(2011) 08 DEL CK 0335

In the Delhi High Court

Case No : CEAC No''s. 6 and 7 of 2009

Bajaj Travels Ltd. APPELLANT

Vs

Commissioner of Service Tax RESPONDENT

Date of Decision : 03-08-2011

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11D, 35G(3)
Finance Act, 1994 — Section 66, 67, 68, 72(2), 73(2)
Service Tax Rules, 1944 — Rule 6(7)

Citation : (2012) 190 DLT 479 : (2012) 25 STR 417 : (2011) 33 STT 346 : (2012) 48 VST 389

Hon'ble Judges : M.L. Mehta, J;A.K. Sikri, J

Bench : Division Bench

Advocate : P.S. Patwalia, Arvind Nayar and Ms. Netta Kushwaha, for the Appellant; Mukesh Anand, R.C.S. Bhadoria and Shailesh Tiwari, for the Respondent

Final Decision : Allowed

Judgement

A.K. Sikri, J.—The appellant in both these appeals, filed u/s 35G(3) of the Central Excise Act, 1944 read with Section 83 of the Finance Act, 1994, is the same company. The challenge is also to the singular judgment dated 19th June, 2006 passed by Customs, Excise and Service Tax Appellate Tribunal (hereinafter referred to as the Tribunal) whereby two appeals of the appellant herein have been decided. Primary, nay, sole grievance of the appellant is against the imposition of penalties. These penalties were the result of two orders dated 19th June, 2009 and 31st January, 2006 passed by the Commissioner of Tax, New Delhi on identical grounds, albeit for varying periods, resulting into two proceedings giving rise to two appeals. Otherwise issues are common in both the appeals which are admitted on the following substantial questions of law:-

1. Whether the Tribunal erred while upholding the penalty u/s 76 and reducing the penalty to 25% of the Service Tax demand u/s 78 of the Finance Act, 1994 when in the backdrop of the facts of the matter, the present case is fully covered

within the ambit of the provisions of Section 80 of the Finance Act, 1994?

2. Whether the Tribunal miserably failed to appreciate the fact that in both the cases, the service tax was immediately paid upon issuance of show cause notice and before passing the adjudication order with heavy interest of Rs. 29.00 lacs and Rs. 18.00 lacs respectively showing the bona fide of the appellant herein?

3. Whether the Amendment in Section 78 by the Finance Act, 2008 operate retrospectively being a beneficial peace of legislation which provides that in case where penalty for suppressing the value of taxable service u/s 78 is imposed, penalty for failure to service tax u/s 76 shall not apply, therefore, in another words, simultaneous penalties under both Sections 76 and 78 could not have been imposed by the authorities below? Whether the benefit of this Amendment in Section 78 should also be applied to the present case as there should not be two separate penalties for the same alleged offences?

Before we delve into the depth of these questions to find answers thereto, it would be appropriate to trace the history of the proceedings giving rise to these.

2. The appellant is engaged in the Air Travel Agent Services having its registered office in Chandigarh and branch offices in Chandigarh and Delhi. The establishment of the appellant is exigible to service tax. The appellant has also been submitting the service tax return and depositing the service tax from time to time.

3. On 5th September, 2005, the Head Quarter Preventive Staff of the respondent Department visited the office of the appellant at Chandigarh and scrutinized the record pertaining to ticket booking in relation to air travel. It was found that, prima facie, the value of services declared in ST-3 return was far below the value appearing in the appellant''s records. The Department resumed documents/ records as per "Resumption Memo" dated 5th September, 2005 and a panchnama to that effect was drawn on the spot. The officials also visited the branch office of the appellant at Chandigarh and seized the documents from that office as well. Statements of Sh. Prakash Negi, Sales Executive, Sh. Harminder Singh, Sales Manager, Sh. Kuldeep Singh, Manager (Accounts) and Sh. Mohinder Singh Bajaj Director of the appellant were recorded. Thereafter, show cause dated 17th October, 2005 was issued by the respondent stating that the appellant had rendered air travel agent services to the tune of Rs. 2,58,62,84,429/- but had declared to the department in the ST-3 returns only a taxable value of Rs. 1,30,77,36,056 thereby suppressing a taxable value to the tune of Rs. 1,27,85,48,373/-involving short payment of Service Tax amounting to Rs. 86,02,849/-and Education Cess Rs. 64,029/- for the period April, 2000 to March, 2005 for Branch Office, New Delhi. It was further alleged that the appellant did not depict the exact basic fare figures of tickets sold in their ST-3 returns submitted to the department during the period referred above and that there had been under valuation of the taxable services. On this basis, in the show cause notice, the appellant was asked to show as to why:-

