deposited the partial demand (pertaining to period after 18.04.2006) amounting to Rs. 5,49,050/- along with interest on 02.07.2009 and in respect of remaining demand of Rs. 1,82,274/-, the Appellant submitted the same is not liable to be paid.

2.2 After following due process, the entire demand in the show cause notice was confirmed vide OIO dated 16.12.2010 along with interest and penalty was also imposed on the Appellant under Section 77 and 78 of the Act.

2.3 Aggrieved by the said order, the appellant filed appeal before the Ld. Commissioner (Appeals) who partly allowed the appeal filed against OIO dated 16.12.2010 and appropriated the amount already deposited by the appellant and dropped the demand of service tax deposited by the appellant. The penalty under section 76 and 77 of the Act has been imposed.

2.4 Aggrieved by the said order, the appellant has filed the present appeal.

3. Heard both the parties and perused the material on records.

4. Ld. Counsel for the appellant submitted that the impugned order has gone beyond the scope of OIO and appeal/cross objections filed. She further submitted that the OIO has clearly held in its para 5.5.5 that no penalty under Section 76 is imposable. Further, no cross-objection or appeal has been filed by the department against OIO, therefore, the Ld. Commissioner (Appeals) by imposing penalty under Section 76 in the absence of any appeal/cross- objections filed by the department has clearly gone beyond the scope of OIO and appeal filed before them. She further submitted that the penalty imposed under Section 76 is liable to be set aside.

4.1 She further submitted that in the present case, the extended period is not invocable and penalty not imposable because the entire issue travelled upto Hon'ble Apex court in the case of Indian National Shipowners Association v. Union of India - 2009 (13) S.T.R. 235 (Bom.) maintained at Union of India v. Indian National Shipowners Association reported in 2010 (17) S.T.R. 157 (S.C.) and was decided in favour of the Appellant.

4.2 She further submitted that this shows that the issue relates to interpretation of law, therefore, the extended period of limitation is not invocable in the present case and hence the penalty is not imposable.

4.3 She further placed reliance on Board Instructions dated 30.06.2010 and 26.09.2011, issued to clarify the position subsequent to decision in the case of Indian Shipowners (Supra).

4.4 She further submits that the appellant was under bonafide belief that the service tax is not payable in the given transaction. She further submits that it is settled law that in case of bonafide mistake, by application of Section 80 of the Act, no penalty is imposable. For this submission, she relied upon the following decisions:-

- Indian Immunologicals Limited vs. CCE&ST, Hyderabad-IV 2019 (1) TMI 1242-CESTAT Hyderabad
- HT Media Ltd. vs. CST, New Delhi 2017 (9) TMI 1005- CESTAT NEW DELHI

- RSWM Ltd. vs. CCE, Jaipur-II 2016 (11) TMI 1363 - CESTAT NEW DELHI
- DSM Sinochem Pharmaceuticals India Pvt. Ltd. vs. C.C.E., Chandigarh 2016 (10) TMI 241 - CESTAT CHANDIGARH

4.5 She further submitted that the appellant was entitled to Cenvat Credit of the tax which was paid, thus the entire transaction was revenue neutral, hence, there was no intention to evade payment of tax and hence, no penalty can be imposed on the appellant. For this submission, she relied upon the following decisions:-

- PEC Ltd. vs. Commissioner of Service Tax (Adjudication) New Delhi 2022 (2) TMI 92- CESTAT NEW DELHI
- (Flakt) India Ltd. vs. Commissioner of Service Tax, Kolkata (Vice- Versa) 2019 (2) TMI 946 - CESTAT KOLKATA

4.6 She also submits that the penalty under Section 76 is imposed when the assessee fails to make the payment of Service tax for the reasons other than fraud or suppression and further, the penalty under Section 76 can only be imposed when the show cause notice is issued within normal period of limitation; which fact has been accepted by the Adjudicating Authority in the Order-in-Original dated 16.12.2010.

4.7 She also submits that in the present case, the penalty has been imposed by invoking the extended period of limitation which is bad in law.

5. On the other hand, the Ld. Authorized Representative reiterated the findings in the impugned order.

6. After considering the submissions of both the parties and perusal of material on record, we find that as soon as audit objection was raised demanding service tax of Rs. 7,31,324/- the appellant deposited Rs. 5,49,050/- alongwith interest on 02.07.2009 pertaining to the period after 18.04.2006 and contested the demand of Rs. 1,82,274/-. Further, we find that the period involved in the present case is 2005-2006 and 2006-2007 and the Hon'ble Supreme Court in the case of Indian National Shipowners Association cited (supra) held that the assessee is not liable to pay service tax prior to 18.04.2006 and settled the issue finally which also shows that the issue relates to interpretation of law and extended period of limitation is not invocable and therefore, the penalty cannot be imposed.

6.1 Further, we find that the impugned order has travelled beyond the OIO because in the OIO, the original authority in Para 5.5.5 held that the appellant is not liable to penalty under Section 76 and against the said finding, no appeal was filed by the department and no cross objections were filed before the lower authorities which also shows that the impugned order imposing penalty under Section 76 is bad in law and the same has travelled beyond the OIO.

6.2 Further, we also find that the appellant had a bonafide belief that he is not

liable to pay tax and as soon as it was pointed out; he paid the tax as per his liability and contested that the demand is barred by limitation, which was accepted by the appellate authority.

6.3 Further, in this case, there was no intention to evade the payment of service tax because the appellant would have been claimed cenvat credit of the tax paid by him which makes the entire transaction as revenue neutral.

7. In view of above, we are of the considered view that the imposing of penalty under Section 76 , 77 and 78 are not sustainable in law and therefore, we set-aside the same by allowing the appeal of the appellant with consequential relief, if any, as per law.