IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,

WEST BLOCK NO.2, R.K. PURAM, NEW DELHI-110066

BENCH-SM

COURT –IV

Service Tax Appeal No.ST/53452/2018-ST [SM]

[Arising out of Order-in-Appeal No.BHO-EXCUS-002-APP- 222-18-19 dated 26.06.2018 passed by the Commissioner (Appeals), Central Goods & Service Tax, Raipur]

Shri Sarveshwari Logistics ...Appellant

Vs.

CCE & ST, Raipur ... Respondent

Present for the Appellant : Mr.Pranav Mittal, Advocates
Present for the Respondent: Ms.Tamanna Alam, D.R.

Coram: HON'BLE MRS. RACHNA GUPTA, MEMBER (JUDICIAL)

Date of Hearing/Decision: 03/01/2019

Final ORDER NO. 50038/2019

PER: RACHNA GUPTA

The appellants herein are providing services under the category of Site formation and clearance, excavation, earth-moving and demolition services and are discharging Service Tax to the Exchequer. However, the Department received the information that the full Service Tax Liability has not been discharged by the appellant for the period April 2014 to December, 2014 nor the ST-3 Return has been filed.

Proposing the recovery of said short payment alongwith the interest at appropriate rate and proportionate penalties that show cause notice No.1561 dated 05.01.2017 was served upon the appellant. The joint Commissioner vide Order in Original No.12 dated 15.02.2018 has confirmed the said proposal. An appeal was preferred before the Commissioner (Appeals) who vide Order-in-Appeal No.53 dated 26.06.2018 has confirmed the findings of the Original Adjudicating Authority. Being aggrieved, the appellant is before this Tribunal.

2. I have heard Shri Pranav Mittal , ld. Advocate for the appellant and Ms. Tamanna Alam, ld. D.R. for the Department.

3. It is submitted on behalf of the appellant that they had regularly been filing their returns and discharging their liability towards Service Tax for providing the impugned services. It was only for the year 2014 that neither the tax was paid nor the ST-3 Returns was filed. It is impressed upon that it happened due to the financial constrains as well as for the reason that the invoices from the service recipients were not received in time during the said period. It is further impressed upon that the entire deficiency was made good alongwith the interest much prior the issuance of the show cause notice. A due intimation for the same was sent to the Department vide

letter dated 17.10.2015. The ld. Counsel, therefore, has impressed upon the applicability of sub-section (3) of Section 73 of Finance Act, 1994 and has prayed for doing away with the penalty. However, without contesting for the duty as has been deposited with the interest. Order accordingly, is prayed to be set aside.

4. Per-contra, ld. D.R. has impressed upon the applicability of sub-section (4) of Section 73 of the Finance Act with the mention that the appellant did not make the payment unless and until, it was brought to his notice by the Department since it amounts to the suppression of fact sub-section (3) thereof, as prayed, is not applicable. Appeal is accordingly prayed to be dismissed.

5. After hearing both the parties, I observe that narrow compass of the adjudication is that of penalty imposed and confirmed by Commissioner (Appeals) on the appellant. The only ground praying for setting aside the same is the applicability of Section 73 (3) of the Finance Act, which reads as follows:-

Section 73 (3) of the Finance Act, which reads as follows:-

> *(3) Where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously*

refunded, the person chargeable with the service tax, or the person to whom such tax refund has erroneously been made, may pay the amount of such service tax, chargeable or erroneously refunded, on the basis of his own ascertainment thereof, or on the basis of tax ascertained by a Central Excise Officer before service of notice on him under sub-section (1) in respect of such service tax, and inform the [Central Excise Officer] of such payment in writing, who, on receipt of such information shall not serve any notice under sub-section (1) in respect of the amount so paid :

Provided that the Central Excise Officer may determine the amount of short-payment of service tax or erroneously refunded service tax, if any, which in his opinion has not been paid by such person and, then, the Central Excise Officer shall proceed to recover such amount in the manner specified in this section, and the period of "thirty months" referred to in sub- section (1) shall be counted from the date of receipt of such information of payment.

Explanation.1— For the removal of doubts, it is hereby declared that the interest under section 75 shall be payable on the amount paid by the person under this sub-section and also on the amount of short payment of service tax or erroneously refunded service tax, if any, as may be determined by the [Central Excise Officer], but for this sub-section.

Explanation 2. — For the removal of doubts, it is hereby declared that no penalty under any of the provisions of this Act or the rules made thereunder shall be imposed *in respect of payment of service tax under this sub-section and interest thereon.*

(4) Nothing contained in sub-section (3) shall apply to a case where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of —

(a) fraud; or

(b) collusion; or

(c) wilfulmis-statement; or

(d) suppression of facts; or

(e) contravention of any of the provisions of this Chapter or of the rules made thereunder with intent to evade payment of service tax.

