

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 19.07.2018

Judgment Pronounced on : 10.08.2018

CORAM :

THE HONOURABLE MR.JUSTICE S.MANIKUMAR

AND

THE HONOURABLE MR.JUSTICE SUBRAMONIUM PRASAD

C.M.A.No. 3174 of 2017

Commissioner of Central Excise and
Service Tax Large Taxpayer Unit,
1775, Jawaharlal Nehru Inner Ring Road,
Anna Nagar Western Extension,
Chennai - 600 101.

... Appellant

Vs.

M/s. SIFY Technologies Ltd,
2nd Floor, Tidel Park,
No.4, Canal Bank Road,
Taramani, Chennai.

... Respondent

Prayer : This Civil Miscellaneous appeal is filed under section 35 G of Central Excise Act, 1944, against the final order No.41010 of 2016 dated 16.06.2016 passed by the Honourable Customs, Excise and Service Tax Appellate Tribunal, Chennai.

For Appellant : Mr.V.Sundereshwaran
Senior Standing Counsel for CCEST
For Respondents: Mr.Raghavan Ramabadran
for Mrs.V.Lakshmi kumaran
assisted by Ms.Swetagiridhar.

JUDGMENT

SUBRAMONIUM PRASAD, J.

The instant appeal is directed against the final order No.41010 of 2016 dated 16.06.2016 passed by the Honourable Customs, Excise and Service Tax Appellate Tribunal, Chennai, whereby the Tribunal has set aside the order passed by the Appellate Authority penalty under Section 78 of the Finance Act, 1994, by invoking the provisions of Section 80 of the Finance Act, 1994.

2.Heard, Mr.V.Sundereshwaran, learned Senior Standing Counsel for CCEST and Mr.Raghavan Ramabadran, learned counsel for the respondent.

3.The respondent is registered with the service tax under Registration No.AAA CS 9032RST001 for various services namely, "Leased Circuit, On line Information, Internet cafe, Advertisement, Franchisee, 'Business Auxiliary Service', etc.". Based on reports that the respondent is not paying appropriate service tax, their office was inspected. Investigations conducted revealed that the respondent is calculating their service tax liability based on the collection report for each month taking the total collection as the cum-tax value and are working the service tax backwards. It was noticed that the accounting system did not provide for the capturing of the amount of Tax Deducted at Source (TDS) recovery made by their clients from their invoices for the calculation of their service tax liability. For example, when an invoice is raised for say, X amount, their clients have been making payments less TDS for the purpose of Income tax, say Y amount, in respect of certain services thereby making a net payment of X-Y, say amount Z. Respondent has been taking this amount Z as the cum-tax amount and were calculating the service tax liability which was based only on the collections made during the month. The TDS was never reflected in their collection reports was never made a part of the reckoning for the purpose of service tax. The respondent did not pay the appropriate service tax on the TDS amount withheld by their clients.

4.During investigation, the statement of Shri. M.K.Vijayakumar, Senior Manager Finance, was recorded on 16.07.2007. Questions regarding non payment of service tax of amount on TDS with held by the clients against the service bills were put to him. The questions put to Mr.M.K.Vijayakumar and the answers of Mr.M.K.Vijayakumar are as under:-

" Question No. 9:

It appears that the amount of TDS withheld by your clients against your service bills in terms of the Income Tax Act is not reflected in your collections report and hence not reckoned in calculating monthly service tax liability. Do you agree?

Answer No.9:

Normally, we will account receipts on actual basis as at the time of accounting receipts the people concerned are not aware of any invoice deductions including shortfall in services and TDS.

Only before finalizing Income Tax returns during the next financial year usually during October, we will consolidate the TDS certificates. Our Accounts Receivable team depending upon their workload will start issuing credit memos to the customers and account the same in our books of account. While accounting these credit memos if they attach service tax tag, the tax is getting remitted otherwise both positive and negative effect in remittance report will be reported. Hence, we could not categorically say that we have complied 100% on TDS credit memos. Thus we would like to reiterate that for some of the TDS we have remitted service tax and for some of the cases we have not remitted the service tax. Further all the TDS certificates do not attract service tax liability. At present, we do not have complete details of TDS on which service tax is payable.

Question No. 10:

As per Section 67 of the Finance Act, 1994 the taxable value is the gross amount charged for the services rendered and no abatement is available for TDS which is nothing but on account of your Income Tax. In such a case why you have not paid service tax on TDS withheld by your customers?