(i) the service tax amounting to Rs. 86,02,849/- and Education Cess amounting to Rs. 64,029/- payable for the period April, 2000 to March, 2005 should not be recovered from them u/s 68 and Section 73 of the Chapter V of the Finance Act, 1994 read with Section 11D of the Central Excise Act, 1944.

(ii) Interest at the applicable rates on the service tax and education cess recoverable should not be recovered from them u/s 75 of the Act.

(iii) Penalty should not be imposed upon them for suppression of the taxable value for payment of service tax u/s 78 for failure to pay service tax u/s 76 and for filing of prescribed ST-3 returns improperly and with incorrect details u/s 77 of the Act.

4. The appellant submitted a detailed written reply dated 17th November, 2005. The defence was that it was paying service tax as per its bona fide understanding that the service tax was to be paid on the commission retained by the appellant. It was pleaded that the matter of calculation was not clear to it. Therefore, it had been filing its service tax returns on the basis of the commission retained by it and the correct method of computing the service tax was pointed out by the visiting team of the department. Therefore, the allegation of suppression, mis-statement were wrongly attributed to it. It was claimed that the appellant is a reputed organization discharging its tax liability diligently and was filing statutory returns with the department regularly. Therefore, in view of the above submissions, the allegation of suppression, mis-statement etc. was not sustainable in the eyes of law. As a law abiding assessee, it had started depositing the differential service tax and have cleared all the dues including the interest of Rs. 29,00,000/- as a law-abiding asses-sec on the full amount despite the fact that they had deposited a sum of Rs. 35 lacs even before the issuance of the show cause notice. The amount of Rs. 35 lacs was paid before the issuance of show cause notice. Therefore, no interest was chargeable for the amount deposited prior to the issuance of the show cause notice still entire interest was paid. Relying upon the judgment of the Larger Bench of the CESTAT rendered in the case of 2004 (96) ECC 180 , it was submitted that since the appellant had discharged its full duty and interest liability, that itself showed its bona fide. Therefore, the case fell within the parameters of Section 80 of the Finance Act, which provides non-imposition of penalty.

However, the Commissioner of Service Tax, Delhi did not agree with the contentions of the appellant. He, therefore, passed the orders dated 31st January, 2006 and confirmed the demand of Service Tax amounting to Rs. 86,02,849/- (which was already paid by the appellant) and also ordered for an Education Cess of Rs. 64,029/- interest as per provisions of Section 75 of the Act. The amount of Rs. 29,00,000/- already paid by the appellant as interest was accepted by the Commissioner of Service Tax. He has also imposed penalty of Rs. 100/- for every day of default u/s 76 and Rs. 86,66,878/- u/s 78 and also imposed penalty of Rs. 1000/- u/s 77 of the Act on the appellant. To the same effect orders were passed for other period.

5. Being aggrieved by the orders passed by the Commissioner of Central Excise, the appellant preferred two appeals before the Tribunal.

