IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 22/12/2017

C O R A M

THE HON'BLE MR.JUSTICE S.MANIKUMAR

AND

THE HON'BLE MR.JUSTICE R.PONGIAPPAN

Civil Miscellaneous Appeal No.3499 of 2017

The Commissioner of Service Tax
Service Tax II Commissionerate
Newry Towers
Plot No.2054, I Block
2nd Avenue, 12th Main Road
Anna Nagar
Chennai 600 040. ... Appellant/Respondent

Vs

P.S.Swaminathan ... Respondent/Appellant

Appeal filed under Section 35 G of the Central Excise Act, 1944, against the Final Order No.41836 of 2016, dated 10/10/2016, on the file of the CESTAT, South Zonal Bench, Chennai.

For appellant ... Mr.A.P.Srinivas

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J U D G M E N T

(Judgment of the Court was made by S.MANIKUMAR, J)

Challenge in this appeal is to a final order No.41836 of 2016, dated 10/10/2016, on the file of CESTAT, Madras.

2. Short facts leading to the appeal are that P.S.Swaminathan/appellant was earning rental income by letting out the portion of his property at Guindy, Chennai. He is not paying service tax under “Renting of immovable property service”. Therefore, DGCEI, issued SCN No.42 of 2012, dated 22/3/2012, demanding service tax of Rs.23.34.424/- for the period 2007 to 2011 along with interest under proviso to Section 73 (1) and Section 75 of the Finance Act, 1994. SCN also proposed to imposed penalty under Sections 76, 77 and 78 of the Finance Act, 1994. The SCN was made answerable to the Additional Commissioner/Joint Commissioner of Service Tax, Chennai.

3. Vide O-I-O No.57 of 2014, dated 2/7/2014, the Additional Commissioner, confirmed the demand of service tax of Rs.23,34,424/- along with interest under provisio to Section 73 92) and 75 of the Finance Act, 1994. The order also appropriated service tax amount of Rs.23,34,424/- and interest of Rs.9,95,980/- paid by the assessee. Further, the adjudicating authority had imposed penalty of Rs.23,34,424/- and Rs.10,000/- under Sections 78 and 77 of the Finance Act, 1994.

4. Aggrieved by the penalty imposed, the assessee preferred an appeal to the Commissioner (Appeals) vide Appeal No.191/2014 (MST) dated 24/9/2014. The Appellate Authority reduced the penalty imposed under Section 78 to 50% in respect of transaction for the period from 8/4/2011 to 30/9/2011, as the said proviso to sub-Section 1 of Section 78 of the Act was introduced with effect from 8/4/2011 only. Accordingly, the Commissioner (Appeals - II) vide Order-In-Appeal No.447 of 2015, dated 31/12/2015 held that the impugned order is upheld in its entirety but modified the penalty imposed under Section 78 of the Act is upheld in respect of the transaction for the period from 1/6/2007 to 7/4/2011.

5. Aggrieved by the said order, the assessee preferred an appeal before CESTAT. CESTAT set aside the penalty vide Final Order No.41836 of 2016, dated 10/10/2016. Hence the instant Civil Miscellaneous Appeal, on the following substantial questions of law:-

> (i). Whether the CESTAT is correct in granting waiver of penalty imposed under Section 78 of Finance Act 1994 by invoking the provision of Section 80 in the absence of any reasonable cause for failure to pay service tax.
>
> (ii). Whether the CESTAT is correct in granting waiver of penalty by relying upon the judgment in the case of C.B.Venkatesh & Co Vs. CCE & ST, Coimbatore, which is applicable only for circumstances falling under Section 80 (2) to justify waiver of penalty and applying the said ratio to waive penalty in the instant case which does not fall under Section 80 (2) of Finance Act, 1994.
>
> (iii). Whether the CESTAT is correct in waiving the penalty when there is suppression of facts with intention to evade payment of service tax is clearly made out by the department?”

6. Supporting the substantial questions of law, Mr.A.P.Srinivas, learned counsel for the appellant submitted that if the appellant really had no intention to evade payment of service tax, he could have registered with the Department as provider of "other Taxable Service" and could have shown the rent received value, as exempted income in the ST-3 returns. Failure to do the same, proves his intention to hide the income from the Department.

