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

APPEAL NO: ST/87344/2018

Arising out of:	Order-in-Appeal No. MUM/DGPM/WRU/APP-53/2017-18 dated 26/03/2018
Passed by:	Principal Additional Director General, DGPM, WRU, Mumbai.

	Appellants – Represented by:
Sanghavi Land Developers Pvt Ltd.	Shri Jitu Motwani, Advocate
versus	
	Respondent – Represented by:
CCGST, Mumbai East	Shri M.P. Damle, Assistant Commissioner (AR)

Date of hearing: 12/12/2018
Date of pronouncement: 21/02/2019

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Hon'ble Shri Ajay Sharma, Member (Judicial)

ORDER NO: A/85344 / 2019

The instant appeal has been filed against the impugned order dated 26.3.2018 passed by the Principal Additional Director General, DGPM, WRU, Mumbai in Order-in-Appeal No. MUM/DGPM/ WRU/APP-53/2017-18. The only issue to be decided in this appeal is whether the Appellants are liable for penalty u/s. 78 of the Finance Act, 1994.

2. The Appellant are engaged in the business of construction of residential complexes as well as renting of immovable property. The said construction activity has been brought under the service tax only w.e.f. 1.7.2010 by way of amendment in the existing *Construction of Complex Services under section 65(105)(zzq) and (zzh)* of the Finance Act, 1994 and the said amendment was challenged by the *Maharashtra Chamber of Housing Industry* before the Hon'ble High Court of Judicature at Bombay by way of writ petition on the ground that the activities by the builders cannot tantamount to provision of any taxable service and therefore no service tax was to be paid. Since there was confusion in the entire construction industry at that time therefore neither the Appellant collected service tax from the buyers nor paid the same till the matter was finally decided by the Hon'ble High Court on 20.1.2012 by which the Hon'ble High Court upheld the constitutional validity of the amendment made by the Government. Thereafter on 2.3.2012 the anti-evasion team visited the office of appellant and found that the Appellant was not discharging service tax liability on the construction services nor declaring the statutory ST-3 returns. Since the appellants were not aware about the final disposal of writ petition by the Hon'ble High Court, therefore, immediately after pointing out by the said team, in the month of March, 2012 itself the Appellant deposited a sum of Rs.19,79,927/- towards service tax applicable on construction services during the

relevant period. Thereafter much belatedly a show cause cum demand notice dated 21.6.2016 was issued to the Appellant demanding the service tax amount, which according to the department the appellant had short paid by Rs.1,47,072/- for the period from 1.3.2012 to 31.3.2015, alongwith interest u/s. 75 and penalty u/s.78 of the Finance Act, 1978.

3. Ld. counsel for the appellant submitted that in the instant appeal they are only challenging the imposition of penalty u/s.78 of the Finance Act, 1994. He also submitted that the Appellant are willing to deposit the amount of interest u/s. 75 ibid. According to him, the appellants were not aware about the final order of the Hon’ble High Court and therefore they did not deposit the service tax. But immediately after pointing out by the anti-evasion team, in the month of March, 2012 itself they deposited a sum of Rs.19,79,927/- towards service tax despite the fact that they did not collect the said amount from their customers/buyers. According to him there was no suppression on the part of the appellant because at that relevant point of time there was confusion whether the builders are liable to pay the service tax in view of the amendment in the relevant sections of Finance Act and therefore the penalty u/s. 78 ibid cannot be imposed on the Appellant. The ld. Authorised Representative re-iterated the findings recorded in the impugned order and prayed for dismissal of the Appellant filed by the appellant.

4. I have heard ld. counsel for the Appellant and ld. Authorised Representative for the Revenue and perused the record. The relevant provisions of the Finance Act, 1994 which are relevant for deciding the issue are reproduced as under:-

> “78. Penalty for suppressing value of taxable service. - If the Central Excise Officer in the course of any proceedings under this Chapter is satisfied that any person has, with intent to evade payment of service tax, suppressed or concealed the value of taxable service or has furnished inaccurate value of such taxable service, he may direct that such person shall pay by way of penalty, in addition to service tax and interest, if any, payable by him, a sum which shall not be less than, but which shall not exceed twice, the amount of service tax sought to be evaded by reason of suppression or concealment of the value of taxable service or the furnishing of inaccurate value of such taxable service :
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> Provided that if the value of taxable service (as determined by the Central Excise Officer on assessment) in respect of which value has been suppressed or concealed or inaccurate value has been furnished exceeds a sum of twenty-five thousand rupees, the Central Excise Officer shall not issue any direction for payment by way of penalty without the previous approval of the Collector of Central Excise.”
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> Xxx xxx xxx
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> “80. Penalty not to be imposed in certain cases. - Notwithstanding anything contained in the provisions of section 76, section 77, section 78, or section 79, no penalty shall be imposable on the assessee for any failure referred to in the said provisions, if the assessee proves that there was reasonable cause for the said failure.”

