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IN THE HIGH COURT OF DELHI AT NEW DELHI

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CEAC 42/2015

PRINCIPAL COMMISSIONER OF SERVICE
TAX DELHI –II

..... Petitioner

Through: Ms Sonia Sharma, Senior Standing
Counsel.

versus

TOPS SECURITY LTD

..... Respondent

Through: Ms Kavita Jha, Mr Shammi Kapoor, Mr
Vaibhav Kulkarni and Ms Purva Juneja,
Advocates.

CORAM:

JUSTICE S.MURALIDHAR

JUSTICE VIBHU BAKHRU

ORDER

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05.12.2015

Dr. S. Muralidhar, J.:

1. This appeal by the Principal Commissioner of Service Tax, Delhi under Section 35G of the Central Excise Act, 1944 (CE Act) read with Section 83 of the Finance Act 1994, is directed against an order dated 18th November 2014 passed by the Customs, Excise & Service Tax Appellate Tribunal (CESTAT) in Appeal Nos.54595-54597 of 2014.

2. Admit.

3. The following question of law is framed:

“Was the CESTAT justified in granting to the Respondent the benefit

of payment of reduced penalty to the extent of 25% in terms of the 3rd proviso to Section 78 (1) of the Finance Act 1994 (as it stood prior to its substitution by the Finance Act 2015) within 30 days from the date of the order of the CESTAT?

4. This Court has heard the submissions of Ms Sonia Sharma, learned counsel for the Appellant and Ms Kavita Jha, learned counsel for the Respondent.

5. The facts leading to the filing of the present appeal are that the Respondent, Tops Security Limited, is engaged in the business of providing security services. An investigation carried out by the Directorate General of Central Excise Intelligence revealed that the Respondent was charging and collecting service tax from its clients but the service tax that was paid was not commensurate with the amount received for the services rendered. Accordingly, a Show Cause Notice (SCN) dated 20th October, 2009 was issued to the Respondent by the Commissioner of Service Tax demanding service tax amounting to Rs.8,15,44,386/- for the period 2004-05 to 2008-09 by invoking the extended period and proposing penalty under Section 78 of the Finance Act, 1994. Subsequently, SCN dated 10th April, 2011 demanding differential service tax of Rs.89,76,597/- for the period 2009-10 and another SCN dated 20th October, 2011 demanding differential service tax of Rs.81,07,919/- to the period 2010-11 were also issued. In these SCNs penalty under Section 76 of the Finance Act, 1994 was proposed.

6. Consequent upon the above SCNs, an Order-in-Original was passed by the Adjudicating Authority, i.e. the Commissioner (Adjudication), on 6th

November, 2012 confirming the above demand of service tax with interest. As regards the first SCN the said Order-in-Original levied penalty equivalent to the service tax amount in terms of Section 78 of the Finance Act, 1994. As regards the other two SCNs, the service tax demand along with interest was confirmed and penalty under Sections 76 and 77 of the Finance Act, 1994 was levied.

7. Aggrieved by the above Order-in-Original, the Respondent filed appeal Nos.54595-54597/2014 before the CESTAT. The said appeals along with applications for stay were listed before the CESTAT on 18th November, 2014 i.e. over two years after the passing the Order-in-Original by the Adjudicating Authority. In the impugned order passed on that date, the CESTAT recorded the statement on behalf of the Respondents that they were not disputing their liability to pay service tax and interest but only were seeking to avail the benefit of the reduced penalty in terms of the 3rd proviso to Section 78 of the Finance Act, 1994. After noticing the judgment of the Gujarat High Court in the case of **CCE, Ahmedabad v. Ratnamani Metals and Tubes Ltd. 2013 (296) ELT 327 (Guj. HC)**, the CESTAT ordered as under:

“In the light of the foregoing, we do not find any merit in the appeals except to the extent that the benefit of 25% of mandatory equal penalty under Section 78 (ibid) is required to be extended to the appellants. Accordingly the appeals Nos. ST/55809/2013 and ST/55810/2013 relating to Show Cause Notices dated 10.4.2011 and 20.10.2011 are dismissed and appeal No. 55715/2013 relating to the Show Cause Notice dated 20.10.2009 is partially allowed only to the extent that the penalty of Rs. 8,15,44,386/- imposed under Section 78 of Finance Act, 1994 will be reduced to 25% of the said amount provided the service tax and interest are paid within 30 days from the

date of communication of this order and the said reduced penalty (25% of 8,15,44,386/-) is also paid within the said time i.e. 30 days from the date of communication of this order.”

