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

Appeal No. ST//86692/2018

(Arising out of Order-in- Appeal No. 39/GH/2017-18/RAIGAD dated 20.02.2018 passed by the Commissioner(Appeals) of CGST & CX, Thane)

Q&Q Research Insights Pvt. Ltd. Appellant

Vs.

CCGST & CX, Mumbai Respondent

Appearance:

Shri Bipin Kumar Sinha, Consultant for the appellant
Shri Dilip Shinde, AC (AR) for the respondent

CORAM:
Hon'ble Dr. Suvendu Kumar Pati, Member (Judicial)

Date of hearing : 06.09.2018
Date of decision : 08.01.2019

O R D E R No: **A/85025 / 2019**

Confirmation of penalty of ₹41,04,525/- under section 78 of the Finance Act by the Commissioner (Appeals) of CGST & CX, Thane by upholding the OIO is assailed in this appeal.

2. Factual backdrop of the case is that the appellant is engaged in providing marketing and research agency services to various companies and has registered it under service tax. For the financial year 2013-14 and 2014-15, it filed ST3 return belatedly for the period from April to

September 2013 on 04.04.2014 and for the period from October 2013 to March 2014 on 05.04.2014. Vide show-cause notice dated 28.09.2014 issued under section 73(1) it was asked to reply for alleged short payment of service tax to the tune of ₹41,04,525/- and asked as to why the same amount along with interest and penalty under section 76, 77 and 78 of the Finance Act shall not be recovered from it? Matter was adjudicated upon that ended in confirmation of duty liability, interest and penalty by the adjudicating authority and after the same was unsuccessfully challenged before the Commissioner (Appeals), jurisdiction of the Tribunal is invoked.

3. In the memo of appeal and during the course of hearing of appeal, ld. Counsel for the appellant submitted that it is beyond the scope of the adjudicating authority to confirm penalty while show-cause was issued under section 73(1) and not under its proviso in which penalty of equal amount of duty is specified in case of fraud, collusion, wilful misstatement or suppression of fact or contravention of the provisions of the Chapter of the Finance Act. Therefore, Commissioner (Appeals)'s order confirming penalty under section 78 of the Finance Act is erroneous. In citing decision reported in Uniworth 2013 (288) ELT 161 (SC) along with other decisions included Larsen & Toubro reported in 2007 (211) ELT 513 (SC) the ld. Counsel for the appellant argued that no such

allegation is made in the show-cause notice to attract penalty and therefore the entire penalty of ₹4104,525/- under section 78 of the Finance Act is unsustainable. He further pointed out that in all those cases, the cardinal principle of law set was the burden of proof to establish any malafide was on the department and there was no averment that duty of excise has been intentionally evaded or fraud or collusion has been practiced or there was any mis-statement or suppression of fact for which he prayed to set aside the order of the Commissioner (Appeals).

4. In response to such submissions, ld. AR for the department supported the reasoning and rationality of the order passed by the Commissioner (Appeals) and argued that when appellant had admitted such non-payment of duty and discharged the tax liability, there is no reason to interfere in the order of the Commissioner (Appeals) imposing penalty on the appellant as it was apparent from the ST-3 returns that appellant had filed the same but not paid the service tax and it has also admitted tax liability in response to the show-cause notice without assigning any reason as to why it had not discharged the service tax liability for which interference by the Tribunal is uncalled for.

5. Heard from the both sides at length, perused the case record and the relied upon judicial decisions. Going by the

show-cause notice, and its reply it can very well be said that assesse (appellant) was found to have short paid the service tax during the period and it had gone to its notice during finalisation of the financial accounts for which it could not revise the same in their return as time for such revision of ST-3 had already lapsed. Further, such short payment was mainly due to the fact that it had failed to furnish proof during assessment that it had fulfilled the criteria of "pure agent" as laid down under Rule 5 and failed to discharge service tax liability under reverse charge mechanism on payment made to the Directors. Show-cause also indicated that appellant had failed to charge and pay the service tax on the value received as pure agent and value of director service for which it had contravened the provision of Section 68 of the Finance Act. There is nothing available in the show-cause that such contravention of the Act or Rule was made with an intent to evade payment of service tax. On the other hand, the show-cause notice indicates that appellant had failed to discharge the same and such use of word that appellant had failed to discharge the service tax is also found in the OIO and OIA. Further on close scrutiny of the order of Commissioner (Appeals), it is noticed that appellant had produced 14 plus 12 invoices in support of its claim as "pure agent" but those were found unacceptable by the Commissioner (Appeals) since the description of services referred in those invoices were local conveyance, travel cost, face to face interview and the ground of rejection, as stated by him, is that it was not understood from those invoices as to how the appellant had acted as “pure agent” and on whose behalf! I also fail to understand the logic of the Commissioner (Appeals) in the sense that, to his best assessment, what could be considered as “pure agent” in terms of Rule 5 of Service Tax Determination of Rules, 2006 which confines the definition to the expenditure or cost incurred by the service provider as a pure agent of the recipient of service. In the instant case when the nature of service provide by the appellant being marketing and research agency services, why those items like travel cost, local conveyance, interview etc. will not be considered as expenditure for a company engaged in marketing and research agency. Be that as it may, when appellant had not challenged the same those point needs no further discussion except for the purpose that availment of benefits as pure agent was asserted by the appellant and denied by the revenue authority in which case it cannot be said that such denial has attained finality and appellant had therefore contravened the provisions of the Act Rule as contemplated in Section 73(1) proviso.

5.1. Likewise in borrowing Section 194J of the Income Tax Act which made remuneration made to the director as taxable without distinction of the payment if made to the directors as salary or remuneration, the Commissioner had confirmed the invocation of notification no.30/2012-ST dated 20.06.2012 that was made effective from July 2012 and demanded tax liability under reverse charge mechanism. Therefore, it cannot be said that appellant had not followed the provisions contained in Chapter of Finance Act or in the Rule made thereunder since under erroneous interpretation of the provisions, it had not considered those duty and not discharged those duty liability. On the other hand, when it had met the duty demand without protest after the same has brought to its knowledge, Explanation – 2 to Section 73(3) of the Finance Act is more applicable to the appellant. Hence the order –

6. The appeal is allowed and the order passed by the Commissioner (Appeals) of CGST & CX, Thane imposing penalty under section 78 is hereby set aside.

(Pronounced in Court on 08.01.2019)

Dr. Suvendu Kumar Pati
Member (Judicial)

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