CUSTOMS, EXCISE AND SERVICE TAX APPELLAT TRIBUNAL
REGIONAL BENCH AT HYDERABAD
Division Bench – Court No. - I

Service Tax Appeal No.1823 of 2011

Arising out of Order-in-Original No.20/2011(MP) dated 21.03.2011 passed by Commissioner of Central Excise, Customs & Service Tax, Visakhapatnam I

Commissioner of Central Excise, Customs & Service Tax, Visakahpatnam I
Central Excise Building, Port Area, Visakhapatnam-530035

...Appellant

VERSUS

M/s Dredging Corporation of India
Port Area, Vizag Port Trust, Visakhapatnam-530035

.....Respondent

APPEARANCE

ShriS.Hanuma Prasad (A.R.) for the Appellant-Revenue
Shri Harish Bindhumadhavan, Advocate for the Respondent

CORAM: HON'BLE SHRI P.K.CHOUDHARY, MEMBER(JUDICIAL)
HON'BLE SHRI P.V.SUBBA RAO, MEMBER(TECHNICAL)

ORDER NO. 30066/2022

DATE OF E-HEARING : 08.03.2022
DATE OF PRONOUNCEMENT/DECISION :09. 06.2022

Per Bench :

Briefly stated, the facts of the case are that the Respondent herein is engaged in the provision of Dredging Services and is a Govt. of India Enterprise and is centrally registered with the Service Tax Department for provision of the said services at Visakhapatnam. The Respondent states that based on specific intelligence and investigation was initiatedby the DGCEI, Chennai unit, that the Respondent have hired two foreign dredgersfrom outside India and have not paid service tax on the hiring charges paid to the said foreign owners as import of service effective from 16.05.2008 vide Notification No.16/2008-ST dated 10.05.2008, summon proceeding was initiated and the Respondent subsequently agreed to the findings of the department and paid an amount of Rs.8,18,61,920/- towards the Service tax which has been proposed to be appropriated in the Show Cause Notice dated 22.12.2009. During the adjudication proceedings, the Respondent also paid the interest due on such Service Tax and prayed for

waiver of penalty. By the impugned OIO dated 21.03.2011, the Ld. Adjudicating authority invoked section 80 and dropped the entire amount of penalty as proposed in the SCN and ordered for appropriation of the amounts paid towards service tax and interest. Hence the present appeal by the Revenue assailing non-imposition of penalties invoking section 80. According to the Revenue, the Commissioner was not correct in dropping the penalties invoking section 80 because, this can be invoked only if the assessee proves that there was reasonable cause for the failure. It cannot be said that there was a reasonable cause for failure for the following reasons:

a) The demand in the present case was made invoking extended period of limitation under the proviso to section 73(1) and the reasons for invoking the extended period were indicated in the SCN and the demand was also confirmed by the Commissioner invoking extended period of limitation. Having confirmed the demand invoking extended period of limitation, the Commissioner has, in paragraph 18 of the impugned order, held that there was no suppression of facts and dropped the imposition of penalties which is not correct.

b) The finding of the Commissioner in paragraph 14 of the impugned order that the respondent was caught unaware of the levy of service tax is not correct or logical because it was also mentioned that the assessee was under the impression that there was no service tax liability as the services in the subject case was received beyond the land mass. The assessee (respondent) cannot take simultaneous stand of ignorance of levy and plea that they were under the impression that there was no service tax liability in their case, as the services were received beyond Indian territorial jurisdiction.

c) The Commissioner has wrongly accepted the assessee's argument that at the time of entering into the agreement with the foreign suppliers for supply of tangible goods, there was no levy of service tax on the service.

d) Nothing prevented the assessee from making payment of service tax after the levy was imposed on supply of tangible goods service from 16.5.2008.

e) Revenue neutrality cannot be the basis to determine if there was suppression of facts or not. Reliance was placed on CCE Mumbai vs Mahindra & Mahindra [2005(179) ELT 21 (SC)], DharmpalSatyapalvsCCE New Delhi [2005(183) ELT 241(SC), IFB Industries Ltd vs CCE Goa[2005(179) ELT 487(Tri-Mum)

f) The assessee has not paid the service tax on its own and it was paid only after it was pointed out by the officers during investigation.

g) The argument that the respondent assessee is a Government of India undertaking and as such no malafide or profit motive can be attributed is not correct since law does not make any distinction between the Government companies and others.

h) The adjudicating authority itself has confirmed the duty liability invoking extended period of limitation while dropping the penalties on the ground that the respondent had no intention to evade payment of service tax.

