

**Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench at Ahmedabad**

REGIONAL BENCH-COURT NO. 2

Service Tax Appeal No. 10486 of 2019- DB

(Arising out of OIA-AHM-EXCUS-001-APP-085-2018-19 dated 07/12/2018 passed by the Commissioner (Appeals), Central Excise, Customs and Service Tax-AHMEDABAD)

Khs Machinery Pvt Ltd

Near Hirapur Chokdi
Vatva-Mehmdabad Highway
Ahmedabad, Gujarat

.....Appellant

VERSUS

**Principal Commissioner, CGST &
Central Excise- Ahmedabad South**

7th Floor, Central GST Bhavan,
Nr. Polytechnic, Ambawadi,
Ahmedabad-380015

.....Respondent

APPEARANCE:

Shri Jigar Shah & Shri Amber Kumrawat, Advocate for the Appellant

Shri Rajesh Nathan, Assistant Commissioner (AR) for the Respondent

CORAM:

HON'BLE DR. AJAYA KRISHNA VISHVESHA, MEMBER (JUDICIAL)

HON'BLE MR. SATENDRA VIKRAM SINGH, MEMBER (TECHNICAL)

Final Order No. 10793/2025

DATE OF HEARING: 10.09.2025

DATE OF DECISION: 19.09.2025

SATENDRA VIKRAM SINGH

M/s K. H. S. Machinery Pvt Ltd, Ahmedabad (Appellant) are engaged in Erection, Commissioning & Installation Services, Business Auxiliary Service, Goods Transport Agency Service & Intellectual Property Right Service. During audit of their records, the officers found that the appellant had received services from M/s Gurucharan S. Bhuller, Germany and paid them charges under the head of "Legal & Professional Charges/Consulting Charges". These services were for getting co-ordination with their collaborator namely M/s. KHS Maschinen-und-Anagenbau AG, Germany for

1. Indian Customers visits including escorting, translation etc
2. Technical data transmission with required translation
3. Board matters
4. Miscellaneous support for visiting employee on training

The department alleged that the appellant obtained Business Support Service but have not paid service tax on them under reverse charge mechanism. They also did not declare the details of the services and service tax payable in their service tax returns. Accordingly, the department issued them a show cause notice dated 07.10.2010 for treating the services received by them as taxable service and demanding service tax of Rs. 32,72,936/- under RCM under proviso to Section 73(1) of the Finance Act, 1994 by invoking larger period along with interest under Section 75 and penalties under Section 76, 77 and 78 of the Finance Act, 1994.

1.1 The above matter was decided vide order-in-original dated 28.01.2013 wherein the adjudicating authority confirmed the entire service tax amount of Rs. 32,72,936/- under Section 73(1) along with interest under Section 75 and imposed penalty under Section 76, a penalty of Rs. 10,000/- under Section 77 and a penalty equal to service tax amount under Section 78 of the Finance Act, 1994. Aggrieved, with the said order, the appellant filed appeal before the Commissioner (Appeals) who vide impugned order dated 07.12.2018, allowed the party's appeal to the extent of dropping demand of service tax of Rs. 27,52,635/- on reimbursable expenses and upheld the remaining demand, interest and the penalties. Aggrieved with the said order, appellant file appeal before this Tribunal.

2. In their appeal, the appellant took the following grounds: -

- a) They have paid service tax along with interest and therefore, it is a fit case for not imposing any penalty under Section 76,77 and 78 of the Finance Act, 1994 as this is not attributable to any *mala fide* motive or intent to defraud the government revenue or delay in payment of service tax. Hon'ble Tribunal in the case of Chansama Taluka Sarvoday Mazdoor Kamdar Sahakari Mandli Ltd Vs. CCE, Ahmedabad, 2012-TIOL-41-CESTAT-AHM, held that whether it is before amendment of Section 78 of

the Finance Act, 1994 or thereafter, double penalty under Section 76 and 78 cannot be imposed.

b) As the allegation of suppression of facts or wilful misstatement made in the show cause notice and sustained by the original Adjudicating authority, it was mandatory on their part to impose penalty under Section 78. If that be so, penalty under Section 76 would not arise.

c) The records on the basis of which demand has been raised are duly reflected in their balance sheet. Under the circumstances, show cause notice for demanding service tax by invoking extended period is not legally sustainable.

In view of the above, they prayed for setting aside the impugned order-in-appeal and allowing the prayer of the appellant.

3. During hearing, learned Advocate pleaded that they have paid the service tax amount along with interest and therefore, penalty under both the Sections i.e. Section 76 and 78 should not be imposed simultaneously and only one penalty i.e. either Section 76 or 78 can only be imposed on them. He also argued that extended period of limitation is not invocable as the present issue arises out of observations during audit and there is no suppression on their part. He cited the decision of Hon'ble Supreme Court in the case of CCE-Bangalore Vs. M/s. Pragathi Concrete Products -2015-VIL-166-SC-CE, wherein Hon'ble Apex Court held that suppression of facts cannot be alleged by the department in cases where issue is arising from the audit. He also justified his say of non-invocation of extended period, in view of the decision in the case of Padmini Products Vs. CCE- 1989 (43) ELT 195(SC) and CCE Vs. Chemphar Drugs & Liniments- 1989 (40) ELT 276-SC. Learned Advocate also drawn attention of the Bench towards decision of Hon'ble Tribunal in the case of GD Goenka Pvt Ltd Vs. CGST 2023 (8) TMI 995-CESTAT wherein it is held that to invoke extended period of limitation, it is essential to establish one of the 5 necessary elements and their existence cannot be presumed because the assessee is operating under self-assessment. For invocation of simultaneous

penalty under Section 76 and 78, learned Advocate relied upon the decision of Hon'ble High Court in the case of M/s. Raval Trading Company Vs. CST-2016 (2) TMI 172. He also mentioned that the same position has been maintained in the following decisions: -