Answer No.10:

As per Section 67 of the service tax is payable on collections. Accordingly, we are remitting service tax. For TDS the benefit will accrue to the company only when the income tax department admits the customer TDS certificates. Otherwise we may have to forego the money. Hence, we have not considered TDS while remitting service tax on collections. Further, while accounting the receipts we may not be aware even the customer has deducted money either for TDS or for deficiency in services. In the absence of such information it is absolutely not possible for us to assume and discharge service tax on TDS account. Further, submission of TDS certificate from the customer is basic criteria for getting the benefit. This will be normally issued after closure of the financial year and we file Income Tax returns in the month of October. The fate of TDS certificates submitted will be known after 2 years when the Income Tax Department finalises the Income Tax Assessment of our company.

Question No. 11:

Please see the collections report produced by you for November 2005 and March 2006. The service tax payable shown therein does not match with service tax paid column in your remittance report. Please explain for the deferences.

Answer No.11:

I have seen and signed the said collections reports for November 2005 and March 2006. The reason for the differences- as I said earlier while calculating service tax on advances will carry in the system unapplied status. Any receipt applied to an invoice and later unapplied will also have unapplied status. The program computes service tax on advances for all receipts having unapplied status. Hence, the difference will come and ultimately over a period of time any previous month receipt having unapplied status on the date of report running will be paying service tax twice on the same receipt. This is due to deficiency in the logics built in the program."

5. A perusal of the reply makes it clear that service tax was being paid on the net amount received by the respondent that is on the invoice price minus TDS amount withheld by the client. Show cause notice dated 19.10.2007 was issued to the respondent. Para 6,7,8 and 9 of the show cause notice reads as under:-

"6. To a specific query Shri. Vijayakumar admitted to the fact that in respect of the TDS amount withheld by their clients they had not paid the service tax on all such deductions for the reason that their personnel while giving credit to such deductions would have failed to attach the service tax tag to the transaction which then will go unrecognised by their accounting software. He also stated that they did not have the details of such instances where the service tax was not paid on the TDS. He further contented that the service tax is payable on realization of the value and that since the benefit of TDS account will accrue to the company only after the income tax department admits the TDS certificates and in case it is not admitted by IT Department they will have to forego the benefit and in which case they are not liable to service tax. Further all the TDS certificates will be received only after the closure of the financial year which will then be submitted to

the income tax department only in the month of October every year and moreover the fate of the TDS will be known only after 2 years thence. For the above reasons they had not considered TDS while calculating the service tax each month based on the collection reports. That they require at least two months to furnish the required details in respect of the TDS.

7.As per Section 67 of the Finance Act, 1994 read with Service Tax (Determination of value Rules), 2006 the service tax is payable on the gross amount of the value for the services rendered. In terms of rule 6 of Service Tax Rules, 1994 the service tax is payable once the amount billed is realized. In the case of TDS, when the client has made the payment deducting the TDS it tantamounts to the entire bill having been realized and SIFY ought to have included the amount of TDS in their calculations for the payment of service tax which they have failed to do so. The contentions of the assessee that the benefit TDS would accrue only after the admission of the TDS certificates by the IT Department appears to be not tenable for the reason that the Rule 6 of the Service Tax Rules clearly specify that the tax is to be paid once the invoice value is realized. In the instant case, when the charges minus the TDS is made by the clients, it would tantamount to realization of the taxable value and TDS amount will form part of their taxable value. The amount of TDS on which the service tax has not been paid and the service tax payable is shown in the Annexure I to this notice based on the figures furnished by SIFY in their Income Tax returns and the figures furnished by them for the year 2006-2007. As the assessee is unable to produce the month wise details of the TDS the applicable/enhanced rate of tax is reckoned each year for the purpose of working out the service tax liability.

8.From the foregoing it appears that SIFY have suppressed the value of TDS deducted by their clients in the taxable value of the services rendered by them, thereby have short paid the service tax, for the period from 01.04.2002 to 31.03.2007. Therefore it appears that SIFY have contravened Section 67 & 68 of the Finance Act, 1994, and suppressed and misdeclared the facts with intent to evade payment of Service Tax. It appears that but for the investigation, the non-consideration of TDS amount for payment of Service Tax would have gone unnoticed. Therefore, the extended

period of time limit under proviso to Section 73(1) of the Finance Act, 1994, is liable to be invoked for demand of Service Tax and Education Cess. It further appears that SIFY are liable to pay interest on the Service Tax and Education Cess not paid under Section 75 of the Act, and also are liable to penal action under Section 76 & 78 of the Finance Act, 1994.

