

**Mount Shivalik Industries Ltd. Vs. Cce and C**

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**Court :** Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

**Decided On :** Feb-22-2006

**Judge :** M Ravindran

**Appellant :** Mount Shivalik Industries Ltd.

**Respondent :** Cce and C

**Judgement :**

1. This appeal is directed against Order-in-Appeal dated 27.9.2005 wherein the Commissioner (Appeals) has upheld the Order-in-Original imposing penalty and seeking to recover interest from the appellants.

2. The relevant facts that arise for consideration are that the appellants were receiving services of GTO for the period from 16.11.97 to 2.6.98. Validity of these services were challenged in the Supreme Court and a retrospective amendment was carried out to the Finance Act and the appellants were required to pay their service tax as recipient of services of GTO. The appellants discharged the service tax liability on 9.2.04, 16.2.04 and 1.3.2004. Show cause notice was issued to the appellants in November, 2004 directing them to show cause as to why penalty should not be imposed and interest should not recovered from them for depositing the service tax liability late. The appellants contested the show cause notice and the adjudicating authority vide Order-in-Original dated 14.6.2005 imposed penalty of Rs. 41,910.00 and also directed to pay interest as per the provisions of Section 75 of the Finance Act, 1994. On appeal the Commissioner (Appeals) also upheld the Order-in-original. Hence, this appeal.

3. Learned Advocate appearing for the appellants submits that the amendment carried out by Section 116 and 117 of Finance Act, 2000 was to bring the GTO services into net of service tax and to validate any action taken for recovery of such services for the period from 16.11.97 to 2.6.98. He also submitted that the amendment to Section 68 was carried out to make the person who has not yet paid the Service Tax but liable to pay, by Finance Bill 2003 and assented by the President on 17.5.2003. He submits that, as per the provision of Section 71A which were introduced, they are required to file return on 17.11.2003. It was his submission that due to this retrospective amendment the interest liability, if any, at all, would start from 17.11.2003. He further submits that the Hon'ble Supreme Court in the case of Gujarat Ambuja Cements Ltd. v. UOI as reported at has extended the period for filing the returns from 17.11.2003 to further two weeks. He also submits that since the amount of service tax liability was paid before issue of show cause notice, no penalty is warranted as held by the Larger Bench of the Tribunal in the case of CCE, Delhi-III, Gurgaon v. Machine Montell (I) Ltd. as reported at .

4. Considered the submissions of both sides and perused the records. It is not in dispute that the appellants have discharged their service tax liability without being asked to do so. The question arises, whether the appellants are liable to pay interest on such amount, and if so, from what date and also whether they are liable to pay penalty as upheld by the Commissioner (Appeals). In respect of penalty, I find that the issue is fully settled by the case of Machino Montell (supra) wherein it was held that if duty liability is discharged before the issue of show cause notice, then the question of imposition of penalty does not arise. In this case since the service tax liability was discharged even without issue of show cause notice, the appellant is on

strong footing for setting aside the penalty imposed on them. I hold that the penalty imposed on the appellant in this case is not correct and set aside the same.

5. In respect of the interest sought to be recovered from the appellants, relying upon Section 116 and 117 of the Finance Act of 2000, which amended Section 65 of Finance Act, 1994 retrospectively.

The said Section 116 & 117 read as under: 116. During the period commencing on and from the 16<sup>th</sup> day of July, 1997 and ending with the 16<sup>th</sup> day of October, 1998, the provisions of Chapter V of the Finance Act, 1994 shall be deemed to have had effect subject to the following modifications, namely : (i) for Clause (6), the following clause had been substituted, namely: "(6) "assessee" means a person liable for collecting the service tax and includes - (ii) in relation to services provided by a clearing and forwarding agent, every person who engages a clearing and forwarding agent and by whom remuneration or commission (by whatever name called) is paid for such services to the said agent; or (iii) in relation to services provided by a goods transport operator, every person who pays or is liable to pay the freight either himself or through his agent for the transportation of goods by road in a goods carriage; 117. Notwithstanding anything contained in any judgment, decree or order of any court, Tribunal or other authority, Sub-clauses (xii) and (xvii) of Clause (d) or Sub-rule (1) of Rule 2 of the Service Tax Rules, 1994 as they stood immediately before the commencement of the Service Tax (Amendment) Rules, 1998 shall be deemed to be valid and to have always been valid as if the said sub-clauses had been in force at all material times and accordingly, - (i) any action taken or anything done or purported to have been taken or done at any time during the period commencing on and from the 16<sup>th</sup> day of July, 1997 and ending with the day, the Finance Act, 2000 receives the assent of the President shall be deemed to be valid and always to have been valid for all purposes, as validly and effectively taken or done; (ii) any service tax refunded in pursuance of any judgment, decree or order of any court striking down Sub-clauses (xii) and xvii) of Clause (d) of Sub-rule (1) of Rule 2 of the Service Tax Rules, 1994 before the date on which the Finance Act, 2000 receives the assent of the President shall be recoverable within a period of thirty days from the date on which the Finance Act, 2000 receives the assent of the President, and in the event of non-payment of such service tax refunded within this period, in addition to the amount of service tax refunded within this period, in addition to the amount of service tax recoverable, interest at the rate of twenty-four per cent per annum shall be payable, from the date immediately after the expiry of the said period of thirty days, till the date of payment.

