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

Reserved on: March 11, 2015
Pronounced on: April 17, 2015

\+ **CEAC 95/2014**

DELHI TRANSPORT CORPORATION ..... Petitioner

Through: Mrs.Avnish Ahlawat with Ms. Latika Choudhary and Ms.Anchal Choudhary, Advs.

versus

COMMISSIONER SERVICE TAX ..... Respondent

Through: Mr.Rahul Kaushik, Adv.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE R.K.GAUBA

MR. JUSTICE R.K.GAUBA

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1. This appeal under Section 35G of the Central Excise Act, 1944 has been preferred by Delhi Transport Corporation (DTC), a Central public sector undertaking, to assail the order dated 25.04.2014 passed by the principal bench of Custom Excise and Service Tax Appellate Tribunal (hereinafter referred to as "the CESTAT"), dismissing the appeal Nos. 174-176 of 2010, thereby confirming the liability of the appellant to service tax, interest and penalties assessed/imposed by the Commissioner (Adjudication) through order dated 01.10.2009 in the wake of show cause notices dated 14.01.2008, 09.07.2008 and 01.08.2008 covering the period 01.05.2006 to 31.03.2008.

2. The background facts may be noted at the outset.

3. With the objective of augmenting its revenue, DTC entered into

contracts with seven agencies (contractors/advertisers) thereby providing space to such parties for display of advertisements, *inter alia*, on bus-queue shelters and time-keeping booths. The said contracts included one dated 08.11.2004 with M/s Shivaai Industries Pvt. Ltd (SIPL), 2305, Dharampura, Chawri Bazar, Delhi-110006 (service tax registration No. DL-1/ST/R-II/ADV/SIPL/1921/06) and the other M/s International Avenues (IAV), A-1, Community Centre, C-Block, Naraina Vihar, New Delhi-110028 (service tax registration No. DL-1/ST/R-II/ADVIA/1907/06). It appears that both the said contracts contained similar stipulations including clause No. 9 which would read as under:-

> *"It shall be responsibility of the contractor/Advertiser to pay direct to the authority and MCD concerned the advertisement tax or any other taxes levy payable or imposed by any authority and this amount will be in addition to the license fee quoted above"*

4. Concededly, DTC received from the said contractors/advertisers, total sum of ₹ 30,43,71,671/- (Rupees Thirty Crore Forty Three Lacs Seventy One Thousand Six Hundred & Seventy One only) during the period 01.05.06 to 31.03.2007, ₹13,41.91,242 (Rupees Thirteen Crore Forty one Lacs Ninety One Thousand Two Hundred & Forty Two only) during the period 01.04.2007 to 30.09.2007, and ₹14,74,04,453/- (Rupees fourteen Crore Seventy Four Lacs Four Thousand Four Hundred & Fifty three only) during the period 01.10.2007 to 31.03.2008. According to the claim of the respondent-revenue, the aforesaid receipt on account of "sale of space or time for advertisement" gave rise to service tax liability (inclusive of Service Tax @ 12% & Education Cess @ 2% and higher Education Cess at 1%) to the tune of ₹7,19,01,910/- (Rupees Seven Crore Nineteen Lacs One

Thousand Nine Hundred and Ten Only).

5. According to the case of the Revenue on the basis of input received from its Anti-Evasion branch to the effect that DTC having engaged itself in afore-mentioned contracts had failed to pay tax on services thereby rendered, a communication was sent on 25.01.2007, followed by reminders dated 01.03.2007 and 26.03.2007 calling upon it to provide requisite details/documents respecting the contracts, service tax registration certificate and payments made on such account. Since the response received from DTC, *inter alia*, by letter dated 29.03.2007 and the documents furnished therewith, would not indicate requisite compliance, it was advised by letter dated 05.07.2007 of Joint Commissioner, Service Tax to apply for service tax registration and also to depute an officer conversant with the facts, *inter alia*, for purposes of assessment. Reminders were sent on 08.10.2007 and 20.11.2007, however, evoking no response.

