IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi – 110 066.
Principal Bench, New Delhi

COURT NO. III

DATE OF HEARING : 02/02/2017.
DATE OF DECISION : 08/02/2017.

Service Tax Appeal No. 390 of 2011

[Arising out of the Order-in-Original No. 39-ST/PKJ/CCE/ADJ/ 2010 dated 13/12/2010 passed by The Commissioner (Adjn.) of Central Excise, New Delhi.]

M/s Meinhardt Singapore Pte. Ltd.] Appellant
(Shri Rajesh Srivastava)]

Versus

CST, Delhi Respondent

Appearance

Shri Atul Kumar Gupta, C.A. – for the appellant.

Shri Sanjay Jain, Authorized Representative (DR) – for the Respondent.

CORAM: **Hon'ble Shri S.K. Mohanty, Member (Judicial)**
Hon'ble Shri B. Ravichandran, Member (Technical)

Final Order No. 50680/2017 Dated : 08/02/2017

Per. B. Ravichandran :-

The appeal is against order dated 13/12/2010 of Commissioner of Service Tax (Adjn.), New Delhi. The appellants are engaged in providing taxable service under the category of consulting engineers. They were registered with the Department and were discharging service tax liability. However, during the period 2006-2007 to September 2008, the appellant did not discharge service tax liability on the taxable considerations received by them. Upon follow up enquiry by the officers of the Department, an amount of Rs. 3,54,37,986/- was later paid by the appellant. Proceedings were initiated against the appellant for confirmation of service tax liability and for imposing penalties. The impugned order confirmed a service tax liability of Rs. 3,54,37,986/- alongwith interest. The amounts already paid towards service tax and interest were appropriated. Penalty of equivalent amount was imposed on the appellant under Section 78 of the Finance Act, 1994.

2. In the present appeal, the appellant are not contesting their service tax liability. They are also not contesting the fact that they did not discharge service tax in time even after receipt of the consideration from the clients. However, it is the submission of the appellant that the delay in payment of service tax is due to acute financial problem. There is no intention to evade the service tax. The amount of service tax payable has been reflected in their annual balance sheet under the head "statutory liabilities". Accordingly, the learned Consultant strongly pleaded that they should not be subjected to penalty under Section 78. Full amount with interest for delayed payment has been paid before the issue of show cause notice. As such, the proceedings against them should have been close in terms of Section 73 (3).

3. The learned Consultant relied on various decided cases to state that penalty cannot be imposed when the assessee discharged the service tax liability before the issue of show cause notice. These decisions are examined later in this order.

4. The learned AR submitted that the appellants were registered with the Department for discharging service tax liability. They are well aware of the statutory requirements. They have mis-stated regarding payment of service tax when the enquiry was conducted by the officers of Ranchi Commissionerate. They have wrongly stated that they were centrally registered with Delhi Service Tax Commissionerate and discharged the service tax there. Further, financial hardship claimed cannot be the reason for holding the service tax payment when the amount was collected from the client. The case is not falling within the scope of Section 73 (3) as there is a prolonged, intentional delay in paying service tax even after realising the tax value from the clients. Section 73 (4) clearly states that the provisions of sub-Section (3) will not apply in case service tax has not been paid due to reasons of willful mis-statement, suppression of facts etc.

5. We have heard both the sides and perused the appeal records. The appellant is only contesting the imposition of penalty under Section 78. We note that the service tax is payable by the appellant, during the material time, only when the consideration for services were received. Thus, it is apparent that the liability to

