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

**Service Tax Appeal No. 280 of 2012**

(Arising out of Order-in-Original No. 86/Commr/ST/Kol/2011-12 dated 27.03.2012 passed by Commissioner of Central Excise & Service Tax, Kolkata.)

**M/s Guru Shipping & Clearing Pvt. Ltd.,**
8, Lyones Range, Kolkata-700001.

**...Appellant (s)**

*VERSUS*

**Commissioner of Service Tax, Kolkata.**
GST, Bhawan (3rd Floor,) Rajdanga, Main Road, Kolkata-700107.

. ..**Respondent(s)**

**APPERANCE :**
Shri Aditya Dutta, Advocate for the Appellant
Shri J. Chattopadhyay, Authorized Representative for the Respondent

**CORAM:**
**HON'BLE MR. ASHOK JINDAL, MEMBER (JUDICIAL)**
**HON'BLE MR. K. ANPAZHAKAN MEMBER (TECHNICAL)**

**FINAL ORDER No...76625/2023**

DATE OF HEARING : 11.09.2023

DATE OF PRONOUNCEMENT: 13.09.2023

**PER K. ANPAZHAKAN :**

The Appellant, M/s Guru Shipping & Clearing Pvt. Ltd. are engaged in providing Cargo Handling Service and registered under Service Tax. During the course of scrutiny of service tax related records of the Appellant, it was noticed that during the Financial Year 2009-10, the Appellant has neither paid service tax nor filed service tax returns. Accordingly, Show Cause Notice dated 20.04.2011 was issued to the Appellant demanding service tax including Education Cess, totally amounting to Rs.96,80,867/-along with interest and penalty. The Notice was adjudicated vide Order-in-Original dated 27.03.2012, wherein service tax of Rs.1,08,13,836/- was confirmed along with interest and

equal amount of tax was also imposed as penalty under Section 78 of the Finance Act, 1994. Aggrieved against the impugned order, the Appellant has filed the present appeal.

2. In their submissions, the Appellant stated that the show cause notice was issued for an amount of Rs.96,80,867/- whereas the adjudicating authority has gone beyond the Notice and confirmed an amount of Rs.1,08,13,836/- which is bad in law and hence the impugned order is to be construed as non-est. They cited Section 73(2) of the Finance Act, 1994 and contended that the law does not provide confirmation of any amount in excess of the demand made in the Notice. In support of his contention he cited the decision of the Hon'ble Supreme Court in the case of UOI vs Mohit Minerals reported in 2022(61)GSTL.257 (S.C.), wherein it has been held that when a source of power exists, any power exercised in excess of that power is invalid and without jurisdiction. Accordingly, he argued that this O-i-O is to be construed as non-est and the demand confirmed is liable to be set aside on this ground alone.

3. Regarding the merits of the case, he admitted that there was a delay in payment of service tax and consequently they could not file the return also in time. He contended that the Appellant themselves declared their liability and the CERA Audit party arrived at the demand based on the records submitted by them. Out of the total demand of Rs.96,80,867/- made in the Notice, Rs.86,00,867/- was paid before issue of the Notice. As per their calculation, they themselves admitted a higher liability of Rs.1,08,13,836/- as against the demand of Rs.96,80,867/- made in the Notice. The balance amount was also paid subsequently along with interest. Thus, they contended that there was no intention to evade payment of service tax. The delay in payment was only due to financial crisis. In the show cause notice also there was no allegation of suppression of fact with intention to evade payment of service tax. Further,

they stated that as they have paid the entire amount of service tax confirmed along with interest, they could have availed the SVLDRS Scheme, but could not do so due to illness and demise of one of the working partners. Accordingly, they requested for waiver of penalty under Section 80 of the Finance Act, 1994.

4. The Ld.A.R. submitted that the adjudicating Authority confirmed the demand in excess of the demand made in the Notice because the same was admitted by the Appellant and the excess liability was not disputed. He stated that but for the scrutiny of the records of the Appellant by CERA Audit, the service tax payable would have escaped. Thus, he contended that the extended period has been rightly invoked. Accordingly, he prayed for upholding the order passed by the adjudicating authority.

5. Heard both sides and perused the appeal records.

6. We observe that the Notice was issued to the Appellant for a demand of Rs. amount of Rs.96,80,867/-,whereas the adjudicating authority has gone beyond the Notice and confirmed an amount of Rs.1,08,13,836/-. The Appellant cited Section 73(2) of the Finance Act, 1994 and contended that the law does not provide confirmation of any amount in excess of the demand made in the Notice. The Ld.A.R. submitted that the adjudicating Authority has confirmed the demand in excess of the demand made in the Notice because the same was admitted by the Appellant and the excess liability was not disputed. We observe that even if an excess amount of service tax was admitted by the Appellant, the right course of action would be to issue a Corrigendum to the demand and include the excess amount to the Notice before confirmation. Thus, we hold that confirmation of duty in excess of the demand made in the notice is not sustainable. Accordingly, we uphold the confirmation of Service Tax of Rs.96,80,867/- as demanded in the Notice.

7. The Appellant mainly contests the penalty equal to the service tax imposed in the impugned order under Section 78 of the Finance Act, 1994. They contended that there was no intention to evade payment of service tax. They themselves declared their liability and the CERA Audit party arrived at the demand based on the records submitted by them. Out of the total demand of Rs.96,80,867/- made in the Notice, Rs.86,00,867/- was paid before issue of the Notice. As per their calculation, they themselves admitted a higher liability of Rs.1,08,13,836/- as against the demand of Rs.96,80,867/- made in the Notice. The balance amount was also paid subsequently along with interest. The delay in payment was only due to financial crisis. In the show cause notice also there was no allegation of suppression of fact with intention to evade payment of service tax. Further, they stated that as they have paid the entire amount of service tax confirmed along with interest, they could have availed the SVLDRS Scheme, but could not do so due to illness and demise of one of the working partners. Accordingly, they requested for waiver of penalty under Section 80 of the Finance Act, 1994. We find merit in the submissions of the Appellant. We perused the Notice issued to the Appellant. Notice only says that 'had the scrutiny of records not been conducted by the Audit, the non-payment of service tax could have gone undetected'. There is no other evidence brought on record to allege suppression of fact on the part of the Appellant with an intention to evade payment of tax. Further, if the Appellant has any intention to evade payment of tax, they could not have declared more tax liability than what was demanded in the Notice, on their own volition. Thus, we hold that there is suppression of fact with an intention to evade payment of tax has been not established in this case. Accordingly, we observe that it is a fit case to invoke the provisions of Section 80 of the Finance Act, 1994 and waive the penalty and we do the same.

8. In view of the above discussion, we uphold the demand of service tax of Rs.96,80,867/- along with interest as demanded in the Notice. Penalty imposed under Section 78 of the Finance Act, 1994 is set aside by invoking the provisions of Section 80 of the Finance Act, 1994. The appeal is disposed of in the above terms.

(Pronounced in the open court on…13.09.2023.…)

Sd/-
**(Ashok Jindal)**
**Member (Judicial)**

**Sd/-**
**(K. Anpazhakan)**
**Member (Technical)**

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