

IN ORDERS IN APPEAL :

Shri Ramesh Ramdev Yadav, House No. B-53, Botani Nagar, Sector 5, Gandhidham (hereinafter referred to as 'Appellant No. 1'), Sri Lalhan Sukhar Yadav, House No. 1177, Sector-6, Botani Nagar, Gandhidham (hereinafter referred to as 'Appellant No. 2') and Shri Vageshwar Lal Bhatt, House No. 1215, Sector - 14, Gandhidham (hereinafter referred to as 'Appellant No. 3') and al. collectively referred to as "Appellants" filed appeals against the orders detailed in Table below (hereinafter collectively referred to as "the impugned orders") passed by the Assistant Commissioner, CGST Gandhidham, Urban Division, Gandhidham (hereinafter referred to as "the lower adjudicating authority").

Appeal No.	Appellant	Order-in-Original No. & Date	Sum No. & Date	Period involved
36/GDM/2018-19	Appellant No. 1	03/GST/UA/2018-19 dated 02.05.2018	00017/2018-19 dated 14/01/17-17 dtd. 21.2.2017	01.15-16-17 2018-19 upto Sept 2018
38/GDM/2018-19	Appellant No. 2	05/GST/UA/2018-19 dated 02.05.2018	00018/2018-19 dated 14/01/17-17 dtd. 21.2.2017	--- do ---
39/GDM/2018-19	Appellant No. 3	06/GST/UA/2018-19 dated 02.05.2018	00019/2018-19 dated 14/01/17-17 dtd. 21.2.2017	--- do ---

2. The brief facts of the case are that the Directorate General of Central Excise Intelligence issued show cause notices to the appellants for recovery of service tax, interest, fees for late filing of returns and penalty under Section 70 of the Act. The impugned orders confirmed demand of Service Tax under Section 73(1) of the Finance Act, 1994 (hereinafter referred to as 'the Act'), interest under Section 75 of the Act, late fee under rule 70(b) of the Service Tax Rules, 1994 read with Section 70 of the Act and also imposed penalty under Section 70(1) of the Act.

3. Being aggrieved with the impugned orders the appellants preferred the present appeals stating that the lower adjudicating authority has wrongly confirmed demand under Section 73 of the Act and interest under Section 75 of the Act and wrongly imposed penalty under Section 70 of the Act.

4. The Appellants also filed written submissions stating that they had paid entire Service Tax and non-payment of Service Tax was due to financial

friendship and liquidity crunch; that paid service tax as and when they received payments from the various receiving units; that they also paid entire interest liability on Service Tax due; that they also paid late fees of Rs. 15,000/-; that there is no outstanding Service Tax or interest to be paid by them in these cases; that they had no intention to evade Service Tax.

3.2 The Appellants further submitted that the inquiry against them started on 15.04.2016 and Show Cause Notices were issued to them on 21.2.2017 whereas they had started payment of due Service Tax from December, 2015 (before inquiry started) and they paid entire amount of Service Tax and interest and late fee before Show Cause Notice was issued to them as under:-

Appellant No. 1:-

Sr.No.	Challan No:-	Challan Date	Service Tax	Interest	Fee for late filing	Total
1.	00182	15/02/2015	4,22,667/-	15,000/-	0	4,37,667/-
2.	00133	00/03/2016	8,03,793/-	5,467/-	8,300/-	8,62,560/-
3.	00181	16/01/2017	5,80,090/-	45,430/-	0	6,25,520/-
4.	00585	11/01/2017	5,63,323/-	22,370/-	0	5,85,693/-
5.	00584	11/01/2017	0	0	6,000/-	6,000/-
6.	00489	12/01/2017	150/-	9,000/-	100/-	9,250/-
Total:-			19,70,013/-	4,34,267/-	4,800/-	25,10,575/-

Appellant No. 2:-

Sr.No.	Challan No:-	Challan date	Service Tax	Interest	Fee for late filing	Total
1.	00203	16/12/2015	4,15,100/-	14,745/-	0	4,29,845/-
2.	00133	05/07/2016	3,28,459/-	52,175/-	8,000/-	3,52,520/-
3.	00314	11/01/2017	11,74,927/-	54,220/-	0	12,29,147/-
4.	00382	11/01/2017	0	0	6,000/-	6,000/-
Total:-			26,28,268/-	1,61,317/-	14,000/-	28,04,385/-

