

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

Appeal No. ST/87380/2018

(Arising out of Order-in-Appeal No. MKK/543/RGD-APP/2017-18 dated 16.02.2018 passed by the Commissioner of CGST & CE, (Appeals), Raigad)

CCGST Belapur

Appellant

Vs.

Reliance Infocomm Infrastructure Ltd.

Respondent

Appearance:

Shri Suresh, AC (AR) for the appellant
Ms. Ginita Badani, Advocate for the respondent

CORAM:

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

Date of hearing : 18.09.2018

Date of decision : 25.01.2019

O R D E R No: **A/85193 / 2019**

Order passed by the Commissioner of CGST & CE, (Appeals), Raigad setting aside the penalty imposed by the adjudicating authority on the respondent under section 77 and 78 of the Finance Act read with 15(3) of Cenvat Credit Rules is assailed by the appellant department before this forum.

2. Factual backdrop of the case, in a nutshell, is that respondent Reliance Infocomm Infrastructure Ltd. was

pointed out by the audit team to have availed ineligible cenvat credit of ₹23,98,774/- on “business support service” and “renting of immovable property service.” Between the Financial year 2009-10 and 2011-12, it was also discovered by the said EA 2000 audit that there was mismatch between profit and loss account and balance sheet with ST3 returns for the Financial year 2010-11 and reconciliation of the same brought a difference of ₹48,69,069/- in the taxable value which was less shown in the ST-3 returns and accordingly service tax liability of ₹5,01,483/- was calculated. In compliance to such audit observation, appellant discharged duty liability along with interest for both components but was subsequently vide notice dated 31.03.2013 was put to show-cause for alleged suppression with a proposal for imposition of penalty under section 76, 77 and 78 of the Finance Act r/w Rule 15(3) of the Cenvat Credit Rules. Matter was adjudicated upon, penalty equivalent to duty demand was confirmed under section 78 and penalty of ₹7000/- was imposed under section 77 of the said Act by the adjudicating authority who set aside only proposed penalty under section 76 of the Act. Matter was taken to the Commissioner (Appeals) by the respondent who set aside the penalty on all scores. The said order is being challenged here by the appellant department.

3. In the memo of appeal and during course of hearing of the appeal, learned AR for the department submitted that the order passed by the Commissioner (Appeals) is erroneous inasmuch as the finding of which he arrived at such conclusion is illogical. While admitting that show-cause notice does not reveal that proviso to Section 73(1) was invoked for imposition of penalty under section 78 of the Finance Act. Learned AR Shri Suresh submitted that during the corresponding period 2009 to 2012 no such provision in the Finance Act 1994 other than Section 73(1) or Rule 15 of Cenvat Credit Rules 2004 could be pressed into service to make such demand in the show-cause for which Section 73(1) is implicit in the show-cause though not expressly referred inasmuch as Section 15(3) of the Cenvat Credit Rules was invoked in the show-cause notice itself and ingredient of the offence constituting suppression misstatement and intention to evade payment of service tax on the part of respondent was squarely made out in the OIO as discussed in para 1.3 and 1.4. of the order. He placed his reliance on the order of the CESTAT Ahmedabad bench in the case of Geedelon Texo Twist Pvt. Ltd. reported in 2009 (238) ELT 455 (T-Ahd) to support his contention. He further submitted that the respondent department had not disclosed the entire transaction in ST3 return for which it can be considered to have misstated the facts with a clear intention

to evade payment of duty and had audit not been conducted, the fact of not discharging service tax liability would have remained unnoticed and since respondent department is registered from 2006 and very familiar with service tax provisions, it's conducted itself clearly justified suppression. The other contention of the appellant is that Rule 9(6) of the Cenvat Credit Rules 2004 puts the burden of proof regarding admissibility of cenvat credit on the assessee and in case of any doubt it could have sought advice from the department and should never have misstated the fact in the ST3 return for which the order of the Commissioner (Appeals) is liable to be set aside.