The Tribunal decided these appeals vide impugned orders dated 19th June, 2006. It was found by the Tribunal that the appellant was actually paying the service tax at the prevailing rate u/s 66 on the net commission instead of on the gross commission. That had resulted in short payment of tax. While doing so, in the ST-3 returns, instead of showing the gross and net commission and calculation of service tax on that basis, the tax payment shown was as if it was on the ''basic fare'' shown in the ST-3 returns was not the actual ''basic fare''. Those were much lower amount which was being determined by the back calculation so that the tax on the same at the rate mentioned in Rule 6 (7) matches the service tax paid by the appellant on the net commission at the normal rate. The difference between the basic fare declared and the actual basic fare on which the tax was to be paid at the rate prescribed under Rule 6 (7) was to the tune of about Rs. 213 crores in aggregate. Since in the ST-3 returns, the tax payment was being done on basic fare basis under Rule 6(7), though no formal declaration of option in this regard had been made, the Commissioner had rightly held that the appellant had opted to pay tax on the "basic fare" and having done so, it should pay the tax on the actual "basic fare" instead of tax on much lower amount declared in the returns. There was thus, short payment of service tax whether calculated on basic fare basis under Rule 6(7) at the rate prescribed thereunder or calculated at the normal rate on the gross commission. The Tribunal thus confirmed the tax demand as per the orders of the Commissioner.

6. We may hasten to add that there is no dispute in this behalf and the appellant has accepted the position that tax as adjudicated and demanded was payable. The dispute, in fact, is about the penalty imposed upon the appellant u/s 76,77,78 of the Finance Act.

7. Insofar as imposition of penalty u/s 77 of the Act is concerned, since it can be levied only on non-filing of the return and in the present case, the appellant had been admittedly filing the returns, the penalty u/s 77 has been set aside by the Tribunal.

8. Insofar imposition of penalty u/s 76 of the Act is concerned, the Tribunal has taken the view that as the appellant failed to discharge service tax liability by due date resulting in huge short payment and provisions of this Section stand attracted. While holding so, the Tribunal rejected the contention of the appellant that penalty under Sections 76 and 78 of the Act cannot be imposed at the same time when the offence is the same. Since the two Sections are distinct and separate and even those offences are committed in the course of same transactions or arise out of the same act, penalty would be imposable both u/s 76 as well as Section 78 of the Act. However, the penalty u/s 76 is reduced to Rs. 1005 per day in one of these appeals.

9. Insofar as penalty u/s 78 of the Act is concerned, the Tribunal took note of the

fact that it is attracted wherever any service tax has not been levied or paid or has been short levied or short paid or erroneously refunded by the reason of fraud, suppression of facts, wilful misstatement or contravention of any provisions of Finance Act or of the rules made thereunder with intent to evade the payment of service tax. According to the Tribunal the ingredients of this provision have been satisfied in the instant case as there was deliberate mis-declaration in the ST- 3 returns by the appellant with the intention to suppression of measure of levy. However, going by that fact that service tax as determined u/s 73(2) of the Act alongwith interest and penalty was paid within 30 days from the date of the communication of the order, having regard to the first and second proviso to Section 78 of the Act, the penalty would be 25% of the service tax. Thus, while upholding the penalty u/s 78 of the Act, the Tribunal has reduced the same to 25% of the service tax. The position is summed up by the Tribunal in para 18 of its order which reads as under:-

(18). On the basis of our above observations and findings, we, therefore, hold as under:-

(i) The service tax demand alongwith interest in both the cases is upheld.

(ii) while the penalty u/s 77 of the Act is set aside, imposition of penalty u/s 76 of the Act is upheld.

(iii) In appeal case No. ST/440/06, the penalty u/s 76 of the Act is reduced from Rs. 200/- per day to Rs. 100/- per day while in the appeal case No. ST/111/ 06, the imposition of penalty at Rs. 100/- u/s 76 of the Act per day is upheld.

(iv) As regards penalty u/s 78 while holding that the penalty under this section is attracted in both the appeal cases, the benefit of first proviso to Section 78 would be available to the appellant in accordance with the ratio laid down by Hon''ble Delhi High Court in the case of K.P. Pouches P. Ltd. (supra), since the appellant in both the cases has paid entire service tax alongwith interest even prior to the issue of adjudication order, and accordingly the penalty in both the appeals is reduced to 2596 of the service tax demand.

