CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL CHENNAI

REGIONAL BENCH – COURT NO. III

Service Tax Miscellaneous Application No.40165 of 2019
(on behalf of Appellant)
In
Service Tax Appeal No.42316 of 2016
(Arising out of Order-in-Appeal No.487/2016 (STA-I) dt. 22.08.2016 passed by Commissioner of Service Tax (Appeals-I), Chennai]

M/s.Creasakthi SCM Ltd. **Appellant**
Rep.by its Director M. Venkataraman,
No.A-13, Thiru-Vi-Ka Industrial Estate,
Chennai 600 020.

VERSUS

Commissioner of Service Tax, **Respondent**
Service Tax – III Commissionerate,
Newry Towers,
No.2054-1, 12th Main, II Avenue,
Anna Nagar
Chennai 600 040.

APPEARANCE :

Shri J. Shankarraman, Advocate
Shri S.Sivaramakrishnan, Advocate
For the Appellant

Ms.T. Usha Devi, DC (AR)
For the Respondent

CORAM :

HON'BLE MS. SULEKHA BEEVI, C.S., MEMBER (JUDICIAL)

DATE OF HEARING : 19.07.2019
DATE OF DECISION : 19.07.2019

MISC. ORDER No. 40342 / 2019

The above ROM application has been filed by the appellant seeking to rectify the mistake in the Final Order No.41595/2017 dt. 09.08.2017.

2. On behalf of the appellant, Ld. Counsel Shri J. Shankarraman appeared and argued the matter. He submitted that at the time of hearing of the appeal, the appellant had contested only the penalty imposed under Section 78 of the Finance Act, 1994. The show cause notice was issued to the appellant alleging short payment of service tax under the category of 'Clearing & Forwarding Services' and 'GTA Services'. Much prior to the issuance of the SCN itself, appellant had paid the entire service tax demand along with interest. This was pointed out to the Tribunal and also submitted that the appellant had filed the returns for the disputed period reflecting the taxable value as well as the tax liability. However, the Tribunal in paras-3,4, 5 and 6 of the order observed that appellant has not filed the statutory returns as mandated by law and therefore proceeded to sustain the penalty imposed. He adverted to the relied upon documents of the SCN and submitted that as per Sl.No.5 of the Annexure to SCN, ST-3 returns for the disputed period 2009-10, 2010-11 is one of the category of documents relied on by the department for issuance of the SCN. It is therefore very much clear that appellant has filed returns. This being so, the Tribunal has erred in observing that the appellant has not filed returns for the disputed period. In fact, the Director, Mr. M. Venkataraman in his statement dt. 21.02.2011 had clarified that even though bills were raised along with service tax amount, the clients failed to make payment immediately upon which the appellant faced great difficulty to run the business and due to such financial constraint the service tax could not be paid. Apart from delay in payment of service

tax, the appellant has not suppressed any facts from the department. The entire figures for proposing the demand in the SCN has been taken from the books of accounts as well as the returns filed by the appellant. Thus, the Tribunal has erred in holding that there is suppression of facts on the part of appellant. The main reason for holding that there is suppression is that the appellant has not filed ST-3 returns and therefore did not disclose the liability to the department. He argued that this is an error apparent on the face of record which requires rectification.

3.1 Ld. A.R Ms. T. Usha Devi appearing on behalf of the department opposed the application. She pointed out that in para-8 of the SCN, it has been clearly alleged that the appellants have not filed any returns during the disputed period. Further, in para-3 of the SCN wherein the statement of Shri V.K.Balasubramanian, Manager (Accounts) has been reproduced, it has been admitted by him that they have not filed any returns in respect of the service tax under GTA. It is also pointed out by her that in para 8.4, the original authority has noted that for the disputed period, the appellants have not filed returns correctly. She therefore submitted that the Tribunal is right in observing that the appellants have not filed returns during the disputed period and therefore has upheld the penalty imposed.

