CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
<u>ALLAHABAD</u>

REGIONAL BENCH - COURT NO.I

Service Tax Appeal No.70057 of 2020

(Arising out of Order-In-Appeal No.NOI-EXCUS-001-APP-1091-19-20 dated 11/11/2019 passed by Commissioner (Appeals) CGST, Noida)

M/s Priya Chhatwal .....**Appellant**
(C-7, Green Park Extension
New Delhi-110016)

VERSUS

Commissioner of Central Taxes, Noida ....**Respondent**
(4th Floor, C-56/42, Renu Tower
Sector-62, Noida)

<u>APPEARANCE:</u>

Absent on call for the Appellant
Shri A. K. Choudhary, Authorized Representative for the Respondent

CORAM: HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO.-70138/2024

DATE OF HEARING : 06.03.2024
DATE OF DECISION : 06.03.2024

<u>SANJIV SRIVASTAVA:</u>

The present case is in relation to the personal penalty imposed on the appellant in terms of Section 78A of the Finance Act, 1994. The Original Authority vide Order-In-Original imposed a penalty of Rs.5 lakhs on the appellant which by the provisions of Section 78 has been reduced to Rs.1 lakhs by Commissioner (Appeals). Matter has been listed in the past on 18.08.2023, 22.09.2023 and then thereafter today.

1.2 In terms of the proviso to Section **35 C (1A) providing as under** the matter cannot be adjourned further and hence taken up for consideration after hearing the learned Authorized Representative in the matter as the appellant has not been appearing neither making any communication with the Bench.

2.1 The issue is in a very narrow compass. The appellant is one of the partners in a partnership firm M/s Health Sanctuary, Noida. Additional Commissioner while confirming the demand of Rs.55,01,364/- against the partnership firm has imposed penalty on the appellant:-

> "xi. I also made responsible Ms. Shubhi Kamal, C-1/529, Palam Vihar, Gurgaon, Haryana-122017/J5-1, DLF Phase-2, Gurgaon-122001; Ms. Priya Chhatwal, C-7, Green Park Extension, New Delhi-110016, partners of M/s Health Sanctuary, Noida (a partnership firm) jointly and severally for payment of aforesaid adjudged dues and I also impose personal penalty amounting to Rs. 5,00,000/- on each of Ms. Shubhi Kamal, Ms. Priya Chhatwal and Mr. Dev Sharma, in terms of Section 78A of Finance Act, 1994."

2.2 Appellant had filed an appeal before the Commissioner (Appeals) Central goods and Service Tax, Noida, who reduced the penalty to Rs.1,00,000/- taking note of Section 78A of the Act.

3.1 I have considered the impugned order along with the submissions made in appeal and during the course of argument by the learned authorized representative.

3.2 In the impugned order following observations have been made for imposition of penalties under Section 78A:

> *"5.4 So far as the penalty upon the partners of the firm are concerned, it is abundantly clear from the above discussions and the explanation appended to Section 9AA that wherever reference of Company has been given the firm is also to be dealt with in the same manner as any company and similarly partners of the firm are to be dealt as directors of company by virtue of the said explanation. The firm's partners can be held liable for the mischief committed during the course of business in the name of the firm who are incharge and are responsible for conduct of business in the name of the firm who are incharge and are responsible for conduct of the business of the company. In view of the above reasons, the firm's partners who are responsible for the conduct of the business and were responsible and incharge at the relevant time can be personally held liable.*
> *5.5 Now I proceed to the second issue. I find that it is the admitted fact that in STI application dated 01.09.2012 filed with the department, in the ownership details, Ms Shubhi Kamal and Ms Priya Chhatwal have been shown as two partners of M/s Health Sanctuary Noida, the main noticee.*

