

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT AHMEDABAD

REGIONAL BENCH – COURT NO. 03

Service Tax Appeal No. 623 of 2011

[Arising out of OIO-STC-33-COMMR-AHD-2011 passed by Commissioner of Service Tax-SERVICE TAX - AHMEDABAD]

M/s Sanghi Infrastructure Ltd

1st Floor, President House,
Ambawadi Circle, Ahmedabad,
Gujarat-380006

.....Appellant

VERSUS

C.S.T. & S.T.-Ahmedabad

7 th Floor, Central Excise Bhawan, Nr. Polytechnic,
Ambawadi, Ahmedabad,
Gujarat-380015

.....Respondent

APPEARANCE:

Sh. R. Subramanya, Advocate for the Appellant
Ms. Nitina Nagori, Authorized Representative for the Respondent

CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
HON'BLE MEMBER (TECHNICAL), MR. RAJU

FINAL ORDER NO. A/ 11012 /2019

DATE OF HEARING: 05.04.2019
DATE OF DECISION: 21.06.2019

RAMESH NAIR

The present appeal has been filed by M/s Sanghi Infrastructure Ltd., against Order dated 18.07.2011 issued by the Commissioner, Service Tax, Ahmedabad. Brief facts of the case are that the Appellant were issued show cause notice dated 18.02.2011 alleging that during service tax audit of the Appellant, It was found that the Appellant during the period 2007 – 08 to 2008 – 09 had rendered the "Dredging Services" but short paid the service tax during said period. That for the period 2008 – 09 the income shown in Balance Sheet was Rs. 42,02,90,252/- liable for service tax amount of Rs. 4,60,46,112/- whereas as per service tax returns the assessee has paid tax of Rs. 3,24,01,120/- . Thus they have short paid service tax amount of Rs. 1,36,44,992/-. The Appellant later paid the said amount. Also for the year 2009 – 10, the Appellant did not pay service tax or file returns. Shri Anil Ramsahay Agarwal, the Manager (Accounts) of the Appellant in his statement informed the officers that they could not pay service tax due to

huge amount of expenditure incurred for repair and maintenance of dredgers. That the value of services shown less in Service Tax Returns was due to lapse of the accounts department but they have discharged the service tax liability. That in case of service tax for the year 2009-10, they are trying to deposit the service tax and file returns. The show cause notice demanded service tax amount of Rs. 1,36,44,992/- for the year 2008 – 09 and since paid by the Appellant, it was proposed to appropriate the same. For the year 2009 – 10 a service tax demand of Rs. 2,80,136/- was demanded and to appropriate an amount of Rs. 30,00,390/- paid by the Appellant against said demand. It was also proposed to demand interest and penalty upon the Appellant. The demand and interest and penalties as proposed were confirmed against the Appellant vide impugned order dated 18.07.2011. Aggrieved, the Appellant has filed present appeal.

2. Sh. R. Subramanya, Ld. Counsel appearing for the Appellant submits that the demand of service tax of Rs. 7,07,616/- along with interest and penalty has additionally been confirmed by the adjudicating authority which was not proposed in the show cause notice and hence it is not sustainable. He also submits that the non deposit of service tax was not due to any fraud, suppression or malafide intention and therefore the demand made against them by invoking extended period of limitation is not sustainable. He submits that service tax could not be deposited due to financial problems arising due to huge expenditure on repair and maintenance of dredgers. All the transactions were recorded in books of accounts and during audit it was known. Further that service tax amount of Rs. 2,68,84,535/- was paid even before issue of show cause notice hence there cannot be any penalty under section 76, 77 and 78. He relies upon judgment in case of Adecco Flexion Workforce Solutions Ltd. 2011 – TIOL – 635 – HC – KAR. He also submits that they are also eligible for cenvat in respect of duties paid on capital goods and service tax on input services.