3.2 With regard to argument of the Ld. Counsel that ST-3 returns have been filed as shown in the RUD of the SCN, Ld. A.R submitted that it might have been an error while noting the RUD. The appellants have paid up the service tax along with interest only after being pointed out by the department. Therefore, they are guilty of suppression of facts with intent to evade tax which has been upheld by the Tribunal. She therefore pointed out that there being no error apparent on the face of record, ROM application may be dismissed.

4. Heard both sides.

5. On perusal of the final order impugned herein, in para-4, the Tribunal has noted that appellants have not filed any returns which amounts to non-disclosure of facts and then has upheld the penalty imposed under section 78 of the Finance Act, 1994. On perusal of Annexure A of the SCN, the list of relied upon documents by the department has been given. Sl.No.5 shows that the appellants have filed ST-3 returns for the period 2009-10 as well as 2010-11. Thus, it can be seen that appellants have filed returns for the disputed period. The contention of the Ld.A.R that appellants have not filed returns and the RUD so noted by department may be due to human error does not seem to be convincing to be accepted. RUD is the basis for issuing SCN. Further, in para-8 the adjudicating authority has noted that appellants have not filed the returns correctly. Not filing returns at all or not filing correct returns are both different. An assessee when filing returns may not include the value of certain services which they believe is not taxable. This may be filing of incorrect returns. On perusal of para-3 of the SCN extracting the statement of Shri V.K. Balasubramanian it is

seen that they have not filed ST-3 returns with respect to GTA liability. The relevant portion is reproduced as under :

- Since April 2009 they have filed to pay service tax;
- In respect of GTA, liability would not be more than 2 to 2.5 lakhs yearly; transporters were showing service tax liability payments in their lorry receipts to be paid by Consignor or Consignee generally, but in some cases, on behalf of customers they are paying service tax under GTA. For the said reasons, they have not filed ST-3 Returns;
- Exact liability would be calculated and would be paid by 10th Feb 2011 and would file returns.

The statement of Mr. M. Venkataraman, Director is also worthy of reproducing as under :

- Even though bills were raised along with service tax amount raised every month, the payments were not received by the company immediately
- The delay in receipt of payments and their commitments had posted great difficulties to run the business on day to day basis;
- Have paid service tax upto January 2011 as far as C&F services are concerned

6. From the above statements, I am able to conclude that the appellants have filed ST-3 returns for the disputed period and they have not given details of GTA service tax liability. It is explained in the statement of Shri V.K.Balasubramanian that they had not reflected the details of GTA, since service tax was paid by the service recipient as per law and they were under bonafide belief that they are not required to pay any service tax. Further from statement of Shri M. Venkatraman it is also established that though they were raising invoices, they could not pay up the service tax liability as there was delay in getting payments from their customers.

7. From the evidence placed before me, I am able to conclude that the appellants have filed returns during the disputed period but had not made disclosure with regard to the GTA services. Whether this was a

bonafide belief or not cannot be decided in an ROM application. The observation made by the Tribunal that appellants had not filed any returns and thus upholding the entire penalty is an error in noting the facts of the case. The Tribunal being the last fact finding authority, the facts as reflected in the records ought to be considered. Therefore, I am of the view there is apparent error on the face of record in the observations noted by the Tribunal that the appellants have not filed any returns. In these circumstances, the entire penalty imposed cannot sustain, as they had filed returns. Moreover, the demand has been confirmed on the basis of the figures reflected in the returns as well as books of account of the appellant. With regard to C&F services there was only delay in payment. I am of the view that the penalty imposed with regard to C&F services requires to be set aside which I hereby do. The penalty in respect of GTA services is sustained. The penalty being composite penalty, the adjudicating authority is directed to quantify the penalty in respect of GTA services.

8. The ROM application is allowed in the above manner and the final order is modified accordingly.

(dictated and pronounced in court)

(Sulekha Beevi, C.S)
Member (Judicial)

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