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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Decided on: 21st January, 2019

\+ SERTA 15/2018 & CM 21070/2018

MEINHARDT SINGAPORE PTE. LTD. ..... Appellant
Through: Mr.Sandeep S.Tiwari, Mr.Krishna Kant Pandey, Mr.Sudhir Singh, Ms.Rekha Tiwari & Mr.Sumit Singh, Advocates

versus

COMMISSIONER OF SERVICE TAX, NEW DELHI ..... Respondent
Through: Mr.Harpreet Singh, Sr.Std.Counsel with Ms.Suhani Mathur, Advocate

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE PRATEEK JALAN

S. RAVINDRA BHAT, J. (OPEN COURT)

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1. The appellant urges the question of law as to whether *"imposition of penalty for non-payment of service tax was unwarranted"*.

2. The brief facts are that the appellant was a regular service tax assessee. For certain period starting from 2006-07, 2007-08 to 2008-09 [April to September] the appellant had not paid the entire service tax liability but only discharged a part thereof and also did not pay the amounts due in time. Consequently, it claimed that it was unable to discharge its tax liability on account of some internal difficulties. Furthermore, significantly it claimed that the amounts were not available with it at the relevant time.

The service tax dues were ultimately paid on 09.01.2009 – which is noted in the Show Cause Notice issued to the assessee. After inquiry the Commissioner of Service Tax, issued Show Cause Notice on 12.03.2009, asking the assessee to show cause why the penalty ought not to be imposed, for late payment of service tax. The ground of suppression of material facts too was alleged.

3. The appellant contested the Show Cause Notice and suffered an adjudication order whereby it was imposed with 100% penalty under Section 73(4) read with Section 78 of the Finance Act, 1994.

4. Learned counsel urged that the appellant went before the CESTAT, which affirmed the order of the Commissioner. Consequently, the appellant is before this Court. It is urged in the appeal that the appellant had not indulged in suppression or mis-representation of facts and was rather constrained by the circumstances, inasmuch as it could not deposit the amounts. The Show Cause Notice had alleged both, non-payment of duty and suppression of facts, and sought to reverse the credit granted earlier. Learned counsel urged that the issue of reverse credit was decided in favour of the assessee, however, on erroneous premises, the Commissioner held that the Show Cause Notice with respect to the extended period of limitation [on the ground of suppression of material facts and mis-representation] was warranted.

5. The CESTAT in its analysis of the facts observed as follows:-

> *"5. We have heard both the sides and perused the appeal records. The appellant is only contesting the imposition of penalty under Section 78. We note that the service tax is payable by the appellant, during the material time, only when the consideration for services were received. Thus, it is apparent that the liability to service tax is after the receipt of*

money from the client. It is clearly recorded that the appellants realized the invoice amount inclusive of service tax and they have not paid the service tax to the Government thereafter, as stipulated by the provisions of Finance Act, 1994. It is clear that the amount realised from the clients which included the tax, has been used for internal purposes by the appellant disregarding the statutory tax liability to the Government. The bonafideness of the appellant cannot be accepted in such an act. Financial hardship cannot be pleaded against penal action when the tax collected is not remitted to the Government and used for other expenses. Regarding the case laws referred to by the appellant, we note that none of them will come in aid of their case. In ***Gupta Metallics & Power Ltd. vs. CCE, Nagpur*** *reported in* ***2016 (44) S.T.R. 681 (Tri. – Mumbai)****, the Tribunal was dealing with bonafide mistake of the appellant not declaring certain amount received as commission. In* ***Vista Infotech vs. CST, Bangalore*** *reported in* ***2010 (17) S.T.R. 343 (Tri. – Bang.)****, the Tribunal is dealing with a case of delay in payment of service tax for the period January to June 2007 which was paid on 5th and 19th July, 2007. The decision of Hon'ble High court of Karnatka in* ***CCE & ST, LTU, Bangalore vs. Adecco Flexione Workforce Solutions ltd.*** *reported in* ***2012 (26) S.T.R. 3 (Kar.)*** *and the decision of the Tribunal in the case of* ***CCE, Visakhapatnam – II vs. M/s Tirupathi Fuels Pvt. Ltd.*** *reported in* ***2016 – TIOL – 2311 – CESTAT - HYD,*** *were examining the application of sub-section (3) of Section 73 to the appellant's case. We note that in the present case, the appellant did not discharge the service tax liability even after receipt of money with tax from the clients for a long period of more than one financial year. This fact has been admitted. It is also noted that in the guise of getting central registration in Delhi they have given an impression to the Service Tax Authorities at Ranchi that the tax due is being discharged at Delhi. The Original Authority has recorded that after numerous letters to follow up, it is*

noted that the appellant was registered centrally at Delhi only on 15/12/2008. Thus, we note that the attitude of the appellant did not provide substance to their claim of bonafideness for delay in discharging of tax liability in time. In ***Indsur Global Ltd. vs. Addl. Commr. of Service Tax, Vadodara*** *reported in* ***2015 (38) S.T.R. 14 (Guj.)****, the Hon'ble Gujarat High Court held that when the assessee recovered the service tax from service recipient and did not deposit with the Government till it was pointed out and followed up by the Department, provision of Section 80 cannot be invoked. The said order has been affirmed by the Hon'ble Supreme Court reported in* ***2016 (44) S.T.R. J59 (S.C.).*** *In,* ***IWI Crogenic Vaporization Systems India vs. CCE, CST, Vadodara – II*** *reported in* ***2015 – TIOL – 1458 – CESTAT – AHM.,*** *the Tribunal held that when the tax was recovered and not paid to the Department, it is clearly a case of evasion of tax with intention. In the present case also, we note that the appellant did not file statutory returns indicating the provision of service and receipt of taxable income and accordingly we are in agreement with the lower Authority regarding imposition of penalty on the appellant.*

