IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
CENTRAL EXCISE APPEAL No. 46 OF 2019

M/s. Dilip Chhabria Design Pvt. Ltd. .. Appellant.
vs.
The Commissioner of Central Excise Pune-I .. Respondent.

Mr.Rajeev Waglay i/b DSR Legal for the Appellant.
Mr. P.S. Jetly a/w. Mr. Ram Ochani for the Respondent.

CORAM: M.S. SANKLECHA, J.
AND M.S.SONAK, J.
DATE : 11 JUNE 2019.

P.C.:

1] This appeal under Section 83 of the Finance Act, 1994 read with Section 35G of the Central Excise Act, 1944 challenges the order dated 24th July 2018 passed by the Customs, Excise and Service Tax Appellate Tribunal, Mumbai (Tribunal).

2] Mr. Waglay, learned counsel appearing for the appellant, in support of the appeal raised the following re-framed question of law for our consideration:-

> "*Q. Whether in the facts and circumstances of the case and in law, the Tribunal was correct in holding the proviso to Section 78(1) of the Finance Act, 1994 is*

applicable in the facts of the present case for the purposes of imposing penalty ?"

3] The appellant is engaged in providing taxable services such as Interior Decorator Services, Design Services, servicing of Motor Vehicle and Management Consultancy Services.

4] On a surprise visit by the Officers of Revenue on 3rd December 2012, it was found that the appellant had not paid service tax from December 2011 onwards. Thus, the Show Cause Notice dated 25th February 2014 was issued demanding service tax along with interest and also imposing penalty. In the meantime, the respondent had deposited the service tax payable by them from the period December 2011 to March 2013 for which the Show Cause Notice was issued. In its reply to the above notice, the appellant pointed out that they are not contesting the demand of service tax which has now been paid. However, non-payment of service tax was only because of its financial difficulty. It was further pointed out that in fact there was no suppression as in its ST-3 Returns, they had always declared the quantum of the service tax payable, but not paid. However, the submissions did not find favour with the Commissioner of Service Tax. Thus, by an order dated 1st September 2004 confirmed the service tax demand of Rs.1,93,17,035/- as well as imposing penalty of Rs.96,58,517/- under the provisions of Section 78(1) of the Finance Act, 1994.

5] Being aggrieved by the above order dated 1st September 2004, the appellant filed an appeal to the Tribunal. However, the contest in the appeal was only restricted to the penalty imposed. The impugned order of the Tribunal records the fact that admittedly, the appellant was aware of its service tax liability and had collected it from its customers but had not paid the same to Service Tax Department. The only reason given by the appellant for not doing the same was of its financial difficulty. The impugned order records the fact that this was not a case of any *bona fide* belief or even ignorance on the part of the appellant, but deliberate defiance of law and thus penalty order was upheld.

6] Mr. Waglay, learned counsel appearing for the appellant, in support of the appeal, submits that in the facts of this case no penalty was imposable upon the appellant. This in view of the fact that Section 78 of the Finance Act would have no application, as there was no suppression of facts and / or willful misstatement on its part. This is evident, he submits from their ST-3 Returns, where the appellant had made complete disclosure of their service tax liability even though the same was not paid to the Revenue. Further, he placed reliance upon the decision of the Tribunal in case of ***Onward E-Services Ltd.. Vs. Commissioner of Service Tax, Mumbai-II – 2019 (21) GSTL 167*** to contend that in similar facts, the Tribunal held that no penalty is imposable.

7] Mr. Jetly, learned counsel appearing on behalf of the Revenue, supported the impugned order of the Tribunal and submits no interference is warranted.

8] The admitted position before us is that the extended period of limitation invoked for the purposes of service tax is not subject matter of challenge. This for the reason that the appellant accepted its service tax liability. It is also admitted position before us that the appellant had collected service tax from its customers/clients, but had failed to deposit the same with the Department only on account of financial difficulties faced by it. It is also not disputed that failure to pay over the amount to the Revenue was noticed by the Department only on surprise visit in 2012. In the aforesaid facts, the Show Cause Notice which was issued to the appellant invoked the extended period of limitation for the purposes of service tax and also proposed imposition of penalty under section 78 of the Finance Act, 1994.

9] The parameters/conditions for purpose of invoking the extended period of limitation under Section 73(1) of the

Finance Act, 1994 are similar/identical to the conditions for imposing equivalent penalty under Section 78 of the Finance Act, 1994. In the facts of the case, the appellant had advisedly and correctly not challenged the invocation of the extended period of limitation for recovery of service tax. The challenge is only to the imposition of penalty and is based on the fact that there is no willful suppression on the part of the appellant as all the due liabilities had been declared in ST-3 Returns, though not paid over to the Revenue.

10] We note that under Section 78 of the Finance Act, 1994, equivalent penalty can be imposed in cases of willful mis-statement or suppression of facts or for contravention of any of the Act or Rules made thereunder with an intent to evade payment of service tax. In this case, it cannot be disputed that the appellant after having recovered the service tax from its customer had not paid over the amount to the State. Thus, undeniably they have contravened the Finance Act, 1994 and Rules made thereunder, which obliges the assessee to make over the payment to the Government before the specified date. This non-payment was certainly with intent to evade the service tax as there was no justification for keeping the amounts recovered from the customer with itself and not passing it over to the Government on whose behalf it is collected. The financial difficulties faced by the appellant can never justify the non-payment of tax to the Government. The above fact coupled with misrepresentation to its customers that the amount collected from them will be paid over to the Government, would clearly point to *mala fide* conduct on the part of the appellant. Therefore, we see no reason to interfere with the impugned order of the Tribunal.

11] Besides, the decision which was relied upon in case of *Onward E-Services Ltd. (supra)* to contend that no penalty under Section 78 of the Finance Act, 1994 is imposable. In the facts of the above case, the non-payment of service tax was disclosed by the Revenue and not as a result of a surprise visit, as in this case. Thus, on the above facts the

Court held as the declaration was voluntary, there is no question of any suppression, willful mis-statement or contravention of any of the acts or rules made thereunder with intent to evade payment of service tax. Thus, the aforesaid decision will not assist the appellant as it turned on its own facts.

12] In the above view, the question as proposed does not give any rise to substantial question of law and thus not entertained. Accordingly, the appeal is dismissed.

(M.S.SONAK, J.) **(M.S.SANKLECHA, J.)**