CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

WEST ZONAL BENCH, MUMBAI

Service Tax Appeal No. 89164 of 2018

(Arising out of Order-in-Appeal No. IM-CGST-A-1/MUM/125/18-19 dated 25-06-2018 passed by the Commissioner of CGST & CEx (Appeal-1), Mumbai.)

........Appellant

ASHA TRANSPORT
House No. 201
At Post Jaskhar Uran
Raigad – 400702, Maharashtra

VERSUS

Commissioner of C.G.ST.-BELAPUR ....Respondent
Null CGO Complex,
10, CBD Belapur
Navi Mumbai-400614.

APPERANCE:

Shri Kishor J. Devani, Advocate for the Appellant
Shri Dharmendra Singh, Supdt., Authorised Representative for the Respondent

CORAM:

HON'BLE DR. SUVENDU KUMAR PATI, MEMBER (JUDICIAL)

FINAL ORDER NO. A/85114/2020

Date of Hearing: 01-10-2019
Date of Decision: 31-01-2020

DR. SUVENDU KUMAR PATI:

Imposition of duty liability of Rs. 11,70,743/- along with applicable interest and equivalent penalty under Section 78 of the Finance Act 1994 as well as penalty of Rs. 10,000/- under section 77 and Rs. 2,000/- under Rule 7-c of Service Rules 1994 read with provisions of the Finance

Act 1994 and its confirmation by the Commissioner (Appeals) is assailed in this appeal.

2. Factual draw back of the case as reveals from the appeal memo is that appellant had been providing Tour Operator Service which was made taxable w.e.f. 16th May 2008 but claims to be unaware of the same as was not a qualified person managing a sole proprietor-ship concern. In February 2010, during EA audit of M/s. Gateway Terminals India Pvt Ltd, it was noticed by the tax authorities that appellant had not charged Service Tax in the bills raised by it in the name of M/s. Gateway Terminals India Pvt Ltd and no payment has been made to that effect. Being informed it had obtained service tax registration on 17th March 2010 and discharged all service tax dues to the extent of Rs. 24,08,587/- including such payment shown by the Auditor against M/s. Gateway Terminals. Appellant was asked to pay interest on the service tax liability which it had discharged but was show caused on allegation of non-payment of interest. In the adjudication process tax liability, equivalent penalty and penalty under Section 70 and 77 of FA were confirmed. Appellant's unsuccessful attempt before the Commissioner (Appeals) has brought the dispute to this Forum.

3. In the memo of appeal and during the course of hearing of appeal, Ld. Counsel for the appellant Mr Kishor J. Devani submitted that appellant had discharged entire service tax dues based on the audit objection raised by Service Tax Department in the audit conducted at M/s Gateway Terminals India Pvt Ltd. It had also made its assessment

of service tax liability and discharged the entire liability of Rs. 24,08,587/- and not even claimed cum duty benefit as contemplated U/s 67 of FA, in which case it would have been paid only Rs. 15,19,797/- as total service tax liability that shows the *bona fide* of appellant for which allegation of suppression to evade duty liability is not sustainable. He further argued that show cause notice was issued in 2013 much after discharge of entire duty liability along with interest and expressed surprise over the findings in the order in original that Rs. 9,451/- was paid to as interest from out of amount of Rs. 25,449/- paid on 22nd July 2011 from the details in the Challan can be noticed that altogether Rs. 6,68,238/- was paid towards interest and Rs. 5,52,912/- was shown in the challan under the code meant for payment of interest. With reference to judicial decisions in the case of *Virtual Marketing (India) Pvt Ltd v. Commissioner of Service Tax, Mumbai (2016) 11TMI 18* and in the case of *Veer Jawan Security Services v. CCE 2018(3) TMI 272*, he argued that invocation of extended period is not justified and the order imposing penalty U/s 77 as well as u/s 70 of FA 1994 is not sustainable in law since there was no proposal in the show cause notice for imposition of such penalty for which the order passed by the Commissioner (Appeals) is required tobe set aside.

4. In response to such submissions, Learned Authorised Representative for the Respondent Department Mr Dharmendra Singh argued in support of the reasoning and rationality of the order passed by the Commissioner (Appeals) and had drawn attention of this Bench to para 4 & 6 of the show cause notice dated 6-2-2013 to justify that

despite five letters dated 23-7-2010, 27-1-2011, 10-6-2011, 13-9-2011 7 20-10-2011 sent to the appellant by the Department to pay interest of Rs. 1,40,775/-, Appellant had not responded for which it was justify Show caused as wilful suppression was manifest on record for which interference by Tribunal in the order passed by the Commissioner (Appeals) is uncalled for.

5. I have heard arguments at length from both the sides and perused the case record. It is observed that appellant had obtained service tax Registration on 17th March 2010 for providing Tour Operator Service though it was made taxable on 16th May 2008. OIA reveals that during audit of records of M/s Gateway Terminals Pvt. Ltd. such irregularities was noticed and para wise audit objection summary for M/s. Gateway Terminals indicates that a total of Rs.11,70,743/- and interest of Rs. 1,40,775/- was due against appellant towards service tax duty liability. The said summary audit objection was dated 21-6-2010 but OIA reveals that the service tax alone of Rs. 11,70,743/- was paid on 8-4-2010. It seems that appellant discharged the duty liability, though belatedly, even before the matter was brought to its knowledge by the respondent Department. The dispute therefore remained confined to payment of interest component which appellant claims to have paid but respondent Department denies to have received the same. Further going by the submissions of appellant, it is very much clear that appellant had even paid its other service tax liability for extending services to one NSICT. Both the show cause notice as well as adjudication orders clearly indicate that appellant had not collected the required service tax from the customers. Therefore, its submission that it had not availed the

benefits of cum duty u/s 67 of FA 1994 to which it was entitled has its force. This coupled with discharge of service tax liability against services extended to other service receivers for which no duty demand was made by the respondent department, it can be affirmatively stated that there was no intention traceable, in the entire proceeding concerning suppression of fact for the purpose of non-discharge of service tax. Further, appellant disputes the bifurcation made by the Commissioner (Appeals) on payment of Rs. 1,24,867/- by showing payment towards interest charged at Rs. 9,541/- in para 5 of his order, which appellant states to have paid under the interest code and furnished documentary proof too, besides the fact that with recalculation on the basis of cum duty benefit Rs.8,88,790/- was stated tobe refundable to the appellant, which it had never sought for. Be that as it may a bare reading of Section 73 & 78 of FA would clearly indicate that interest component is not structured in service tax liability to invoke section 78 and thereby justify extended period. Hence the order.

ORDER

6. The appeal is allowed and the order no. IM-CGST-A-1/MUM/125/18-19 dated 25-06-2018 of the Commissioner of CGST & C.Ex (Appeal-1), Mumbai is hereby set aside.

(Order pronounced in the court on 31-01-2020)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

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