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

Appeal No. ST/86255/2018

(Arising out Order-in- Appeal No. PUN-EXCUS-001-APP/0959/2017-18 dated 27.12.2017 passed by the Commissioner of Central tax (Appeals-I), Pune)

M/s. Libin Erectors Pvt. Ltd. Appellant

Vs.

Commissioner of Central Tax, Ratnagiri Respondent

<u>Appearance:</u>

Shri Rajiv Luthia, CA for the appellant
Shri Atul Sharma, (AR) for the respondent

<u>CORAM:</u>
Hon'ble Dr. Suvendu Kumar Pati, Member (Judicial)

Date of hearing : 15.06.2018
Date of decision : 26.07.2018

O R D E R No: **A / 86979 / 2018**

The order of Commissioner of Central tax (Appeals-I), Pune passed in Order-in-Appeal No. PUN-EXCUS-001-APP/0959/2017-18 dated 27.12.2017 upholding the service tax demand of `15,62,686/- along with interest and penalty under Section 77 as well as modifying imposition of penalty under Section 78(1) from 15% of the tax demand to 50% of the tax demand by way of allowing appeal preferred by the respondent department is challenged before this Tribunal.

2. The brief facts of the appellant's case is that it is a private limited company engaged in the business of providing maintenance and repair services and it has been regularly filing service tax returns as well as paying service tax on value of taxable services, on receipt of such tax from service recipient and it was unaware of changes made in the service tax club regarding payment of service tax slabs accrual basis after introduction of Point of Taxation Rules, 2011 with effect from 01.04.2011. It therefore continued to pay service tax after receipt of consideration value of service as contemplated under Section 68 read with Rule 6 of Service Tax Rules, 1994. During audit conducted for the period from financial year 2011 to 2014 objection was raised that appellant had not paid service tax in terms of Rule 3 of Point of Taxation Rules, 2011 and accordingly a tax demand of `17,79,239/- was made. Appellant recalculated the same and found actual tax liability came to `15,16,841/- and paid the same along with interest of `1,95,081/- vide challan dated 04.06.2014. Subsequently show-cause notice dated 15.04.2016 was issued and on receipt of its reply, first adjudicating authority i.e. Asst. Commissioner of Service tax, Div-V, Ratnagiri confirmed the demand of service tax of `15,62,686/- along with interest, penalty of `10,000/- under Section 77(2) and penalty of 15% of duty demand under Section 78(1)(i) of Finance Act, 1994

by justifying the extended period and holding the ground of suppression raised in the notice as valid. Respondent department preferred an appeal before the Commissioner (Appeals) to enhance the penalty imposed under Section 78(1)(i) and succeeded in the appeal in getting the same enhanced by 50% from 15%. The said order of the Commissioner (Appeals) is being challenged in this forum.

3. In his memo of appeal, and during the course of hearing of appeal, ld. Chartered Accountant for the appellant submitted that notice should not have been issued after service tax liability along with interest was discharged in view of proviso to Section 73(3) and extended period of limitation should not have been invoked as well as consequent penalties under Section 77 & 78 should also have not been imposed in the absence of ill intention of the appellant. He also took the court to the provisions of Point of Taxation Rules, 2011 that came into force on 01.04.2011 and its subsequent amendment made to Rule 9 of said Point of Taxation Rules, 2011 by Notification no.25/2011-ST dated 31.03.2011 by virtue of which discretion was with the tax payer upto bar up to 30.06.2011 to adhere to date of invoice or date on which payment was received as the date for determination of Point of Taxation and wanted to justify the stand of the appellant that going by detail of transaction

furnished by the appellant between period 01.04.2011 and 31.01.2014 which was accepted by the first adjudicating authority for reducing the total demand from `17,79,239/- to `15,16,841/-, it can conveniently be said that aggregate of the duty payable for bills up to 30.06.2011 was `6,96,062/-, the period for which option was granted to the service provider vide Notification 25/11 to deposit the tax after the date on which the payment was received and therefore demand of duty for the entire period along with interest and imposition of penalty of 50% of the duty levied is unjustified and same is liable to be set aside.

