CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH
BANGALORE

Appeal(s) Involved:

ST/22018/2018-SM

[Arising out of Order-in-Appeal No. MLR-EXCUS-000-APP-MSC-143-2018-19 dated 10/09/2018 passed by Commissioner of Central Tax , BELGAUM (APPEALS)]

Mandovi Motors Pvt Ltd
Arvind Building Balmatta Road Hampankatta
MANGALORE - 575001
KARNATAKA

Appellant(s)

Versus

Commissioner Of Central Excise & Central Tax, Mangalore Commissionerate
7th Floor, Trade Center, Bunts Hostel Road
Mangalore - 575003
Karnataka

Respondent(s)

Appearance:

Shri Rajesh Kumar, CA
HIRAGANGE & ASSOCIATES
#1010, 1st floor(Above Corp.Bank) 26th Main, 4th T Block, Jayanagar, Bangalore
Bangalore - 560041
Karnataka

For the Appellant

Shri K. Murali, Superintendent(AR)

For the Respondent

Date of Hearing: 28/02/2019
Date of Decision: 28/02/2019

CORAM:
HON'BLE MR. S.S GARG, JUDICIAL MEMBER

Final Order No. 20230 / 2019

Per : S.S GARG

The present appeal is directed against the impugned order dt. 10/09/2018 passed by the Commissioner(Appeals) whereby the Commissioner(Appeals) has rejected the appeal of the appellant.

2. Briefly the facts of the present case are that the appellants are engaged in providing services under the category of ‘Maintenance or Repair service’, ‘Business Auxiliary Services’, ‘Commercial Training Services’. During the scrutiny of the records of the appellant, it was observed that the appellant has short paid the service tax of Rs.17,48,317/- for the period January 2015 to March 2016. Therefore a show-cause notice dt/ 29/06/2017 was issued to the appellant demanding therein service tax of Rs.17,48,317/- along with interest and also proposed imposition of penalty. Assistant Commissioner vide order dt. 17/02/2018 confirmed the demand of CENVAT credit of Rs.17,48,317/- along with interest and imposed a penalty of Rs.13,32,182/- under Section 78. Further tax paid by the appellant amounting to Rs.17,48,317/- and interest paid of Rs.4,40,533/- were appropriated. Aggrieved by the said order, appellant filed appeal before the Commissioner(Appeals) who rejected the same.

3. Heard both sides and perused records.

4. Learned consultant appearing for the appellant submitted that the impugned order is not sustainable in law as the same has been passed without properly appreciating the facts and the law. He further submitted that the appellant has been regularly paying service tax and also filing ST3 returns in time. During February and March 2017, audit was conducted by the Department wherein it was alleged that the appellant has short

declared the turn over and accordingly short paid the service tax for the period January 2015 to March 2016 to the tune of Rs.17,48,317/-. He further submitted that though the appellant had confusion regarding the taxability of many elements like incidental charges, insurance commission and was of the view that the same is not liable to service tax. He further submitted that though there was a confusion, but without going into the reconciliation aspect , the appellant decided to pay the service tax along with interest and accordingly paid entire service tax of Rs.17,48,317/- and interest of Rs.4,40,553/- on 28/03/2017 i.e. before the issuance of show-cause notice which was issued on 29/06/2017. He further submitted that once the entire service tax along with interest has been paid before issue of show-cause notice, then the show-cause notice should not have been issued. For this submission, he relied upon the following decisions:-

i. Adecco Flexione Workforce Solution Ltd. [2012(26) STR 3 (Kar.)]
ii. CST Vs. Master Kleen [2012(25) STR 439 (Kar.)]
iii. Tejas Agency Vs. CCE&ST, Bhavnagar [2013-TIOL-1596-CESTAT-AHM]
iv. Bhoruka aluminium Ltd. Vs. CCE&ST, Mysore [2017(51) STR 418 (Tri. Bang.)]

5. On the other hand, the learned AR defended the impugned order and submitted that it is a case of short payment of service tax which was detected during the audit and thereafter the appellant paid the service tax along with interest; therefore the appellants are liable to penalty under Section 78.

6. After hearing both sides and perusal of provisions of Sections 73, 76 and 78 of the Finance Act, 1994, I find that once the appellant had paid the service tax before the issue of show-cause notice along with interest and there is no fraud, willful misstatement or suppression of facts with intent to evade tax, then he is not liable to pay any penalty. The Tribunal, in its order in the case of Bhoruka Aluminium Ltd. (supra) in para 7, has observed as under:-

> ***7.****After considering the submissions by both the parties and perusal of the provisions of Sections 73, 76 and 78 of the Finance Act, 1994 and the judgments relied upon by the appellant cited supra, I find that Section 73(3) is very clear as it says that if tax is paid along with interest before issuance of the show cause notice, then in that case, show cause notice shall not be issued. In this case, I find that the contention of the appellant that he bona fidely believed that he is not liable to pay service tax but during the audit, the audit party informed him that he is liable to pay service tax, then he immediately paid the entire service tax along with interest. Except mere allegation of suppression, the Department did not bring any material on record to prove that there was suppression and concealment of facts to evade payment of tax. Consequently, in my opinion, the imposition of penalty under Section 78 of the Act is not justified and bad in law. Moreover, in the impugned order, the learned Commissioner (Appeals) has not recorded any finding on suppression of facts by the appellant with an intention to evade tax. In view of the above discussion, I set aside the impugned order by allowing the appeal of the appellant.*

7. Therefore by following the ratio of the said decision cited supra, I am of the view that imposition of penalty is not sustainable in law. Accordingly, I set aside the impugned order by allowing the appeal of the appellant.

(Operative portion of the Order was pronounced
in Open Court on **28/02/2019**)

S.S GARG
JUDICIAL MEMBER

Raja...