6. Against the above backdrop, three show cause notices were issued by the Revenue, they being notices dated 14.01.2008, 25.04.2008 (followed by corrigendum dated 09.07.2008) and 01.08.2008, the import and effect whereof was to call upon DTC to explain as to why:-

> *"(i) The service tax (including Edu. Cess) due amounting to ₹7,19,01,910/(three SCNs), on the value of taxable services should not be demanded and recovered under the proviso to the Section 73(1) read with Section 68 of the Finance Act, 1994 and Rule 6 of Service Tax Rules, 1994 and education cess under Section 95 of Finance Act (no.2) 2004 read with Section 66 of the Chapter - V of Finance Act, 1994;*
> *(ii) Interest at the appropriate rates on the said amount of ₹7,19,01,91 0 t - (three SCNs) which they have not paid during the period May, 2006 to March, 2008, should not be recovered under Section 75 of the Finance Act. 1994;*

(iii) Penalty should not be imposed under Section 76 of the Finance Act, 1994, as amended in view of failure to pay the Service Tax amounting to ₹7,19,01,910/-(three SCNs) on the said services as stated above;
(iv) Penalty should not be imposed under Section 77 of the Finance Act, 1994, as amended in view of failure to get registered and furnish prescribed returns in time;
(v) Penalty should not be imposed under Section 78 of the Finance Act. 1994, as amended on account of suppression of fact that service of Sale of Space for Advertisement had been rendered and intentionally contravening of provisions of service tax law & rules with intent to evade payment of duty and thereby evading Service Tax amounting ₹7,19,01,910/- on the said services as stated herein above."

7. DTC submitted replies by letters dated 03.07.2008, 07.11.2008 and 13.12.2008, *inter alia*, seeking to explain that it is an autonomous body of Govt. of NCT of Delhi created under the Road Transport Act and had no intention to violate the provisions of the taxing statutes. It submitted that the obligation for registration under the Service Tax Rules had escaped the notice of its accounts department and chartered accountant/auditors and thus, the omission was neither intentional nor deliberate. It was submitted that after the requirement had come to its notice, DTC had taken the requisite steps for registration. It further stated that since it was obliged to provide transport services to the public at large at subsidized rates, it had been incurring losses and consequently depended on grants from the government and for this reason it was moving the Central Government to grant exemption. DTC further stated that in terms of the contractual arrangement, the liability towards statutory taxes, including service tax, was to be borne by the contractors engaged by it and that all such contractors, except the two mentioned above, had been paying the service tax chargeable

in their respect pursuant to supplementary bills raised from time to time and further that all such remittances received had been duly deposited with the service tax department. DTC also stated that the money received from such contractors in the form of licence fee, repair or maintenance charges, was being shared with Municipal Corporation of Delhi (MCD) equally and thus, the liability towards service tax arising therefrom also required to be apportioned to the extent of 50%.

8. DTC resisted the show cause notices also on the ground that the two above-mentioned contractors (i.e. Shivaai Industries and Intentional Avenues) had taken a stand contradictory to the contractual terms in such regard, failing to abide by their obligation in terms of clause 9 (as quoted earlier), in spite of directions of this court on the petitions under Section 9 of Arbitration and Conciliation Act, 1996 by orders dated 20.02.2007 and 18.01.2008 in OMP Nos. 465-466/2005. DTC informed the Revenue that it intended to institute contempt/execution proceedings against the contractors for failure to deposit the service tax in spite of contractual obligation and the directions of the High Court. It added that the amount of service tax to the extent realized from the contractors had been deposited with the service tax department.

9. The matter arising out of the three show cause notices was decided through original order No. 23-25/JM/2009 dated 01.10.2009 passed by the Commissioner (Adjudication) Service Tax thereby confirming the demand of ₹7,19,01,910/- under Section 73 read with Section 68 and 95 of the Finance Act, 1994, and Section 140 of the Finance Act, 2007, directing interest (at appropriate rate) to be charged under Section 75 and imposing penalties of ₹1,000/- under Section 77 of Finance Act for failure to file ST-3

returns for each of the three periods, ₹5,000/- under Section 77(1) for not obtaining the registration in accordance with Section 69, ₹5,000/- under Section 77(2) generally for the contravention of the statutory provisions relating to the service tax and ₹7,19,01,910/- (Rupees Seven Crore Nineteen Lacs One Thousand Nine Hundred and Ten Only) under Section 78 for intentional failure to pay the service tax to evade the liability.

