

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE  
TRIBUNAL, MUMBAI  
REGIONAL BENCH**

**Service Tax Appeal No. 86016 of 2018**

(Arising out of Order-in-Original No. 01/COM/CD/17-18 dated 15.12.2017  
passed by the Commissioner of CGST & Central Excise, Thane Rural)

**M/s. Tharwani Infrastructures**

**Appellant**

Sheet No.34, Near Hanuman Mandir,  
Kalyan Ambarnath Road, Opp. Thambi  
Garage, Ulhasnagar 421 003.

Vs.

**Commissioner of CGST, Thane Rural**

**Respondent**

Utpad Shulk Bhavan, 4<sup>th</sup> Floor, Bandra-Kurla  
Complex, Bandra (E), Mumbai 400 051.

Appearance:

Shri Mihir Deshmukh with Shri Rajan Mishra, Advocates, for the  
Appellant  
Shri Nitin Tagade M., Joint Commissioner, Authorised Representative  
for the Respondent

**CORAM:**

**HON'BLE DR. SUVENDU KUMAR PATI, MEMBER (JUDICIAL)  
HON'BLE MR. ANIL G. SHAKKARWAR, MEMBER  
(TECHNICAL)**

Date of Hearing: 07.06.2023

Date of Decision: 22.06.2023

**FINAL ORDER No. 85986/2023**

PER: ANIL G. SHAKKARWAR

Brief facts of the case are that the appellant was engaged in providing services taxable under the category of 'construction of complex service'. The said service became taxable to service tax with effect from 01.07.2010. The said levy was challenged before Hon'ble Bombay High Court by Maharashtra Chamber of Housing Industry. On 19.01.2012, Hon'ble Bombay High Court upheld the levy and collection of service tax on construction of complex service. The appellant obtained registration of service tax on 17.02.2012. The appellant ascertained on their own service tax amounting to Rs.6,05,60,663/- for the period from 01.07.2010 to 31.03.2016 and paid the same. Further, they paid service tax of Rs.1,01,42,141/-. Totally they have paid service tax of Rs.7,07,02,774/- for the period from Financial

Year 2010-11 to Financial Year 2015-16. They also paid interest of Rs.23,39,370/- on their own ascertainment. For the Financial Year 2010-11 to Financial Year 2015-16, they filed ST-3 returns. However, the said ST-3 returns were not filed on due dates. The appellant was issued with a show cause notice dated 27.04.2017 wherein it was proposed to confirm service tax of Rs.7,07,02,774/- for the period from 01.07.2010 to 31.03.2016 already paid by the appellant and there was proposal to appropriate the same. There was proposal to recover and appropriate interest on the said amount of service tax. Further, there was proposal to levy late fee for not filing ST-3 return timely. In addition, there were proposals for imposition of penalty under Section 77 and Section 78 of Finance Act, 1994. The above said demand was raised by invocation of proviso to sub-section (1) of Section 73 of Finance Act, 1994 which deals with extended period of limitation. On contest, the show cause notice was adjudicated through the impugned order-in-original wherein original authority confirmed the demand and appropriated the already paid service tax against the said demand. Further, the recovery of interest at appropriate rate under Section 75 of Finance Act, 1994 were ordered. The original authority imposed late fee of Rs.1,45,700/- for delayed filing of ST-3 returns. Further, a penalty of Rs.10,000/- has been imposed under Section 77 of Finance Act, 1994 and penalty of Rs.7,07,02,774/- was imposed under Section 78 of Finance Act, 1994. Aggrieved by the said order, appellant is before this Tribunal.

2. Heard the learned counsel for the appellant. He has submitted that the entire service tax was paid before issue of show cause notice. Further, interest of Rs.23,39,370/- was paid before issue of show cause notice and voluntarily additional amount of interest of Rs.14,35,461/- was paid on 19.01.2018 after passing of the order-in-original towards differential interest. He has submitted that sub-section (3) of Section 73 of Finance Act, 1994 has provided that if the service tax is paid on the basis of own ascertainment, then Revenue is not empowered to issue show cause notice to the appellant. He has further submitted that the original authority has not computed the quantum of

interest that was required to be paid by the appellant though the dates of payment of service tax and due dates were known to the adjudicating authority at the time of passing of the order-in-original. Therefore, on that count, the order to pay interest is not sustainable. He has further submitted that there was no intention to evade service tax and, therefore, proviso to sub-section (1) of Section 73 *ibid* was not invocable. He has relied on the decision of this Tribunal in the case of Hare Krishna Enterprises vs. Commissioner of Service Tax-VII, Mumbai passed through final order No. 89201/17/SMB dated 11.08.2017 and final order passed by this Tribunal in the case of Shree Riddhi Siddhi Builders in appeal No. ST/87424/17 and submitted that when there is no case of suppression, there is no case for imposition of penalties under Section 78 of Finance Act, 1994.

3. Heard the learned AR. He has submitted that though there was voluntary payment by the appellant, there was investigation by Revenue and, therefore, the impugned order is legal and proper.

4. We have carefully gone through the record of the case and submissions made. We have also perused the provisions of sub-section (3) of Section 73 of Finance Act, 1994. We note that the appellant had paid the entire service tax ascertained by them before issue of show cause notice. He had also paid interest of Rs.23,39,370/- voluntarily before issue of show cause notice. We find from the said sub-section (3) of Section 73 *ibid* that if the service provider, on the basis of its own ascertainment, pays service tax before issue of show cause notice, then Revenue cannot issue show cause notice. The said provision is not applicable only if the non-payment of service tax is on account of collusion, misstatement, suppression of fact with intention to evade payment of duty. We find that in the present case, Revenue has invoked proviso to sub-section (1) of Section 73 of Finance Act, 1994 for raising demand for the larger period from 01.07.2010 to 31.03.2016 by issue of show cause notice on 27.04.2017. However, we find that for invocation of extended period and for making inoperative the said provisions of sub-section (3) of Section 74 *ibid*, there are dual criteria of collusion,

misstatement, suppression of fact and intention to evade duty. In the present case, the appellant has paid the entire service tax before issue of show cause notice. Therefore, intention to evade service tax is absent in the present case. Therefore, we hold that there was no case for issue of show cause notice and, therefore, there would not have been occasion to propose imposition of penalty. Had there been no occasion to issue show cause notice, there could not have been occasion to impose penalty. We, therefore, hold that imposition of penalty under Section 77 and Section 78 of Finance Act, 1994 is not sustainable in the present case. We, therefore, modify the impugned order by setting aside penalties imposed on the appellant under Section 77 and Section 78 of Finance Act, 1994.

5. In above terms, by modifying the impugned order, we allow the appeal. Appellant shall be entitled for consequential relief, if any, in accordance with law.

(Order pronounced in the open court on 22.06.2023)

**(Anil G. Shakkarwar)**  
**Member (Technical)**

**(Dr. Suvendu Kumar Pati)**  
**Member (Judicial)**

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