7. CESTAT waived the penalty in the instant case, based on its own decision pronounced in C.B.Venkatesh & Co Vs. CCE & ST, Coimbatore, which is applicable only for circumstances falling under Section 80 (2), and not to justify waiver of penalty under Section 80 (1) of Finance Act, 1994.

8. To substantiate the case, Mr.A.P.Srinivas, learned Senior Standing Counsel for Customs, Central Excise and Service Tax, relied on the following decisions and reiterated the stand that penalty under Section 78 of the Act is mandatory in nature.

(i). K.Gopalakrishnan, Prop. Of Kamachi Mahal Vs. CCE, CESTAT, Chennai.

(ii). UOI Vs. M/s. Dharmendra Textiles Processors and Ors {2008 (231) ELT 3 (SC)

(iii). Commission of C.Ex.Vadodara Vs. Swathi Chemical Industries Ltd {2009 (248) ELT 421 Tri.Ahmd).

(iv). Commission of C.Ex.Ludhiana Vs. Silver Oak Gardens Resort - {2009 (9) STR 481 (Tri.Del.)

(v). Mett. Macdonald Ltd., Vs. Commission of C.Ex.Jaipur - {2006 (2) STR 524 (Tr.Del).

(vi). A.K.Construction Vs. Commissioner of Customs & C.Ex., Nagpur {2011 (22) STR 445 (T)}.

9. Heard Mr.A.P.Srinivas, learned counsel for the appellant and perused the materials available on record.

10. After considering the statutory provisions and submissions, the Commissioner of Service Tax, vide order, dated 2/7/2014, order in original, held thus:-

> "13. In the Show Cause Notice No.42/2012, dated 22/3/2012, it was proposed to appropriate Service Tax of Rs.17,66,551/- and interest of Rs.1,76,456/- paid by the assessee on 31/3/2011, 19/7/2011, 23/12/2011 & 14/1/2012. Further, it is seen from the records available that the assessee has also paid the balance service tax amount or rs.5,67,873/- and the interest amount of Rs.5,18,460/- vide challan No.0001 dated 30/5/2014 which is on record. They have also paid an interest amount of

Rs.3,01,064/- for the period from 2008 - 2009 to 2012 - 2013 (upto June 2013). Thus, the total service tax paid is Rs.23,34,424/- and the total interest paid is Rs.9,95,980/-.

14. In terms of Section 68 of the Finance Act, 1994, every person providing taxable service should pay service tax at the rate specified in Section 66 in such manner and within such period as may be prescribed. Also, as per the proviso to Rule 6 (1) of the Service Tax Rules, 1994, if the assessee is an individual or proprietary firm or partnership firm, the service tax is to be paid to the credit of the Central Government by the 6th day of the month (electronically internet banking) or 5th day of the month immediately following the quarter in which the payments are received. The assessee, an individual, was therefore, required to pay service tax on the rental income received on the 5th day of the month following the quarter of receipt of such rental income.

15. The assessee have contravened the provisions of Section 68 of the Finance Act, 1994 read with Rule 6 of the Service Tax Rules, 1994, in as much as they did not properly assess the Service Tax due for the period from 1/6/2007 onwards the pay the service tax within such period as prescribed under the Act. Also, they had failed to file the returns within the due date. The fact of non-payment of service tax would not have come to light but for the investigation carried out by DGCEI, Chennai. Hence there is suppression of facts with intent to evade payment of duty is evident in the instant case. I observe that once it is held that they have suppressed the facts with intention to evade payment of service tax, penalty under Section 78 is mandatorily imposable as had been held by the Apex Court in the case of Dharmendra Textile Mills Ltd., reported in 2008 (231) ELT 3 (SC) and Rajasthan Spinning & Weaving Mills Ltd., reported in 2009 (238) ELT 3 (SC). Regarding penalty under Section 76 of the Finance Act, it is observed that in terms of para 8.1 of Ministry's letter No.334/1/2008 - TRU dated 29/2/2008, the penalty under Section 78 which is equal to the service tax itself is sufficient to cover the contraventions; hence I do not propose any

penalty under Section 76 of the Act.

16. Also I hold that the assessee is liable for penalty as provided under Section 77 of the Act for his failure to furnish returns within the prescribed time. I also hold that the assessee is liable to pay interest in terms of Section 75 of the Act.

