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

Service Tax Appeal No.40966 of 2014

(Arising out of Order-in-Original No. CHN.SVTAX-000-COM-041-13-14 dated 22.1.2014 passed by the Commissioner of Service Tax, Chennai)

M/s. Kaveri Warehousing Pvt. Ltd. **Appellant**
New No. 9, Old No. 5, Errabalu Street
Chennai – 600 001.

Vs.

Commissioner of GST & Central Excise **Respondent**
Chennai North Commissionerate
26/1, Mahatma Gandhi Road
Nungambakkam, Chennai – 600 034.

APPEARANCE:

Smt. Radhika Chandrasekar, Advocate for the Appellant
Shri M. Ambe, DC (AR) for the Respondent

CORAM

Hon'ble Shri P. Dinesha, Member (Judicial)
Hon'ble Shri M. Ajit Kumar, Member (Technical)

Final Order No. 40797/2023

Date of Hearing : 31.08.2023
Date of Decision: 15.09.2023

Per M. Ajit Kumar,

This appeal is filed by M/s. Kaveri Warehousing Pvt. Ltd. against Order-in-Original No. CHN.SVTAX-000-COM-041-13-14 dated 22.1.2014 (impugned order) passed by the Commissioner of Service Tax, Chennai.

2. Brief facts of the case are that the appellants are engaged in Storage and Warehousing Services and Goods Transport Operator Services. Based on investigations by officers of DGCEI, Chennai, it was noticed that the appellant had a centralized registration at Chennai for their various branches situated all over India. The appellants were

collecting service tax for rendering Storage and Warehousing Services but did not pay service tax for the period from February 2009 to December 2009. The verification culminated into issue of Show Cause Notice dated 1.3.2012 by the ADG, DGCEI, Chennai demanding service tax of Rs.4,15,36,896/- on Storage and Warehousing Service and GTA service for the period from February 2009 to December 2009 besides demanding interest and imposition of penalty. After due process of law, the Commissioner of Service Tax vide the impugned order confirmed the duty demanded along with interest and imposed penalties. Aggrieved by the said order, the appellant is before this Tribunal assailing the findings and order.

3. No cross-objection has been filed by respondent-department.

4. We have heard Smt. Radhika Chandrasekar, learned counsel for the appellant and Shri M. Ambe, learned Deputy Commissioner (AR) for the respondent-department.

4.1 The learned counsel for the appellant submitted that the appellant is engaged in providing service under the category of storage and warehousing services. The Appellant had not discharged service tax for the period February 2009 to December 2009 due to financial constraints. On being pointed out by the department about non-payment of service tax, they had discharged the entire service tax to the extent of Rs.4,15,36,896/- (through cash and cenvat) along with proportionate interest to the extent o.Rs.11,77,532/-. She stated since the entire amount of duty had been paid prior to the issuance of Show cause notice, therefore in terms of Section 73(3) show cause notice ought not to have issued. She contended that:

A. The demand of Service Tax on the ground that the appellant is ineligible for credit of Rs.4,05,781/-, out of the total CENVAT credit paid towards duty was incorrect. She stated that since the Department did not question the eligibility of cenvat credit used to set off the liability in the SCN the same cannot be denied by the adjudicating authority vide the impugned order. The OIO travels beyond the scope of the SCN. Therefore, the same is liable to be set aside.

B. The Jurisdictional Tribunal in the case of ***Servocraft HR Solutions Pvt.3 Ltd. Vs. Commissioner of Central Excise and Service Tax Service Tax*** in ***Appeal No. 40625 of 2013 dated 07.03.2023***, held that, no Show Cause Notice is to be issued when the assessee has paid Service Tax along with interest and no penalties are warranted under Section 77 and 78 of the Finance Act, 1994. She referred to Board's **Letter F.NO. 137/167/2006-CX.4 dated 3-10-2007** which prescribes conclusion of proceedings against such person who satisfies the provision of section 73(3) of the Finance Act, 1994. Further this is not merely a conclusion under sub-section (1), but conclusion of all proceeding against such person including those under sections 76, 77 and 78 of the Finance Act. The Hon'ble Supreme Court in the case of ***Paper Products Ltd Vs. Commissioner of Central Excise (1999)7 SCC 84*** has held that Circulars issued by the Board are binding on the Department.

C. Without prejudice she submitted that in terms of Section 80, penalty cannot be imposed under Section 76, 77 and 78 if the

Assessee proves that there was a reasonable cause for the said failure. The Appellant had not discharged service tax for the period February 2009 to December 2009 due to financial constraints. However, the moment the investigating authority pointed out the non-payment of service tax, the appellant had discharged the same along with interest. That the Madras High Court in the case of ***CST Vs. Lawson Travels (2014) TIOL 2295*** has held that a careful perusal of the order of the Tribunal would reveal that 'reasonable cause' as provided under Section 80 of the Act has been recorded by the Tribunal, therefore, it rightly went on to invoke the provisions of Section 80 of the Act on the ground of reasonable cause.