10. It is clear from the above that the case of the department is that the appellant who is the registered as "Travel Agent" and had been providing air travel agent services had suppressed the taxable value while evading the payment of service tax. The appellant contended that due to misunderstanding and confusion of the methodology of calculation of service tax the short fall occurred in discharging payment of the service tax. However, it was submitted that whatever amount of service tax was received from the customers the same was paid to the department thus not retaining a single penny with them. Further the appellant paid almost the entire amount before the issuance of the show cause notice. The appellant further averred that there was no mala fide intention, reasons of fraud, suppression of material facts or any intention on the part of the appellant at any stage to evade service tax. Thus, the defence of the appellant is that it was at best a case of shortfall of service tax on account of bona fide

reason and u/s 80 of the Act, the appellant ought not to have been penalized for the same. According to the appellant the Tribunal has miserably failed to appreciate this plea of the appellant based on cogent and material facts available on record as well as various judgments holding that in such circumstances there is a reasonable cause in not depositing the service tax and the penalty should not have been imposed.

11. It is also contented by the appellant that Section 78 has been amended by the Finance Act, 2008 categorically providing that in case where penalty for suppressing the value of tax u/s 78 is imposed, penalty for failure to deposit the service tax u/s 76 of the Act shall not apply and, therefore, simultaneous penalties both under Sections 76 and 78 of the Act cannot be imposed.

12. Mr. Mukesh Anand, learned counsel appearing for the Department countered the aforesaid submissions of Mr. Patwalia. His thrust was that it was not a case of bona fide error on the part of the appellant who had in fact collected the service tax from the customers but did not deposit the same. He highlighted the facts that as per the scrutiny, following position emerged in respect of the appellant''s Branch Office at New Delhi:

Period: April 2000 to March, 2005

Details of Basic fare

Value of basic fare of International tickets (in Rs.)

Basic fare declared as per ST-3 returns

1,30,77,36,056.00

Basic fare as per records resumed from the notice or IATA-BSP

2,58,62,84,429.00

Difference

1,27,85,48,373.00

He further emphasized that the investigation revealed that the appellant was passing on a portion of the commission received to their customers and were calculating the Service Tax payable on the commission retained by them. However, in the ST-3 returns they were showing the Service Tax payable by ''basic fare'' method by back calculating the basic fare from the service tax already calculated on commission retained by them. Further, on perusal of the sale bills issued by them, it is clear that they were collecting Service Tax on ''basic fare'' method. Thus, it appeared that the assessee had rendered Air Travel Agent Services to the tune of Rs. 2,58,62,84,429/- (basic fare) but had declared to the department in the ST-3 returns only a taxable value of Rs. 1,30,77,36,056/- (basic fare) thereby suppressing a taxable value to the tune of Rs. 1,27,85,48,373/- (basic fare) involving short payment of service tax amounting to Rs. 86,02,849/- and education cess Rs. 64,029/-for the period

April, 2000 to March, 2005 for branch office New Delhi. This, according to him, could not be a bona fide error and was a clear attempt to evade the payment of requisite service tax and in these circumstances the penalty was rightly imposed. Mr. Mukesh Anand also relied upon the findings of the Commissioner in this behalf duly endorsed by the Tribunal. According to him, legal position was clear namely the service tax was to be paid on the basis of commission received from the Air Lines and not on the basis of commission retained by the appellant after passing portion of the said commission to the customers. The appellant was showing incorrect figure of payment of service tax on the basis of basic fare in the service tax returns. However, in the ST-3 returns they were showing the Service Tax payable by basic fare method by back calculating the basic fare from the service tax already calculated on commission retained by them. In this manner the appellant was not reflecting the correct amount of basic fare. He argued that Rule 6(7) of the Service Tax Rules, 1944 provided an option to the Air Travel Agent to pay an amount calculated at the specified rate of the basic fare towards the discharge of his service tax liability instead of paying service tax at the rate specified thereunder and the option once exercised would apply uniformly in respect of all the booking of the air travel by the Air Travel Agent and could not be changed during the financial year under any circumstances. In this scenario plea raised by the appellant that although it was aware of both the methods of payment of service tax but nobody advised it that conditions of two cannot be adopted was clearly baseless. It was, therefore, a deliberate mis-declaration on the part of the appellant to suppress the measure levy which was liable for penalty and the penalty imposed in these circumstances was fully justified.

