

II. ORDER-IN-APPEAL II

M/s. Nirubha Mangalsinh Cahil & Co., Office No. 304, Nirma Plaza Complex, Lalaji Road, Near Sureswar Mandar Chowk, Bravnagar (hereinafter referred to as "the appellant") filed appeal against Order-in-Original No. 01/AC/STAX/DCW/2017-18 dated 17.04.2017 (hereinafter referred to as "the impugned order") passed by the Assistant Commissioner (AC), Central Excise HQ., Bravnagar (hereinafter referred to as "the lower adjudicating authority").

2. The brief facts of the case are that the appellant provided taxable services "Commercial or Industrial Construction Service"; "Business Auxiliary Service"; "Erection, Commissioning and Installation Service"; and "Site Formation and Clearance, Excavation and Earthmoving and Demolition Service" to various customers, either as a contractor or as a sub-contractor but made paltry payment of Rs. 1,757/- only towards service tax. Accordingly, inquiry was initiated against the appellant under summons proceedings and the appellant stated that they did not pay any other amount towards service tax except Rs. 1,757/- during the period from 2010-11 to 2013-14; that they were doing work as per work order/agreement entered with various customers, however, there was no work order/agreement in writing with M/s. Bhanagar Energy Company Limited; M/s. Bright Construction and M/s. Khushal Corporation during the period from 2010-11 to 2013-14; that they were not aware of service tax provisions on the activities undertaken by them and as such neither collected any amount towards service tax nor paid it to the Government Exchequer except Rs. 1,757/- and so declared actual taxable amount of consideration in S-1 Returns; that the appellant submitted various financial documents like work orders/letter of Intent/Invoices/Financial Ledgers/Audit Reports etc.; that the information submitted by the appellant revealed that as per their various financial documents, they received gross taxable income of Rs. 4,12,5,119/- during the period from 2010-11 to 2013-14 towards provision of services, having service tax liabilities of Rs.

48,19,722/- however, they paid service tax of Rs. 1,787/- only and hence they have short-paid service tax of Rs. 48,17,975/-. However, the appellant paid service tax of Rs. 4,00,000/- on 17.11.2014. Show Cause Notice E. No. 3/15-20/Dem-5/HQ/2015-16 dated 10.02.2016 was issued to the appellant proposing recovery of service tax of Rs. 48,17,975/- under proviso to Section 73(1) of the Finance Act, 1994 (hereinafter referred to as 'the Act') along with interest under Section 75 of the Act and for imposition of penalty under Section 76, 77, 77(1)(a), 77(1)(b), 77(1)(c)(i) & 78 of the Act. The SCN was adjudicated by the lower adjudicating authority vide impugned order wherein demand of service tax of Rs. 49,17,975/- has been confirmed under proviso to Section 73(1) of the Act and appropriated Rs. 4,00,000/- paid; recovery of interest under Section 75 of the Act and imposed penalty of Rs. 11,000/- each under Section 77(2), 77(1)(a), 77(1)(b), 77(1)(c)(i) & Rs. 48,17,975/- under Section 78 of the Act.

3. Being aggrieved by the impugned order, the appellant filed the present appeal, *inter alia* on the grounds that,

(i) The service tax was not being paid because of a bonafide belief that the same was not payable and the appellant did not know the service tax law; however, the appellant paid service tax Rs. 4,00,000/- on 17.11.2014 during investigation.

(ii) The appellant did not contest levy of service tax. Since, the appellant was under bonafide belief regarding their activity falls under service tax or not, therefore, there was a reasonable cause on their part in not depositing service tax. The appellant is of the view that they are entitled for the benefit of Section 80 of the Act and accordingly, no penalty should be imposed on them.

(iii) Mere detection by the department does not mean that non-payment of service tax was with intention to evade unless the department brings out clear facts that the appellant was having the knowledge that service tax was payable but still they did not pay the same with intention to evade. No such fact forthcoming from SCN as well as impugned order. It is a fact that the appellant paid Rs.

recovered the service tax from their customers. Therefore, the appellants requested to grant immunity from the penalty as per decision of the Hon'ble Bombay High Court in the case of Ashish Yashirao Patel reported as 2008 (10) STR 5 (Bom) and Lark Chemicals reported as 2008 (9) STR 2311 (Bom).

4. Personal hearing in the matter was attended to by Shri Madhuk N. Vadodriya, CA, who reiterated the grounds of appeal and submitted that they have paid Rs. 4 lacs during investigation which has also been appropriated in the impugned order; that penalty is not impossible on them and needs to be waived under Section 80 of the Act as there was no suppression of facts on their part in this case.

Findings:-

5. I have carefully gone through the facts of the case, the impugned order, appeal memorandum and the submissions of the appellant. I find that the impugned order was received by the appellant on 05.06.2017 and appeal is filed on 27.07.2017 i.e. delay of 25 days beyond normal period of 60 days from the date of receipt of the impugned order. The appellant has stated that their consultant was engaged with adjudication proceedings of various authorities due to drive of adjudication; early work of notices issued by the Income Tax Department due to demonetization of currency; statutory audit work of Nationalized Banks and migration & consulting work of GST etc. Since delay in filing appeal is of 25 days only, I condone delay and proceed to decide the appeal on merits. The issue to be decided in the present appeal is as to whether the impugned order imposing penalty, in the given facts of the case, is proper or otherwise.

6. I find that the appellant has not contested demand of service tax of Rs. 48,17,975/- confirmed vide the impugned order and has filed appeal seeking immunity from imposition of penalty in terms of Section 80 of the Act.