10. In reaching conclusions to above effect, the adjudicating authority repelled the contentions of DTC objecting to the assessment for the extended period of five years invoking Section 73 of the Finance Act, 1994 holding that the assessee had contravened the relevant statutory provisions thereby indulging in "suppression of material facts". Penalty under Section 77 of the Finance Act was imposed for the reason the assessee had not got itself registered for purposes of service tax and had also failed to file the requisite returns in such regard respecting the value of the taxable service provided. Penalty was imposed under Section 78 of the Finance Act, declining benefit of Section 80, referring in this context to the facts that the assessee had neither applied for service tax registration nor discharged its service tax liability even though it had been made aware of the obligations. Interest on account of delay in payment of the service tax was additionally imposed under Section 75 for the reason that it was mandatory under the law to do so.

11. The order dated 01.10.2009 of Commissioner (Adjudication), Service Tax was challenged before CESTAT by way of three separate appeals (pursuant to three show cause notices) but unsuccessfully. As noted by the CESTAT in (Para 5 of) the impugned order, DTC did not assail the conclusion of the adjudicating authority as to the classification of the service nor impeached the quantum of service tax that had been confirmed. Its

contentions were restricted to the following effect:-

> *"5. ... that since under agreements with advertisers, the reciprocal obligation of the parties covenanted that the recipient of the service would be liable for tax, the appellant was under a bona fide belief that the liability to remit service tax stood transferred to the recipient qua the agreements; that this was a bona fide belief which caused the failure to file returns and remit service tax. Therefore, ... the extended period of limitation invoked while issuing the first show cause notice dated 4.1.08 is unjustified and for the same reasons, penalty under Section 78 of the Act should not have been imposed, by exercising discretion under Section 80 of the Act."*

12. The appellant relied upon *Rashtriya Ispat Nigam Limited v. Dewan Chand Ram Saran* (2012) 5 SCC 306 to urge that having entered into the contracts in the nature mentioned above, it was a legitimate expectation that the service tax liability would be borne by the contractors/advertisers and, thus, there was no justification for the appellant being held in default or burdened with the penalty under Section 78 of the Finance Act. It was argued that in the wake of orders dated 20.02.2007 and 18.01.2008 of this court on the applications of the two contractors under Section 9 of Arbitration and Conciliation Act, 1996, *inter alia*, fastening the liability of service tax (in the event of it being imposed) on such contractors, the Revenue ought not to insist upon such payment by DTC. The CESTAT, however, held that such considerations would not transfer the substantive and legislatively mandated liability to service tax from the appellant (the service provider) to the advertisers (the service recipients).

13. The CESTAT rejected the claim of DTC as to "*bona fide* belief" by observing that:-

> *"6. A bona fide belief is a belief entertained by a reasonable person. The appellant is a public authority and an instrumentality of the State and should have taken care to ascertain whether it was liable to tax in terms of the provisions of the Act. There is neither alleged, asserted nor established that there is any ambiguity in the provisions of the Act, which might justify a belief that the appellant/service provider, was not liable to service tax. It is axiomatic that no person can harbour a "bona fide belief" that a legislated liability could be excluded or transferred by a contract. The appellant was clearly and exclusively liable to service tax on rendition of the taxable service of "sale of space or time for advertisement". This liability involved the non-derogable obligation to obtain registration, file periodical ST-3 returns and remit service tax on the consideration received during the period covered by such ST-3 returns. These were the core and essential obligations the appellant should have complied with. We therefore find no basis for the claim that the appellant harboured a bona fide belief."*
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> [emphasis supplied]

14. While dismissing the appeals, the jurisdictional commissioner was directed to give credit for remittance, if any, made on such account.

15. Service tax was introduced, for the first time, by Chapter V of the Finance Act, 1994 and has continued to be enforced in terms of such legislation, though amended several times. By virtue of Section 68, read with Rule 6(1) of the Service Tax Rules, 1994 framed thereunder, every person providing "taxable service" to any person is liable to pay service tax, at the rates specified in Section 66, to the credit of the Central Government. In terms of Section 67 (as amended with effect from 01.05.2006 by Finance Act, 2006) in a case where the provision of service is "for a consideration in money" it is the gross amount charged by the service provider for such service which is the value of the service for purposes of calculating the levy

of service tax. Section 69 of the Finance Act, 1994 stipulated that every person liable to pay service tax must mandatorily make an application to get itself registered for purposes of service tax within the period prescribed in the rules. Rule 6 of the Service Tax Rules, 1994 prescribe that a person liable to pay service tax is required to deposit the service tax chargeable on the services provided in the bank designated by the Central Board of Excise and Customs in the prescribed format and also submit returns in such regard on quarterly basis. Section 95 of the Finance Act, 2004 added the liability of the service provider to pay Education Cess on the tax levied and calculated under Section 91 read with Section 66.

