(2015) 04 MAD CK 0095

In the Madras High Court

Case No : C.M.A. No. 1018 of 2011

The Commissioner of Central Excise Central Excise Commissionerate	APPELLANT
Vs	
Joe Transport and Others	RESPONDENT

Date of Decision : 23-04-2015

Acts Referred:
Central Excises and Salt Act, 1944 — Section 11A, 11AC, 11D
Finance Act, 1994 — Section 68, 70, 73(1), 73(1)(a), 73(a)

Citation : (2015) 39 STR 366

Hon'ble Judges : R. Sudhakar, J;K.B.K. Vasuki, J

Bench : Division Bench

Advocate : M. Santhanaraman, for the Appellant; S. Yashwanth, Advocates for the Respondent

Judgement

R. Sudhakar, J.—Aggrieved by the order of the Tribunal in allowing the appeal filed by the assessee, the appellant/Revenue is before this Court by filing the present appeal. This Court, vide order dated 12.4.2011, while admitting the appeal, framed the following substantial questions of law for consideration :-

"1) Whether the Hon''ble Tribunal is legal and correct in setting aside the penalty imposed under Section 78 of the Finance Act, 1994, when there was wilful suppression of facts with an intent to evade service tax, as vividly brought out in the show cause notice which was affirmed in Order-in- Original?

2) Whether the Hon''ble Tribunal is right in holding that there is no need in this case for imposition of penalty under Section 78 of the Finance Act, 1994 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?"

2. The appellant is a service provider, more particularly providing cabs on rental basis. A show cause notice was issued, which was agitated and a demand for

service tax of Rs. 4,04,132/- was passed together with education cess of Rs. 2,317/- totalling to Rs. 4,06,449/- for the period June, 2001 to December, 2005 under proviso to Section 73(1) of the Finance Act, 1994. In addition to the above, penalty of Rs. 4,06,449/- under Section 78; penalty of Rs. 100/- per day from the date on which service tax for the amount of June, 2001 was ought to have been paid till the date of payment, subject to a maximum of Rs. 4,06,449/-, under Section 76; Rs. 1,000/- under Section 77 and Rs. 500/- under Section 75-A of the Finance Act were also imposed on the assessee. The amount of Rs. 5,89,971/- paid by the assessee was adjusted in full against the demand of service tax amounts apart from adjusting the balance amount of Rs. 6,227/- towards the penalty. Against the said order, the assessee filed appeal before the Commissioner (Appeals), who rejected the appeal upholding the order of the adjudicating authority.

3. Aggrieved against the said order of the Commissioner (Appeals), the assessee filed appeal before the Tribunal and the Tribunal, while set aside the penalty imposed under Section 78 of the Finance Act, however, directed the assessee to pay interest on the delayed payment of tax forthwith. Aggrieved by the said order of the Tribunal, the appellant/Revenue is before this Court by filing the present appeal.

4. Heard the learned standing counsel appearing for the appellant/Department and the learned counsel appearing for the respondent/assessee and perused the materials available in the typed set of documents.

5. The main bone of contention of the Department is that the finding of the adjudicating authority is very clear and categorical, in that there is a wilful suppression of the value of taxable services rendered by the assessee and, therefore, penalty is also imposable under Section 78 of the Act. For better clarity, the order of the original authority, imposing penalty, is extracted hereinbelow :-

"12. From the above it is also seen that Joe Transport have intentionally suppressed the taxable services provided by them to the organizations like CPCL, GAIL, etc., with an intention to evade payment of service tax. The taxable services provided by Joe Transport were brought to light only by the investigations conducted by the department. Hence, the amount of Rs. 4,06,449/- (Service Tax : Rs. 4,04,312/- and Education Cess : Rs. 2,317/-) being the service tax payable by Joe Transport for the taxable services provided by them during the period from June, 2001 to December, 2005 is liable to be recovered under proviso to Section 73(1) of the Finance Act, 1994. Further the excess amount of Rs. 1,77,296/- collected by Joe Transport from GAIL in excess of the service tax due is liable to be recovered from them under Section 11D of the Central Excise Act, 1944 read with Section 83 of the Finance Act, 1994.

13. Inasmuch as the service provided has wilfully suppressed the value of taxable services rendered by him and did not pay service tax, they are liable to

penal action under Section 78 and Section 76 of the Finance Act, 1994. Further, they registered with the department only in 2003 and did not file the statutory returns in terms of Section 70 of the Finance Act, 1994. For the above contraventions, I find that Joe Transport are liable to penal action under erstwhile Section 75A and Section 77 of Finance Act, 1994. Further Joe Transport failed to pay service tax in accordance with the provisions of Section 68 of the Finance Act, 1994 and hence they are liable to pay interest under Section 75 of the Finance Act, 1994.

14. In view of the above, I pass the following order :-

i. I confirm the demand of Rs. 4,06,449/- (Service Tax : Rs. 4,04,312 and Education Cess : Rs. 2,317/-) (Rupees Four Lakh Six Thousand four Hundred and Forty Nine only) being the service tax payable for the period from June, 2001 to December, 2005, on Joe Transport, Nagapattinam, under proviso to erstwhile Section 73(a)/Section 73(1)(a)/ present Section 73(1) of the Chapter V of the Finance Act, 1994;

ii. I appropriate an amount of Rs. 4,06,449/- out of the total amount of Rs. 5,89,971/- already paid by them, against the service tax due as in (i) above;

iii. I confirm the demand of Rs. 1,77,296/- (Rupees One Lakh Seventy Seven Thousand Two Hundred and Ninety Six only) being the amount representing service tax collected from GAIL, on Joe Transport, Nagapattinam under Section 11D of Central Excise Act, 1944, read with Section 83 of the Finance Act, 1994;

