IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

CENTRAL EXCISE APPEAL NO. 13 OF 2014

The Commissioner of Service Tax	**}**	
Mumbai - I	**}**	**Appellant**
versus		
M/s. Riya Travels & Tours (India)	**}**	
Pvt. Ltd.	**}**	**Respondent**

Mr. Pradeep S. Jetly with Ms. Suchitra Kamble for the Appellant.

Mr. V. Sridharan-Senior Advocate with Mr.Prakash Shah i/b. M/s. PDS Legal for the Respondent.

CORAM :- S.C.DHARMADHIKARI & S.P.DESHMUKH, JJ.
DATED :- JANUARY 5, 2015

P.C. :-

The Revenue is aggrieved by the order dated 5th April, 2013 of the Customs, Excise and Service Tax Appellate Tribunal (CESTAT). That order was delivered on an Appeal by the Respondent Assessee. The Respondent Assessee was aggrieved and dissatisfied with the order-in-original dated 9th October, 2012 passed by the Commissioner of Service Tax-II, Mumbai.

2) Mr. Jetly appearing for the Revenue submits that the Appeal raises substantial question of law. In that regard, our attention is invited to page 7 of the Appeal paper book.

3) Mr. Jetly submits that the Tribunal overlooked the fact that the penalty was not restricted by law to the sum of Rs.10 crores. If the intention of the Tribunal was to hold that the penalty could not have been imposed and beyond Rs.10 crores, then, it would not have sustained the substantive order of the Commissioner. Our attention is invited by Mr. Jetly to the substantive order of the Commissioner in that regard, styled as the order-in-original.

4) On the other hand, Mr. Sridharan appearing for the Assessee would submit that the issue raised in the present Appeal is completely academic. In terms of the order of the Commissioner of Service Tax, the Assessee has remitted and paid the sums and the certificate in the form of a communication dated 2nd November, 2012 Annexure 'J' at page 162 is relied upon in that behalf by him. He has also relied upon the provision of Finance Act, 1994 as applicable at the relevant time. He submits that section 78 and particularly second proviso thereto of the Finance Act, 1994 states that if the 25% of the total tax is imposed as penalty and that is paid within the time specified therein, then, no sum beyond said amount can be termed as a penalty, particularly payable. In the present circumstances therefore, whether the penalty should have been restricted to Rs.10 crores or to Rs.13 crores is academic and therefore the Appeal does not raise any substantial question of law. It deserves to be dismissed.

5) We have perused the Appeal paper book including the impugned orders. We find, from a reading of the order passed by the Commissioner of Service Tax and particularly paras 12.1 to 12.4 thereof, that he was concerned with the value of taxable service. In the present case, evasion of Service Tax was alleged against the Respondent/Assessee. That was on the footing that the Service Tax liability has not been discharged. A show cause notice was issued raising a particular demand. There was an adjudication thereunder and the Commissioner concluded that whether the Assessee is entitled to the benefit of payment of reduced penalty of 25% in terms of the first proviso to section 78, he has to decide the quantum of penalty under section 78. After reproducing section 78 with the applicable proviso, what the Commissioner has done thereafter is to render a finding that the redetermination of quantum of penalty under section 78 has become necessary because the amount of Service Tax liable to be confirmed has undergone change. The earlier order of the Commissioner confirmed the Service Tax demand. That is now required to be changed because of the direction to recompute or recalculate the tax liability. The minimum penalty that is required to be imposed is then referred to and what the Commissioner has held in para 12.3 is that a sum of Rs.7.67 crores was confirmed as the Service Tax demand. The penalty is Rs.10 crores in terms of the earlier order. The demand

under de-novo proceedings is now confirmed at Rs.11.29 crores. Hence, considering the legal provision, the quantum of penalty based upon the amount sought to be evaded has been computed. The amount of penalty would vary between the tax demanded to double of the said amount. It depends upon the gravity of offence. There is a finding that the Assessee deliberately evaded the Service Tax. Therefore, case for imposition of penalty is made out. No leniency is warranted. The Commissioner proposed to impose penalty of Rs.13 crores under section 78. Whether the Assessee is eligible for benefit of reduced penalty of 25% of the Service Tax in terms of first proviso to section 78 is thereafter discussed.

6) We are not concerned with the interpretation of the provision and wider controversy thereon in this case. Suffice it to hold that a reading of paras 12.1 to 12.4 of the order of the Commissioner together leaves us in no manner of doubt that the Commissioner proceeds to recompute and recalculate the tax liability and penalty. The penalty that he has computed is based on evasion and consistent therewith. However, he has not ignored the proviso to section 78 and in computing the benefit thereunder that he refers to the figures in a table, copy of which is found at page 153 of the Appeal paper book. Hence, if the Assessee is required to pay the balance of Service Tax amounting to

Rs.3,62,80,398/- and appropriate interest under section 75 on the total amount confirmed under this order less the amount already paid and the differential penalty under section 78 which is 25% of the Service Tax demand confirmed, less 25% of the Service Tax demand confirmed under the earlier order and already paid, then, the Assessee would get the benefit of reduced penalty. It is this computation which has been reflected in the operative order in para 14. That order has been complied with by the Assessee and as certified by the Commissioner at page 162 of the Appeal paper book.

7) In these circumstances, when all these events are noted, the Tribunal's order should be read as directing, firstly seeking compliance of the direction of recalculation and recomputation of the tax liability/demand, secondly the amount of penalty that could have been imposed in law when that demand is confirmed and thirdly, had the proviso been invoked, then, the benefit in terms of the proviso would be admissible and to what extent. Meaning thereby, 25% of the amount of penalty as redetermined and recomputed, if deposited, the benefit would be available. In such circumstances, we do not think that the Tribunal intended to impose any outer limit or cap on the penalty. The understanding of the Revenue that the outer limit of Rs.10 crores is imposed in the impugned order on the quantum of penalty is therefore

not correct and has no basis. It arises out of incomplete reading of the order-in-original and the relevant paragraphs. After having read the same and in the manner indicated above, we do not find that the Appeal raises any substantial question of law. It is devoid of merits. It is accordingly dismissed. No costs.

(S.P.DESHMUKH, J.) **(S.C.DHARMADHIKARI, J.)**