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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066

SINGLE MEMBER APPEAL BRANCH

Appeal No. ST/571 /2009 &454 / 2009 -SM[BR] Date 27/08/2010

Assistant Registrar
C.E.S.T.A.T, New Delhi
To :
1. M/S ESS ESS ENGINEERING ,
2. M/S ESS ESS ENGINEERING

F-76, INDUSTRIAL AREA, PHASE-VII, MOHALI.

M/S ESS ESS ENGINEERING , Appellant

Vs

C.C.E. CHANDIGARH Respondent

I am directed to transmit herewith a certified copy of **Final order No**.915 – 916 / 2010-SM[BR] dated 12.8.2010 passed by the Tribunal under Section 129, (B) of the Customs Act,1962 & Financial Act 1994 relating to Service Tax

Assistant Registrar
(SM Appeal Branch)

Copy to :

1. Respondent

   C.C.E. CHANDIGARH

   C.R. BUILDING, PLOT NO. 19, SECTOR 17-C, CHANDIGARH 160017
2. Adv. / Consult

   MR.G.S.BHANGOO

   H.NO. 5, SECTOR-10A, CHANDIGARH.

3 S.D.R
~~4 J.C.D.R.~~
5 Bar association. CESTAT. New Delhi
6 Director Publications. Customs. Excise. I.P. Estate. New Delhi
7 M/s Centax Publictions Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi - 3
8 Company Law Institute of India Pvt Ltd.,No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
9 M/s. Deeparchie Publications. M-93. Marg. 46. Saket. New Delhi 110017
10 Taxmann Allied Service Pvt Ltd.. 59/32. New Rohtak Road. New Delhi - 110005
11 Easy Service Tax Online Dot Com Pvt.Ltd.407A.Iscon Mall.Above Star India Bazar.Satellite Road.Ahmedabad-15
12 LAWCRUX Advisors Pvt Ltd. LAW House.1-8.Sector - 10. Faridabad 121003 (Haryana)
13 . TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor,Vasant Arcade,Nelson Mandela Road, Vasant Kunj, New Delhi - 110070
14 Office Copy
15 Guard file

Assistant Registrar
(SM Appeal Branch)

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block 2, R.K.Puram,New Delhi-110066
Principal Bench, New Delhi.

ST/571 & 454/09-SM

(Arising out of Order-in-Appeal No.180/CE/CHD/2009 dt.17.4.09 passed by the Commissioner(Appeals), Chandigarh)

For approval and signature:

Hon'ble Mr. Rakesh Kumar, Member (Technical)

1.Whether Press Reporters may be allowed to see: the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?

2.Whether it would be released under Rule 27 of : the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?

3.Whether their Lordships wish to see the fair copy of the order? :

4.Whether order is to be circulated to the Department Authority? :

M/s. Ess Ess Engineering Appellant

Vs

CCE, Chandigarh Respondent
And vice versa

Appearance
Sh. Vikrant Kakria, Adv. For Appellant

Sh. S.K.Bhaskar,DR for Respondent

Coram: Hon'ble Mr. RAKESH KUMAR, MEMBER (TECHNICAL)

Date of hearing: 12.8.2010
Date of Order :
Final Order No. 915-916/2010 SM(BR)

Per Rakesh Kumar:

The facts leading to these two appeals– Appeal No.ST/571/09-SM filed by M/s. Ess Ess Engineering (hereinafter referred to as the Appellant) and Appeal No.ST/454/09-SM filed by the Revenue are, in brief, as under:

1.1 The Appellant are registered with the Department as the person providing the taxable service of Erection, Commissioning and Installation since 1.7.03. In the course of audit of their records, the auditors were of the view that during the period from 1.7.03 to Sept.'06, they had not paid service tax on certain value of the taxable service and the entire value of taxable service had not been declared in the ST-3 returns filed by them. The Appellant paid the disputed amount of service tax of Rs.5,57,285/- alongwith interest of Rs.1,44.909/- during Dec'06 – March'07 period. Subsequently however, a show cause notice dt.24.4.08 was issued to the Appellant for –

(a) Confirming the service tax demand of Rs.5,57,285/- under Section 73 of the Finance Act,1994 alongwith interest and also appropriation an amount of Rs.5,57,285/- together with interest amount of Rs.1,44,909/- already paid by them against this demand; and

(b) imposition of penalty on them under Section 76 & 78 of the Finance Act,1994.

