

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE
TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH : KOLKATA**

REGIONAL BENCH - COURT NO.2

Service Tax Appeal No.77223 of 2018

(Arising out of Order-in-Appeal No.141/S.TAX-I/KOL/2018 dated 19.02.2018 passed by Commissioner of CGST & Central Excise, Haldia Commissionerate [Acting as Commissioner (Appeal)], Kolkata.)

M/s. Rajasthan Guest House

(19, Zakaria Street, P.O.-Colootala, Kolkata-700073.)

...Appellant

VERSUS

Commissioner of CGST & CX, Kolkata North Commissionerate

.....Respondent

(180, Shantipally, Rajdanga Main Road, Kolkata-700107.)

APPEARANCE

Shri Tarun Chatterjee, Advocate & Ms.Vineeta Pandey, Company Secretary
for the Appellant (s)

Shri J.Chattopadhyay, Authorized Representative for the Respondent (s)

CORAM: HON'BLE SHRI P.K.CHOUDHARY, MEMBER(JUDICIAL)

FINAL ORDER NO. 75503/2022

DATE OF HEARING : 4 July 2022

DATE OF DECISION : 01 September 2022

P.K.CHOUDHARY :

The facts of the case in brief are that the Appellant is registered under the category of "Restaurant" and "Accommodation in Guest House" service and is engaged in running a small guest house w.e.f. 13.05.2014. During the course of scrutiny of the records for the period from 2011-12 to 2013-14, it was noticed that the Appellant has short paid the service tax amounting to Rs.12,08,519/- and thus a Show Cause Notice dated 29.09.2016 was issued proposing recovery of the said amount along with interest and penalties under sections 77(1)(a), 77(2) and 78 of the Finance Act, 1994.

2. The Appellant had agreed and paid the above amount of service tax between 25.09.2014 to 29.06.2015 i.e. before the issuance of the Show Cause Notice and thus had requested the department to drop the penalty proceedings as there was no *mala fide* intent to evade payment of service tax.

3. The Adjudicating Authority as well as the first appellate authority have confirmed the demand of penalty on the ground of suppression and thus the present appeal.

4 Heard both sides and perused the appeal records.

5. I find that the issue involved in this appeal is no more *res integra* in view of the decision of the Tribunal in the case of *Bhoruka Aluminium Limited Vs. CCEx. &S.Tax, Mysore* reported in [2017 (51)STR 418 (Tri.Bangalore)]. The relevant paras of the said decision are reproduced below :-

"4. *The learned counsel for the appellant submitted that imposition of penalty under Section 78 of the Finance Act is contravention to the provisions of Section 73(3) of the Finance Act, 1994. He further submitted that service tax along with interest has already been paid by the appellant before issuance of show cause notice. He also submitted that Section 73(3) of the Finance Act, in unambiguous terms states that when an assessee has paid service tax either on his own or on the basis of the officer's ascertainment and informs the officer of such payment, then the said Section does not give any power to such officer to issue a show cause notice in respect of the tax so paid and such issuance of show cause notice is sans force of law and accordingly, not sustainable and tenable. The learned counsel relied upon the decision of this Tribunal in the case of South India Paper Mills Ltd. v. C.C.E. & S.T. reported in 2016-TIOL-2294-CESTAT-BANG wherein in the similar circumstances, the penalty under*

Section 78 of the Finance Act was dropped in toto. He also relied upon the following case laws :

- (i) *Intercontinental Consultants & Technocrats Pvt. Ltd. v. U.O.I.* [[2013 \(29\) S.T.R. 9](#) (Del.)]
- (ii) *Amit Sales v. C.C.E.* [[2009 \(13\) S.T.R. 165](#) (Tri.-Del.)]
- (iii) *Jindal Saw Ltd. (IPU) v. C.C.E.* [[2013 \(30\) S.T.R. 490](#) (Tri.-Ahmd.)]
- (iv) *C.S.T., Bangalore v. Motor World* [[2012 \(27\) S.T.R. 225](#) (Kar.)]
- (v) *Hindustan Petroleum Corporation Ltd. v. C.C.E., Mumbai-II* [[2012 \(25\) S.T.R. 161](#) (Tri.-Mumbai)]
- (vi) *C.C.E. & S.T., LTU, Bangalore v. Adeco Flexione Workforce Solutions Ltd.* [[2012 \(26\) S.T.R. 3](#) (Kar.)]
- (vii) *Reliance Industries Ltd. v. Commissioner of Customs, Rajkot* [[2013 \(287\) E.L.T. 433](#) (Tri.-Ahmd.)].

6. On the other hand, the learned AR submitted that the appellant is guilty of suppression of facts as he failed to inform the Department regarding availment of irregular Cenvat credit and, therefore, the lower authority has rightly imposed the penalty under Section 78 of the Finance Act, 1994.

7. After considering the submissions by both the parties and perusal of the provisions of Sections 73, 76 and 78 of the Finance Act, 1994 and the judgments relied upon by the appellant cited supra, I find that Section 73(3) is very clear as it says that if tax is paid along with interest before issuance of the show cause notice, then in that case, show cause notice shall not be issued. In this case, I find that the contention of the appellant that he bona fidely believed that he is not liable to pay service tax but during the audit, the audit party informed him that he is liable to pay service tax, then he immediately paid the entire service tax along with interest. Except mere allegation of suppression, the Department did not bring any material on record to

prove that there was suppression and concealment of facts to evade payment of tax. Consequently, in my opinion, the imposition of penalty under Section 78 of the Act is not justified and bad in law. Moreover, in the impugned order, the learned Commissioner (Appeals) has not recorded any finding on suppression of facts by the appellant with an intention to evade tax. In view of the above discussion, I set aside the impugned order by allowing the appeal of the appellant."

6. I find that the facts of the present case are squarely covered by the aforesaid decision of the Tribunal.

In view of the above, the impugned orders are set aside and the appeal filed by the appellant is allowed with consequential benefit

(Order pronounced in the open court on 01 September 2022.)

Sd/
(P.K.CHOUDHARY)
MEMBER (JUDICIAL)

sm