(2014) 09 MAD CK 0059

In the Madras High Court

Case No : C.M.A. Nos. 2444 of 2007 and 1112 of 2009

Commissioner of Central Excise APPELLANT

Vs

Busy Bee RESPONDENT

Date of Decision : 05-09-2014

Acts Referred:
Finance Act, 1994 — Section 75, 76, 76, 77, 77
Income Tax Act, 1961 — Section 273B

Citation : (2015) 49 GST 27 : (2015) 37 STR 932 : (2015) 84 VST 512

Hon'ble Judges : R. Sudhakar, J;G.M. Akbar Ali, J

Bench : Division Bench

Advocate : A.P. Srinivas, Standing Counsel, Advocates for the Appellant; C. Rekha Kumar, Advocates for the Respondent

Judgement

R. Sudhakar, J.

1. The department has filed these appeals. While in C.M.A. No. 2444 of 2007 challenge is made to the Final Order No. 89/2007, dated 29.1.2007 passed by the Customs, Excise and Service Tax Appellate Tribunal (for brevity, "the Tribunal, in C.M.A. No. 1112 of 2009, the Final Order No. 999/2008, dated 15.9.2008, passed by the Tribunal is challenged.

1.1 The brief facts of the case are as under: The assessee was originally rendering housekeeping-service for certain clients. They registered themselves with the Service Tax Department and collected and paid the service tax amounting to Rs. 3,86,217/- for the period from 1.7.2003 to 30.6.2004. After coming to know that such a service is not liable for service tax, the assessee surrendered the registration certification and did not claim refund of the amount.

1.2 The assessee, subsequently, entered into a contract of service with BPL and ICICI Bank to do back office work. Unaware of the taxability of the said service, the assessee did not get itself registered for this service. The department taking note of the fact that the assessee had neither paid service tax for such services rendered nor registered with the department under the category of "Business Auxiliary Service", issued a letter dated 17.6.2005, calling upon the assessee to pay service tax of Rs. 4,28,461/- and educational cess of Rs. 7,037/- under the category of "Business Auxiliary Service" for the back office support rendered from 1.6.2004 to 31.3.2005 along with interest. The assessee immediately applied for registration certificate for addition of category "Business Auxiliary Service" and they were issued such registration certificate on 4.8.2005. In response to the letter dated 17.6.2005 issued by the Department, the assessee initially paid certain amount.

1.3 Thereafter, the department issued a show cause notice in C. No. IV/16/213/2005-STC, dated 7.11.2005 (despatched on 18.11.2005). A reply was submitted by the assessee and pursuant to the same, the matter was taken up for adjudication. The stand taken by the assessee before the adjudicating authority was that they came to know about the taxable event of back office service rendered by them only after receipt of intimation from the Department and they immediately co-operated with the department by getting themselves registered and paying certain amount towards service tax and interest. In fact, before the adjudication, the entire amount of tax and interest was paid. However, the adjudicating authority passed the following order:

"I have gone through the records of the case, the written and oral submissions made by the assessee. The notice alleges that M/s. Busybee has rendered that service under the category of Business Auxiliary Service without registration and have failed to pay service tax for the gross amount received by them for the service rendered by them for the back office support to M/s. BPL and ICICI Banks. In this case I find that the assessee has admitted the tax liability and in fact have paid the service tax of Rs. 4,03,065 and Rs. 6637 totalling Rs. 4,09,702/- in five installments as per details below:

As per Section 75 of the Finance Act, 1994, the assessee is liable to pay interest at the appropriate rates on the service tax payable. The interest payable works out to Rs. 53,617. I find that vide Challan dated 23.6.2006 the assessee has paid the interest of Rs. 51,713 and Rs. 1904 vide challan dated 2.8.2005.

The next point to be decided is the penalty under Sections 76, 77 and 78 of the Finance Act, 1994 for the contravention of its provisions of the Finance Act, 1994. Even though the assessee came forward to pay the service tax and interest, it was done so only on being directed by the department to do so.

Accordingly, I pass the following order:

ORDER

I appropriate the Service Tax amount of Rs. 4,09,702/- (Rupees four lakhs nine thousand seven hundred and two only) and interest amount of Rs. 51,713 (Rupees fifty one thousand seven hundred and thirteen only) already paid by them.

I impose a penalty of Rs. 100/- (Rupees One hundred only) per day for the period during which the service tax were not paid under Section 76 of the Finance Act, 1994.

I also impose a penalty of Rs. 1,000/- (Rupees one thousand only) under section 77 of the Finance Act, 1994.

I impose a penalty of Rs. 4,09,702/- (Rupees four lakhs nine thousand seven hundred and two only) under section 78 of the Finance Act, 1994."