5. It is not in dispute that when the amendment was carried out in the provision of service tax regarding construction activities, there was lot of confusion amongst the builders and the *Maharashtra Chamber of Housing Industry* even filed a writ petition before the Hon’ble High Court on which the Hon’ble High Court has passed the order on 23.7.2010 of no coercive steps against the builders for recovery of service tax. The said order of *no coercive steps* was in force upto January, 2012 when the said writ petition was finally decided by the Hon’ble High Court upholding the constitutional validity of the aforesaid amendments. There is no reason not to accept the reasoning given by the ld. counsel for the appellants that they were not aware about the final decision of the Hon’ble High Court, because as soon as the anti-evasion team visited the office of the appellants in the month of March, 2012 and informed them about the decision of the Hon’ble High Court and pointed out that they have not paid the service tax, immediately the appellants in the month of March, 2012 itself paid the service tax of Rs.19,79,927/- upto date. Thereafter they are discharging their service tax liability regularly. After the decision of the Adjudicating Authority, the appellant has deposited the balance amount of service tax of Rs.1,47,072/- in the month of February, 2017 which remained outstanding due to the calculation error for the period from 1.3.2012 to 31.3.2015. It is clear that the Appellants were under bonafide belief that the writ petition is still pending and that’s why

they did not discharge the service tax liability in the month of January, 2012 on the disposal of writ petition. In a similar matter, this Tribunal in the matter of *Interjewel Pvt. Ltd. vs. CST, Mumbai; 2015(40) STR 759 (Tri.-Mumbai)* decided the issue of penalty in favour of assessee/appellant therein and held as under:-

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> 9. At the same time, we find that all the appellants have been taking a consistent plea before the Adjudicating Authority that they were under a bona fide belief that the writ petition which has been filed by them has been admitted and is still pending, hence they need not discharge any Service Tax liability. On perusal of the records, we find that factually appellants had filed writ petition on 8-9-2006 and it was admitted by the Hon'ble High Court on 29-3-2007. We find that the department was represented by the standing counsel before the Hon'ble High Court and department's Affidavit was filed on 29-9-2006, which admitted the contentions that the appellants were engaged in importing of rough diamonds and have paid commission to the brokers through whom they procured diamonds from DTC. If the department was aware of writ petition filed by the appellants and have filed an affidavit in September, 2006, nothing prevented them from issuing protective demand notices in order to safeguard the revenue. As has been already reproduced hereinabove, we find that bulk of the show cause notices were issued by the Revenue Department in 2011 invoking the periods as indicated against the details of individual appellants. In our view, the demand of the Service Tax liability by invoking the extended period in all these cases will not survive as Revenue was well aware of the activity of the appellant of remitting the payments to the broker as commission through proper banking channels, which has been mentioned in writ petition before the Hon'ble High Court. In our considered view, the Revenue Department having filed an affidavit before the Hon'ble High Court in response to the writ petition filed by the appellant, invocation of extended period seems to be not in consonance of the law, and it has to be held that the Revenue authorities were aware of the fact that the appellant have remitted money to the broker situated abroad as commission. We are of the considered view, that appellants could have entertained a bona fide belief that the constitutional validity having been challenged by them in the writ petition and

> the same being pending before the Hon'ble High Court, they need not pay any Service Tax on the amount that is remitted to the brokers. This can be bona fide belief of the appellants, accordingly, the demand which has been confirmed against all the appellants by invoking the extended period of limitation are liable to be set aside and we do so to that extent the appeals are allowed. At the same time, the demands which are within the period of limitation from the date of issuance to the show cause notice needs to be upheld with interest and we do so, to that extent appeals are rejected.
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> 10. This takes us to the issue of penalties imposed on the appellants under various provisions of the Finance Act, 1994. We find that the appellant need not be visited by penalties under the various sections of the Finance Act inasmuch, they could have entertained the bona fide belief as to that their writ petition may be decided in their favour. Invoking the provisions of Section 80 of the Finance Act, 1994, we find that the appellants have made out justifiable reason for setting aside the penalties imposed on them. Invoking the said provisions of Section 80 of the Act, we set aside the penalties imposed on all the appellants herein to that extent the appeals are allowed."

6. The provisions under Section 11AC of the Central Excise Act, 1944 and Section 78 of the Finance Act, 1994, are pari materia. In the matter of *Rajasthan Spinning and Weaving Mills (supra)* the Hon'ble Supreme Court has laid down that unintentional and bona fide non-payment of duty does not entail penalty under Section 11AC of the Act of 1944. Similarly, in the matter of *Commissioner of Central Excise, Vapi v. Kisan Mouldings Limited - (2010) 15 SCC 100 = 2010 (260) E.L.T. 167 (S.C.),* following the ratio of Rajasthan Spinning and Weaving Mills case (supra), the Hon'ble Supreme Court has held that since it is a case of bona fide mistake and there was no intention to evade tax by the respondent, penalty was rightly not imposed. Thus, it is quite vivid that presence of mens rea is absolutely necessary

ingredient for imposing penalty under Section 78 of the Finance Act, 1994, as laid down by the Hon'ble Supreme Court. In the present matter, the Appellants were under a bona fide belief that they were not liable to pay Service Tax for construction services. The conduct of the appellant of prompt payment of Service Tax immediately after gaining knowledge about its liability to pay Service Tax, is sufficient reason to believe that the appellant did not have an intention to evade the payment of Service Tax. Therefore, considering the overall facts and circumstances of the case, while upholding the interest liability u/s.75 ibid, I find that Section 80 ibid can be invoked for waiver of penalty imposed on the appellant. Accordingly, I waive the penalty imposed on the appellant under Section 78, invoking the provisions of Section 80 of the Finance Act, 1994. The appeal is disposed of accordingly.

(Pronounced in Court on 21/02/2019)

(Ajay Sharma)
Member (Judicial)

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