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HIGH COURT OF CHHATTISGARH, BILASPUR

Writ Petition (T) No.113 of 2015

M/s. Mahadev Logistics, a partnership firm registered under the Indian Partnership Act, 1932, having its registered office at 142, Shahid Smarak Complex, G.E. Road, Raipur, Chhattisgarh – 492001, represented through its authorised signatory Ms. Kiran Pandey, aged about 35 years, D/o Shri R.N. Pandey of the above address.

---- Petitioner

Versus

1. Customs and Central Excise Settlement Commission (Principal Bench) At: 3rd Floor, Samrat Hotel, Kautilya Marg, Chanakya Puri, New Delhi – 110021.

2. The Commissioner, Central Excise, Customs & Service Tax, At: Central Excise Building, Dhamtari Road, Tikrapara, Raipur (C.G.)

3. Nalwa Steel & Power Ltd. At: Gharghoda Road, Taraimal, Raigarh – 496001 (C.G.), represented through its authorised representative.

---- Respondents

For Petitioner: Mr. Vaibhav Shukla, Advocate.
For Respondents No.1 and 2: -
Mr. Vinay Pandey, Junior Standing Counsel for Central Excise, Customs and Service Tax.
For Respondent No.3: Mr. Neelabh Dubey, Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal

Order On Board

12/04/2017

1. Invoking jurisdiction of this Court under Article 226/227 of the Constitution of India, the petitioner herein, a partnership firm,

calls in question legality, validity and correctness of the final order dated 3-3-2015 passed by the Customs & Central Excise Settlement Commission whereby a penalty of ₹ 4,50,000/- has been imposed upon the petitioner by the said Commission in exercise of power conferred under Section 78 of the Finance Act, 1994.

2. The essential facts requisite to adjudicate the *lis* between the parties are as under: -

2.1) The petitioner herein, M/s. Mahadev Logistics, is a partnership firm which is engaged in activities of supply of vehicles like Hyva, Dumpers, Pay Loader, Tipper etc. on hire basis and also in goods transportation by road but without service tax registration. These activities are classified under supply of taxable goods service and goods transport services under sub-clause (zzzzj) of clause 105 and clause 50(f) of Section 65 of the Finance Act, 1994. Investigation was initiated against the petitioner on the basis of intelligence report that the petitioner is engaged in supply of tangible goods on hire basis without obtaining service tax registration and accordingly, summons were issued on 30-5-2014 requiring the petitioner to submit the details / documents related to its activities. Immediately thereafter, on 13-6-2014, the petitioner obtained service tax registration and submitted documents before the concerned

competent authority. On 25-7-2014, on its own, the petitioner deposited service tax accepting its liability to the extent of ₹ 91,61,846/- and intimated to the Department. Similarly, on 26-8-2014, the petitioner also admitted and deposited interest liability to the extent of ₹ 32,62,861/- with intimation to the respondent Department. Thereafter, on scrutiny of records / documents submitted by the petitioner, it was revealed that the petitioner is engaged in the business of supply of vehicles, as mentioned herein, to M/s. Nalwa Steel and Power Limited, respondent No.3 herein, which are used for material handling in the plant for which the petitioner receives rent on yearly, monthly or trip basis for such supplies as per the agreement entered into with respondent No.3 herein and the petitioner was found involved to have been engaged in providing services of transportation of goods. Thereafter, on 21-10-2014, show cause notices were issued to the petitioner. Statement of authorised representative of the petitioner was recorded on 3-9-2014 in which it was stated by Mr. Jagdish Parulkar that they are engaged in supply of tangible goods service with M/s. Nalwa Steel and Power Limited and two other companies and they have obtained service tax registration on 13-6-2014 for supply of tangible goods and they did not obtain service tax registration in time because they understood that the work at M/s. Nalwa Steel and Power Limited is the

transportation work. They have neither claimed service tax nor collected the same from M/s. Nalwa Steel and Power Limited – respondent No.3. The service tax liability for the services provided to respondent No.3 against supply of tangible goods service has not been discharged on due dates but on being pointed out by the Department, they have discharged all the service tax liability for the period 2009-10 to 2013-14 amounting to ₹ 91,61,846/- including service tax and interest of ₹ 32,62,861/- have been paid.

