

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

Appeal No. ST/86629/2018

(Arising out of Order-in- Appeal No. MUM-DGPM-
WRU/APP04/2017-18 dated 28.02.2018 passed by the
Principal ADG, Customs, C.Tax, Mumbai)

M/s. S.S. Construction

Appellant

Vs.

CGST, Mumbai West

Respondent

Appearance:

Ms. Kranti Rathi, Advocate with Shri J.R. Gawde,
Consultant for the appellant
Shri Dilip Shinde, AC (AR) for the respondent

CORAM:

Hon'ble Dr. Suwendu Kumar Pati, Member (Judicial)

Date of hearing : 06.08.2018

Date of decision : 20.12.2018

O R D E R No: **A/88157/2018**

Imposition of penalty under Section 78 of the Finance Act, 1994 against non-payment of service tax collected for providing telecom services and work contract services by the adjudicating authority which has attained finality in the order of the Commissioner (Appeals) is assailed by the appellant company before this forum.

2. Brief fact of the appellant's case is that it has been providing works contract services and telecommunication services since 03.11.2006. It has provided services like laying of cables and dock lines for telecommunication companies namely Tata Telecommunications, BSNL etc. as its major clients. Anti-evasion wing of the appellant department, upon collection of intelligence report, visited the office premises of the appellant, inspected its documents and found non-payment of service tax collected to the tune of ₹47,65,673/- during the period 2010 to 2011 and sort payment of ₹71,476/- in the financial year 2010-11, 2011-12, 2012-13 and non-filing of ST-3 returns after March 2009. Statement of partner Shakeel Ahmed was recorded, who admitted service tax liability and attributed the reason of non-payment to delayed clearance of its bill by Tata Telecommunications and shortage of cash flow. Such raid was conducted on 16.08.2011 and immediately thereafter by 19.08.2011 the outstanding amount was paid by the appellant but vide show-cause notice dated 24.06.2014, it was asked to discharge the duty liability, interest and penalty by invoking the extended period on the ground that appellant had suppressed the duty liability in not filing return and not paying the same promptly to the government after its collection. Reply of appellant was filed before the adjudicating authority who confirmed the duty

liability interest and penalty invoking the extended period and after unsuccessfully challenging the same before the Commissioner (Appeals), the appellant has filed this appeal in the Tribunal.

3. In the memo of appeal and during course of hearing of the appeal, Id. Counsel for the appellant Ms. Kranti Rathi submitted that appellant was not extended the benefit provided under Section 73(3) of the Finance Act, 1994 after payment of duty, interest and penalty component accordingly and was put to show-cause almost two years after the visit of the departmental officials. In citing judicial decisions in Ford India Pvt. Ltd. vide Final order no. 40182-40183/2018 dated 23.01.2018, CCE vs. Mahindra & Mahindra Ltd. 2018-TIOL-187-SC-MUM-CX, Thirumurugan Enterprises 2015 (14) STR 681 (Mad.), A.N. Impex 2016 (42) STR 793 (Bom), Amway India Enterprises Pvt. Ltd. 2015 (39) STR 1006 (Tri-Del), Vista Infotech 2010 (17) STR 343 (Tri.Bang), S.K. Electro Engineers 2015 (39) STR 686 (Tri Mum), Royes Inds Ltd. 2016(344) ELT 466 (Tri-Hyd), Pragathi Concrete Products (P) Ltd. 2017 (50) STR 92 (SC), CCE Nagpur vs. Hyundai Unitech Electrical Transmission Ltd. 2015 (323) ELT 220 (SC), CCE Vadodara vs. Gujarat Narmada Fertilizers Co. Ltd. 2012 (285) ELT 336 (Guj), Simplex Infrastructures Ltd. 2016 (42) STR 634 (Cal.), MP Laghu Udhdyog Nigam Ltd. 2015 (37) STR 308 (Tri-Del),

Uniworth Textiles Ltd. 2013 (SC2)-GJX-0032-SC, the Id. Counsel for the appellant prays for waiving of penalty on the ground that appellant was maintaining records and books of accounts for which those transactions were reflected and there was no intention to suppress the fact so as to evade tax.

