IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 27.01.2021

CORAM:

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM
and
THE HONOURABLE MS.JUSTICE R.N.MANJULA

C.M.A.No.1944 of 2016
and
C.M.P.No.14135 of 2016

M/s.Srinivasa Real Estate,
Rep., by its Proprietor,
Mr.Ravi Appasamy,
No.3, Mangesh Street, T.Nagar,
Chennai-600 017,Tamil Nadu. .. Appellant/Appellant

-vs-

1.The Additional Commissioner of Service Tax,
Office of the Commissioner of Service Tax,
MHU Complex, 692, Anna Salai,
Nandanam, Chennai-600 095.

2.The Commissioner of Central Excise (Appeals),
26/1, Mahatma Gandhi Road,
Chennai-600 034.

3.The Customs, Excise and Service Tax Appellate Tribunal,
South Zonal Bench, Shastri Bhavan Annexe, 1st Floor,
No.26, Haddows Road, Chennai-600 006.
.. Respondents/Respondents

Appeal under Section 35G of the Central Excise Act, 1944 against the order dated 17.03.2015, made in Final Order No.40447/2015 on the file of the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai.

For Appellant : Mr.G.Baskar
for Ms.G.Susheela
For Respondents: RR1 & 2 - Mr.A.P.Srinivas,
Senior Standing Counsel
: R3 - Tribunal

JUDGMENT
(Judgment of the Court was delivered by T.S.Sivagnanam, J.)

This appeal filed by the appellant/assessee under Section 35G of the Central Excise Act, 1944 (hereinafter referred to as "the Act") read with Section 83 of the Finance Act, 1994 (hereinafter referred to as "the Finance Act"), is directed against the order dated 17.03.2015, passed by the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai (for brevity "the Tribunal") in Final Order No.40447 of 2015.

2.The assessee has raised the following substantial question of law for consideration:-

> "Whether on the facts and circumstances of the case, the Customs, Central Excise and Service Tax Appellate Tribunal is right in law in confirming the levy of penalty u/s 78 of the Finance Act, 1994?"

3.The assessee is engaged in the business of construction of commercial and residential complexes and registered with Service Tax Department in respect of industrial or commercial construction services with effect from 16.06.2005. The business premises of the appellant-assessee was inspected by the officials of the Department on 29.11.2005, pursuant to which, a show cause notice was issued calling upon the assessee to explain as to why a sum of Rs.28,92,635/-, being the service tax on "construction of complex" service, should not be demanded for the period from 16.06.2005 to 31.03.2006 under proviso to Section 73(1) of the Finance Act; an amount of Rs.22,30,957/- paid on various dates should not be appropriated against the service tax demanded; why the education cess should not be demanded and the amount already paid should not be adjusted towards education cess; why interest should not be demanded under Section 75 of the Act; why penalty should not be levied under Section 76 of the Act; why penalty under Section 77 of the Act should not be imposed; and why penalty under Section 78 of the Act should not be imposed for non-payment of service tax by suppression of facts and contravention of the provisions of the Finance Act and the Rules made thereunder.

4.The assessee submitted their reply, which was also in tune with the statement, which was recorded from the Proprietor of the assessee and the Accounts Manager, at the time of inspection. The assessee would contend, though they collected amounts as advances from their clients, who have booked apartments towards construction of residential complexes after 16.06.2005, they had not collected/realised any amount from their clients separately towards service tax.

5.With regard to the allegation of non-payment of service tax that had fallen due with effect from 16.06.2005, they had stated two reasons. Firstly, the assessee was under the impression that service tax liability would arise only after completion of the services, that is, after completion of the construction activity. Secondly, due to lack of awareness regarding the effect of the legal provisions, which were brought into effect for the first time from 13.05.2005 by which, advances received before, during and after providing of services, were also subjected to payment of service tax.

