

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

STA No.30 of 2014 (O&M)

Reserved on:08.04.2015

Date of decision:29.04.2015

Ajay Kumar Gupta

....Appellant

Versus

Customs, Excise & Service Tax Appellate Tribunal & another

.....Respondents

**CORAM: HON'BLE MR.JUSTICE S.J.VAZIFDAR, ACTING CHIEF JUSTICE
HON'BLE MR.JUSTICE G.S.SANDHAWALIA**

Present: Mr.Sudhir Malhotra, Advocate, for the appellant.

Mr.Sukhdev Sharma, Advocate, for the respondents.

G.S.Sandhawalialia J.

The appeal, filed under Section 35 G of the Central Excise Act, 1944 (for short, the 'Act') read with Section 83 of the Finance Act, 1994 (for short, the 'Finance Act'), is directed against the order dated 12.09.2014 (Annexure A-6), passed by the Customs, Excise & Service Tax Appellate Tribunal, New Delhi (for short, the 'Tribunal'). Vide the said order, the appellant has been held liable to pay penalty under Section 78 of the Act, equivalent to the service tax evaded and recovery of interest under Section 75 of the Act and the order of the Commissioner (Appeals) dated 21.06.2013 (Annexure A-3) has been set aside.

2. The substantial question of law that arises for consideration is as under:

“Whether Section 78 of the Act stipulates imposition of penalty on any person liable to pay such service tax or erroneous refund as determined under Section 73A(2) of the Finance Act.”

3. The pleaded case of the appellant is that he provides liaisoning and consultancy services and in view of his registration under the Finance Act under the category of 'Business Auxiliary Services', he had raised three invoices dated 29.03.2008 with service tax element of ₹6,52,207/- to M/s Ahmedabad Strips Pvt. Ltd. He deposited the service tax on 15.11.2008 and was issued show cause notice on 24.06.2009 that he had deposited the service tax late and not deposited the interest due and the amount deposited had only been done after the initiation of the enquiry of the service tax which had then been paid by the appellant. The service tax was required to be deposited by the noticee under Section 73A of the Act, as per the provisions of Rule 6 of the Service Tax Rules, 1994. Accordingly, interest was also liable to be recovered from the noticee along with invoking the penal provisions as provided under Sections 75 & 76 of the Act.

4. Thereafter, on 29.06.2012 (Annexure A-2), the demand of service tax of ₹6,52,207/- was confirmed by the adjudicating authority and appropriation was ordered from the amount already deposited and interest was also liable to be recovered from the noticee and penal action under Sections 76, 77 & 78 of the Act was held to be warranted, resulting in imposition of penalty of ₹200/- per day or 2% of service tax per month, whichever was higher, starting from the first day after the due date till the actual payment. Penalty of ₹1000/- was also imposed on the appellant along with other penalty of a sum of ₹6,52,207/-, under Section 78 of the Act.

5. The appellant filed an appeal wherein he took the plea that the said service became taxable from 07.07.2009 onwards and the service tax was collected by mistake and it had already been deposited and there was no deliberate defiance on his part. The First Appellate Authority noticed that the legal consultancy service had been brought under the service net from 01.09.2009 and during the year 2007-08, service tax was not leviable on legal consultancy

service and it was his duty to deposit the said amount with the Central Government, forthwith, as per Section 73A of the Act. Accordingly, it was held that the amount collected was not chargeable but it was his duty to deposit with the Central Government and therefore, penalty was not liable to be imposed under Sections 76 & 78 of the Act whereas the nominal penalty imposed under Section 77 of ₹1000/ was upheld and the order was, accordingly, modified.

6. The Revenue filed an appeal before the Tribunal taking the plea that since the amount had not been deposited by the appellant by 31.03.2008, Section 68 had been contravened and thus, sought the restoration of the orders of the adjudicating authority. The Tribunal allowed the appeal on the ground that since the service tax had been collected for the three invoices, it was required to be deposited in terms of Section 73A(2) but was not deposited till 15.11.2008. It was, accordingly, held that there was a wilful suppression of fact with an intention to evade the tax and the appellant's *mala fides* were established since the amount had been deposited only on the insistence of the Revenue. Reliance was placed upon Section 73A to contend that the service tax was to be deposited forthwith with the Government and that Section 68 was not relevant which had been relied upon by the Commissioner (Appeals). Accordingly, the order of the adjudicating authority and the penalty levied under Section 78 and recovery of interest under Section 75 was restored, leading to the filing of the present appeal.

7. That it would be appropriate to take into account the relevant provisions since the factum of the appellant not providing the taxable service as per Section 68 is not denied. The same reads as under:

“[68. Payment of service tax

(1) Every person providing taxable service to any person shall pay service tax at the rate specified in section [66B] in such manner and within such period as may be prescribed.

(2) Notwithstanding anything contained in sub-section (1), in respect of [such taxable services as may be notified] by the Central

Government in the Official Gazette, the service tax thereon shall be paid by such person and in such manner as may be prescribed at the rate specified in section [66B] and all the provisions of this Chapter shall apply to such person as if he is the person liable for paying the service tax in relation to such service:]

[Provided that the Central Government may notify the service and the extent of service tax which shall be payable by such person and the provisions of this Chapter shall apply to such person to the extent so specified and the remaining part of the service tax shall be paid by the service provider.]”

