IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, CHENNAI

Service Tax Appeal No.40764 of 2014

(Arising out of Order-in-Appeal No. 31/2014-ST dated 22.1.2014 passed by the Commissioner of Central Excise (Appeals), Salem)

M/s. RPP Infra Projects Ltd. **Appellant**
No. 454, Raghupathy Naickenpalayam
Poondurai Road, Railway Colony Post
Erode – 638 002.

Vs.

Commissioner of GST & Central Excise **Respondent**
No. 1, Foulks Compound, Annai Medu
Salem – 636 001.

APPEARANCE:

Shri D. Jaishankar, Advocate for the Appellant
Shri R. Rajaraman, AC (AR) for the Respondent

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Hon'ble Ms. Sulekha Beevi C.S., Member (Judicial)

Final Order No. **40344 / 2022**

Date of Hearing : 14.10.2022
Date of Decision: 14.10.2022

Brief facts are that the appellants who are engaged in providing various taxable service are holding service tax registration with the department. On verification of accounts and audit conduct by the department, it was noticed that they have short-paid service tax of Rs.3,10,008/- for the period 2010 – 11 and 2011 – 12 on goods transport agency service. The appellant then paid the service tax along with interest on being pointed out by the department. However, Show Cause Notice was issued proposing to appropriate the amount already paid by the

appellant and for imposing penalties. After due process of law, the original authority imposed penalty under sections 77 and 78 of the Finance Act, 1994. The appellant filed appeal before Commissioner (Appeals) who upheld the same. Aggrieved by the said order of imposing penalties, the appellant is now before the Tribunal.

2. The learned counsel Shri D. Jaishankar appeared and argued for the appellant. He submitted that immediately when the audit had pointed out the short-payment of service tax, the appellant had paid up the entire amount along with interest. In fact, during the relevant time, there was much confusion with regard to the tax that has to be paid on GTA service. There were various circulars which explained the meaning of consignment note and also the requirement to pay service tax in case the freight paid is less than 750 / more than 750 / less than 1500 / more than 1500. The appellant was under the bonafide belief that the said amount of freight paid by the appellant is note taxable under the GTA service. For this reason, the appellant had not paid the service tax. Further, even if the tax is paid, the appellant would be eligible to avail CENVAT credit. Hence the situation is revenue neutral also. On being pointed out by the department, the appellant had paid up the tax to buy peace and to avoid litigation. He adverted to sub-section (3) of section 73 of Finance Act, 1994 to argue that when the tax is paid along with interest, as ascertained by the officers, there is no requirement to issue a

Show Cause Notice. In the present case, there was no deliberate suppression on the part of the appellant and the penalties has been imposed without any factual basis. The appellant did not pay the tax only because the appellant was under the belief that such amount is not taxable and the issue with regard to GTA service was interpretational in nature during the relevant time.

3. It is also pointed out by the learned counsel that the appellant in abundant caution had paid 1% penalty as envisaged under sec. 73(4A) of the Finance Act, 1994 so as to avoid litigation and buy peace from the department. These facts were not considered by the adjudicating authority and penalty @ 100% under sec. 78 was imposed.

4. He relied upon the decision in the cases of Spectrum Power Generation Ltd. Vs. CCE, Hyderabad reported in 2017 (3) GSTL 500 (Tri. Hyd.), CCE & LTU, Bangalore Vs. Adecco Flexione Workforce Solutions Ltd. reported in 2012 (26) STR 3 (Kar.) and CCE, Nagpur Vs. Galaxy Construction Pvt. Ltd. reported in 2017 (48) STR 37 (Bom.).

5. The learned AR Shri R. Rajarajamn supported the findings in the impugned order. He adverted to para 2.01 of the Order in Original and submitted that there was deliberate suppression on the part of the appellant in not accounting the freight paid for the period 2010 – 11 and 2011 – 12 for an amount of Rs.11,77,406/. The said short-payment would not have come to light but for the verification and audit done by the department. Since there is

deliberate suppression, the Show Cause Notice issued as well as the penalty imposed is legal and proper. He prayed that the appeal may be dismissed.

6. Heard both sides.

7. The issues is whether the penalty imposed under sec. 77 and 78 of the Finance Act is legal and proper.

8. As per sub-section (3) of section 73 reads as under:-

> *"(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 :*
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> *Provided that the 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 18 paid by such person and, then, the Central Excise Officer shall proceed to recover such amount in the manner specified in this section, and the period of "thirty months" referred to in sub- section (1) shall be counted from the date of receipt of such information of payment.*
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> *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 [Central Excise Officer], but for this sub-section.*
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> *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."*

9. It can be seen that the department has to refrain from issuing Show Cause Notice if the appellant pays up the service tax along with interest as ascertained by himself or by the officers. In the present case, the appellant has paid up the service

tax along with interest on 4.5.2012 and 16.8.2012. The Show Cause Notice was issued only on 22.10.2012. The learned AR has submitted that there is deliberate suppression of facts and therefore the Show Cause Notice issued and the penalties imposed are proper. One of the argument put forward by the learned counsel for appellant is that there was no deliberate suppression and they were under the bonafide belief that the said amount of freight paid which has been accounted in the ledger as "conveyance others" during the relevant time was not taxable as per definition GTA services during the relevant period. There was confusion as to whether the freight paid on single pack and multiple packs transported in a single consignment attracts levy of service tax or not. It can be seen that the appellant on being pointed out has paid the service tax immediately. It is also seen that they have paid 1% penalty in case the matter falls under sec. 73(4A) of Finance Act, 1994. The conduct of the appellant pursuant to the verification of accounts shows that they had the intention to pay up the service tax. Further, the payment of service tax on GTA service during the relevant period was under litigation before various forums and there were conflicting decisions. It is also argued that the entire issue is a revenue neutral as they would be eligible to take credit of the service tax being tax paid on input services. Taking note of these submissions, I am of the view that there is no deliberate suppression of facts. On such score, sub-section (3) of section 73

would apply. The decision of the Hon'ble High Court of Karnataka in the case of Adecco Flexione Workforce Solutions Ltd. (supra) has held that no penalty can be imposed under sub-section (3) of section 73 of Finance Act, 1994.

10. From the foregoing, I hold that the penalties imposed under sections 77 and 78 are not legal and proper and requires to be set aside. The impugned order is modified to the extent of setting aside the penalties imposed under sec. 77 and 78 of Act ibid. Ordered accordingly. The appeal is allowed with consequential relief, if any.

(Dictated in open court)

(**SULEKHA BEEVI C.S.**)
Member (Judicial)

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