16. By Finance Act, 2006, Section 65 (105) was amended to add the following to the categories of "taxable service":-

> *"(zzzm) to any person, by any other person, in relation to sale of space or time for advertisement, in any manner; but does not include sale of space for advertisement in print media and sale of time slots by a broadcasting agency or organization."*

17. There is no dispute that services provided are taxable within the meaning of Section 65 (105) (zzzn) and that the appellant is liable to pay service tax thereupon. We, however, do not agree with the views of CESTAT that the service tax liability could not have been transferred by way of a contract. The reliance of DTC on the ruling in *Rashtriya Ispat Nigam Limited* (supra) on this score was correct and it appears that the same has not been properly appreciated by CESTAT. Noticeably, the claim of the assessee in that case was also founded on contractual terms similar to the one relied upon by the appellant here.

18. The service tax liability in *Rashtriya Ispat Nigam Limited* (supra)

arose out of contract given out for transportation of goods. The contractor engaged had undertaken to "bear and pay all taxes, duties and other liabilities in connection with discharge of his obligation". The contractor had invoked the arbitration clause for raising a dispute as to its liability to pay service tax. The claim petition was dismissed by the arbitrator which award was challenged by a petition under Section 34 of Arbitration and Conciliation Act before a Single Judge of Bombay High Court. The Learned Judge held that insofar as the service liability is concerned, the appellant (*Rashtriya Ispat Nigam Limited*) which had given the contract was the assessee and liable to tax. The appeal preferred against the said order on the petition was dismissed by the Division Bench of the High Court.

19. Against the backdrop of the above-noted facts in civil appeal carried to Supreme Court, it was observed as under:-

> *"37. As far as the submission of shifting of tax liability is concerned, as observed in para 9 of Laghu Udyog Bharati v. Union of India, (1999) 6 SCC 418, service tax is an indirect tax, and it is possible that it may be passed on. Therefore, an assessee can certainly enter into a contract to shift its liability of service tax.*
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> *38. Though the appellant became the assessee due to amendment of 2000, his position is exactly the same as in respect of Sales Tax, where the seller is the assessee, and is liable to pay Sales Tax to the tax authorities, but it is open to the seller, under his contract with the buyer, to recover the Sales Tax from the buyer, and to pass on the tax burden to him. Therefore, though there is no difficulty in accepting that after the amendment of 2000 the liability to pay the service tax is on the appellant as the assessee, the liability arose out of the services rendered by the respondent to the appellant, and that too prior to this amendment when the liability was on the service provider.*
>
> *39. The provisions concerning service tax are relevant only as*

between the appellant as an assessee under the statute and the tax authorities. This statutory provision can be of no relevance to determine the rights and liabilities between the appellant and the respondent as agreed in the contract between two of them. There was nothing in law to prevent the appellant from entering into an agreement with the respondent handling contractor that the burden of any tax arising out of obligations of the respondent under the contract would be borne by the respondent."

20. The above ruling of Supreme Court in the case of *Rashtriya Ispat Nigam Limited* (supra), however, cannot detract from the fact that in terms of the statutory provisions it is the appellant which is to discharge the liability towards the Revenue on account of service tax. Undoubtedly, the service tax burden can be transferred by contractual arrangement to the other party. But, on account of such contractual arrangement, the assessee cannot ask the Revenue to recover the tax dues from a third party or wait for discharge of the liability by the assessee till it has recovered the amount from its contractors.