13. We have given our due considerations to the aforesaid submissions made by the learned counsel for both the parties. The service tax was introduced by the Finance Act, 1994 and the relevant provisions are contained in Chapter-V of the said Act, Section 66 is the charging Section and Section 67 provides the manner of valuation of taxable services for charging service tax. Section 68 of the Act, cast an obligation on every person providing taxable service to any person to collect the service tax at the rate specified in Section 66 of the Act. From Section 76 to Section 80 of the Act, different kinds of penalties are provided for varying default/failure on the part of those who are liable to pay service tax. Since in the instance case the penalties are levied under Sections 76 and 78 of the Act, we reproduce these two Sections hereunder:-

76. Section 76- Penalty for failure to pay service tax.-Any person, liable to pay service tax in accordance with the provisions of section 68 or the rules made under this Chapter, who fails to pay such tax, shall pay, in addition to such tax and the interest on that tax amount in accordance with the provisions of section 75, a penalty which shall not be less than two hundred rupees for every day during which such failure continues or at the rate of two per cent of such tax, per month, whichever is higher, starting with the first day after the due date till the date of actual payment of the outstanding amount of service tax:

Provided that the total amount of the penalty payable in terms of this section shall not exceed the service tax payable.

78. Penalty for suppressing value of taxable service.-Where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, by reason of-

(a) fraud; or

(b) collusion; or

(c) Wilful mis-statement; or

(d) suppression of facts; or

(e) contravention of any of the provisions of this Chapter or of the rules made thereunder with intent to evade payment of service tax.

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 not be less than, but which shall not exceed twice, the amount of service tax so not levied or paid or short-levied or short-paid or erroneously refunded)

(Provided that where such service tax as determined under sub-section (2) of section 73, and the interest payable thereon u/s 75 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 this section shall be twenty five per cent of the service tax so determined:

Provided further that the benefit of reduced penalty under the first 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 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 also that in case where the service tax determined 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 first proviso 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 of communication of the order by which such increase in service tax takes effect.

A perusal of the provisions would show that Section 76 provides for penalty for failure to pay service tax. In such a case, in addition to the tax and interest on that tax amount to be calculated in accordance with the provision of Section 75, penalty is also leviable on the defaulter which shall not be less than Rs. 200 for every day during which such failure continues or at the rate of two per cent of such tax per month whichever is higher. There is, however, a cap on this penalty stipulated in the proviso to this Section which states that penalty payable is not to exceed the service tax payable.

14. On the other hand, as per Section 78, penalty can be imposed for suppressing the value of taxable service. This provision applies where the service tax has not been levied or paid or where it has been short-levied or short-paid or where the service tax has been erroneously refunded by reasons of circumstances stipulated therein which are fraud or collusion or wilful mis-statement or suppression of acts or contravention of any of the provisions of this Chapter or of the rules made thereunder. Such fraud, collusion etc. has to be with intent to evade payment of service tax. Thus, provision of Section 78 are attracted when not only a case of fraud, collusion etc. is made out but it is also established that the defaulter did not pay or short- paid or got refund of the tax paid with intent to evade the payment of service tax. In such a case, the person who is liable to pay such service tax or is erroneously refunded the tax can be levied the penalty which shall not be less than the amount of service tax evaded/ refunded subject to maximum of the twice the said amount of the non-levy/non-payment/short-levied/short-payment/erroneous refund. However, in case the service tax as determined u/s 72(2) of the Act is paid alongwith the interest payable u/s 75, within 30 days from the date of communication of the order, this penalty is to be reduced to 2596 of the service tax so determined.