2. Heardboth sides through video conferencing and perused the appeal records.

3. We find that the small issue to be decided in this case is whether the Ld. Adjudicating Authority was correct in invoking section 80 of the Finance Act, 1994 to drop the penalty as proposed in the SCN for delay in payment of service tax. This reads as follows:

> " Section 80. Penalty not to be imposed in certain cases- Notwithstanding anything contained in the provisions of section 76 (section 77 or section 78), no penalty shall be imposable on the assessee for any failure referred to in the said provisions, if the assessee proves that there was reasonable cause for the said failure."

Revenue's contention is that the impugned order was not correct because it has, on the one hand, correctly confirmed the demand invoking extended period of limitation which requires suppression of facts to be established and on the other hand, has dropped the proposal to impose penalties invoking section 80 holding that there was reasonable cause for the assessee's failure by the assessee (respondent). In this regard, we find that the issue whether there was suppression of facts or not and whether the penalty under section 78 is mandatory or not having regard to the facts of the case and also that the Respondent is a PSU and that the amounts were payable under Reverse Charge Mechanism (RCM) and would have otherwise been eligible as Cenvat credit to the Respondent, is to be decided.

4. We find that the present issue involved in this appeal is no more *resintegra* in view of the decision of the Tribunal in the case of BhorukaAluminium Limited Vs. CCEx. &S.Tax, Mysore reported in 2017 (51)

STR 418 (Tri.Bangalore) . The relevant para of the said decision are reproduced below :

> "4. The learned counsel for the appellant submitted that imposition of penalty under Section 78 of the Finance Act is in contravention to the provisions of Section 73(3) of the Finance Act, 1994. He further submitted that service tax along with interest has already been paid by the appellant before issuance of show cause notice. He also submitted that Section 73(3) of the Finance Act, in unambiguous terms states that when an assessee has paid service tax either on his own or on the basis of the officer's ascertainment and informs the officer of such payment, then the said Section does not give any power to such officer to issue a show cause notice in respect of the tax so paid and such issuance of show cause notice is sans force of law and accordingly, not sustainable and tenable. The learned counsel relied upon the decision of this Tribunal in the case of South India Paper Mills Ltd. v. C.C.E. & S.T. reported in 2016-TIOL-2294- CESTAT-BANG wherein in the similar circumstances, the penalty under Section 78 of the Finance Act was dropped in toto. He also relied upon the following case laws :
>
> (i) Intercontinental Consultants & Technocrats Pvt. Ltd. v. U.O.I. [2013 (29) S.T.R. 9 (Del.)]
>
> (ii) Amit Sales v. C.C.E. [2009 (13) S.T.R. 165 (Tri.-Del.)]
>
> (iii) Jindal Saw Ltd. (IPU) v. C.C.E. [2013 (30) S.T.R. 490 (Tri.-Ahmd.)]
>
> (iv) C.S.T., Bangalore v. Motor World [2012 (27) S.T.R. 225 (Kar.)]
>
> (v) Hindustan Petroleum Corporation Ltd. v. C.C.E., Mumbai-II [2012 (25) S.T.R. 161 (Tri.-Mumbai)]
>
> (vi) C.C.E. & S.T., LTU, Bangalore v. AdecoFlexione Workforce Solutions Ltd. [2012 (26) S.T.R. 3 (Kar.)]
>
> (vii) Reliance Industries Ltd. v. Commissioner of Customs, Rajkot [2013 (287) E.L.T. 433 (Tri.-Ahmd.)].
>
> 5. On the other hand, the learned AR submitted that the appellant is guilty of suppression of facts as he failed to inform the Department regarding

availment of irregular Cenvat credit and, therefore, the lower authority has rightly imposed the penalty under Section 78 of the Finance Act, 1994.

6. After considering the submissions by both the parties and perusal of the provisions of Sections 73, 76 and 78 of the Finance Act, 1994 and the judgments relied upon by the appellant cited supra, I find that Section 73(3) is very clear as it says that if tax is paid along with interest before issuance of the show cause notice, then in that case, show cause notice shall not be issued. In this case, I find that the contention of the appellant that he bona fidely believed that he is not liable to pay service tax but during the audit, the audit party informed him that he is liable to pay service tax, then he immediately paid the entire service tax along with interest. Except mere allegation of suppression, the Department did not bring any material on record to prove that there was suppression and concealment of facts to evade payment of tax. Consequently, in my opinion, the imposition of penalty under Section 78 of the Act is not justified and bad in law. Moreover, in the impugned order, the learned Commissioner (Appeals) has not recorded any finding on suppression of facts by the appellant with an intention to evade tax. In view of the above discussion, I set aside the impugned order by allowing the appeal of the appellant."

