

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL  
CHENNAI**

REGIONAL BENCH – COURT NO. III

**Service Tax Appeal No. 40625 of 2013**

(Arising out of Order-in-Original No. 26/2012 dated 27.11.2012 passed by the Commissioner of Central Excise and Service Tax, Chennai-IV Commissionerate, 692, M.H.U. Complex, Anna Salai, Nandanam, Chennai – 600 035)

**M/s. Servocraft HR Solutions Private Limited** : **Appellant**  
RF 4, Galilei Square, 27/11,  
Lakshmi Street, Kilpauk,  
Chennai – 600 010

**VERSUS**

**The Commissioner of Central Excise and Service Tax** : **Respondent**  
692, M.H.U. Complex, Anna Salai, Nandanam,  
Chennai – 600 035

**APPEARANCE:**

Smt. R. Srivishva Priya, Learned Advocate for the Appellant

Smt. Sridevi Taritla, Learned Additional Commissioner for the Respondent

**CORAM:**

**HON'BLE MRS. SULEKHA BEEVI C.S., MEMBER (JUDICIAL)**  
**HON'BLE MR. VASA SESHAGIRI RAO, MEMBER (TECHNICAL)**

**FINAL ORDER NO. 40121 / 2023**

DATE OF HEARING: 01.03.2023

DATE OF DECISION: 07.03.2023

**Order : [Per Hon'ble Mrs. Sulekha Beevi C.S.]**

Brief facts of the case are that the appellants are engaged in the recruitment of skilled, semi-skilled and non-skilled persons as per the requirement of their client, and also supply manpower on man-hour basis. They are registered with the Service Tax Department under 'Manpower Recruitment or Supply Agency Service'.

2. During the course of audit of accounts of the appellant, it was noticed by the Department that though the appellant had raised bills on their customers indicating service charges and Service Tax separately, they were not paying Service Tax within the due date prescribed as per Rule 6 of the Service Tax Rules, 1994 and was habitually delaying payment of Service Tax on various occasions. It was also noticed that they had not paid the Service Tax collected from the customers for the period from August 2010 to October 2010 till the visit of the audit officers on 24.11.2010. On being pointed out, the appellant paid the amount of Service Tax along with interest. It was also noted that the appellant filed ST-3 returns for the half year ending September 2010 and March 2011 on 21.02.2011 and 20.07.2011 and there was late filing of returns for other periods.

3. Show Cause Notice No. 359/2011 dated 26.09.2011 was issued, proposing to demand the amount of Rs.50,11,790/- for the period from August 2010 to October 2010 along with interest and for imposing penalties. After due process of law, the Original Authority, vide order impugned herein, confirmed the above demand along with interest and appropriated the amount with interest already paid by the appellant. A penalty of Rs.5,000/- was imposed under Section 77 of the Finance Act, 1994 for the delay in filing periodical ST-3 returns. Further, a penalty equal to the amount of Service Tax confirmed was imposed under Section 78 of the Act. The appellant was given an option to pay reduced penalty up to 25% of the Service Tax demanded if the Service Tax and interest was paid by the appellant within 30 days from the date of receipt of the order. Aggrieved by such order, the appellant is now before the Tribunal.

4. Smt. R. Srivishva Priya, Learned Counsel, appeared and argued the matter on behalf of the appellant. She contended that the appellant is not contesting the liability to pay Service Tax and the interest thereon; the contest in

the appeal is confined to the penalties imposed under Sections 77 and 78 of the Finance Act, 1994.

4.1 She adverted to sub-Section (3) of Section 73 of the Finance Act, 1994 to argue that since the appellant had paid the Service Tax along with interest upon being pointed out by the audit party, the Department ought not to have issued any Show Cause Notice; the Show Cause Notice has been issued alleging suppression with intention to evade payment of Service Tax. She submitted that the appellant had no *mala fide* intention and that the delay in paying the Service Tax was only because of financial hardships; however, the appellant had taken every effort to make the payments at the earliest.