- Commissioner v. Tejas Agency 2014 (340) STR 803 (Guj)
- M&B Engineering Limited v. CCE 2024 (7) TMI 313 CESTAT
- The Financiers vs. CCE, Jaipur, 2007 (8) STR 7 (Tri-Del);
- CCE, Ludhinana vs. Pannu Property Dealer, 2009 (14) STR 687 (Tri-Del.)
- CCE, Chandigarh vs. City Motors, 2010 (19) STR 486 (P&H)

3.1 For payment of interest, he mentioned that the extended period has been wrongly invoked in this case and therefore, since demand is not sustainable, interest will also not be recoverable from them. Learned Advocate also prayed for invoking Section 80 of the Finance Act, 1994 for setting aside penalties imposed on them under Section 76, 77 and 78 of the Finance Act, 1994, by stating that there was reasonable cause to believe that the appellants were not liable to pay service tax. He relied upon the following judgments: -

- ETA Engineering Ltd. v. CCE, Chennai, 2004 (174) E.L.T 19 (Tri-LB)
- Flyingman Air Courier Pvt. Ltd. v. CCE, 2004 (170) ELT 417 (Tri.- Del.)
- Star Neon Singh Vs. CCE, Chandigarh, 2002 (141) ELT 770 (Tri.- Del)

4. Learned AR on the other hand, reiterated the findings of the lower authority. He mentioned that the appellant has still not paid penalty amount of Rs. 5,20,301/- imposed upon them under Section 78, even when, they are contesting simultaneous payment of penalty under Section 76 and 78 of the Finance Act, 1994. He prayed for dismissing the appeal of the party and upholding the impugned order.

5. We have heard the rival submissions. In this case, learned Advocate during arguments stated that they have paid the disputed service tax amount along with interest. Before the Tribunal they are contesting simultaneous

imposition of penalty under Section 76 and 78 of the Finance Act, 1994. We find that similar issue came up before Hon'ble High Court of Gujarat in the case of M/s Raval Trading Company Vs. Commissioner of Service Tax reported at 2016 (42) STR 210 (Guj.), wherein Hon'ble Court had discussed insertion of Proviso to Section 78. The relevant paras 11, 12 and 16 of the judgment are reproduced below: -

"11. *In view of the nature of this further proviso and the relevant position of the two statutory provisions both pertaining to penalty, we are convinced that the proviso was in the nature of clarificatory amendment and not creating a liability for the first time. Even without the aid to this further proviso to Section 78, one entire plausible view was that the situation envisaged under Section 76 of the Finance Act, 1994, would exclude those cases covered under Section 78 of the Finance Act, 1994. In other words, Section 76 of the Finance Act, 1994, would cover only the cases of non-payment of service tax which are not related to fraud, collusion, wilful misstatement, suppression of facts or contravention of any of the provisions of the said Chapter or the rules made thereunder with the intent to evade payment of service tax since legislature had already provided for penalty in Section 78 in such situations. Thus further proviso to Section 78 made it explicit which was till then implicit.*

12. *Section 76 of the Finance Act, 1994, as is now amended with effect from 14-5-2015 gives further credence to this argument. Section 76(1) as it stands after the said amendment provides that where service tax was not levied or not paid or having been short-levied or short-paid, or erroneously refunded for any reason, other than the reason of fraud or collusion or wilful misstatement or suppression of facts or contravention of any of the provisions of Chapter 5 or the rules made thereunder with an intent to evade the payment of service tax, the person liable shall in addition to service tax and interest also be liable to pay penalty not exceeding ten per cent of the amount of such service tax. Thus, by way of this amendment, the statute has ensured that Sections 76 and 78 of the Finance Act, 1994, apply in mutually exclusive areas. In other words, the cases of non-payment of tax by reason of fraud or collusion or wilful misstatement or suppression of facts, etc., would be covered under Section 78 of the Finance Act, 1994, and all cases other than those envisaged under Section 78 would be covered under Section 76 of the Finance Act, 1994.*

16. *Under the circumstances, we answer the additional question in favour of the appellant-assessee and delete the penalty under Section 76 of the Finance Act, 1994, while upholding the penalty imposed under Section 78 and other penalties. The tax appeal is accordingly disposed of with no order as to costs."*

5.1 We also find that in the case of The Financers Vs. Commissioner of Central Excise, Jaipur and in the case of Commissioner of Central Excise, Ludhiana Vs. Pannu Property Dealers (cited supra), it has been held that when equal penalty under Section 78 has been imposed, prima facie, there is no justification for imposition of penalty under Section 76. Similar finding was given by the Tribunal in the case of CCE, Ludhiana Vs. Silver Oak Gardens Resort reported in 2008 (9) STR 481 (Tri.-Del.), wherein the Tribunal held that penalty under Section 76 is not warranted when penalty under Section 78 has been imposed and that imposition of penalty under Section 76 as well as Section 78 is too harsh. These cases also pertain to period when proviso to Section 78 was not in existence as in the present matter.

5.2 Considering overall intent of the Appellant, we are of the view that their case is squarely covered by the above decision and therefore, we find it fit for waiver of penalty imposed upon them under Section 76 of the Finance Act, 1994. The prayer of the appellant therefore, is partly allowable. Accordingly, we modify the impugned O-I-A to the extent of setting aside penalty imposed on the appellant under Section 76 of the Finance Act, 1994.

6. Appeal is partly allowed with consequential relief, if any.

(Pronounced in the open court on 19.09.2025)

(AJAYA KRISHNA VISHVESHA)
MEMBER (JUDICIAL)

(SATENDRA VIKRAM SINGH)
MEMBER (TECHNICAL)