

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH – COURT NO. – IV

SERVICE TAX APPEAL NO.51289 of 2018

[Arising out of Order-in-Appeal No.101 (SRM)ST/JDR/2018 dated 25.01.2018 passed by the Commissioner (Appeals), Jodhpur].

M/s. Krishi Upaj Mandi Samiti (Anaj) **...Appellant**
Bhamasha Mandi, Kota,
Rajasthan.

VERSUS

The Commissioner of Central Excise
& CGST, Udaipur **...Respondent**

APPEARANCE:

Mr. Ankit Sareen & Yash Tandon, Advocate appeared for the appellant
Mr. S.K. Meena, Authorised Representative for the Respondent

Coram:

HON'BLE DR.RACHNA GUPTA, MEMBER (JUDICIAL)
HON'BLE MRS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)

DATE OF HEARING/DECISION: 27/06/2023

FINAL ORDER NO. 50904/2023

DR. RACHNA GUPTA

Present appeal has been filed against the order in appeal bearing No.101/2018 dated 25.01.2018, that too, for the partial relief of setting aside the order imposing penalties on the appellant. The facts relevant are as follows:-

The appellants are engaged in providing the service of renting of immovable property. The Department vide Show Cause Notice No.1632 dated 24.04.2014 proposed a demand of Rs.13,19,341/- towards the tax liability of the appellant for rendering the said services during the period from 01.04.2012 to 31.03.2013. The recovery of interest at the proportionate rate and the imposition of appropriate penalty were also proposed against the appellant. The said proposal has been confirmed by the original adjudicating authority vide Order-in-Original No.51/2016 dated 29.12.2016. The appeal against the said order has been dismissed by Commissioner (Appeals) vide the order under challenge. Still being aggrieved, the appellant is before this Tribunal.

2. We have heard Mr. Ankit Sareen, Shri Yash Tandon, Id. Counsels for the appellant and Mr. S.K. Meena, Id. Authorised Representative for the Department.

3. Ld. Counsel for the appellant has mentioned that though at the time of filing the appeal, the entire order passed by the Commissioner (Appeals) was prayed to be set aside. However, during the pendency of appeal the issue with respect to the liability of Krishi Upaj Mandis while rendering the service of renting of immovable property has been settled by this Tribunal vide Final **Order No.53436-53500/2017 dated 25.05.2017** (a bunch of 65 appeals) where the liability of such service providers towards payment of service tax has been confirmed. Ld. Counsel has mentioned that the period involved

i.e. for the period of 2 months in question, the appellant had not discharged the liability purely due to the confusion because of interpretational issues. There were decisions on both the sides. It is impressed upon that non-payment is for the said reason and there was no intent to evade the liability. The penalty is accordingly, prayed to be set aside. It is also impressed upon that in the aforementioned Final Order also the penalties have been set aside by this Tribunal against those appellants for the same reason. The order under challenge is accordingly, prayed to be modified to that extent. Ld. Counsel has relied upon the following case laws:-

1. Decision of CESTAT, New Delhi in the case of New Allenberry Works vs. Commissioner of Central Excise (Final Order NO.A/51803/2014-SM (BR) dated 28.04.2014 in Appeal No. E/1182/2011 – EX (SM).
2. Decision of Karnataka High Court in the case of Commissioner of Service Tax vs. Motor World decided on 21.04.2011.
4. While rebutting these submissions, Id. D.R. has mentioned that the penalties have been imposed under section 76, 77 and 78 of the Finance Act, 1994. Those are the mandatory penalties in case of non-deposit /non-discharge of the service tax liability by the assessee. Once the liability has been acknowledged by the appellant and it is an admitted fact that for the period in question the service tax was not paid by the appellant despite said liability. the question

of setting aside of the penalty does not at all arise. Appeal is accordingly, prayed to be dismissed.

5. Having heard both the parties, we observe that the scope of the present appeal has shrunk to very narrow compass i.e. to the aspect of imposition of penalty only. From the perusal of section 76, 77 & 78 of the Finance Act, 1994, we observe that the penalty can be imposed in the following circumstances:-

- (a) Non-payment of tax due to circumstances mentioned in Sections 76, 77 and 78;
- (b) Failure on the part of the assessee to comply with the requirements of the said provisions;
- (c) Absence of 'reasonable cause' for the failure to comply with the requirement of law.

