

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH
CHENNAI**

Appeal No.ST/286/2012

[Arising out of Order-in-Original No.78/2011 dt. 28.12.2011 passed by
Commissioner of Service Tax, Chennai]

Talentpro India HR Pvt. Ltd.

Appellant

Versus

Commissioner of Service Tax, Chennai

Respondent

Appearance :

Ms. D.S.Vipula, Advocate
For the Appellant

Ms. T. Usha Devi, AC (AR)
For the Respondent

CORAM :

Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)
Hon'ble Shri P. Dinesha, Member (Judicial)

Date of hearing / decision : 16.10.2018

FINAL ORDER No. 42654 / 2018

Per Shri Madhu Mohan Damodhar

The appellants are engaged in providing manpower supply and maintaining payrolls processing for various companies. During the course of audit, it was noticed that appellants had not paid service tax service tax of Rs.1,05,84,653/- in the month of December 2010 collected from their customers within due date. On being pointed out, the appellants paid the tax liability along with interest of Rs.1,24,406/- on 07.02.2011. SCN dt. 28.09.2011 was issued to the appellants proposing appropriation of the amounts of Rs. 1,05,84,653/- paid

towards service tax and appropriation of Rs.1,24,406/- paid towards interest liability by them and also imposition of penalties under Section 76 & 78 of the Act. In adjudication, the Commissioner vide impugned order dt. 28.12.2011 confirmed the tax liabilities as proposed in the notice and imposed penalty under Section 76 ibid, however held that there is no scope for imposition of penalty under Section 78 ibid. Appellants have filed this appeal against imposition of penalty under Section 76.

2. Today when the matter came up for hearing, on behalf of the appellant, Ms. D.S. Vipula, Ld. Advocate made oral and written submissions which can be summarized as under :

i) Appellant has discharged the entire amount of service tax for the disputed period even before the issue of SCN. Section 76 envisages payment of penalty on failure to discharge service tax. However, in the instant case there is no such failure but only mere delay in payment which does not attract penalty under Section 76.

ii) Reliance is placed on the decision of Karnataka High Court in the case of CCE Vs Adecco Flexion Work Force Solutions Ltd. 2012 (26) STR 3, wherein it was held that if the tax and interest are paid prior to the SCN, there cannot be any penalty.

3. On the other hand, Ld. A.R Ms. Usha Devi supports the impugned order. She points out that the assessee had consistently delayed payment of service tax which was already collected and such habitual delay cannot not be qualified as condonable delay.

4. Heard both sides and have gone through the facts. We find that the adjudicating authority in para 6.1 of the impugned order has noted that the appellants were paying service tax regularly upto August 2010 except for few days delay; that from September 2010 to December 2010, the delay ranges from 30 to 40 days for each month; that however they paid appropriate amount of interest for such delayed payment; that even in respect of December 2010 covered in the SCN, the due date for payment of SCN was on 06.01.2011, the audit was conducted on 01.02.2011 and the assessee paid entire amount of service tax of Rs.1,05,84,653/- on 07.02.2011 after a delay of 32 days. Hence there appears to no malafide intention on the part of assessee to evade payment of service tax and that ST-3 returns had also been filed without delay. For these reasons, the adjudicating authority has held that ingredients of proviso to Section 73 (1) are not present in this case and in consequence there is no scope for imposition of penalty under Section 78 *ibid*. While so giving the appellants benefit of doubt in respect of penalty under Section 78, the adjudicating authority in para 7.3 nonetheless took the view that there is no reasonable cause for non-payment of service tax and has confirmed the penalty under Section 76. However, from narration in para-4 of the order, we find that during the personal hearing on 13.12.2011, the appellants had submitted that delay in payment of service tax was purely due to financial crunch but have paid the service tax with a delay of one month and also paid the interest liability thereon.

5. We find merit in the appeal. The adjudicating authority has held that ingredients of fraud, suppression, misstatement etc. are not present on the part of the appellant against which conclusion there is no appeal filed by the

department. This being so, the reason of financial crunch given by the appellant should be given some credence, particularly in view of the mitigating factor that it is not a case of absolute non-discharge of tax liability but delayed payment of tax, that too with interest paid thereon. In the circumstances, there is reasonable cause for failure to discharge the tax liability and hence we hold that imposition of penalty under Section 76 ibid also is not justified and requires to be set aside, which we hereby do. Appeal is allowed to the extent of setting penalty under Section 76 of the Finance Act, 1994.

(operative part of the order pronounced in court)

(P. Dinesha)
Member (Judicial)

(Madhu Mohan Damodhar)
Member (Technical)

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