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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **SERTA 8/2017**

Date of decision: 10th November, 2017

COMMISSIONER OF TAX, GST DELHI EAST..... Appellant
Through: Mr. Amit Bansal, Sr. Standing Counsel with Mr. Akhil Kulshrestha, Advocate.

versus

M/S INDIAN RAILWAY FINANCE CORPORATION
..... Respondent
Through:

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MS. JUSTICE PRATHIBA M. SINGH

SANJIV KHANNA, J. (ORAL):

Having heard counsel for the appellant, we are not inclined to interfere with the impugned order, which records and affirms on the bona fide conduct of the respondent-assessee, M/s. Indian Railway Finance Corporation.

2. The respondent-Corporation, a Government of India Corporation, was established with an objective to raise money from the market to part finance the planned outlay and finance capital expenditure for expansion, development and modernization of Indian Railways. The respondent-Corporation in turn raises funds in the

form of taxable and tax free bonds, term loans from banks/financial institutions and through offshore borrowings.

3. For overseas borrowing, the respondent-Corporation had paid arrangement fee, annual agency fee, upfront fee, underwriting fee etc. to several non-resident financial institutions.

4. As per the case set up by the appellant, reverse charge principle was applicable on the said charges and the respondent-Corporation was liable to pay service tax on the aforesaid services under clause (12), Section 65 of Chapter-V of the Finance Act, 1994.

5. The stand taken by the respondent-Corporation was that as per their understanding, they were not liable to pay service tax on the aforesaid fee etc. payable to non-resident financial institutions. No service was rendered by these non-resident financial institutions in India.

6. Nevertheless, to avoid any dispute or controversy, the respondent Corporation had discharged the service tax liability as raised by the appellant amounting to Rs.1,21,92,787/-. They had also paid interest of Rs.23,96,774/- on the said amount.

7. The question raised in the present case relates to imposition of penalty under Section 78 of the Finance Act. The order-in-original itself records that the service tax on reverse charge basis was payable on payments to non-residents with effect from 19th April, 2006 in view of the amendment carried out in the Finance Act through insertion of Section 66A. In fact, the respondent-Corporation had paid service tax even for the prior period. We have referred to the aforesaid position to show the bona fides of the respondent-Corporation.

8. Counsel for the appellant submits that in view of the fact that the respondent-Corporation has made payment, it should be inferred that they accept their fault and the requirements for imposition of penalty under Section 78, i.e. fraud, collusion, misstatement, suppression of facts or contravention of any provision of the Act or the Rules made there under, with the intent to evade payment of service tax, was satisfied. It is stated that Section 78 is *pari materia* with the proviso to Section 73, which provides for extended period for recovery. Payments made by the respondent Corporation were for the extended period.

9. The said argument proceeds on the assumption that since the respondent-Corporation had paid the service tax for the extended period without any contest, it should be held that the said Corporation has accepted that they had suppressed facts or contravened provisions of the Act/Rules with the intent to evade payment of service tax. The argument should be rejected. Goodness and precocious conduct of the respondent Corporation in making payment has to be appreciated and not condemned. The respondent-Corporation, to show their bona fides, had paid service tax even for the period prior to 19th April, 2006. Non-contest in the proceedings under Section 73 cannot be used as a ground or reason to establish and show that requirements of Section 78 are satisfied. The Tribunal after appreciating different aspects, including conduct of the respondent-Corporation has held that penalty should not be levied. The finding is a finding of fact.

9. We do not find any reason to interfere with the impugned order in the facts of the present case. The appeal is dismissed in limine, without costs.

SANJIV KHANNA, J

PRATHIBA M. SINGH, J

NOVEMBER 10, 2017
NA/VKR