

**CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH AT HYDERABAD**

Bench – SMB
Court – I

Appeal Nos. ST/30480-30481/2018

(Arising out of Order-in-Appeal No. TTD-EXCUS-000-APP-130-17-18
dated 23.02.2018 & Order-in-Appeal No. TTD-EXCUS-000-APP-131-
17-18 dated 27.02.2018 passed by Commissioner of Customs
(Preventive), Vijayawada)

M/s Wipro Enterprises Ltd.,

.....Appellant(s)

Vs.

**The Commissioner of Customs, Central
Excise & Service Tax, Tirupati – G S T**

.....Respondent(s)

Appearance

Shri R. Rajesh, for the Appellant.

Shri Arun Kumar, Deputy Commissioner (AR) for the Respondent.

Coram:

Hon'ble Mr. P. Venkata Subba Rao, Member (Technical)

Date of hearing: 27/06/2018

Date of decision: 02/07/2018

FINAL ORDER No. A/30643-30644/2018

[Order per: P. Venkata Subba Rao]

These two appeals are filed by the appellant against
Order-in-Appeal No. TTD-EXCUS-000-APP-130-17-18 dated

23.02.2018 & Order-in-Appeal No. TTD-EXCUS-000-APP-131-17-18
dated 27.02.2018.

2. Heard both sides and perused the records.

3. The facts of the case in brief are that the appellants are engaged in the manufacture of Hydraulic Cylinders and are registered with Central Excise. They are also registered with the Department under service tax provisions for payment of service tax under the categories of GTA Service, Manpower Recruitment, Rent-a-Cab etc. During the period 2013-2014, 2014-2015 and 2015-2016, the appellant had short paid the service tax on the services mentioned above, and it was detected by the Department during the course of Audit on scrutiny of their records. The appellant paid the service tax along with applicable interest as pointed out by the audit even before show cause notice was issued. A show cause notice was issued to the assessee demanding the service tax short paid under Section 73 of the Finance Act along with interest under Section 75 and penalty under Section 78 of the Finance Act, 1994. It has been alleged in the show cause notice that the assessee had not correctly declared the value of the services rendered in their ST-3 returns and thereby short paid service tax. The fact of short payment would not have come to the notice of the Department but for the audit of the unit. The assessee had short paid the service tax during the period but had not reconciled his accounts even after lapse of more than one year from

the relevant date. It clearly shows that the assessee has willfully evaded payment of appropriate service tax and taking a chance of non-detection conducted by the Department. Accordingly, it was proposed to demand the service tax invoking the extended period along with interest. It was also proposed to impose a penalty under Section 78. After following the due process of law, the Learned Assistant Commissioner had confirmed the demands along with interest and imposed penalties under Section 75 and 78 of the Finance Act, 1994.

4. Aggrieved, the appellant filed an appeal before the Commissioner (Appeals) who upheld the Order-in-Original and dismissed the appeals. Learned Commissioner (Appeals) rejected the claim of the appellant that there was no suppression of facts and hence the proviso to Section 73(1) cannot be invoked and neither can penalty can be imposed under Section 78. He concluded with the appellant had failed to declare the true value of the taxable services in their ST-3 returns and thereby suppressed the facts from the Department. He therefore held that the proviso to Section 73 (1) is invokable. He further held that penalty under Section 78 is imposable as the short payment was a result of “suppression of facts by the appellant”.

5. Learned Representative of the appellant submits that the difference occurred due to an error in their calculation and there was

no intention to evade payment of service tax. As soon as the audit had pointed out the mistake, they had paid the differential service tax along with interest immediately even before the show cause notice was issued to them. He asserted that the service tax is evaded without any *malafide* intention on his part. He further argued that they had a turnover around four hundred crores and they had no intention to evade a tax of few lakhs of rupees. He therefore argued that the Learned Commissioner (Appeals) had erred in upholding the Order-in-Original and prayed that the penalty under Section 78 may be set aside.

