

(2016) 01 GUJ CK 0188
In the Gujarat High Court
Case No : Tax Appeal No. 111 of 2016

IWI Crogenic Vaporization System (India) Pvt. Ltd.	APPELLANT
Vs	
The Commissioner of C. Excise and Service Tax, Vadodara-II	RESPONDENT

Date of Decision : 28-01-2016

Acts Referred:

Finance Act, 1994 — Section 73, Section 76, Section 77, Section 77(1), Section 77(2), Section 78, Section 80

Citation : (2016) 54 GST 132

Hon'ble Judges : Akil Abdul Hamid Kureshi and Mohinder Pal, JJ.

Bench : Division Bench

Advocate : Paritosh Gupta for Paresh M. Dave, Advocate, for the Appellant;

Final Decision : Dismissed

Judgement

Akil Abdul Hamid Kureshi, J.—1. Assessee has filed this appeal challenging judgment of the Customs, Excise and Service Tax Appellate Tribunal (CESTAT) dated 29.6.2015 raising following questions for our consideration:

"(1) Whether penalty equal to amount of service tax is permissible under Section 78 of the Finance Act, 1994 when the appellant has admittedly paid the entire service tax with interest before filing ST-3 returns, and thereafter disclosing full and complete facts and details about taxable services, service tax liability and service tax paid for such liability while filing the returns?

(2) Whether imposition of penalty equal to amount of service tax permissible in the facts of this case when the appellant has admittedly discharged the entire service tax liability with interest for late payment of service tax when the inquiry was conducted thereby showing bona-fide in respect of late payment of service tax?

(3) Whether penalty equal to the amount of service tax could not be waived under Section 80 of the Finance Act, 1994 when there was no evasion of service tax by an assessee, who discharged the entire service tax liability with interest

without waiting for any show cause notice or adjudication upon realizing about service tax liability that remained to be discharged?

(4) Whether imposition of multiple penalties under Sections 77(1), 77(2) and 78 of the Finance Act, 1994 is permissible and justified in the facts of the present case?"

2. Upon perusal of the documents on record and hearing learned counsel for the appellant, we notice that the disputes raised by the assessee are two, namely, (1) with respect to penalty confirmed by the Tribunal imposed under Section 78 of the Finance Act, 1994 and (2) with respect to penalty imposed under Section 77 of the said Act.

3. As is well known, Section 78 of the Finance Act, 1994 provides for penalty for suppressing etc. of value of taxable services. Sub-section (1) thereof provides for a penalty on any service tax not paid or not levied or short-levied or short paid or erroneously refunded, by reason of fraud, collusion, willful mis-statement, suppression of facts or contravention of any of the provisions or the act and rules made with intent to evade payment of service tax.

4. In the present case, before the Tribunal as well as before us, it was contended that such penalty could not have been imposed in view of the fact that the assessee had paid the service tax even before issuance of the show cause notice. Reliance was placed on Sections 80 and 73 of the Finance Act, 1994 in this respect. The Tribunal, however, rejected such a contention making following observations:

"3. Heard both the sides and perused the case records. The appellant is not contesting the payment of Service Tax on merits. The only argument of the appellant is that penalty under Section 78 of the Finance Act, 1994 is not imposable as the entire Service Tax demand along with interest, was paid before the issue of show cause notice. It was also their case, that Service Tax required to be paid under reverse charge mechanism was admissible as Cenvat Credit to the appellant and accordingly there cannot be any intention to evade payment of Service Tax. In this regard, it is observed that the appellant was recovering the Service Tax from the services. Further, they were registered with the Central Excise Dept. for providing several services including the services on which Service Tax was required to be paid on reverse charge basis. Appellant was also recovering the Service Tax from the service recipients. Once appellant is registered with respect to services, it is understood that the due service tax should have been paid to the Central Excise Dept when the same is received from the Service recipients or payable on reverse charge mechanism. No financial hardship has been claimed by the appellant as was the case before the Bench in case of Bhagwati Caterers Pvt. Ltd. Vs. CST, Ahmedabad (supra) as pointed out by the Learned Authorized Representative, appearing on behalf of the Revenue. Appellant has also not filed required periodical returns Revenue could detect none payment of Service Tax as a result of special investigation. It

is not the case where the appellant was not registered with Central Excise Dept and could claim ignorance of law. By recovering the Service Tax from their service recipients and not paying the same to the Dept. has to be considered as evasion of Service Tax with intention to evade when no periodical returns were filed. In view of the above observations, there is no reason to interfere with the order passed by the lower authorities and the order passed by the first appellate authority is required to be upheld".

5. It can thus be seen that the Tribunal came to the factual finding that the assessee had recovered service tax from service recipients. The assessee was also registered with the Central Excise Department for providing several services including the service in question on which service tax was required to be paid on reverse charge basis. It was held that having collected such tax from the service recipients and having been registered in respect of such service, the assessee was required to pay service tax to the Excise Department. The assessee had not filed requisite periodical returns and the fact of non payment of service tax came to light of the Department only as a result of special investigation. The Tribunal also noted that assessee had not pleaded any case of financial hardship.

6. Under the circumstances, the Tribunal correctly rejected the assessee's request for deleting the penalty. The question whether any service tax was not paid on account of fraud, willful misstatement, collusion, suppression of facts or contravention of the provisions with intention to evade payment of service tax is essentially a question of fact. The Tribunal having noticed the admitted facts and having come to the conclusion regarding such element of mens rea, we do not find any question of law arising.

7. Section 80 of the Act provides that notwithstanding anything contained in section 76, section 77 or section 78, no penalty would be imposable when the assessee proves that there was reasonable cause for the failure to pay the tax. In the present case, assessee could not demonstrate the reasonable cause for not paying the tax. As noted by the Tribunal, case of financial hardship was not even pleaded.

8. Section 73 of the Act pertains to recovery of service tax not levied or paid or short-levied or short-paid or erroneously refunded. Sub-section (1) there of pertains to recovery of such taxes by issuance of show cause notice. Sub-section (2) requires Central Excise Officer to consider the representation of the assessee if so made in response to show cause notice and determine the amount of service tax due from the assessee. Sub-section (3), however, requires that when such service tax is paid before issuance of show cause notice, the officer shall not serve any notice under sub-Section (1) in respect of such amount. Explanation (2) of Sub-section (3) of Section 73 provides that no penalty under any of the provisions of this Act or the rules would be imposed in respect of payment of service tax under the sub-section and interest thereon. However, Sub-section (4) of Section 73 which is material for our purpose reads as under:

"(4) Nothing contained in Sub-section (3) shall apply to a case 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) willful 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 intent to evade payment of service tax".

9. When therefore the Tribunal confirmed the penalty under section 78 holding that the unpaid service tax was on account of willful mis-statement of suppression of facts by the assessee, by virtue of sub-Section (4) of Section 73, nothing stated in sub-section (3) would apply to such a case.

10. Section 77 likewise pertains to penalty for contravention of rules and provisions of Act for which no penalty is specified elsewhere. Such penalty was imposed for non filing of the returns and for late payment of service tax. Here also, appellant has not made out any case for interference.

11. Counsel lastly contended that by virtue of proviso to Section 78, if the tax demand is based on records maintained by the assessee the penalty would be 50% of otherwise imposable. He pointed out that the term specified record used in the said provision has now been defined by including an explanation to Section 78. However, we notice that such a contention was never raised before the Tribunal and being a mixed question of law and facts, we do not permit same before us for the first time. However, if it is open for the appellant to file a rectification application before the Tribunal on such basis, we do not prevent him from doing so. Tax Appeal is therefore dismissed.