8. The question that has been urged in this appeal by the Department is whether the CESTAT was justified in law in extending to the Respondent the benefit of payment of 25% of the penalty within 30 days of the order of the CESTAT, which was obviously far beyond the period of 30 days as envisaged in terms of the 3rd proviso to Section 78 (1) of the Finance Act 1994 (as it stood prior to its substitution by the Finance Act, 2015)?

9. When this appeal was first listed for hearing on 11th September 2015, the Court was informed by the learned counsel for the Appellant that the Respondent had not even complied with the above order dated 18th November, 2014 of the CESTAT. In other words, the reduced penalty was not paid within 30 days of the passing of the order of the CESTAT. Indeed, this has not been disputed before this Court by the learned counsel for the Respondent as well. She informed the Court that upon failure of the Respondent to avail of the benefit granted to it by the CESTAT by the impugned order, the Department has initiated steps for recovery of the service tax, interest and penalty by *inter alia* freezing the accounts of the Respondent. She urged that in view of this development, the question urged by the Department in the present appeal has been rendered academic and should be left open for decision in an appropriate case.

10. This Court is not inclined to accept the plea of the Respondent since the question of law that arises is of considerable importance and is likely to arise

in several similar appeals before the CESTAT under the Finance Act 1994.

11. At the outset, it requires to be noticed that although under Section 83 of the Finance Act, 1994 many provisions of the CE Act (for which corresponding similar provisions do not exist in the Finance Act) have been made applicable “in relation to service tax as they apply in relation to duty of excise” a significant omission is Section 11AC of the CE Act which also deals with levy of penalty for short-levy or non-levy of excise duty in certain cases. While the reason for this may be that a similar provision exists in the Finance Act 1994 in the form of Section 78, one consequence would be that the circulars issued by the Central Board of Excise and Customs (‘CBEC’) in relation to Section 11AC of the CE Act will not *ipso facto* apply to the interpretation of Section 78 of the Finance Act 1994. Therefore, even the decisions of the Courts interpreting Section 11AC of the CE Act (some of which will be discussed hereafter) will also not *ipso facto* apply for the purposes of interpretation of the 3rd proviso to Section 78 of the Finance Act, 1994 read with Section 83 thereof.

12. With these prefatory comments, the scheme of the provisions of the Finance Act, 1994 relevant to the question of penalty may be examined. Section 76 of the Finance Act 1994 talks of penalty leviable generally upon failure to pay service tax plus interest in accordance with Section 75. Section 77 talks of penalty for contravention of the rules and provisions of the Act for which no penalty is specified elsewhere. Section 78 (1) of the Finance Act 1994 (as it stood prior to its substitution by the Finance Act 2015), which is relevant for the purpose of the present case, reads as under:

“Section 78. Penalty for suppressing, etc., of value of taxable services.

(1) 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) Wilful 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 the intent to evade payment of service tax,

the person, liable to pay such service tax or erroneous refunds, 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 be equal to the amount of service tax so not levied or paid or short-levied or short-paid or erroneously refunded.

Provided that where true and complete details of the transactions are available in the specified records, penalty shall be reduced to fifty per cent of the service tax so not levied or paid or short-levied or short-paid or erroneously refunded.

Provided further that where such service tax and the interest payable thereon is paid within thirty days from the date of communication of order of the Central Excise Officer determining such service tax, the amount of penalty liable to be paid by such person under the first proviso shall be twenty-five per cent of such service tax;

Provided also that the benefit of reduced penalty under the second proviso shall be available only if the amount of penalty so determined has also been paid within the period of thirty days referred to in that proviso.

Provided also that in case of a service provider whose value of

taxable services does not exceed sixty lakh rupees during any of the years covered by the notice or during the last preceding financial year, the period of thirty days shall be extended to ninety days.”