4. Respondent department has not filed any cross objection but referring to the order-in-original passed under para 40, the ld. AR for the department submitted that appellant company had not disputed the allegations in their replies but disputed the correctness of the worksheet enclosed to the show-cause notice in respect of amount worked out therein. He also submitted that admission is best proof and as per the Indian Evidence Act, the same is not required to be established by way of additional proof. Pointing to the observation made by the first adjudicating authority and the appellate authority regarding suppression of fact the ld. AR submitted that the adjudicating authority was not empowered under the

statute to impose penalty of 15% for which the Commissioner (Appeals) had rightly allowed the appeal preferred by the department and increased the penalty to 50% since such 15% penalty was permitted by the statute to have been voluntarily paid by the defaulter and cannot be imposed in an adjudication process.

5. Heard both sides at length and gone through the case record including the orders passed by the adjudicating authority and first appellate authority as well as provision of law involved in the case. Admittedly, appellant company had expressed its ignorance about change of procedure concerning Point of Taxation Rules, with effect from 01.04.2011 and made delayed payment of service tax upon its receipt and not on the basis of dates on which invoices were raised by it. But it pleads that because of long practice prevailing since introduction of service tax, it was just carrying forward the process and there was no ill intention that can be attributed to evade tax since all the tax liabilities were addressed with due payment of interest after the same being identified by way of audit. This being the circumstantial situation on record, it is imperative to have a look on the provisions contained in Finance Act, 1994 that enables assessment beyond the extended period on grounds of suppression, non-disclosure etc. and to

analyse if there was any ill intention on the part of the appellant to evade tax so as to impose penalty contemplated under Section 77 and 78 of Finance Act, 1994.

6. Proviso to Section 73 reads as follows:-

> "PROVIDED that 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) wilful mis-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,
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> by the person chargeable with the service tax or his agent, the provisions of this sub-section shall have effect, as if, for the words [Eighteen months] , the words "five years" had been substituted."

Therefore for reason of fraud/collusion/wilful mis-statement/ suppression of fact or contravention of the provisions and rules intended to evade tax would entail the departmental officer to go beyond the normal period of 18 months and in such a eventuality as contemplated under Rule 4 that provides an exclusion clause to non-imposition of penalty in respect of payment of service tax and interest under sub-

Section 3 before issue of show-cause notice, penalty can be imposed. Contradictory decisions are cited, divergent views are put forth by both the parties on this point. But a close reading of the Rule would clearly indicate that the explanation 2 has been inserted to sub-rule 3 of Rule 73 with effect from 08.05.2010 and sub-rule 4 has all along been existing since implementation of Finance Act, 1994. Therefore, there is no need to venture into such debate that explanation 2 providing non-imposition of penalty under any of the provisions of Act and Rule on fulfilment of requirement of sub-rule(3) would have application to sub-rule 4 since sub-rule 4 starts with an non-obstinate clause "nothing contained in sub-rule 3 shall apply" to a case where service tax has not been levied or paid or short levied or short paid or erroneously refunded by reason of those five grounds mentioned above under proviso to sub-rule (1) of Rule 73.

7. Be that as it may it is now to be seen as to how this practice of fraud, collusion, submission of "wilful" misstatement or suppression of fact vis-a-vis contravention of provisions of this chapter and rules made thereunder "with intend to evade tax payment" is to be established and on whom the burden lies. In an adversarial judicial system and as per rule of evidence, burden lies on the person who

asserts in the affirmative. Therefore, it is up to the respondent department to establish that the appellant had practised any kind of act contemplated under sub-rue (4) so that penalty can be imposed on it. Going by the adjudication order and also the order passed by the Commissioner (Appeals), it cannot be said to have been established by the department that such practice of fraud collusion etc., were established before those authorities. Rather what is found from the order-in-original is that the first adjudicating authority has narrated (in para 15) that the basic allegation made in the show-cause notice is that LEPL (appellant) **<u>failed</u>** to pay service tax on the service rendered by them on which invoices were issued by the 6th day of month following which the service is deemed to be provided as per Point of Taxation Rules, 2011. It has further been mentioned in the order of first adjudicating authority under para 18 that appellant **<u>failed</u>** to file service tax returns pertaining to the relevant period within the prescribed time limit. But immediately he changed his version to state that the same amounts to suppression (from the department) of the fact that they had not discharged service tax liability on those invoices to evade payment of service tax. I failed to understand how “failure” has become synonymous with “suppression.”

