IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:03.02.2020

CORAM

THE HON'BLE DR.JUSTICE VINEET KOTHARI
AND
THE HON'BLE MR.JUSTICE R.SURESH KUMAR

C.M.A.No.3379 of 2019 and
C.M.P.No.19726 of 2019

M/s.Bright Marketing Company
No.647, S.K.R. Complex,
P.N.Road, Tirupur - 641 602. ... Appellant

Vs.

The Commissioner of Central Excise and Service Tax,
Coimbatore Commissionerate,
7, Race Course Road,
Coimbatore - 641 018. ... Respondent

Appeal filed under Section 35G(1) of the Central Excise Act, 1944, challenging the impugned order passed by the Customs, Excise and Service Tax Appellate Tribunal, Chennai seeking to set aside the modified order passed in Misc. Order No.40500/2018 dated 05.06.2018 in ST/ROM/40859/2017-SM in Final Order No.41619/2017 dated 10.08.2017 in Appeal No.ST/40971/2017-SM against the order passed by the Commissioner of Customs, Central Excise & Service Tax(Appeals-I) Coimbatore dated 19/01/2017 made in A.No.75/2016-ST order in Appeal No.CMB/CEX/000/APP/018/2017 against the order passed by the Additional Commissioner of Customs, Central Excise & Service Tax Coimbatore, dated 29/02/2016 made in 010 SL.No.20/2016-ADC, C.NOV/MRS/15/74/2014-ST-ADJ

For Appellant : Mr.N.Viswanathan

For Respondent : Mrs.R.Hemalatha
Senior Standing Counsel

J U D G M E N T

(Judgment of the Court was delivered by DR.VINEET KOTHARI,J)

The Assessee, M/s.Bright Marketing Company is aggrieved by the order passed by the learned Customs, Excise and Service Tax Appellate Tribunal (CESTAT) on 05.06.2018 upholding the imposition of penalty at the reduced rate of 25% amounting to Rs.8,84,648/- by the original impugned order dated 10.08.2017. The relevant portions of the impugned order of the learned Tribunal dated 10.08.2017 are quoted below for ready reference:

> "11.Similarly, the appellant's claim to reduce the penalty to 25% in terms of the proviso to Section 78 can also not to be appreciated in as much as, the benefit of reduced penalty can be extended only if the entire service tax along with interest and along with 25% penalty is deposited within 30 days of the passing of the order of determination of service tax. Learned advocate fairly agreed that such penalty to the extent of 25% has not been deposited by them. In such a scenario, benefit cannot be extended.
>
> 12.The original adjudicating authority, while confirming the demand and interest and imposing penalty had already granted the benefit of reduced penalty of 25%, provided the appellant deposits the entire service, tax, interest along with 25% penalty within a period of 30 days from the date of receipt of the order. The appellants have chosen not to exercise the option given by the Assistant Commissioner, which case, the penalty cannot be reduced at the appellate stage."

2.The learned counsel for the Assessee Mr.N.Viswanathan submitted that the Assessee in the present case had already paid the service tax which was short paid by him along with interest in the year 2013 before the issuance of the impugned Show Cause Notice under Section 73(1) of the Act which was issued on 15.10.2014. He drew our attention to the Extract of Audit Note on the basis of which, the short levy of service taxes was pointed out in the case of the Assessee, in which, the payment of service tax of Rs.8,32,490/- along with Education Cess and interest of Rs.72,690/- as on 18.03.2013 is admitted in the Audit Objection raised by the Department itself. He submitted that the learned Commissioner of Appeals also noted these facts duly in his order dated 19.01.2017. In para 12 of his order is also quoted below for ready reference:

> "12.Thus it is clear that the appellant had realized the charges for the period from April 2012 to December 2012 but has failed to pay the service tax by due date. This cannot be claimed as default in payment as there is failure to file the ST 3 returns as well. In this regard it is seen that the ST 3 return for the quarter April to June 2012 was filed on 26.03.2013 (due dated 25.11.12); the ST 3 return for the quarter July to September was filed on 26.03.2013 (due date 15.4.13) and the ST 3 return for the Half year October 2012 to March 2013 was filed on 1.11.2013 (due date 10.09.13).

Therefore the arguments of the appellant that the failure to pay appropriate service tax for the period April 2012 to December 2012 has to be considered as default in payment cannot be accepted as the said amounts have not been declared in the relevant ST 3 returns."

3.He therefore submitted that as per Section 73(3) of the Finance Act, 1994 [in short "the Act"], the Assessee had rightly paid the short levied service tax and the penalty imposed under Section 78 of the Act was impermissible on the Assessee and even the reduction of the penalty to the extent of 25% ordered by the Tribunal was not justified.

4.Per contra, the learned counsel for the Revenue Mrs.R.Hemalatha submitted that the Assessee paid the said short levied service tax only upon the Audit Objection raised in the matter and the same communicated to him, therefore, it should be construed that the Assessee had paid the said service tax, had suppressed the liability to pay the service tax initially, which only upon the Audit Objection raised, he has paid. She further submitted that the service tax was not initially paid along with interest, but the interest was only paid later on. She further urged that the Tribunal in its discretion has already reduced the penalty to 25%, for which even there was an agreement from the side of the Assessee's counsel, which has been recorded by the learned Tribunal in para 11 of the order dated 10.08.2017, noted above.

5.We have heard the learned counsels for the parties.

6.Section 73(3) and sub-section (4) of the Act are quoted below for ready reference.