13. Under Section 78 (1) of the Finance Act 1994, there are five alternative instances where in terms of the above proviso a person who is liable to pay service tax as determined under Section 73(2) would also be made liable to pay penalty, in addition to the service tax and interest “equal to the amount of the service tax so not levied or paid or short-levied or short-paid”. In other words, a penalty of 100% of the service tax amount determined to be paid by an Assessee under Section 73(2). The second proviso to Section 78 (1) of the Finance Act 1994 gives an Assessee the benefit of paying a reduced penalty of 25% of the service tax. However, when the second proviso is read with the third proviso, it is plain that for availing of the benefit two conditions have to be satisfied by the Assessee. The first is that “such service tax and interest payable thereon” should be paid “within 30 days from the date of communication of the order of the Central Excise Officer determining such service tax.” The second condition is that the reduced penalty amount constituting 25% of the service tax has also to be paid within the same period of 30 days. It may noted here that Section 78 has been replaced by a new Section 78 under the Finance Act 2015. Although there is some change as far as the second proviso is concerned, the third proviso remains unchanged.

14. Section 78 (1) of the Finance Act 1994 is *in pari materia* with Section 11AC of the CE Act (which also now stands substituted by the Finance Act,

2015). The third proviso to Section 78 (1) of the Finance Act, 1994 corresponds to the second proviso to Section 11 AC of the CE Act as it stood prior to its substitution by Finance Act, 2011 and to Section 11 AC (1) (c) as it stood after such substitution. Section 11AC of the CE Act has been the subject matter of decisions of the High Court as well as circulars of the CBEC which will be discussed hereafter, although as earlier noted, Section 11 AC of the CE Act does not *ipso facto* apply to the levy of penalty under the Finance Act, 1994 by virtue of Section 78 read with Section 83 thereof.

In ***K. P. Pouches (P) Ltd. v. Union of India 2008 (228) ELT 31 (Del HC)***, the facts were that when certain consignments of excisable goods were intercepted by the officers of the Central Excise Department, the Assessee admitted that his employee had committed a mistake in clearing them without payment of duty. On the same day when the goods were intercepted, the Assessee himself debited from the Provisional Ledger Account (PLA) Register the sum of Rs.2,73,488 constituting the duty in respect of the said goods. The SCN issued to the Assessee mentioned in para 8 about the said debit entry and the fact that it had been made “voluntarily and admittedly” by the Assessee. In the adjudication order, while confirming the duty, a penalty equivalent to 100% of the duty was levied under Section 11AC of the CE Act. After losing the appeal before the CESTAT, the Assessee contended before this Court that in view of the first proviso to Section 11AC of the CE Act as it then stood, penalty in excess of 25% of the duty could not have been levied “since the entire duty was paid by the Assessee on the date of search and seizure” i.e. well before the date of the SCN. In the above circumstances, this Court was of the view that in the absence of the

adjudicating order mentioning that the Assessee was entitled to the benefit of the reduced penalty in terms of the first proviso to Section 11AC of the CE Act, the Assessee could not have been denied that benefit at the appellate stage only because it failed to pay the reduced penalty within 30 days of the date of communication of the adjudication order. This Court in ***K. P. Pouches (P) Ltd. v. Union of India*** (*supra*) further observed as under:

“27. To obviate any similar situation from arising in future, we are of the opinion that in its adjudication order the adjudicating authority under the Act should explicitly state the options available to the Assessee under Section 11AC of the Act. Once the choices are made known to the Assessee and it still does not take advantage of the first proviso to Section 11AC of the Act, it will be entirely at its own peril. Therefore, it would be beneficial, both from the point of view of the Revenue as well as the Assessee, if the options available to the Assessee are mentioned in the adjudication order itself.”

15. Consequent to the above decision, a circular was issued by the CBEC on 22nd May 2008 stating that it had been decided that wherever penalty is imposed under Section 11AC of the CE Act, the provisions contained in first and second proviso to Section 11AC should be mandatorily mentioned in the Order-in-Original itself by the adjudicating authority.

16. It appears that thereafter a situation arose where a Commissioner (Appeals) allowed the benefit of the proviso to Section 11AC of the CE Act at the appellate stage and permitted an Assessee to pay reduced penalty of 25% within 30 days of the communication of the order of the Commissioner (Appeals). This was done on a collective reading of Section 11AC with

Section 35F of the CE Act. The CBEC, on a review of the case, issued another circular on 15th September, 2009 opining that the view of the Commissioner (Appeals) was not in consonance with a combined reading of all the four provisos to Section 11AC of the CE Act. It was made clear that “the benefit of 25% penalty is applicable only when the Assessee has paid the duty, reduced and penalty and interest within 30 days of the communication of the order passed by the adjudication authority.” It was further clarified that “only where penalty was enhanced at the appellate stage that in case of the 25% of the differential amount the penalty can be paid within 30 days of the order and not otherwise.”