Appellant No. 3:-

Sr.No.	Challan No:-	Challan date	Service Tax	Interest	Fee for late filing	Total
1.	00207	16/12/2015	1,70,179/-	13,351/-	0	1,83,530/-
2.	00314	10/08/2016	5,94,501/-	27,268/-	8,000/-	6,09,769/-
3.	00735	10/01/2017	1,80,012/-	36,480/-	0	2,16,492/-
4.	00785	10/01/2017	7,02,845/-	37,319/-	0	7,28,164/-
5.	00784	10/01/2017	0	0	6,000/-	6,000/-
Total:-			17,00,163/-	1,55,460/-	14,000/-	28,70,251/-

3.3 It is clear from the above Table that the appellants had started paying Service Tax before initiation of summons proceedings and had made full payment of Service Tax, Interest and late fee before issuance of show cause notice. In view of such facts, adoption of strict law regarding payment of Service Tax do not survive.

3.4 The Appellants contended that there was no acquisition of such untrue statement on their part with intent to evade payment of Service Tax and therefore, penalty under Section 73 of the Act is not inapplicable.

3.5 The Appellants also submitted that their case is covered under sub section (3) of Section 73 of the Act, which provides as under:-

"Where any service tax has not been levied or paid or has been erroneously 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 not be deemed to have evaded such service tax, chargeable or erroneously refunded, on the basis of his own recalculation thereof, or on the basis of the records maintained by a Central Excise Officer before service of notice as per clause (a) in sub section (1) in respect of such service tax, and in favour of the said person, if such person has not given any notice under sub section (1) in respect of the amount so paid."

3.6 CIRC Circular No. 137/157/2008-Cx dated 3.10.2008 has clarified that such cases need to be concluded under Section 73(3) of the Finance Act, 1994 when Service Tax along with interest is paid voluntarily and no notice need to be served upon them as per Section 73(3) of the Act.

3.7 The appellants relied upon the following case laws:-

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|-------|----------------------------|---------------------------|
| (i) | Adoro Hextone Welfare Soc. | 2012-26-JR-3-K&B. |
| (ii) | Motorsand and Others | 2009-TIOL-419-TR-K&B-TF |
| (iii) | Hindustan Steel Ltd. | 2009-TIOL-148-SO-CE-LS |
| (iv) | M. B. Engineering Ltd. | 2009-TIOL-119-TIOL-T&B |
| (v) | Anirash Enterprise | 2016-TIOL-1076-CESTAT-K&B |

4. Sh. Abhishek Dixhi, Chartered Accountant, reiterated the grounds of Appeals during personal hearing and submitted that in these cases payments of Service Tax could not be made in time due to liquidity problem being faced by the appellants. His payments of Service Tax had been started by them on the very month before initiation of inquiry by CEC. He stated that on the Service Tax along with entire Interest was paid by them before issue of Show Cause Notice. That late fee had also been paid to all 3 cases before issue of Show Cause Notice.

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that there is no fraud, suppression of facts, etc. on their part and hence, penalty under Section 78 of Act was not imposable upon them as held by the Hon'ble CESTAT & High Courts in many cases as detailed in their written submissions.

4.1 Personal hearing notice was also sent to the jurisdictional Division, however, no officer appeared from the Department on date of personal hearing or thereafter.

6.2. FINDINGS:

6.1 I have carefully gone through the facts of the case, impugned orders, grounds of appeals and submissions made by the appellants. The issues to be decided in the present appeals are as to:

- (i) whether the impugned orders confirming demands, ordering payment of interest and late fee are correct or not.
- (ii) whether appropriation of amounts paid by the appellants is correct or otherwise.
- (iii) whether imposition of penalty on the appellants under Section 78 of the Act is correct or not.

6.2 I find that appellants have contended that they have paid entire Service Tax and interest and also late fee before issue of Show Cause Notices so claiming that there was no suppression of facts on their part with intent to evade payment of Service Tax as they had started paying due Service Tax and interest much before SLMNOs were issued to them and thus, penalty imposed on them under Section 78 of the Act should be set aside as non-payment of Service Tax was due to financial hardship faced by them.

