

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 16.12.2015

THE HONOURABLE MR.JUSTICE M.JAICHANDREN
AND
THE HONOURABLE MRS.JUSTICE S.VIMALA

C.M.A.No2072 of 2011

M/s.Kripa Outdoor Publicity
rep by its Proprietor
Mr.R.Parthasarathy

... Appellant / Appellant

Versus

1. Customs, Excise and Service Tax
Appellate Tribunal
South Zonal Bench
Shastri Bhavan Annex (I Floor)
26, Haddows Road, Chennai - 600 006

...Appellate Authority/Respondent

2. The Commissioner of Central Excise
Chennai II Commissionerate
MHU Complex, 692, Anna Salai
Nandanam, Chennai - 35

.. Respondent/Respondent

Appeal filed against the order of the Customs, Excise and Service Tax Appellate Tribunal, Chennai, in Final order No.1185/10 dated 19.11.2010, in appeal No.ST/30/2004.

For Appellant : Mr.N.Viswanathan
For Respondent : R1-Tribunal
Mr.Vikram Ramakrishnan
for R2

JUDGMENT

This Civil Miscellaneous Appeal has been filed, under Section 35(G)(1) of the Central Excise Act against the final order, dated 22.11.2010, passed by the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai, confirming the order passed by the authorities below imposing the maximum penalty on the appellant, on the belated payment of duty, under Section 76 of the Finance Act, 1994.

The brief facts of the case are as follows:

2. The appellant had formed a partnership company during the year, 1985, doing business in outdoor rural advertising services. The appellant had voluntarily registered itself with the authorities concerned, on 26.2.1998, and had also obtained a certificate of registration. Due to the misunderstanding that had developed between the partners of the partnership firm and on account of severe business losses, it could not pay the tax in respect of its business activities and therefore, no returns had been filed, for the period, from May 1997 to March 2000.

3. It has been further stated that the partnership had been dissolved in the month of June, 2000, and it had been made into a proprietary firm with R.Parthasarathy as the sole proprietor of the firm. In spite of the business losses suffered by the appellant, the service tax liability of the firm, for the period, from May 1997 to March 2000, had been paid and half yearly returns covering the said period had been filed, on 20.9.2000. However, it could not pay the interest with the hope that it would be waived, due to the financial difficulties of the appellant.

4. It had been further stated that, on 21.3.2003, a show cause notice had been issued to the appellant demanding the payment of the interest on the belated payment of the taxes, for the period covering, May 1997 to March 2000. A penalty had also been proposed, under Section 76 of the Finance Act, 1994, for the failure of the appellant to pay the tax in time, as required under Rule 6 of the Service Tax Rules, 1994, read with Section 68 of the Act. However, the appellant had replied to the show cause notice, agreeing to pay the interest, at the earliest, and had prayed for setting aside of the proposal made to impose the penalty, under Section 76 of the Act. Accordingly, the appellant had sought the extension of the benefit of Section 80 of the Act, which provided the authorities concerned the discretion to waive the imposition of the penalty, on being shown reasonable cause for failing to pay the tax within the stipulated period. The appellant had paid the entire tax and interest before the passing of the adjudication order.

5. It has been further stated that the Deputy Commissioner of Central Excise (ST), Chennai II Commmissionerate, had passed the order, in Order-in Original No.22/2003, dated 6.10.2003, imposing the maximum penalty, as provided under the Act, stating that no justification had been found for the failure of the appellant to pay the service tax in time, from May 1997 to March 2000. The appellant had filed an appeal against the said order, before the Commissioner of Central Excise (Appeals), Chennai, in

Appeal A.1/2005 (M-II), pleading for waiver of the penalty, under Section 80 of the Act. However, the Commissioner of Central Excise (Appeals) had passed a cryptic order, rejecting the appeal, holding that the order passed by the lower authority was fair and proper. The Commissioner of Central Excise (Appeals) had not considered the reasons stated by the appellant and had not exercised his discretion conferred on him, under Section 80 of the Act, in a proper manner.

6. Aggrieved by the order passed by the Commissioner of Central Excise (Appeals), the appellant had preferred an appeal before the Customs Excise and Service Tax Appellate Tribunal, in ST/30/2004. The Tribunal had passed the impugned order, dated 19.11.2010, confirming the orders passed by the lower authorities. The Tribunal had passed the said order holding that there were no sufficient grounds to extend the protection from imposing of penalty on the belated payment of tax, by the appellant, under Section 80 of the Act.

