(2010) 11 GUJ CK 0060

In the Gujarat High Court

Case No : Tax Appeal No. 782 of 2010

Commissioner, Central Excise and Customs APPELLANT

Vs

Ashish Amand and Co. RESPONDENT

Date of Decision : 25-11-2010

Acts Referred:

Central Excises and Salt Act, 1944 — Section 35G
Finance Act, 1994 — Section 69, 75, 76, 77, 78

Citation : (2011) 38 VST 342

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

Bench : Division Bench

Advocate : Darshan M. Parikh, for the Appellant;

Final Decision : Allowed

Judgement

Ms. Harsha Devani, J.—In this appeal u/s 35G of the Central Excise Act, 1944, the appellant-Revenue has challenged order dated 19th May, 2009 made by the Customs, Excise and Service Tax Appellate Tribunal ("the Tribunal") proposing the following questions :

(i) Whether the penalty u/s 76 of the Finance Act, 1994 can be reduced below the minimum limit prescribed ?

(ii) Whether the penalty u/s 76 of the Finance Act, 1994 can be dropped without invoking section 80 of the Finance Act, 1994 ?

2. The respondent is a holder of service tax registration u/s 69 of the Finance Act, 1994 (""''the Act") under the category of "maintenance and repair service". The respondent filed service tax returns late by 414 days and 329 days, respectively. The respondent had also short-paid interest of Rs. 118 for the period October, 2006 to December, 2006. A show-cause notice therefore, came to be issued to the respondent proposing to recover interest of Rs. 118 u/s 75 and for imposition of penalties under sections 76 and 77 of the Act.

3. The show-cause notice came to be adjudicated vide order dated February 27, 2008 whereby interest came to be confirmed u/s 75 of the Act and penalty of Rs. 1,30,860 came to be imposed u/s 76 of the Act. Penalty of Rs. 1,000 came to be imposed u/s 77 of the Act. The assessee carried the matter in appeal before the Commissioner (Appeals), who vide order dated August 12, 2008 upheld the order of the adjudicating authority imposing penalty under sections 76 and 77 of the Act but reduced the penalty u/s 76 of the Act from Rs. 1,30,860 to Rs. 41,000. Against the order of the Commissioner (Appeals), the Revenue preferred appeal before the Tribunal which came to be dismissed vide the impugned order.

4. 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 76 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] 35 VST 242 rendered on July 8, 2010 in Tax Appeal No. 1367 of 2009 to submit that the controversy in issue stands concluded by the said decision in favour of the Revenue.

5. Despite service of notice for final disposal, there is no appearance on behalf of the respondent-assessee. In the circumstances, Admit. The following substantial question of law arises for determination :

Whether the penalty u/s 76 of the Finance Act, 1994 can be reduced below the minimum limit prescribed by invoking section 80 of the Finance Act, 1994 ?

6. 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 [2010] 35 VST 242, 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 is attracted, if the assessee 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 assessee. 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.

7. 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 76 of the Finance Act, 1994 cannot be reduced below the minimum prescribed by invoking section 80 of the Finance Act, 1994.

8. 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/169/08 is restored to the file of the Tribunal. The Tribunal shall decide the appeal afresh in the light of the decision of this court in the case of Commissioner, Central Excise and Customs v. Port Officer [2010] 35 VST 242, after giving the parties reasonable opportunity of hearing.