(2011) 11 P&H CK 0074

In the Punjab And Haryana At Chandigarh

Case No : STA No. 13 of 2011 (O and M)

Commissioner, Central Excise Commissionerate, Ludhiana — APPELLANT

Vs

City Cables — RESPONDENT

Date of Decision : 21-11-2011

Acts Referred:

Central Excises and Salt Act, 1944 — Section 35G
Finance Act, 1994 — Section 65(21), 68, 69, 73, 75

Citation : (2013) 31 STR 279 : (2012) 35 STT 558 : (2012) 53 VST 447

Hon'ble Judges : Hemant Gupta, J;G.S. Sandhawalia, J

Bench : Division Bench

Advocate : Sukhdev Sharma, for the Appellant;

Judgement

Hemant Gupta, J.—The Revenue is in appeal u/s 35G of the Central Excise Act, 1944 against the order dated 28.02.2011 (Annexure A-4) passed by the Customs Excise & Service Tax Appellate Tribunal, New Delhi (for short "the Tribunal") in ST/Appeal No. 761 /2007. The learned counsel for the Revenue has claimed the following substantial question of law, as arising from the order of the Tribunal:

(i) Whether penalty imposed u/s 78 of the Finance Act, 1994 can be reduced to 25% by invoking the provisions of first proviso to section 78, when the assessee has not paid 25% of the penalty amount within 30 days of the order as required under the second proviso to section 78 ibid?

As per the facts on record, the assessee was working as cable operator as defined in section 65(21) of the Finance Act, 1994 (as amended) (for short ''the Act'') without any registration u/s 69 of the Act. He was liable to file quarterly service tax returns u/s 68 of the Act read with rule 6 of the Service Tax Rules, 1994. A search was conducted at the business as well as residential premises of assessee, but before a show cause notice could be served to the assessee as to why he has not paid duty under the aforesaid Act, the assessee deposited the entire amount of duty and interest thereon. After considering the reply filed to the show cause notice, the Adjudicating Authority confirmed the demand of service tax of Rs. 11,46,537/- along with interest. In addition to the penalties under Sections 75A, 76, 77 & 78 of the Act, the Adjudicating Authority also imposed a penalty of the equivalent amount of the duty payable u/s 78 of the Act.

2. The assessee preferred an appeal against the said order. The Commissioner (Appeals) set aside the order of imposing penalties. However, in Revenue''s appeal, the learned Tribunal vide order dated 1.2.2011 gave an option to the assessee to deposit 25% of the penalty of the service tax demand in terms of second proviso to section 78 of the Act relying upon two judgments of this Court in CCE w. J.R. Fabrics 2009 (238) ELT 209 and Commissioner of Central Excise Vs. Bajaj Travels Limited,

3. Learned counsel for the appellant has vehemently argued that the benefit of reduced penalty can be availed by the assessee, if he deposits the amount of penalty within 30 days of the order, but the Authorities under the Act are not competent to give option to the assessee to deposit such amount. The relevant provisions of the Act read as under:

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 -

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 30 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 the 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.

4. The Delhi High Court in K.P. Pouches (P) Ltd. Vs. Union of India (UOI), has held that since the amount of duty was paid even before the show cause notice was issued, therefore, the assessee would be liable to pay only 25% of the duty amount as penalty. It was observed as under:

21. As far as we are concerned, no one can say that if the Assistant Commissioner had in fact imposed only 25% of the duty amount by way of penalty (as he should have), the assessee would not have paid the penalty amount within 30 days of the Adjudication order. However, the benefit of doubt in this regard must go to the assessee considering its bona fides, which are obvious from the fact that the assessee debited the duty amount on the date of the search, well before a show cause notice was issued to it. Under these circumstances, we can only infer that if the correct penalty had been imposed upon the assessee, he would have paid it within the time prescribed.

5. In J.R. Fabrics case (supra), again the assessee deposited the amount of duty before the show cause notice was issued. Similar is the view taken by another

Division Bench of this Court.

6. We are in respectful agreement with the view taken in the aforesaid judgments. An assessee is required to be informed to avail the benefit of second proviso so that he can deposit 25% of the penalty amount. Such option alone will satisfy the purpose of insertion of the proviso as it is a benefit, which is conferred on the assessee. The Adjudicating Authority has not given such option.

7. Since the amount of duty was already paid even before issuance of show cause notice, we find that direction to deposit 25% of the penalty amount in terms of the second proviso to section 78 is fair, reasonable and meets the ends of justice. Consequently, we do not find that any substantial question of law arises for consideration by this Court.

Dismissed.