6. The bare perusal makes it clear that the word used in the provision is "shall". Thus, the legislature has mandated that where the duty, which has either not been paid or has been short paid, if stands paid, the Department mandatorily has not to serve any show cause notice upon such an assessee. The fact of the present case that the entire duty as has been proposed to be recovered from the impugned show cause notice stands deposited vide challan No. 00055 dated 18.03.2003. The interest has also been deposited vide challan No. 00003 dated 19.03.2003. The fact has very much been acknowledged in the show cause notice itself.

7. It is apparent from the show cause notice itself that Department has duly acknowledged the following payments to have already been made.

	Payment Particulars								
	ST	**ED**	**SHED**	**Total**	**Challan No.**	**Date**	**Due Date**	**Days of Delay**	**Interest @18%**
April – June 2014	2,54,288/-	5,086/-	2,543/-	2,61,17/-	001	26/07/2014	06/07/2014	20	2,583/-
	1,72,323/-	3,446/-	1,724/-	1,77,93/-	004	27/08/2014	06/07/2014	52	4,552/-
	2,66,871/-	5,337/-	2,669/-	2,74,877/-	001	25/11/2014	06/07/2014	142	19,249/-
	3,31,487//-	6,630/-	3,315/-	3,41,432/-	007	05/01/2015	06/07/2014	183	30,813/-
	4,38,221/-	8,765/-	4,382/-	4,51,368/-	002	08/09/2014	06/07/2014	64	14,246/-
	2,55,339/-	5,107/-	2,553/-	2,62,999/-	1839	28/01/2015	06/07/2014	2016	26,718/-
	499/-	10/-	4/-	513/-	5965	04/02/2015	06/07/2014	213	54
TOTAL	**17,19,028/-**	**34,381/-**	**17,190/-**	**17,70,599/-**					
July – Sep 2014	4,42,573/-	8,852/-	4,425/-	4,55,850/-		13/01/2015	06/10/2014	99	22,255/-
	7,32,960/-	14,659/-	7,330/-	7,54,949/-		13/01/2015	06/10/2014	99	36,858/-
	5,90,471/-	11,809/-	5,905/-	6,08,185/-		28/01/2015	06/10/2014	114	34,192/-
	3,41,061/-	6,821/-	3,411/-	3,51,293/-		05/01/2015	06/10/2014	91	15,765/-
TOTAL	**17,66,004/-**	**35,320/-**	**17,660/-**	**21,70,27/-**					
Oct – Dec 2014	4,84,319/-	9,686/-	4,843/-	4,98,848/-	2780	18/03/2015	06/01/2015	71	17,467/-
	1,81,165/-	3,623/-	1,812/-	1,86,600/-	2042	14/05/2015	06/01/2015	128	11,779/-
	1,45,306/-	2,906/-	1,453/-	1,49,665/-	260	20/05/2015	06/01/2015	134	9,890/-
	1,73,124/-	3,462/-	1,731/-	1,78,317/-	5264	03/06/2015	06/01/2015	148	13,015/-
	1,91,597/-	3,832/-	1,916/-	1,97,345/-	1436	17/06/2015	06/01/2015	162	15,766/-
	408/-	8/-	4/-	420/-	478	15/12/2016	06/01/2015	709	147/-
TOTAL	**11,75,919/-**	**23,517/-**	**11,759/-**	**12,11,195/-**		**Total Interest Payable**			**2,75,348/-**
GRAND TOTAL				**51,52,071/-**		**Interest Paid**			**2,07,347/-**
						Interest to Collect			**68,001/-**

8. Perusal makes it clear that the entire payment alongwith interest was made much prior the show cause notice dated 05.01.2017. There is no reason to deny the benefit of sub section (3) of Section 73 of the Act to the appellant. The intimation was also very much to the Department vide the letter on record dated 17.10.2015. Since the facts were to the notice of the Department, the Department was liable to issue

show cause notice, during the normal period of one year. The Department is therefore opine to have wrongly invoked the extended period. For the said reason itself, it is held that the plea of suppression of facts as is alleged against the appellant is not sustainable. Show cause notice is accordingly held to be barred by time. Section 73 to sub-section (3) is held to be applicable to the given facts and circumstances. No question of imposition of penalty at all arises. Order imposing the same is hereby set aside. Appeal stands accordingly, allowed.

[Dictated and pronounced in the Open Court]

(RACHNA GUPTA)
MEMBER (JUDICIAL)

Anita