1.2 The show cause notice was adjudicated by the Jt. Commissioner vide order-in-original dt.30.6.08 by which the service tax demand was confirmed alongwith interest and the amount of Rs.5,57,285/- plus interest of Rs.1,44,909/- already paid by them was appropriated towards the service tax demand. Besides this, penalty of Rs.5,57,285/- was imposed on the Appellant under Section 78 of the Finance Act,1994 and penalty equal to 2% of confirmed amount per month during the period of default subject to ceiling of Rs.5,57,285/- was imposed under Section 76 of the Act. On appeal to Commissioner(Appeals), the Commissioner(Appeals) while upholding the service tax demand alongwith interest and also the imposition of penalty under Section 78, set aside the penalty under Section 76. The Department has come in appeal against the part of the Commissioner(Appeals)'s order setting aside the penalty under Section 76 and M/s. Ess Ess Engineering have filed an appeal against the Commissioner(Appeals)'s order upholding the penalty under Section 78.

2. Heard both the sides.

2.1 Shri Vikrant Kakria, Advocate, learned Counsel representing M/s. Ess Ess Engineering pleaded that the appellant had service tax registration, since 1.7.03, when the service tax was imposed on installation and commissioning service, that they had been paying service tax regularly and filing the ST-3 returns, that the appellant, in addition to erection, installation and commissioning, also performs the jobs of fabrication, dismantling etc. and in the invoices raised by them to their clients, though they had separately mentioned the amounts charged for fabrication & dismantling, they had not paid the service tax on the amount charged for fabrication & dismantling; that it is because of this only that there is difference between the value of taxable service declared by them in their ST-3 returns on which the service tax was paid and the gross amount charged by them from their clients, as disclosed in their financial records which had been shown to the audit, that non-payment of service tax on certain amount was only due to the fact that as per the appellant's understanding, the service tax was not payable on charges for fabrication and dismantling, that as soon as this was pointed out ~~then~~ to them they paid the service tax alongwith interest and that in view of this, there was no justification for imposition of penalty on them under Section 76 or 78 of the Finance Act - more so, when the entire amount of disputed service tax alongwith interest had been paid by them with prior to issue of show cause notice. He also pleaded that even if penalty under Section 78 is held to be imposable on the Appellant, since the entire amount of service tax alongwith interest had been paid prior to issue of show cause notice, in accordance with judgment of the Hon'ble

Delhi High Court in the case of K.P.Pouches vs UOI reported in 2008(228)ELT.31, the original adjudicating authority should have given an option to the appellant in accordance with the provisions of first proviso to Section 78 of the Finance Act to pay reduced penalty within the stipulated period, but since no such option was given, the appellant cannot be deprived of the benefit of reduced penalty in accordance with the first proviso to Section 78.

2.2 Shri S.K.Bhaskar, the learned DR, pleaded that this is a case of not disclosing the full value of taxable service with intent to evade the service tax; that the collection of service tax is on the basis of self assessment and it is the assessee who is responsible for determining his tax liability correctly and making the service tax payment on the basis of self assessment and correctly declaring the value of taxable service and service tax payable in the ST-3 returns; that since the Appellant did not disclose the full amount of taxable service in the ST-3 returns resulting in short payment remaining un-detected till it was detected during audit, the penalty under Section 78 has been correctly imposed, that since the service tax payable by the appellant was not paid by the due date, the provisions of Section 76 would be attracted, and that this is not a case where the provisions of Section 80 can be invoked for waiving the penalty. He also cited the Tribunal's judgment in the case of Bajaj Travels Ltd. vs CCE, Chandigarh reported in 2009(16)STR.183 wherein it was held that the penalty under Section 76 as well as 78 can be imposed together.

