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(2010) 06 MAD CK 0268

In the Madras High Court

Case No : Civil Miscellaneous Appeal No. 1398 of 2010

Commissioner of Central Excise APPELLANT

Vs

Shri Suthan Promoters RESPONDENT

Date of Decision : 18-06-2010

Acts Referred:

Finance Act, 1994 — Section 73(1), 73(2), 76, 77, 78

Citation : (2011) 183 ECR 65 : (2010) 29 STT 5

Hon'ble Judges : M.M. Sundresh, J;F.M. Ibrahim Kalifulla, J

Bench : Division Bench

Advocate : S. Udayakumar, for the Appellant;

Final Decision : Dismissed

Judgement

F.M. Ibrahim Kalifulla, J.—This appeal is directed against the order of the CESTAT, dated 12-11-2001 passed in Final Order No. 1744 of 2009.

2. The issue relates to the levy of penalty. The substantial question of law that is raised in this appeal reads as under:

Whether the Hon''ble Tribunal is right in holding that none of the ingredients to impose penalty u/s 78 of the Finance Act, 1994, viz., fraud, collusion, wilful misstatement, suppression or contravention with the intent to evade payment of service tax was alleged in this case, while the demand of service tax was held to be sustainable for extended period in terms of proviso to Section 73(1) of the Act, which also required the above ingredients to be satisfied?

3. The respondent-assessee was involved in the business of construction of residential complex. It constructed 12 dwelling units and its transactions were subject to levy of service tax with effect from 16-6-2005 under the heading ''Construction of residential complex''. On being noticed that the respondent failed to file the necessary returns, the respondent was proceeded against by way of necessary notice and statements were recorded on 2-3-2006. The receipt of Rs. 1,11,79,757 for the period from 16-6-2005 to 31-12-2005 from the buyers

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of flats for providing such service was noted. The liability was determined by the assessing authority by assessing the tax amount at a sum of Rs. 3,68,932 along with cess. Thereafter, the respondent paid a sum of Rs. 2,33,098 towards service tax, cess and interest. After adjusting the said payment, for the balance amount, a show-cause notice was issued for imposition of penalty by the Commissioner by notice dated 9-10-2007. Thereafter, the Commissioner in exercise of his powers of suo motu revision u/s 84 of the Act, passed orders on 13-12-2007 imposing a penalty of Rs. 200 per day starting with the first day after the due date till the actual payment of service tax. A sum of Rs. 1,000 was imposed by way of penalty u/s 77 of the Finance Act, 1994 and a sum of Rs. 3,72,945 on the notice issued u/s 78 of the Finance Act, 1994.

4. On an appeal preferred by the assessee, by the order impugned in this appeal, the Tribunal set aside the order of the Commissioner holding that there was no specific finding by the Commissioner to the effect that there was any fraud or collusion or wilful mis-statement or suppression of facts or contravention with any intent to evade payment of service tax.

5. A perusal of Section 78 of the Finance Act, 1994 makes it clear that 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 wilful misstatement or suppression of facts or contravention of any of the provisions of Chapter V, a person, who is liable to pay such service tax or erroneous refund as determined under Sub-section (2) of Section 73, would also be liable to pay a penalty, in addition to such service tax apart from interest thereon.

6. A perusal of the order of the Commissioner discloses that no such specific finding as regards fraud or collusion or wilful mis-statement or suppression of facts or contravention of any of the provisions of Chapter V. or the Rules made thereunder, with any intention to evade payment of service tax had been recorded. The plea of the respondent-assessee was that it was ignorant of the statutory liability, viz., payment of service tax, which for the first time came into effect on and from 16-6-2005. Though ignorance of law cannot be an excuse for payment of service tax, when it comes to the question of imposition of penalty, and when the statute specifically stipulates the circumstances under which such penalty and interest thereon can be levied, we are of the considered opinion that in the absence of any specific finding relating to such instances, viz., fraud or collusion or wilful mis-statement or suppression of facts or contravention of any of the provisions of Chapter V, with particular reference to the intention of the assessee to evade payment of service tax, it will have to be held that the approach of the Tribunal in finding fault with the order of the Commissioner that there was no allegation of either fraud or collusion or wilful mis-statement or suppression of facts, merit acceptance. Reading Sections 78 and 80 together, where again it is stated that for imposition of penalty u/s 78, the presence of reasonable cause would be germane, we are of the view that the order of the Tribunal in interfering with the order of the Commissioner by upholding the

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penalty u/s 76 of the Finance Act, 1994 while reducing the same from Rs. 200 per day to Rs. 100 per day and the penalty of Rs. 1,000 imposed u/s 77 and in setting aside the penalty imposed u/s 78 of the Act, is well-justified and we do not find any good ground to interfere with the same. We are satisfied that the law stated by the Tribunal on the interpretation of Section 78 read along with Section 80 of the Act, is well in order and the question of law raised by the appellant is answered in favour of the respondent-assessee. The appeal fails and the same is dismissed. No costs.

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