7. The Civil Miscellaneous Appeal had been admitted on the following question of law:

"1. Whether the Appellate Tribunal was right in passing the cryptic order approving the orders of the lower authorities without setting out the reasons as to how the grounds canvassed by the appellant herein would not meet the reasonable cause to extend the benefit of Section 80 of the Finance Act, 1994, to the appellant herein?"

8. The learned counsel appearing for the appellant had submitted that the order passed by the Tribunal is illegal and void, as it has been passed in violation of the principles of natural justice. The Tribunal had erred in not exercising its discretion conferred on it, under Section 80 of the Finance Act, 1994. The Tribunal had not considered the reasons adduced by the appellant for the waiver of the penalty. The Tribunal ought to have considered the fact that the appellant had paid the tax, voluntarily, even though it was belated in nature. As such, the appellant had not attempted to evade the payment of tax, even though it was in serious financial difficulties.

9. A counter affidavit has been filed on behalf of the second respondent. It has been stated that the appellant is carrying on business of outdoor publicity services. It has registered itself with the Department, on 26.2.1998. The appellant had filed ST - 3 returns with the Department, only on 20.9.2000. It did not pay any service tax for the period, from May 1997 to April 2000. On scrutiny of ST - 3 returns filed by

the appellant, it had been found that the appellant had paid the tax well beyond the due dates. However, no interest had been paid for the belated payment of tax. Therefore, a show cause notice, dated 21.3.2003, had been issued to the appellant, seeking to impose a penalty of Rs.200 per day, for the belated payment, in terms of Section 76 of the Finance Act, 1994. Vide order in Original, dated 6.10.2003, the penalty had been reduced by the original authority to the minimum amount of Rs.100 per day and the liability had been fixed at Rs.3,42,389/-. The original authority had levied a minimum amount of penalty of Rs.100 per day, under Section 76 of the Act, on the basis that, as far as the delay in the payment of service tax is concerned, there was no justification on the part of the appellant to make the payment with the delay of about three years.

10. It has been further submitted that the Order-in-Original, dated 6.10.2003, had been challenged by the appellant, before the Commissioner of Central Excise (Appeals). The first appellate authority, after examining the case records and the submissions made on behalf of the appellant, had passed an order, dated 27.1.2004, rejecting the appeal filed by the appellant, as there was no infirmity in the order under appeal.

11. Aggrieved by the said order, the appellant had approached the the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai. The Tribunal, vide its order, No.1185/2010, dated 19.11.2010, had dismissed the appeal on the ground that the authorities below had categorically held that there was no justification on the part of the appellant to make the payment of tax with the delay of about 3 years. The Tribunal did not find the case of the appellant fit enough for the exercise of its discretion, under Section 80 of the Finance Act, 1994.

12. The learned counsel appearing on behalf of the second respondent had submitted that the order of the Tribunal in rejecting the appeal of the appellant is correct in the eye of law. No materials had been furnished by the appellant to substantiate its claim that it was under severe financial hardship. Further, no materials were made available, by the appellant, to show that the partnership firm had been converted into a sole proprietary concern. The service tax payable by the appellant, for the period, from May 1997 to April 2000, had not been paid, for about 3 years. Due to the belated payment of the service tax, the appellant had been imposed with the penalty, under Section 76 of the Act. Since no grounds had been made out, by the appellant, for exercising the discretion, for waiver of the penalty, under Section 80 of the Act, the Tribunal had rightly rejected the appeal filed by the appellant.

13. The learned counsel appearing for the appellant had relied on the following decisions in support of his contentions:

13.1. In HINDUSTAN STEEL LTD., Vs. STATE OF ORISSA (1978 (2) E.L.T. (J 159) (S.C.)), the Supreme Court had held that no penalty should be imposed for technical or venial breach of legal provisions or where the breach flows from the bona fide belief in the manner prescribed by the statute.