O R D E R

17.1. In confirm the demand of Service tax amount of Rs.23,34,424/- (Rupees Twenty three lakhs thirty four thousand four hundred and twenty four only), including education cesses from Shri P.S.Swaminathan payable for the period from 1/6/2007to 30/9/2011 under proviso to Section 73 (1) of the Finance Act, 1994 read with Section 73 (2) of Finance Act, 1994;

17.2. I appropriate the amount of Rs.23,34,424/- (Rupee Twenty three lakhs thirty four thousand four hundred and twenty four only), including cesses paid by the assessee, as discussed in para 13, and adjust the same towards the demand made at clause 17.1 above;

17.3. I order the assessee to pay the interest on the demand confirmed at clause 17.2 under Section 75 of the Finance Act, 1994

17.4. I appropriate the interest amount of Rs.9,95,980/- (Rupees Nine lakhs ninety five thousand nine hundred and eighty only) paid by the assessee, as discussed in para 13 above, and adjust the same towards the interest made at clause 17.3 above;

17.5. I impose penalty of Rs.23,34,424/- (Rupees Twenty three laksh thirty four thousand four hundred and twenty four only) under Section 78 of the Finance Act, 1994. However, the penalty imposed shall be reduced to 25%, if the service tax amount demanded under clause 17.1 above along with the interest ordered under Clause 17.3 above together with the reduced penalty is paid within 30 days of receipt of this order;

17.6. I impose a penalty of Rs.10,000/- under Section 77 of the Finance Act, 1994;

17.7. I do not impose any penalty under Section 76 of the Finance Act, 1994 for the reasons mentioned in the findings."

11. On appeal, the Commissioner of Service Tax (Appeals - II), vide, order, dated 31/12/2015, after considering the grounds of appeal, decisions relied on, at paragraph Nos.8 to 14, ordered as hereunder:-

> "8. As regard the reliance placed by the appellants on Section 73 (3) of the Act, it is observed that as per the said Section, if the service tax payable by a person is paid either on the basis of his own ascertainment or on the basis of tax ascertained by the Central Excise Officer before the issue of notice and the payment details are informed to the Central Excise Officer, the show cause notice shall not be issued in respect of the amount so paid. In the present case, the appellants had not discharged their entire liabilities before issue of show cause notice. Further, this is a case of suppression of facts with intention to evade service tax and accordingly the provisions of Section 73 (3) are not applicable to this case as provided under Section 73 (4) of the Finance Act, 1994 which reads as below:-
>
> (4). Nothing contained in sub-Section (3) shall apply to a case where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of -
>
> a. fraud; or
> b. collusion; or
> c. wilful mis-statement; or
> d. suppression of facts; or
> e. contravention of any of the provisions of this Chapter or of the rules made there under with intent to evade payment of service tax.
>
> 9. The above Section specifically states that the provisions of Section 73 (3) shall not apply to cases involving any of the above said ingredients namely fraud, collusion, wilful mis statement and suppression of fact or contravention of the provisions of Section 73 (3) are not applicable to this case.
>
> 10. Another plea of the appellants is that they are entitled for the benefit of Section 80 of the Act. It is observed that it is true that the issue of service tax on renting of immovable property had been the subject matter of debate and undergone several rounds of litigations. However, considering the facts and circumstances, the

Government, in the Finance Act, 2012, had inserted sub-Section (2) to Section 80 of the Finance Act, 1994 and it reads as under:-

(2) Notwithstanding anything contained in the provisions of Section 76 or Section 77 or Section 78, no penalty shall be imposable for failure to pay service tax payable, as on the 6th days of March, 2012, on the taxable service referred to in sub-clause (zzzz) of clause (105) of Section 65, subject to the condition that the amount of service tax along with interest is paid in full within a period of six months from the date on which the Finance Bill, 2012 receives the assent of the President.

