CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD

REGIONAL BENCH - COURT No. I

Service Tax Appeal No.55881 of 2014

(Arising out of Order-in-Appeal No.NOI/EXCUS/000/APPL/141/14 dated 24/07/2014 passed by Commissioner (Appeals), Customs & Central Excise, Noida)

M/s Pheonix Lamps Ltd. **.....Appellant**

(Earlier Known as M/s Halonix Ltd.)

59-D, NESZ, Phase-II

Noida (U.P.)

VERSUS

Commissioner of Central Excise, **....Respondent**

C-56/42, Sector-62,

Noida

WITH

Service Tax Appeal No.55879 of 2014

(Arising out of Order-in-Appeal No.NOI/EXCUS/000/APPL/139/14 dated 24/07/2014 passed by Commissioner (Appeals), Customs & Central Excise, Noida)

M/s Pheonix Lamps Ltd. **.....Appellant**

(Earlier Known as M/s Halonix Ltd.)

A-1, Phase-II

Noida (U.P.)

VERSUS

Commissioner of Central Excise, **....Respondent**

C-56/42, Sector-62,

Noida

AND

Service Tax Appeal No.55880 of 2014

(Arising out of Order-in-Appeal No.NOI/EXCUS/000/APPL/140/14 dated 24/07/2014 passed by Commissioner (Appeals), Customs & Central Excise, Noida)

M/s Pheonix Lamps Ltd. **.....Appellant**

(Earlier Known as M/s Halonix Ltd.)

59-A, NESZ, Phase-II

Noida (U.P.)

VERSUS

Commissioner of Central Excise, ...Respondent

C-56/42, Sector-62,

Noida

APPEARANCE:

Shri Atul Gupta for the Appellant
Shri Gyanendra Kumar Tripathi, Authorised Representative for the Respondent

CORAM: HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. ANIL G. SHAKKARWAR, MEMBER (TECHNICAL)

FINAL ORDER NOS.71437-71439/2019

DATE OF HEARING :19 July, 2019
DATE OF DECISION :19 July, 2019

PER: JUSTICE DILIP GUPTA

These three Service Tax Appeals seek to assail the three orders dated 24 July, 2014 passed by the Commissioner (Appeals) upholding the three Orders-In-Original dated 7 February, 2014. The orders dated 7 February, 2014 seek to confirm the demand of service tax and also impose penalty. The Commissioner (Appeals) dismissed the three Appeals that had been filed by M/s Pheonix Lamps Ltd. (the appellant) to assail the aforesaid orders dated 7 February, 2014.

2. M/s Pheonix Lamps Ltd. (earlier known as M/s Halonix Ltd.) is situated in Noida and has a Central Excise Registration. It is engaged in the manufacture of Electrical Lamps. Two units are situated in SEZ, while one unit is situated outside SEZ. A team of officers of the Anti-Evasion Unit of Customs, Central Excise & Service Tax, Commissionerate visited the premises of the appellant on 8 December, 2010 and noticed that the appellant was liable to pay service tax on 'Selling Commission'

services provided in relation to export of goods to foreign agents in foreign currency under reverse charge mechanism as provided for in Section 66 of the Finance Act, 1994 (hereinafter referred to as the Act). The appellant, however, informed the team of Officers that it was not liable to pay service tax in view of the exemption granted under Section 26 of the Special Economic Zone Act, 2005 (hereinafter referred to as 2005 Act). The period of dispute is from 3 March, 2009 to 31 March 2011. However, as the Department had raised this issue, the appellant states that it deposited Service Tax to the extent of Rs.10,26,947/- and interest to the extent of Rs.1,28,857/- . This fact was informed the Department by letters dated 31 March, 2011.

3. The appellant thereafter claimed refund of the aforesaid amount in terms of the Notification No.9/2009 dated 3 March, 2009 and Notification No. 17/2011 dated 1 March, 2011. These Notifications provide for exemption from payment of service tax on specified services received from the authorized operation in SEZ by way of refund. The refund claims were also sanctioned by Orders dated 31 January, 2012 and 13 February, 2012 and full and final settlement of the claims were made through two cheques dated 31 January, 2012 and 13 February, 2012.

