IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH, CHENNAI

ST/42316/2016 -SM

[Arising out of Order-in-Appeal No.487/2016 (STA-I), dated 22.08.2016 passed by the Commissioner of Service Tax (Appeals-I), Chennai]

APPELLANT

M/s. CREASAKTHI SCM LTD.

Versus

COMMISSIONER OF SERVICE TAX, CHENNAI-III RESPONDENT

Appearance:

For the Appellant Shri Sivaramakrishnan, Adv.
For the Respondent Shri K.P. Muralidharan, AC (AR)

CORAM:

Hon'ble Smt. Archana Wadhwa, Member (Judicial)

Date of hearing **26-07-2017**
Date of pronouncement 9-8-2017

FINAL ORDER NO. 41595 /2017

Per Archana Wadhwa:

After hearing both sides, I find that the appellant, who is engaged in providing C&F Services and GTA Services, were registered with the department. It was noticed that they neither filed the returns for the period 2009-2010 to 2010-2011 (upto Jan.'11) nor paid service tax to the extent of Rs.49,74,211/-. Thereafter, summons were issued and statements were recorded . The appellant did not contest their liability to pay service tax and deposited the entire service tax along with interest of Rs.5.07,132/-.

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2. In the above scenario, proceedings were initiated against the appellant by way of show-cause notice proposing imposition of penalty in terms of the provisions of section 77 and 78 of the Finance Act, 1994. After due adjudication, penalty of identical amount was imposed under section 78 by original adjudicating authority and further penalty of Rs.10,000/- was imposed under section 77 of the Finance Act, 1994. The said order of adjudicating authority was upheld by Commissioner (Appeals) and hence, the present appeal.

3. I find the only challenge in the present appeal is to imposition of penalty. Learned advocate appearing for the appellant has fairly agreed that neither any return was filed during the period in question nor any service tax was deposited. Further, no intimation was given to the Revenue as regards the assessee's liability and obligation to pay the said amount to service tax. It is only when the appellant's jurisdictional authorities directed them to pay the amount, the same was deposited. However, he submits that having deposited the amount along with interest, penal provisions should not have been invoked against them and no proceedings should have been initiated in terms of the provisions of Section 73(3) of the Act. Learned advocate submits that the tax could not be deposited as they were facing financial crunch and have subsequently deposited the same along with interest, penalty imposed upon them be set aside.

4. Countering the arguments, learned departmental representative draws my attention to the provisions of Section 78 of the Act and submits that imposition of penalty, in case of non-filing of returns or non-payment of service tax is mandatory and there is no discretion vested with the authorities to either reduce the penalty or

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set aside the same. He submits that the appellants have collected the service tax amount from their customers and instead of paying the same, they have retained it and have enjoyed the financial benefits. He also submits that this is a clear case of malafide, thus invocation of the penal provisions is justified. Section 73 (3) is applicable only in those cases where there is no malafide or suppression or mis-statement etc., with an intention to evade payment of duty. As in the present case, the appellants have collected service tax from their customers but were not depositing with the exchequer, nor even intimating the Revenue about their liability to pay, it is a clear case of malafide, suppression, mis-statement etc.

5. After appreciating the submissions made by both sides, I find that there is no dispute on the facts that the assessee is under a legal obligation to file the requisite returns provided under the statute and to discharge its service tax liability accordingly. The appellant in the present case was duly aware of its legal obligations as they were registered with the serviced tax department and were following due procedure prior to the period in question. The appellant's stand that service tax was not being paid on account of financial crunch cannot be appreciated in as much as they were collecting service tax from their customers and instead of depositing the same, it was being pocketed.

6. Thus it is evident that they retained the amount and enjoyed the financial accommodation till such time the department initiated action. Even if it is assumed that tax was not being deposited on account of financial difficulties, nothing stopped the appellant to file the statutory returns disclosing their liability to pay service tax, in

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which case, it would have been a case of delayed payment and not of non-payment. The fact of non-disclosure and non-filing of returns leads to the inevitable conclusion that the appellant was doing so with malafide intention, in which case, there is clear mandate of law contained in the provisions of Section 78, for imposition of penalties.

6.1 As is seen from the above, there is a clear mandate of law provided under Section 78 of the Finance Act, 1994 that any person, who has not paid or short-paid the tax on account of any fraud; collusion; willful mis-statement; or suppression of facts or has evaded any tax provisions with an intent to evade payment of duty would be liable to equal amount of penalty.

6.2 The question required to be decided in the present appeal is whether such non-payment of service tax by the appellant was on account any one of the ingredients mentioned in the said Section 78. As already observed, the appellant was registered and was paying service tax but for the period involved in the present appeal. The said non-payment was detected by the department on investigations made against them. It cannot be held that such non-payment of service tax or even non-disclosure of the value of the same in the return was on account of the non-receipt of compensation from the clients as they were collecting service tax from their customers. Even otherwise, I find that the payment of service tax is the legal obligation of the service provider, irrespective of the fact of receipt of value of the service from service recipient. All these factors lead to an inevitable conclusion that there was malafide on the part of the appellant to suppress the value of the services and not to pay service tax on the same. As such, I hold that they are liable to penalty under Section 78 of the Finance Act, 1994.

