FARAD CONTINUATION SHEET No.
IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

CENTRAL EXCISE APPEAL NO. 10/2016
(THE COMMISSIONER, CENTRAL EXCISE, NAGPUR **VERSUS** M/S KHARE & TARKUNDE INFRASTRUCTURE PVT. LTD., NAGPUR)

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Office Notes, Office Memoranda of Coram, appearances, Court's orders of directions and Registrar's orders	Court's or Judge's orders

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Shri S.N. Bhattad, counsel for the appellant.

CORAM : SMT. VASANTI A NAIK AND V.M. DESHPANDE, JJ.
DATE : MARCH 01, 2017.

By this central excise appeal, the appellant-department has challenged the order of the Customs Excise and Service Tax Appellate Tribunal, dated 11.03.2015 partly allowing the appeal filed by the respondent and holding that it was a fit case for invoking the provisions of Section 80 of the Finance Act, 1994 so as to delete the order imposing penalty under Section 73 of the Act.

The respondent undertakes construction activities and for the relevant period, i.e. 2004-05 to 2008-09, the respondent was awarded a contract for construction of Cotton Market under Technology Mission on Cotton and Grain Market Yard for the Agriculture Produce Market Committee and Shopping cum Commercial Complex and Departmental Store for the Nagar Parishad. The respondent did not discharge the service tax liability on the said contract of construction work. During scrutiny of records, it was noticed that service tax was liable to be paid by the respondent on the aforesaid services. A show cause notice was served on the respondent but, before the service of the show cause notice, the respondent had paid the service tax of Rs.63,71,163/-. However, according to the Commissioner, a sum of Rs.8,75,809/- was still payable. The adjudicating authority appropriated the amount deposited by the respondent and also imposed interest and penalty on the respondent. The order of the Commissioner was challenged by the respondent before the Tribunal. On an appreciation of the provisions of the Finance Act, 1994, the Tribunal came to a conclusion that though the respondent had claimed that it was not liable to pay service tax on the amounts received by it for executing work of construction for Agriculture Produce Market Committee, Malkapur, the respondent was liable to pay the same. The demand of service tax by the appellant-department was confirmed by the Tribunal. The Tribunal was, however, of the view that penalty could not have been imposed on the respondent under Section 73 of the Act in view of the provisions of Section 80. The order of the Tribunal so far as it sets aside the penalty imposed by the adjudicating authority on the respondent is assailed by the appellant-department in this appeal.

Shri Bhattad, the learned counsel for the appellant, submitted that the Tribunal could not have set aside the penalties imposed on the respondent. It is submitted that though the respondent had not paid the service tax in respect of the services rendered to A.P.M.C. Malkapur, it had paid the service tax on the services rendered to A.P.M.C. Belad. It is submitted that the respondent was liable to pay service tax to the tune of Rs.72,46,972/-, but the respondent had only paid a sum of Rs.63,71,163/- before the show cause notice was served. The learned counsel relied on the judgments reported in **(2009) 13 SCC 448** (*Union of India Versus Rajasthan Spinning and Weaving Mills*), **(2008) 13 SCC 369** (*Union of India & Others Versus Dharmendra Textile Processors & Others*) and **(2012) 5 SCCC 523** (*Commissioner of Central Excise, Kolkata Versus Plaxair India Private Limited*) to substantiate his submission that no sooner than the service tax is not paid, the penalty is liable to be mandatorily imposed.

On hearing the learned counsel for the appellant and on a perusal of the orders of the authorities, it appears that there is no scope for interference with the order of the Tribunal in this appeal. Even before a show cause notice was served on the respondent, dated 16.10.2009, the respondent had discharged the service tax liability to the tune of Rs.63,71,163/-. The maximum amount of the service tax dues were paid by the respondent even before the issuance of the show cause notice. The Tribunal has recorded a pure finding of fact that the respondent had entertained a *bona fide* belief that the construction activity undertaken by the respondent for A.P.M.C. Malkapur could not have fastened the liability on the respondent to pay service tax as the construction was for the government agency. The Tribunal held that there was reason to believe that the respondent could have entertained a *bona fide* belief that the activity undertaken by the respondent for the A.P.M.C. would not be covered under the tax net. The Tribunal held that it was necessary for the adjudicating authority to have applied the provisions of Section 80 of the Act to consider whether there was any reasonable cause for the failure on the part of the respondent to pay the service tax. In respect of A.P.M.C. Belad, the respondent had stated before the adjudicating authority that the respondent had paid the entire amount of service tax in regard to the construction work for the said A.P.M.C. as the said amount was received by it, as service tax from A.P.M.C. Belad and the said amount was paid as it would have attracted the provisions of Section 11-D of the Central Excise Act. We do not find any reason to interfere with the order of the Tribunal in this appeal, specially when the Tribunal has applied the provisions of Section 80(1) and 80(2) of the Act to hold that the penalty could not have been imposed on the respondent. We do not find that the Tribunal has committed any fault in invoking the provisions of Section 80 of the Act for setting aside the orders imposing penalty. The Tribunal rightly held that if the service tax liability and the interest thereon is discharged on the direction of the Central Excise officers, there was no need to issue a show cause notice. In the circumstances of the case, we do not find any reason to interfere with the order of the Tribunal in which the Tribunal has exercised the discretion in favour of the respondent by invoking the provisions of Section 80 of the Act. The judgments reported in **(2009) 13 SCC 448** (*Union of India Versus Rajasthan Spinning and Weaving Mills*), **(2008) 13 SCC 369** (*Union of India & Others Versus Dharmendra Textile Processors & Others*) and **(2012) 5 SCCC 523** (*Commissioner of Central Excise, Kolkata Versus Plaxair India Private Limited*) and relied on by the counsel for the appellant are not applicable to the facts of the case. The Hon'ble Supreme Court was considering the provisions of Section 11AC of the Central Excise Act in the said cases and after considering the said provisions, the Hon'ble Supreme Court held that the imposition of penalty was mandatory and by no stretch of imagination it could be said that the adjudicating authority has a discretion to levy a duty less than what is legally and statutorily leviable. The provisions of Section 11C are entirely different from the provisions of Section 80 of the Act. Section 80 of the Act gives a discretion to the adjudicating authority, not to impose penalty in certain cases. The judgments have no relevance whatsoever to the case in hand as in those cases, the provisions of Section 11AC of the Excise Act were considered and in the present case, we are considering the provisions of Section 80 of the Act.

Since no substantial question of law arises for consideration in this central excise appeal, the same is dismissed with no order as to costs.

JUDGE **JUDGE**

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