

ORDER-IN-APPEAL:

The present appeal has been filed by M/s. Kipon Pharmaceuticals Pvt. Ltd. (hereinafter referred to as the appellant) against Order In-Original No.17/Demand/2016-17 dated 25.01.2017 (hereinafter referred to as the Impugned Order) passed by the Assistant Commissioner, Central Excise Division, Surindranagar (hereinafter referred to as the original Authority) wherein he has (i) confirmed the Service Tax demand of Rs.4,80,804/- on the appellant under Section 73(1) of the Finance Act, 1994 together with interest under section 73(b) and imposed penalty of Rs.4,80,804/- under Section 76(a) and imposed penalty of Rs.10,015/- under Section 77(2) (B) and (ii) appropriated the payment of Service Tax of Rs.4,80,804/- and interest of Rs.92,015/- against liability in respect of Services received from their Directors for the period from December 2012 to October 2013.

2. Briefly stated the facts of the case are that the appellant is engaged in the manufacturing of 'SP' Medicines and holding Service Tax Registration No. AA-32MA-7756700. During the course of audit on 18/18-11-2013, it was observed that the appellant has paid Rs.38,80,000/- as Professional Fees and Commission to their Directors I.J.H. However, it was noticed that the appellant has not paid service tax of Rs.4,80,804/- of the amount 38,80,000/- as Commission to the Directors I.J.H. under Reverse Charge Mechanism during the period, December 2012 to October 2013. The appellant had ignored the observation raised by the Audit as per EAF No.062013-4 dated 17-12-2013 and Service tax payment of Rs.4,80,804/- alongwith interest of Rs.92,015/- was paid vide Order CIN No.0220282271120130017 & No. 0220282271131509023 respectively on 27-11-2013.

3. Department issued Show Cause Notice No.0001-11061306/JV/2013-14 dated 29.02.2016 to the appellant asking them to show why (i) Service tax amounting to Rs.4,80,804/- payable and already paid by them should not be apportioned against their liability under provisions of Section 73(1) of the Finance Act, 1994 read with Section 69 of the Finance Act, 1994 (ii) interest at the applicable rate Rs.92,015/- payable and already paid by them should not be apportioned against their liability under provisions of Section 73 of the Finance Act, 1994 (iii) penalty under Section 77(2) of the Act should not be imposed upon them for contravention of provision of Section 73 of the Act read with Rule 7 of the Rules as they failed to assess their correct tax liability and file correct service tax returns for the period under reference and (iv) penalty should not be imposed upon them under section 73 of the Finance Act, 1994 for non-payment of their due Service tax in time and for suppressing the value of taxable services with an intention to evade payment of Service tax. The adjudicating authority while confirming the demand

and imposed penalty as mentioned at Para 1 above. Observed that the appellant had not exercised their option to pay up the penalty under Section 73 (4) (a) so as to conclude arrangements in the matter as no intimation of such payment in this regard had been provided in writing to the department. He also observed that with the introduction of Reverse Charge Mechanism with Notification No.30/2012-87 dated 20.06.2012 (w.e.f. 01.07.2012), the service receiver i.e. the appellant was required to pay the Service tax on 100% of the amount of taxable services provided, under the provisions of Section 69 of the Finance Act, 1994 read with Rule 4 of the Service Tax Rules, 1994.

4. The personal hearing in the matter was held on 24.01.2017. Sanjiv Mehra, Chartered Accountant and Shri Nilesh Chakravarti, Central Excise in charge authorized representatives appeared on behalf of the appellant and related the grounds of appeal. They submitted that Service tax along with interest has already been paid by them prior to issuance of SMTN, penalty cannot be imposed as provided under Section 73(3) of Finance Act, 1994 and requested to decide the case at an earliest and on merits.

5. Find that in case of instant appeal the impugned order was received by the appellant on 07.02.2017 and date of filing of appeal is 04.04.2017. Hence, the appeal has been filed within the stipulated time period and there is no delay in filing the appeal. The condition of pre-deposit also stand fulfilled.

6. Find that the demand of Service Tax is already paid by the appellant. The only issue to decide in the instant appeal is whether penalty imposed is correct or otherwise.

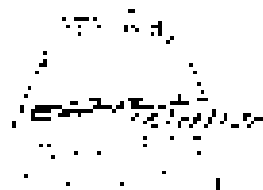
7. Section 73(3) of the Finance Act, 1994 provides that where any service tax has not been levied or paid or has been short levied or short paid or erroneously refunded, the person chargeable with the service tax, or the person to whom such tax amount has erroneously been made, may pay the amount of such service tax, chargeable or erroneously refunded, on the basis of his own ascertainment thereof, or on the basis of tax ascertained by a Central Excise Officer before service of notice on him under sub-section (1) in respect of such service tax, and inform the [Central Excise Officer] of such payment in writing, who, on receipt of such information shall not issue any notice under sub-section (1) in respect of the amount so paid. Further Explanation 2 of the said Section also clarify that no penalty under any of the provisions of this Act or the rules made thereunder shall be imposed in respect of payment of service tax under this subsection and interest thereon.

3. On going through the impugned order, I find that the appellant has reported the service tax with interest immediately on being pointed out by the audit. I find that conditions regarding waiver of penalty made by the appellant has ample force. If they have paid service tax amount along with interest immediately on being pointed out by Audit and before issuance of show cause notice, therefore, as per Section 73(3) of the Finance Act 1994 they deserve leniency in the case. To address my view point, please refer to the decision of APPELLATE COMPTROLLER EDUCATION: I, UTTARANCHAL, C. EX, MADURA, dated on 2014 (21) S T R, 33 (11) - Chennai, wherein keeping in view the Section 80 of Service Tax Act, the imposition of penalties under section 76 and 78 were set aside. Applying the ratio of said decision I find that in the present case no penalty is required to be imposed under section 76(2) and 78 of the Act.

4. I further find that CBEC has issued guidelines from time to time through the circulars that when the assessee makes payment of service tax along with interest, the proceedings should be treated as concluded. Board's letter F No.137/167/2016 CX.I dated 04.10.2014 which clarified conclusion of proceedings in terms of sub-section (3) of Section 73 of the Act; that the SGN is not warranted when the service tax was paid step-by-step by the appellant. Thus, I find that as contended by the appellant the waiver of penalties is also get fulfilled from the fact that they would be eligible for the waiver of show cause notice in terms of section 73(3) of the Finance Act, 1994, since they have already paid service tax along with interest before issuance of show cause notice in the matter.

10. In view of the foregoing, I set aside the impugned order passed by the adjudicating authority and allow the appeal filed by the appellant in above terms.

11. The appeal filed by the appellant stands disposed of in above terms.



(P. A. Vasave)
 Commissioner (Appeals) /
 Commissioner
 CGST & Central Excise,
 Kulsb (Gandhidham)

F. No. V/277/DVT/2017

Date: 12.04.2017



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2. The Commissioner, GST & C. Ex., Bhavnagar
3. The Additional Commissioner, GST & C. Ex. (System), Bhavnagar
4. Assistant Commissioner, GST & Central Excise Division - Bhavnagar

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