

[2011] 30 STT 10 (New Delhi - CESTAT)

CESTAT, NEW DELHI BENCH

Ess Ess Engineering

v.

Commissioner of Central Excise, Chandigarh

RAKESH KUMAR, TECHNICAL MEMBER

FINAL ORDER NOS. 915-916/2010-SM(BR)

APPEAL NOS. ST/454 & 571/2009-SM

AUGUST 12, 2010

ORDER

1. The facts leading to these two appeals Appeal-No. ST/571/09-SM filed by M/s. Ess Ess Engineering (hereinafter referred to as 'the Appellant') and Appeal No. ST/454/09-SM filed by the Revenue are, in brief, as under :

"1.1 The Appellant are registered with the Department as the person providing the taxable service of Erection, Commissioning and Installation since 1-7-2003. In the course of audit of their records, the auditors were of the view that during the period from 1-7-2003 to Sept.'06, they had not paid service tax on certain value of the taxable service and the entire value of taxable service had not been declared in the ST-3 returns filed by them. The Appellant paid the disputed amount of service tax of Rs. 5,57,285 along with interest of Rs. 1,44,909 during Dec.'06 - March'07 period.

Subsequently however, a show-cause notice dt. 24-4-2008 was issued to the Appellant for -

(a) Confirming the service tax demand of Rs. 5,57,285 under section 73 of the Finance Act, 1994 along with interest and also appropriation an amount of Rs. 5,57,285 together with interest amount of Rs. 1,44,909 already paid by them against this demand; and

(b) imposition of penalty on them under sections 76 & 78 of the Finance Act, 1994.

1.2 The show-cause notice was adjudicated by the Jt. Commissioner *vide* order-in-original dt. 30-6-2008 by which the service tax demand was confirmed along with interest and the amount of Rs. 5,57,285 *plus* interest of Rs. 1,44,909 already paid by them was appropriated towards the service tax demand. Besides this, penalty of Rs. 5,57,285 was imposed on the Appellant under section 78 of the Finance Act, 1994 and penalty equal to 2% of confirmed amount per month during the period of default, subject to ceiling of Rs. 5,57,285 was imposed under section 76 of the Act. On appeal to Commissioner (Appeals), the Commissioner (Appeals) while upholding the service tax demand along with interest and also the imposition of penalty under section 78, set aside the penalty under section 76. The Department has come in appeal against the part of the Commissioner (Appeals)'s order setting aside the penalty under section 76 and M/s. Ess Ess Engineering have filed an appeal against the Commissioner (Appeals)'s order upholding the penalty under section 78."

2. Heard both the sides.

2.1 Shri Vikrant Kakria, Advocate, learned Counsel representing M/s. Ess Ess Engineering pleaded that the appellant had service tax registration, since 1-7-2003, when the service tax was imposed on installation and commissioning service, that they had been paying service tax regularly and filing the ST-3 returns, that the appellant, in addition to erection, installation and commissioning, also performs the jobs of fabrication, dismantling etc. and in the invoices raised by them to their clients, though they had separately mentioned the amounts charged for fabrication & dismantling, they had not paid the service tax on the amount charged for fabrication & dismantling; that it is because of this only that there is difference between the value of taxable service declared by them in their ST-3 returns on which the service tax was paid and the gross amount charged by them from their clients, as disclosed in their financial records which had been shown to the audit, that non-payment of service tax on certain amount was only due to the fact that as per the appellant's understanding, the service tax was not payable on charges for fabrication and dismantling, that as soon as this was pointed out to them they paid the service tax along

with interest and that in view of this, there was no justification for imposition of penalty on them under section 76 or 78 of the Finance Act - more so, when the entire amount of disputed service tax along with interest had been paid by them with prior to issue of show-cause notice. He also pleaded that even if penalty under section 78 is held to be imposable on the Appellant, since the entire amount of service tax along with interest had been paid prior to issue of show-cause notice, in accordance with judgment of the Hon'ble Delhi High Court in the case of *K.P. Pouches v. Union of India* 2008 (228) ELT 31, the original adjudicating authority should have

given an option to the appellant in accordance with the provisions of first proviso to section 78 of the Finance Act to pay reduced penalty within the stipulated period, but since no such option was given, the appellant cannot be deprived of the benefit of reduced penalty in accordance with the first proviso to section 78.

