
(2010) 07 GUJ CK 0014
In the Gujarat High Court
Case No : Tax Appeal No. 1367 of 2009

Commissioner, Central Excise and Customs	APPELLANT
Vs	
Port Officer	RESPONDENT

Date of Decision : 08-07-2010

Acts Referred:

Finance Act, 1994 — Section 68, 76, 77, 78, 79

Citation : (2011) 238 CTR 95 : (2010) 35 VST 242

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

Bench : Division Bench

Advocate : Darshan M. Parikh, for the Appellant; S.N. Soparkar and Swati Soparkar, for the Respondent

Judgement

D.A. Mehta, J.—This appeal has been preferred by the Appellant-Revenue challenging order dated December 26, 2008 made by the Customs, Excise and Service Tax Appellate Tribunal, West Zonal Bench, Ahmedabad (the Tribunal) proposing following question of law:

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

2. On May 6, 2010, when the appeal came up for hearing, following order came to be made by the court:

1. Heard the learned standing counsel for the Appellant-Revenue.

2. The learned Counsel has invited attention to Section 76 as it stood at the relevant time as well as Section 80 of the Finance Act, 1994 to assail the impugned order of the Tribunal.

3. Notice for final disposal returnable on June 24, 2010.

3. Pursuant to the said order in response to notice issued by the court, the Respondent-Assessee has put in appearance through learned senior advocate, who has been heard. ADMIT. The aforesaid question is treated as the substantial

question of law.

4. The learned Counsel appearing for the Respondent-Assessee submitted that u/s 76 of the Finance Act, 1994 (the Act) the authority is empowered to levy penalty but has discretion in so far as the quantum of penalty is concerned. When read with Section 80 of the Act the said discretion empowers the authority to reduce the penalty to an amount below the limit stipulated in Section 76 of the said Act because once there is a discretion to delete the entire penalty such discretion can also extend to reducing the penalty partially, if the facts so warrant. In support of the submissions following ten judgments have been relied upon to submit that High Courts of Rajasthan, Bombay, Punjab and Haryana and Karnataka have taken a view similar to the view adopted by the Tribunal in the facts of the present case and, therefore, no interference was warranted:

- (i) Union of India v. Dial and Travels [2007] 7 STT 372 (Raj);
- (ii) Commissioner of Central Excise & Customs, Nasik v. D.R. Gade [2008] 16 STT 249 (Bom);
- (iii) Commissioner of C. Ex. & Customs, Nashik v. Vinay Bele & Associates [2008] 9 STR 350 (Bom);
- (iv) Commissioner of Service Tax, Mumbai v. S.R. Enterprises [2008] 15 STT 430 (Bom);
- (v) Commissioner of Central Excise & Service Tax, Jalandhar v. R.K. Associates [2009] 18 STT 536 (P&H);
- (vi) Commissioner of Central Excise Commissionerate, Jalandhar v. Darmania Telecom [2009] 20 STT 98 (P&H);
- (vii) Commissioner of Central Excise, Mangalore v. Vishwanatha Karkera [2009] 21 STT 213 (Karn);
- (viii) Commissioner of Central Excise v. Madhuri Travels [2009] 23 STT 45 (Bom);
- (ix) Commissioner of Central Excise, Jalandhar v. Batala CITI Cable (P.) Ltd. [2010] 24 STT 354 (P&H);
- (x) Commissioner of Central Excise, Jalandhar v. Steel Craft (India) [2010] 25 STT 421 (P&H).

5. It was further submitted that the Finance Act, 1994, which imposes service tax, is an all India statute and this High Court should normally not deviate from the view expressed by the other High Courts in the country. Lastly, it was submitted that if the court was of the opinion that the impugned order of the Tribunal was a non-speaking order, the matter could be restored to file of the Tribunal, leaving it open to the Assessee to plead applicability of Section 80 of the Act.