5. We find that the facts of the present case are squarely covered by the aforesaid decision of the Tribunal. The question which arises is since the Commissioner has confirmed the demand invoking extended period of limitation and took a contrary view when it comes to invoking section 80, which view is correct. Can there be suppression of facts when it comes to confirmation of demand and 'reasonable cause for failure' under section 80 at the same time? We agree with the revenue that these two are contradictory. We hold that the Commissioner should have dropped the demand for the extended period of limitation in view of our finding in this case that there was no suppression of facts. However, the confirmation of demand has not been assailed by the respondent, possibly because it was entitled to the CENVAT credit of whatever service tax it paid. Hence, we cannot modify the impugned order with respect to the confirmation of the demand. Thus, invoking section 80 to waive the penalties was correct and invoking extended period of limitation for confirmation of demand was not.

6. Another argument put forth on behalf of the Revenue is that the respondent cannot take two contradictory stands- one that it was not aware of the levy at all and that it did not pay because the services were rendered outside Indian territorial jurisdiction and that the Commissioner has erred in accepting these contradictory submissions by the assessee. We do not find any force in this argument. One may hold a view that no tax is payable on more than one ground. For instance, one may be under the impression that the particular service is not taxable and also that the service was being rendered outside the jurisdiction of India and not taxable. Similarly, one may contest the demand of say, central excise duty or customs duty both on merits and on limitation.

7. It has been submitted by the Revenue that the Commissioner has wrongly accepted the assessee's argument that at the time of entering into the agreement with the foreign suppliers for supply of tangible goods, there was no levy of service tax on the service. We find that the Commissioner has noted this submission as a matter of fact in paragraph 15 of the impugned order and he has not held that no service tax was payable because the contracts were entered into earlier. He considered this and other submissions to determine if there was suppression of facts on behalf of the respondent and find nothing wrong in noting the submissions by the respondent.

8. It has been submitted on behalf of the Revenue that nothing prevented the assessee from making payment of service tax after the levy was imposed on supply of tangible goods service from 16.5.2008 Theassessee has not paid the service tax on its own and it was paid only after it was pointed out by the officers during investigation.We agree and the respondent assessee has paid the service tax not on its own but after it was pointed out by the DGCEI. This does not prove that the respondent had suppressed facts. It could have declined to pay service tax for the extended period of limitation but it paid the service tax anyway and also CENVAT credit of the service tax so paid as it was entitled to.

9. It has been submitted on behalf of revenue that Revenue neutrality cannot be the basis to determine if there was suppression of facts or not. Reliance was placed on CCE Mumbai vs Mahindra & Mahindra, DharmpalSatyapal and IFB Industries Ltd. We proceed to examine this proposition and the case laws relied upon.

10. In the case of Mahindra & Mahindra, a larger bench of Supreme Court clarified the position of law regarding invocation of larger period of limitation alleging suppression of facts in cases where there is revenue neutrality. It would be essential to examine the background. In the case of AMCO Batteries Ltd. [2003 (153) E.L.T. 7 (S.C.)] the charge of suppression of facts was dismissed on the ground of Revenue neutrality. Relying on this judgment, of the Supreme Court, the CEGAT ruled in favour ofthe assessee in Mahindra & Mahindra Ltd. On appeal by the Revenue, a two member bench of Supreme Court held that AMCO Batteries does not lay down the correct law and referred the matter to the Chief Justice [Commissioner vs Mahindra &Mahindra 2004 (171) E.L.T. 159 (S.C.)]. The matter was then examined by a larger bench of Supreme Court [2005(179) ELT 21 (SC)] which did not overrule but clarified the decision of the AMCO as follows:

> **3.**We have carefully examined the *AMCO Batteries* decision. The aforesaid observations in para 10 have to be read in the context of the facts noticed in paras 7, 8 and 9 of the decision. **The *AMCO Batteries*decision cannot be held to have laid down that in cases where the assessee is entitled to get the benefit of the Modvat scheme, there can be no question of suppression of fact or invocation of the extended period of limitation under proviso to Section 11A. In fact it has not been so held In *AMCO Batteries* decision. Having regard to the facts and circumstances noticed in the earlier paragraphs 7, 8 and 9 and in addition to the appellant therein being entitled to get the benefit of Modvat scheme it was observed in para 10 that there was no justifiable reason for the appellant to suppress any fact**.
>
> **4.**There can be number of eventualities where extended period of limitation in terms of proviso to section 11A may be available to the Department despite availability of Modvat credit to an assessee. **The availability of Modvat credit to an assessee by itself is not conclusive or decisive consideration. It may be one of the relevant consideration. How much weight is to be attached thereto would depend upon the facts of each case.**
>
> **5.**In the present case the Tribunal has not examined any other consideration except the availability of the Modvat credit to the appellant. In this view we set aside the impugned judgment and remit appeal i.e. E/3025/01-Mum. for its fresh decision by the Tribunal in accordance with law. It would be open to the assessee to contend that the extended period of limitation is not available to the Department. Likewise it would be open to the Department to controvert it. The question will be decided on its own merits in accordance with law.
>
> **6.**The appeal is allowed in the above terms.

