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

Appeal No. ST/85584/2018

(Arising out of Order-in-Appeal No. GOA-EXCUS-000-APP-090-2017-18 dated 25.09.2017 passed by Commissioner of Customs Central Excise (Appeals), Goa)

Kundil Alloys Pvt. Ltd. **Appellant**

Vs.

Respondent

Commissioner of Cus & CE,
Goa

Appearance:

Shri C.S. Biradar, Advocate for appellant
Shri V.R. Reddy, Asst. Commr (AR) for respondent

CORAM:

Hon'ble Mr. Sanjiv Srivastava, Member (Technical)

Date of Hearing & Decision: 24.05.2018

FINAL ORDER NO...A/86799/2018

Per: Sanjiv Srivastava

The appeal is directed against the Order-in-Appeal No. GOA-EXCUS-000-APP-090-2017-18 dated 25.09.2017 vide which the Commissioner (Appeals) has upheld the demand of service tax of Rs.26,245/- along with the interest of Rs.10,053/- and imposed a penalty of Rs.26,245/- on the appellant under Section 78 of the Finance Act,1994.

2. Heard Shri C.S. Biradar, Advocate for the appellant and Shri V.R. Reddy, Authorised Representative on behalf of Revenue.

3. Learned Counsel at the outset submitted that he is not disputing the demand of service tax and interest which was paid by the appellant even before issuance of show-cause notice on being pointed out by the audit party. He is in appeal only for a penalty imposed under Section 78 of the Finance Act,1994. He contested that on his own he has paid the entire amount prior to issuance of show-cause notice and in view of provision contained in Section 73(3) no penalty should have been levied in respect of payment of service tax under this Section. He also argued that in his case there was no malafide intention for evading any taxes because during the period the unit was closed. Further to establish his bonafide, he immediately after the audit, paid the tax amount along with interest and notice was issued nine months thereafter. As such, in his case there was also no suppression as all the evidences with regard to payment details were recorded in his records.

4. Learned A.R. reiterated the order of the Commissioner (Appeals).

5. I have considered the submissions made by both the sides.

6. In the present case there is no dispute with reference to the service tax or interest payment. Only dispute is with regard to demand of penalty. The entire proceedings were initiated after payment of entire sums due to the Government in form of

service tax and interest, show-cause notice has been issued nine months after. Section 73(3) of the Finance Act, 1994 is 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:*
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> ***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 eighteen months referred to in sub-section (1) shall be counted from the date of receipt of such information of payment.*
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> ***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.*
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> ***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.

7. In the present case when the appellant has paid the entire amount, issuance of show-cause notice for imposition of penalty would not have been called for. The decision of the Hon'ble High Court of Karnataka in the case of *CCE & S.T LTU, Bangalore v. Adecco Flexione Workforce Solutions Ltd. 2012 (26) STR 3 (Kar)* has held that -

> ***"3.*** *Unfortunately the assessing authority as well as the appellate authority seem to think. If an assessee does not pay the tax within the stipulated time and regularly pays tax after the due date with interest. It is something which is not pardonable in law. Though the law does not say so, authorities working under the law seem to think otherwise and thus they are wasting that valuable time in proceeding against persons who are paying service tax with interest promptly. They are paid salary to act in accordance with law and to initiate proceedings against defaulters who have not paid service tax and interest in spite of service of notice calling upon them to make payment and certainly not to harass and initiate proceedings against persons who are paying tax with interest for delayed payment. It is high time, the authorities will change their attitude towards these tax payers, understanding the object with which this enactment is passed and also keep in mind the express provision as contained in sub-sec. (3) of Sec. 73. The Parliament has expressly stated that against persons who have paid tax with interest, no notice shall be served. If notices are issued contrary to the said Section, the person to be punished is the person who has issued notice and not the person to whom it is issued. We take that, in ignorance of law, the authorities are indulging in the extravaganza and wasting their precious time and also the time of the Tribunal and this Court. It is high time that the authorities shall issue appropriate directions to see that such tax payers are not harassed. If such instances are noticed by this Court hereafter, certainly it will be a case for taking proper action against those law breakers."*

6.1 Further, I find that in this case when audit was conducted there was enough time for issue of demand notice without invocation of extended period. The charges of suppression etc cannot be invoked in this case when the adjudicating authority himself says in his order that "I also observed that calculation of demand was based on documentary evidence and falling under criteria displayed under the provision of Section 73(1) of the Act". If all the documentary evidences were available and made available to the audit party at the relevant time there cannot be any justification for holding malafide and issuing notice under Section 73(4) of the Act. Accordingly, in terms of explanation to the Section 73(3) when entire amount of tax and interest has been paid, no penalty under any provision should be imposed. Accordingly, appeal is allowed and the penalties imposed are set aside.

(Order dictated in Court)

(Sanjiv Srivastava)
Member (Technical)

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