4. Subsequently a demand-cum-show cause notice dated 18 January, 2013 was issued to M/s Pheonix Lamps Ltd.,A-1, Phase-II, Noida (U.P.), M/s Pheonix Lamps Ltd., 59-A, NSEZ, Phase-II, Noida (U.P.) and M/s Pheonix Lamps Ltd., 59-D, NSEZ, Phase-II, Noida (U.P.). The notices mentioned that under Section 66A of the Act, a liability was cast on the service recipient to pay service tax on 'selling commission' paid by them to the foreign commission agents in foreign currency under a reverse charge mechanism. The appellant had provided details for remittance of 'selling commission' for the period March 2009 to March 2011 and on pointing out by the Department also deposited the service tax on 31 March, 2011 plus interest. Thus, during the period from 3 March, 2009 (the date on which the Notification

No.9/2009 was issued) to March, 2011, the appellant paid an amount of Rs.99,70,427/- towards 'selling commission' for export of goods to foreign commission agent in foreign currency, but with an intention to evade service tax, did not pay service tax amounting to Rs.10,26,954/- on the aforesaid amount under the reverse charge mechanism. This fact came to the notice of the Department only when an investigation was conducted. A notice was, therefore, issued to all the three units requiring them to show cause as to why :-

"(a) Service Tax amounting to Rs. 10,26,954/- (Rs. Ten Lac Twenty Six Thousand Nine Hundred Fifty Four only) [Rs. 4,40,219/- relating to unit at 59(A) NSEZ Phase-II Noida + Rs. 5,86,735/- relating to unit at 59 (D) NSEZ Phase-II Noida] including Primary and Secondary and Higher Education Cess not paid by them during the period March 2009 to March 2011, should not be demanded and recovered from them under proviso to Sub Section (1) of Section 73 of the Finance Act, 1994 and an amount of Service Tax Rs. 10,26,947/- (Rs. Ten Lac Twenty Six Thousand Nine Hundred Forty Seven only) deposited by them during the course of investigation should not be appropriated against the said liability.

(b) Appropriate interest on the amounts of Service Tax, as per para (a) above, should not be charged and recovered from them under Section 75 of the Finance Act, 1994 and the amount of interest of Rs. 1,28,857/- (Rs. One Lac Twenty Eight Thousand Eight Hundred Fifty Seven only) deposited by them during the course of investigation should not be appropriated against the said liability.

(c) Penalty should not be imposed upon them under Section 78 of the Finance Act, 1994."

5. The appellant submitted a detailed reply dated 27 February, 2013 to the aforesaid show cause notice dated 18 January, 2013 and denied the allegations contained in the show cause notice. It was stated that though the appellant had

deposited the entire amount of service tax as also interest and informed the Department but still it was served with a show cause notice which would be contrary to the provisions of Section 73(3) of the Act. The appellant also pointed out that there was no suppression of facts with an intention to evade payment of service tax since prior to 3 March, 2009, when Notification No.9/2009 was issued, the appellant was entitled to full exemption from payment of service tax under Section 26 of the 2005 Act. It was also pointed out that it was only by way of the aforesaid Notification dated 3 March, 2009 that exemption was provided from payment of service tax by way of refund and the appellant acquired knowledge of this Notification only when the Department corresponded. It also pointed out that the 'selling commission' amount in foreign exchange was paid through banking channel and was duly reflected in the books of account and in the balance sheet and it was not even the case of the Department that this amount was clandestinely removed without disclosing it in the books of account.

6. The reply submitted by the appellant did not find favour of the Original Authority and three similar separate orders each dated 7 February, 2014 were passed confirming the demand of service tax. The order is reproduced below :

> "(a) I hereby confirm the demand, of Service Tax amounting to Rs. 10,26,954/- (Rs. Ten Lac Twenty Six Thousand Nine Hundred Fifty Four only) [Rs. 4,40,219/- relating to unit at 59(A) NSEZ Phase-II Noida + Rs. 5,86,735/- relating to unit at 59(D) NSEZ Phase-II Noida] including Primary and Secondary and Higher Education Cess not paid by them during the period March 2009 to March 2011, under Sub Section (2) of Section 73 of the Finance Act, 1994. However the said amount of Service Tax Rs. 10,26,947/- (Rs. Ten Lac Twenty Six Thousand Nine Hundred Forty Seven only) has been appropriated since deposited by them during the course of investigation (As already reported in the SCN).
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> (b) I confirm the demand of Rs. 1,28,857/- of account of interest on the amounts of Service Tax, as per para (a) above, under Section 75 of the Finance Act, 1994. However the amount of interest of Rs. 1,28,857/- (Rs. One Lac Twenty Eight Thousand Eight Hundred Fifty Seven only) has been appropriated since deposited by the party during the course of investiagion (As proposed in the SCN).

