

**CESTAT, AHMEDABAD BENCH**

**VSE Stock Services Ltd.**

**v.**

**Commissioner of Central Excise, Vadodara-II**

**B.S.V. MURTHY, TECHNICAL MEMBER**

**ORDER NO. A/1673/WZB/AHD/2012**

**APPEAL NO. ST/188 OF 2011**

**NOVEMBER 16, 2012**

**ORDER**

1. During the period from April, 2007 to July, 2007 and November to December, 2007, the appellants had utilized total Cenvat Credit of Rs.29,90,943/- for payment of Service Tax in respect of Stock Broker service provided by them. It was found that this credit was not admissible to them since it was availed after close of the month and as soon as it was pointed out, the appellants paid the amount with interest. Nonetheless, on verification, it was found that there was a short payment of Rs.1,70,047/- and this was pointed out by way of issuing show-cause notice on 15th October, 2008. In October, 2008 itself the appellants paid this amount also and penalty under Section 76 has been set aside by the learned Commissioner. In the impugned order penalty of Rs.5000/- imposed under Section 77 of the Finance Act, 1994 has been upheld, hence the appeal.

2. Heard both sides.

3. The learned Advocate on behalf of the appellants relies upon the decision of this Tribunal in the case of *Shree Rama Multi-Tech Ltd. v. CST* [Order nos A/2111/WZB/Ahd/2011, dated 18-11-2011] to submit that in this case, the appellants had Calculated and paid the entire amount of credit with interest and on finding that there was a short-fall in payment, the proviso of Sec.73 (3) of the Finance Act, 1994 would come into play and, therefore, the concerned Central Excise Officer should have informed the assessee instead of issuing show-cause notice. Though the Revenue had one year time for issue of show-cause notice, instead of intimating the appellants who would have been willing to deposit the amount without any notice, they have issued show-cause notice in this case. The appellant was not disputing the merit of the stand taken by the revenue. Show-cause notice has been issued which in accordance with the provisions of Sec.73 (3) of the Finance Act, 1994, need not have been issued at all.

4. I find that in the case of *Shree Rama Multi-Tech Ltd.*, (*supra*) a similar view was taken and paragraph 5 & 6 in the abovesaid order are reproduced below:

"5. According to the section 73(3). when intimation is received from service tax assessee that he has paid service tax and if he has intimated that he is not liable to pay interest, the provisos to Section 73(3) came into play. Therefore, in this case, after receiving a letter from the appellant on 19-12-2008, intimating the payment of service tax and disputing the liability of interest, the Central Excise Officers should have determined the amount of short payment of service tax (which happens to be an interest element in this case), and should have proceeded to recover the amount in the manner specified in this Section and the period of one year counts from the date of intimation. This means that if interest was not paid, the main section comes into play once again. Therefore, after receiving the intimation on 19-12-2008 the Central Excise officers should have determined the interest payable and

communicated to the assessee and if the assessee did not pay the same, they had one year period for issue of show-cause notice. In this case, without intimating to the assessee that he is liable to pay interest and they should pay the same, the officers proceeded to issue show-cause notice straight away. Section 73(3) contemplates non-issue of show-cause notice in the event of an assessee paying full amount of service tax with interest. When the Section and provisos are read together, in this case also, a letter should have been written to the assessee to pay interest and if they fail to pay interest show-cause notice should have been issued. There is no evidence on record to show that any such letter was written by the Revenue. Nevertheless, at least after issue of show-cause notice, once the interest amount was paid, this was a fit case for dropping the further proceedings. Instead of doing so, I find that penalties have been imposed under Sections 76 and 77. This is contrary to the provisions of Section and the CBEC has also issued a letter dated 3-10-2007 wherein the field offices have been directed not to commence proceedings where the assessee discharges full amount of service tax and interest.

6. Coming to the penalty imposed wider Section 78, this is a case where there was no need for the appellants to resort to suppression or mis-declaration since whatever service tax was to be paid, they were eligible for the credit. By evading the payment of service tax, the appellant stands to lose rather than getting any undue benefit. By delaying payment of service tax the assessee had to pay interest on the amount which is not available as cenvat credit. Therefore, in this case, suppression of fact or mis-declaration could not have been invoked for imposition of penalty under Section 78 of the Finance Act, 1994. Other than non-payment of service tax, there is no other evidence to justify imposition of penalty."

5. Since the issue is covered by precedent decision of the Tribunal and no contrary decision has been produced to contest the same I follow the decision in the case of *Shree Rama Multi-Tech Ltd. (supra)* above and allow the appeal with consequential relief, if any, to the appellant.