6.3 I find that Section 78 of the Act was amended, with effect from 14.5.2015 and instructions issued by CBEC vide DOF No. 334/5/2015-TRU dated 28.02.2015 stated that a reduced penalty equal to 25% of the Service Tax amount is to be paid if Service Tax, interest and reduced penalty is paid within 30 days of service of notice and a reduced penalty equal to 25% of the Service Tax amount, determined by the Central Excise officer by an order, is to be paid if the Service Tax, interest and reduced penalty is paid within 30 days of such order. However, the impugned order have imposed penalty equal to 100% of Service Tax involved, which is not correct at all.

6.4 As per Section 78(i) of the Act was introduced w.e.f. 14.5.2015, which provides that even for the period prior to 14.5.2015, amended Section 78 of the

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Act would apply and hence, the period from April to May, 2015 was also covered under amended Section 70 of the Act.

6.3 The facts of the case reveal that the appellants had obtained Service Tax registration in September, 2011 and all these appellants are proprietary concerns and hence, Service tax was payable by them on quarterly basis and they had started paying due Service Tax from December, 2015, whereas, 1st summons was issued to the Appellants in December-2016 to one appellant and in January-2017 to two appellants and by that time, the Appellants had already paid significant amount of the Service Tax, along with interest and also late fee, which are recorded in the impugned orders also. The appellants have recorded all their transactions in their books of accounts and the department has not been able to find any transactions not shown in their books of accounts. In view of such facts, the allegation of suppression of facts with intent to evade payment of Service Tax is not substantiated at all, because the appellants have paid due Service Tax in full along with interest due thereon and late fee even before the department could initiate investigation against them by way of Summons proceedings in December, 2016 in respect of one appellant and in January-2017 in respect of 2 appellants and the entire amount of Service Tax, full interest and full late fee has been paid by all three appellants by January, 2017 by one issue of show cause notices to them in February, 2017. Hence, I hold that there are cases of default of payment of due Service Tax by the appellants in due time and not of suppression of facts with intent to evade payment of Service Tax.

6.4 CBEC also issued Circular vide No. 137/60/2015-11, dated 18.5.2015 after amendment of Section 70 and insertion of Section 75B in the Act, are relevant portion of which states as under:-

".....

6.7 It is further clarified that as per Section 75B of the Customs Act, 1962, in cases not involving fraud, suppression of facts, etc., if the assessee pays the tax and interest thereon, on the basis of his own ascertainment or that ascertained by the department, no penalty is payable and no show cause notice shall be served under sub-section (1) of Section 70 in respect of the amount so paid. Further, as per provisions of clause (b) of proviso to Section 75, in such cases no penalty, fraud, suppression of facts, etc., if the tax and interest thereon is paid within 30 days of the expiry of 90 days period shall be payable and the proceedings shall be deemed to be concluded. These two provisions have to be read harmoniously to conclude that in cases not involving fraud, suppression of facts, etc., if the assessee pays the tax along with interest, etc., within 30 days

of payment of SGT by before the issuance of SGN, then in such cases proceedings shall be deemed to be concluded. Legal provisions for similar closure in Central Excise are present in clause (a) of sub-section (1) of Section 116C of the Central Excise Act, 1944.

6.5 In view of legal position, facts of these cases and clarifications issued by CBEC, the court on penalty is impugned in the appellants in these cases under Section 73 of the act.

6.6 The Hon'ble High Court of Andhra Pradesh in the case of The Paints & Pigments Ltd. reported as 2017(7)GST 147(A2) has held as under :-

“7. It is true that under Section 73(i) of the Finance Act, 1944, an assessee is liable to pay service tax, if service tax has not been levied or paid or has been short-paid or short-paid or erroneously refunded, by reason of fraud, collusion, wilful misstatement or suppression of facts or contravention of any of the provisions of the Act and the rules with the intent to evade payment of service tax.

8. Before Section 73 was substituted by the Finance Act, 2015, the position remained the same, except with small differences. One of the differences was that under the second proviso to sub-section (1) of Section 73, if an assessee chose to pay service tax and interest within 30 days from the date of communication of the order of the Central Excise Officer determining said service tax, the amount of penalty liable to be paid under the first proviso, would be 20% of such service tax. The first proviso reduced the penalty to 10% in cases where true and complete details of the transaction were available in the specified records.

9. After the amendment under the Finance Act, 2015, the penalty leviable under the first proviso reduced to 50% and the penalty payable in cases where service tax and interest was remitted within 30 days of service of notice, was reduced to 10%.