11. The above provision grants relief from the penalty subject to fulfillment of a condition that the amount of service tax payable, as on the 6th days of March 2012 along with interest is paid in full within a period of six months from the date (i.e. from 28/5/2012) on which the Finance Bill, 2012 receives the assent of the President. However, the appellants had not paid their entire tax liability along with interest before the period prescribed thereon. Thus, the appellants had not fulfilled their statutory requirement of discharging the service tax liability even after an opportunity to get relief from the penalty was provided under Section 80 (2). Moreover, in this case, the appellant tried to escape from the tax liabilities by suppressing the relevant facts till such time, the department pointed out. Thus, the revenue to the Government would have otherwise remained unpaid. Therefore, there could not be any room for non imposition of penalty under Sections 77 and 78 of the Act. By considering the facts and circumstances of the case, I do not find any of the reasons put forth by the appellants as reasonable cause. In the absence of any reasonable cause for failure to pay service tax, I am not inclined to give relief under Section 80 of the Act.

12. As regards the claim of the appellants for cum tax benefit, it is observed that though the appellants claimed that they had not collected service tax, they had not provided any documents in support of their claim. In the absence of any documentary evidence, the claim of the appellants cannot be considered.

13. As regards the claim of the appellants that penalty under Section 78 stand reduced to

fifty per cent, it is observed the subject demand was proposed based on the details collected from their books of accounts and therefore, the appellants are entitled for the reduced penalty in terms of the proviso to sub-Section 1 of Section 78 of the Act that reads as under:-

Provided that where true and complete details of the transactions are available in the specified records, penalty shall be reduced to fifty per cent of the service tax so not levied or paid or short-levied or short-paid or erroneously refunded;

However, the said provision was introduced w.e.f.8/4/2011 and hence, the appellants are entitled for the benefit of reduced penalty w.e.f. 8/4/2011 only. Accordingly, the penalty imposed under Section 78 is reduced to 50% in respect of the transaction for the period from 8/4/2011 to 30/9/2011 and in respect of the remaining period, the imposition of penalty does not require any interference.

14. In view of the foregoing discussions, the impugned order is upheld in its entirety except with the following modification in respect of imposition of penalty under Section 78 of the Act.

(i). the penalty imposed under Section 78 of the Act, is upheld in respect of the transaction for the period from 1/6/2007 to 7/4/2011.

(ii). The penalty imposed under Section 78 of the Act is reduced to 50% in respect of the transaction for the period from 8/4/2011 to 30/9/2011.

15. Appeal is disposed of in the aforesaid terms."

12. When the respondent filed, a further appeal CESTAT, Madras, on 10/10/2016 in Final order No.41836/2016, ordered as hereunder:-

"The only issue involved in this appeal is whether the penalty is leviable for delay in deposit of service tax relating to "Renting of Immovable Property" when legislature intended to grant immunity from prosecution against such delay due to interpretational difficulty arose prior to Home Solutions Retail Ltd., judgment reported in 2010 (19) STR 3 (Del.).

2. Following the earlier decision of this Bench in the case of M/s. C.B.Venkatesh &

Co Vs. CCE & ST, Coimbatore, disposed vide final order No.41314/2015 dated 30/9/2015, holding no levy of penalty on the above circumstance, on the appellant, in absence of appellant's contumacious conduct and appreciating that levy was crystalized by the judgment of the Hon'ble High Court of Delhi in the case of Home Solutions Retail Ltd. ZVs. UOI (supra) appeal is allowed."

13. Though Mr.A.P.Srinivas, learned counsel for the appellant, raised the above questions of law and made submissions, we are not inclined to accept the same, for the reason that Assessee had paid service tax of Rs.23,34,424/-, and total interest paid was Rs.9.95,980/-, which means, major portion of the service tax has already been paid, even before the introduction of the Finance Act. Therefore, it cannot be said that there was any intention on the part of the respondent/assessee to evade payment of service tax.

14. In the light of the above discussion and having regard to the reasoning of the CESTAT, Madras, we are not inclined to interfere with the decision of CESTAT, Madras, in setting aside the penalty.

15. In view of the above discussion, Civil Miscellaneous Appeal is dismissed. Substantial questions of law are answered, as against the revenue. No costs.

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

mvs.

To

1.The CESTAT, South Zonal Bench, Chennai.

2. The Commissioner of Service Tax
(Appeals-ii)
Newry Towers, 3rd floor, Plot No.2054, I Block
40, 2nd Avenue, 12th Main Road Anna Nagar
Chennai 600 040.

C.M.A.No.3499 of 2017

SSD(CO)
TR(06/02/2018)