IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI, PRINCIPAL BENCH NEW DELHI

Date of Hearing:23.09.2016
Date of Decision:20/02/2017

Service Tax Appeal No.469/2010

[Arising out of Order-in-Original No.9/JM/2010 dated 9.3.2010 passed by the Commissioner (Adjudication), Service Tax, New Delhi]

For Approval and Signature:
Hon'ble Smt. Archana Wadhwa, Member (Judicial)
Hon'ble Shri V. Padmanabhan, 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 should 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 Departmental authorities?	

Mr. Rohtas Goel Appellants

Vs.

CST, New Delhi Respondent

Appearance:
Rep. by Shri P.K. Sahu, Advocate for the appellant.
Rep. by Shri Ranjan Khanna, DR for the respondent.

Coram: Hon'ble Smt. Archana Wadhwa, Member (Judicial)
Hon'ble Shri V. Padmanabhan, Member (Technical)

Final Order No.51902/2017

Per V. Padmanabhan:

The present appeal is directed against the order-in-original dated 9.3.2010 passed by the Commissioner (Adj.), Service Tax, New Delhi. The appellant is the Chairman and Managing Director of M/s. Omaxe Limited. He entered into a trade mark agreement with the company for granting right to use the trade mark "OMAXE", which was registered in his name, and received payment of consideration along with an annual royalty. Revenue took the view that such transfer of the right to the use of the trade mark is liable to payment of service tax under the category of intellectual property service falling under Section 65(55)(b) of the Finance Act, 1994. In the impugned order, demand of service tax stands confirmed to the tune of Rs.1,20,85,135/- along with interest under Section 75. Penalties have also been imposed under Section 76 and 78. The service tax demanded stands already deposited along with interest as well as 25% of the penalty imposed under Section 78.

2. In the present appeal, the submission of the appellant is that they are not contesting the payment of service tax and interest. However, they prayed for setting aside the penalties imposed. Their submission is that since the entire service tax demanded has already been paid, Revenue should not have issued any show cause notice upon them. They further submitted that the interest due on the service tax also stands fully paid. They claimed that the service tax was not paid by him as per his belief that the amount has been received from the company, which is owned and controlled by him. He further submits that if the corporate veil is lifted, there would not be two persons entering into a commercial transaction and hence, the ingredients of service was absent in their case. In any case, he submits that their details were duly reflected in the balance sheet of the company and no attempt was made to conceal the same. They also relied upon the following judgements:-

(1) **Lawson Travel & Tours (I) Pvt. Ltd. Vs. CST – 2008 (12) STR 572 (Tribunal**),

(2) Commissioner Vs. CABS India – 2015 (39) STR J176 (Kar),

(3) CCE, Kolkata-I Vs. Hazi Abdul Razzaque – 2006 (4) STR 37 (T),

(4) CCE-I Vs. Gaurav Merchantiles Ltd. -2005 (190) ELT 11 (Bom.) and

(5) Union of India vs. T.P.L. Industries Ltd. – 2007 (214) ELT 506 (Raj.)

3. In the above case laws, it has been held that if the tax and interest is paid and the same was informed to the Revenue Authorities, then the show cause notice need not be issued. No penalty should also be imposable under such situations.

4. Heard Shri P.K. Sahu, ld. Advocate for the appellant and Shri Ranjan Khanna, ld. DR for the Revenue/Respondent.

5. It is not in dispute that the entire service tax covered in the dispute stands paid by the appellant before issue of show cause notice. The interest involved also stands fully paid. The appellant is not challenging the demand of the service tax. Their only submission is to waive the penalties imposed upon them under Sections 77 and 78.

6. We find that the issue whether penalty is imposable, where the short levied duty is already deposited by the assessee before issue of show cause notice, has been considered and settled in various decisions, some of which have been cited by the appellant. In the case of **Union of India Vs. TPL Industries Ltd. – 2007 (214) ELT 506 (Raj.),** the Hon'ble Rajasthan High Court has held as follows:-

> "**9.** In these cases the respondents assessee have deposited the short levied Duty before issuance of show cause notice, which fact is not in dispute. The adjudicating authority levied the duty as well as penalty equal to the amount to duty with reference to Section 11AC and he did not consider Rule 173Q the purpose of levy of penalty. The Tribunal has set aside the penalty be holding that since the assessee has paid short levied duty even before issuance of show cause notice, no case for penalty has been made out under

Section 11AC. In setting aside the penalty, the Tribunal has followed the decision of Bombay High Court in case of *CCE* v. *Gaurav Mercantiles Ltd*. reported in 2005 (190) E.L.T. 11.

10. The proposition appears to be well settled that where the duty has been deposited before issuance of show cause notice under Section 11A & Section 11AB of the Central Excise Act, 1944, no action under Section 11AC of the said Act for imposition of penalty can be initiated or taken. The reason is obvious. As on the date show cause notice is issued, there is no short levy of Duty for which such notices can be issued.

11. In *Commissioner of Central Excise, Mangalore* v. *Shree Krishna Pipe Industries* [2004 (165) E.L.T. 508] Karnataka High Court, in *Commissioner* v. *Jkon Engineering (P) Ltd*. [2005 (67) RLT 157] Madras High Court and in *Commissioner of Central Excise* v. *Gaurav Mercantiles Ltd*. [2005 (190) E.L.T. 11] Bombay High Court have all taken the view that where duty imposed has been deposited before issuance of the show case notice under Section 11AC of the Central Excise Act, 1944, no action under Section 11AC of the Act, 1944 should be initiated or taken.

12. Further the Karnataka High Court while considering the question opined that where the party even before issuance of show cause notice has deposited the duty, the inference can reasonably be drawn that there was no question of any fraud, misrepresentation or suppression of fact, which is essential foundation for levy of penalty under Section 11AC of the Act of 1944, at all. In coming to this conclusion, the Karnataka High Court has referred to the decision of Tribunal in *Rashtriya Ispat Nigam Ltd.* v. *Commissioner of Central Excise* [2003 (161) E.L.T. 285], appeal against which has been dismissed by the Supreme Court as reported in *Commissioner of Central Excise* v. *Rashtriya Ispat Nigam Ltd*. [2004 (163) E.L.T. A53 (S.C.)].

13. In view of the aforesaid consistent view of three different High Courts and appeal against the Tribunal's order taking the same view having been dismissed by Apex Court, and no other view contrary to it has been brought to our notice, we do not find any reason to take a different view.

14. Accordingly, the appeals fail and are hereby dismissed."

7. Various other High Courts, whose decisions have been cited by the appellant, have taken the similar view. Since Section 11 AC of the Central Excise Act is *pari materia* with Section 78 of the Finance ACT, 1994, we are of the view

that the decisions will be applicable and no penalty will be leviable on the appellant.

8. Inasmuch as the appellant is not disputing the liability to pay service tax as well as interest, the same are upheld.

9. The appeal is disposed of in the above terms.

[Order pronounced in open court on 20.02.2017.]

(Archana Wadhwa)
Member (Judicial)

(V. Padmanabhan)
Member (Technical)

Ckp.