> (c) I imposed the penalty of Rs 10,26,954/- (Rs. Ten Lac Twenty Six Thousand Nine Hundred Fifty Four only) [Rs. 4,40,219/- relating to unit at 59(A) NSEZ Phase-II Noida + Rs. 5,86,735/- relating to unit at 59(D) NSEZ Phase-II Noida] including Primary and Secondary and Higher Education Cess, under Section 78 of the Finance Act, 1994."

7. The Adjudicating Authority, while dealing with suppression of information, noticed the case of the appellant regarding the provisions of Section 26 of the 2005 Act and the Notification dated 3 March, 2009 but observed that since the appellant was a registered service tax assessee, it was expected to be aware of the service tax laws and ignorance of law cannot be made an excuse. It is only on this basis that the Adjudicating Authority framed an opinion that appellant had not paid service tax under the reverse charge mechanism with an intention to evade payment of service tax.

8. There separate appeals were filed by the appellant to assail the order dated 14 February, 2014. As stated above all the three appeals were dismissed by the Commissioner (Appeals) by three separate identical orders, each dated 24 July, 2014. The pleas of the appellant regarding Section 73(3) of the Act and that there was no suppression of facts with intention to evade service tax, were rejected.

9. In regard to the suppression of facts, the Commissioner (Appeals) observed as follows:-

> "**4.4** I agree with the arguments of the adjudicating authority. If the intentions of the appellant were honourable, they would not have taken a year to deposit the service tax due. The pleas of the appellant regarding the applicability of explanation 2 of section 73(3) of the act, cannot be accepted as I agree with view point of the adjudicating authority that the appellant had malafied intentions. It is not a case of ignorance of law, but a deliberate well thought act of evasion. Therefore the decision of the adjudicating authority on this point is just and proper.
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> **4.5** The appellant has pleaded that they were not aware of introduction of the notification no. 09/2009-ST dated 03/03/2009, which provided the exemption from payment of service tax by way of refund and that they became aware of such law only after the correspondence with the department. I find this argument unbelievable. The appellant are well

established listed company and are in this business since long. With such large business interest, these type of companies have to abide by several laws hence either a consulting firm is engaged on full time basis to look after the taxation and legal issues or a legal department is crested within the company to look after such type of matters.

Therefore as per the apex court in case of intentional evasion of tax, mere payment of duty and interest will not absolve the erring party of its misdemeanours. I am of the opinion that the appellant has deliberately delayed the payment of service tax with malafide intentions. Therefore the case law of Hindustan Steels Limited Vs State of Orissa (1978 ELT (159)) id not applicable. Hence the penalty imposed under section 78 of the act is proper.

4.6 The notification no. 09/2009-ST dated 03/03/2009 provided for the exemption from the payment of service tax by way of refund, hence the act of revenue of sanctioning the refund will not absolve the appellant from its act of intentional service tax evasion. As regards the applicability of the case law of Hindustan Steels Limited Vs State of Orissa 1978 ELT 159, the said case law has also stated that "penalty will not be imposed unless the party obliged either acted in defiance of law and was guilty of conduct contumacious or dishonest or acted in conscious disregard of its obligations". I have already discussed in the foregoing paras regarding culpability state of the appellant. Thus the argument adopted by the appellant is one of convenience and has no legal basis and therefore merits to be rejected out rightly."

10. Shri Atul Gupta learned counsel for the appellant submitted:-

(i) That there was no suppression of facts, much less suppression with an intention to evade payment of service tax as not only was the payment reflected in the books of account but even service tax was paid by the appellant when the Department brought to the notice of the appellant that in terms of Notification dated 3 March, 2009 exemption from payment of Service Tax was by way of refund. Elaborating this submission learned counsel pointed out that prior to the issuance of the Notification dated 3 March, 2009, the payment of service tax was exempted under Section 26 of 2005 Act;

(ii). That the Commissioner (Appeals) completely failed to appreciate the aforesaid submissions made by the appellant and thereby committed an illegality; and

(iii) That even otherwise, as the appellant had deposited the entire amount of service tax with interest prior to the issuance of show cause notice, the Department could not have issued a show cause notice in view of the provisions of Section 73(3) of the Act.

11. Learned Authorized Representative of the Department, however, supported the impugned orders and submitted that they do not call for any interference in this appeal.