7. I may refer to the Tribunal's decision in the case of *Larsen & Touboro Vs Commissioner of Central Excise, Mumbai* reported as *2003 (161) E.L.T.827 (Tri.-Mumbai)* as also another decision in the case of *Sunil Hi-Tech Engineers Ltd. Vs Commissioner of Central Excise, Nagpur* reported as *2014(36) S.T.R. 408 (Tri.-Mumbai)* and in the case of *Hindustan Petroleum Corporation Ltd. Vs Commissioner of Central Excise, Mumbai* reported as *2015 (38) S.T.R. 131 (Tri.-Mum.)* laying down that where there is suppression of facts proved against the assessee, imposition of penalty under Section 78 of the Finance Act, 1994 is mandatory.

8. Learned advocated has contended that in as much as, they had paid the service tax along with interest prior to issuance of the show-cause notice, there was no justification for the show-cause notice to be issued, in terms of the provisions of Section 73(3) of the Finance Act, 1994. Having gone through the same, I find that if an assessee deposits the service tax, either on the basis of his own ascertainment or on the basis of tax ascertained by a Central Excise officer, before the service of the notice on him, the requirement of serving any show-cause notice gets diluted and the same is not required to be issued. However, sub-section 4 of Section 73 is to the effect that sub-section 3 shall not apply in a case where service tax has not been levied or paid on account of fraud; willful mis-statement; or suppression of facts. As I have already held that non-payment in the present case was on account of suppression and with malafide, the provisions of Section 73 (3) would not get attracted.

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8.1 For the above proposition, I refer to and relied upon the Hon'ble Supreme Court's decision in the case of *Rajasthan Spinning Mills* (supra) reported as *2009 (238) E.L.T. 3 (S.C.)* laying down that when the statute provides mandatory penalty, the question of payment of duty before or after notice cannot alter liability to penalty. In as much as, the conditions of Section 11AC of Central Excise Act in that case were found to be satisfied, the Hon'ble Supreme Court observed that payment of differential duty before the issuance of the show-cause notice cannot be adopted as a reason for setting aside the imposition of penalty. In the present case, it already stands observed that non-payment was on account of malafide, the imposition of penalty under Section 78 cannot be set aside on the ground of the appellant having deposited the entire duty and interest prior to the issuance of the show-cause notice.

9. Similarly, the appellant's claim of invocation of Section 80 of the Finance Act, 1994 can also not be appreciated in as much as, the said section applies only if the assessee proves that there was "reasonable cause" for the failure to deposit and that reasonable cause has to be bonafide. The appellant, in the present case, is a registered service provider and is paying service tax on the value of the service. It is only that such value was not being fully disclosed, with a malafide intention to evade payment of service tax on the same. As such, there was no reasonable cause on the part of the appellant to believe that the service tax was not required to be paid. Accordingly, I hold that the said section is also not applicable to them.

9.1 The Tribunal in case of *Inma International Security Academy P. Ltd. Vs Commissioner of Central Excise, Chennai* reported as *2006 (1) S.T.R. 289 (Tri.-Chennai)* has observed as under:-

"After giving careful consideration to the submissions, I find that the only reason stated by the assessee in their reply to the show-cause notice for the delay of payments of service tax, is financial crisis. Financial crisis is a universal plea, which could be made by any assessee. If it is accepted as coming within the meaning of the expression "reasonable cause" under Section 80 ibid, the penal provisions of Section 76 to 79 of the Finance Act will be just dead letters this cannot be the legislative intent. Hence financial hardships cannot be brought within the purview of the expression "reasonable cause" used in Section 80 of the Finance Act 1994.

10. Similarly, the appellant's claim to reduce the penalty to 25% in terms of the proviso to Section 78 can also not to be appreciated in as much as, the benefit of reduced penalty can be extended only if the entire service tax along with interest and along with 25% penalty is deposited within 30 days of the passing of the order of determination of service tax. Learned advocate fairly agreed that such penalty to the extent of 25% has not been deposited by them. In such a scenario, benefit cannot be extended.

11. The original adjudicating authority, while conforming the demand and interest and imposing penalty had already granted the benefit of reduced penalty of 25%, provided the appellant deposits the entire service, tax, interest along with 25% penalty within a period of 30 days from the date of receipt of the order. The appellants have chosen not to exercise the option given by the Assistant

Commissioner, which case, the penalty cannot be reduced at the appellate stage.

12. For the foregoing reasons, I find no merit in the appellant's contention to set aside penalty. The impugned order is, accordingly, upheld and appeal is rejected.

(Pronounced in open court on 9/8/17)

9/8/17

(ARCHANA WADHWA)
MEMBER (JUDICIAL)

ksr
09-08-2017

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