She referred to various judgments of courts / Tribunal in support of their stand and prayed that the penalties imposed may be set aside.

4.2 The learned AR for the department has stated that although the appellant had claimed to have paid an amount of Rs 2,18,47,630/- in cash and Rs 1,96,89,265/-by way of CENVAT credit towards duty due after the visit of DGCEI officers and before issue of SCN, on scrutiny of the payments it was noticed by the Original Authority at para 6.1 of the impugned order that the actual Cenvat credit debited was only Rs 1,85,44,015/-. Further an amount of Rs 4,05,781/- of credit availed by the appellant was not found eligible as the service had not been received by the appellant. Hence the actual amount of credit eligible for appropriation was only Rs 1,81,38,234/- as against Rs.1,96,89,265/- claimed to have been paid by the appellant. He

further reiterated the points given in the impugned order and prayed that the order may be upheld.

5. We have gone through the appeal and have heard the rival parties. Both parties do not dispute the taxability of the service, calculation of duty, interest etc. or to its confirmation. The challenge is mainly on the penalty imposed on the appellant and to the cenvat credit of Rs. 4,05,781/- used to pay duty which was found ineligible, as set out in the impugned order. We examine the issues raised by the appellant below.

6. The appellant states that since the Department did not question the eligibility of cenvat credit used to set off the liability in the SCN the same cannot be denied by the adjudicating authority. We find that the SCN has framed allegations against the appellant for not having discharged duty for the period from February 2009 to December 2009. The demand had not crystallized at that stage and the question of the adjudicating authority scrutinizing the CENVAT credit entries would have been premature. As seen from para 3.0 of the impugned order it was in their reply to the SCN vide their letter dated 04/07/2012 that the appellant had claimed and brought to the notice of the learned adjudicating authority that they had discharged the entire demand even before issue of the SCN. It is only when the issue was finally examined by the adjudicating authority after following the process of natural justice that he recorded his findings, and the demand was confirmed. Scrutiny of the payments made against the demand alleged in the SCN is part of the quasi-judicial process prior to the issue of the order. The question of eligibility of money deposits / CENVAT credits in

the book of the appellant or claimed to having been paid, being appropriated or not is a part of the adjudicating authority's discretionary jurisdiction at this stage. Hence if he has come across credit payments made by the appellant that were found not legally subject to appropriation, or for any other reason, it was well within his discretion not to do the same. In this case the appellant was not found eligible to have availed the credit of Rs. 4,05,781/- as the service had not been received by the appellant. The non receipt of service has not been disputed before us. Further it is also seen that the impugned order has pointed out discrepancies in the amounts claimed to have been debited towards duty from the credit account and that which was actually debited as discussed at para 6.1 of the impugned order. This has also not been disputed by the appellant. This only goes to show that the scrutiny of payments claimed by the appellant is a part of the quasi-judicial process involved in the passing of the order in original and any discrepancies noticed and pointed out cannot be faulted. We do not find any reason to interfere with the impugned order in this regard.

7. The next issue raised by the appellant is that as per Section 73(3) of the Finance Act 1994, if tax is paid along with interest before the issuance of show-cause notice, then in that case show-cause notice shall not be issued. Before taking up the issue it is necessary to reproduce the relevant portions of section 73 ibid, as it then stood.

> *Section 73*
>
> *73. Recovery of service tax not levied or paid or short-levied or short-paid or erroneously refunded*
>
> . . . .

(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:

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 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 one year referred to in sub-section (1) shall be counted from the date of receipt of such information of payment.
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.

(4) Nothing contained in sub-section (3) shall apply to a case where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of-

(a) fraud; or

(b) collusion; or

(c) wilful mis-statement; or

(d) suppression of facts; or

(e) contravention of any of the provisions of this Chapter or of the rules made thereunder with intent to evade payment of service tax.

From a plain reading of the section 73 it is seen that nothing contained in sub-section (3) shall apply to a case where section 73 (4) applies. This is a case where the Original Authority has invoked the extended time limit under proviso to section 73(1) of the Finance Act 1994 for demand of service tax citing suppression of facts with an intention to evade payment of duty. The appellant has agreed that duty is payable for the entire period which was subsequently covered by the SCN and

has paid a substantial part of the dues. Hence the payment of duty for the extended period, which is triggered by fraud, suppression etc, is not under challenge. This being so section 73 (4) applies in their case and they cannot seek protection under section 73 (3). The appellant has further referred to Boards letter **F. No. 137/167/2006-CX4, Dated 3-10-2007**, which is reproduced below.