6.1 I find that the lower adjudicating authority has held that the

appellant provided various taxable services during the period from 2010-11 to 2013-14 but, they neither assessed appropriate service tax nor paid service tax payable to the Government; that the appellant never disclosed receipt of income from such taxable services in their S1-B Returns. These facts could be unearthed by the department after investigation and the appellant made payment of due service tax of Rs. 1,787/- against liability of Rs. 45,17,975 on their own and Rs. 1,00,000/- after persuasion by the department. The appellant contravened the provisions of Section 68 and Section 70 of the Act with intent to evade payment of service tax and therefore, the lower adjudicating authority has correctly confirmed the demand under the proviso to Section 73(1) of the Act invoking extended period.

6.2 The appellant has contended that they have not charged/collected service tax and hence not paid service tax on account of their bonafide belief that the activities carried out by them were not liable to service tax and therefore, this is not a case of suppression of facts with intent to evade payment of service tax knowingly. Hence, imposition of penalty is required to be set aside and benefit under Section 80 of the Act may be granted to them. I find that Section 80 of the Act can be invoked only when the appellant is able to establish that there was reasonable cause for their failure to pay service tax. In the present case, the appellant has not provided any justified reason for their failure in making payment of service tax. The appellant has not paid service tax payable even now, after more than 3 years of detection by the department.

6.3 I find that the turnover of the appellant is substantial and hence, if they had any doubts regarding charging & payment of service tax, they could have and should have had advice from the department, which was not done by them. In view of above facts, I have no option but to hold that they suppressed the facts from the department right from the beginning with intent to evade payment of service tax. The part payment of Rs. 4,00,000/- made by the

appellant during investigation, after detection by the department, could not be of any help to them. The mala-fide intent of the appellant is established beyond doubt in this case due to non-payment of full service tax even now and therefore, this case is not fit to invoke the provisions of Section 80 of the Act.

7. The act of the appellant also cannot be overlooked in the name of ignorance of law. I find that the Hon'ble Gujarat High Court, in the case of *Rajeshree Dyg. & Ptg. Mills (P) Ltd.* reported as 2014 (205) F.T.R. 447 (G.J.) has held that *'We are conscious of the fact that this being the provision embedded in the statute itself, nobody can be permitted to plead ignorance of the law. We are also aware that this being the law and intent of legislation being also very clear all concerned are expected to know the law.'* The Hon'ble Supreme Court in the case of *Cummins India Ltd* reported as 2013 (297) F.T.R. 468 (S.C.) has held that it is settled principle that ignorance of law is no excuse not to pay taxes.

8. In view of above facts, the demand was correctly confirmed invoking extended period under Section 72 (1) of the Act. I have already held that the appellant had suppressed the material facts from the department with intent to evade payment of service tax and hence, confirmation of demand of Rs. 48,17,975/- and imposition of penalty of Rs. 48,17,975/- under Section 78 of the Act is correct, legal and proper. Since, the impugned order had already given option to pay penalty to 25% of Rs. 48,17,975/- as provided under Section 78 of the Act, no further relaxation can be granted by this Appellate Authority.

9.1 I find that the appellant failed to obtain Service Tax Registration and also failed to file it amended in time in terms of Section 69 of the Act read with Rule 4 of the Service Tax Rules, 1994 (hereinafter referred to as 'Rules'). Hence, penalty of Rs. 10,000/- imposed under Section 77(1)(c) of the Act is upheld.

9.2 The lower adjudicating authority held that the appellant failed

to maintain and preserve statutory records and also failed to produce the same when called for from them and therefore, imposed penalty of Rs. 10,000/- each under Section 77(1)(b) and Section 77(1)(c)(ii) of the Act. I find that demand has been worked out on the basis of the various documents / records submitted by the appellant only and hence, the findings of the lower adjudicating authority for imposition of penalty under Section 77(1)(b) and Section 77(1)(c)(ii) of the Act are not correct and are required to be set aside and 100%.


8.3 I also uphold recovery of late fee of Rs. 1,000/- imposed/payable under Rule 70(c) of the Rules read with Section 70 of the Act for late filing of ST-3 Returns for the period from April, 2013 to September, 2013.


8.4 The lower adjudicating authority has held that the appellant did not file prescribed ST-3 Returns under Section 70 of the Act in respect of taxable services in question and therefore, penalty imposed under Section 77(2) of the Act, whereas late fee of Rs. 1,000/- imposed for filing returns late. Thus, penalty of Rs. 10,000/- imposed under Section 77(2) of the Act is set aside.

9. In view of above, I uphold the impugned order (except penalty of Rs. 10,000/- imposed under Section 77(2), 77(1)(b) and 77(1)(c)(ii) of the Act as discussed in Para 8.2 and 8.4 above) and reject the appeal.

९.१ अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।

9.1 The appeal filed by the appellant stand disposed off on above terms.

आ.स.स.

 आ.स.स. अधिकारी
 जिला कार्यालय


 (कुमार अतीश)
 आयुक्त (अपीलस)

By Regd. Post A.D.

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पास, भावनगर.

Copy for information and necessary action to:

- 1) The Chief Commissioner, CGST & Central Excise, Ahmedabad Zone, Ahmedabad for his kind information.
 - 2) The Commissioner, CGST & Central Excise, Bhavnagar Commissionerate, Bhavnagar.
 - 3) The Assistant Commissioner, CGST & Central Excise Division-I, Bhavnagar.
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