

Gujarat Security Services Vs. Cst

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Ahmedabad

Decided On : Sep-14-2007

Reported in : (2008)(223)ELT209TriAhmd

Judge : A Wadhwa

Appellant : Gujarat Security Services

Respondent : Cst

Judgement :

1. After hearing both the sides, I find that the appellant is a registered service tax provider in the category of security services under Section 69 of the Finance Act, 1994. They were issued a show cause notice on 20/12/2004 alleging late deposit of service tax and thus proposing to take penal action against them. The said show cause notice was adjudicated by the Asst. Commissioner confirming the demand of duty of Rs. 11,85,783/- and imposing personal penalty of identical amount under Section 76 of the Finance Act in addition to imposition of penalties under the other Sections. The said order of the Asst.

Commissioner was put to challenge by the appellant before Commissioner (Appeals) along with an application for dispensing with the condition of pre-deposit of duty and penalty. It is seen that the said application was decided by Commissioner (Appeals) vide his stay order dt. 24/9/2004 directing the appellant to make a pre-deposit of Rs. 4 lakhs and submit proof by 25/10/2004. Inasmuch as the appellant did not comply with the above stay order and their appeal was

dismissed by Commissioner (Appeals) vide his order-in-appeal No. 6/2004(ST) dt. 24/12/2004 for non-compliance with the provisions of Section 35F of Central Excise Act, 1944 read with the stay order. It is not disputed that the said order of Commissioner (Appeals) was not appealed against by the appellant and as such attained finality.

2. Subsequent to the above development, appellant vide their letter dt.

20/10/2005 filed an application in terms of Section 74 of the Finance Act for rectifying the mistake in the earlier order on the ground that the number of days delay in depositing the tax considered by the Adjudicating Authority was 12486 days instead of 1418 days and if the said mistake is modified the penalty amount would come down to Rs. 1,41,800/-. However, Addl. Commissioner vide his office letter dt.

25/1/2006 rejected the said application by observing as under: It is seen from records that the issue was covered in your appeal against OIO No. STC/OIO/982/SCA-89/03-04 dt.27/1/04, filed with Commissioner (Appeals) which was dismissed subsequently by the Commissioner (Appeals). In view of this there can be no rectification at the stage in terms of provisions of Section 74(2) of the Finance Act, 1994.

It may also be mentioned here, that there is no apparent mistake in the calculation of Number of days as mentioned in your application.

The days have been calculated considering due date of each payment and calculated upto the date of payment of the service tax. The total number of days so calculated have been taken into consideration.

3. The said letter dt. 25/1/2006 of the Addl. Commissioner was appealed against by appellant before Commissioner (Appeals).

4. Commissioner (Appeals) while dealing with the said appeal of the appellant accepted their stand that they were within their right to file a rectification of mistake application in terms of provisions of Section 74. By further referring to Section

74(2) which restricts the power of the Central Excise officers to rectify any mistake apparent from the reference to such matters other than the matters which have been considered and decided in appeal or revision, she accepted the appellant's stand that inasmuch as appeal filed by them was not considered and decided but was dismissed for non-compliance with the provisions of Section 35F of the Central Excise Act, it was open to the Addl. Commissioner to consider the request for rectification of mistake on merits after considering the contentions of the appellants.

Accordingly, Commissioner (Appeals) observed, I, therefore, hold that the appeal filed should be restricted only to consider whether there is an apparent mistake on record in the order-in-original dt. 27/1/2004. The other grounds of appeal such as the request for reduction in penalty imposed under Section 76, 77 and 78 cannot be either considered or dealt with as once the appeal was dismissed on 13/1/2005 vide order-in-appeal No. 6/2004(STC) dt 24/12/2004, all the penalties and duty liabilities as imposed by the Adjudicating Authority became final and cannot be reconsidered at this stage, excepting that what is permissible under Section 74.

5. After observing so, she proceeded to calculating the number of day delay and arrived at a finding that the same were to the tune of 6671 and the penalty amount would be Rs. 6,67,111/-. For better appreciation of the reasonings adopted by Commissioner (Appeals), I reproduce para-11 of the said decision: 11. The suggested methodology by the appellants that the total number of days of delay should be counted for all the returns together is, however, not in consonance with the wordings of Section 76 which clearly states that the penalty shall not be less than one hundred rupees of every day during which 'such' failure continues.