"73. Recovery of service tax not levied or paid or short-levied or short-paid or erroneously refunded. —
....
(3) Where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the person chargeable with the service tax, or the person to whom such tax refund has erroneously been made, may pay the amount of such service tax, chargeable or erroneously refunded, on the basis of his own ascertainment thereof, or on the basis of tax ascertained by a Central Excise Officer before service of notice on him under sub-section (1) in respect of such service tax, and inform the [Central Excise Officer] of such payment in writing, who, on receipt of such information shall not serve any notice under sub-section (1) in respect of the amount so paid.

PROVIDED that the [Central Excise Officer] may determine the amount of short payment of service tax or erroneously refunded service tax, if any, which in his opinion has not been paid by such person and, then, the [Central Excise Officer] shall proceed to recover such amount in the manner specified in this section, and the period of [thirty months] referred to in sub- section (1) shall be counted from the date of receipt of such information of payment.

[Explanation.1]: For the removal of doubts, it is hereby declared that the interest under section 75 shall be payable on the amount paid by the person under this sub-section and also on the amount of short payment of service tax or erroneously refunded service tax, if any, as may be determined by the [Central Excise Officer], but for this sub-section.

[Explanation 2]: For the removal of doubts, it is hereby declared that no penalty under any of the provisions of this Act or the rules made thereunder shall be imposed in respect of payment of service-tax under this sub-section and interest thereon.

(4) Nothing contained in sub-section (3) shall apply to a case where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded 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 or of the rules made thereunder with intent to evade payment of service tax."

7.Section 78 of the said Act is also quoted below for ready reference.

"78. Penalty for failure to pay service tax for reasons of fraud, etc. —

(1) Where any service tax has not been levied or paid, or has been short-levied or short-paid, or erroneously refunded, by reason of fraud or collusion or willful mis-statement or suppression of facts or contravention of any of the provisions of this Chapter or of the rules made thereunder with the intent to evade payment of service tax, the person who has been served notice under the proviso to sub-section (1) of section 73 shall, in addition to the service tax and interest specified in the notice, be also liable to pay a penalty which shall be equal to hundred per cent. of the amount of such service tax:"

8.Section 78 of the Act applies only when there is a failure on the part of the Assessee to pay service tax for reasons of fraud etc., as enumerated in Section 73(4) of the Act quoted above. The penalty under Section 78 of the Act is not attracted, in case the Assessee falls within the four corners of Section 73(3) of the Act. Sub-section (4) of Section 73 is non obstante to Section 73(3) of the Act. It begins with the terms "Nothing contained in sub-section (3) shall apply to a case where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of - (a) fraud; or (b) collusion; or (c) wilful mis-statement; or (d) suppression of facts", the Assessee has failed to pay the service tax.

9.Sub-section (3) clearly provides for a remedy to the Assessee to correct his error of short-levy of service tax in two ways (i) either suo motu or (ii) on the basis of tax ascertained by a Central Excise Officer before service of notice under Section 73(1) of the Act, which is the impugned show cause notice in that present case issued only on 15.10.2014. There is no dispute before us that the Assessee filed the returns and paid the short-levied service tax in the year 2013 itself with interest as noted above and that was definitely prior to issuance of show cause notice issued on 15.10.2014. Therefore, in our opinion, the Assessee had complied with the terms of Section 73(3) of the Act and would not fall within the mischief of Section 73(4) of the Act, thereby obviously the Assessee would not attract the imposition to penalty under Section 78 of the Act, which is applicable only if the Assessee falls within the mischief to Section 73(4) of the Act viz., fraud, collusion, suppression of facts, wilful mis-statement.

10.The Audit Objection raised by the Audit Officer is also ascertainment of tax by a Central Excise Officer within the meaning of Section 73(3) of the Act and there is no dispute that an Auditor of the Department is also a Central Excise Officer. Therefore, payment of the service tax with interest by the Assessee in the year 2013 itself, of course, not on his own or suo motu but on the basis of the Audit Objection viz., on the basis of the determination by an Auditor of the Department would not take out the case of the Assessee from the ambit and scope of Section 73(3) of the Act. Therefore, in our opinion, the question of imposition of penalty under Section 78 of the Act on the Assessee would not arise in the present case.

11.Unless the penalty under Section 78 of the Act itself is leviable on the Assessee, there is no question of any reduction of the quantum of penalty to 25% thereof by the learned Tribunal in its discretion. What is not at all leviable, cannot be reduced.

12.Therefore, the Assessee is entitled to get the relief in the present case and the Appeal filed by the Assessee deserves to be allowed. The same is accordingly allowed and the penalty order of original adjudicating Authority as well as that of the learned Tribunal upholding the imposition of penalty under Section 78 of the Act to the extent of 25% both deserve to be set aside. We hereby do so.

13.The Civil Miscellaneous Appeal is allowed accordingly. There shall be no order as to costs. Consequently, connected Miscellaneous Petition is closed.

-s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

Sgl
To

1.The Commissioner of Central Excise and Service Tax,
Coimbatore Commissionerate,
7, Race Course Road,
Coimbatore - 641 018.

2.The Commissioner of Customs
Central Excise & Service Tax(Appeals-I)
Coimbatore

3.The Additional Commissioner of Customs
Central Excise, Coimbatore

+1 cc to Mr.N.Viswanathan Advocate sr8079
+1 cc to M/s.R.Hemalatha Advocate sr8330

C.M.A.No.3379 of 2019

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