4.2 She pointed out that in paragraph 3 of their reply to the Show Cause notice, the appellant had stated that they had paid the Service Tax along with appropriate interest much before the issuance of the Notice and had intimated the Department officers about such payment; though it is alleged that the appellant has suppressed facts, there is no evidence to establish the same. The amount of tax has been quantified and demanded based only on the accounts maintained by the appellant; that this itself would make it clear that the appellant has not suppressed any figures or transactions. She contended that mere failure on the part of an assessee to pay Service Tax or file the return cannot be considered as suppression of facts with intent to evade payment of tax; there should be some positive act other than mere inaction or failure on the part of the assessee such as conscious or deliberate withholding of information so as to avoid payment of tax, in order to invoke the extended period of limitation by alleging fraud or suppression of facts.

4.3 The Circular dated 03.10.2007 issued by the Central Board of Excise & Customs in F. No. 137/167/2006-CX.4 was relied upon by her to argue that penalty cannot be imposed when Service Tax along with interest has been

paid by the assessee. She argued that the intention of sub-section (3) of Section 73 is to conclude the proceedings and to avoid unnecessary hardships to an assessee when the tax and interest has been paid.

4.4 The Learned Counsel for the appellant relied upon the decision in the case of *M/s. Vista Infotech v. Commissioner of Service Tax, Bangalore [2010 (17) S.T.R. 343 (Tribunal – Bangalore)]* and the decision of this Bench of the Tribunal in the case of *M/s. Dusters Total Solutions Services Pvt. Ltd. v. Commissioner of Service Tax, Chennai [Final Order No. 41943 of 2018 dated 06.07.2018 – CESTAT, Chennai]*

4.5 She prayed that the penalties imposed may be set aside.

5.1 Smt. Sridevi Taritla, Learned Authorized Representative, appeared and argued for the Department. She contended that the appellant had paid the Service Tax along with interest only after the inspection by the audit party; they have been making delayed payment of Service Tax and also delay in filing returns, habitually. That the non-payment of Service Tax would never have come to light if the verification had not been done by the audit party. She therefore argued that the penalties imposed are legal and proper.

5.2 To support her contentions, the Learned Authorized Representative for the Department relied upon the decision of the Tribunal in the case of *M/s. Nebula Computers Pvt. Ltd. v. Commissioner of G.S.T. & Central Excise, Chennai [2023 (2) TMI 897 – CESTAT, Chennai]*.

5.3 She prayed that the appeal may be dismissed.

6. Heard both sides.

7. The issue to be analysed in the present appeal is whether the penalties imposed under Sections 77 and 78 of the Finance Act, 1994 on the appellant are legal and proper.

8. Sub-section (3) of Section 73 of the Finance Act, 1994 reads as under: -

*"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 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."*

9. The above provision provides that no Show Cause Notice is to be issued when the assessee has paid the Service Tax along with interest. The Learned Counsel for the appellant has submitted that the delay in paying the Service Tax was due to financial hardships. On being pointed out by the internal audit group, the appellant has immediately paid the Service Tax along with interest. It is also to be stated that the appellant has accounted the amounts received by them as well as the details of transactions. To such extent, there has been no suppression of facts on their part.

10. The words 'suppression of facts' are preceded by the word 'fraud' and therefore, there should be some positive act on the part of the appellant so as to evade payment of Service Tax, to saddle the burden of intention to evade payment of Service Tax. In the present case, we do not

find any suppression of facts on the part of the appellant. Delay in payment of Service Tax due to financial hardships cannot always be considered to be 'suppression of facts.'

