Sharayu Khot.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

CENTRAL EXCISE APPEAL NO. 192 OF 2017

The Commissioner of Service Tax-VI **...Appellant**

Versus

M/s. Shreenath Motors Pvt.Ltd. **...Respondent**

Ms. P.S. Cardozo, for the Appellant.

Mr. R.G. Sheth a/w Ms. Pinky D. Chainani, for the Respondent.

CORAM : M.S. SANKLECHA &
RIYAZ I. CHAGLA, JJ.

DATE : 19 September 2018

ORDER :

1. This Appeal under Section 83 of the Finance Act, 1994 ("***the Act***") read with Section 35G of the Central Excise Act, 1944 challenges the order dated 5th April 2016 passed by

Customs, Excise and Service Tax Appellate Tribunal (for short "***the Tribunal***").

2. Ms. Cardozo, the learned Counsel for the Revenue states that the challenge in the present Appeal to the impugned order dated 5th April 2016 is only to the extent that it holds that no penalty is imposable. The finding on quantum is accepted by the Revenue.

3. The Revenue urges the following two questions of law for our consideration:-

(i) Whether in the facts and circumstances of the case and in law was the Tribunal right in setting aside penalty imposed under Sections 76 and 78 of the Act after confirming the demand of service tax?

(ii) Whether in the facts and circumstances of the case and in law was the provisions of Section 80 applicable in cases involving suppression of facts fraud etc.?

4. The Respondent is a car dealer and also a selling agent for the banking and financial institutions that provide loan to purchasers of cars. The Respondent receives commission from the banks and financial institutions who grant loans to the purchaser of vehicles/cars. On 19th November 2005, the Respondent being of the view that the Commission earned on the above activity is on account of services rendered by them under the head "*business auxiliary service*", paid the service tax of Rs. 21.10 Lakhs by cash and debit to the said Cenvat account (in the aggregate) to the Revenue.

5. Thereafter, the Revenue issued a Show Cause cum Demand Notice on 1st March 2007 invoking the extended period of limitation *inter alia* in respect of the above services to be extent of Rs. 20.76 Lakhs and seeking to recover service tax for a period from July, 2003 to March, 2006 by appropriating the above payments under the head business auxiliary services.

The Respondent resisted the Show Cause Notice. However, the Additional Commissioner of Central Excise by an order dated 14th June 2010 confirmed the Show Cause Notice and also imposed penalty under Sections 76 and 78 of the Act.

6. On Appeal, the Commissioner (Appeals) allowed the Respondent's Appeal by holding that the services rendered by the respondent would be appropriately classifiable under business support service which was introduced only in 2006. Thus, prior thereto no tax was payable on the services rendered. This was after placing reliance upon the various decisions including the decision of this Court in ***Indian National Shipowners***' ***Association***[1] and other decisions of the Tribunal. Therefore, in the above facts, the penalty imposed under Sections 76 and 78 of the Act was also deleted.

7. Being aggrieved, the Revenue appealed to the Tribunal. The impugned order placed reliance upon the decision

1 ***2009 (14) STR 289 (Bom)***

of its co-ordinate Bench on ***South City Motors Ltd. Vs. Commissioner of Service Tax, Delhi***[2] to hold on merits that the service tax would be payable under the head "*business auxiliary service*" and introduction of another head "*business support service*" would not detract from the fact that these services continued to be classified under the head "business auxiliary service". Thus, the impugned order restored the order of the Additional Commissioner to hold that the tax of Rs. 20.72 Lakhs is payable under the head "*business auxiliary service*". However, in these facts, the impugned order of the Tribunal held that no penalty can be imposed. Thus, in view of there being lack of clarity as to whether or not these services as rendered by the Respondent are classifiable under business auxiliary service. In fact, the decision in ***South City Motors Ltd.*** (supra) had also held that in view of contrary decisions, no *malafide* or element of suppression, mis statements, etc. could be said to arise. Therefore, the impugned order holds that no penalty is in these facts is imposable.

2 ***2012 (25) STR 483 (Tri.Del.)***

8. Ms. Cardozo, the learned Counsel appearing in support of the Appeal submits that once the duty payments has been confirmed, the penalty should have been imposed. This as the notice was issued under the proviso of Section 73 of the Act.

9. We find that in the present fact while service tax has been confirmed following the decision of its Co-ordinate Bench in ***South City Motors Ltd.*** (supra). However, the same decision is relied upon to hold that no penalty is imposable where there was divergence of view. Therefore, in these facts, there was reasonable cause for non payment of service tax making Section 80 of the Act applicable. It is not as though the confirmation of demand would *ipso facto* lead to penalty. In fact, Section 80 of the Act provides for non imposition of penalty, if there is a reasonable cause. This is available in ample measure in the present facts. Thus, no fault can be found with the impugned order of the Tribunal.

10. In the above view, as the order dated 5th April

2016 of the Tribunal not imposing penalty is one on facts, no substantial question of law arises. This is so as the impugned order is not shown to be perverse in any manner. Hence, not entertained.

11. Accordingly, the Appeal is dismissed.

[RIYAZ I. CHAGLA J.] **[M.S. SANKLECHA, J.]**