> Section 73(1A) of the Finance Act, 1994 provides for conclusion of adjudication proceeding in the cases of wilful suppression/ fraud / collusion if the taxpayer pays 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.
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> 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 and78, get concluded.
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> 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, 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.
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> 3.1 The relevant portion of section 73 is reproduced below.-
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> *"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-sections (1A) and (3) of section 73 implies conclusion of entire proceedings under the Finance Act, 1994.

It is seen that the letter clarifies the position regarding a case where section 73 (3) applies. However as discussed above the appellants case

is covered by section 73 (4) due to which section 73 (3) will not apply. This being so the appeal on this ground fails.

7.1 The appellant has relied on the following judgments in support of their averments:

A) ***Servocraft HR Solutions Pvt.3 Ltd. Vs. Commissioner of Central Excise and Service Tax Service Tax in Appeal No. 40625 of 2013 dated 07.03.2023,*** wherein it was held that, no Show Cause Notice is to be issued when the assessee has paid the Service Tax along with interest and no penalties are warranted under Section 77 and 78 of the Finance Act, 1994.

B) ***C.C.E. Vs. Adecco Flexione Workforce Solutions Ltd. (2012) 26 STR 3 (Kar.)*** wherein it was held that payment of dues by the appellant shows his intention that they want to buy peace. Even before the interest could be paid the Department ought not to have issued a Show Cause Notice in the present case.

C) ***YCH Logistics Vs. CCE Service Tax Appeal No. 886 of 2012 dated 13.03.2020*** has held that Section 73(3) is very clear as it says that if a tax is paid along with interest before the issuance of show-cause notice, then in that case show-cause notice shall not be issued

D) ***Sen Brothers Vs. CCE (2014) 33 STR 704*** has held that it is thus evident from the aforesaid provisions that in the cases of non-payment of Service Tax on due dates, once payment along with interest is made before issuance of show cause notice, in

such cases no show cause notice could be issued for imposition of penalty.

We find that none of the cases above are covered by the provisions of section 73(4) and are hence distinguished and are not applicable to the facts of this case.

8. The final submission made by the appellant is that in terms of section 80, penalty cannot be imposed under section 76, 77 and 78 if the Assessee proves that there was a reasonable cause for the said failure. The Appellant had not discharged service tax for the period February 2009 to December 2009 due to financial constraints. Section 80 is extracted below:

> **Section 80. Penalty not to be imposed in certain cases**
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> (1) Notwithstanding anything contained in the provisions of section 76, or section 77, no penalty shall be imposable on the assessee for any failure referred to in the said provisions, if the assessee proves that there was reasonable cause for the said failure.
>
> (2) Notwithstanding anything contained in the provisions of section 76 or section 77 or section 78, no penalty shall be imposable for failure to pay service tax payable, as on the 6th day of March, 2012, on the taxable service referred to in sub-clause (zzzz) yes of clause (105) of section 65, subject to the condition that the amount of service tax along with interest is paid in full within a period of six months from the date on which the Finance Bill, 2012 receives the assent of the President.

The Appellant has stated that they had not discharged service tax for the period February 2009 to December 2009 due to financial constraints. The Appellant had borrowed heavily from the banks and all receipts were going directly to the bank as per the escrow arrangement. After adjustment of the loan liability the banks directly dispersed the salaries to the employees listed with the bank. Therefore, the appellant was not in a position to pay service tax within the time

limit prescribed under the statute. However, the moment the investigating authority discovered the non-payment of service tax, the appellant had discharged duty along with part interest. We find that as per the general rule of legal proceedings, he who asserts must prove. It was for the appellant to prove financial constraint before the original authority and thereby plead 'reasonable cause' for delayed payment. A bald statement of financial constraint will not be enough. Even as per section 106 of the Indian Evidence Act, the fact within the knowledge of a person must be proved as the burden of proof is cast upon him. Not only have they not done so the circumstantial evidence also do not help establish their cause, for the following reasons:

a) There was no confusion on legal issues or any dispute regarding the taxability of the service being provided by them.

b) The duty that they were required to pay was tax collected from their clients / customers and was not to be paid from their own resources. Collecting tax from their customers (public money) and not depositing it to the government exchequer is breach of law and may be viewed as an embezzlement of public funds.

c) After the introduction of the self-assessment regime in Service Tax, it is incumbent upon the assessee to make a truthful declaration of facts in their declarations, ST-3 returns etc. made to the department. Trust brings with it responsibility.

d) The appellant filed their ST-3 Return for the period October 2008 to March 2009 and April 2009 to September 2009 on 08/07/2010 and October 2009 to March 2020 on 02/11/2010 i.e. only after the investigation initiated by officers of DGCEI, Chennai. In fact,

if they genuinely faced a financial constraint and could not pay their dues, they should have declared the tax dues not paid in column 4C of the ST-3 Return and filed it on time. The ST-3 Return has the columns to show the cash/CENVAT credit balance lying with them and the tax due but not paid. Suppressing these facts by not filing their Returns, even after having collected the tax from their customers, is a clear case of suppression of vital information with intention to evade payment of duty.

e) They had a cenvat credit balance of Rs 1,81,38,234/- but did not use it to pay long outstanding tax dues, although they could not have used it to settle other outstanding payments to third parties, if any. Clubbing this with their non-filing of ST-3 Returns clearly shows their intention to evade payment of duty.

f) Once the officers visited their unit and discovered the evasion of duty, they have immediately cleared all the tax dues. They did not face any financial constraint in doing so.

