(2010) 11 GUJ CK 0091

In the Gujarat High Court

Case No : Tax Appeal No. 780 of 2010

Commissioner APPELLANT

Vs

Target Polymers Pvt. Ltd. RESPONDENT

Date of Decision : 25-11-2010

Acts Referred:

Central Excises and Salt Act, 1944 — Section 35G
Finance Act, 1994 — Section 73, 76, 77, 78, 79

Citation : (2011) 22 STR 267 : (2011) 33 STT 359

Hon'ble Judges : Harsha Devani, J;H.B. Antani, J

Bench : Division Bench

Advocate : Darshan M. Parikh, for the Appellant;

Final Decision : Allowed

Judgement

Harsha Devani, J.—In this appeal u/s 35G of the Central Excise Act, 1944, the Appellant revenue has challenged order dated 23rd October, 2009 made by the Customs, Excise and Service Tax Appellate Tribunal (the Tribunal) proposing the following questions:

(i) Whether the penalty u/s 78 of the Finance Act, 1994 can be reduced below the minimum limit prescribed by invoking Section 80 of the Finance Act, 1994?

(ii) Whether the Tribunal 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, with a finding of fact on this behalf?

2. M/s. Target Polymers Pvt. Ltd., 6, Patel Colony, R.K. Colony, Jamnagar is holding service tax registration under the category of "Business Auxiliary Service."

3. During the scrutiny of the records of the Respondent, it was observed that the Respondent had received an amount of Rs. 41,05,929/- (including service tax) towards commission income/job charges as reflected in the Profit and Loss

Account for the year 2004-05, 2005-06 and 2006-07. The Respondent had not paid service tax amounting to Rs. 4,81,121/- to the Government on such receipted amount. Consequent to the aforesaid inquiry, investigation and persuasive actions, the Respondent paid Rs. 4,81,121/- along with interest. The investigations led to issuance of Show Cause Notice dated 11th September, 2008.

4. The Show Cause Notice was adjudicated vide Order-in-Original dated 16th January, 2009 by the Adjudicating Authority wherein service tax of Rs. 4,81,121 /- came to be confirmed against the Assesses u/s 73 of the Finance Act, 1994 (the Act) along with interest. Penalty of Rs. 1,000/- came to be imposed u/s 77 and penalty of Rs. 4,81,121/- came to be imposed u/s 78 of the Act. Being aggrieved, the Assesses carried the matter in appeal before the Commissioner (Appeals), who vide order dated 28th April, 2009 confirmed the service tax with interest. He, however, inter alia reduced the penalty imposed u/s 78 of the Act from Rs. 4,81,121/- to Rs. 1,00,000/- by resorting to the provisions of Section 80 of the Act. Revenue carried the matter in appeal before the Tribunal but did not succeed.

5. Mr. Darshan Parikh, learned Senior Standing Counsel for the Appellant submitted that in the light of the provisions of Section 78 of the Act, it was mandatory to impose penalty in terms of the said provision. That there was no discretion vested in the authority to impose a lesser penalty than that provided under the said provision. That as such, the Commissioner (Appeals) was not justified in reducing the penalty imposed u/s 78 of the Act and that the Tribunal was not justified in confirming the same. In support of his submissions, the learned Counsel placed reliance upon a decision of this Court in the case of Commissioner, Central Excise and Customs v. Port Officer 2010 (19) S.T.R. 641 : 2010 (257) E.L.T. 37 rendered on 8th July, 2010 in Tax Appeal No. 1367 of 2009 to submit that the controversy in issue stands concluded by the said decision in favor of the revenue.

6. Despite service of notice for final disposal, there is no appearance on behalf of the Respondent Assesses. In the circumstances. Admit. The following substantial question of law arises for determination:

Whether the penalty u/s 78 of the Finance Act, 1994 can be reduced below the minimum limit prescribed by invoking Section 80 of the Finance Act, 1994?

7. From the facts noted hereinabove, it is apparent that the Commissioner (Appeals) had reduced the penalty imposed u/s 78 of the Act by resorting to the provisions of Section 80 of the Act. This Court, in the case of Commissioner, Central Excise and Customs v. Port Officer (supra) was dealing with the question as to whether penalty u/s 76 of the Finance Act, 1994 can be reduced below the limit prescribed by the section. The Court held that Section 80 of the Act overrides the provisions of Section 76, Section 77, Section 78 and Section 79 of the Act and provides that no penalty shall be imposable even if any one of the said provisions are attracted, if the Assesses proves that there was reasonable

cause for failure stipulated by any of the provisions. Whether a reasonable cause exists or not is primarily a question of fact. The provision indicates that the onus to establish reasonable cause is on the Assesses. Once reasonable cause is established, the authority has discretion to hold that no penalty is imposable. The provision does not say that even upon establishment of reasonable cause, a reduced quantum of penalty is imposable. The provision only says that no penalty is imposable. It was further held that on a conjoint reading of Section 76 and Section 80 of the Finance Act, 1994, it is not possible to envisage a discretion as being vested in the authority to levy penalty below the prescribed limit. If the authority imposing the penalty is not entitled to levy below the minimum prescribed, the appellate Court and the Tribunal cannot read the provision so as being vested with such powers, namely, to reduce the penalty below the minimum prescribed. The Court accordingly answered the question in the negative.

8. The aforesaid decision would be squarely applicable to the facts of the present case wherein the Commissioner (Appeals) had reduced the penalty below the minimum prescribed by resorting to the provisions of Section 80 of the Finance Act, which has been confirmed by the Tribunal. In the circumstances, following the said decision, the question is accordingly answered in the negative. The penalty u/s 78 of the Finance Act, 1994 cannot be reduced below the minimum prescribed by invoking Section 80 of the Finance Act, 1994.

9. In the light of the aforesaid, the appeal is accordingly allowed in the following terms. The impugned order of the Tribunal is hereby quashed and set aside. Appeal No. ST/294/09 is restored to the file of the Tribunal. The Tribunal shall decide the appeal afresh in light of the decision of this Court in the case of Commissioner of Central Excise and Customs v. Port Officer (supra), after giving the parties reasonable opportunity of hearing.