> *Again as per ITR 5 with the Income Tax Authorities for the financial year 2013-14(A.Y 14-15), Ms Priya Chhatwal and Ms Shubhi Kamal were two partners of the firm (main noticee). I find that the declarations given to the government authorities are in itself a concrete evidence which prove that Ms Priya Chhatwal is the partner of the main noticee. The appellant has Contended that there was supplementary agreement dated 31.03.2012 that all the liabilities regarding taxes and penalties are sole responsibility of Orb Health Sanctuary. I find that the name of Ms Priya Chhatwal, as a partner of the Main noticee, have been mentioned in the documents submitted by them to different government authorities (Income Tax/ Service Tax) etc., then the appellant cannot escape from her responsibility from the government dues against the said firm by virtue of some mutual agreement without informing the department within time about the said agreements. I agree with the findings of the adjudicating authority that it is nothing but an afterthought, an attempt to escape responsibility. The appellant has further submitted that M/s New Spice Wellness and M/s Health Sanctuary(main noticee) have signed an Indemnity bond on 14.12.2017, by which New Spice had been indemnified of liability of Service tax. I find that the said bond was made in December 2017 i.e. after issuance of instant Show Cause Notice on 14.11.2017, wherein the proposal of personal penalty on the appellant after investigation was already done by the department. Therefore the indemnity bond is also another attempt to escape the responsibility which came to the knowledge of the appellant once SCN was issued to her."*

From the perusal of the above para the Commissioner (Appeals) has held that the appellant was one of the partner of the main notice.

3.3 Original authority has observed as follows:

> *"Further Ms. Shubhi Kamal, C-1/529, Palam Vihar, Gurgaon, Haryana-122017/ J5-1, DLF Phase-2, Gurgaon-122001; Ms. Priya Chhatwal, C-7, Green Park Extension, New Delhi-1100 16 (Both partners of M/s Health Sanctuary, Noida (a partnership firm) gs per the ITR-5 of the financial year 20 13-14 (A.Y. 20 14-15) and Mr. Dev Sharma Authorized Signatory of M/s. Health Sanctuary Noida, H.No. 33, Khasra No. 99, Dabri Village, New Delhi-110045 are responsible, for such short payment and evasion of Service Tax in as much as they are instrument in suppressing, the gross income of the company in the financial records of the company e.g., Balance sheet & Profit & Loss account which they have*

> *finalized and submitted to the various departments with their signatures, non issuance of invoices for providing taxable services, suppressing and miss-declaration of taxable value in the ST-3 returns, failed to make proper assessment etc. knowingly and willfully-to evade payment of service tax. Thus, they are also liable to penalty in terms of Section 78A of Finance Act, 1994 as amended being responsible for all omissions. and commissions: as. discussed in.the. preceding paras.*
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> *It is very well establishes that the party has neither co-operated in investigation and deliberately. and intentionally not submitted required documents/ records (to be maintain and furnish as provided in Rule 5 of the Service Tax Rules, 1994), nor they fled their defence reply nor attended the personal hearings*
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> ***From the above facts, it has been established that the Mr. R.H. Chaudhary and Ms. Shubi Kamal is running business under name & style "HEALTH SANCTUARY" at different places in Delhi & NCR and neither disclosing their true & correct revenue to any authority and nor paying the tax as applicable.*** *Ms Priya Chattwal's defense submission is nothing but an after-thought and an attempt to escape the responsibility. When they have filed ST I in their name as to why she did not inform the department about supplementary deed entered by her."*

From the findings as recorded above it is evident that no case has been made against the appellant to have been actively involved in running of the business in anime and style "Health Sanctuary". On the contrary it has been held that Mr R H Chaudhary and Ms Shubhi Kamal were running the business. No specific finding has been recorded against the appellant.

3.4 The section 78A of the Finance Act, 1994 reads as follows:

SECTION 78A. Penalty for offences by director, etc., of company — *Where a company has committed any of the following contraventions, namely :—*

(a) evasion of service tax; or

(b) issuance of invoice, bill or, as the case may be, a challan without provision of taxable service in violation of the rules made under the provisions of this Chapter; or

(c) availment and utilisation of credit of taxes or duty without actual receipt of taxable service or excisable goods either fully or partially in violation of the rules made under the provisions of this Chapter; or

(d) failure to pay any amount collected as service tax to the credit of the Central Government beyond a period of six months from the date on which such payment becomes due,

then any director, manager, secretary or other officer of such company, who at the time of such contravention was in charge of, and was responsible to, the company for the conduct of business of such company and was knowingly concerned with such contravention, shall be liable to a penalty which may extend to one lakh rupees.