2.2) Thereafter, after replying the show cause notice and recording their statements, the petitioner made an application to the Settlement Commission on 21-11-2014 to settle the dispute in connection with the show cause notice, whereas the petitioner accepted the total service tax liability and interest to the tune of ₹ 91,61,846/- and prayed that the admitted amount of service tax liability and interest be accepted and the petitioner be granted immunity from imposition of penalty and also granted immunity from prosecution.

2.3) The said Commission proceeding under Section 32F of the Central Excise Act, 1944 (for short, 'the Act of 1944') issued notice to the petitioner and copy of the application was forwarded to the Commissioner, Customs and Central Excise for report under Section 32F (3) of the Act of 1944. The Additional

Commissioner, Central Excise, Customs and Service Tax, by its memorandum dated 8-1-2015 submitted revenue report stating that the application had already paid service tax liability against supply of tangible goods service accepting their liability after initiation of investigation by the Department and also paid interest on the said amount, but the petitioner is liable for penalty, as the petitioner has willfully suppressed the fact of providing taxable service of supply of tangible goods with mala fide intent to evade payment of service tax.

2.4) The said Commission by its impugned order held that the petitioner has already paid service tax liability of ₹ 91,61,846/- and also paid interest, therefore, nothing is required to be done on that count and also granted full immunity from prosecution, as the petitioner has cooperated in the proceedings before the Commission and made full and true discloser of its duty liability. However, the Commission imposed a penalty of ₹ 4,50,000/- upon the petitioner observing that it is a case of willful suppression of taxable value of service and the petitioner is liable to make payment of ₹ 4,50,000/-.

2.5) Questioning legality, validity and correctness of imposition of penalty, as stated herein-above, the instant writ petition has been filed by the petitioner herein stating inter alia that imposition of penalty to the petitioner by the impugned order is

unsustainable and bad in law.

3. Return has been filed by the Department opposing the writ petition.

4. Mr. Vaibhav Shukla, learned counsel appearing for the writ petitioner, would vehemently submit that the petitioner did not obtain service tax registration under bona fide impression that since the petitioner is a goods transport agency under Section 65 (50b) of the Finance Act, 1994, which is exempted from service tax liability under Section 66D of the Finance Act. He would further submit that after notice of investigation, the petitioner found that the services rendered by it are taxable as per Section 66E (f) of the Finance Act as supply of tangible goods and the petitioner voluntarily and without recovering the amount from respondent No.3, immediately made payment of service tax on 28-6-2014 which was paid to the petitioner later by respondent No.3 and also paid the amount of interest liability on 28-6-2014 without waiting to obtain the same from the service recipient i.e. respondent No.3, as such, there is no attempt on the part of the petitioner to willfully suppress tax and interest liability with an intention to evade payment of tax. He would further submit that the petitioner having been granted immunity from prosecution finding no *mens rea*, penalty under Section 78 of the Finance Act, 1994, imposed is per se impermissible, as there is no *mens*

rea on the part of the petitioner to evade the tax liability and as such, the order impugned so far as imposing penalty to the tune of ₹ 4,50,000/- deserves to be set aside.

5. Vehemently opposing the submissions of Mr. Vaibhav Shukla, learned counsel for the petitioner, Mr. Vinay Pandey, learned Junior Standing Counsel appearing for the Revenue, would submit that there is willful suppression of taxable value of service tax by the petitioner and it could have been deducted by the officers of the Excise Department, and evasion of service tax by the petitioner would not have come to light and, therefore, the Settlement Commission is absolutely justified in imposing penalty in exercise of power conferred under Section 78 of the Finance Act, 1994 and as such, the writ petition deserves to be dismissed.

6. Mr. Neelabh Dubey, learned counsel for respondent No.3, would submit that service tax liability has been paid subsequently by respondent No.3 to the petitioner and before that, the service tax liability has been discharged by the petitioner. He would further submit that there is no *mala fide* on the part of the petitioner in not discharging the service tax liability.

7. I have heard learned counsel for the parties and also considered the rival submissions made herein-above and gone through the record carefully and critically.