Rule 6 of the Service Tax Rules, 1994 specifies that service tax is payable every quarter by the 25th of the month immediately following the said quarter hence each non-payment becomes a failure under Section 76. The phrase "for every day during such failure" has to be interpreted accordingly. It is, therefore, clear that while the methodology adopted by the Assistant Commissioner in counting number of days was incorrect, that suggested by the appellants is equally not applicable. The mistake of not quantifying penalty for each failure on the basis of

the number of days of delay and the amount of service tax payable is apparent on record and the Asst.

Commissioner has made a mistake in arriving at the quantum of penalty which is now corrected to Rs. 6,67, 111/-. As stated earlier the appeal is limited to the rectification of mistake and does not interfere with the order-in-appeal No. 6/2004(STC) dt.24/12/2004.

6. After hearing both the sides, I find that the said order of Commissioner (Appeals) is self-contradictory inasmuch as on one hand it is being observed that the earlier order-in-appeal dt. 24/12/2004, which has attained finality is not being interfered with and on the other hand penalty amount is being reduced to Rs. 6.67 lakhs. No doubt the provisions of Section 74 gives jurisdiction to the Central Excise officer who passed any order under the provisions of this chapter, to rectify any mistake apparent from the record, within a period of 2 years of the date on which such order was passed. Sub-clause 2 of the said section is to the effect that whether any matter has been considered and decided in any proceeding by way of appeal, the Central Excise officer may amend the order in relation to any matter other than the matter which has been so considered and decided. A cumulative reading of the above two sub-rules clearly indicate that the officer who has passed the order can rectify the mistake, which is apparent from the records. As such, it can be safely concluded that the mistake which has been referred to relates to the clear mistake from records, which may be a typographical mistake or a calculative mistake or any arithmetic mistake. The same by no stretch of imagination, can be extended to an interpretation of the legal provisions of law. Inasmuch as in the present case, the mistake pointed out by the appellant was a mistake relating to the method to be adopted for the purpose of calculating the number of days delay it cannot be said that the mistake was a mistake apparent from records. The same definitely involved interpretation of the provisions of law. This becomes clear from the fact that Commissioner (Appeals) has herself also not accepted the appellant's stand and has adopted a different methodology for calculating the number of days delay. This shows that the issue is not a simple issue of calculation but involves legal interpretation. As such, first of all, it cannot be said to be a mistake apparent from the records.

7. Secondly, the earlier order of the Asst. Commissioner was appealed against by the appellant and their appeal dismissed for non-compliance with the provisions of Section 35F. The result of such dismissal was as if the order of the Asst. Commissioner has attained finality.

Admittedly the appellate Commissioner's order was not taken to appeal before Tribunal. The question arises as to whether in such a scenario, the assessee can approach the original Adjudicating Authority for fresh calculation of penalty amount under the guise of rectification of mistake. In my views, the answer to the above question is emphatic "NO". The strict interpretation to the expression "other than matter which has been so considered and decided" given by Commissioner (Appeals) in the present matter to suggest that if the appeal is dismissed for non-compliance, the matter cannot be said to be considered and decided by him, is not in accordance with the principles of jurisprudence. Once an appeal stands filed and dismissed on whatsoever grounds, the same attains finality and if no further appeal is filed there against, the matter becomes final and cannot be reopened and that too at the level of the Asst. Commissioner, by filing any rectification of mistake application. Admittedly, the appellants were within the rights to re-approach the Commissioner (Appeals) either for modification of the said order or after depositing the directed amount, for disposal of appeal on merits. Neither course having been adopted by the appellant, it is to be held that the orders of Addl. Commissioner stood confirmed by Commissioner (Appeals) and could not have been subsequently modified by him.

8. In view of my above discussion, I hold that the Addl. Commissioner order as contained in his letter dt. 25/1/2006 rejecting the prayer for modification was correct and Commissioner (Appeals)'s impugned order lowering the penalty amount is not in accordance with law. However, there is no appeal by the Revenue against such reduction of penalty and as such the same cannot be enhanced to the original quantum of penalty.

In any case, having held Commissioner (Appeals) order is not justified for interfering in the quantum of penalty, I reject the appeal on this limited ground itself.