15. By their very nature, Sections 76 and 78 of the Act operate in two different fields. In the case of Asstt. CCE v. Krishna Poduval (2006) 3 STT 96 the Kerala High Court has categorically held that instances of imposition of penalty u/s 76 and 78 of the Act are distinct and separate under two provisions and even if the offences are committed in the course of same transactions or arise out of the same act, penalty would be imposable both under Sections 76 and 78 of the Act. We are in agreement with the aforesaid rule.

16. No doubt, Section 78 of the Act has been amended by the Finance Act, 2008 and the amendment provides that in case where penalty for suppressing the value of taxable service u/s 78 is imposed, the penalty for failure to pay service tax u/s 76 shall not apply. With this amendment the legal position now is that simultaneous penalties under both Sections 76 and 78 of the Act would not be levied. However, since this amendment has come into force w.e.f. 10th May, 2008, it cannot have retrospective operation in the absence of any specific stipulation to this effect. Going by the nature of the amendment, it also cannot be said that this amendment is only clarificatory in nature. We may mention that Punjab and Haryana High Court in CCE v. Pannu Property Dealers, (2010) 29 STT 180 has taken the view that even if the scope of two sections of the Act may be different, the fact that penalty has been levied u/s 78 could be taken into account for levying or not levying penalty u/s 76 of the Act. However, that was a

case where the appellate authority had exercised its discretion not to levy the penalty u/s 76 of the Act, when the larger penalty had already been imposed u/s 78 of the Act. In this scenario, the appeal of the Revenue against the said view taken by the appellate authority was-dismissed holding that "appellate authority was within its jurisdiction not to levy the penalty u/s 76 of the Act having regard to the fact that penalty equal to service tax had already been imposed u/s 78 of the Act. This thinking was also in consonance with the amendment now incorporated though the said amendment may not have been applicable at the relevant time. Moreover, the amount involved is Rs. 51,026/- only." The Court, thus, chose not to interfere with the aforesaid discretion of the Tribunal.

17. However, in the instant case, the appellate authority, including the Tribunal, has chosen to impose the penalty under both the Sections. Since the penalty under both the Sections is imposable as rightly held by Kerala High Court in Krishna Poduval (supra), the appellant cannot contend that once penalty is imposed u/s 78, there should not have been any penalty u/s 76 of the Finance Act.

18. We, thus, answer question no.3 against the assessee and in favour of the Revenue holding that the aforesaid amendment to Section 78 by Finance Act, 2008 shall operate prospectively.

19. Coming to questions No. 1 & 2, the case of the appellant is that having regard to the provisions of Section 80, there was no reason to impose the penalty under Sections 76 and 78 of the Finance Act. Section 80 is couched in the following language:-

80. Penalty not to be imposed in certain cases.--Notwithstanding anything contained in the provisions of Section 76 (Section 77 or section 78), no penalty shall be impossible on the assessee for any failure referred to in the said provisions if the assessee proves that there was reasonable cause for the said failure.

20. The facts narrated above, clearly disclose, and there is no dispute about the same, that there was failure on the part of the appellant to pay full service tax. It was argued by the learned counsel for the appellant that this provision has no application as tax was paid though short-paid. Section 76 applies only when no tax is paid at all as it deals with "failure to pay service tax" and not when tax is paid but short-paid. However, the defence of the appellant is that this failure was due to reasonable cause and, therefore, Section 80 becomes applicable. A bare reading of this provision would show that the onus is upon the appellant to prove "reasonable cause" for this failure. The moot question is as to whether the appellant has been able to discharge this onus? Before we advert to this issue, it is necessary to understand the meaning which is to be assigned to expression "reasonable cause". It would mean, in common parlance a cause or ground which was not unreasonable. To put it otherwise, in the context of this case the appellant has to show that there was sufficient and proper reasons which