8. In order to judge the correctness of the plea raised at the Bar, it would appropriate to notice Section 78 of the Finance Act, 1994 which provides penalty for suppressing, etc., of value of taxable services. Section 78 of the Finance Act, 1994 states as under: -

> "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—
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> (a) fraud; or
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> (b) collusion; or
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> (c) willful mis-statement; or
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> (d) suppression of facts; or
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> (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,
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> 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 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.

(2) Where the service tax determined to be payable is reduced or increased by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the court, then, for the purposes of this section, the service tax as reduced or increased, as the case may be, shall be taken into account:

Provided that in case where the service tax to be payable is increased by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the court, then, the benefit of reduced penalty under the second proviso to sub-section (1), shall be available, if the amount of service tax so increased, the interest payable thereon and twenty-five per cent. of the consequential increase of penalty have also been paid within thirty days or ninety days, as the case may be, of communication of the order by which such increase in service tax takes effect:

Provided further that if the penalty is payable under this section, the provisions of section 76 shall not apply.

Explanation.—For the removal of doubts, it is hereby declared that any amount paid to the credit of the Central Government prior to the date of communication of the order referred to in the second proviso to sub-section (1) or the first proviso to sub-section (2) shall be adjusted against the total amount due from such person."

9. A focused study of Section 78 (1) of the Finance Act, 1994 would show that where any 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 willful mis-statement; or suppression of facts; or contravention of any of the provisions of Chapter V of the Finance Act, 1994 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 refund, as may be 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.

10. Section 78 of the Finance Act, 1994 is *pari materia* to Section 11AC of the Act of 1944. Section 11AC of the Act of 1944 provides as under: -

> "**11AC. Penalty for short-levy or non-levy of duty in certain cases**.—(1) The amount of penalty for non-levy or short-levy or non-payment or short payment or erroneous refund shall be as follows:—
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> (a) where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, by reasons of fraud or collusion or any willful 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 payment of duty, the person who is liable to pay duty as determined under sub-section (10) of section 11A shall also be liable to pay a penalty equal to the duty so determined;
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> (b) where details of any transaction available in the specified records reveal that any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded as referred to in sub-section (5) of section 11A, the

person who is liable to pay duty as determined under sub-section (10) of section 11A shall also be liable to pay a penalty equal to fifty per cent. of the duty so determined;

(c) where any duty as determined under sub-section (10) of section 11A and the interest payable thereon under section 11AA in respect of transactions referred to in clause (b) is paid within thirty days of the date of communication of order of the Central Excise Officer who has determined such duty, the amount of penalty liable to be paid by such person shall be twenty-five per cent, of the duty so determined only in a case where the penalty is paid within the period so specified;

(d) where the appellate authority or tribunal or court modifies the amount of duty of excise determined by the Central Excise Officer under sub-section (10) of section 11A, then, the amount of penalties and interest payable shall stand modified accordingly and after taking into account the amount of duty of excise so modified, the person who is liable to pay duty as determined under sub-section (10) of section 11A shall also be liable to pay such amount of penalty or interest so modified.

Explanation.—For the removal of doubts, it is hereby declared that in a case where a notice has been served under sub-section (4) of section 11A and subsequent to issue of such notice, the Central Excise Officer is of the opinion that the transactions in respect of which notice was issued have been recorded in specified records and the case falls under sub-section (5), penalty equal to fifty per cent. of the duty shall be leviable.

(2) Where the amount as modified by the appellate authority or tribunal or court is more than the amount determined under sub-section (10) of section 11A by the Central Excise Officer, the time within which the interest or penalty is payable under this Act shall be counted from the date of the order of the appellate authority or tribunal or court in respect of such increased amount."

11. In the matter of **Maya Devi v. Raj Kumari Batra**[1], the Supreme Court has held that where an authority is vested with discretionary powers, discretion has to be exercised by application of mind and by recording reasons to promote fairness, transparency and equity.