9. Now, therefore, M/s. SIFY., Chennai-600 113, are hereby required to show cause to the Commissioner of Service Tax, Office of Commissioner of Service Tax, 'MHU Complex' 692, Anna Salai, Nandanam, Chennai - 35 as to why:-

a. The service tax of Rs.1,44,40,336/- (Rupees One Crore forty four lakhs ten thousand three hundred and thirty six only) (Service Tax Rs.1,41,74,369/- & Education Cess Rs.2,35,967/-) should not be demanded from them under the proviso to Section 73(1) of Finance Act, 1994;

b. The interest on the Service tax and Education Cess payable by them should not be demanded from them under Section 75 of the Finance Act, 1994;

c. a penalty should not be imposed on them under Sections 76 and 78 of Finance Act, 1994 for the alleged contravention."

6. The respondent gave a reply to the show cause contending that the short remittance was a result of wrong software programme and the shortfall in the remittance was not wilful para 4.4 to 4.9 of reply reads as under:-

"4.4. While the aforesaid method ensure that all the accounting entries are captured, due to mistake in the legacy application

for quantification of service tax liability, TDS deductions that remain outstanding were deducted without determining the service tax liability.

4.5. This resulted in short computation and payment of service tax liability. This is a system application error. Even the notice has not disputed the fact that all the transactions are entered into the database, the whole service tax report generation is computerized with minimal manual interference. It is the ERP accounting system which did not provide for the capturing of the TDS recovery made by their clients from their invoices in the computation of service tax liability.

4.6. In such circumstances, a system program error resulting in short remittance cannot be construed as a wilful suppression by the Noticee in

discharging the service tax liability. The Noticee had the opportunity to find the lapse only during the present system migration and paid the differential service tax liability along with applicable interest. In such a situation, the issue of show cause notice is unwarranted and may be set aside.

4.7. The Noticee submits that the entire mistake appears to have arisen on account of the provisions in the Service Tax Rules, which require payment of service tax not on the amount billed but on the basis of the amounts realized from the customers. As there was no documentation or record as to the details of outstanding amounts from the customers pertaining to TDS collection, such amounts escaped scrutiny.

4.8. It is submitted that the fact of TDS collection becomes known to SIFY only at the end of the financial year and on receipt of various TDS certificates. It is only on receipt of the TDS certificates the outstanding balance in the customer account is reduced and taken to TDS Receivable Account. The Noticee would like to submit that they are able to claim TDS benefits like a refund claim, if any only at the time of filing income tax returns, which is in October of the next financial year. Therefore there was no mala fide intention in not discharging the tax liability on monthly basis on TDS amounts.

4.9. That the error in not remitting the service tax is bona fide is also clear from the fact that the TDS deductions are shown as outstanding not only in the taxable services but also for exempted/non taxable services. In the circumstances, the Noticee submits that no penal proceedings be taken against the Noticee."

7. The adjudicating authority rejected the defence of the assessee and has observed as under:-

" 5.1. On examination of the facts and circumstances of the case, I am of the view that it is not a case of simple failure, but travels beyond that, as the assessee could have detected the mistake at the time of finalization of accounts or preparation of Income Tax return. A prudent businessman normally reconcile the receipts with the bill amount and as the deduction of TDS amount is a statutory one, it will not be considered as outstanding just because there is a delay in the receipt of TDS certificate. Even assuming that the TDS amount was shown as outstanding till the receipt

of TDS certificate, they should have accounted the TDS amount as realized amount after the receipt of TDS certificate. It is not the case of the assessee that the TDS amounts are shown as outstanding permanently. Once the TDS certificates are received it is considered as realised amount and at least at that time the assessee should have paid the service tax. The fact of such non-inclusion of TDS amounts in the taxable value was not voluntarily disclosed by the assessee but was unearthed by the officers of the SIV Cell of the Service Tax Department and such non-payment of Service Tax on the TDS amounts collected would not have come to light but for the systematic study and in-depth investigation conducted by the Department. Hence, there has been a wilful suppression of facts with intention to evade payment of service tax."

8.The adjudicating authority held that the instant case was not one of simple omission or failure, but there was wilful suppression of fact. The authority held that assessee has enjoyed financial accommodation of more than 10 crores of rupees for more than 5 years and that even the payment of interest does not cover the entire financial accommodation enjoyed by them. The adjudicating authority therefore held that the assessee is liable to pay penalty under Section 78 of the Finance Act, 1994.. He, however, gave a concession on the penalty imposed by directing that since the entire amount of service tax had been paid the penalty would be reduced to 25% service tax demanded if the penalty under Section 78 is paid within 30 days of the communication of the order.