iv. I appropriate an amount of Rs. 1,77,296/- (Rupees One Lakh Seventy Seven Thousand Two Hundred and Ninety Six only) out of the balance of Rs. 1,83,523/- available from the amount already paid by Joe Transport, towards the amount due in (iii) above;

v. I impose a penalty of Rs. 4,06,449/- (Rupees Four Lakhs Six Thousand Four Hundred and Forty Nine only) on Joe Transport, under Section 78 of the Finance Act, 1994;

vi. I appropriate the balance amount of Rs. 6,227/- (Rupees Six Thousand Two Hundred and Twenty Seven only) out of the amount of Rs. 5,89,971/- already paid by them, towards the penalty due in (v) above;

vii. I impose a penalty of Rs. 100/- (Rupees Hundred only) per day, from the date on which service tax for the amount of June, 2001 is ought to have been paid till the date of payment of service tax as in (i) above, subject to a maximum of Rs. 4,06,449/- under Section 76 of the Finance Act, 1994;

viii. I impose a penalty of Rs. 1,000/- (Rupees One Thousand only) under Section 77 of the Chapter V of the Finance Act, 1994;

ix. I impose a penalty of Rs. 500/- (Rupees Five Hundred only) under erstwhile Section 75A of the Finance Act, 1994;

x. I confirm the demand of interest at appropriate rates, under Section 75 of the Finance Act, 1994."

6. It is the further submission of the Department that once the wilful suppression on the part of the assessee stands proved, the Department is empowered to impose penalty under Section 76 as well as under Section 78 of the Finance Act, 1994, and that the imposition of penalty is mandatory and is not at the discretion of the authority.

7. The question of imposition of penalty has been decided by the Larger Bench decision of the Supreme Court in Union of India (UOI) and Others Vs. Dharamendra Textile Processors and Others, (2008) 219 CTR 617 : (2008) 133 ECC 247 : (2008) 159 ECR 247 : (2008) 231 ELT 3 : (2008) 306 ITR 277 : (2008) 11 JT 255 : (2008) 13 SCALE 233 : (2008) 13 SCC 369 : (2008) 174 TAXMAN 571 : (2009) 11 Vat Reporter 63 : (2008) 18 VST 180 , wherein it was held that penalty under Section 11AC of the Central Excise Act is mandatory and there is no element of discretion. The relevant portion of the said decision reads as under:

"26. In Union Budget of 1996-97, Section 11AC of the Act was introduced. It has made the position clear that there is no scope for any discretion. In para 136 of the Union Budget reference has been made to the provision stating that the levy of penalty is a mandatory penalty. In the Notes on Clauses also the similar indication has been given.

27. Above being the position, the plea that the Rules 96ZQ and 96ZO have a concept of discretion inbuilt cannot be sustained. Dilip Shroff''s case (supra) was not correctly decided but Chairman, SEBI''s case (Supra) has analysed the legal position in the correct perspectives. The reference is answered...."

8. Similar view was taken by the Supreme Court in Union of India (UOI) Vs. Rajasthan Spinning and Weaving Mills, (2009) 224 CTR 1 : (2009) 165 ECR 93 : (2009) 238 ELT 3 : (2009) 7 JT 314 : (2009) 8 SCALE 231 : (2009) 13 SCC 448 : (2009) 10 SCR 58 : (2009) 20 STT 481 : (2009) 180 TAXMAN 609 : (2009) 4 UJ 1637 : (2009) 11 Vat Reporter 210 . It is apposite to refer to paragraphs (23) to (25) of the said decision, which read as under:

"23. The decision in Dharamendra Textile must, therefore be understood to mean that though the application of Section 11AC would depend upon the existence or otherwise of the conditions expressly stated in the section, once the section is applicable in a case the concerned authority would have no discretion in quantifying the amount and penalty must be imposed equal to the duty determined under sub-section (2) of Section 11A. That is what Dharamendra Textile decides.

24. It must, however, be made clear that what is stated above in regard to the decision in Dharamendra Textile is only in so far as Section 11AC is concerned. We make no observations (as a matter of fact there is no occasion for it!) with

regard to the several other statutory provisions that came up for consideration in that decision.

25. In the light of the discussion made above it is evident that in both the appeals, orders were passed by the Tribunal on a wrong premise. In both the appeals, therefore, the impugned orders passed by the Tribunal are set aside and the matters are remitted to the respective Tribunals for fresh consideration, in accordance with law, and in the light of this judgment...."

9. This Court also, in the case of Dhandayuthapani Canteen - Vs - CESTAT (CMA No. 2440 of 2008 dated 12.12.2014), considering the various case laws, as discussed above, on the subject, held in favour of the Revenue holding that even when penalty under Section 76 of the Finance Act, 1994 has been imposed, penalty under Section 78 of the Finance Act, 1994 is also imposable.

10. In such view of the matter, this Court finds that the Tribunal has come to an erroneous conclusion that once penalty is imposed under Section 76 of the Finance Act, 1994, there is no necessity for imposition of penalty under Section 78 of the Finance Act, 1994. The above view of the Tribunal runs contrary to the law laid down on the subject, as referred to supra. For the reasons stated above, the substantial questions of law are answered in favour of the appellant/Revenue and against the respondent/assessee.

11. In the result, the appeal is allowed. However, it is made clear that the respondent/assessee is entitled to raise such legal pleas/objections that may be permissible as per law. However, in the circumstances of the case, there shall be no order as to costs.