11. In the case of *M/s. Vista Infotech (supra)*, the Tribunal has observed as under: -

*"5. We have considered the submissions made by both sides and perused the records. We find that there is no dispute that the appellant had been discharging the service tax liability on the services rendered by him during the period from January 2004 to December 2006. During the relevant period i.e. from January 2007 to June 2007, the appellant had failed to discharge the service tax though he had collected the same from the customers. The appellant's representative had explained in his statement that the delay in deposit of service tax was due to the financial crunch which arose on account of non-release of payment from one of their major clients, but discharged the tax liability along with interest thereon on 5-7-2007 and 19-7-2007. We find that once an assessee accepts the non-payment of service tax liability and pays the dues along with interest, then provisions of Section 73(3) of the Act get attracted. We find that the C.B.E & C. Circular dated 3-10-2007 had clarified as under : -*

*"Subject: Issuance of SCNs for levy of penalty in the cases where service tax is paid suo motu by the assessee - Reg.*

*Section 73(1A) of the Finance Act, 1994 provides for conclusion of adjudication proceedings in the cases of willful suppression/fraud/collusion if the taxpayer prays service tax liability along with interest and a penalty equal to 25% of service tax amount, within a period of one month from the date of issue of SCNs. Similarly, Section 73(3) provides conclusion of adjudication proceedings in other cases on payment of service tax and interest.*

*2. A question has been raised as to whether the conclusion of proceedings in such cases is limited to the action taken under Section 73 of the Act or all proceedings under the Finance Act, 1994, including those under Sections 76, 77 and 78, get concluded.*

*3. The issue has been examined. The intention of Section 73(1A) has already been explained vide para 8(g) of the post budget instructions issued by TRU vide D.O.F. No. 334/4/2006-TRU, dated 28-2-2006 [2006 (4) S.T.R. C30], wherein it has been clarified that this sub section provides for conclusion of adjudication proceedings in respect of person who has voluntarily deposited the service tax.*

3.1 The relevant portion of Section 73 is reproduced below :

*"Provided further that where such person has paid service tax in full together with interest and penalty under sub-section (1A), the proceeding in respect of such person and other person to whom notices are served under sub-section (1) shall be deemed to be concluded."*

*Thus, law prescribes conclusion of proceedings against such person to whom SCN is issued under sub-section (1) of Section 73. Therefore, it is not merely a conclusion under sub-section (1), but conclusion of all proceeding against such person. Similar is the position in respect of sub-section (3) of Section 73.*

4. *Accordingly, conclusion of proceeding in terms of sub-section (1A) and (3) of Section 73 implies conclusion of entire proceedings under the Finance Act, 1994."*

*It can be seen from the above reproduced Board's Circular, it is clarified that no show cause notice will be served on the defaulter, provided the taxpayer discharged the service tax liability along with interest, and the proceedings remain concluded.*

6. *We find that this Bench in the case of Vee Aar Secure (supra) has held as under :-*

*"5. On a very careful consideration of the entire matter, we find that in the case law of Karnataka High Court, cited by the learned SDR, the High Court actually upheld the order of the original authority imposing penalty. In this case also, in our view, the case law does not help the Revenue. In the present case, the original authority has given a reasoning for waiver of penalty in exercise of his powers under Section 80 of the Finance Act, 1994. There was actually no mala fide and intention to evade payment of service tax. Once the lapse was pointed out, the appellants discharged the service tax liability along with interest. This fact has been taken into account by the lower authority. Moreover, even Section 73(3) provides waiver of show cause notice when the assessee pays the service tax liability immediately after it is pointed out. These situations had been examined by this tribunal in the case of M/s. Majestic Mobikes Pvt. Ltd. & Ors. [Final Order No. 652 to 672/2008 dated 30th May 2008] [[2008 \(11\) S.T.R. 609](#) (Tribunal)] and the tribunal had given a finding that where the original authority exercised his powers under Section 80 of the Finance Act, after recording proper reasons, it cannot be reopened to enhance the penalty by the Commissioner in the Order-in-Revision. The present situation in the appeal is clearly covered by aforesaid decision. In view of this, we are of the view that the impugned Order-in-Revision has no*