6. The Learned Departmental Representative on the other hand, reiterated the arguments made in the Order-in-Original and Order-in-Appeal and said that the mandatory penalty under Section 78 cannot be set aside because there was a suppression of facts. He relied upon the judgement of Hon'ble High Court of Karnataka in the case of *Commissioner of Customs, Mangalore Vs. Jindal Vijayanagar Steel Ltd.*, [2017 (346) ELT 378 (Kar.)] and relying on the judgment of the Apex Court in the case of *Union of India Vs. Rajasthan Spinning & Weaving Mills* [2009 (238) ELT 3 (S.C.)] wherein it was held that mandatory penalty does not get altered because of the fact that the assessee had paid the duty prior to issue of show cause notice. This judgment of the Hon'ble High Court of Karnataka was appealed against by the assessee but upheld by the Hon'ble Supreme Court. He further relied on the judgment of the Hon'ble High Court of Delhi in

the case of *Shiva Alloys Pvt. Ltd.*, [2018-TIOL-988-HC-DEL-CX] in which the Hon'ble High Court had held the payment of duty, whether made before or after issuing of show cause notice, is not determinative and relevant factor for deciding whether or not penalty should be imposed. He also relied on the order of the CESTAT, Chennai in the case of Cholamandalam MS General Insurance Company Limited decided by Final Order No. 42719/2017 by CESTAT-Chennai, and it was held as follows:

When the value of services is reflected in the statutory returns on the lower side but subsequently stand detected by the Revenue on the higher side, the same leads to inevitable conclusion that such a lower value was being reflected in the statutory records/returns with a malafide intention to evade payment of service tax. If that be so, the benefit of section 80 as contended by the appellants, cannot be extended to them. The provisions of section 73 also makes it clear that in case of suppression, fraud, mis-statement etc., with an intent to evade payment of duty would call for imposition of penalty to the extent of 100% of tax evaded. At this stage, reference can be made to Tribunal's decision in the case of wherein vide Final Order No. 41600/2017, dated 09.08.2017, the Tribunal discussed all the provisions of penalties in terms of the Finance Act, 1994 invoking the provisions of section 80 and has held that the same is not applicable in cases of suppression and fraud etc. In such circumstances, no fault can be found with the findings of the Commissioner (Appeals) order. Accordingly, appeal filed by the assessee is rejected.

In view of the above, the Learned Departmental Representative argued that the fact a lower value was declared in the ST-3 returns is sufficient invoking penalty under Section 78 of the Finance Act, 1994. This mandatory penalty does not get altered by the fact but they have paid service tax as well as interest well before the issue of show cause notice.

7. I have considered the arguments of both sides and perused the records.

8. There is no dispute on the facts of the case, that the appellant had declared a lower value in their returns than the actual value of services rendered by them and when this was pointed by the audit, they paid the differential tax along with applicable interest. The only question is of penalty under Section 78. This mandatory penalty is imposable under 5 conditions

a) fraud

b) collusion

c) willful mis-statement

d) suppression of facts

e) contravention of any provisions of this Chapter or of the rules made thereunder with intent to evade payment of service tax. Of these five elements, the allegation in the present case is the suppression of the fact inasmuch as the appellant suppressed the true value of the services rendered by them and declared a lower value in ST-3 returns. I find that in an identical case in respect of the Cholamandalam MS General Insurance Company Ltd., and CESTAT-Chennai, had held that not reflecting the true value of services rendered in the ST-3 returns accounts to suppression of facts and therefore penalty under Section 78 is imposable. I respectfully follow the same. As far as the question of payment of the differential service tax along with interest before issuance of show cause notice is concerned, I find it is now being settled by the Hon'ble Supreme Court in the case of Rajasthan Spinning & Weaving Mills (supra), that when mandatory penalty is imposable, whether the duty is paid

before issue of show cause notice or after notice cannot alter the penalty. Thus, this issue is *no more res integra*. In view of the above, I find no reason to interfere with the Order-in-Appeal.

8. The appeals are rejected and the Order-in-Appeal is upheld.

(Order pronounced on 02/07/2018 in open court)

(P. VENKATA SUBBA RAO)
MEMBER(TECHNICAL)

Lakshmi....