

**IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL, CHENNAI**

Service Tax Appeal No. 287 of 2012

(Arising out of Order-in-Original No. 5/2012 S. Tax/Ch. IV dated 15.2.2012 passed by the Commissioner of Central Excise, Chennai IV Commissionerate)

M/s. Nebula Computers Pvt. Ltd.

No. B, Devkar Apartments
No. 147, Luz Church Road
Mylapore, Chennai – 600 004.

Appellant

Vs.

Commissioner of GST & Central Excise

Chennai North Commissionerate
26/1, Mahatma Gandhi Road
Nungambakkam, Chennai – 600 034.

Respondent

APPEARANCE:

Shri M.N. Bharathi, Advocate for the Appellant
Smt. Sridevi Taritla, ADC (AR) for the Respondent

CORAM

Hon'ble Shri P. Dinesha, Member (Judicial)
Hon'ble Shri M. Ajit Kumar, Member (Technical)

Final Order No. **40065 / 2023**

Date of Hearing : 15.02.2023

Date of Decision: 22.02.2023

Per M. Ajit Kumar,

This appeal is filed by M/s. Nebula Computers Pvt. Ltd. against Order in Original No. 05/2012 dated 15.2.2012 passed by Commissioner of Central Excise, Chennai IV Commissionerate.

2. M/s. Nebula Computers Pvt. Ltd. are rendering the services of Manpower Recruitment and Supply Services. The accounts / records of the assessee were taken up for audit by the Internal Audit of the

Service Tax Commissionerate, Chennai, during which it was noticed that the assessee had rendered the services of manpower recruitment agency and realized an amount of Rs.4,90,79,293/- for the period from April 2009 to January 2010 but did not pay the service tax of Rs.50,55,167/- collected from their customers. It was also noticed that the appellant did not file ST-3 Returns for the half-year ending 30.9.2009. They had also paid service tax belatedly for the year 2008 – 2009 with interest but there was a short-payment of Rs.12,059/-. Hence Show Cause Notice was issued to the appellant and after due process, the amount was confirmed in the impugned Order in Original.

3. We have heard learned counsel Shri M.N. Bharathi for the appellant and learned AR Smt. Sridevi Taritla for the Revenue.

4. The appellant is not contesting the amounts demanded in the impugned order. They are, however, aggrieved that in spite of CBEC Circular F. No. 137/167/2006-CX dated 3.10.2007 wherein the Board had stated that once service tax along with interest is paid before the issue of Show Cause Notice, that the entire proceedings is deemed to have been concluded. Hence no Show Cause Notice could have been issued to them. They have also referred to certain judgments of the Tribunal in this regard. They further contend that the ingredients to invoke the proviso to Section 73(1) are absent in this case and hence the question of penalty does not arise. Further, with regard to suppression of facts with intention to evade payment of tax liability, they submitted that they have filed statutory ST-3 Returns and had paid the entire service tax and interest and had intimated the fact

through ST-3 Returns. Hence the impugned order passed confirming the demand is not sustainable and is bad in law.

5. The Revenue has stated that this is a clear cut case of evasion as the appellant had collected tax from the public but failed to deposit it to the Government exchequer. Further, they had also withheld the information by not filing the ST-3 returns for the period from March 2009 to September 2009. Hence the confirmation of demand and interest along with imposition of penalty is justified.

6. We find that the appellant is not contesting the demand for tax and interest but is only aggrieved by imposition of fine and penalty. The fact that the appellant has collected Service tax from the recipients of service but not having deposited it into the government exchequer is not contested by them. They are pleading financial hardship for not paying the tax when due and are pleading for the benefit of not being penalised, for having subsequently paid the tax along with interest before the issue of show cause notice. In the case of indirect taxes, it is the duty of the assessee to collect the tax from the buyer of goods/ recipient of service and deposit the same to the government exchequer within the due date. Collecting tax but not depositing it in the exchequer and not reporting the fact of having collected it to the department by filing ST-3 returns on time period was inferred by the Lower Authority as having been done with the intent to evade payment of duty. No substantive reasons have been demonstrated by the appellant to show that they were facing financial hardship. In the circumstances the subjective satisfaction of the original authority in coming to his conclusion, is not found to be perverse.

7. It has been held by courts that appellate bodies should be mindful of the first-hand knowledge of the original authority and the position that he holds to assess the facts and the credibility of circumstances from his own observations. Even if a superior appellate body feels that another view is possible, that is no ground for substitution of the original authorities view with one's own by exercising its appellate jurisdiction. The exception would be if the impugned order is demonstrably found as not being rational or reasonable or is suffering from procedural impropriety. Which is not the case here. In the circumstances we find that the show cause notice having been issued invoking the extended time limit under proviso to section 73 (1) of the Finance Act 1994 and the imposition of penalty cannot be said to be unwarranted. The appellants plea that once the service tax along with interest is paid before the issue of show cause notice then the entire proceeding is deemed to have been concluded, depends on the facts and circumstances of each individual case. They have cited both circular and F No 137/167/2006-C.Ex dated 03/10/2007 and certain judgements in furtherance of their plea. It is seen that the circular dated 03/10/2007 clearly states that section 73(1A) of the Finance Act, 1994 provides for conclusion of adjudication proceedings in the case of wilful suppression/fraud/collusion if the taxpayer pays service tax liability along with interest if the tax payer pays service tax liability along with interest and a penalty equal to 25% of service tax amount within a period of one month from the date of issue of show cause notice. In the instant case where suppression of facts has been alleged in the Show Cause Notice, the appellant has not

paid the reduced penalty as is required by law along with tax and interest, however the same facility has still been extended to them by the original authority in the impugned order. Further with regard to the judgements cited by the appellant against the imposition of penalty, it is felt that each case has to be seen from the facts and circumstances that prevail. In the case decided by the Hon'ble Madras High Court, it was noted by the Hon'ble Court that the appellant had demonstrated the severe hardship faced by them as recorded in para 7.1 of the Tribunal order which is not the situation here, where a bland statement of financial hardship has been made without any supporting materials/pleadings. In its decision in *Onward E-Services Ltd. vs Commissioner of Service Tax Mumbai* as reported in 2019 (21) GSTL 167 (Tri. Mum.), the Tribunal noted that the assessee had correctly declared the value in the ST-3 returns filed by them and had not suppressed any facts unlike the present case where no ST-3 Returns were filed for the relevant period on time. In the case of *Cosmic Dyes Chemicals vs Collector of Central Excise, Bombay* reported in 1994 (9) TMI 86, the Hon'ble Supreme Court noted that it was a case where the goods were thought to be exempt from duty, whereas in the instant matter the taxability of the service during the relevant period is not under challenge. The judgements cited are hence not relevant in the appellant's case.

8. In the circumstances, undue sympathy to impose an adequate penalty would undermine the efficacy of law and encourage other tax payers to avoid paying taxes on time while waiting for if and until they have been found to have evaded duty by the department to pay their

taxes. The appeal is hence devoid of merit and is rejected. The impugned order is upheld.

(Pronounced in court on 22.02.2023)

(P. DINESHA)
Member (Judicial)

(M. AJIT KUMAR)
Member (Technical)

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