For these reasons we find that the appellant has not shown 'reasonable cause' within the meaning of Section 80 ibid for their failure to pay duty.

8.1 We now examine the judgments cited by the appellant to support their stand on this issue. It must be said at the outset that the issue involved as to what constitutes 'reasonable cause' is one of fact and involves the subjective satisfaction of the Authority deciding the matter. Decisions of Courts / Tribunals essentially involving questions of fact, are not always a precedent for decisions in other cases. Each judgment based on the peculiar facts of a case has to be understood

in the terms set out therein. It is an accepted principle that it is neither desirable nor permissible to pick out a word or a sentence from a judgment divorced from the context of the question under consideration and treat it to be complete law. No general principle can be evolved from the said judgments. The judgments cited are:

A) ***CST Vs. Lawson Travels (2014) TIOL 2295*** wherein the Hon'ble Madras High Court held that a careful perusal of the order of the Tribunal would reveal that 'reasonable cause' as provided under Section 80 of the Act has been recorded by the Tribunal stating that the respondent assessee had fallen into financial crisis on account of the criminal breach of trust committed by their sub-agent and criminal proceedings were initiated against such persons and the same are pending. In addition to the above, the Tribunal also came to hold that it is a case of payment of duty voluntarily at the time of investigation even prior to issuance of show cause notice. Therefore, the Tribunal went on to invoke the provisions of Section 80 of the Act on the ground of reasonable cause. The Court finds no cause to interfere with the order of the Tribunal. We find that the subjective satisfaction of the Tribunal was based on the facts of the case involving criminal breach of trust committed by their sub-agent where criminal proceedings were initiated and was upheld by the Hon'ble Court. In this case the facts are different. Further it was for the appellant to prove financial constraint before the original authority and thereby plead 'reasonable cause' for delayed payment while explaining the unused CENVAT credit lying in their books. The appellant has not done so.

B) ***Daurala Organics Vs. CCE (2014) 35 STR 214*** wherein it has been held that the benefit of Section 80 is not deniable even when extended period of limitation is invoked for demand of duty. This judgement pertains to a case where the Adjudicating Authority was of the view that the issue involved interpretation of legal provisions which has resulted in the non-payment of service tax in time. The facts are distinguished. In **Gazi Saduddin v. State of Maharashtra and Another** [(2003) 7 SCC 330] the Hon'ble Supreme Court held as under:

> "Primarily, the satisfaction has to be of the authority passing the order. If the satisfaction recorded by the authority is objective and is based on the material on record then the courts would not interfere with the order passed by the authority only because another view possibly can be taken. Such satisfaction of the authority can be interfered with only if the satisfaction recorded is either demonstratively perverse based on no evidence, misreading of evidence or which a reasonable person could not form or that the person concerned was not given due opportunity resulting in prejudicing his rights under the Act."

C) **CCE, Guntur vs. Narasaraopet Municipality** (2015) 39 STR 800 (A.P.) and **Commissioner of Central Excise vs. Dineshchandra R. Agrawal** [(2013) 31 STR 5] wherein penalties set aside in the order under appeal by invoking the provisions of Section 80 were upheld. The case laws state that power to set aside penalty is given to the Tribunal if a reasonable cause exists. We have discussed above that the appellant has failed to make out a case of 'reasonable cause'. The judgments are distinguished on facts.

8.2 For the reasons stated, we are of the view that the subjective satisfaction of the adjudicating authority cannot be interfered with as the impugned order is not shown to be demonstratively perverse based on no evidence or misreading of evidence or which a reasonable person

could not form. The penalty imposed is mandatory in nature and as held by the Hon'ble Supreme Court in **UOI Vs. Dharmendra Textile Processors (2008) 13 SCC 369**, the section prescribing mandatory penalty should be read as penalty for a statutory offence and the authority imposing penalty has no discretion in the matter in such cases and was duty bound to impose penalty equal to the duties so determined.

9. Having regard to the discussions above the impugned order merits to be upheld and is so ordered. The appeal fails and is disposed of accordingly.

(Pronounced in open court on 15.09.2023)

(**M. AJIT KUMAR**)
Member (Technical)

(**P. DINESHA**)
Member (Judicial)

Rex