6. The facts which emerge from the orders placed on record indicate that

originally the adjudicating authority confirmed demand to the tune of Rs. 93,621 towards short-paid service tax and imposed penalty of Rs. 20,000 u/s 76 of the Act with penalty of Rs. 95,000 u/s 78 of the Act. When the matter was carried in appeal before the Commissioner (Appeals) in the first round vide order dated May 1, 2007, the Commissioner (Appeals) deleted the entire penalty u/s 76 of the Act on the footing that penalty had been levied also u/s 78 of the Act and thereafter reduced the penalty u/s 78 of the Act from Rs. 95,000 to Rs. 94,000. The same was carried in appeal by the Respondent-Assessee. The Tribunal vide order dated September 3, 2007 allowed the appeal and remanded the matter back to the adjudicating authority.

7. In the fresh round of proceedings the adjudicating authority once again confirmed the demand of service tax at Rs. 93,180 and imposed penalty of Rs. 93,180 u/s 78 of the Act, and penalty of Rs. 93,180 u/s 76 of the Act. When the Assessee went in appeal before the Commissioner (Appeals) following order was made by the Commissioner (Appeals) on May 5, 2008:

8. As regards the equal penalty imposed u/s 76, I find that, the lower authority under his Original Order No. 1344/Service Tax/2006 dated August 31, 2006 has imposed penalty of Rs. 20,000 for the delay payment of service tax. The penalty has been increased by the lower authority in his de novo order from Rs. 20,000 to Rs. 93,180 for the same violation without any additional ground. I find that the Appellant has already paid the interest of Rs. 21,926 vide T. R. 6 challan dated December 20, 2007 for the delay payment of differential service tax and delay in payment of service tax is on account of change in the rate with effect from September 10, 2004. This is not a case where the Assessee failed to pay their service tax on monthly/quarterly basis. I find that, there is justification in the Appellant's arguments. Therefore I take lenient view and reduce the penalty imposed u/s 76 of the Finance Act, 1994 from Rs. 93,180 to Rs. 10,000.

9. In view of the above discussion, I uphold the order of the lower authority to the extent of confirming and appreciating the demand of service tax and interest paid thereon and set aside the penalty imposed u/s 78 of the Finance Act, 1994 and reduce the penalty imposed u/s 76 as stated in para 8 of this order.

8. Revenue carried the matter in appeal before the Tribunal and the Tribunal has passed the following order:

2. In view of the several decisions cited by the learned chartered accountant on behalf of the Respondents, which clearly cover the issue under consideration u/s 76 of the Finance Act, 1994, i.e., penalty can be reduced in exercise of the power u/s 80 of the Finance Act, 1994, I respectfully follow the decisions cited and reject the appeal filed by the Revenue against the impugned order. I also find that benefit of Section 80 of the Finance Act, 1994 has been appropriately extended to the Respondents.

9. As can be seen from the impugned order of the Tribunal in first numbered paragraph No. 2 (there being two paragraphs bearing No. 2), the Tribunal has

recorded submissions of both the sides and accepted the contentions raised on behalf of the Assessee that authority has discretion to impose lesser penalty u/s 80 of the Act. Thereafter the decisions have been enumerated by the Tribunal on which reliance has been placed on behalf of the Assessee. In the entire order one does not find as to how and in what manner either Section 76 or Section 80 of the Act vests a discretion in the authority to levy penalty below the minimum prescribed. The last sentence, which appears in the order, indicates that the same is virtually an afterthought. After holding that the Tribunal rejects the appeal filed by the Revenue it is observed I also find that benefit of Section 80 of the Finance Act, 1994 has been appropriately extended to the Respondents. The impugned order is thus not a reasoned order.

10. Sections 76 and 80 of the Act as are relevant for the present (and as applicable at the relevant point of time), read as under:

76. Penalty for failure to collect or pay service tax.-Any person, liable to pay service tax in accordance with the provisions of Section 68 or the Rules made thereunder, who fails to pay such tax, shall pay, in addition to paying such tax, and interest on that tax in accordance with the provisions of Section 75, a penalty which shall not be less than one hundred rupees but which may extend to two hundred rupees for everyday during which such failure continues, so, however, that the penalty under this clause shall not exceed the amount of service tax that he failed to pay.