*merit. We set aside the same and restore the order of the Original Authority."*

*The ratio of the aforesaid decision has been followed by this Bench in many of subsequent decisions. Accordingly, we find that the appellants have made out a prima facie case in their favour for non-imposition of penalty under Sections 76, 77 and 78 of the Act.*

*7. In view of the foregoing reasons, respectfully following the decision of this Bench, we hold that the impugned order as regards imposition of penalty under Sections 76, 77 & 78 of the Finance Act, 1994 is liable to be set aside and we do so. The appeal is allowed with consequential relief, if any."*

12. In the case of *Commissioner of Central Excise & Service Tax, LTU, Bangalore v. M/s. Adecco Flexione Workforce Solutions Ltd. [2012 (26) S.T.R. 3 (Kar.)]*, the Hon'ble Karnataka High Court has held that Show Cause Notice ought not to be issued when the assessee has paid Service Tax along with interest on being pointed out.

13. In the case of *Commissioner of Service Tax, Bangalore v. M/s. Vee Aar Secure [2011 (22) S.T.R. 517 (Kar.)]*, it was held that when upon being pointed out, the assessee got themselves registered with the Service Tax Department and paid the entire Service Tax with interest, the penalty imposed was unwarranted.

14. The Tribunal in the case of *M/s. Dusters Total Solutions Services Pvt. Ltd. (supra)* had occasion to analyse a similar issue and set aside the penalties imposed. The relevant portion of the said order reads as under: -

*"5.10 The appellant has paid up the service tax belatedly before issuance of SCN. The interest which is in the nature of compensation for the delay in payment, was also paid after issuance of SCN and much before issuing the Order-in-Original. The conduct of the appellant in paying up service tax and interest, and the categorical finding of the Commissioner that there is no intention to evade tax, persuades us to hold that appellant has established reasonable cause for invoking Section 80 of the Act ibid. The Hon'ble High Court for the State of Telangana and State of Andhra Pradesh in Commissioner*



*of Cus., C. Ex. & S.T., Guntur Vs. Narasaraopet Municipality (supra) held that Section 80 begins with a non obstante clause and, hence, has overriding effect on Sections 76, 77 and 78 of the Act ibid.*

*5.11 From the above discussions and the decisions cited supra, we are of the considered opinion that the penalty imposed under Section 76 requires to be set aside which we hereby do. The impugned order is modified to the extent of setting aside the penalty imposed under Section 76 only."*

15. The Learned Authorized Representative for the Department has relied upon the decision in the case of *M/s. Nebula Computers Pvt. Ltd. (supra)*. In the said case, the Tribunal has refused to take note of the plea raised by the appellant therein that the tax was not paid due to financial hardship, which is a view taken on the facts and circumstances of the said case that undue sympathy is not required. The said decision is therefore distinguishable on facts. Further, the intention of sub-section (3) of Section 73 is to place an assessee who has not paid Service Tax for some plausible reason on a different footing. Loss in business, cancellation of contracts, death or resignation of the person handling the accounts are some of the situations by which an organization may be put into difficulties. An assessee who has suppressed figures in their account or issued parallel invoices so as to evade the payment of tax will not be covered under sub-section (3) of Section 73 of the Finance Act, 1994. As already stated, apart from a vague allegation, there is no evidence that the appellant has suppressed facts with the intent to evade payment of tax.

16. From the foregoing, we hold that the penalties imposed are unwarranted and require to be set aside, which we hereby do. The impugned order is modified to the extent of setting aside the penalties imposed under Sections 77 and 78 of the Finance Act, 1994.

17. The appeal is partly allowed in the above terms, with consequential reliefs, if any.

(Order pronounced in the open court on **07.03.2023**)

Sd/-  
**(SULEKHA BEEVI C.S.)**  
MEMBER (JUDICIAL)

Sd/-  
**(VASA SESHAGIRI RAO)**  
MEMBER (TECHNICAL)

Sdd