service tax is after the receipt of money from the client. It is clearly recorded that the appellants realized the invoice amount inclusive of service tax and they have not paid the service tax to the Government thereafter, as stipulated by the provisions of Finance Act, 1994. It is clear that the amount realised from the clients which included the tax, has been used for internal purposes by the appellant disregarding the statutory tax liability to the Government. The bonafideness of the appellant cannot be accepted in such an act. Financial hardship cannot be pleaded against penal action when the tax collected is not remitted to the Government and used for other expenses. Regarding the case laws referred to by the appellant, we note that none of them will come in aid of their case. In **Gupta Metallics & Power Ltd. vs. CCE, Nagpur** reported in **2016 (44) S.T.R. 681 (Tri. – Mumbai)**, the Tribunal was dealing with bonafide mistake of the appellant not declaring certain amount received as commission. In **Vista Infotech vs. CST, Bangalore** reported in **2010 (17) S.T.R. 343 (Tri. – Bang.)**, the Tribunal is dealing with a case of delay in payment of service tax for the period January to June 2007 which was paid on 5th and 19th July, 2007. The decision of Hon'ble High Court of Karnataka in **CCE & ST, LTU, Bangalore vs. Adecco Flexione Workforce Solutions Ltd.** reported in **2012 (26) S.T.R. 3 (Kar.)** and the decision of the Tribunal in the case of **CCE, Visakhapatnam – II vs. M/s Tirupathi Fuels Pvt. Ltd.** reported in **2016 – TIOL – 2311 – CESTAT – HYD**, were examining the application of sub-Section (3) of Section 73 to the appellant's case. We note that in the present case, the appellant did not discharge the service tax liability even after receipt of money with tax from the clients for a long period of more than one financial year. This fact has been admitted. It is also noted that in the guise of getting central registration in Delhi they have given an impression to the Service Tax Authorities at Ranchi that the tax due is being discharged at Delhi. The Original Authority has recorded that after numerous letters to follow up, it is noted that the appellant was registered centrally at Delhi only on 15/12/2008. Thus, we note that the attitude of the appellant did not provide substance to their claim of bonafideness for delay in discharging of tax liability in time. In **Indsur Global Ltd. vs. Addl. Commr. of Service Tax, Vadodara** reported in **2015 (38) S.T.R. 14 (Guj.)**, the Hon'ble Gujarat High Court held that when the assessee recovered the service tax from service recipient and did not deposit with the Government till it was pointed out and followed up by the Department, provision of Section 80 cannot be invoked. The said order has been affirmed by the Hon'ble Supreme Court reported in **2016 (44) S.T.R. J59 (S.C.)**. In **IWI Crogenic Vaporization Systems India vs. CCE, CST, Vadodara – II** reported in **2015 – TIOL – 1458 – CESTAT – AHM**., the Tribunal held that when the tax was recovered and not paid to the Department, it is clearly a case of evasion of tax with intention. In the present case also, we note that the appellant did not file statutory returns indicating the provision of service and receipt of taxable income and accordingly we are in agreement with the lower Authority regarding imposition of penalty on the appellant.

6. The learned Consultant for the appellant submitted that certain amounts of service tax paid in normal course was also taken into account while imposing penalty by the Original Authority. In this connection, we note that there is no co-relation that any regular payment made by the appellant is towards the services rendered during a particular month. In fact when the appellants were receiving consideration from clients and not discharging the full tax liability, later payment of tax liability in part will be attributable to the past arrears as there is no dispute regarding the tax liability at any point of time. In other words, when there is a non-payment of service tax within the stipulated time, the authorities are right in proceeding against the appellant to confirm and recover the non-paid tax liability and to impose penalty. We note that the closure of proceeding as pleaded by the appellant in terms of Section 73 (3) is not possible in the present case in view of the facts discussed above. Such closure is not permissible if the case is covered under the provisions of Section 73 (4).

7. The appellant also pleaded for reduction of penalty to 25% is available to the appellant when the service tax dues alongwith interest and alongwith the said 25% penalty is paid within 30 days of order passed by the Commissioner. In the present case, though it is recorded that the appellants have discharged service

tax liability with interest before the notice they have not paid the 25% of penalty which is also required to be paid within one month of the order to avail such reduction in penalty. No authority can give extension of time for such concession.

8. The learned Consultant also relied on the decision of Hon'ble Delhi High Court in **K.P. Pouches (P) Ltd. vs. Union of India** reported in **2008 (228) E.L.T. 31 (Del.)** to state that the Original Authority should have mentioned the availability of option to pay 25% of penalty within one month of the order. We note that the Hon'ble Delhi High Court examined the provisions of Section 11AC of Central Excise Act, 1944 and expressed opinion that in order to avoid uncertainty in following the compliance of said penal provision, the Adjudicating Authority should explicitly state the option available in the order. We note, same issue came up before the Hon'ble Bombay High Court also in **CCE, Raigad vs. Castrol India Ltd.** reported in **2012 (286) E.L.T. 194 (Bom.)**. The Hon'ble Bombay High Court held that non-mentioning of option will not violate the statutory provisions of Section 11AC. The Hon'ble Delhi High Court in **Principal Commissioner of Service Tax, Delhi – II vs. Tops Security Ltd.** reported in **2016 (41) S.T.R. 612 (Del.)** held that Adjudicating Authority not mentioning the option of 25% in the order issued under Section 78 (1) does not render the order bad in law.

9. In view of the above discussion and findings, we find no merit in the present appeal and accordingly dismissed the same.

(Order pronounced in open court on 08/02/2017.)

(S.K. Mohanty)
Member (Judicial)

(B. Ravichandran)
Member (Technical)

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