BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 20.03.2018

CORAM:

THE HONOURABLE **MR.JUSTICE G.R.SWAMINATHAN**

W.P.(MD)No.4045 of 2018
and
W.M.P(MD)No.4206 of 2018

M/s AAR Foundation
No.27, 7th Ward, 1st Street,
Surandai – 672 856,
rep. by its Proprietor ... Petitioner

Vs.

Joint Commissioner of Central Excise,
O/o the Commissioner of Central Excise,
Central Revenue Building,
Tractor Road,
NGO A Colony,
Tirunelveli – 627 007. ... Respondent

PRAYER: Writ Petition is filed under Article 226 of the Constitution of India, to issue a Writ of Certiorari to call for the records of the respondent relating to passing of Order in Original vide No.12/JC/ST/2017 dated 12.04.2017 quash the same insofar as the levy of penalty.

For Petitioner : Mr.S.Sathiyanarayanan

For Respondent : Mr.R.Aravavindan

ORDER

The writ petitioner is a service provider engaged in providing Erection, Commissioning and Installation, Construction services, GTA and Work Contract Services. He is registered with the Service Tax Department in terms of Section 69 of Chapter V of the Finance Act, 1944. The petitioner entered into a contract with a company for the construction of transmission line. The scope of the work pertains to excavation including trial pit, stub setting, foundation, erection of towers, stringing including benching, revetment and tack welding of bolts and nuts with all required materials for foundation except cement and reinforcement steel. The other party to the contract was to arrange deliver cement in bulk quantities at the petitioner's designated cement godown and unloading shall be arranged by the writ petitioner herein. In the understanding of the writ petitioner, the services provided by them fell under the category of "supply of man power" and "execution of work contract". Service Tax was paid on that basis. The department did not accept the aforesaid categorization and took the view that the service provided by the writ petitioner would fall under the category "Commissioning and Installation Service". According to the petitioner, even though they want to stand their ground as regards the classification of their services, in order to give a quietus to the whole issue and with an intention not to precipitate the matter, they submitted to the classification of service as "erection, commissioning or installation services". They paid the balance amount of service tax payable by them. Since there was a delay in remittence, the interest amount was also later remitted. All these happened during the period 2012-2013. Three years later, the respondent issued show cause notice dated 15.03.2016 proposing to levy penalty under Section 78 of the Finance Act. The petitioner submitted their reply dated 06.04.2016. In response thereto, the impugned order dated 12.04.2017 came to be passed levying penalty of Rs.59,73,446/- on the petitioner under Section 78(1) of the Finance Act 1994. The attention of the petitioner was drawn with the relevant proviso with regard to reduction of penalty. Aggrieved by the same, this order levying penalty is assailed in this writ petition.

2.Heard the learned counsel appearing for the petitioner and the learned Standing Counsel appearing for the respondent.

3.The learned Standing Counsel appearing for the respondent placing reliance on the Division Bench decision of this Court reported in **2015 (39) S.T.R. 386 (Mad) [Dhandayuthapani Canteen vs. CESTAT, Chennai]** submitted that the authorities have rightly exercised discretion in this matter and that levy of penalty was inescapable in this case.

4.Admittedly, the petitioner herein had classified the services provided by him under certain headings and there was short payment of service tax payable by him. The writ petitioner had voluntarily accepted the classification indicated by the Department and made the balance payment later. It is true that the balance amount as well as interest portion were paid before the issuance of the show cause notice. But then there is no provision of law whereby penalty can be withheld or not, merely because tax is paid before issuance of show cause notice under the provision of the Finance Act, 1994.

5.The learned standing counsel pointed out that the Honourable Division Bench had respectfully followed the decision of the larger bench of the Honourable Supreme Court of India in **Union of**

India and others vs. Dharamendra Textile Processors and others reported in **2008(231) E.L.T.3(SC).**

6.The learned counsel appearing for the petitioner wanted this Court to set aside the impugned order in the light of the latest Division Bench decision of this Court reported in **CDJ 2017 MHC 4512 [The Commissioner of Central Excise Salem vs. M/s JSW Steels Limited, Salem.**

7.The learned counsel appearing for the petitioner also endeavoured to take this Court through the definition of 'work contract' to sustain the contention that the original classification was actually not erroneous.

