

washing and ironing of clothes of the customers in its premises on agreed upon charges, duly accounted in its books of accounts. During investigation, central excise officers verified the transactions, recorded statement of the General manager and issued show-cause cum demand notice dated 21.10.2016 for payment of service tax of ₹10,52,362/- for the period from 2011-12 to 2014-15 along with interest penalty invoking provisions of Section 76, 77(2) and 78 of the Finance Act, 1994. The matter was adjudicated upon and duty demand interest as well as penalty except under Section 76 got confirmed in order-in-original against which appellant preferred appeal before the Commissioner (Appeals), Pune who vide his order dated 01.11.2017, waived off duty liability up to implementation of negative list holding that only dried cleaning was taxable in the pre-amended period. He confirmed the duty liability for the period after 01.07.2012, reduced the penalty imposed under Section 77(2) to 10,000/- from 20,000 and directed for requantification of the duty liability, interest as well as proportionate penalty under Section 78. The said order is being challenged in this appeal.

3. In his memo of appeal and during course of hearing of the appeal the Id. Counsel for the appellant Shri J.N. Somaiya submitted that appellant is a cooperative society of rural ladies who were ignorant of the applicability of new

service tax Rules post negative list regime and since the entire transactions were reflected in the books of Account, basing on which duty demand is made, there was no suppression of fact and under the bonafide belief that such dhulai/estri were not taxable services the same was not collected from the customers and paid to the government. While conceding that no ST-3 returns were filed, the Id. Counsel for the appellant pointed out that bonafideness of the appellant was apparent since there was no intention to evade payment of service tax especially when up to 03.06.2012 their activities were not taxable and for service provided thereafter also they have not collected any tax from the customer. In citing judicial decision of Bordubi Engineering Works vs. UOI 2016 (42) STR 803 (Guj), K.T. Murukan 2017 (5) GSTL-248 (Ker.) and Uniworth Textiles Ltd. 2013 (288) ELT 161 (SC) he argued that mere omission to pay tax/ file returns by itself cannot establish malafide of the assessee in the absence of independent corroborative evidence in which invocation of extended period is not justified and to that extent the order of the Commissioner (Appeals) is to be declared invalid since duty demand is not sustainable for the entire period.

4. In response to such submissions, Id. AR for the department Shri Dilip Shinde reiterates the reasoning and rationality of the order passed by the Commissioner

(Appeals) and in citing case laws reported in 2016 (41) STR 651 (Tri-Del), 2012 (27) STR 242 (Tri-Mumbai), 2014 (34) STR 252 (Tri-Ahmd.), 2017 (52) STR 40 (Tri-Del), he argued that penalty imposed for non-payment of service tax by invoking extended period and under Section 78 is proper and justified for which interference by the Tribunal is uncalled for.

5. Heard from both sides at length and perused the case records as well as the case laws cited and relied upon by the adversaries. Admittedly appellant is a unit constituted under Cooperative Society Act and as its name indicates the members of the society are ladies but it has acquired the status of a limited company registered under the Service Tax way back in 2005 and was engaged in providing Business Auxiliary Service and transportation of goods by road services besides these two disputed services namely washing and ironing. As found from the order-in-original, appellant started paying service tax voluntarily on these two services from 01.04.2015 as laundry activities. In his detail order, the Commissioner (Appeals) has given his finding that prior to 01.07.2012 only dry cleaning was taxable and appellant's washing procedure was not scrutinised to find out the use of solvent which is most important for the purpose of determination of cleaning procedure and as the washing charges were mentioned in

the invoice and same has been stated in the book of accounts, he accepted the submissions of the appellant that washing of clothes were done in washing machine with the help of water and washing powder/ liquid for which he held that service given by appellant before 01.07.2012 is not taxable but as negative list under Section 66D or mega exemption Notification no. 25/2012-ST have not contained the name of services provided by the appellant, the further period post negative list is taxable. I find no irregularity in his order on duty liability of the appellant applicable with effect from 01.07.2012, having regard to extension of cum tax benefit as provided under section 67(2) of the Act.

6. Penalty was imposed under Section 77(2) and under Section 78 of the Finance Act, 1994 by the Commissioner (Appeals). But while reducing penalty from ₹20,000 to ₹10,000 under Section 77(2) of the Act, the Commissioner (Appeals) has given his reasoning that ₹20,000 was maximum penalty prescribed and as appellant was yet to file the prescribed return for which he considered that it would be improper to invoke Rule 7C and Section 70 of the Act to impose maximum penalty by equating the delay in filing with non-filing of return. Since respondent department has not challenged the same reduction of penalty, such reduction of penalty under Section 77(2) appears to be reasonable.

7. Now coming to the penalty imposed under Section 78 of the Act, it is imperative to have a look at the order-in-original where appellant was given an option to pay reduced penalty of 25% if duty demand along with interest was to be paid within 30 days from the receipt of this order. This itself is indicative of the fact that the amount of service tax was determined under sub-rule (2) of 73 and the reflection of detail related to such transaction are recorded in the specified records for the period beginning with 08.04.2011. moreover, when notice of show-cause is issued by extending the period of limitation to 5 years, it does not necessarily mean that fraud, collusion, wilful misstatement or suppression of fact have been established since on apprehension of such acts, records can be scrutinised but that does not necessarily mean that when duty liability has arisen the same should not be paid, keeping penalty aspect to be established beyond reasonable doubt by the prosecution itself through cogent evidence for justifying penalty intended to be imposed under Section 78 of the Act. In the instant case the service provided by the appellant was not taxable before introduction of negative list. It was not filing returns on those scores though it was duly maintaining the record. Further if the contention of Id. Advocate is to be accepted, the rural folk of Indian society continue to follow the same procedure unless being

appraised about change of any system, law, rule or regulation and to this extent, the observation of Hon'ble Supreme Court made in Uniworth Textile cited supra that mere non-payment of duty is not equivalent to collusion or wilful mis-statement or suppression of fact is relevant. It was further noted by the Hon'ble apex court that if the same were to be true then what would amount to ordinary default? Ultimately it was held that a specific or more serious niche is to be shown to construe the act of the appellant is fit for the applicability of proviso to Section 73(1). Further it has been rightly held in case law reported in 2016 (37) ELT 482 (SC), as submitted by the Id. Counsel, that mere omission to disclose would not amount to suppression of fact unless there was deliberate attempt to evade duty and in the instant case as there was no proof furnished by the department that suppression had taken place and finding in the order-in-original reveals that appellant had started voluntarily paying the service tax, penalty of equivalent amount under Section 78 of the Act would be a travesty of justice. Hence the order –

8. The appeal is allowed in part and the order passed by the Commissioner (Appeals) is modified as follows.

(i) service tax liability to be requantified with effect from 01.07.2012 by giving cum-tax benefit in terms of Section 67(2) of the Act.

(ii) Applicable interest to be levied on requantified service tax liability penalty of ₹10000/- in terms of Section 77(2) of the Act is confirmed. Penalty under Section 78 of the Act is set aside.

(Pronounced in Court on 31.12.2018)

Dr. Suvendu Kumar Pati
Member (Judicial)