IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI

APPEAL NO: ST/85812 & 85813/2017

[Arising out of Order-in-Appeal No: NGP/EXCUS/000/APPL/553 & 554/ 16-17 dated 24th January 2017 passed by the Commissioner of Customs, Central Excise & Service Tax (Appeals), Nagpur.]

Vidyadhar Balkrishna Wakode
Balkrishna Ramkrishna Wakode …***Appellants***

versus

Commissioner of Central Excise, Customs & Service Tax
Nagpur ***…Respondent***

Appearance:

Shri S M Vaidya, Advocate for appellant

Shri MP Damle, Assistant Commissioner (AR) for respondent

CORAM:

Hon'ble Shri C J Mathew, Member (Technical)

Date of hearing: 10/11/2017
Date of decision: 10/11/2017

ORDER NO: ____________________________

Appellants, Shri Vidyadhar Balkrishna Wakode and Shri Balkrishna Ramkrishna Wakode, are in the business of providing services of promoting holiday options designed by M/s Pancard Clubs

Limited, known popularly as 'Magic Holidays', enabling customers to hedge against further increases in prices by pre-booking holidays for 25 years at current rates. The appellants were being remunerated with a commission on which tax liability was held to be due. The original authority confirmed demand of ₹ 9,94,376/- in the case of Shri Vidyadhar Balkrishna Wakode, along with interest thereon, and imposed penalty of ₹ 20,000/- under section 70 besides penalties under section 76, 77 and 78. In the proceedings against Shri Balkrishna Ramkrishna Wakode, the original authority confirmed the demand of ₹ 8,57,698/-, along with interest thereon, and imposed similar penalties. *Vide* impugned orders-in-appeal no. NGP/EXCUS/000/APP/553/16-17 and NGP/EXCUS/000/APP/554/16-17 dated 24th January 2017, the first appellate authority set aside the penalty under section 76 while recomputing the penalty under section 78 and upholding the penalties under section 70 and 77. Aggrieved by this, the appellants are before the Tribunal seeking relief.

2. Appellants claim that the demand for tax computed in the show cause notice had already been discharged by them after obtaining registration. In computing their liability, it is their claim that, as they had not collected tax from their principal, the benefit of 'cum-tax' should be extended to them.

3. Heard Learned Counsel for the appellants and Learned

Authorised Representative.

4. The claim of the appellant before the lower authority has been that, considering the circumstances of the payment of taxes, the show cause notice should not have been issued in view of section 73(3) of Finance Act, 1994. In their prayer, they have sought limiting of the demand to the normal period with the claim that there has been no suppression on their part. However, this prayer is not being pressed.

5. It is seen from the record that the appellant had discharged tax liability on 'cum-tax' basis well before the issue of show cause notice, and that they themselves had not been the subject matter of the investigation.

6. It is also seen from the show cause notice that the first summons was issued to them much after discharge of tax liability. By no stretch of imagination, can it be considered that the appellant was subject to any investigation at that point of time. For invoking the provisions of section 73(4) of Finance Act, 1994, the existence of ingredients enumerated therein should be justifiably evidenced. Considering the initial reach of the investigations and the scope of activities of the appellants a bald finding of suppression of fact will not suffice.

7. The principal had deployed about three hundred individuals to

promote and market the holiday package and it could appear all of them, uniformly, had not discharged the tax liability. It would, therefore, be inappropriate to fasten the charge of suppression on the appellants without specific reason to do so.

8. The appellant has discharged tax liability on ‘cum-tax’ computation. It is apparent from the records that no service tax has been collected from the recipient of the service, therefore, it would be appropriate to limit the tax liability to that discharged by the appellant. Consequently, section 73(3) of Finance Act, 1994 would apply as held by the Hon’ble High Court of Bombay in *Commissioner of Central Excise, Nagpur v. Galaxy Construction Pvt Ltd [2017 (48) STR 37 (Bom.)]*. The issuance of the show cause notice itself is questionable and not in accordance with law. The scope of imposition for penalties does not exist.

9. The impugned order is set aside to the extent of discharging the appellant from all penal consequences and tax beyond the amount deposited.

(Pronounced in Court)

(C J Mathew)
Member (Technical)

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