IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 04.06.2015

CORAM:

THE HONOURABLE MR.JUSTICE R.SUDHAKAR
and
THE HONOURABLE Ms.JUSTICE K.B.K.VASUKI

Civil Miscellaneous Appeal No.223 of 2010
& M.P.No.1 of 2010

M/s.Bootleggers Island
represented by its Proprietor
Mr.Rajesh Bajaj,
No.6 (Old No.12), Govardhan Street,
Royapettah, Chennai - 600 014.
.. Appellant

versus

1. Customs, Excise and Service Tax Appellate Tribunal, Shastri Bhavan Annexe,
No.26, Haddows Road, Chennai - 600 006.

2. The Commissioner of Service Tax,
MHU Complex, No.694, Anna Salai,
Nandanam, Chennai - 600 035.
.. Respondents

PRAYER: APPEAL under Section 35G of the Central Excise Act, 1994 against the order dated 13.08.2009 made in Final Order No.970 of 2009 on the file of the Customs, Excise and Service Tax Appellate Tribunal, Chennai.

For Appellant : Mr.S.Muthuvenkataraman

For Respondent : Mr.Vikram Ramakrishnan

J U D G M E N T

(Judgment of the Court was delivered by R.SUDHAKAR,J.)

This Civil Miscellaneous Appeal filed by the assessee as against the order dated 13.08.2009 made in Final Order No.970 of 2009 on the file of the Customs, Excise and Service Tax Appellate Tribunal, Chennai was admitted by this Court on the following substantial questions of law:

(i) Whether no penalty under Sections 76 and 77 can be imposed if the failure is supported by reasonable cause in terms of Section 80 of the Finance Act, 1994?

(ii) Whether the order of the Tribunal imposing penalty under section 76 and 77 without rendering any finding on rasonable, vitiates the order for filing to take into account relevant aspect, thereby rendering the order bad for want of jurisdiction?

(iii) Whether the order of the Tribunal confirming the levy of penalty after finding that taxes has been paid even before the issuance of show cause notice?"

2. The above substantial questions of law are re-framed as follows:

a) Whether no penalty under Sections 76 and 77 can be imposed if the failure is supported by reasonable cause in terms of Section 80 of the Finance Act, 1994?

b) Whether the order of the Tribunal in imposing penalty under Sections 77 and 78 without taking into account relevant aspects and without rendering a finding on reasonable cause is not bad?

c) Whether the Tribunal was justified in confirming the levy of penalty despite in a case where substantial service tax has been paid even before issuance of show cause notice?

3. The brief facts of the case are as follows:

The appellant/assessee is engaged in video tape production. Since the assessee had not filed ST-3 returns for the periods July, 2001 to September, 2001 and October, 2001 to March, 2002, notice was issued directing the assessee to file returns. Thereafter, the assessee filed returns and paid belatedly service tax upto December, 2001. Since the assessee had not paid service tax from January, 2002 to March 2002, October, 2002 to December, 2002 and January, 2003 to March, 2003 and for the belated payment of service tax, the assessee had not paid any interest, show cause notice was issued proposing to demand service tax with interest and penalty. In response to the said notice, the assessee filed reply stating that the belated payment of service tax was not due to malafide intention and their customers were not willing to reimburse the service tax and hence, the incidence of service tax had to be paid out of the price already agreed upon. The assessee also agreed to pay interest and sought for dropping of the penalty proceedings.

4. Not satisfied with the reply filed by the assessee, the Adjudicating Authority passed an order in the following manner:

" 16.1. The amount of service tax demanded in the service tax was Rs.3,08,750/- whereas the assessee had stated the amount paid prior as well as after the issue of the SCN, as stated in the reply dated 24.11.20023 to be adjusted against the demand. Accordingly the revised working sheet is prepared and enclosed as Annexure to this order. I confirm that the assessee shall pay the Service tax due to Rs.9,915/- (Rupees nine thousand nine hundred and fifteen only) for the notice period, after adjusting the amounts already paid.

16.2. Levy of interest on belated payment is a mandatory provision under section 75 of the Act and hence, I impose the interest of Rs.50,907/- (Rupees fifty thousand nine hundred and seven only) under section 75 of the Act.

16.3. As I find that there is continuous default in payment of Service Tax, therefore I order levy of penalty @ Rs.100/- (Rupees one hundred only) per day of delay of each due of Service tax, from the due date till it was paid, subject to the maximum of the Service tax payable. Accordingly, I order levy of penalty of Rs.2,58,675/- (Rupees two lakh fifty eight thousand, six hundred and seventy five only) under section 76 of the Act.