12. It is settled law that an order imposing a penalty for failure to carry out a statutory obligation is the result of quasi-criminal proceedings and penalty will not ordinarily be imposed unless the party obliged has either acted deliberately in defiance of law or was guilty of contumacious or dishonest conduct, or acted in conscious disregard of its obligation. A penalty will not also be imposed merely because it is lawful to do so. In spite of a minimum penalty prescribed, the authority competent to impose the penalty may refuse to impose the penalty if the breach complained of was a technical or venial breach, flew from a bona fide though mistaken belief. (See **Karnataka Rare Earth & anr. v. Senior Geologist, Department of Mines & Geology**[2] and **Bharjatya Steel Industries v. Commissioner, Sales Tax, UP**[3].)

13. Penalty imposable under Section 11AC of the Act of 1944 has been considered by the Supreme Court in the matter of **Union of**

1 (2010) 9 SCC 486
2 (2004) 2 SCC 783
3 (2008) 11 SCC 617

India v. Rajasthan Spinning and Weaving Mills[4] relying upon its earlier decision in the matter of **Cosmic Dye Chemical v. CCE**[5] and it has been held that suppression or mis-statement of facts must be willful to constitute a ground for the purpose of Section 11AC of the Act of 1944 and mis-statement or suppression of facts must be willful and the condition precedent for imposition of penalty is that the authority would have to be satisfied that non-payment or short payment of duty was deliberate with intent to avoid payment of duty. In paragraph 29 of the judgment, it has finally been observed by the Supreme Court that penalty under Section 11-AC is punishment for an act of deliberate deception by the assessee with the intent to evade duty by adopting any of the means mentioned in the section.

14. Similar is the proposition of law laid down by the Supreme Court in the matter of **Commissioner of Central Excise, Chandigarh v. Pepsi Foods Ltd.**[6] in which Their Lordships of the Supreme Court considering the levy of penalty under Section 11AC of the Act of 1944, while following the principles of law laid down in **Rajasthan Spinning and Weaving Mills** case (supra), clearly held that in order to attract the penalty provision under Section 11AC, criminal intent or 'mens rea' is a necessary constituent and when no fraud or suppression or misstatement is alleged by the

4 (2009) 13 SCC 448
5 (1995) 6 SCC 117
6 2010 (260) E.L.T. 481 (S.C.)

revenue against the assessee, the imposition of penalty under Section 11AC of the Act of 1944 is wholly impermissible, and observed in paragraphs 19, 20 and 21 as under:

> "19. From a perusal of the aforesaid section, especially the underlined portion, it is clear that in order to attract the penalty provision under Section 11AC, criminal intent or `*mens rea*' is a necessary constituent. In the reply to the show cause notice the stand which has been taken by the respondent is that it has been paying the duty and there is no mala fide intention on its part to evade the payment of duty. The further stand is that the goods were cleared from the factory only on payment of duty. This stand which has been taken in the reply to the show cause notices was not found to be incorrect in the order-in-original. As such the imposition of penalty of the equal amount of duty under the order-in-original cannot be sustained.
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> 20. It is well settled that when the statutes create an offence and an ingredient of the offence is a deliberate attempt to evade duty either by fraud or misrepresentation, the statute requires `*mens rea*' as a necessary constituent of such an offence. But when factually no fraud or suppression or misstatement is alleged by the revenue against the respondent in the show cause notice the imposition of penalty under Section 11AC is wholly impermissible.
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> 21. The Court in this connection may remind itself of the fundamental principle "that an accused person cannot be convicted without proof of *mens rea*, unless from a consideration of the terms of the statute and other relevant circumstances it clearly appears that that must have been the intention of Parliament." [See the decision of the House of Lords in Vane v. Yiannopoullos, (1964) 3 All ER 820, and the opinion of Lord Reid at page 823]."

15. Similarly, in the matter of **Commissioner of Central Excise, Calcutta-II v. Indian Aluminium Company Limited**[7], Their

7 (2010) 15 SCC 167

Lordships of the Supreme Court have categorically held by relying upon the judgment of the Supreme Court in **Rajasthan Spinning and Weaving Mills** case (supra) that unintentional and bona fide non-payment of duty does not entail penalty under Section 11-AC of the Act of 1944. Identically, in the matter of **Commissioner of Central Excise, Vapi v. Kisan Mouldings Limited**[8], following the ratio of **Rajasthan Spinning and Weaving Mills** case (supra), the Supreme Court has held that that since it is a case of bona fide mistake and there was no intention to evade tax by the respondent, penalty was rightly not imposed.

