

(2012) 10 DEL CK 0327

In the Delhi High Court

Case No : CEAC 8 of 2012 and CM Application 3458 of 2012

Meinhardt Singapore Pte Ltd.

APPELLANT

Vs

Commissioner of Central Excise

RESPONDENT

Date of Decision : 03-10-2012

Acts Referred:

Finance Act, 1994 — Section 73, 73(1), 75, 76, 77

Citation : (2013) 32 STR 535 : (2012) 37 STT 793

Hon'ble Judges : S. Ravindra Bhat, J;R.V. Easwar, J

Bench : Division Bench

Advocate : Ruchir Bhatia, for the Appellant; S. Zafar Moonis, for the Respondent

Final Decision : Allowed

Judgement

Mr. Justice S. Ravindra Bhat

1. Admit. With consent of counsel for the parties, matter was heard for disposal. The substantial question of law which arises for consideration is whether the Tribunal fell into error in directing payment of 25% of the tax amount towards the penalty demand made in the Order in Original impugned before it in entirety.

2. The facts which are not in dispute are that the appellant/assessee had concededly not deposited service tax for the period 2006-07 to 2008-09. However, it deposited a sum of Rs. 3,54,37,986/- (Rupees Three crores fifty four lakhs thirty seven thousand nine hundred eighty six) on 3.3.2009. In view of this development, the Service Tax authorities issued a show cause notice as to why the amount so deposited should not be appropriated towards interest and the liability arising on account of default in payment of tax and default in compliance with the other provisions of the Finance Act, 1994.

3. The relevant part of the show cause is extracted below: -

28. Now therefore, MSPL are hereby called upon to show cause to the Commissioner, Service Tax, 17-B, IAEA House, M.G. Marg, I.P. Estate, New Delhi

- 110 002 as to why:

(i) Service Tax along with Education Cess and Secondary Higher Education Cess amounting to Rs. 3,54,37, 986/- (Three Crore Fifty Four Lacs Thirty Seven Thousand Nine Hundred Eighty Six only) should not be demanded and recovered from them under provisions of proviso to Section 73 (1) of Finance Act, 1994 by invoking extended periods of five years.

(ii) Service Tax along with Education Cess and Secondary Higher Education; Cess amounting to Rs. 3,54,37, 986/- (Three Crore Fifty Four Lacs Thirty Seven Thousand Nine Hundred Eighty Six only) paid by them should not be appropriated against aforesaid demand.

(iii) Interest at appropriate rate should not be demanded and recovered from them towards late payment of Service Tax along with Education Cess and Higher Education Cess u/s 75 of Finance, Act, 1994.

(iv) Interest amounting to Rs. 62,39,220/- paid by them towards late payment of said Service Tax along with Education Cess and Higher Education Cess should not be appropriated towards the aforesaid demand.

(v) Penalty should not be imposed upon them u/s 76, 77 & 78 of the Finance Act, 1994 for the contravention as mentioned above.

4. After considering the appellant's submissions, the Commissioner (Service Tax) by an order dated 13.12.2010 directed appropriation of the amount deposited (i.e. Rs. 3,54,37,986/-) and recovery of interest quantified at Rs. 62,39,220/-. The Commissioner also imposed penalty of the amount identical with the service tax liability i.e. Rs. 3,54,37,986/- under Section- 78 of the Act. The appellant approached the CESTAT which by the impugned order directed deposit of 25% of the said penalty amount which in fact works out to Rs. 88,59,497/-.

5. At the outset, counsel for the appellant argued that the first proviso to Section- 78 directs that the penalty demanded in terms of the Act, if paid within 30 days from the date of communication of the order determining the service tax "shall be 25% of the service tax so determined". It is submitted that the appellant had complied with the demand even before the issuance of the show cause notice and consequently was entitled to the reduced penalty provided for by Section- 78 which could not be increased by exercise of any discretion as the provision is mandatory.

6. Learned Counsel for the respondents, on the other hand, submitted that at the stage of the consideration of the application for waiver of pre-deposit, the Tribunal has to see the broad merits of the case; having considered these, the impugned order gave substantial relief and instead of Rs. 3,54,37,986/-, the assessee was directed to pay 25% of that amount i.e. approximately Rs. 89 Lakhs. Consequently, no error of law vitiates the order of the Tribunal.

7. We have carefully considered the submissions. Section- 78 of the Finance Act,

1994 to the extent it is relevant for the purpose of this appeal reads as follows: -

Penalty for suppressing value of taxable service.

78. [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 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 not be less than, but which shall not exceed twice, 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:

8. In this case, the service tax itself was concededly paid on 3.3.2009, i.e., before the show cause notice which was issued on 12.3.2009. The Order in Original confirmed the said demand for Rs. 3,54,37,986/- which had been so deposited. Having regard to these, prima facie, the provisions of the first proviso to Section- 78 was attracted and the Commissioner could not have demanded any amount in excess of 1/4th of the service tax liability, as penalty. The directions to pay Rs. 3,54,37,986/- as penalty, therefore, is facially incorrect. We, however, refrain from making any final observations on this as the appeal against that order is pending before the Tribunal.

9. Having regard to the above circumstances, this Court is of the opinion that since the primary liability to pay service tax was discharged by the appellant even before the issuance of show cause notice on 3.3.2009 and the demand was actually confirmed on 13.12.2010, this is an appropriate case where the amount of pre-deposit should be reduced, in the interest of justice.

10. this Court had directed payment of Rs. 25 Lakhs as a pre-condition for the issuance of notice in the appeal by order dated 24.02.2012. The said amount, if

deposited, shall be treated as satisfying the requirement of pre-deposit for the purpose of hearing the appeal; no further deposit is necessary. The Tribunal shall proceed to verify whether the said order has been complied with and after satisfying itself that the amount of Rs. 25 Lakhs was indeed deposited, proceed to hearing the appeal on its merits. The observations in this order are prima facie and not an expression on the merits; all rights and contentions of the parties are hereby reserved and kept open. The appeal is allowed to the above extent.