THE HON'BLE SRI JUSTICE C.V.NAGARJUNA REDDY
AND
THE HON'BLE SRI JUSTICE CHALLA KODANDA RAM

C.E.A. No. 190 OF 2017

DATE: 16th NOVEMBER 2017

Between:
The Commissioner of Central Tax, Central Excise & Service Tax, Secunderabad.

… Appellant

AND

M/s. Vision Labs Institute, Hyderabad

… Respondent

Counsel for the petitioner : Mr. Swaroop Orilla for Mr. M.V.J.K.Kumar Senior Standing Counsel for Central Excise Customs and Service Tax.

Counsel for the respondents :

THE COURT MADE THE FOLLOWING:

O R D E R: *(per Hon'ble Sri Justice C.V. Nagarjuna Reddy)*

This Appeal arises out of Order dated 09.02.2017 in Appeal No.ST/27327/2013 on the file of Customs, Excise and Service Tax Appellate Tribunal, Regional Bench, Hyderabad (for short "the Tribunal).

We have heard Mr. Swaroop Oorilla, learned Junior Standing Counsel for Customs, Central Excise and Service Tax and perused the record.

As the respondent has not filed ST-3 returns and did not discharge its service tax liability for the period April 2010 to March 2011, the Department called for the balance sheet / IT returns and profit & loss accounts and on furnishing of the same by the respondent, a sum of Rs.41,14,067/- was determined as service tax. Before such determination and during the investigation itself, the respondent has paid a sum of Rs.27,78,816/- along with interest of Rs.2,70,140/-, which fact was intimated to the Department vide letter dated 12.03.2012. Thereafter, a show cause notice was issued by the Department on 09.04.2012 raising the demand of Rs.41,14,067/-. After hearing the respondent, the primary authority has determined the service tax liability, apart from levying reduced penalty of 25% under Section 78 of the Finance Act, 1994 (for short, 'the Act'). The respondent was unsuccessful in the Appeal filed before the Commissioner (Appeals), who upheld the decision of the primary authority. Feeling aggrieved by the said order, the respondent has filed Appeal No.ST/27327/2013 before the Tribunal. The respondent pleaded before the Tribunal that the provisions of Section 78 of the Act are not attracted, as none of the ingredients therein namely; fraud or collusion or wilful mis-statement or suppression of facts or contravention of any of the provisions of the Chapter or of the Rules made thereunder with intention to evade payment of service tax exists in the case and that therefore, the primary authority has committed a serious error in imposing penalty. A further contention was advanced that in the absence of any of the above-mentioned grounds under Section 78, the extended period of limitation of five years was not available in the instant case and that therefore, the Order imposing penalty is barred by limitation. In paragraph 5 of its Order, the Tribunal rendered the following findings –

> " I have heard the submissions made by both sides. At the outset, it is to be stated that even prior to issuance of show cause notice the appellants have paid more than half of the demand of service tax along with interest. Even then the department has proceeded to raise demand for the extended period alleging suppression of facts. It is also noteworthy that total demand raised is arrived from the financial statements and such other documents furnished to the department by the appellant. Nothing hidden was unearthed by the department. Mere non-payment of service tax and mere non-filing of returns does not attract the provisions of section 78 as it contains the words fraud, wilful mis-statement and suppression of facts. Ti is also submitted by the

appellants that they did not receive the service tax component from the service recipients which are mostly Government Departments and therefore could not discharge their service tax liability. It is pleaded by them that they were under much financial hardships. The decision in the case of Punj Lloyd Ltd., has analysed the issue whether extended period is invokable for mere non-payment of service tax and failure to file returns. The question has been answered in favour of the assessee. Further, this Tribunal in the case of ICOMM Tele Ltd., vide Final Order stated supra held that when the service tax is not paid due to financial hardships, Section 80 can be invoked to give the benefit of waiving penalty. In view thereof, I hold that the imposition of penalty under Section 78 is unjustified. The impugned order is modified to the extent of setting aside the penalty imposed under section 78 only without disturbing the confirmation of demand, interest thereon or the late fee imposed under Section 77 of Finance Act, 1994. The appeal is partly allowed in above terms, with consequential reliefs, if any."

Learned Counsel for the appellant has not disputed the fact that a substantial part of the amount i.e., a sum of Rs.27,78,816/- along with interest of Rs.2,70,140/- out of Rs.41,14,067/-, was paid even during the investigation and that the balance amount was also paid immediately after determination of the tax liability of the respondent. It is also not in dispute that, as found by the Tribunal, the liability of the respondent was deduced from the financial statements and other documents furnished by it on the notice issued by the Department. Therefore, we are entirely in agreement with the view of the Tribunal that none of the grounds mentioned in (a) to (e) of Section 78(1) of the Act is attracted to the present case. Once the said provision is not attracted, the extended period of limitation under *proviso* to Section 73(1) of the Act is not available to the Department. Admittedly, the action was initiated after the expiry of the normal period of limitation of 18 months.

For the afore-mentioned reasons, question No.3, which alone falls for consideration in this Appeal, is answered against the appellant Department.

In the result, the Appeal is dismissed. No costs.

C.V. NAGARJUNA REDDY, J

CHALLA KODANDA RAM, J

16th November 2017

ssv/ksld