80. Penalty not to be imposed in certain cases.-Notwithstanding anything contained in the provisions of Section 76, Section 77, Section 78 or Section 79, 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.

11. A plain reading of Section 76 of the Act indicates that a person who is liable to pay service tax and who has failed to pay such tax is under an obligation to pay, in addition to the tax so payable and interest on such tax, a penalty for such failure. The quantum of penalty has been specified in the provision by laying down the minimum and the maximum limits with a further cap in so far as the maximum limit is concerned. The provision stipulates that the person, who has failed to pay service tax, shall pay, in addition to the tax and interest, a penalty which shall not be less than one hundred rupees per day but which may extend to two hundred rupees for everyday during which the failure continues, subject to the maximum penalty not exceeding the amount of service tax which was not paid. So far as Section 76 of the Act is concerned, it is not possible to read any further discretion, further than the discretion provided by the Legislature when Legislature has prescribed the minimum and the maximum limits. The discretion vested in the authority is to levy minimum penalty commencing from one hundred rupees per day on default, which is extendable to two hundred rupees per day, subject to a cap of not exceeding the amount of service tax payable. From this discretion it is not possible to read a further discretion being vested in

the authority so as to entitle the authority to levy a penalty below the stipulated limit of one hundred rupees per day. The moment one reads such further discretion in the provision it would amount to re-writing the provision which, as per settled canon of interpretation, is not permissible. It is not as if the provision is couched in a manner so as to lead to absurdity if it is read in a plain manner. Nor is it possible to state that the provision does not further the object of the statute or violates the legislative intent when read as it stands. Hence, Section 76 of the Act as it stands does not give any discretion to the authority to reduce the penalty below the minimum prescribed.

12. In so far as Section 80 of the Act is concerned, it overrides provisions of Sections 76, 77, 78 and 79 of the Act and provides that no penalty shall be imposable even if any one of the said provisions are attracted if the Assessee proves that there was reasonable cause for failure stipulated by any of the said 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 the 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 no penalty is imposable. If one reads the power in the provision as contended by the Respondent it would mean that the provision is re-drafted by incorporating words which are not there. At the cost of repetition, it is required to be stated that the language of the provision as it stands is unambiguous and it is not necessary to add any words to make the provision intelligible.

13. Therefore, even on a conjoint reading of Sections 76 and 80 of the Act it is not possible to envisage a discretion as being vested in the authority to levy a penalty below the minimum prescribed limit. If the authority imposing the penalty is not entitled to levy below the minimum prescribed the appellate authority and the Tribunal cannot read the provision so as being vested with such powers, namely, to reduce the penalty below the minimum prescribed.

14. When one goes through the impugned order of the Tribunal it becomes clear that the Tribunal has failed to even consider the provisions of Sections 76 and 80 of the Act before passing the impugned order. The statement by the Tribunal that benefit of Section 80 of the Act has been appropriately extended to the Assessee indicates total non-application of mind on the part of the Tribunal. How and in what manner reasonable cause is shown to exist by the Assessee in the facts of the case has not even been recorded. It is unfortunate that despite a catena of judgments of the apex court and this High Court the Tribunal continues to pass orders which can at best be termed to be non-speaking and cursory. It is necessary that the Tribunal realises that passing of such orders results in multiplicity of proceedings without benefiting any one, resulting in repeated litigation.

15. In so far as judgments of the various High Courts cited on behalf of the

Assessee are concerned, suffice it to state that this Court is in respectful disagreement with the said judgments in light of the fact that in none of the judgments have the provisions of either Section 76 or Section 80 of the Act been analyzed and dealt with.

16. In the circumstances, the impugned order of the Tribunal dated December 26, 2008 is hereby quashed and set aside and Appeal No. ST/126 of 2008 stands restored to file of the Tribunal for deciding the same afresh in accordance with law. Existence or otherwise of reasonable cause having not been pleaded before any authority at any stage, the contentions based on the same raised by learned Counsel for the Assessee have not been gone into, leaving it open to the Assessee to raise the same before the Tribunal. The question is accordingly answered in the negative. The appeal stands disposed of accordingly.