Explanation. - For the removal of doubts, it is hereby declared that no act or omission on the part of any person shall be punishable as an offence which would not have been so punishable if this section had not come into force." From the plain reading of the above retrospective amendments it can be concluded that these retrospective amendments sought to: (a) bring in the service receiver of Goods Transport Operators under the category of Service Tax Payer by amending the definition of assessee.

(b) To validate any action taken during the relevant period of authorization in respect of services received from G.T.O. The appellants' case before me, will not get covered by retrospective amendments as, they had discharged the Service Tax liability on the services received from Goods Transport Operators, and there was no action initiated against them for recovery of interest during the relevant period. As there was no action initiated for the recovery of interest from the appellants, the department's contention that he case is covered under Section 117 of Finance Act, 2000, miserably fails. If no attempt was made during the relevant period to raise any demand, the said action cannot be validated by taking recourse to retrospective amendments.

6. Having noticed the loophole in the provisions, a further amendment was brought by the Finance Act, 2003. Section 158 of the Finance Act, 2003 retrospectively amended the Section 68 and sought to insert a new Section 71A in the Finance Act, 1994, with retrospective effect. The Section 158 would read as under: 158. During the period commencing on and from the 16 day of July, 1997 and ending with the 16<sup>th</sup> day of October, 1998, the provisions of Chapter V of the Finance Act, 1994 (32 of 1994), as modified by Section 116 of the Finance Act, 2000 (10 of 2000), shall have effect and be deemed always to have had effect subject to the following further modifications, namely: (a) in Section 68, in Sub-section (1), the following proviso shall be

inserted at the end and shall be deemed to have been inserted on and from the 16<sup>th</sup> day of July, 1997, namely: (i) in relation to services provided by a clearing and forwarding agent, every person who engages a clearing and forwarding agent and by whom remuneration or commission (by whatever name called) is paid for such services to the said agent for the period commencing on and from the 16<sup>th</sup> day of July, 1997 and ending with the 16<sup>th</sup> day of October, 1998; or (ii) in relation to services provided by goods transport operator, every person who pays or is liable to pay the freight either himself or through his agent for the transportation of goods by road in a goods carriage for the period commencing on and from the 16<sup>th</sup> day of November, 1997 and ending with the 2<sup>nd</sup> day of June, 1998.

Shall be deemed always to have been a person liable to pay service tax, for such services provided to him, to the credit of the Central Government."; (b) after Section 71, the following section shall be inserted and shall be deemed to have been inserted on and from the 16<sup>th</sup> day of July, 1997, namely: 71A. Filing of return by certain customers -Notwithstanding anything contained in the provisions of Sections 69 and 70, the provisions there of shall not apply to a person referred to in the proviso to Sub-section (1) of Section 68 for the filing of return in respect of service tax for the respective period and service specified therein and such person shall furnish return to the Central Excise Officer within six months from the day on which the Finance Act, 2003 receives the assent of the President in the prescribed manner on the basis of the self-assessment of the service tax and the provisions of Section 71 shall apply accordingly.; (c) in Section 94, in Sub-section (2), after Clause (c), the following clause shall be inserted and shall be deemed to have been inserted on and from the 16<sup>th</sup> day of July, 1997, namely: A plain reading of Section 158 would reveal that provisions were inserted to Section 68, in order to bring the category of receiver of the services of GTO as the person liable to pay service tax. It can be seen that till this retrospective amendment the payment of service tax under Section 68 was to be made only by the service provider. After the retrospective amendment in Finance Act, 2003, the receiver of the services from G.T.O. was also made liable to pay service tax. Since the calculation of service tax liability would have been a bone of contention, the Finance Act, 2003, sought to insert a new Section 71A to make the receiver of services of G.T.O. to file returns. This insertion was necessitated as the provisions of Sections 69 & 70 of Finance Act, 1994 applied only to service provider. By inserting Section 71A, the Finance Act, 2003 made the service receivers to file return to the authorities to ascertain the service tax liability. The said Section 71A also granted time of six months from the date of assent of the bill by the President. The Finance Bill 2003 received the assent of the President on 16.5.2003. This would imply that the service receiver were required to file the returns by 17.11.2003 and discharge their service tax liability. It can be seen that by bringing this Section 71A in the statute, the liability to discharge the service tax was extended up to 17.11.2003. In other words, if an assessee does not pay his service tax liability by 17.11.2003, the interest liability gets fastened on to the assessee till the payment of service tax.

7. The Hon'ble Supreme Court in the case of Ambuja Cements Ltd. (supra) was seized with the challenge to the Section 71A wherein, the Hon'ble Supreme Court in its interim order had granted the petitioner a further period of 2 weeks from 17.11.2003 to file return and discharge the service tax due. Since the Hon'ble Supreme Court has granted a further period of two weeks for filing the return and discharge the service tax liability, the interest liability, if any, on the appellants, will be from the period subsequent to the two weeks of 17.11.2003. In this case the appellants have deposited service tax liability on 13.1.2004 and 1.2.2004 and hence interest liability on the appellants will accrue from the expiry of two weeks from 17.11.2003, till the discharge of Service Tax liability by the appellants.

8. In view of the above interest has to be calculated as per above direction. The appeal is allowed in the above terms.