> ***"Explanation****––For the removal of doubts, it is hereby clarified that where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, and the proceedings with respect to a notice issued under sub-section (1) of section 73 or the proviso to sub-section (1) of section 73 is concluded in accordance with the provisions of clause (i) of the first proviso to section 76 or clause (i) of the second proviso to section 78, as the case may be, the proceedings pending against any person under this section shall also be deemed to have been concluded."*

3.5 From the perusal of the above section it is evident that penalty under this section can be imposed only on a person who at the time of such contravention was in charge of, and was responsible to, the company for the conduct of business of such company and was knowingly concerned with such contravention. Original authority has instead brushed aside the submissions made by the appellant on the basis of supplementary agreement, as afterthought, without examining the same. In absence of any finding to the effect that appellant was responsible for the conduct of business of the firm at the time of contravention, I do not find any merits in the orders of lower authorities imposing penalty on the appellant under Section 78A.

3.6 In case of **Manjeet Kaur Bansal [2022 (56) G.S.T.L. 295 (Tri. - Del.)]** Delhi bench has held as follows:

> ***"8.*** *The perusal thereof makes it abundantly clear that the penalty under these Sections can be imposed, if and only if, there has been an evasion of tax that too with utmost intent to not to pay the said tax. Reverting to the facts of the present case, the period of demand is from April, 2013 to June, 2017. The appellant was appointed as Director on 1st December, 2016. This apparent fact is sufficient to falsify any involvement as that of intent/knowledge of the appellant being the Director about tax evasion by the appellant for the period from April, 2013 to November, 2016. For the remaining period, no doubt, there is an admission of the appellant that the impugned demand was not paid at the relevant time, but the admission is rather more in the form of acknowledgement that the non-payment was due to unavoidable circumstances as that of grave medical illness of the spouse of the appellant who finally succumbed to that illness on 24th June, 2017. This fact has been brought to the notice of the Department since the time the Show Cause Notice has been issued but the same has not at all been considered by the Adjudicating Authority below.*
>
> ***9.*** *The authority has miserably failed to distinguish the non-payment of tax for the reasons beyond the control of the assessee from the situation where the assessee has failed to deposit tax with the sole intention to not to deposit the same. Section 78/78A can be attracted only in the later situation. I observe that there are ample medial documents on the record of this appeal. Perusal whereof reveals that the spouse of the appellant was diagnosed a brain lesion way back in the year 2005 when he was for the first time operated. The surgical interventions were repeated as it was again in 2008, 2014 and lately in 2017 thereafter he even went into Coma and finally passed away. This situation definitely was one of the gravest situations for the present appellant to actually to not be fully aware about the day-to-day affairs of the Company. There is sufficient admission of Amar Sigh Gautam that he was looking after the financial affairs of the Company. The financial statements in the form of balance-sheets, tax returns etc. as placed on record bear his signature as the person authorized for the Company. None of those documents bear the signature of the appellant. Department has not produced any such documents for a subsequent period where the appellant would have been a signatory to such returns. Mere oral submission of Mr. Amar Singh Gautam that he was acting under the guidance of the appellant cannot be fully sufficient*

for holding at least that the appellant had the knowledge and the intent to not to make the impugned payment.

10. *From the order of Hon'ble High Court of Rajasthan while granting her Bail also it is apparent that out of the total demand Rs. 1.12 Crore was deposited at the initial stage of proceedings itself. As already submitted by Learned Counsel for the appellant Rs. 97 Lakhs were deposited even before the issuance of Show Cause Notice. These apparent admitted facts are sufficient to falsify any mala fide intent with the appellant to avoid or to not to discharge here tax liability. This observation is sufficient for me to hold that at least Section 78A cannot be invoked against the appellant. The penalty confirmed thereunder is accordingly, held to be not sustainable. I draw my support from the decision of Apex Court in the case of Hindustan Steel Ltd. v. State of Orissa reported in 1978 (2) E.L.T. J159 (S.C.) wherein it was held that penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. Further, we find that in the SCN, it has not been established that these individuals have acted in contumacious manner so as to impose penalty. In another case titled as Continental Foundation Joint Venture v. CCE, Chandigarh [2007 (216) E.L.T. 177 (S.C.)] - Hon'ble Apex Court held that omission by a party to do what he might have done would not render it suppression. As far as fraud and collusion are concerned, it is evident that the intent to evade duty is build into these words. So far as the misstatement or suppression is concerned, they are clearly qualified by the word 'wilful' preceding the words "mis-statement or suppression of facts" which again means intent to evade duty. Apparently, there is no deliberate intent on part of appellant to not to pay the duty."*

3.7 I do not find any merits in the impugned order which is set aside.

4.1 Appeal is allowed.

(Dictated and pronounced in open court)

(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

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