11. In the case of DharmpalSatyapal, the assessee was manufacturing the goods but had not obtained central excise registration and had not disclosed the manufacture at all. Before the Supreme Court, it was submitted on its behalf that the assessee was entitled to claim proforma credit/ modvat credit. However, no record on credit entitlement was produced. The Supreme court held that the

assessee failed to prove its bonafides. Relevant paragraphs of this judgment are below.

> **24.**We do not find any merit in these submissions. As stated above, the adjudication in this case was confined to the question of excisability and concealment of the existence of two units in which the compound (kimam) was manufactured. No explanation has been given by the assessee for not disclosing the affairs of these units, particularly when the assessee was in business for couple of years and when the assessee had been dealing with other traders who operated from licensed factories. It was for the assessee to explain the reasons for not getting the units registered or licensed. It was for the assessee to explain its failure to maintain the records under the 1944 Act and rules thereunder. In each of the above decisions, we find that there was substantial compliance of the rules under the said Act. In each of the decisions the findings indicate technical non-compliance and not total non-compliance of the rules. It was for the assessee to explain the basis of its alleged *bona fide* impression. In this connection, no evidence was put before the commissioner about receipt and utilization of the compound in the manufacture of TulsiZafraniZarda. **No evidence was led to show that the amount of proforma/modvat credits was equal to the duty demanded, although it was urged that after 3/94, the liability to duty on inputs stood shifted to the final product**.
>
> **25.**Modvat is basically a duty collecting procedure which provides relief to the manufacturer on the duty element borne by him in respect of the inputs used by him. The relief is given under the modvat scheme on the actual payment of duty on the input. On such payment, the assessee gets a right to claim adjustment/set-off against the duty on the final product. The question of duty adjustment/set-off against duty on the final product was not in issue. In any event, no record on credit entitlement was produced. A right to claim proforma/modvat credit against duty on final product was different from the defence of *bonafides* in a case where circumstances mentioned in the proviso to section 11A(1) stands proved by the department for invoking larger period of limitation. **The burden to prove the defence of *bonafides* was on the assessee and the assessee in this case has failed to prove its *bonafides*. Under modvat, excisable finished products made out of duty-paid inputs are given relief of excise duty to the extent of duty paid on inputs. In the circumstances, we are satisfied that the department was justified in invoking the extended period of limitation under the proviso to Section 11A(1).**
>
> **26.**On the applicability of the Notification No. 121/94, dated 11-8-1994, the tribunal remanded the case back to the commissioner for re-examination of the limited question of its applicability. The tribunal also directed the commissioner to reconsider the quantum of penalty, fine etc. in the light of its findings on the applicability of the said notification. We do not wish to express any opinion on the applicability of the notification dated 11-8-1994. Suffice it to state, that, on the issue of excisability and clandestine manufacture and removal of the compound (kimam) from the two unlicensed/unregistered units at 96, Okhla Industrial Estate, Phase-III, New Delhi/E-1, Maharani Bagh, New Delhi, we do not find any infirmity in the impugned judgment.
>
> **27.**Accordingly, these civil appeals filed by the assessees are dismissed with no order as to costs.

12. In the case of IFB Industries Ltd., the appellant was transferring goods at a lower value to its own sister concern in Bhopal and never disclosed such invoices to the Revenue. It's plea that whatever duty it paid would be available to its sister unit in Bhopal and hence it was a revenue neutral situation and the longer period of limitation cannot be invoked was not accepted by the Tribunal

relying on the judgment of the larger bench of Supreme Court in the case of Mahindra & Mahindra (supra). The relevant portions of the order are as follows:

