THE HON'BLE SRI JUSTICE V. RAMASUBRAMANIAN

AND

THE HON'BLE MS. JUSTICE J. UMA DEVI

<u>CENTRAL EXCISE APPEAL No. 24 of 2017</u>

<u>JUDGMENT:</u> ***(Per VRS,J)***

Aggrieved by the deletion of penalty by the Commissioner (Appeals) and confirmation of the same by the CESTAT, the Revenue has come up with the present appeal under Section 35G of the Central Excise Act, 1944 read with Section 83 of the Finance Act, 1994.

2. Heard Ms. Sundari R Pisupati, learned senior standing counsel for Customs, Central Excise and Service Tax, appearing for the appellant/Revenue.

3. It appears that the respondent-assessee registered themselves as an assessee under the Service Tax Rules, 1994. The respondent is offering the service of transport of goods by road. According to the Department, after an enquiry, it came to light that the respondent was not filing returns and not paying tax.

4. However, even before a show-cause-notice could be issued, the respondent-assessee paid the duty involved together with interest on the duty short-paid by them. But, the Additional Commissioner issued a show-cause-notice calling upon the respondent-assessee to show cause as to why penalty should not be levied.

5. The respondent-assessee submitted their objections and also appeared for personal hearing and contended that since they had paid the service tax and interest even before the issue of the show-cause-notice, they cannot be slapped with an order of penalty.

6. Over-ruling the objections, the original authority confirmed the demand for imposition of penalty.

7. Aggrieved by the said order, the respondent-assessee filed an appeal to the Commissioner (Appeals). By an order in appeal, dated 29.12.2010, the Commissioner (Appeals) allowed the appeal, on the short ground that since the respondent had paid the tax before the issue of the show-cause-notice, they required a lenient treatment.

8. As against the said order, the Revenue filed an appeal before the CESTAT. The CESTAT followed a decision of the Mumbai Bench of the Tribunal in ***Sunitha Tools (P) Limited Vs. CST, Mumbai***[1], and dismissed the appeal. Therefore, the Revenue is before us.

9. It is strenuously contended by Ms. Sundari R Pisupati, learned senior standing counsel for the Department, that wherever there is fraud, collusion, willful mis-statement or suppression of facts, the liability to pay the penalty is automatic, in view of Section 78(1) read with Section 73(4). Heavy reliance is placed upon the decision of the Hon'ble Supreme Court in ***Union of India (UOI) Vs. Rajasthan***

---

[1] 2014-TIOL-2094

Spinning and Weaving Mills[2]. Reliance is also placed upon a decision of the Himachal Pradesh High Court in ***Commissioner of Central Excise Vs. Him Chemicals and Fertilizers Limited***[3] as well as a decision of the Madras High Court in ***Commissioner of Central Excise Vs. Sri Ranga Balaji Cotton Mills***[4].

10. We have carefully considered the above submissions.

11. It is true that under Section 78(1) of the Finance Act, 1994, an assessee is liable to pay service tax, if service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, by reason of fraud, collusion, willful mis-statement or suppression of facts or contravention of any of the provisions of the Act and the Rules with the intent to evade payment of service tax.

12. Before Section 78 was substituted by the Finance Act, 2015, the position remained the same, except with small differences. One of the differences was that under the second proviso to sub-section (1) of Section 78, if an assessee chose to pay service tax and interest within 30 days from the date of communication of the order of the Central Excise Officer determining such service tax, the amount of penalty liable to be paid under the first proviso, would be 25% of such service tax. The first proviso reduced the penalty to 50% in cases where true and complete details of the transactions were available in the specified records.

---
[2] (2009) 13 SCC 448
[3] 2010 (256) ELT 363 (H.P.)
[4] 2015 (317) ELT 698 (Mad.)

13. After the amendment under the Finance Act, 2015, the penalty leviable under the first proviso remained at 50% and the penalty payable in cases where service tax and interest was remitted within 30 days of service of notice, was reduced to 15%.

14. Therefore, it is clear that both before and after the amendment, the Act did not treat all cases of fraud, collusion, willful mis-statement, suppression of facts or contravention of the provisions of the Act alike. The liability to pay penalty arose in cases of fraud, collusion, willful mis-statement, suppression of facts or contravention of the provisions of the Act. But, the quantum of said penalty depended upon the question as to whether the amount of tax and liability was paid and, if so, at what point of time. Keeping this distinction in mind, let us go back to Section 73(3) and Section 73(4). Section 73(3) reads as follows:

> *"Where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the person chargeable with the service tax, or the person to whom such tax refund has erroneously been made, may pay the amount of such service tax, chargeable or erroneously refunded, on the basis of his own ascertainment thereof, or on the basis of tax ascertained by a Central Excise Officer before service of notice on him under sub-section (1) in respect of such service tax, and inform the Central Excise Officer of such payment in writing, who, on receipt of such information shall not serve any notice under sub-section (1) in respect of the amount so paid:*
>
> *PROVIDED that the Central Excise Officer may determine the amount of short payment of service tax or erroneously refunded service tax, if any, which in his opinion has not been paid by such person and, then, the Central Excise Officer shall proceed to recover such amount in the manner specified in this section, and the period of eighteen months*

referred to in sub section (1) shall be counted from the date of receipt of such information of payment."

15. We have already seen that the liability to pay penalty imposed under Section 78(1) arises only after the service of notice under the proviso to Section 73(1). But, under sub-section (3) of Section 73, the Department cannot even issue a show-cause-notice, in cases where the service tax and interest has been paid, immediately upon the ascertainment of the service tax either on own assessment or on the basis of what was ascertained by the Central Excise Officer. Sub-section (3) was intended to confer an extended benefit much more in nature than the varying degrees of penalty imposed under the different provisos of sub-section (1) of Section 78.

16. It is true that sub-section (4) of Section 73 keeps the operation of sub-section (3) out of the purview, in cases where the service tax has not been levied, paid, short-levied or short-paid by reason of fraud, collusion, willful mis-statement, etc. But nevertheless, the law does not treat all cases of fraud, collusion, willful mis-statement, suppression of facts, etc., alike.

17. Keeping this in mind, if we go through the order in original, it could be found that the respondent-assessee paid the service tax to the extent of Rs.40,39,751/- along with interest to the tune of Rs.12,42,633/-. This amount was paid even before the show-cause-notice, dated 22.04.2010, was issued. It is only in Paragraph-15 (iii) and 15 (iv) that the adjudicating authority has recorded a finding that

the respondent-assessee willfully suppressed the true and correct value of the freight incurred. But, the findings recorded in Paragraph-15 (iii) and 15 (iv), in our considered view, are not sufficient to enable the Department to fall back upon sub-section (4) of Section 73, so as to keep the application of Section 73(3) out of the reach of the respondent-assessee. Hence, we do not think that the Commissioner (Appeals) and the CESTAT were wrong in deleting the penalty. Therefore, the appeal is dismissed.

Consequently, miscellaneous petitions if any pending in the appeal shall stand dismissed. There shall be no order as to costs.

V. RAMASUBRAMANIAN, J

J. UMA DEVI, J.

13th March, 2017
cbs

THE HON'BLE SRI JUSTICE V. RAMASUBRAMANIAN √

AND

THE HON'BLE MS. JUSTICE J. UMA DEVI

C.E.A.No.24 of 2017
(dismissed)

13th March, 2017

cbs