4. In response to such submissions, though that no Cross objection is field, the learned counsel for the respondent Ms. Ginita Badani submitted that the respondent had received an intimation later from the appellant department on 06.12.2012 intimating the respondent to cooperate in the proper audit to be conducted in its concern and produce relevant documents before it. It also requested that payment of service tax with interest with furtherance of the audit objection by the respondent would help conclude all proceedings and put an end to the litigation. Referring to relevant para of the said audit report produced vide Exhibit A, the learned counsel for the respondent submitted that the respondent was instructed that for voluntary compliance of

the audit objection raised by the audit parties, there exist a provision under section 73(3) Chapter V of the Finance Act 1994 wherein only applicable service tax and interest can be paid and a letter seeking waiver of penalty/show-cause notice can be given by the assessee thus leading to better compliance and less litigation. The respondent abided itself with the letter and spirit of the audit report but was put to show-cause notice subsequent to its compliance of the audit and payment of differentia amount of tax along with interest as well as reversal of credit. Supporting the reasoning and rationality of the order passed by the Commissioner (Appeals), the learned counsel for the respondent in citing judicial decisions reported in 2017 (47) STR 225 (Tri-Mum), 2016 (45) STR 99 (Tri-Mum) and 2012 (26) STR 3 (Kar) argued that as per Section 73(3) of the Finance Act issuing a show-cause notice after payment of service tax with interest is not supported by the provisions of the Act and circular no. 137/167/2006-CX – IV dated 03.10.2007 clearly stipulates that in such a situation, all proceedings are required to be concluded against the person to whom show-cause is issued under sub section (1) of section 73 if he had paid service tax in full together with interest and penalty, if applicable under sub section (1)(a). She further prayed for affirmation of the order passed by the Commissioner (Appeals).

5. Heard from both sides at length, and gone through the case record and relevant case laws produced by both parties. The grounds on which Commissioner (Appeals) had set aside the order of the first appellate authority are mainly two. First, for differential short payment of service tax, no show-cause notice was issued as appellant had already paid the said tax along with interest; Second, appellant was not issued with show-cause under section 73(1) of the Finance Act for which it has to be presumed that department has accepted the liability under section 73(3). Going by the OIO, para 1.3 and 1.4 on which the learned AR for the department placed his reliance, it cannot be said that the adjudicating authority has indicated the manner in which suppression of fact or misstatement has been established against the appellant except that he pointed out that short payment was noticed while making reconciliation with ST3 return. However, considering the fact that on such short payment, no show-cause notice was issued, the same cannot be recorded as suppression with malafide intention to evade payment of tax because no opportunity was provided to the appellant to justify such mismatching. On the other hand para 1.2 of the said order indicates that on being pointed out on such difference of amount which was shown less in the ST3 return, the appellant had accepted the objection and discharged the service tax liability. In respect of wrong availment of cenvat

credit, no finding is given in the OIO or OIA that those credits were in fact inadmissible and not supported by the Rule except that respondent had accepted the fact of such availment of such credit as inadmissible. Though admissibility or inadmissibility of the credit in respect of renting of immovable property and business support service is a mixed question of fact and law, the same requires no discussion here in view of admission by the respondent except to the extent that there is a difference between compliance of audit report and discharge of duty liability in respect of imposition of tax as per Section 265 of the Constitution of India. Moreover, appellant was given a written promise before commencement of Audit that if any discrepancy in the audit is pointed out and the same is complied with, no further litigation would ensue.

6. When show-cause does not contain the rule violated by the respondent while proposing penalty which Commissioner (Appeals) found from the factual aspect of the case to have been covered under Section 73(2) and held that in such an event proceeding is to be concluded under section 73(3) in view of the judicial decisions referred above by the respondent, there is nothing left before this court to interfere with the finding of the Commissioner (Appeals).

7. In respect of penalty imposed under section 77 by the adjudicating authority the Commissioner (Appeals) clearly referred in his order that Section 70 can only be invoked when there is failure to furnish return in prescribed form and not that return has been incorrectly filed. A reading of Section 70 of the Finance Act would take any prudent man to conclude that such a finding made by the Commissioner (Appeals) is not erroneous and therefore his order setting aside penalty under section 77 of the Finance Act needs no interference in view of the fact that audit was conducted on the basis of production of books of account and other documents. Hence the order

8. The appeal is dismissed and the order passed by the Commissioner (Appeals) in appeal no. MKK/543/RGD-APP/2017-18 dated 16.02.2018 is hereby confirmed.

(Pronounced in Court on 25.01.2019)

Dr. Suvendu Kumar Pati
Member (Judicial)