13.2. In D.R.GADE Vs. COMMISSIONER OF CUSTOMS, NASIK, 2006 (2) S.T.R. 205 (Tri. - Mumbai), the Customs Excise and Service Tax Appellate Tribunal, West Zonal Bench, Mumbai, had held that the appellant therein had paid the tax amount in full, as well as the interest, which was about 40% of the tax amount. Any pecuniary advantage claimed by the appellant had been neutralised by the payment of interest. The appellant being a small tax payer, the revision of penalty equivalent to the tax amount, by the Commissioner of Customs, was unduly harsh. Hence, the penalty amount, under Section 76 of the Finance Act, 1994, had been restored to the originally determined amount to Rs.4,000/-.

13.3. In COMMISSIONER OF CENTRAL EXCISE, COIMBATORE Vs. BUSY BEE 2015 (37) S.T.R. 932 (MAD.) the Division Bench of this Court had held that the penalty imposed on the assessee would not be sustainable if the assessee proves the reasonable cause for its failure to pay the tax and if there was no contumacious conduct or deliberation or violation of the statute by the assessee. The mere payment of the service tax, which had been done belatedly, and the payment of interest thereon, cannot be taken to be a sufficient cause for the exercise of the discretion vested with the authority concerned, for waiving the penalty under Section 80 of the Act.

13.4. In COMM. OF CUS., C.EX. & S.T., GUNTUR Vs. NARASARAOPET MUNICIPALITY 2015 (39) S.T.R. 800 (A.P.), it had been held that the power to set aside the penalty is available with the appellate authorities on the assessee showing reasonable cause.

13.5. In BELLARY CITY CABLE Vs. COMMISSIONER OF C. EX., CUS. & S.T., BELGAUM 2015 (39) S.T.R. 687 (TRI. - BANG.), it had been held that the appellant/assessee was not aware of the provisions of law and as a result, continued to operate as they were operating earlier. The intention behind introduction of provisions of Section 80 of the Finance Act, 1994, is to ensure that the assessees, who had not paid the tax, can make the payment with interest and a lenient view can be taken with regard to the payment of penalty in cases where there is lack of

knowledge and reasonable cause for such non payment.

14. The learned counsel appearing on behalf of the second respondent had relied on the decision of the High Court of Gujarat, at Ahmedabad, in COMMISSIONER OF C. EX. & CUSTOMS Vs. PORT OFFICER 2010 (257) E.L.T. 37 (GUJ.) to state that the onus to establish that there was a reasonable cause for the assessee, for the non payment of the tax within the stipulated time, is on the assessee. There are no materials placed by the assessee, in the present case, to substantiate its claims for the waiver of the penalty amount and therefore, its claim is liable to be rejected.

15. In view of the submissions made by the learned counsels appearing for the appellant, as well as the second respondent, and on a perusal of the records available, it is noted that the appellant had not furnished any material to substantiate its claim that it was under severe financial hardship.

16. It is also noted that no materials were made available, by the appellant, to show that the erstwhile partnership firm had been converted into a sole proprietary concern. The service tax payable, by the appellant, for the period, between May 1997 and April 2000, had not been paid, for nearly about 3 years. Therefore, the appellant had been imposed with the penalty, under Section 76 of the Act. Since no acceptable cause or reason had been shown by the appellant for exercising its discretion, for waiving the penalty, under Section 80 of the Act, the penalty amount levied on the appellant had been confirmed by the Tribunal. In such circumstances, we do not find any reason to interfere with the impugned order passed by the Tribunal, dated 22.11.2010. Further, it is seen that the decisions relied on by the learned counsel, appearing on behalf of the appellant, are not applicable to the facts and circumstances of the present case. Therefore, the question of law raised in the Civil Miscellaneous Appeal is answered against the assessee and in favour of the Revenue. As the present Civil Miscellaneous Appeal is devoid of merits, it is liable to be dismissed. Accordingly, the Civil Miscellaneous Appeal stands dismissed. No costs.

sd/-

Assistant Registrar (Cs-III)

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Sub-Assistant Registrar

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To

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Appellate Tribunal
South Zonal Bench
Shastri Bhavan Annex (I Floor)
26, Haddows Road,
Chennai - 600 006

2. The Commissioner of Central Excise
Chennai II Commissionerate
MHU Complex, 692, Anna Salai
Nandanam, Chennai - 35

+1 CC to MR.N.Viswanathan Advocate. SR.NO.67875

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CO-CA
JD 08/01/2016



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