2.2 Shri S.K. Bhaskar, the learned DR, pleaded that this is a case of not disclosing the full value of taxable service with intent to evade the service tax; that the collection of service tax is on the basis of self-assessment and it is the assessee who is responsible for determining his tax liability correctly and making the service tax payment on the basis of self-assessment and correctly declaring the value of taxable service and service tax payable in the ST-3 returns; that since the Appellant did not disclose the full amount of taxable service in the ST-3 returns resulting in short payment remaining undetected till it was detected during audit, the penalty under section 78 has been correctly imposed, that since the service tax payable by the appellant was not paid by the due date, the provisions of section 76 would be attracted, and that this is not a case where the provisions of section 80 can be invoked for waiving the penalty. He also cited the Tribunal's judgment in the case of *Bajaj Travels Ltd. v. CCE* [2009] 21 STT 412 (New Delhi - CESTAT) wherein it was held that the penalty under section 76 as well as 78 can be imposed together.

3. I have carefully considered the submissions from both the sides and perused the records. I find that short payment was detected in course of audit of records of the Appellant company when they submitted their financial records to the audit for inspection. It is not in dispute that the Appellant were registered with Department and they were filing

their returns regularly. The allegation against them is that they were not disclosing full value of the taxable service provided to their clients with intention to evade the service tax. However, the appellant's contention is that in addition to erection, commissioning and installation, they were also undertaking the work relating to fabrication and dismantling, on which they were not paying any service tax, as according to them, service tax was not payable on charges for fabrication and dismantling. On going through the records, I find substance in this contention of the appellant. In view of this, I am of the view that short payment was mainly due to the appellant's understanding that they are not liable to pay service tax on the fabrication and dismantling charges. In view of this so far as penalty under section 76 is concerned, I am of the view that there is a case for invoking section 80.

4. As regards penalty under section 78 is concerned, the same is imposable in a case where service tax has not been levied or paid or has been short levied 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 intent to evade payment of service tax. The question arises as to whether in the circumstances of this case, the penal provisions of section 78 are invokable.

5. Identical words - "fraud, collusion or any wilful mis-statement or suppression of facts or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade the payment of duty", also appear in proviso to section 11A(1) of Central Excise Act, 1944 for invoking longer limitation period of five years for issue of show-cause notice for non-paid, short paid or erroneously refunded duty and Hon'ble Supreme Court in the case of *CCE v. Chemphar Drugs & Liniments* 1989 (40) ELT 276 has held that for invoking this proviso, something positive other than mere inaction or failure on the part of the manufacturer or conscious or deliberate withholding of information, when the manufacturer knew otherwise, is required. In case of *Continental Foundation Jt. Venture v. CCE* 2007 (216) ELT 177 (SC), Hon'ble Supreme Court has held that since the expression - "Suppression" in proviso to section 11A(1) is accompanied by very strong words such as "fraud" or "collusion", it has to be construed strictly and mere omission to give correct

information is not suppression of facts unless it was deliberate act to evade the payment of duty and that suppression means failure to disclose full information with intent to evade payment of duty. The view that the word “suppression” gets its colour from the words “fraud” and “collusion” preceding the same, is in accordance with the well established principle of interpretation of statutes—*Noscitur - a sociis*, according to which when two or more words susceptible of analogous meaning are coupled together, they take, as it were, their colour from each other and the meaning of the more general gets restricted to a sense analogous to that of the less general.

6. The ratio of the above judgments of Hon'ble Supreme Court with regard to proviso to section 11A(1) of Central Excise Act, 1944 would apply to the provision of section 78 of the Finance Act, 1994 where identical words have been used. Therefore, for imposition of penalty under section 78 some positive evidence of deliberate misdeclaration of value of taxable service with intent to evade the service tax, other than mere failure to declare the full value of taxable service in ST-3 returns must be produced. In this case, there is no dispute that in the books of account and other financial records, all the transactions had been disclosed and those records had been produced by the Appellant to the Departmental auditors. In view of these circumstances, I am of the view that there is no justification for imposition of penalty under section 78.

7. In view of the above discussion, the appeal filed by the Department is dismissed and the appeal filed by the Appellant is allowed.

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