16. Thus, it is quite vivid that presence of *mens rea* is absolutely necessary ingredient for imposing penalty under Section 78 of the Finance Act, 1994, as held by Their Lordships of the Supreme Court in afore-cited cases, as provisions under Section 11AC of the Act of 1944 and Section 78 of the Finance Act, 1994, are *pari materia*.

17. Applying the principles of law laid down by the Supreme Court, while reverting back to the facts of the present case, the question for consideration would be, whether the Settlement Commission is justified in imposing penalty under Section 78 of the Finance Act, 1994 holding that there is willful suppression of taxable value of service.

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8 (2010) 15 SCC 100

18. It is true that agreement between the petitioner and respondent No.3 clearly provides that the petitioner would produce the service tax registration certificate and likewise, reimbursement of service tax was limited to the production of demand regarding payment of service tax. But, it is not in dispute that the petitioner did not produce the service tax registration certificate to respondent No.3, however, immediately after initiation of investigation and upon service of notice of investigation by respondents No.1 and 2, the petitioner had already discharged its tax liability before issuance of show cause notice and paid the service tax liability on 25-7-2014 and discharged interest liability on 26-8-2014. It is also not in dispute that the petitioner discharged the tax liability even before receiving the said service tax amount from the service recipient – respondent No.3 herein and further, the learned Settlement Commission has already accepted the service tax liability and the interest liability holding that the petitioner has made full and true disclosure of its duty liability. It is also an admitted fact that the service tax was recoverable from respondent No.3 and the petitioner would get nothing from evasion of tax, as it has not to be paid by the petitioner from its own funds, it was recovered from respondent No.3 on production of service tax registration certificate and evidence of it and it could have been reimbursed by respondent

No.3. Therefore, there is no reason for the petitioner to evade the tax liability. Apart from the fact that the Tax Tribunal itself has held the disclosure to be full and true disclosure, it has accepted the duty liability and interest therein and had already granted immunity from the prosecution which clearly and unmistakably demonstrates that there is no *mens rea* on the part of the petitioner to evade the tax. Otherwise, there is no reason for the Settlement Commission to grant immunity to the petitioner from criminal prosecution. As held by the Supreme Court in **Pepsi Foods Ltd.** case (supra) and **Rajasthan Spinning and Weaving Mills** case (supra), presence of *mens rea* is a necessary constituent for imposing penalty under Section 78 of the Finance Act, 1994, which is absolutely absent in the present case and there is no intention to evade tax by the petitioner, it was a bona fide mistake on its part which it immediately rectified on being noticed particularly, in view of the fact that the Settlement Commission has granted immunity to the petitioner from prosecution under the Finance Act, 1994 and the Rules made thereunder.

19. Therefore, this Court is of the considered opinion that there is no willful suppression of facts to evade tax on the part of the petitioner and it was bona fide on the part of the petitioner, it was not deliberate and in absence of finding relating to *mens rea*

recorded by the Settlement Commission, the penalty imposed upon the petitioner under Section 78 of the Finance Act, 1994 deserves to be quashed.

20. Resultantly, the writ petition is allowed and part of the order imposing penalty of ₹ 4,50,000/- upon the petitioner under Section 78 of the Finance Act, 1994 is hereby quashed. However, if the penalty amount has been recovered or paid by the petitioner, it shall be refunded to the petitioner within four weeks from the date of receipt of a copy of this order. No order as to costs.

Sd/-
(Sanjay K. Agrawal)
Judge

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HIGH COURT OF CHHATTISGARH, BILASPUR

Writ Petition (T) No.113 of 2015

M/s. Mahadev Logistics

Versus

Customs and Central Excise Settlement Commission and others

HEAD NOTE

Presence of *mens rea* is a necessary constituent for imposing penalty under Section 78 of the Finance Act, 1994.

वित्त अधिनियम, 1994 की धारा 78 के अधीन शास्ति अधिरोपित करने हेतु आपराधिक मनःस्थिति एक आवश्यक घटक है।