9.The respondent challenged the order by filing an appeal before the Appellate Tribunal, South Zonal Bench at Chennai. It was contented by the respondent that the short deposit was due to system program error. It was further contented that when it come to know that this part of the gross receipt is also taxable, it has discharged the liability there on. It was therefore contented that non payment of service tax on the amount with held by the client on account of TDS but subsequent payment of service tax on realising the mistake may not be treated as deliberate suppression of fact in absence of any intention to cause evasion and therefore a lenient view may be taken and penalty be not levied under Section 78 of the Finance Act, 1994, by invoking Section 80 of the Finance Act, 1994. The Tribunal accepted this contention and applied Section 80 of the Finance Act, 1994, and allowed the appeal by deleting penalty levied under Section 78 of the Finance Act, 1994.

10. Aggrieved by the order of the Tribunal setting aside the order of penalty leviable under Section 78 of the Finance Act, by invoking Section 80 of the Finance Act, 1994, the Revenue has filed the instant civil miscellaneous appeal by raising the following substantial questions of law:-

"1. Whether Hon'ble Tribunal is correct in granting waiver of penalty under Section 80 of Finance Act, 1994, without even recording its findings, on the reasons/grounds brought out in the Order-in-Original to arrive at the conclusion of wilful suppression and concealment of value of taxable services?

2. When the original authority has categorically held that there is a case of wilful suppression of value of taxable service and the plea of reasonable cause has been negated by the original authority and the same has not been challenged by the taxpayer, is it proper for CESTAT to hold that there was reason to exonerate the taxpayer from the penal provisions by invoking Section 80 of Finance Act, 1994?"

11. The learned counsel appearing for the Revenue / appellant submits that Section 67 of the Finance Act, 1994, postulates that where the service is provided for consideration in money, service tax has to be paid on the gross amount charged by the service provider for such services provided or to be provided by him. According to the learned counsel for the Revenue, tax was paid only after the suppression was unearthed and since the service tax was paid only after the proceedings were initiated against the appellant penalty is therefore to be levied on the appellant. For this purpose the appellant relied on the judgment of the Division Bench of the Gujarat High Court in (2000) 47 STR 209, the Judgment dated 19.09.2017 passed by the Division Bench of the Madras High Court in C.M.A.No.2028 of 2017 and the Judgment dated 07.05.2018 passed by the Division Bench of the Delhi High Court in CEAC No.27 of 2017 reported in 2018-TIOL-988-HC-DEL-CX.

12. The learned counsel for the assessee / Respondent contented that the appellant by paying the service tax on the basis of the amount collected in the month, which was the invoice raised minus the amount TDS withheld by the customer was due to the software which was used and was programmed to calculate tax on the basis of the amount received and this resulted in short computation of service tax and there was no intention to evade payment of service tax.

13.The learned counsel for the Respondent pointed out several judgments of the Tribunal to substantiate his contention that if there is a confusion regarding applicability of law, penalty should not be levied. According to him, the question as to whether service tax can be paid on the net amount received by the service provider was pending before various Tribunals and some Tribunals had infact approved that payment of service tax on the net amount received by the service provider.

14.The relevant portion of provisions of Finance Act, 1994, which are applicable to this case are Sections 67,73,78 and 80 of the Finance Act, 1994 they read as under:-

"Section 67:-

"67.Valuable of taxable services for charging service tax.--For the purposes of this chapter, the value of taxable services,-

(a) in relation to service provided by a stock-broker, shall be the aggregate of the commission or brokerage charged by him on the sale or purchase of securities from the investors and includes the commission or brokerage paid by the stock-broker to any sub-broker;

(b) in relation to telephone connection provided to the subscribers, shall be the gross total amount (including adjustments made by the telegraph authority from any deposits made by the subscribers at the time of applications for telephone connections) received by the telegraph authority from the subscribers.

Explanation.-- For the removal of doubts it is hereby declared that the value of taxable service in this clause shall not include in initial deposits made by the subscribers at the time of applications for telephone connections;

(c) in relation to services of general insurance business provided to the policy holders shall be the total amount of the premium received by the insurer from the policy holders."

