Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench At Ahmedabad

REGIONAL BENCH- COURT NO.3
Service Tax Appeal No.10714 of 2021
(Arising out of OIA-AHM-EXCUS-001-APP-87-2020-21 dated 30/03/2021 passed by Commissioner of Central Excise, Customs and Service Tax-AHMEDABAD-I)

M S KHURANA ENGINEERING LIMITED ....**Appellant**
2nd Floor Msk House Panjarpole Road Ambawadi
Ahmedabad, Gujarat

VERSUS

C.C.E.-AHMEDABAD-I ....**Respondent**
C. Ex Bhavan, Nr Panjrapole & Polytechnic, Ambavadi,
Ahmedabad, Gujarat-380015

APPEARANCE:
Shri. Vipul Khandhar, Chartered Accountant for the Appellant
Shri G. Kirupanandan, Superintendent (AR) for the Respondent

CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR

Final Order No. A/ 10769 /2022

DATE OF HEARING: 24.06.2022
DATE OF DECISION:30.06.2022

RAMESH NAIR

The brief facts of the case is that the appellant is engaged in the providing taxable service namely, "Commercial and Industrial Construction Services" as defined under clause (25b) of Section 65 of the Financed Act, 1994. During the period April, 2005 to September, 2005 the appellant provided the aforesaid services valued Rs. 3,10,43,354/-, however, they have not discharged the service Tax on due dates. Subsequently, they have paid Service Tax along with interest on 1st December, 2005. Thereafter, the show cause notice was issued on 12.03.2017 proposing penalty under Section 78. The adjudicating authority has confirmed the penalty of 200% of the Service Tax amount which amounts to Rs. 2089838/-. The appellant being aggrieved by the imposition of penalty filed appeal before the Commissioner (Appeals) who has upheld the penalty, therefore, the present appeal filed by the appellant.

2. Shri. Vipul Khandhar, Learned Chartered Accountant, appearing on behalf of the appellant submits that the appellant paid the Service Tax with interest before the issuance of the show cause notice and there is no suppression of fact on the part of the appellant, therefore, in terms of Rule 73 (3) the department was not supposed to issue any show cause notice, hence, the penalty under Section 78 is not sustainable. He further submits that as regard the details of Services provided by them, they have issued the valid invoices and shown in their books of account as Service Tax payable,

therefore, there was no malafide intension on the part of the appellant. For this reason also the penalty is not imposable. He placed relied upon the following judgments:-

- NOKIA INDIA PVT. LTD. VS. COMMISSIONER OF SERVICE TAX, DELHI-2017 (52) S.T.R. 74 (Tri.-Del.)
- NISCHINT ENGINEERING CONSULTANTS PVT.LTD. VS. COMMR. OF C. EX., AHMEDABAD-2010 (19) S.T.T. 276 (Tri.- Ahmd.)
- KRISHNA SECURITY & DETECTIVE SERVICES VS. COMMR. OF S.T., AHMEDABAD- 2011 (24) S.T.R. 574 (Tri.-Ahmd.)
- SUNITA TOOLS PVT. LTD. Vs. COMMISSIONER OF SERVICE TAX, MUMBAI-II-2015 (37) S.T.R. 644 (Tri.- Mumbai)
- COMMISSIONER OF C. EX., VISAKHAPATNAM Vs. TIRUPATHI FUELS PVT. LTD. -2017 (7) G.S.T.L. 142 (A.).)
- SANTHI CASTING WORKS Vs. COMMISSIONER OF C. EX., COIMBATORE-2009 (15) S.T.R 219 (Tri.- Chennai)

3. on the other hand, Shri. G. Kirupanandan, Learned Superintendent (Authorized Representative) appearing on behalf of the Revenue reiterates the finding of the impugned order. He also relied upon the following judgments:-

- RAVAL TRADING COMPANY Vs. COMMISSSIONER OF SERVICE TAS - 2016 (142) STR 210 (Guj.)
- MODERN BUSINESS SOLUTIONS Vs. COMMISSIONER OF SERVICE TAX, AHMEDABAD-2019 (24) GST; 353 (Tri.,- Ahmd)
- INDUS GLOBAL LTD Vs. ADDITIONAL COMMISSIONER OF SERVICE TAX, VADODARA – 2015 (38) STR 14 (Guj.)
- PEARL TRAVELS Vs. COMMISSIONER OF C.EX & S.T., DAMAN – 2020 (37) GSTL 242 (Tri.- Ahmd)

4. I have carefully considered the submission made by both the sides and perused the records. I find that the limited issue to be decided in this case is that in the facts and circumstances of the present case whether the appellant is liable for penalty under Section 78 or otherwise. I find that this is not the

case where the appellant have supressed the transaction of services whereas, they have issued the legitimate invoices wherein they have shown the Service Tax. This is only case of delayed payment of Service Tax which was subsequently paid on 1st December, 2005 along with interest. The relevant provision under Section 73 (3) is reproduced below:-

> *"Where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the person chargeable with the service tax, or the person to whom such tax refund has erroneously been made, may pay the amount of such service tax, chargeable erroneously refunded, on the basis of his own ascertainment thereof, or on the basis of tax ascertained by a Central Excise Officer before service of notice on him under sub-section (1) in respect of such service tax, and inform the Central Excise Officer of such payment in writing, who, on receipt of such information shall not serve any notice under sub-section (1) in respect of the amount so paid :*
>
> *Provided that the Central Excise Officer may determine the amount of short payment of service tax or erroneously refunded service tax, if any, which in his opinion has not been paid by such person and, then, the Central Excise Officer shall proceed to recover such amount in the manner specified in this section, and the period of eighteen months referred to in sub-section (1) shall be counted from the date of receipt of such Information of payment."*

4.1 from the above Section 73(3) it is clear that if the assesse on his own ascertainment or on pointed out by the department pay the required Service Tax along with interest then department is not supposed to issue any show cause notice, consequently, no penalty can be imposed. In the present case, the appellant have admittedly paid the Service Tax on 1st December, 2005 along with interest, thereafter, the show cause notice was issued on 12.03.2017. Since, the appellant had already paid the Service Tax along with interest without contesting the same their case clearly falls under Section 73 (3) of Finance Act, 1994. The judgment relied upon by the Learned Chartered Accountant also support their case. The judgments relied upon by the Revenue being on different fact are not applicable in the fact of the present case.

5. Accordingly, the penalty imposed under Section 78 is set aside. Appeal is allowed with consequential relief.

(Pronounced in the open court on 30.06.2022)

(RAMESH NAIR)
MEMBER (JUDICIAL)

Prachi