(2010) 11 GUJ CK 0058

In the Gujarat High Court

Case No : Tax Appeal No. 828 of 2010

Commissioner of C. Ex. and Customs APPELLANT

Vs

V.M. Constructions RESPONDENT

Date of Decision : 25-11-2010

Acts Referred:

Central Excises and Salt Act, 1944 — Section 35G
Finance Act — Section 77, 78, 79, 80
Finance Act, 1994 — Section 76

Citation : (2011) 22 STR 520

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 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. The respondent assessee is holding Service tax registration under the category of "Construction service". The respondent had paid due Service tax alongwith interest for the period from April, 2007 to June, 2007, July, 2007 to September, 2007 and October, 2007 to December, 2007 late by 109 days, 14

days and 86 days respectively. In respect of the said default, a show-cause notice came to be issued on 9th June, 2008 to the respondent proposing to impose penalty for late payment of Service tax u/s 76 of the Finance Act, 1994 (the Act). The show-cause notice came to be adjudicated vide order dated 16th December, 2008 whereby the adjudicating authority imposed a penalty of Rs. 41,800/- u/s 76 of the Act for late payment of Service tax. Being aggrieved, the assessee preferred appeal before the Commissioner (Appeals), who vide order dated 28th April, 1999 reduced penalty of Rs. 41,800/- imposed u/s 76 of the Act to Rs. 12,000/- by invoking Section 80 of the Act. Revenue carried the matter in appeal before the Tribunal but did not succeed.

3. Mr. Darshan Parikh, learned Senior Standing Counsel for the appellant submitted that in the light of the provisions of Section 76 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, and 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 rendered on 8th July, 2010 in Tax Appeal No. 1367 of 2009 [2010 (19) S.T.R. 641 (Guj.) : 2010 (257) E.L.T. 37 (Guj.)] to submit that the controversy in issue stands concluded by the said decision in favour of the revenue.

4. Pursuant to the notice for final disposal issued by the Court, the respondent assessee has vide communication dated 5th October, 2010. requested that the matter be adjourned for a month or one and a half months to enable him to prepare his defence and reply in consultation with his lawyer. However, despite a period of more than one month having elapsed since the date of the said communication, there is no appearance on behalf of the respondent.

5. 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 76 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 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, that is, 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 allowed in the following terms. The impugned order of the Tribunal is hereby quashed and set aside. Appeal No. ST/296/09 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 affording the par-(sic) an opportunity of hearing.