> **4.**The appellants have also challenged the above order on the point of limitation, inasmuch as the show cause notice was issued after the normal period of limitation. However, on being queried, the ld. Advocate fairly agreed that the invoices showing the lower value in case of transfer to their Bhopal unit were not being placed before the Central Excise authorities. He, however, submits that whatever duty they would have paid at their end, the same was available to their Bhopal unit as Modvat credit and, as such, there could be no intention to evade any duty on their part, justifying invocation of longer period of limitation. We do not find much force in the above contention of the appellants, as in a recent judgment in the case of *Commissioner of Central Excise, Mumbai* v.*Mahindra & Mahindra Ltd.*, on 10-9-2004 in the Civil Appeal No. 487/03 [2005 (179) E.L.T. 21 (S.C.)], Larger Bench of the Hon'ble Supreme Court has held that such a circumstances by itself cannot be made a ground to hold that there was no suppression on the part of the assessee.
>
> **5.**In view of the foregoing, we confirm the demand of duty against the appellants. However, in the facts and circumstances of the case, the penalty is reduced to Rs. 15,000/-. But for the above modification in the quantum of penalty, the appeal is otherwise rejected.

13. The above case laws make it clear:

a) that merely because the MODVAT/CENVAT credit is available and therefore, revenue neutrality could apply, it does not necessarily mean that extended period of limitation cannot be invoked; it can be invoked if the elements necessary to invoke such a period are present;
b) The availability of Modvat credit to an assessee by itself is not conclusive or decisive consideration. It may be one of the relevant consideration. How much weight is to be attached thereto would depend upon the facts of each case.

14. In the factual matrix of this case, we have considered various factors. The respondent is a Government of India undertaking. We agree with the Revenue that there is no separate law for the public sector undertakings and the same tax laws apply to them as to others. No more and no less. To demand duty within the normal period of limitation, nothing needs to be proved other than that the service was taxable at a specific rate during the period. The extended period of limitation, however, can be invoked only if the factors viz., (a) fraud; or (b) collusion; or (c) wilful mis-statement; or (d) suppression of facts; or (e) contravention of any of the provisions of the chapter or the rules with an intent to evade payment of duty were present. Since the Show Cause Notice is issued by the Revenue and it is for the Revenue to prove the existence of any of these elements. Evidently, each of these factors, such as fraud, collusion, suppression of facts, require also an

intention to evade. It is a well settled legal position that suppression is not mere omission (which could also be careless or negligent) but a positive act of suppression. The qualifying clause makes it abundantly clear that there must be an intent to evade payment of duty. The existence of such an intent can only be inferred from the facts of every case.

15. It is in this context, the background of the assessee may also assume significance. We find it significant that the respondent is a public sector undertaking which is one of the factors to consider if it hadan intent to evade payment of duty. Another factor which weighed in our conclusion is the fact that the respondent was to gain nothing by evading. It is not a case that somebody else would get CENVAT credit but the respondent itself would pay with one hand and immediately take credit of the service tax so paid. As per the judgment of AMCO as further clarified in Mahindra & Mahindra, this is a very significant factor in the present case to establish that there was no intent to evade. In the absence of the intent, suppression cannot be alleged and therefore, extended period of limitation could not have been invoked.

16. A question may arise that if we find that the elements necessary to invoke extended period of limitation were not available and therefore, Revenue could not have demanded duty for an extended period, can the respondent seek refund of the service tax so paid voluntarily by it? It cannot, for the reason the charge of service tax is not under section 73 but is under the charging sections (whether under forward charge or under reverse charge). There is no limitation on the charge of the service tax and it does not extinguish with the efflux of time. Only the remedy available to the department to recover the service tax not paid is enabled and also limited by section 73. If the charge is proven or is uncontested, and the assessee pays the tax, though it is beyond the limitation, it cannot seek refund of the service tax so paid. It is like a time-barred debt. If A owes B some money but B does not sue within the limitation of time available, B loses his right to remedy though the charge on A continues. If A repays B after the limitation, he cannot ask B to return the repaid debt on the ground that B could not have sued him. At any rate, in this case, the respondent not only paid the service tax and also took CENVAT credit of the same and so this question does not arise.

17. It has been submitted on behalf of the Revenue that the adjudicating authority itself has confirmed the duty liability invoking extended period of limitation while dropping the penalties on the ground that the respondent had no

intention to evade payment of service tax. As we have found that even extended period of limitation could not have been invoked in the factual matrix of this case, we find nothing inconsistent wrong in the Commissioner invoking section 80 to waive the penalties. We fully endorse the views expressed by the Commissioner that there were reasonable causes for failure of the respondent not paying service tax.

17. In view of the above, the appeal filed by the department is dismissed. Cross objection is also disposed of.

(Order pronounced in the open court on 09.06.2022)

(P.K.CHOUDHARY)
MEMBER (JUDICIAL)

(P.V.SUBBA RAO)
MEMBER (TECHNICAL)

mm