1.4 Aggrieved by the said order, the assessee filed an appeal to the Commissioner (Appeals), who, after considering the payment of service tax and interest, upheld that the imposition of penalty under Sections 76 and 77 of the Finance Act, 1994. However, he set aside the penalty imposed under Section 78 of the Finance Act, 1994 holding as follows:

"4.4. Further, the lower authority, imposed penalty under Section 78 of the Act, merely on the fact that the appellants had not discharged the tax liability at the appropriate time. Mere failure to pay the tax liability alone is not a sufficient ground to prove that the appellants had suppressed facts and that there was an intention to evade the payment. To invoke the penal provisions of this section, any one of the following should be present:

(a) Fraud or

(b) Collusion or

(c) Wilful mis-statement or

(d) Suppression of facts or

(e) Contravention of any provisions of this Chapter or of the rules made thereunder with intent to evade payment of service tax.

4.5 The appellants'' main activity being what it was, they were ignorant of the fact that service tax was payable by them on the back office support services rendered by them. The lower authority has failed to prove with the available facts and evidences that there was a mala fide intention on part of the appellants to evade the payment of service tax. It is not out of place to state here that the appellants had in fact come forward to register the impugned services and in fact paid a part of the amount along with interest disputing to the fact that the service tax was payable only on the commission received for the services rendered. Subsequently on being issued with a demand notice, the appellants have duly paid the balance of service tax along with interest in installments, well before the completion of adjudication proceedings. The lower authority imposed penalty thinking that it was mandatory and did not exercise his discretion in this regard, as stated in the section. No evidence has been brought out to indicate that the appellants had mala fide intention to evade payment of tax. Hence, I am of the view that the penalty imposed under Section 78 of the Finance Act is not sustainable."

1.5 Assailing the portion of the order of the Commissioner (Appeals) confirming the imposition of penalty under Sections 76 and 77 of the Finance Act, 1994, the assessee preferred an appeal to the Tribunal, while the Revenue assailed the portion of the order of the Commissioner (Appeals) deleting the penalty imposed under Section 78 of the Finance Act, 1994.

1.6 In the appeal filed by the assessee, the Tribunal, taking note of the provision of Section 80 of the Finance Act, 1994 and the conduct of the assessee, came to the conclusion that no penalty is leviable in the facts and circumstances of the case. The relevant portion of the order dated 29.1.2007 passed by the Tribunal is as under:

"4. I have carefully studied the case records and considered the submissions made by both sides. It is obvious from the findings of the lower appellate authority that the appellants had committed the transgressions owing to their ignorance of the legal provisions. I am satisfied that the assessee had satisfactorily established that there was reasonable cause for the failures found against them. The findings of the appellants'' bona fide conduct is also fortified by the record of their conduct. They had registered themselves as an assessee in 2003 for an activity which was not liable to service tax and paid an amount of Rs. 3.86 lakhs, refund of which they had not claimed from the Department. Section 80 of the Finance Act, 1994 reads as follows:

''80. Notwithstanding anything contained in the provisions of Section 76, Section 77, Section 78 or Section 79, no penalty shall be imposable on the assessee for any failure referred to in the said provisions, if the assessee proves that there was reasonable cause for the said failure.''

I am inclined to waive the penalties against the appellants as provided in Section 80 of the Finance Act, 1994. In the circumstances, the impugned order is set aside. The appeal is allowed."

1.7 The Tribunal, in the appeal filed by the Department challenging the deletion of penalty imposed under Section 78 of the Finance Act, 1994, followed the above decision rendered by it on 29.1.2007 in the assessee''s appeal and dismissed the appeal of the Department holding that there is no case to restore the penalty imposed by the original authority.

1.8 Aggrieved by the said orders, the Department has filed these appeals on the following substantial questions of law

"C.M.A. No. 2444 of 2007:

(i) Is the Tribunal''s decision to allow the service provider''s appeal against the impugned Order-in-Appeal without considering the grounds in the cross appeal filed by the Department against the same Order-in-Appeal correct in view of the Larger Bench decision of the Tribunal in the case of CCE v. Standard Tarpaulin Industries, 2002 (143) ELT 430 ?

(ii) Is the Tribunal''s decision to waive the penalties imposed under Sections 76, 77 and 78 of the Finance Act, 1994 correct in view of the judgment pronounced in the case of Commissioner of Central Excise Vs. Machino Montell (I) Ltd., and Commissioner of Central Excise and Customs Vs. Padmashri V.V. Patil Sahakari Sakhar Karkhana Ltd., ?