Section 73:-

"73. Value of taxable services escaping assessment.--

(a) the Central Excise Officer has reason to believe that by reason of omission or failure on the part of the assessee, to make a return under section 70 for any quarter or to disclose wholly or truly all material facts necessary for his assessment for any quarter, the value of taxable service for that quarter has escaped assessment or has been under-assessed, or

(b) notwithstanding that there has been no omission or failure as mentioned in clause (a) on the part of the assessee, the Central Excise Officer has, in consequence of information in his possession, reason to believe that the value of any taxable service assessable in any quarter has escaped assessment or has been under-assessed.

he may, in cases falling under clause (a), at any time within five years, and in cases falling under clause (b), at any time within six months from the date for filing the return, serve on the assessee a notice containing all or any of the requirements which may be included in a notice under sub-section (2) of section 70 and may proceed to assess or re-assess the value of taxable service, and the provisions of this Chapter shall, so far as may be, apply, as if the notice were a notice issued under that sub-section."

Section 78:-

"78. Penalty for suppressing value of taxable service.-- If the Central Excise Officer in the course of any proceedings under this Chapter is satisfied that any person has, with intent to evade payment of service tax, suppressed or concealed the value of taxable service or has furnished inaccurate value of such taxable service, he may direct that such person shall pay by way of penalty, in addition to service tax and interest, if any, payable by him, a sum which shall not be less than, but which shall not exceed twice, the amount of service tax sought to be evaded by reason of suppression or concealment of the value of taxable service or the furnishing of inaccurate value of such taxable service;

Provided that if the value of taxable service (as determined by the Central Excise Officer on

assessment) in respect of which value has been suppressed or concealed or inaccurate value has been furnished exceeds a sum of twenty -five thousand rupees, the Central Excise Officer shall not issue any direction for payment by way of penalty without the previous approval of the Collector of Central Excise."

Section.80:-

"80.penalty not to be imposed in certain cases.--

Notwithstanding anything contained in the provisions of section 76, section 77, section 78, or section 79, no penalty shall be imposable on the assessee for any failure referred to in the said provisions, if the assessee proves that there was reasonable cause for the said failure."

15. Section 67 of the Finance Act, 1994, makes it very clear that when the service tax is provided for consideration of money service tax is payable on the gross amount charged by service provider for the service provided are to be provided by it. There is no ambiguity in the Section. The respondent cannot blame the system error or a faulty software by which the service tax payable was calculated. It is clearly a bogey raised by the respondent to evade payment the service tax. The service tax has been paid only after the inspection and investigation by the department and full payment of service tax is not a mitigating circumstance, in the facts of the case. Violation of a statute in which there is no ambiguity and relying on the software programme as a reason for non payment of service tax in time cannot be a reasonable cause for the failure to pay tax, in time.

16. As stated above, as per Section 67 of the Finance Act, 1994, service tax is payable on the gross amount of value service rendered and service tax is payable once the amount billed is realized. But for the investigation, the non payment of service tax would have gone unnoticed. The amount received from the client would include the entire service tax which has been calculated from the customer and it should have been paid to the department. The TDS amount with held cannot be said to include the service tax component. Viewed in this angle the respondent has received the service tax and has not passed on it

to the department. The invoice that is raised would contain the amount payable towards service Tax. For example if service provided for Rs.100 and service tax there on is Rs.10 the total invoice will be for Rs.110. If the client remits the Rs.99 then the sum of Rs.99 would include Rs.10 to be paid towards service tax and Rs.10 should be paid to the Government. The service tax cannot be calculated on Rs.99.

17.The respondent therefore has clearly manipulated their accounts and paid lesser service tax even though they have recovered the entire portion of service tax from the client. The respondent cannot take shelter under a faulty programme when they themselves handled in the system. The service tax could not have been calculated on the basis of the amount received from the clients minus TDS. The order of the Tribunal therefore deserves to be set aside and the respondent is liable to pay penalty. Section 80 of the Finance Act,1994, cannot be invoked.

18.However, considering the facts and circumstances of the case and also considering the fact that the department has not challenged the concession granted to the respondent by the adjudicating authority we extend the same concession to the respondent by reducing 25% of the penalty amount on Rs.1 crore and 10 lakhs provided the same is paid within 30 days from the date of receipt of the communication of this order. There shall be no order as to costs.

Sd/-

Assistant Registrar(CSiv)

//True Copy//

Sub Assistant Registrar

gsp

To

1. The Customs,
Excise and Service Tax Appellate Tribunal,
Chennai.

2.The Commissioner,
Central Excise and Service Tax ,
Large Tax Payer unit,
1775,Jawarlal Nehru Inna ring road,
Anna Nagar west Extension,
Chennai.

+1 cc to Mr.V.Sundereshwaran Advocate SR.NO. 54910

+1 cc to Mrs.V.Lakshmi kumaran Advocate SR.NO. 54911

C.M.A.No.3174 of 2017

MG(CO)

ASK(30/08/2018)