6. The learned Consultant for the appellant submitted that certain amounts of service tax paid in normal course was also taken into account while imposing penalty by the Original Authority. In this connection, we note that there is no co-relation that any regular payment made by the appellant is towards the services rendered during a particular month. In fact when the appellants were receiving consideration from clients and not discharging the full tax liability, later payment of tax liability in part will be attributable to the past arrears as there is no dispute regarding the tax liability at any point of time. In other words, when there is a non-payment of service tax within the stipulated time, the authorities are right in proceeding against the appellant to confirm and recover the

non-paid tax liability and to impose penalty. We note that the closure of proceeding as pleaded by the appellant in terms of Section 73(3) is not possible in the present case in view of the facts discussed above. Such closure is not permissible if the case is covered under the provisions of Section 73(4).

7. The appellant also pleaded for reduction of penalty to 25% is available to the appellant when the service tax dues alongwith interest and alongwith the said 25% penalty is paid within 30 days of order passed by the Commissioner. In the present case, though it is recorded that the appellants have discharged service tax liability with interest before the notice they have not paid the 25% of the penalty which is also required to be paid within one month of the order to avail such reduction in penalty. No authority can give extension of time for such concession."

6. This Court is of the opinion that the impugned order is justified and warranted in the circumstances. Whatever be the constraint, the assessee was faced with, it was duty bound to remit amounts collected by it towards service tax, in a planned manner, and as required by law. The deposit belatedly, by it, on the ground that the amounts were deposited on adhoc basis due to operation of a centralised system, cannot be a legitimate excuse. What is evident is that the assessee/appellant withheld the amounts collected from the service recipient as tax liability. As the remitter, assessee/appellant was duty bound to comply with the terms of the Finance Act and Rules, which prescribed not only filing of returns but also periodic deposit of these amounts. The delay in deposit of these amounts spanned over a period of two and half years and therefore, amounted to mis-reporting of true and correct facts. To that extent, the Show Cause Notice was justified. The finding of misreporting too was warranted.

7. As far as the penalty goes, the provision under Section 78 of the Act, and also even Section 73(4), leave no manner of choice; it is a matter of course. The only mitigating circumstances whereby the penalty could be reduced might have been if the assessee had deposited the reduced amounts within 15 or 30 days of receipt of the Show Cause Notice as indicated in proviso 1 and 2 to Section 78, which reads as follows:-

> *"**78.** (1) Where any service tax has not been levied or paid, or has been shortlevied or short-paid, or erroneously refunded, by reason of fraud or collusion or wilful mis-statement or suppression of facts or contravention of any of the provisions of this Chapter or of the rules made thereunder with the intent to evade payment of service tax, the person who has been served notice under the proviso to sub-section (1) of section 73 shall, in addition to the service tax and interest specified in the notice, be also liable to pay a penalty which shall be equal to hundred per cent. of the amount of such service tax:*
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> ***Provided** that in respect of the cases where the details relating to such transactions are recorded in the specified record for the period beginning with the 8th April, 2011 upto the date on which the Finance Bill, 2015 receives the assent of the President (both Days inclusive), the penalty shall be fifty per cent of the service tax so determined.".*
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> ***Provided** further that where service tax and interest is paid within a period of thirty days of —*
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> *(i) the date of service of notice under the proviso to sub-section (1) of section 73, the penalty payable shall be fifteen per cent. of such service tax and proceedings in respect of such service tax, interest and penalty shall be deemed to be concluded;*
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> *(ii) the date of receipt of the order of the Central Excise Officer determining the amount of service tax under sub-section (2) of section 73, the penalty payable shall be twenty-five per cent. of the service tax so determined:*

> ***Provided*** *also that the benefit of reduced penalty under the second proviso shall be available. only if the amount of such reduced penalty is also paid within such period."*

8. In the present case, concededly, reduced penalty amounts were not deposited by the assessee, which is a statutory mandate. No doubt they were paid in the interregnum, at a later stage, pursuant to the permission granted by this Court on account of pre-deposit order made by the CESTAT [after 03.10.12, having regard to the order in CEAC 8/2012], however, that did not in any manner mitigate the appellant's liability; it ought to have deposited the reduced penalty amounts within the time stipulated by law.

9. For the above reasons, the Court holds that there is no merit in the appeal and no substantial question of law arises. The appeal is accordingly dismissed.

S. RAVINDRA BHAT, J

PRATEEK JALAN, J

JANUARY 21, 2019
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