C.M.A. No. 1112 of 2009:

(i) Whether the Tribunal has any discretion to impose penalty, which is less than the minimum amount permissible to be imposed under Section 78 of the Finance Act, in view of the High Court decision in the case of Commissioner of Central Excise and Customs Vs. Padmashri V.V. Patil Sahakari Sakhar Karkhana Ltd., ;

(ii) Whether the Tribunal is right in totally waiving the penalty under Section 78 of the Finance Act, 1994 by virtue of Section 80 of the Finance Act, 1994 based on irrelevant considerations and by overlooking the relevant ones?"

2. We have heard the learned Standing Counsel appearing for the Department and the learned counsel appearing for the assessee and perused the orders passed by the Tribunal and the authorities below.

3. In short, the core issue that needs to be considered in these cases is whether the Tribunal was justified in invoking Section 80 of the Finance Act, 1994 to decide not to impose penalty on the assessee.

4. The facts, as stated above, are not in dispute. It is the plea of the department that the assessee is liable to pay penalty under section 76 of the Finance Act, 1994 for failure to pay service tax; under section 77 of the Finance Act, 1994 for non registration may be justified; and under section 78 of the Finance Act, 1994 for intending to evade payment of service tax.

5.1 At the outset, we would like to deal with the penalty leviable under Section 78 of the Finance Act, 1994. A reading of the provisions of Section 78 of the Finance Act, 1994 makes it clear that penalty is leviable, if 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 with an intent to evade payment of service tax.

5.2 In the case on hand, the assessee has clearly stated that they had originally got a registration certificate for housekeeping and realizing that the said service is not taxable, they have surrendered the same. It may be emphasized here that the assessee had, in fact, paid duty even when there was no requirement under law and has not even chosen to claim refund till date. Even in respect of the present demand, on receipt of notice from the department about the liability of service tax in respect of back office work, they have paid the service tax and interest even before adjudication. This only goes to show that the assessee had no intention to evade payment of tax and non-payment was due to lack of knowledge and awareness.

5.3 That apart, one another factor which enures to the benefit of the assessee is that there is no finding in the given case as to how the original authority has imposed penalty under Section 78 of the Act. The Original Authority should have applied his mind as to how penalty is leviable under Section 78 of the Act and there should have been some reasons given thereunder, which we find are absent in the original order.

5.4 In such view of the matter, the order of the Tribunal confirming the deletion of penalty imposed under section 78 of the Finance Act, 1994 is justified and warrants no interference.

5.5 Apropos of the levy of penalty under sections 76 and 77 of the Finance Act, 1994, it would be relevant to refer to Section 80 of the Act, which reads as under:

"80. Notwithstanding anything contained in the provisions of Section 76, Section 77, Section 78 or Section 79, no penalty shall be imposable on the assessee for any failure referred to in the said provisions, if the assessee proves that there was reasonable cause for the said failure."

5.6 The provision of Section 80 of the Finance Act, 1994 gives the authority the power to consider not to impose penalty in certain cases, where the assessee shows reasonable cause for his failure to comply with the requirement of the Finance Act, 1994. This provision is analogous to Section 273B of the Income-tax Act, which also states that no penalty shall be imposable on the assessee for any failure referred to in the said provision, if the assessee proves that there is reasonable cause for the failure.

5.7 Though the learned Standing Counsel appearing for the Revenue contended that penalty under Section 76 of the Finance Act, 1994 is leviable for failure to pay service tax and under Section 77 of the Finance Act, 1994 for nonregistration of the service, we are not convinced with the said plea, as Section 80 of the Finance Act, 1994 starts with a non-obstante clause and states that no penalty under Sections 76 to 79 of the Finance Act, 1994 can be imposed, if the assessee proves that there was reasonable cause for the failure to pay tax.

5.8 The provision of Section 80 of the Finance Act, 1994 is in consonance with the decision of the Supreme Court in Pratibha Processors and others Vs. Union of India and others, , wherein it has been held that penalty is ordinarily levied for some contumacious conduct or for a deliberate violation of the provisions of the particular statute.

5.9 In the case on hand, the assessee has stated that they were under the impression that the service rendered by them will not be exigible to service tax. On an earlier occasion, the assessee registered and paid service tax on a nontaxable service and they did not even seek for refund of the amount. The bona fide confusion in the mind of the assessee as to which service is taxable or nontaxable is apparent and that justifies the plea of failure to pay service tax. This reasoning pari passu applies to non-registration of said service rendered by them. Therefore, the demand of penalty under Sections 76 and 77 of the Finance Act, 1994 is not tenable.

5.10 In such view of the matter, we are convinced that the assessee, by his conduct which is above board, has shown reasonable cause as required under Section 80 of the Finance Act, 1994 and the same was rightly accepted by the Tribunal.

For the foregoing reasons, we answer the substantial questions of law against the Revenue and in favour of the assessee. Accordingly, these appeals are dismissed. No costs.