4. In response to such submissions of the appellant, Id. AR for the respondent department supported the reasoning and rationality of the order passed by the Commissioner (Appeals) and argued with reference to case laws reported in CCE vs. Neminath Fabrics Pvt. Ltd. 2010 (256) ELT 369 (Guj) that as department acquired knowledge of irregularity, fact of suppression cannot be obliterated. He strenuously argued that unless anti-evasion team had not raided the premises of the appellant, the fact of suppression by way of evasion of tax would not have been known. Referring to the order passed by the Commissioner (Appeals) in para 6.1, 6.2 and 7 where reference to order-in-original is made by the Commissioner (Appeals), Id. AR argued that the appellant had collected service tax amount during the period April 2010 to June 2011 but had not deposited the same in government exchequer nor disclosed the same on its own to the department and the statement of one of its partners indicates that such service tax liability was not discharged due to cash flow and fund problem which itself

indicates that tax liability was well within the knowledge of the appellant firm who had intentionally withheld the same for which extended period was rightly invoked that needs no interference of the appellate Tribunal.

5. Heard from both sides at length and perused the case records and relevant judicial decisions submitted by adversaries. On perusal of the case records it is observed that both show-cause and order-in-original reveal that anti-evasion wing had visited the premises of the appellant on 16.08.2011 and found collection of service tax of over ₹47,65,673/- made by the appellant but not paid, besides short payment of ₹71,476/- for other period. But surprisingly only cash crisis/ fund shortage was cited as the ground for such non-discharge of duty liability but on 18.08.2011 and 19.08.2011, the appellant was able to discharge the entire amount, which is just within two days from the date of raid conducted by the respondent department. Further, order-in-original at para 5.9 reveals that appellant was not filing ST-3 returns and would have continued to evade service tax by suppressing material facts, had there been no intervention by the department. This being the factual aspect, it cannot be said that appellant had a bonafide intention to discharge duty liability and it could not do so due to incapacity. The other ground cited by the appellant in placing reliance to the statement

of the partner is that they did not get payment against work done for Tata Telecommunications but nowhere in the reply to the show-cause notice or personal hearing, they had established that in between raid conducted on 16.08.2011 and payment made on 18.08.2011 the appellant had in fact received such payment and promptly discharged its duty liability. Further, appellant wants its case to be covered under Section 73(3) but to being it to its preview, the fact of duty liability should not have been in its knowledge and should have been brought to its notice by the central excise officer. In that context, no such material is forthcoming that appellant was ignorant of its duty liability and had in fact furnished its statement by way of ST3 returns to the department indicating its duty liability.

6. Section 78 requires that such fact of wilful suppression, misstatement etc. had to be established by the department on whom the burden of proof lies and department has successfully discharged the same by getting the same admitted by the partner of appellant firm which remained unchallenged by the appellant all throughout the proceedings. Therefore the onus has shifted to the appellant which is supposed to disprove the allegation of the department but both stand taken by the appellant regarding delayed payment and cash crunch could not be substantiated by it as it could generate cash of

huge amount for payment within two days of visit by the departmental officials to its premises and in not producing any documentary proof regarding non-payment or delayed payment by the service recipient namely Tata Telecommunications. The case laws cited by the appellant are factually unrelated to the facts of the appellant's case as in Ford India Pvt. Ltd. case, the issue was in respect of interpretation concerning business auxiliary services and in CCE vs. Mahindra & Mahindra, such irregularity were indicated through revenue audit conducted in routine manner and the like. On the other hand, the case law cited by the Id. AR i.e. CCE vs. Neminath Fabrics Pvt. Ltd. though was decided in respect of shortage of stock that was allegedly cleared without payment of tax, is squarely applicable to the case of the appellant. Hence the order –

7. The appeal is dismissed and the order passed by the Commissioner (Appeals) vide Order-in- Appeal No. MUM-DGPM-WRU/APP04/2017-18 dated 28.02.2018 is hereby confirmed.

(Pronounced in Court on)

Dr. Suvendu Kumar Pati
Member (Judicial)