6. We further observe that section 80 of the Act mandates that no penalty shall be imposable on the assessee for any failure as above. Given the language of said section 80, we observe that it confers discretion on the service tax authorities to not to impose penalty if there is a reasonable cause for said failure in a given case. If that may be the case, the penalty under section 76, 77 and 78 cannot be an automatic consequence. We rely upon the decision of **Motor World** (supra) as placed on record by the appellant for these observations.

7. In the present case, we find no denial to the fact that the issue of tax liability of Krishi Upaj Mandis with respect to rendering the services of renting of immovable property was pending adjudication on interpretational grounds and it could be decided only in the year 2017 vide the Final Order of this Tribunal as mentioned above. In view of said acknowledgement when we peruse the said final order, we observe the following findings:-

"12. *Accordingly, we hold that the appellants are not liable to Service Tax on renting of immovable property used for storage of agricultural produce in the market area. In this connection, we refer to Paras 161 and 162 of the Budget Speech of the Hon'ble Finance Minister while introducing Budget 2012-2013. The same is extracted as below :-*

161. The important inclusions in the negative list comprise all services provided by the Government or local authorities, except a few specified services where they compete with private sector. The list also includes pre-school and school education, recognized education at higher levels and approved vocational education, renting of residential dwellings, entertainment and amusement services and a large part of public transportation including inland waterways, urban railways and metered cabs.

162. Agriculture and animal husbandry enjoy a very important place in our lives. Practically all services required for cultivation, breeding, production, processing or marketing up to the stage the produce is sold in the primary markets are covered by the list.

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15. *In view of the above position, we find that the appellants are not liable to Service Tax for the period after 1-7-2012.*

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18. *In view of the above discussions and analysis, the appeals are disposed of in the following terms :-*

(I) The appellants are liable to pay Service Tax under the category of "renting of immovable property service" for the period up to 30-6-2012.

(II) For the period from 1-7-2012 (Negative List Regime), the appellants are not liable to pay Service Tax under the said tax entry in respect of shed/shop/premises leased out to the traders/others for storage of agricultural produce in the marketing area. The Negative List will not cover the activities of renting of immovable property for other than agricultural produce.

(III) The demands, wherever raised invoking extended period, shall be restricted to the normal period. Penalties imposed on the appellants are set aside.

(IV) The threshold exemption available to the small scale service provider in terms of the applicable notifications during the relevant years, shall be extended to the appellant on verification of their turnover."

8. In view of those observations and the submissions of the appellant in the present case that the non-payment of service tax for a period of 2 months, in question, was purely for the reason of prevalent confusion due to interpretational issues with respect to the impugned service. The said circumstance is sufficient for us to hold that *mens rea*, the important ingredients for imposition of penalty under section 76, 77 & 78 of the Act i.e. an intent to evade the payment is missing with the present appellant. From the above discussion, it is apparent that there was no intent with the appellant to evade the payment. There has been catena of decisions holding

that mere non-payment of the tax / duty will not be sufficient to invoke the provisions giving discretion to the Department to impose the penalty. Finally, keeping in view that this Tribunal vide its **Final Order dated 25.05.2017** (with respect to a bunch of 65 Appeals has also set aside the order imposing penalties for the same reason as quoted by the appellants in the present case. It has been held as follows:-

"By no stretch of imagination, the act of short payment in the given facts and circumstances can be held to be an Act of fraud. Form the wordings of Section 78 itself, we observe that the liability to pay penalty is not arising merely on the basis of default, it arises only when the non-payment is by the reason of fraud or collusion or willful misstatement or suppression of facts etc. An order imposing penalty is otherwise a result of quasi criminal proceedings and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing the impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute. We draw our support from the decision of Hon'ble Apex Court in the case of

***Hindustan Steel Ltd. Vs. State of Orissa reported as
1969 (2) S.C.C. 627.”***

9. In the given set of circumstances, we find no other reason to differ from those findings. We accordingly, accept the request of the appellant and set aside the order imposing penalties upon the appellants. Consequent to these findings, the order under challenge stands modified and appeal stands partly allowed.

[Dictated and pronounced in the open Court]

**(DR. RACHNA GUPTA)
MEMBER (JUDICIAL)**

**(HEMAMBIKA R. PRIYA)
MEMBER (TECHNICAL)**