(2010) 10 GUJ CK 0078

In the Gujarat High Court

Case No : Tax Appeal No. 829 of 2010

Commissioner of C. Ex. and Customs APPELLANT

Vs

Bhavani Enterprise RESPONDENT

Date of Decision : 27-10-2010

Acts Referred:

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

Citation : (2011) 21 STR 107

Hon'ble Judges : K.A. Puj, J;Harsha Devani, J

Bench : Division Bench

Advocate : Darshan M. Parikh, for the Appellant;

Judgement

K.A. Puj, J.—The Appellant-revenue has filed this tax appeal u/s 35G of the Central Excise Act, 1944, proposing to formulate the following substantial questions of law for determination and consideration by this Court:

[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?

[iii] 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, with a finding of fact on this behalf?

2. Heard Mr. Darshan Parikh, learned Senior Standing Counsel appearing for the Appellant -revenue. Despite service of notice, nobody appears on behalf of the Respondent.

3. The brief facts of case are that the Respondent is engaged in providing services under the category of "Manpower Recruitment Service and is holding service tax registration No. AELPB7665KST001. The Respondent had paid the

due service tax along with interest for the period from Oct-2006 to Dec-2006 and Jan-07 to Mar-07 i.e., late by 154 days and 69 days respectively and the ST-3 return for the period Oct-06 to March-07 was also filed late by 75 days. Due to the above lapses, a Show Cause Notice dated 22-5-2008, was issued to the Respondent proposing to impose penalty for late payment of Service tax u/s 76 of the Finance Act, 1994 and penalty for late filing of ST-3 returns u/s 77 of the Finance Act, 1994 (herein after referred to as the "Act").

4. The above Show Cause Notice was adjudicated by the Adjudicating Authority vide Order-in-Original No. 193/Service Tax/2008 dated 18-11-2008. The Adjudicating Authority by the said Order-in-Original had imposed (1) penalty of Rs. 44,600/- u/s 76 of the Finance Act, 1994 for late payment of service tax and (2) penalty of Rs. 1,000/- u/s 77 of the Finance Act, 1994 for late filing of ST-3 returns.

5. Being aggrieved by the aforesaid order of the Adjudicating Authority, the Assessee filed appeal before the Commissioner (Appeals), Central Excise, Rajkot. The Commissioner (Appeals), Central Excise, Rajkot vide Order-in- Appeal No. 407(353-RAJ)/2009/COMMR(A)/RAJ dated 11-5-2009 has reduced the penalty of Rs. 44,600/- imposed u/s 76 of Finance Act, 1994 to Rs. 10,000/- by invoking Section 80 of the Finance Act.

6. Being aggrieved, the Appellant filed appeal before the Tribunal against above Order-in-Appeal passed by the Commissioner (Appeals), Central Excise, Rajkot to the extent of reducing the penalty u/s 76 of the said Act.

7. The Tribunal by the impugned Order has rejected the appeal filed by the Appellant.

8. The issue involved in the present tax appeal is similar to one which is involved in Tax Appeal No. 1367 of 2009 [2010 (19) S.T.R. 641 (Guj.) : 2010 (257) E.L.T. 37 (Guj.)]. While deciding the said tax appeal on 8-7-2010, this Court has quashed and set aside the order passed by the Tribunal and restored the matter to the file of the Tribunal to decide the same afresh in accordance with law.

9. This Court in the Tax Appeal No. 1367 of 2009 has taken the view that 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. This Court has, therefore, answered the question accordingly in the negative and the said tax appeal was disposed of.

10. Following the aforesaid decision of this Court, we hereby quash and set aside the impugned order of the Tribunal and restore the matter to the file of the Tribunal to decide the issue afresh in light of the observations made by this Court in the order dated 8-7-2010 in Tax Appeal No. 1367 of 2009, as indicated

hereinabove in the present order.

11. This tax appeal is, accordingly, disposed of.

