

2023-TIOL-58-CESTAT-AHM

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH, AHMEDABAD
REGIONAL BENCH
COURT NO. III**

Service Tax Appeal No. 10276 of 2013

[Arising out of OIA-112-2012-BVR--SKS-COMMR-A—AHD, Dated: 12.11.2012
Passed by Commissioner of Central Excise and Service Tax-RAJKOT]

Date of Hearing: 28.11.2022

Date of Decision: 10.01.2023

**SUMERU BUILDERS
G-1, SUMERU COMPLEX DAWN,
BHAVNAGAR, GUJARAT**

Vs

**COMMISSIONER OF CENTRAL EXCISE AND SERVICE TAX,
RAJKOT, CENTRAL EXCISE BHAVAN,
RACE COURSE RING ROAD...INCOME TAX OFFICE,
RAJKOT, GUJARAT-360001**

Appellant Rep by: Shri B R Bopat, CA

Respondent Rep by: Shri Prakash Kumar Singh, Superintendent (AR)

CORAM: Ramesh Nair, Member (J)

Raju, Member (T)

ST

- Assessee is in appeal against confirmation of demand of service tax and imposition of penalty - Assessee had discharged liability to service tax soon after the same was pointed out by revenue - It has been argued by assessee that there was some doubt regarding their liability to service tax in terms of CBEC Circular No. [108/02/2009-S.T.](#)

therefore, there was some confusion in their mind - He argued that they did not have any intention to evade payment of tax as they had taken registration immediately after amendment clause (zzq) and (zzzh) of sub-section (105) of Section 65 of Finance Act, 1994 - Section 67(2) ibid clearly provided for treating the amount charged by service provider as inclusive of service tax payable unless it is specifically mentioned in documents - No evidence has been produced by revenue to hold that the amount collected by assessee is exclusive of service tax or it has been separately collected by assessee - No merit found in department's stand that benefit of Section 67(2) ibid could not be extended - Assessee discharged the entire service tax along with interest soon after the same was pointed out and in this circumstances the benefit of Section 73(3) ibid should not have been denied - Penalty imposed on assessee are set aside: CESTAT

Appeal allowed

FINAL ORDER NO. A/10027/2023

Per: Raju:

This appeal has been filed by M/s. Sumeru Builders against confirmation of demand of service tax and imposition of penalty.

2. Learned Chartered Accountant appearing for the appellant argued that the appellant had no intention to evade any service tax. The appellants were at the material time engaged in building of residential complex and in terms of clarification issued by CBEC [108/02/2009-ST-F.No. 137/12/2006-CX.4](#) dated 29.01.2009 they were exempted from the payment of service tax in the capacity of "Builders". He pointed out that the Finance Act was amended in 2010 and with effect from 01.07.2010 the liability to pay service tax arose on builders. He pointed out that they took registration on 06.08.2010. He pointed out that they had certain doubts regarding liability of builder to pay service tax and therefore, they did not immediately start paying service tax. He pointed out that the summons were issued to the appellant in the month of April, 2011 and issue regarding payment of service tax on the advance received by the appellant was raised in the said proceedings. The appellant voluntarily discharged service tax amounting to Rs.13,71,476/- along with interest of Rs.47,925/-, late fee of Rs.2,000/- on 18.04.2011 and 20.04.2011 through various challans. He argued that they had also filed ST-3 returns on 20.4.2011.

2.1 He argued that they are not challenging the liability of service tax. He argued that the benefit of Section 73(3) has been denied and a show cause notice was issued to them. Although, they had paid the entire tax liability along with interest before issuance of show cause notice and communicated their acceptance of the liability vide letter dated 25.04.2011. He argued that in view of the above fact that they had accepted the liability, benefit of Section 73(3) should have been allowed.

2.2 He pointed out that the benefit of Section 73(3) has been denied mainly on the ground that the appellant had discharged the service tax liability on cum tax basis in terms of Section 67(2) of the Finance Act, 1994. The show cause notice issued by the revenue in January, 2012 does not grant them the benefit of cum tax calculation of tax liability in terms of Section 67(2) of the Finance Act, 1994 hence the impugned order denies benefit of Section 73(3) of the Finance Act, 1994.

3. Learned AR relies on the impugned order. He pointed out that the appellant had not discharged their service tax liability therefore, the benefit of Section 73(3) of the Finance Act cannot be extended to the appellant.

4. We have carefully considered the rival submissions. We find that the appellants had discharged the liability to service tax soon after the same was pointed out by revenue. It has been argued by the appellant that there was some doubt regarding their liability to service tax in terms of CBEC Circular No. [108/02/2009-ST-F.No. 137/12/2006-CX.4](#) dated 29.01.2009 therefore, there was some confusion in their mind. He argued that they did not have any intention to evade payment of tax as they had taken registration immediately after the amendment clause (zzq) and (zzzh) of sub-section (105) of Section 65 of the Finance Act, 1994. We find that section 67(2) of the Finance Act, 1994 reads as under:-

Valuation of taxable services for charging service tax.

(1).....

(i).....

(ii).....

(iii).....

(2) Where the gross amount charged by a service provider, for the service provided or to be provided is inclusive of service tax payable, the value of such taxable service shall be such amount as, with the addition of tax payable, is equal to the gross amount charged.

He pointed out that since they had discharged the service tax liability after availing the benefit of sub-section (2) of Section 67 of the Finance Act, 1994 their claim to the application of Section 73(3) could not have been discarded by the original adjudicating authority.

4.1 We find that Section 67(2) clearly provided for treating the amount charged by the service provider as inclusive of service tax payable unless it is specifically mentioned in the documents. In the instant case no evidence has been produced by the revenue to hold that the amount collected by the appellant is exclusive of service tax or it has been separately collected by the appellant. In view of the above, we do not find any merit in the department's stand that benefit of Section 67(2) could not be extended. If we consider the facts in this background, we

find that the appellant discharged the entire service tax along with interest soon after the same was pointed out and in this circumstances the benefit of Section 73(3) should not have been denied.

5. The appeal is allowed to the extent that the penalty imposed on the appellant are set aside. Appeal is disposed of in the above terms.

(Pronounced in the open court on 10.01.2023)

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