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

CENTRAL EXCISE APPEAL NO.57 OF 2019

Responsive Industries Ltd (Unit-II) ...Appellant
vs.
The Commissioner of CGST and
Central Excise, Palghar ...Respondent

Mr. Sriram Sridharan a/w. Mr. J. Sanghavi I/b. PDS Legal, for the Appellant.
Mr. Dwivedi a/w. Mr. J.B. Mishra, for the Respondent.

CORAM : M.S. SANKLECHA &
M. S. SONAK, JJ.
DATE : JUNE 04, 2019

P.C.:

. This Appeal under section 83 of the Finance Act, 1994 (Act) and section 35 G of the Central Excise Act, 1944 challenges the order dated 20th April, 2018 passed by the Custom Excise & Service Tax Appellate Tribunal (Tribunal).

2. The Appellant has urged the following questions of law for consideration.

(i) Whether in the facts and circumstances of the case and more particularly in light of the facts that the Appellant had recorded in the transactions in his books of accounts and

paid service tax prior to the issuance of a notice under section 73(1) of the Finance Act, 1994 whether the Appellate Tribunal had erred in denying the benefits of Section 80 of the Finance Act, 1994 to the Appellant ?

(ii) Consequently, whether in the facts and circumstances of the case, the Appellate Tribunal was right in sustaining the imposition of the penalty under section 77 and section 78 of the Finance Act, 1994 ?

(iii) Whether in the facts and circumstances of the case and more particularly in light of the fact that the Appellant had paid service tax prior to the issuance of a notice under section 73(1) of the Finance Act, 1994, whether the provisions of section 73(3) of the Finance Act, 1994 would prevent the issuance of a notice under the section 73(1) of the Finance Act, 1994 ?

3. The Appellant is engaged in manufacture of cotton coated fabrics. The Appellant also holds service tax registration under the category of “Goods Transport Agency (GTA) under the Act. During the course of EA-2000 audit for the period from April 2009 to December 2011, it was found that the Appellant had incurred expenses towards the outward transportation to its buyers but had not paid the service tax payable thereon. On the above facts being pointed out, the Appellant made the payment of service tax payable

for the period from April 2009 to December 2011 along with the interest on 3rd May, 2012.

4. Thereafter, on 21st August, 2012 a show cause notice was issued to the Appellant demanding service tax along with interest and also seeking to impose penalty. The notice alleged suppression of facts with intent to evade duty. By an order dated 19th January, 2015 the Additional Commissioner of Central Excise confirmed the show cause notice resulting in confirmation of the tax demand along with interest and imposing penalty under section 77 of the Act for evasion of payment of service tax. The above order appropriated the amount of service tax along with interest which was deposited by the Appellant before the issuance of show cause notice. This after the order holding that protection against demand penalty under section 73(3) of the Act is not available in view of section 73(4) of the Act.

5. The Appellant being aggrieved by the above order dated 19th January, 2015 of the Additional Commissioner, filed an Appeal to the Commissioner under section 85 of the Act. However, without success. This as the Commissioner ordered dated 25th October,

2017 dismissed the Appeal by holding the order of the Additional Commissioner dated 19th January, 2015 is correct and calls for no interference.

6. Being aggrieved, the Appellant filed an Appeal to the Tribunal. The impugned order of the Tribunal records a finding that the Appellant had not paid the service tax on outward transportation even though the expenditure was incurred on that count by it. In the context of the fact that the show cause notice had invoked extended period of limitation, the impugned order of the Tribunal held that the Appellant was not able to establish any *bonafide* belief on its part in not discharging / paying the service tax on outward transportation. Thus the extended period was invoked. Further the impugned order holds that no reasonable cause has been shown by the Appellant, for non payment of service tax. In the above circumstances, it held that section 80 of the Act, also could not be invoked. Accordingly, Appeal of the Appellant was dismissed.

7. Mr. Sriram Sridharan, the learned counsel appearing in support of the Appellant submits that Appellant has paid service

tax as well as the interest much before the issuance of show cause notice. Thus, it is submitted that in view of section 73(3) of the Act the revenue could not have issued a show cause cum demand notice under section 73(1) of the Act. This particularly so as the tax and interest payable thereon has been paid much prior to the issue of show cause notice. It is also submitted that the Appellants were under a *bonafide* belief that they are not liable to pay the service tax on the goods under transportation. As the Appellant believed that the recipient of the goods were liable to pay the tax. In the above view, it is submitted that this Appeal requires consideration.

8. From the record it is undisputed that Appellant had not paid the service tax as the outward transportation under the category of GTA for the period from April, 2009 to December, 2011, this even though they had admittedly incurred expenses for the same. It is only during the course of EA 2000 audit that above non payment of service tax on the part of the Appellant was discovered by the revenue. This discovery on the part of the Revenue led the Appellant to deposit the service tax as well as interest thereon even before the show cause notice was issued by the revenue. In the above circumstances, even if the tax and the interest on the same

was paid before the issue of notice, it is not open to the Appellant to take benefit of section 73 (3) of the Act as the non payment of the service tax was on account of suppression with a *malafide* intention to evade payment of service tax. Thus in view of section 73(4) of the Act, the benefit of section 73 (3) of the Act, claimed by the Appellant would not be available.

9. The contention that there was a *bonafide* belief that the Appellant are not liable to pay the service tax on outward transportation of goods and the GTA is not supported by any reasonable explanation. The *bonafide* belief that one is not liable to pay the tax has to be based on some facts on record which led to the belief. It is not the Appellant's case that the belief based on a ruling of the some authority that it not liable to pay service tax on outward transportation. A mere statement to the effect that the Appellant was under a *bonafide* belief of non liability of paying tax cannot be accepted in the face of clear provision of law. Thus, it is not possible to accept the contention that the Appellant had *bonafide* belief of for non payment of tax, so as to invoke section 80 of the Act.

10. In these circumstances, the view taken by the Tribunal in the present facts is reasonable and possible view. Accordingly, the question of law as proposed do not give rise to any substantial questions of law.

11. Accordingly, the Appeal is dismissed.

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