
(2023) 08 OHC CK 0014
In the Orissa High Court
Case No : OTAPL No.12 Of 2017

M/s. Dilip Kumar Nayak

APPELLANT

Vs

Commissioner Of Customs, Excise And Service Tax,
Bhubaneswar Commissionerate I

RESPONDENT

Date of Decision : 03-08-2023

Acts Referred:

Finance Act, 1994 — Section 73(1), 73(3), 73(4), 77(3), 78(1), 80

Citation : (2023) 08 OHC CK 0014

Hon'ble Judges : Arindam Sinha, J;G. Satapathy, J

Bench : Division Bench

Advocate : A. K. Mohanty, T. K. Satapathy

Final Decision : Dismissed

Judgement

1. The appeal is directed against decision dated 23rd March, 2017 of the Customs, Excise Service Tax Appellate Tribunal, (CESTAT), Eastern Zonal Bench: Kolkata (Appeal no.ST/99/11). Coordinate Bench had admitted the appeal by framing the substantial question of law reproduced below.

“Whether the decision of the Commissioner of Income Tax as well as the order of affirmation by the CESTAT is sustainable, as it is held that Section-73(4), Chapter-V of the Finance Act, 1994 is applicable to the case of the appellant ?”

2. Mr. Mohanty, learned advocate appears on behalf of appellant and draws attention to paragraph 5 of impugned decision to submit, the service tax in respect of mining service came into effect from 1st June, 2007. Subsequent thereto, there was Central Board of Excise and Customs (CBEC) circular dated 3rd October, 2007. Placing reliance on omitted section 80 in Finance Act, 1994 he submits that the CESTAT committed error in not holding that his client was covered by sub-section (3) in section 77 and said section 80.

3. Perused impugned decision. In paragraph 2 the CESTAT recorded submission of appellant to also be that it had paid the duty plus interest before issuance of

show-cause notice. This appears to be a fact as the Tribunal did not say otherwise in dealing with the case.

4. In context of our observation Mr. Satapathy, learned advocate, Senior Standing Counsel appearing on behalf of the department submits, it is apparent from impugned order that the determination was accepted by petitioner and the tax paid after issuance of summons. Petitioner's challenge was directed against only the penalty order. In the circumstances, the Tribunal correctly appreciated the facts to be, petitioner had evaded payment of the tax by omission to register, mandated by the provisions in the Act. He submits further, the tax being indirect, petitioner consciously collected it but did not register and pay the same. In the circumstances, provision in sub-section(4) of section 73 eclipses application of provision in sub-section (3) of section 73 and omitted section 80.

5. The question framed for answer is whether decision of the Commissioner of Income Tax (CIT), affirmed by the CESTAT is sustainable as it held section 73 (4) in chapter V of Finance Act 1994 to be applicable. To answer the question it is necessary to look at sub-sections (1), (3) and (4) of section 73 read with sub-section (1) in section 78.

6. Sub-section (1) of section 73 provides, the authority may within 18 months from the relevant date serve notice on the person chargeable with service tax, which has not, inter alia, been paid. The proviso gives reasons that may extend the period to 5 years for notice under it being issued.

7. Sub-section (3) in section 73 says, inter alia, where before service of notice under sub-section (1) in respect of service tax payment is made, on receipt of the information the authority shall not serve any notice under sub-section (1) in respect of the amount, so paid. In this case there is no dispute on the charge and payment of service tax. It is only the imposition penalty. Sub-section (4) in section 73 provides for negating application of sub-section (3) on any reason given in the section standing attracted. Sub-section (1) in section 78 mandates that the person, who has evaded payment of service tax, will be liable to pay a penalty. Requirement by the provision is also that the person has been served notice under the proviso to sub-section (1) of section 73.

8. As aforesaid, finding on fact is no notice was issued to petitioner (assessee) under sub-section (1) of section 73. However, sub-section (4) in section 73 includes reason of contravention of any of the provisions in the chapter. Regarding this, demand-cum-show cause notice dated 17th November, 2009 stood issued on petitioner, invoking the proviso to sub-section (1) in section 73. In the circumstances, by operation of sub-section (4) in section 73, provision in sub-section (3) of said section became inapplicable to petitioner.

This is more so because under sub-section (1) of section 78, the requirement is for the person fixed with the liability of penalty to be that he has been served notice under proviso to sub-section (1) of section 73. The show cause notice dated 17th November, 2009 is such notice. Sub-section (1) in section 73 provides

for issuance of two separate notices for distinct purposes. The first is the notice under sub-section (1), which cannot be issued on prior payment of tax and the other, under the proviso.

9. We answer the question in the affirmative and in favour of revenue. Impugned order of the CESTAT and CIT are confirmed and the appeal dismissed.

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