8. Section 68 provides that the person providing taxable service to any person shall pay the service tax at the rates specified. Admittedly, on the date the invoices were raised, the appellant was not liable to pay the service tax though he had collected the same. As per Section 73A(2), the person who has collected any amount which was not required to be collected from any other person, such person shall forthwith pay the amount so collected to the credit of the Central Government. Section 73A(2) reads as under:

“[73A (2) Where any person who has collected any amount, which is not required to be collected, from any other person, in any manner as representing service tax, such person shall forthwith pay the amount so collected to the credit of the Central Government.”

9. The penalty provision under Section 76 refers to Section 68 and the liability to pay service tax, is as per the said section. Section 76 reads as under:

“[76. Penalty for failure to pay service tax

Any person, liable to pay service tax in accordance with the provisions of section 68 or the rules made under this Chapter, who fails to pay such tax, shall pay, in addition to such tax and the interest on that tax amount in accordance with the provisions of section 75, a penalty which shall not be less than [one hundred rupees] for every day during which such failure continues or at the rate of [one per cent] of such tax, per month, whichever is higher, starting with the first day after the due date till the date of actual payment of the outstanding amount of service tax:

Provided that the total amount of the penalty payable in terms of this section shall not exceed [fifty per cent of] the service tax payable.”

10. Thus, once the appellant was not liable to pay under the provisions of Section 68 since he was not providing taxable service at that point of time, the penalty imposable under Section 76 was rightly deleted by the Commissioner (Appeals). Another factor which has to be taken into consideration is that the penalty under Section 78 also pertains to the penalty for suppressing of value of taxable services. The intention, thus, of the person, has to be for evading the service tax which would impose the liability of the penalty and the section further provides that there has to be fraud, collusion or wilful mis-statement or suppression of facts and contravention of the provisions of the Chapter or of the Rules with intent to evade payment of service tax. Section 78 reads as under:

“[78. Penalty for suppressing, etc. of value of taxable services
(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-
(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 the intent to evade payment of service tax,
the person, liable to pay such service tax or erroneous refund, as determined under sub-section (2) of section 73, shall also be liable to pay a penalty, in addition to such service tax and interest thereon, if any, payable by him, which shall be equal to the amount of service tax so not levied or paid or short-levied or short-paid or erroneously refunded:

Provided that where true and complete details of the transactions are available in the specified records, penalty shall be reduced to fifty per cent of the service tax so not levied or paid or short-levied or short paid or erroneously refunded:

Provided further that where such service tax and the interest payable thereon is paid within thirty days from the date of communication of order of the Central Excise Officer determining

such service tax, the amount of penalty liable to be paid by such person under the first proviso shall be twenty-five per cent of such service tax:

Provided also that the benefit of reduced penalty under the second proviso shall be available only if the amount of penalty so determined has also been paid within the period of thirty days referred to in that proviso:

Provided also that in case of a service provider whose value of taxable services does not exceed sixty lakh rupees during any of the years covered by the notice or during the last preceding financial year, the period of thirty days shall be extended to ninety days.

(2) Where the service tax determined to be payable is reduced or increased by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the court, then, for the purposes of this section, the service tax as reduced or increased, as the case may be, shall be taken into account:

Provided that in case where the service tax to be payable is increased by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the court, then, the benefit of reduced penalty under the second proviso to sub-section (1), shall be available, if the amount of service tax so increased, the interest payable thereon and twenty-five per cent of the consequential increase of penalty have also been paid within thirty days or ninety days, as the case may be, of communication of the order by which such increase in service tax takes effect:

Provided further that if the penalty is payable under this section, the provisions of section 76 shall not apply.”

11. Once the service tax was not leviable under Section 68 at that point of time and the liability was only to deposit the tax under Section 73A(2), which has been done on 15.11.2008, after delay, but due to the service being not taxable at the relevant time when the invoices were raised, we are of the opinion that the case would not fall under the provisions of Section 78 for invoking of the penalty, as has been held by the Tribunal. It was the categorical stand of the appellant before the First Appellate Authority that the service tax had been collected by mistake, on account of the new provision and the office of the

appellant was not fully acquainted with the interpretation of the statute due to which the default had occurred and therefore, in view of the defence taken, the Tribunal was not justified, in the present facts and circumstances, to hold that there was a wilful suppression of facts, to bring it within the ambit of Section 78.

12. Accordingly, the substantial question of law is answered in favour of the appellant and it is held that the penalty was not liable to be imposed on him on account of the fact that the service which he was rendering at the time of providing of the service was not taxable.

13. Accordingly, the present appeal is allowed and the order of the Tribunal dated 12.09.2014 (Annexure A-6) is set aside and that of the Commissioner (Appeals) dated 21.06.2013 (Annexure A-3) is restored.

With the above observations, the present appeal stands allowed.

(S.J.Vazifdar)
Acting Chief Justice

(G.S.Sandhawalia)
Judge

29.04.2015
sailesh

Note:- Whether reportable: YES