10. Therefore, it is clear that both before and after the amendment, the liability to pay service tax arises on account of fraud, collusion, wilful misstatement, suppression of facts or contravention of the provisions of the Act and the rules. The liability to pay penalty arises on account of fraud, collusion, wilful misstatement, suppression of facts or contravention of the provisions of the act. But, the amount of said penalty depended upon the question as to whether the amount of tax and liability was paid and, if so, at what point of time. To explain this distinction in more detail we go back to Section 73(3) and Section 73(4), Section 73(1) reads as follows :

“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 referred 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 its ascertained by a Central Excise Officer before service of notice on him under subsection (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 subsection (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 an erroneously refunded service tax, if any.

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which in his opinion has not been paid by any person and, if so, the Central Excise Officer shall proceed to recover such amount in the manner specified in this section, and the period of eighteen months referred to in sub-section (1) shall be counted from the date of receipt of such information of payment."

15. We have already seen that the liability to pay penalty imposed under Section 78(1) arises only upon the service of notice under the proviso to Section 73(1). But, under the section 73 of Section 73, the Department cannot even issue a notice unless, in cases where the Service Tax and interest has been paid, it ascertains upon the ascertainment of the Service Tax either on that assessment or on the basis of what was ascertained by the Central Excise Officer. Sub-section (1) was intended to confer an extensive benefit much more in nature than the varying degrees of penalty imposed under the different provisions of sub-section (1) of Section 78.

16. It is true that sub-section (4) of Section 73 keeps the operation of sub-section (1) out of the purview in cases where the Section 73 has not been invoked, paid, short-levied or short-paid by reason of fraud, collusion, wilful misstatement, etc. but nevertheless, the law does not treat all cases of fraud, collusion, wilful misstatement, suppression of facts, etc., alike.

17. Keeping this in mind, if we go through the order in question, it would be found that the respondent-assessee paid the service tax to the extent of Rs. 40,39,751/- along with interest to the tune of Rs. 12,42,930/-. This amount was paid even before the show cause notice, dated 27-4-2010, was issued. It is only in Paragraphs 15(ii) and 15(iii) that the adjudicating authority has recorded a finding that the respondent-assessee wilfully suppressed the cost and amount value of the freight incurred. But, the finding recorded in Paragraphs 15(ii) and 15(iii) in our considered view, are not sufficient to enable the Department to fall back upon sub-section (4) of Section 73 so as to keep the application of Section 78(1) out of the purview of the respondent-assessee. Hence, we do not think that the Commission's Appeals and the CESTAT were wrong in deleting the penalty. Therefore, "I agree with the Commission."

English as applicant?

6.7 The above judgment of the Hon'ble Andhra Pradesh High Court has been affirmed by the Hon'ble Apex Court reported as 2013 (12) 631 (2013) 507.


7. In view of above factual and legal position, the basis for confirmation of demand, payment of interest and fine are correct, legal and proper but there is no justification to impose penalty on the appellants under Section 78 of the Act. Hence, I have an option but to set aside the penalty imposed on the appellants under section 78 of the Act.

8. Accordingly, the impugned orders are upheld for confirmation of demand, recovery of interest and payment of late fee, as per application law and for appropriation of amounts deposited towards Service Tax, interest and late fee. However, penalty imposed on the appellants under Section 78 of the Act is set aside.

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- 4. अपीलकर्ता द्वारा दलितों को नई गाँव का निर्माण उपरोक्त तरीके से किया जाता है।
- 5. The appeals filed by the appellants are disposed off in above terms.

7. 6.1.



 (कुमार सेतोपा)
 प्रधान आयुक्त (उप-पंचायत)

By R.P.C.D.

To,

1. Shri Ramesh Ramdev Yadav, House No. 2, 45-B, Keshav Nagar, Sector-6, Gandhidham.

2. Shri Lalchand Sukumar Meena, House No. 1177, Sector-6, Keshav Nagar, Gandhidham.

3. Shri Mayas Shankar Ghild, House No. 1215, Sector-14, Gandhidham.

Copy to:

- 1) The Principal Chief Commissioner, Col & Centra. Excise, Ahmedabad Zone, Ahmedabad for his kind information.
- 2) The Commissioner, Col & Central Excise, Gandhidham, for necessary action.
- 3) The Assistant Commissioner, GST & Centra. Taxation, Gandhidham/Bar, Division, Gandhidham Kutch for necessary action. Grand File.