occasioned the appellant to make short deposits of service tax than required under the provisions of the Act. If the appellant can show that the manner in which he was making the deposits of the service tax was bona fide i.e. in good faith, it would amount to ''reasonable cause''. Bona fide implies in the absence of fraud or unfair dealing. The equivalent of this phrase is "honestly". The correct province of this phrase is, therefore, to qualify things or actions that have relation to the mind or motive of the individual. Chambers 20th Century Dictionary defines bona fide mean ''in good faith: genuine''. The word ''genuine'' means ''natural: not spurious; real; pure; sincere''. In Law Dictionary Mozley and Whitley define bona fide to mean ''good faith, without fraud or deceit''. Thus the term bona fide or genuinely refers to a state of mind.

21. We are of the opinion that in the instant case, the appellant has been able to prove its bona fides. Explanation of the appellant for short-payment was, as already pointed out above, that it was paying the service tax as per its bona fide understanding that it was required to pay the same on the commission retained by it and that the method of calculation was not clear to the appellant. This explanation gains momentum from the conduct depicted by the appellant after the visiting team of the Department had pointed out the correct method of computing the service tax. The said team of the Department visited the office of the appellant on 5th September, 2005 and pointed out the irregularity committed by the appellant. Once this mistake was realized, without even waiting for the show cause notice, which was issued on 17th October, 2005, short-fall was made good on 6th September, 2005 i.e. on the very next day after the search. Thus not only the entire tax was paid within two days, so much so, even the interest on the delayed payment was made good. This has further to be seen under the surrounding circumstances prevailing at that time. The service tax was a new tax imposed on the Air Travel Agent Services. There were many misgivings and confusion which led to committal of defaults by many such persons. In fact, the Department itself issued Circular accepting the fact that there was confusion and on that basis penalties in all such cases were waived in respect of those who had paid the service tax in response of the said Scheme. The learned Senior Counsel for the appellant also referred to series of orders passed by the various Benches of CESTAT where such penalties were set aside holding that when the service tax/ short-service tax was paid before the show cause notice, it was a bona fide error. The details of some of these orders are as under;-

(i) (2008) 14 STJ 181

(ii) 2005 (98) ECC 771

(iii) CCE v. R.N. Katyal (2008) 17 STT 232 (New Delhi - CESTAT)

(iv) 2004 (169) ELT 141

(v) 2007 (6) S.T.R. 139

(vi) (2008) 12 STT 413

(vii) CCE v. Bapu Transport (2008) 14 STT 38 (Mum. - CESTAT)

(viii) Niki Associates v. CCE (2008) 16 STT 400 (Mum. - CESTAT)

(ix) (2007) 9 STJ 198

(x) (2007) 7 STT 79

(xi) 2005 (188) ELT 454

(xii) CCE v. R.K. Electronic Cable Network (2006) 3 STT 418 (New Delhi - CESTAT)

(xiii) CCE & C. v. Mukul S. Patil (2008) 16 STT 246 (Bom.).

(xiv) A.R. Ashish V. Patil v. CCE (2006) 5 STT 325 (Mum. - CESTAT)

Even some of the High Courts have taken similar view in the following judgments:-

(i) Union of India (UOI) and Others Vs. T.P.L. Industries Ltd.,

(ii) CCE v. Sigma Steel Tubes 2007 (82) RLT 361 (P &H)

(iii) Union of India (UOI) Vs. Perfect Thread Mills Ltd. and Another,

22. We are, thus, of the opinion that it was not a case of imposition of penalty upon the appellant. We answer the questions of law nos. 1 & 2 in favour of the appellant and against the Revenue. As a result, penalties imposed upon the appellant under Sections 76 and 78 of the Finance Act are hereby set aside.

23. The appeals are allowed in the aforesaid terms.

24. No costs.