8.The only issue that is to be gone into at this stage is whether the impugned order levying the penalty under Section 78 (1) of the Finance Act, 1994 is correct or not.

9.As held by the Honourable Division Bench in the decision reported in **CDJ 2017 MHC 4512** (cited supra), the said provision would be applicable only if, there is an element of fraud or collusion or willful mis-statement or suppression of facts or contravention of any of the provisions of Chapter V or the Rules made thereunder, with intent to evade payment of service tax.

10.The penalty cannot straightaway be levied merely on account of non-levy or non-payment of or short levy or short payment of or erroneous refund of any service tax. This alone is not sufficient. It must be "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 V or of the rules made thereunder with intent to evade payment of service tax.

11.The expression of "by reason of" was interpreted by the Hon'ble Supreme Court in the decision reported in **(1975)1 SCC 138 (State of Gujarat vs. Jamnadas G.Pabri).** The non payment or non levy or short payment or short levy or erroneous refund and circumstances set out in Section 78(1)(a) to (e) must be proximately connected as effect and cause. Again, as held by the Hon'ble Division Bench of this Court in the decision of the **Commissioner of Central Excise, Salem vs. JSW Steels Limited, Salem reported CDJ 2017 MHC 4512,** if the adjudicating authority comes to the conclusion that non payment or short payment of service tax was a conscious and/or deliberate act of the wrong doing and/or deception on the part of the assessee, then alone penalty under 78 of the Finance Act is liable to be imposed.

12.In the present case, as a result of the classification by the writ petitioner, there is actually no short levy of service tax, the rate is of course one and the same, whether it be under the category as projected by the petitioner or as categorized by the department. The only difference is who will pay and how much. In case of work contract services, the service provider will pay 50% and the recipient will pay the balance 50%. If it is a case of supply of man power, the service provider will pay 25% and the recipient will pay the balance 75%. But if the service is categorized as erection commissioning and installation service, the service provider himself will pay the entire 100%. The petitioner has been under the impression however erroneous, that he would not come under the erection, installation commissioning service category. But when the audit wing of the department pointed out the error in classification, the petitioner immediately complied with the directive of the department and paid the balance amount also. Subsequently, the interest amount was also duly remitted. All this happened well before the issuance of the show cause notice dated 15.03.2016.

13.In the matters relating to levy of penalty under Section 78 of the Finance Act, 1994, the onus to establish the existence of the circumstances, set out in Section 78(i)(a) to (e) is squarely on the department. Merely lifting the relevant phrases from the statutory provision would not advance the case of department. In order to justify levy of penalty, the authority must convincing and establish the existence of the element of *mens rea* on the part of the assessee. In this case, the impugned order is short of such materials. One can be high on the rhetoric but short on substance. In this case, the department has not put forth any convincing material to show that the writ petitioner deliberately indulged in wrong doing.

14.As already pointed out, short payment of service tax itself is not sufficient. The short payment by the petitioner must be "by reason of" any of the circumstances set out in Section 78(i) (a) to (e). The burden of proof is only on the department to show the existence of the circumstances. In this case, the department has failed to discharge the burden caste on them. The order impugned in this writ petition is therefore quashed.

15.Accordingly, this writ petition is allowed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(RTI)

/True Copy/

Sub Assistant Registrar(CS-I)

To

Joint Commissioner of Central Excise,
O/o the Commissioner of Central Excise,
Central Revenue Building,
Tractor Road,
NGO A Colony,
Tirunelveli - 627 007.

+ 1 cc TO Mr.S.Sathya Narayanan , Advocate in SR No. 56749

skn
AE/SKN RSK/SAR1/26.07.2018/5P/3C

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and
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