16.4. Apart from being irregular in payment of Service Tax, they were irregular in filing of returns also. Therefore, I order payment of Rs.1000/- (Rupees one thousand only) under section 77 of the Act."

5. Aggrieved by the order of the Adjudicating Authority, the assessee filed an appeal before the Commissioner (Appeals), who dismissed the appeal holding that the appellant/assessee had not paid service tax due, but had collected service tax from their clients. Hence, it was not only an evasion of tax, but also an offence of collecting tax from the clients but not paid to the Government Account. Hence penalty imposed was correct.

6. As against the said order of the Commissioner (Appeals), the assessee went before the Tribunal. The Tribunal remanded the matter back to the Original Authority for de novo adjudication holding that since the appellant was acting in his individual capacity as proprietor of the company and the said capacity was not disputed by the Authorities below, it was open to the authority to examine the question whether the benefit of Noficiation No.7 of 2001, which granted exemption to taxable service provided to a client by an individual professional videographer in relation to video tape production from the whole of the service tax leviable, was available to the assessee.

7. Subsequent to the remand order, the Adjudicating Authority adjudicated the matter once again and confirmed the demand made in the show cause notice holding that the benefit of notification No.7 of 2001 was not available to the assessee. The said demand includes interest under Section 75 and penalty in terms of Sections 76 and 77 of the Central Excise Act.

8. Aggrieved by the said order, the appellant once again went before the Commissioner (Appeals), who rejected the appeal holding that the benefit of exemption under Notification No.7 of 2001 was not available, since the appellant/assessee was not an individual professional videographer and he was a proprietor of a firm.

9. As against the said order, the assessee filed further appeal before the Tribunal. The Tribunal dismissed the appeal, thereby confirmed the order of the Commissioner (Appeals), holding that financial hardship was the only ground raised for belated payment of service tax, which was not a ground for holding that assessees were not liable to penalty.

10. Not satisfied with the order of the Tribunal after two rounds of litigation, the appellant/assessee is now before this Court.

11. Heard learned counsel appearing for the appellant and the learned Standing Counsel appearing for the respondent and perused the materials placed before this Court.

12. Insofar as first and second substantial questions of law are concerned, we find from the record of proceedings that the Tribunal has clearly came to hold that it is not a case of the appellant that the benefit of Section 80 of the Finance Act, 1994 should be extended. In the absence of such a substantial plea and there being no bonafide justification for exemption, penalty was imposed. We find no reason why the Authorities should depart from imposing such penalty as mandated by the provisions of the Act. Accordingly, the first and second questions of law are answered against the appellant/assessee and in favour of the respondent/Revenue.

13. As far as the third question of law is concerned, it is seen that the said issue is covered by the decision of this Court dated 12.12.2014 in C.M.A.No.2440 of 2008 in the case of Dhandayuthapani Canteen - Vs - Customs, Excise and Service Tax Appellate Tribunal, wherein this Court, while considering the issue whether the penalty is imposable where the tax is paid before issuance of show cause notice held that penalty is imposable even in cases where tax is paid before issuance of show cause notice. However, this Court left the issue open to the appellant to agitate before the Commissioner holding as follows:

> "15. However, on the contention of bar of imposition of penalty under Section 76 when penalty is imposed under Section 78 of the Finance Act, the issue is left open to the appellant to agitate before the Commissioner on the order of the Tribunal on remand.

14. In the light of the above, this Civil Miscellaneous Appeal

stands disposed of granting liberty to the appellant/assessee to agitate before the Commissioner with regard to the third question of law. No costs. Consequently, M.P.No.1 of 2010 is closed.

Sd/-
Assistant Registrar

True Copy

Sub Assistant Registrar

To

1. Customs, Excise and Service Tax Appellate Tribunal, Shastri Bhavan Annexe, No.26, Haddows Road, Chennai - 600 006.

2. The Commissioner of Service Tax, MHU Complex, No.694, Anna Salai, Nandanam, Chennai - 600 035.

3. The Chief Commissioner of Central Excise, Chennai-34.

+1 cc to M/s.Vikram Ramakrishnan, Advocate,SR.26781

+1 cc to M/s.G.Rm.Palaniappan, Advocate,SR.28722.

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