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.3418 of 2009
& M.P.No.1 of 2009

M/s.Visranthi Builders,
represented by its Partner,
Mr.C.Kaliaperumal.
.. Appellant

versus

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

2. The Commissioner of Central Excise, No.1 Williams Road, Cantonment, Trichy - 01. .. Respondents

PRAYER: APPEAL under Section 35G of the Central Excise Act, 1994 against the order dated 10.09.2009 made in Final Order No.1245 of 2009 on the file of the Customs, Excise and Service Tax Appellate Tribunal, Chennai.

For Appellant : Mr.S.Muthuvenkataraman

For Respondent : Mr.Chandrasekaran

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 10.09.2009 made in Final Order No.1245 of 2009 on the file of the Customs, Excise and Service Tax Appellate Tribunal, Chennai was admitted by this Court on the following substantial question of law:

"Whether Sections 76 and 80 of the Finance Act, 1994 as amended warrant levy of penalty equal to amount of Service Tax by way of mandatory condition or any discretion is left with the authorities for imposing such penalty."

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

The appellant/assessee is engaged in the business of construction of residential flats for and on behalf of their clients, classifiable as "construction of Residential Complex Service". They had neither registered themselves with the Department nor paid Service Tax on the value of the taxable service rendered by them. Hence show cause notice was issued for the purpose of recovery of service tax due, as the appellant had contravened the provisions of Section 68 of the Finance Act 1994 read with Rule 6 of the Service Tax Rules. It was also proposed to initiate penal action against the appellant. In response to the said notice, the appellant filed reply. After due process of law, the Adjudicating Authority passed an order confirming the demand. With regard to the penal action, the Adjudicating Authority refrained from imposing any penalty on the assessee, since the appellant had furnished the details of the amount collected and paid the service tax due before issuing the show cause notice.

3. The said order of the Adjudicating Authority was revised by the Commissioner of Central Excise holding that since the assessee had failed to pay service tax due on the value of the taxable service rendered by them, they were liable to pay penalty and hence imposed penalty of Rs.200/- per day in respect of service tax payable during the period from 16.6.2005 to 17.4.2006 under the provisions of Section 76 of the Finance Act, penalty of 2% per month in respect of the tax payable during the period from 18.4.2006 till the date of payment of tax due under Section 76, subject to the penalty not exceeding the actual amount of service tax payable, penalty of Rs.1000/- under Section 77 and penalty of Rs.3,30,451/- under Section 78 of the Act.

4. Aggrieved by the order of the Commissioner (Appeals), the appellant/assessee pursued the matter before the Tribunal. The Tribunal upheld the order of the Commissioner (Appeals) holding as follows:

> "I have heard both sides. The finding of the adjudicating authority that the assessee was guilty of suppression remains unchallenged. Once suppression is established, penalty is automatically attracted, in the light of the apex court decision in Union of India Vs. Dharmendra Textile Processors reported in 2008 (231) ELT.3 (S.C.)]. I, therefore, agree with the finding of the Commissioner that penalty is to be imposed, uphold the impugned order and reject the appeal."

5. Aggrieved by the order of the Tribunal, the appellant/assessee is before this Court.

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

7. It is seen that the Adjudicating Authority, in paragraph 22 of the order, has given a clear finding that this is a case of deliberate suppression of facts with a willful intention to evade payment of Service Tax and the evasion would not have come to light but for the investigation conducted by the Officers. On a revision, the Commissioner (Appeals) initiated penalty proceedings and imposed penalty. The said order was confirmed by the Tribunal following the decision of the Supreme Court in the case of Union of India Vs. Dharmendra Textile Processors reported in 2008 (231) ELT.3 (S.C.)], which cannot be faulted with. When there is a deliberate suppression, the provision mandates imposition of penalty. Hence, we find no reason why the Authorities should depart from imposing such penalty as mandated by the provisions of the Act.

8. Similar view was taken by this Court in the decision 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.

9. In the light of the above, the question of law is answered against the appellant/assessee and in favour of the Department granting liberty to the appellant/assessee to agitate the issue before the Commissioner in terms of the order 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. This Civil Miscellaneous Appeal stands disposed of. No costs. Consequently, M.P.No.1 of 2009 is closed.

Sd/-
Asst.Registrar (CS II)

/true copy/

Sub Asst. Registrar

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To

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

2. The Commissioner of Central Excise, No.1 Williams Road,
   Cantonment, Trichy - 01.

1 cc to Mr.T. Chandrasekaran, Advocate, Sr. 26941
1 cc to Mr.R.M. Palaniappan, Advocate, Sr. 26721

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& M.P.No.1 of 2009

SAI (CO)
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