17. The same issue arose again in this Court in ***Sri Sai Enterprises v. Commissioner of Central Excise (2013) 288 ELT 40 (Del)***. This was a case where the Assessee failed to make payment of the service tax and interest but nevertheless sought to avail of the benefit of the reduced penalty in terms of the proviso to Section 11AC of the CE Act. This time, the Court distinguished its earlier decision in ***K. P. Pouches (P) Ltd. (supra)*** and held that it was clear from the conduct of the Assessee that “he never wanted or showed any inclination to pay the duty amount or the interest and was throughout contesting the order in original on merits. In case the Appellant Assessee had any grievance with regard to non-compliance of Section 11AC, the said grievance should have been raised at the earliest opportunity. The Appellant should have deposited the duty amount.” Effectively, therefore, the decision in ***K. P. Pouches (P) Ltd. (supra)*** has been limited to a situation where the entire excise duty leviable has been paid upfront by the Assessee even before issuance of the SCN.

18. In ***CCE, Raigad v. Castrol India Ltd. 2012 (286) ELT 194 (Bom HC)***, the Bombay High Court took note of the decision of this Court in ***K. P. Pouches (P) Ltd. (supra)*** as well as of the CBEC circular and observed that although they required the adjudicating authority to make it explicitly clear in the operative part of the adjudication order regarding availability of paying 25% penalty in terms of the first and second proviso to Section 11AC of the CE Act, it did “not mean that the statute casts such an obligation on the adjudicating authorities. Therefore, if the adjudicating authority fails to make a reference in its order regarding the availability of paying 25% penalty, the Assessee cannot agitate that there is violation of the statutory provisions contained in Section 11AC and it will not be open to the appellate authority or the Courts to permit the Assessee to pay 25% penalty beyond the time prescribed under Section 11AC.” The Bombay High Court, therefore, set aside an order of the CESTAT permitting the Assessee to pay 25% of the penalty within 30 days from the date of communication of the order of its order.

19. When a similar issue arose before the Gujarat High Court in ***CCE, Ahmedabad-III v. Ratnamani Metals and Tubes Ltd. (supra)*** that High Court took the view that where the Order-in-Original of the adjudicating authority did not specifically draw the attention of the Assessee to the benefit of the proviso to Section 11AC concerning payment of the reduced penalty, there was nothing erroneous in an order of the CESTAT extending such benefit at the appellate stage to the Assessee and permitting the Assessee to pay the reduced within 30 days of the order of the CESTAT.

20. The Gujarat High Court at this stage took note only of, and chose to follow, its earlier decisions in *CCE v. Akash Fashion Prints Pvt. Ltd.* 2009 (239) ELT 439 (Guj) and *CCE v. M/s. Krishnaram Dyeing & Finishing Works* 2013 (298) ELT 376 (Guj). Soon thereafter it again dealt with the issue in *Commissioner of Central Excise v. Rajeshree Dyeing & Printing Mills (P) Ltd.* 2014 (305) ELT 442 (Guj). This time the Gujarat High Court took note also of the decisions of this Court and of the Bombay High Court noted hereinbefore and of the Allahabad High Court in *Commissioner of Customs and Central Excise v. Majestic Auto Ltd.* 2013 (289) ELT 95 (All) and held that the interpretation of Section 11 AC of the CE Act in its true spirit contemplates payment of the reduced penalty within 30 days of the communication of the order of the adjudicating authority. It also noted that "this being the provision embedded in the statute itself, nobody can be permitted to plead ignorance of the law." However, it was observed that "we need not be oblivious of stark reality" and that "it would not be too much to expect the Revenue to spell out the fulfilment of such requirements in the order itself." On the facts of the case in *Rajeshree Dyeing & Printing Mills (P) Ltd.* (*supra*), the Gujarat High Court noted that despite the adjudication order spelling out the availability of the option of payment of reduced penalty, the Assessee had not made such payment within the stipulated time. Therefore, it was held that the CESTAT could not have made available the option of payment of reduced penalty at the appellate stage.

21. To round up the discussion of the case law on Section 11AC of the CE Act, the predominant judicial view as evidenced by the decisions of the High

Courts of Bombay, Allahabad and this Court is that, notwithstanding the circular requiring an adjudicating authority to indicate in the adjudication order the option available to an Assessee of paying reduced penalty, that option cannot be made available at the appellate stage by permitting the Assessee to pay the reduced penalty within 30 days of the order of the appellate authority.