3. I have carefully considered the submissions from both the sides and perused the records. I find that short payment was detected in course of audit of records of the Appellant company when they submitted their financial records to the audit for inspection. It is not in dispute that the Appellant were registered with Department and they were filing their returns regularly. The allegation against them is that they were not disclosing full value of the taxable service provided to their clients with intention to evade the service tax. However, the appellant's contention is

that in addition to erection, commissioning and installation, they were also undertaking the work relating to fabrication and dismantling, on which they were not paying any service tax, as according to them, service tax was not payable on charges for fabrication and dismantling. On going through the records, I find substance in this contention of the appellant. In view of this, I am of the view that short payment was mainly due to the appellant's understanding that they are not liable to pay service tax on the fabrication and dismantling charges. In view of this so far as penalty under Section 76 is concerned, I am of the view that there is a case for invoking Section 80.

4. As regards penalty under Section 78 is concerned, the same is imposable in a case where service tax has not been levied or paid or has been short levied or short paid or erroneously refunded, by reason of fraud; or collusion; or wilful mis-statement; or suppression of facts; or contravention of any of the provisions of this Chapter or of the rules made thereunder with intent to evade payment of service tax. The question arises as to whether in the circumstances of this case, the penal provisions of Section 78 are invokable.

5. Identical words – "fraud, collusion or any wilful mis-statement or suppression of facts or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade the payment of duty", also appear in proviso to Section 11A(1) of Central Excise Act,1944 for invoking longer limitation period of five years for issue of show cause notice for non-paid, short paid or erroneously refunded duty and Hon'ble Supreme Court in the case of CCE vs Chemphar Drugs & ~~Lininents~~ Liniments reported in 1989(40)ELT.276(SC) has held that for invoking this proviso, something positive other than mere inaction or failure on the part of the manufacturer or conscious or deliberate withholding of information, when the manufacturer knew otherwise, is required. In case of Continental Foundation Jt. Venture vs CCE, Chandigarh-I reported in 2007(216)ELT.177(SC), Hon'ble Supreme Court has held that since the expression – "Supression" in proviso to Section 11A(1)is

accompanied by very strong words such as "fraud" or "collusion", it has to be construed strictly and mere omission to give correct information is not suppression of facts unless it was deliberate act to evade the payment of duty and that suppression means failure to disclose full information with intent to evade payment of duty. The view that the word "suppression" gets its color from the words "fraud" and "collusion" preceding the same, is in accordance with the well established principle of interpretation of statute – Noscitur - a sociis, according to which when two or more words susceptible of analogous meaning are coupled together, they take, as it were, their color from each other and the meaning of the more general gets restricted to a sense analogous to that of the less general.

6. The ratio of the above judgments of Hon'ble Supreme Court with regard to proviso to Section 11A(1) of Central Excise Act,1944 would apply to the provision of Section 78 of the Finance Act,1944 where identical words have been used. Therefore, for imposition of penalty under Section 78 some positive evidence of deliberate misdeclaration of value of taxable service with intent to evade the service tax, other than mere failure to declare the full value of taxable service in ST-3 returns must be produced. In this case, there is no dispute that in the books of accounts and other financial records, all the transactions had been disclosed and those records had been produced by the Appellant to the Departmental auditors. In view of these circumstances, I am of the view that there is no justification for imposition of penalty under Section 78.

7. In view of the above discussion, the appeal filed by the Department is dismissed and the appeal filed by the Appellant is allowed.

Order dictated in the open Court.

(Rakesh Kumar)
Member Technical

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