21. The directions of this court on the two petitions under Section 9 of Arbitration and Conciliation Act (instituted by the two contractors) would only govern the rights and obligations arising out of the contracts entered upon by DTC with the contractors. It may be that in terms of the said orders, DTC would be in a position to recover the amount of service tax paid by it to the Revenue respecting the services in question. The fastening of liability on such account by such order on the contractors is, thus, a matter restricted to claims of the appellant against such parties. It would have no bearing insofar as the claim of the Revenue against the appellant for recovery of the tax dues is concerned.

22. We agree with the observations of CESTAT that the plea of "*bona fide* belief" is devoid of substance. The appellant is a public sector undertaking and should have been more vigilant in compliance with its statutory obligations. It cannot take cover under the plea that contractors engaged by it having agreed to bear the burden of taxation, there was no need for any further action on its part. For purposes of the taxing statute, the appellant is an assessee, and statutorily bound to not only get itself registered but also submit the requisite returns as per the prescription of law and rules framed thereunder.

23. For the foregoing reasons, the imposition of the service tax liability under Section 73 read with Sections 68 and 95 of Finance Act, 1994 and the levy of interest thereupon in terms of Section 75 of the Finance Act, 1994 cannot be faulted. For the same reasons, the penalties imposed under Sections 76 and 77 of the Finance Act, 1994 also must be upheld.

24. We order accordingly

25. We, however, find substance in the plea of the appellant insofar as the imposition of penalty under Section 78 of the Finance Act, 1994 is concerned, particularly when examined in light of guidance in Section 80. This requires some further elucidation.

26. Section 78 of Finance Act, 1994, to the extent relevant, and the provision contained in Section 80, as they stood at the relevant point of time (i.e. prior to amendments) may be extracted as under:-

> *"**78. Penalty for suppressing value of taxable service.***
> *Where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, by reason of -*
> *(a) fraud; or*

(b) collusion; or
(c) willful mis-statement; or
(d) suppression of facts; or
(e) contravention of any of the provisions of this Chapter or of the rules made thereunder with intent to evade payment of service tax, the person, liable to pay such service tax or erroneous refund, as determined under sub-section (2) of section 73, shall also be liable to pay a penalty, in addition to such service tax and interest thereon, if any, payable by him, which shall not be less than, but which shall not exceed twice, the amount of service tax so not levied or paid or short-levied or short-paid or erroneously refunded."

*"**80. Penalty not to be imposed in certain cases.***
Notwithstanding anything contained in the provisions of section 76 or section 78, no penalty shall be imposable on the assessee for any failure referred to in said provisions, if the assessee proves that there was reasonable cause for the said failure."

[emphasis supplied]

27. It is plain and clear from the reading of the bare text that in order to invoke the penalty under the above-noted clause, the Revenue must make out a case of "intent to evade payment of service tax", which may manifest by reason of fraud, collusion, willful mis-statement or suppression of facts.

28. It is indeed not the case of the Revenue here that service tax liability was avoided by the appellant with intent to defraud or on account of collusion or willful mis-statement or suppression of facts. In the given facts and circumstances and in light of explanations offered by the appellant even in response to the show cause notices, it is clear that there was no effort to "evade" the payment of service tax.

29. Noticeably, the appellant was raising bills on the contractors also to claim the service tax dues in terms of the contractual terms, and – there is no dispute raised in this regard – the collections made from the contractors on

account of service tax chargeable were deposited in the government account from time to time. The insistence of the appellant that it would deposit the service tax with the government only when the contractors discharged their liability on this account may not have been a proper stand. But, from this, it cannot be deduced that the effort was to evade tax liability.

30. At any rate, given the explanation about poor financial position in which the appellant was placed, possibly on account of highly subsidized transport facilities provided and the dependence on the grants from the government, reasonable cause had been shown for the default in paying service tax within the prescribed time.

31. Thus, the inhibition under Section 80 of the Finance Act, 1994 was attracted and penalty under Section 80 could not have been imposed.

32. In the above facts and circumstances, we find the imposition of penalty of ₹7,19,01,910/- (Rupees Seven Crores Nineteen Lacs One Thousand Nine Hundred Ten Only) under Section 78 of the Finance Act, 1994 is unjust and uncalled for. The impugned order of CESTAT to this extent is liable to be set aside.

33. We order accordingly.

34. The appeals are partly allowed to the above extent.

R.K.GAUBA
(JUDGE)

S. RAVINDRA BHAT
(JUDGE)

APRIL 17, 2015
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