CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD

REGIONAL BENCH – COURT NO.I

Service Tax Appeal No.71086 of 2018

(Arising out of Order-in-Appeal No.193/Commr.(Audit)/ST/Appl./KNP/2018 dated 23/03/2018 passed by Commissioner (Audit), , Central Tax & Central Excise, Kanpur)

M/s Jai Jagdamba Malleable (P) Ltd. .....Appellant

Bijoli Industrial Area,

Jhansi-284135

VERSUS

Commissioner of Central Excise & Service Tax, Kanpur

.....Respondent

APPEARANCE:

Shri Vaibhav Dixit, Advocate for Appellant
Shri Mohd. Altaf, Authorized Representative for Respondent

CORAM :
Hon'ble Mrs. ARCHANA WADHWA, MEMBER (JUDICIAL)

DATE OF HEARING : 13 March, 2019
DATE OF PRONOUNCEMENT : 24 May, 2019

FINAL ORDER NO. **71052 / 2019**

ARCHANA WADHWA

The challenge in the present appeal is only to imposition of penalty of Rs.16,23,280/- under Section 78 of the Act and of Rs.10,000/- each in terms of Section 77(1)(a) and 77(2) of the Act.

2. After hearing both the sides duly represented by learned advocate Shri Vaibhav Dixit appearing on behalf of the appellant and learned AR, Shri Mohammad Altaf appearing on behalf of the Revenue, I find that the

appellants were providing services to their clients by way of marketing and promoting their products which service falls under the taxable category of 'Business Auxiliary Service'. The audit conducted in the appellant's factory revealed that the appellant were not paying service tax on the commission earned by them. As a result, on such detection, appellant deposited the entire service tax of Rs.16,23,280/- on 28 December, 2012.

3. Thereafter the show cause notice was issued to them on 05 September, 2013 proposing to confirm the above demand along with interest and with imposition of penalties. The same resulted in passing of the order by the Adjudicating Authority confirming the demand and imposing penalty which order stands confirmed by Commissioner (Appeals).

4. Learned advocate appearing for the appellant is not contesting the demand. However, he submits that inasmuch as the same were deposited before the issuance of show cause notice even though the interest was deposited subsequent to passing of the order, no show cause notice should have been issued to the appellant in terms of Section 73(3) of the Finance Act. Accordingly, prayer is to set aside the penalty.

5. On the other hand the Lower Authorities have observed that the appellant was providing services under an agreement with their clients wherein apart from receiving the consideration for the services, service tax amount was also being collected by them. The Lower Authorities have observed that appellant have collected service tax of Rs.16,23,280/- from their clients and have not paid the same to the government exchequer. It is only

their audit the said fact was detected thus compelling the appellant to deposit the same with the Revenue. In such a scenario the provision of Section 73(3) would not be applicable.

6. I find that the appellant has not disputed the fact that they were collecting service tax from their client but were not crediting the same to the Central Government. The said fact came into light only when the audit was conducted in the assessee factory. It is only after detection, the appellant deposited the service tax. It is also on record that the interest on the said service tax was not paid by the appellant till the disposal of the appeal before Commissioner (Appeals).

7. I have considered the provision of Sub Section 3 of Section 73 of the Finance Act, which are to the effect that wherein service tax has not been levied or paid, the person on the basis of his own ascertainment or on the basis of tax ascertained by Central Excise officers before servicing the notice pays the same and inform his jurisdictional Central Excise Authority, no show cause notice is required to be issued to him. However, the exception stands carved out by way of Sub Section 4 of Section 73 of the Act. Sub-Section 4 of the said section is to the effect that nothing contained in sub-section (3) shall apply to a case where service tax has not been levied or stand short levied or short paid by reason of fraud, collusion, willful misstatement, suppression of facts or contravention of any provisions with intent to evade payment of service tax.

As such the issue to be decided in the present appeal is as to whether it is a simple case of non-payment of service tax, which might have occurred on account of any bona fide belief entertained by the assessee. Admittedly the appellant was collecting the service tax from their clients. However, instead of depositing the same with the exchequer, they were pocketing the said service tax amount so collected by him. This fact clearly reflects upon the mala fide of the appellant. It is a fraud committed on the exchequer and the provisions of Section 73(3), which are applicable only to an innocent assessee, would not apply in the present case. As such, I find no reasons to set aside the penalties imposed upon the appellant.

8. In view of the above, the impugned order is uphold and appeal is rejected.

(Order Pronounced in the open Court on 24 May, 2019)

Sd/-
(Archana Wadhwa)
Member (Judicial)

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