(2010) 09 GUJ CK 0187

In the Gujarat High Court

Case No : Tax Appeal No. 1082 of 2010

Commissioner APPELLANT

Vs

Jivanbhai D. Makwana RESPONDENT

Date of Decision : 30-09-2010

Acts Referred:

Central Excises and Salt Act, 1944 — Section 35G
Finance Act, 1994 — Section 65(68), 76, 77, 78, 80

Citation : (2010) 20 STR 605

Hon'ble Judges : Harsha Devani, J;D.A. Mehta, J

Bench : Division Bench

Advocate : Darshan M. Parikh, SSC, for the Appellant; None, for the Respondent

Final Decision : Dismissed

Judgement

Harsha Devani, J.—In this appeal u/s 35G of the Central Excise Act, 1944 the Appellant-revenue has challenged order dated 21. 10.2009 2010 (18) S.T.R. 206 made by the Customs, Excise and Service Tax Appellate Tribunal (the Tribunal) proposing the following two questions :

(I) Whether the penalty u/s 76 & Section 78 of the Finance Act, 1994 can be dropped without invoking and/or fulfilling the requirements u/s 80 of the Finance Act, 1994?

(ii) Whether the Tribunal, in law was entitled to come to a conclusion regarding the unawareness regarding tax liability/bona fide on the face of the fact that they had collected Service Tax, without finding of fact on this behalf and when this is a case of intentional evasion of service tax?

2. The Respondent was engaged in providing taxable services under the category of "manpower recruitment or supply agency" as defined u/s 65(68) of the Finance Act, 1994 (the Act) as amended from time to time. A show cause notice came to be issued on 5.1.2007, proposing to recover service tax along within interest and penalty under Sections 76, 77 and 78 of the Act. The show cause

notice came to be adjudicated vide order-in-original dated 5.1.2007 whereby service tax of Rs. 1,34,263/- came to be confirmed and penalty came to be imposed under Sections 76, 77 and 78 of the Act. Being aggrieved, the Respondent preferred appeal before the Commissioner (Appeals) who dismissed the appeal. The Respondent carried the matter in second appeal before the Tribunal, who confirmed the demand of service tax but set aside the penalty under Sections 76 and 78 of the Act.

3. Mr. Darshan Parikh, learned Senior Standing Counsel for the Appellant, reiterated the reasoning adopted by the adjudicating authority as well as the Commissioner (Appeals). Referring to paragraph 9 of the order of the Commissioner (Appeals) it was pointed out that the Commissioner (Appeals) had found as a matter of fact that the Assessee had failed to pay the service tax on the value of taxable service realized by it after crossing the exemption limit of Rs. 4,00,000/- and suppressed the said fact with intention to evade payment of service tax to submit that considering the said fact, the Tribunal was not justified in setting aside penalties levied under Sections 76 and 78 of the Act.

4. As can be seen from the impugned order of the Tribunal, on merits, the Tribunal has held against the Assessee and has confirmed the demand of service tax. However, insofar as the question of levy of penalties under Sections 76 and 78 of the Act is concerned, the Tribunal, upon appreciation of evidence on record, was of the view that the Assessee was under a bona fide belief that the service rendered by the Assessee was not covered by the definition of "manpower recruitment or supply agency" as defined under the Act and that as such the Assessee could not be blamed if he thought that the service rendered by him would not fall under the said category of services. The Tribunal, accordingly, was of the view that this was a fit case for invoking the provisions of Section 80 of the Act and to take a lenient view as regards the penalties imposed under Sections 76 and 78 of the Act and accordingly, set aside the penalties.

5. From the facts noted hereinabove, it is apparent that on merits the Tribunal has held against the Assessee insofar as the demand of service tax is concerned. However, on the question of penalty, the Tribunal has found that considering the wording of the contract of service, the Assessee could not be blamed for entertaining a belief that he was not covered by the service, viz. "manpower recruitment or supply agency". It is in these circumstances that the Tribunal has resorted to the provisions of Section 80 of the Act and set aside the penalties. The submission advanced on behalf of the revenue by referring to the findings recorded by the Commissioner (Appeals) is misconceived, inasmuch as all that has been recorded is that the Assessee had failed to pay the service tax due on value of taxable service realized by him and not that the Assessee had realized service tax and not paid the same as was sought to be contended on behalf of the revenue. Section 80 of the Act provides that notwithstanding anything contained in the provisions of Section 76, Section 77 or Section 78, no penalty shall be imposable 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. Considering the provisions of Section 80 of the Act, which opens with the non-obstante clause, once the Tribunal after appreciating the evidence on record has recorded a finding that the Assessee was under the bona fide belief that the service in question was not covered under the definition of "manpower recruitment or supply agency" as defined u/s 65(68) of the Act, it is apparent that the Assessee had proved that there was reasonable cause for the failure referred to in Sections 76 and 78 of the Act and as such the provisions of Section 80 of the Act would clearly be attracted and the question of imposing penalty under Sections 76 or 78 would not arise. In the circumstances, no infirmity can be found in the impugned order of the Tribunal in resorting to the provisions of Section 80 of the Act and deleting the penalties levied under Sections 76 and 78 of the Act.

6. For the foregoing reasons, it is not possible to state that there is any legal infirmity in the impugned order of the Tribunal so as to warrant interference. No question of law, much less, a substantial question of law can be stated to arise out of the impugned order of the Tribunal. The appeal is dismissed accordingly.