(2016) 02 BOM CK 0006

In the Bombay High Court

Case No : Central Excise Appeal No. 273 of 2014

The Commissioner of Central Excise and Service Tax — APPELLANT

Vs

Honai Constructions, Post Hantur — RESPONDENT

Date of Decision : 01-02-2016

Acts Referred:
Finance Act, 1994 — Section 76, Section 77, Section 78, Section 80

Citation : (2016) 02 BOM CK 0006

Hon'ble Judges : S.C. Dharmadhikari and G.S. Patel, JJ.

Bench : Division Bench

Advocate : Pradeep S. Jetly and J.B. Mishra, for the Appellant; Padmavati Patil i/by Aparna Hirandagi, for the Respondent

Final Decision : Dismissed

Judgement

1. This appeal challenges an order dated 3 January 2014 passed by the Customs, Excise and Service Tax Appellate Tribunal, West Zonal Bench, Mumbai (''Tribunal'') reversing the order passed by Commissioner (Appeals-II) dated 20 September 2010. By its order passed on 3 January 2015, the Tribunal allowed the assessee''s appeal and set aside the penalty imposed under Section 78 of the Finance Act, 1994.

2. The appeal before the Tribunal was directed only against that part of the order of Commissioner (appeals) where he sustained the penalty under Section 78 of the Finance Act, 1994 and upheld the imposition thereof.

3. The argument of the assessee was that it was constructing the factory for a co-operative spinning mill by virtue of an agreement of 19 October 2001. The assessee is in the business of civil construction. It undertakes construction activity for both, the private sector and for State. At the time when this agreement was executed, there was no obligation in law to pay service tax on the activity undertaken pursuant to the above agreement. However, during the subsistence and implementation of the contract, service tax was imposed on

commercial construction with effect from 10 September 2004. The Revenue claimed that had they not inspected the premises of the assessee in 2007, they would not have discovered the evasion of service tax. Once the service tax was leviable during the course of implementation of the contract, then, the obligation to pay the same was absolute. There is no question of then contending that there was a bona fide impression of the assessee about the levy not being attracted or any doubt, whether the contract attracted the service tax liability or not. That is how the show cause notice was issued; but an amount of Rs. 20 lakh was paid before the order-in-original came to be passed and after the issuance of show cause notice. The adjudicating authority, however, found that penalty under Sections 76 and 78 of the Finance Act, 1994 was leviable for failure to pay service tax. Therefore, the adjudicating authority imposed the penalties.

4. Aggrieved assessee went before the Commissioner (Appeals), who, by his order dated 20 September 2010, found that the first payment of service tax made in July 2007 should have alerted the assessee to make the further payments; but had the inspection not been carried out by the Revenue, the further payments would not have been forthcoming. It is in these circumstances, he confirmed the penalty under Sections 77 and 78 but set aside penalty under Section 76 of the Finance Act, 1994.

5. The Tribunal set aside eventually all penalties. Mr. Jetly appearing for the Revenue by inviting our attention to paragraphs 2 to 4 of the Tribunal''s order, would submit that Section 76 of the Finance Act, 1994 attracts penalty on failure to pay the service tax, Section 77 of the Finance Act, 1994 attracts penalty for contravention of the provisions of act and rules, whereas Section 78 provides for imposition of penalty in case of failure to pay service tax for reasons of fraud. Mr. Jetly''s submission is that the substantial question of law arises simply because having found that the service tax has not been paid on account of suppression of facts or contravention of any of the provisions of the Act or rules made thereunder with a view to evade payment of service tax, then, penalty was mandatorily leviable. There was no reason for the Tribunal, therefore, to have granted any relief and on a specious ground that the assessee entertained a bona fide belief that it does not fall under the service tax law. The liability was discharged as soon as non payment was brought to the notice of the assessee.

6. Mr. Jetly would submit that this sort of reasoning is impermissible in the light of the judgment of Supreme Court in case of Union of India v. Rajasthan Spinning & Weaving Mills , 2009(238)-E.L.T.-3(S.C.).

7. However, Mr. Patil, learned advocate for the assessee in opposing this appeal would submit that first of all the order passed by the Tribunal raises no substantial question of law as the Tribunal has exercised its discretion in the face of clear facts and which are not disputed. Secondly, it is not as if the reasoning of the Tribunal is perverse. The Tribunal has found that there was enough power and discretion to set aside the penalty and the conduct of the assessee was, therefore, a very relevant factor. The learned advocate for the Respondent-

assessee would, therefore, submit that the appeal be dismissed.

8. Having perused the impugned order passed by the Tribunal, we find that the reasons that are assigned by the Tribunal are in paragraph 4. That paragraph reads as under:

"4. Having considered the rival submissions, I find that in view of the on going contract which was entered into prior to 10.09.2004 and the levy of tax being a new levy from 10.09.2004 and the appellant was under the bona fide belief that they do not fall under the Service Tax liability and keeping in mind the conduct of the appellant that he has discharged the Service Tax alongwith interest soon after being pointed out, it is a fit case for setting aside the penalty under Section 78 and accordingly I do so. Thus, the appeal is allowed in part."

While assigning said reasons the Tribunal omitted from consideration the fact that though the contract was executed prior to 10 September 2004, the same was a continuing contract and obligation. The work continued. The Tribunal omitted the fact that there was an inspection of the premises in the year 2007 and that is how the assessee was called upon to pay the tax which was not paid till then. After that, an order-in-original was about to be passed on a show cause notice, but that was avoided by payment of the tax and discharge of the liability. Whether such an act absolves an assessee from payment of penalty and specifically with the aid of Section 80 of the Finance Act, 1994 which was on the statute book till its amendment by Finance Act, 2015 (Act No. XX of 2015) with effect from 14 May 2015, is the question which has not been examined by the Tribunal at all. There is rather no reference to Section 80 of the Finance Act, 1994.

9. In the light of the above, we are of the view that the appeal raises a substantial question of law. It is admitted on the following substantial question of law:

"(a) Whether the waiver of penalty under Section 78 is justified in the cases where the suppression of facts for evading Service Tax is proved?"

10. With the consent of both sides, we have taken up the appeal for hearing and final disposal. We are of the view that there is much substance in the complaint of Mr. Jetly that the Tribunal''s order is cryptic and the reasons are wholly unsatisfactory. Equally, we are of the view that there is substance in the contention of learned advocate for the assessee that the matter need not be kept pending before us and the Tribunal should have an opportunity to go into all the concerned legal provisions and consider whether they are applicable to the given facts and circumstances, particularly Section 80 of the Finance Act, 1994. Even otherwise, she would say that the Tribunal had always that provision in mind. In these circumstances, whether the matter can be approached from this angle or not must be decided by the Tribunal once again.

11. Accordingly, we quash and set aside the impugned order of the Tribunal

dated 3 January 2014 and restore the appeal to the file of the Tribunal for a decision afresh and in accordance with law. However, we clarify that beyond underlining the controversy and inviting the Tribunal''s attention to the salient features thereof, we have not expressed any opinion thereon. We have kept all pleas open in that regard. This appeal is allowed accordingly with no order as to costs.