6.Further, it was reiterated that the non-payment was due to the understanding of the law at the relevant time and not otherwise and as undertaken to the investigating team, the assessee paid the entire service tax along with interest before 02.12.2005. Further, the Accounts Manager even at the time of inspection, submitted the details regarding group summary of flat advance received from 16.06.2005 to 27.11.2005 in respect of both the projects in which, debit, denoted stamp duty and registration charges and credit, denoted full payment received from their buyers/clients. The assessee also produced sample copies of the agreement of sale of undivided share of land/construction, sample copies of receipts, audited balance sheet, the Nil return filed in the half hear ending September, 2005 along with the copy of the registration certificate. Though such was the explanation offered by the assessee both at the time of inspection and in response to the show cause notice and though the Adjudicating Authority noted that as per the construction agreement, the assessee received a lump sum amount towards construction of the apartment enclosing cost of construction, cash breakup towards the services rendered by them, held the assessee to be guilty of filing Nil return, therefore, imposed penalty under Sections 76, 77 and 78 of the Act.

7.Aggrieved over the same, the assessee filed appeal before the Commissioner of Central Excise (Appeals), Chennai. The said appeal was allowed in part. The first appellate authority vacated the penalty imposed under Sections 76 and 77 of the, but confirmed the penalty levied under Section 78 and while doing so, has not given any independent reason as to why he chose not to interfere with that portion of the order passed by the Adjudicating Authority and sustaining the penalty under Section 78 of the Act.

8.The assessee, being aggrieved over such order, filed appeal before the Tribunal. The Tribunal after extensively referring to the grounds raised by the assessee, dismissed the appeal. The assessee collected service tax amount on the taxable service rendered by them and also suppressed the fact in their half yearly return filed for the period up to September, 2005 and they also filed Nil return for the said period mentioning that they have not rendered any service. The correctness of this finding is questioned before us in this appeal.

9.In our considered view, the Adjudicating Authority as well as the Tribunal committed a fundamental error while appreciating the factual position. It is not in dispute that the assessee did not separately collect service tax from its buyers/clients. Their consistent stand was that they have collected advance amount from their clients, who have booked the apartment for the purpose of construction of residential complexes and after 16.06.2005, they had not collected/realised any amount from their clients separately towards service tax. This factual position has been noted and admitted by the Adjudicating Authority while issuing the show cause notice dated 19.04.2007, as could be seen from paragraph 11(iv) of the show cause notice. Unfortunately, the Adjudicating Authority did not examine this factual position for its correctness, but proceeded on the basis as if the assessee collected service tax separately, did not remit it to the Department, on the contrary filed Nil return.

10.The second aspect of the matter, which the assessee focused was with regard to the uncertainty in the implementation of the law because, for the first time, this particular service was brought within the service tax net with effect from 16.06.2005. The service tax was introduced by amendments to Finance Act, 1994 with effect from from 10.09.2004. The legislation was at its nascent stage. There were several interpretations to the new law and uncertainty loomed even with the Department. This submission made by the assessee was not considered by the Adjudicating Authority. In fact, the assessee stated that as soon as the Department had advised them, they had remitted the entire amount along with interest. This was much prior to the issuance of show cause notice.

11.The Revenue may argue that this is not a mitigating circumstance to desist from levying penalty, however, the Court has to take a broader perspective in the matter because, it is a new branch of Taxation Law introduced in the country for the first time and several services were being included periodically. Much thereafter, the entire structure of the service tax regime had been altered by the introduction of the Negative List. Therefore, this uncertainty in the implementation of a new legislation is undoubtedly a matter, which ought to have been taken note of by the Adjudicating Officer in the peculiar facts and circumstances of this case. However, this cannot be a yardstick for all matters to come under various statutes, but peculiar to the case on hand.

12.As noticed above, the first appellate authority did not render any independent finding, but chose to interfere with the order of the Adjudicating Authority by deleting the penalty under Sections 76 and 77 of the Act. No independent reasons have been given by the first appellate authority to confirm the penalty under Section 78 of the Act. When the matter went before the Tribunal, no attempt has been made to examine the facts of the case and the Tribunal also was of the view that the assessee had separately collected the service tax and not remitted to the Department, but filed Nil return. This being contrary to facts, we are of the considered view that both the authorities and the Tribunal committed error in levying/confirming the penalty under Section 78 of the Act.

13.For the above reasons, this appeal is allowed, the impugned order dated 17.03.2015, is set aside and the substantial question of law is answered in favour of the assessee taking note of the facts and circumstances of this case. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS-VI)

//True Copy//

Sub Assistant Registrar

abr

To

1.The Additional Commissioner of Service Tax,
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+1cc to Mr.G.Baskar, Advocate SR.4498

C.M.A.No.1944 of 2016

BR(CO)
CB(03/03/2021)