3. Ms. Nitina Nagori, Ld. AR appearing for the revenue reiterates the findings of the impugned order. He further submits that the short payment of service tax during the year 2008 – 09 came during audit and thereafter on further investigation it was found that the Appellant has neither paid service tax for the period 2009-10 nor has filed service tax returns. He submits that if the case would not have been detected by the audit officer, the non payment would have remained unnoticed. The assessee is liable to self assess the liability and to pay service tax which has not been done and therefore the larger period of limitation is invokable and penalty is

imposable due to suppression as held in case of Dharmendra Textile Mills 2008 (231) ELT 3 (SC) and Rajasthan Spinning & Weaving Mills 2009 (238) ELT 3 (SC).

4. Heard both the sides and perused the records. We find that the short payment of service tax was detected during audit from the accounts of the Appellant. They had paid the service tax demand for the period 2008 – 09 but could not pay the service tax for the period 2009 -10 nor did file returns due to financial problem. However the fact remains that the Appellant had recorded all the transactions in books of accounts and produced the same before the audit officers during audit. However, the appellant failed to file necessary periodical ST-3 returns to the department, therefore, the fact regarding non payment of service tax was not brought to the notice of department. Therefore, extended period is rightly invoked by the lower authority; accordingly, the demand majority of which amount paid by the appellant is sustainable. As regard, penalty imposed under Section 76, we find that penalty under Section 76 & 78 both cannot be imposed simultaneously in the view of Honb'le Gujarat High Court judgement in case of Raval Trading Co., Vs. CST 2016 (42) STR 210 (Guj.), accordingly, penalty imposed under Section 76 is set aside. As regard penalty imposed under Section 78, we find that as per the appellant's submission, the non payment of service tax is due to financial difficulties. It is also observed that the appellant have recorded the transaction in their books of account and from which only audit could point out the non payment of service tax. With these facts, the appellant has made out a strong case for waiver of penalty under Section 78 invoking Section 80 of the Finance Act, 1994. The Section 80 is reproduced below:

"Penalty not be imposed in certain cases:

Notwithstanding anything contained in the provisios of Section 76, Section77 and Section 78, 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."

5. From the Section 80, it is clear that the penalty under Section 76 or 78 was not be imposable for any failure in the said provisions if the assessee proves that there was reasonable cause for the said failure. We are of the view that if though there is suppression of fact on the part of the appellant and extended period is invoked, the penalty under Section 78 can be waived depending on the reasonable cause for the failure of non payment of service tax. As regard the judgment cited by Ld. AR in the case

of Rajasthan Spinning & Weaving Mills Vs. UOI 2009 (238) ELT 3 (SC) and Dharamendra Textile Processors Vs. UOI 2008 (231) ELT 3 (SC) of the Hon'ble Supreme Court, we find that both these judgements are on the issue of mandatory penalty under Section 11AC of Central Excise Act, 1944. Unlike Section 80 of Finance Act, 1994 in respect of service tax matter, there is no pari-materia section in the Central Excise Act, 1944. In the case of service tax matter, there is special provision provided under Section 80 despite the provision under Section 78 which is parallel to Section 11AC, therefore, judgments on the issue of Section 11AC cannot be applied in the matter of service tax where the immunity to the assessee is provided under Section 80, therefore, these judgments are clearly distinguished. In the present case, the appellant have recorded the transaction in their books but could not pay the service tax due to financial crisis. It is also fact that the appellant had paid the majority of amount after pointing out non payment of service tax. Considering this fact, we are of the view that the appellant have made out a case for waiver of penalty imposed under Section 78 invoking Section 80 of the Finance Act, 1994. Therefore, despite the extended period of demand is invoked, the penalty imposed under Section 78 is though sustainable otherwise, but in the facts and circumstances of the case, there is reason to invoke section 80 as discussed above. Accordingly, we set aside the penalty imposed under Section 78. Further, we also find that demand of Rs. 7,07,616/- has been confirmed which was not even proposed in show cause notice which is not sustainable being beyond the scope of show cause notice, the same is therefore set aside.

6. In view of our above observations, the impugned order is modified to the above extent. The appeal is partly allowed.

(Pronounced in the open court on 21.06.2019)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)