OD-16

CEXA/27/2023
IA NO: GA/1/2024

IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION [CENTRAL EXCISE]
ORIGINAL SIDE

M/S. PARITOSH GHOSH
CONSTRUCTION PVT. LTD.

-Versus-

COMMISSIONER OF CENTRAL EXCISE
KOLKATA SOUTH, COMMISSIONERATE

BEFORE :
THE HON'BLE THE CHIEF JUSTICE T.S SIVAGNANAM
-A N D-
HON'BLE JUSTICE HIRANMAY BHATTACHARYYA
DATE : 5th JULY, 2024.

Appearance :
Ms. Sutapa Roychowdhury, Adv.
Mr. Abhijit Das, Adv.
Ms. Aratrika Roy, Adv.
…for the appellant.

Mr. K K Maiti, Adv.
Mr. Tapan Bhanja, Adv.
…for the respondent.

The Court :- This appeal filed by the assessee under Section 83 of the Finance Act, 1994 read with Section 35G of the Central Excise act, 1944 is directed against the order dated June 15, 2023 passed by the Customs, Excise & Service Tax Appellate Tribunal, Kolkata Regional Bench.

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

> *"Whether on the facts and in the circumstances of the case the imposition of penalty and interest is justified for failure to deposit service tax on reverse charge mechanism when no man power has been supplied to the petitioner as because the petitioner engaged contractors for executing job works who hired labours ?"*

Heard Ms. Roychowdhury, learned counsel assisted by Mr. Abhijit Das and Ms. Aratrika Roy, learned advocates for the appellant and Mr. K. K. Maiti, learned counsel assisted by Mr. Tapan Bhanja, learned counsel for the respondent/revenue.

Two issues were agitated before us; firstly, with regard to the demand of service tax to the tune of Rs.25,16,900/-. It is not in dispute that the said service tax has already been paid by the assessee. From the order passed by the learned Tribunal, we find that the Tribunal has re-appreciated the facts, more particularly, Annexure-B to the Chartered Accountant's certificate and found that there are two parts of the labour charges which have been paid – one, pertaining to labour charges paid to the contractors and, the second pertaining to labour charges paid to the locally hired workers by the company and, thereafter considered the findings recorded by the adjudicating authority and affirmed the same. Thus, we find that there can be substantial question of law arising on the said issue and the appeal challenging the demand of Rs.25,16,900/- towards service tax is affirmed.

The next aspect is with regard to the imposition of penalty and as to whether the adjudicating authority was justified in imposing penalty. In terms of paragraph 7.12 of the order of adjudication (Order-in-original) dated October 9, 2017, penalty has been imposed under Section 78 of the Act. The penalty imposed on the appellant/assessee was reduced by the Tribunal to 25% of the said amount. Challenging the said order, the assessee has preferred the present appeal.

It is settled legal principle that mere use of the expression "fraud" and "willful mis-statement" etc. will not automatically attract the penal provision as the adjudicating authority is bound to bring the facts on record, especially 'fraud' or 'willful mis-statement'. Bearing this principle in mind, we find in the facts of the present case that except using the word 'willful mis-statement', nothing has been brought on record to show as to how and under what manner the statement made by the assessee was willful and with an intent to evade payment of tax. On facts, it is seen that the assessee was not under the service tax net, because their activities remained exempted under the service tax regime so far as forward charge mechanism was in vogue. Reverse charge mechanism became operative only from July 1, 2012 in so far as supply of manpower service is concerned.

In such situation, it cannot be held that the assessee had made a willful mis-statement so as to invoke Section 78 to impose penalty on the assessee.

Accordingly, the appeal (CEXA/27/2023) is partly allowed and the penalty imposed on the assessee is set aside and the substantial question of law is answered in favour of the assessee.

The application for stay (GA/1/2024) stands closed.

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(T.S. SIVAGNANAM)
CHIEF JUSTICE

(HIRANMAY BHATTACHARYYA, J.)

A/s.