12. We have considered the submissions made by the learned counsel for the appellant as also the Authorized Representative for the Department.

13. The appellant is engaged in the manufacture, sale and distribution of Halogen Lamps and other lighting product in India and abroad and has two units located in SEZ. Section 26 of the 2005 Act provides that subject to the provisions of sub section (2), builders, developers and entrepreneurs shall be entitled to certain exemption and one of them is exemption from payment of service tax under Chapter (V) of the Act on taxable services provided to developers or units who carry out authorized operation in SEZ. The contention of the appellant is that in view of the provisions of Section 26 of the 2005 Act, it was not liable to pay any service tax on the 'selling commission' paid by the appellant on the authorized operation carried out in these SEZ. It is true that the exemption was granted under Section 26(1) (e) of the 2005 Act, subject to the provisions of sub section (2) and Notification dated 3 March, 2009 provided that the exemption from payment of Service Tax shall be by way of refund. Thus, it was obligatory on the part of the appellant to have deposited the service tax on reverse charge mechanism and then claimed refund. This was not done and it is only when the Department pointed out this fact to the appellant when it visited the offices of the appellant, that the appellant immediately deposited the amount of service tax as also interest and thereafter claimed refund. This refund was granted to appellant by orders dated 31

January, 2012 and 13 February, 2012 and the amount was also paid to the appellant. These refund orders, as pointed out by the learned counsel for the appellant have attained finality. The refunds were granted since taxable services were provided by the appellant to carry out authorized operation in SEZ.

14. The Department, however, issued a demand-cum-show cause notice dated 18 January, 2013 under Section 73(1) of the Act. The extended period of limitation contemplated under the proviso to 73(1) of the Act was also invoked. According to the Department the appellant had suppressed facts with an intention to evade payment of service tax. The appellant had submitted a detailed reply to the show cause notice pointing out that the appellant had for bona fide reasons not deposited the service tax and in any case when the Department brought to the notice of the appellant the Notification dated 3 March, 2009, the appellant deposited the entire service tax as also interest.

15. The contention of the appellant has to be examined keeping in mind the provisions of Section 26 of the 2005 Act. This section provides exemption from payment of service tax subject to the conditions laid down in sub section (2). It is in terms of sub section (2) of Section 26 of the Act that the Notification dated 3 March, 2009 and the subsequent Notification dated 1 March, 2011 superseding the earlier Notification were issued. The amount paid by the appellant towards the 'Selling Commission' were through banks and was reflected in its books of account. It cannot, therefore, be said that this amount was paid in a clandestine manner. The moment the Department brought to the notice of the appellant, the Notification dated 3 March, 2009 under which it was required to pay service tax under a reverse charge mechanism but could claim refund subsequently, the appellant deposited the entire amount as also the interest. It, however, claimed refund as provided for in the said notification and refunds were ultimately sanctioned and paid. The Commissioner (Appeals) has not accepted this

submission of the appellant merely for the reason that ignorance of law is not an excuse, since the Notification dated 3 March, 2009 required payment of service tax but could thereafter be claimed at by way of refund.

16. The appellant cannot be said to have had any intention to evade payment of service tax, more particularly when the Notification dated 3 March, 2009 enabled the appellant to claim refund of any service tax paid by it in its entirety. It is plausible that the appellant may not have paid service tax because of ignorance of the Notification dated 3 March, 2009. The subsequent Notification dated 1 March, 2011, which superseded earlier Notification dated 3 March, 2009, is in similar terms and it also provides for exemption of payment of service tax by way of refund. It is true that ignorance of law is no excuse, but at the same time nonpayment has to be with an intention to evade payment of service tax. The reasoning given by the Commissioner (Appeals), therefore, cannot be accepted.

17. The requirement that suppression has to be with an intent to evade payment of Service Tax has been emphasized by the Delhi High Court in **Bharat Hotels Ltd. V/s Commissioner of Central Excise (Adjudication)** reported in **2018 (12) G.S.T.L. 368 (Del.).**

18. The orders imposing penalty for the reason that the appellant had not deposited the Service Tax cannot, therefore be sustained. They are, accordingly, set aside and the appeals are allowed.

(Dictated and pronounced in open court)

Sd/-
(JUSTICE DILIP GUPTA)
PRESIDENT

Sd/-
(ANIL G. SHAKKARWAR)
MEMBER (TECHNICAL)

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