8. The dictionary meaning of "suppression" is that it is an act of preventing something from being seen or expressed or from operating. "Failure" on the other hand is incapability or incapacity of a person to act. Therefore, one of these two words cannot be a substitute for another.

9. When any new provision is introduced into the Act and Rule, it's possible bearing on the common mass is mainly ignorance of such change. Understanding of the provision of law or Rule in its infancy stage are bound to result in misinterpretation or misapplication and even in the field of law say experts in the field of law are bound to commit mistakes and the same is apparent on record, which can be traced out from the order of the first appellate authority. A reproduction of such error in calculating the tax liability by the auditor himself is found at para 15,16 and 17 of the order of adjudicating authority and I am tempted to reproduce para 17 wherein it was established that such calculation error basing taxation rule was found to be corrected by the Range Superintendent.

> "17. The report submitted by the R/Supdt. confirmed the claims made by LEPL regarding correction in the amount demanded under the SCN. The R/Supdt. reported that out of total demand of Rs 17,79,239/- an amount of Rs 2,62,398/- is required to be deducted. Hence the

> corrected amount of demand comes out to be Rs 15,16,841/-. The amount of service tax shown as payable as per Sr. no. 11 of annexure is 46,466/- whereas actual amount of service tax paid in this regard by LEPL is 92,311/- which is confirmed by the R/Supdt. Considering the correct payment made by LEPL in respect of Sr. No 11 which is in excess of amount demanded at the said entry by Rs 45,845/-, I find that LEPL have correctly paid the service tax of Rs 15,62,686/- (which is equal to corrected amount of demand of Rs 15,16,841/- plus correct amount of service tax paid by LEPL for Sr. no 11 of annexure which is in excess by Rs 45,845/- of demanded amount)."

10. Therefore, it cannot be said that delayed payment of tax liability by a month or so by the appellant was purposeful and deliberate as it had all along practising the procedure existing before introduction of such Point of Taxation Rules, 2011 with effect from 01.04.2011, since it is apparent from record that it acted on an honest principle found upon reasonable ground of a state of circumstances. In the order of the Commissioner (Appeals) also not a single reference is made to establish that such act of the appellant in delayed payment of tax upon its realisation was made with any ulterior motive to evade tax. It would also be desirable and befitting to reproduce a relevant portion of the judgment pronounced by the Hon'ble Apex Court in the case of Uniworth Textiles Ltd. (2013) TIOL 13, which has

also been relied on by the appellant, though pronounced in reference to Section 28 of the Customs Act. It was held in the said judgment –

> "The conclusion that mere non-payment of duties is equivalent to collusion or wilful misstatement or suppression of facts is, in our opinion, untenable. If that were to be true, we fail to understand which form of non-payment would amount to ordinary default? Construing mere non-payment as any of the three categories contemplated by the proviso would leave no situation for which, a limitation period of six months may apply. In our opinion, the main body of the Section, in fact, contemplates ordinary default in payment of duties and leaves cases of collusion or wilful misstatement or suppression of facts, a smaller, specific and more serious niche, to the proviso. Therefore, something more must be shown to construe the acts of the appellant as fit for the applicability of the proviso."

11. In view of the above facts and circumstances, and in view of the fact that parameters of proviso to Section 73 and ingredients constituting suppression of fact by the appellant has not been made out and the same had not been established by the respondent department before the authorities adjudicating the matter, it can safely be concluded that Section 4 would have no application to the

case of the appellant attracting penalty, in which case explanation 2 to sub-section (3) of Section 73 will have its effect. Hence the order-

12. The appeal is allowed and the order passed by the Commissioner (Appeals) in PUN-EXCUS-001-APP/0959/2017-18 on dated 27.12.2017 imposing duty, interest and penalty is hereby set aside.

(Pronounced in Court on 26.07.2018)

Dr. Suvendu Kumar Pati
Member (Judicial)

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