22. As far as Section 78 (1) read with Section 83 of the Finance Act, 1994 is concerned, apart from the fact that Section 11AC of the CE Act is not *ipso facto* applicable, the circular of the CBEC issued in the context of that provision requiring the adjudicating authority to mandatorily state in the adjudication order the availability of the option of payment of reduced penalty, is also not applicable. In other words, an adjudication order levying penalty under Section 78 (1) of the Finance Act 1994 does not have to mandatorily spell out the option available to an Assessee of payment of reduced penalty under the second proviso thereto. The failure to make such mention neither renders the adjudication order bad in law nor permits an appellate authority to give such an option at the appellate stage.

23. It appears to the Court that the very object of extending to an Assessee the option of availing the benefit of payment of reduced penalty in terms of the second proviso to Section 78 (1) of the Finance Act 1994 was to provide an incentive for prompt payment of the service tax and interest that is due. When an Assessee does not wish to contest the service tax liability or even when it wishes to contest such liability, but is prepared to pay upfront the service tax and interest without prejudice to its rights and contentions, the

statute provides an option of payment of reduced penalty to the extent of 25% of the service tax. This is, of course, subject to payment of not only the service tax and interest but also the reduced penalty within 30 days of the “communication of the order” of the adjudicating authority.

24. The SCN issued to an Assessee invariably mentions the statutory provisions under which the demand for service tax, interest and penalty is proposed to be raised. There can be no question, therefore, of the Assessee being unaware of the provisions of the statute. It is also very likely that in the adjudication proceedings the Assessee, who invariably has an authorised representative to put across its case to the adjudicating authority, will make a reference to the statutory provisions. In particular if the submission relates to penalty it is unlikely that an Assessee will not even refer to the relevant statutory provisions. The question of an Assessee, therefore, pleading ignorance of the law governing the adjudication proceedings cannot arise. There is no statutory requirement that the adjudication order itself should remind the Assessee of the option available of paying a reduced penalty in terms of the second and third proviso to Section 78 (1) of the Finance Act 1994.

25. When it comes to filing a further appeal, it is not unusual to find the covering letter accompanying the order of adjudication mentioning the statutory provision and the time period within which an Assessee may, if it so chooses, file an appeal. However, even if the covering letter failed to mention it, an Assessee would not be able to plead ignorance of such provision and seek extension of the period of limitation on that score. Even

for the purposes of an appeal, the date on which an order is 'communicated' to the party who seeks to file the appeal is the crucial date. That period cannot get extended only because the appellant was not told of the statutory provision under which he can file an appeal.

26. The upshot of this discussion is that an appellate authority cannot at the appellate stage give the option to an Assessee to pay the reduced penalty within a time that is beyond what is stipulated in the third proviso to Section 78 (1) of the Finance Act, 1994. The statute is explicit. The second proviso states that the payment of the service tax and interest has to be paid within “paid within thirty days from the date of communication of order of the Central Excise Officer determining such service tax” and the third proviso states that the reduced penalty that has been determined also has to be paid “within the period of thirty days referred to” in the second proviso. The option to pay the reduced penalty comes to an end on the expiry of thirty days from the date of communication of the adjudication order. It is only where the service tax is enhanced by an appellate authority that, in terms of the proviso to Section 78 (2) of the Finance Act, 1994, the time period for paying the reduced penalty at 25% of such enhanced service tax is computed from the date of communication of the appellate order.

27. In that view of the matter, in the instant case, the CECTAT could not have permitted the Respondent to pay the reduced penalty amount in terms of the second proviso to Section 78 (1) of the Finance Act, 1994 within thirty days from the date of the impugned order of the CESTAT. Such a direction was contrary to the third proviso to Section 78 (1) of the Finance

Act, 1994 and therefore legally unsustainable.

28. Consequently, the question framed is answered in the negative, i.e., in favour of the Department and against the Assessee, by holding that the CESTAT could not have, in terms of the third proviso to Section 78 (1) of the Finance Act, 1994 (as it stood prior to its substitution by the Finance Act 2015) read with Section 83 thereof, extend the time for the Respondent to pay the reduced penalty within 30 days from the date of the order of the CESTAT.

29. The appeal is accordingly allowed but with no orders as to costs.

S.MURALIDHAR, J

VIBHU BAKHRU, J

DECEMBER 05, 2015
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