

(2007) 07 KAR CK 0001
In the Karnataka High Court
Case No : CEA No. 19 of 2005

Commissioner of C. Ex. and STC

APPELLANT

Vs

First Flight Couriers Ltd.

RESPONDENT

Date of Decision : 25-07-2007

Acts Referred:

Finance Act, 1994 — Section 76

Citation : (2007) 213 CTR 550 : (2007) 8 STR 225 : (2008) 12 STT 127 :
(2008) 18 VST 282

Hon'ble Judges : V. Gopala Gowda, J; Arali Nagaraj, J

Bench : Division Bench

Advocate : Latha Prasad, for the Appellant; Kiran and S. Javali, for the
Respondent

Final Decision : Allowed

Judgement

1. The correctness of the order of the Customs, Excise and Service Tax Appellate Tribunal (hereinafter referred as "Tribunal" in short) dated 19-11-2004 in setting aside the order passed by the Commissioner of Central Excise at Commissionerate, Bangalore, is questioned in this Appeal by the appellant urging various legal grounds in support of the substantial question of law framed in this Appeal and prayed to answer the same in favour of the revenue, which reads thus,-

Whether Section 76 of the Finance Act, 1994 relating to Service tax to be read as the penalty which shall not be less than Rs. 100/- per day but for every day during which such failure continues" or "the penalty which shall not be less than Rs. 100/- in absolute terms"?

The grounds urged in support of the said question of law by the appellant is that the Appellate Authority while exercising its appellate jurisdiction overlooked the statutory provision of Section 76 of the Finance Act and not considered the finding and reason recorded by the original authority holding that the assessee is

not entitled to get any exemption u/s 80 of the Income Tax Act (sic - Finance Act, 1994) as the explanation offered by him that during the period from October 1998 to May 1999 the workmen were on strike and therefore, the Service Tax charges could not be remitted and the returns could not be submitted, respectively, to the assessing Authority is the satisfactory explanation for not imposing penalty u/s 76 of the Finance Act, 1994. Therefore, it is contended that non-exercise of discretionary power by the assessing Authority in accepting the tenable explanation offered by the Assessee rendered the order passed by the Assessing Authority is bad in law. The first Appellate Authority without giving any reasons confirmed the order of the original authority, which is erroneous in law. The same is interfered with the second Appellate Tribunal by accepting the explanation offered by the respondent-assesses with out giving any reasons in his order holding that there is no reasonable explanation offered by the assessee for not remitting and submitting the returns within the time prescribed under the rules. Therefore, it is contended that the impugned order passed by the tribunal by setting aside the same and reducing the penalty from Rs. 3,03/- to Rs. 50,000/- is vitiated in law. Therefore, it is urged by the appellant that the substantial question of law is required to be answered in its favour and prayed to set aside the order impugned and restore the order of the original authority.

2. Shri Kiran S. Javali, learned Counsel on behalf of the respondent justifying the impugned order has contended that neither the original authority nor the first appellate Authority have properly appreciated the tenable explanation offered by the respondent of non-remittal of the Service Tax charges by it and not submitting the returns is on account of workmen being unrest during the relevant period of time. Therefore, the respondent was (no) liable to pay the penalty amount as imposed by the Assessing authority in view of Section 80 of the Income Tax Act (sic-Finance Act, 1994) and further it is contended that the second Appellate Tribunal after considering the rival legal contentions and referring to the decisions of the Apex Court in the case of Hindustan Steel Ltd. Vs. State of Orissa, , wherein it is held that penalty is not required to be imposed for technical or venial breach of legal provisions of law and the adjudicating authority can take into consideration, the factors preventing the party from depositing the tax and reduce the penalty and also further placed reliance upon another decision of the Commissioner of Central Excise Delhi-I in the case of Oriental Insurance Co Limited reported in 2006 (2) S.T.R. 249 : 1998 (103) E.L.T. 459 wherein the Commissioner has taken a similar view as held in Hindustan Steel Limited case. Following the aforesaid decisions the second Appellate Tribunal has rightly exercised its discretionary power and reduced the penalty from Rs. 3,03,300/- to Rs. 50,00/- Hence, the same does not call for interference by this Court as neither the question of law framed in this case nor any substantial question of law would arise in this case for consideration of this Court.

3. With reference to the above said legal contentions urged by the learned Counsel on behalf of the appellant and the respondent, we have carefully examined the correctness of the order impugned in this appeal. The question is

required to be answered in the affirmative in favour of the appellant for the following reasons:

Section 80 (sic - 68) Sub-section (2) of the Income Tax Act (sic-Finance Act, 1994) mandates the respondent herein to pay Service Tax. It is an undisputed fact that Service Tax could not be paid within the stipulated time so also returns were not submitted by the respondent. The reason assigned for not having paid the Service Tax was that there was unrest in the factory, which started from October 1998 to May 1999. In this regard, the notification issued by the State Government u/s 10(3) of the Industrial Disputes Act is produced. The same has been disbelieved by the Assessing Authority, as it is not a reasonable explanation for the reasons recorded by him namely that the Service Tax payable for the period from April 1998 to March 1999 during the period prior to October 1998 namely prior to 1-10-1998 the law which was prevalent at that point of time was that the assessee was required to remit the Service Tax on monthly basis and file the ST (3) returns on quarterly basis. The returns for the period April 1998 to June 1998 and July 1998 to September 1998 were required to be filed on or before 15-7-1998, respectively. Further, it is recorded that the company was not prompt in its statutorily complying in remitting the Service Tax and filing the returns. The period, for which the Service Tax and returns are to be filed undisputedly there was no unrest of workmen in the factory. Therefore, the Assessing Authority rightly recorded a finding of fact stating that reasons assigned by the respondent for non-payment of Service Tax and non-submission of quarterly returns to the Assessing Authority, is not tenable in law. Therefore, the Assessing Authority for the period from April 1998 to September 1998, the penalty was imposed by him in exercise of his discretion of power at the rate of Rs. 100/- per day and for the remaining period from October 1998 to March 1999, the explanation offered by the respondent regarding the labour unrest is accepted by the Assessing Authority as the same was evidenced by the Government order of prohibiting the strike. For that period the penalty is not levied by the Assessing Authority. The said finding of fact is affirmed by the first Appellate Authority in its order. No doubt, he has not assigned reasons. Nonetheless, the order of penalty imposed is accepted by him. The same is in conformity with the reasons assigned by the Assessing Authority. The second Appellate Tribunal was not right in setting aside the same by following the decision of the Supreme Court and its own decision of the Delhi Bench and the same is in contravention of the material on record on the basis of which the finding is recorded by the original authority and further there is no tenable explanation by the assessee for not to impose penalty upon it for the period April 1998 to September 1998. Therefore, the original authority has rightly imposed Rs. 200/-. The same neither can be termed as unreasonable or arbitrary. The second Appellate Authority has not applied its mind with reference to the findings and reason recorded in imposing the penalty in exercise of the power u/s 76 of the Finance Act. Therefore, the Appellate Tribunal committed an error in law in interfering with the said portion of the order by reducing the penalty from Rs.

3,03,300/- to Rs. 50,000/-. Therefore, without assigning any reasons for setting aside the findings recorded by the fact finding authority, the second Appellate Tribunal simply placed reliance upon the decision of the Supreme Court and the decision of the Delhi Bench, which decisions have no application to the fact situation of this case, particularly having regard to the finding recorded by the original authority. Therefore, we have to answer the substantial question of law in favour of the appellant-revenue and allow the appeal.

4. Accordingly, the appeal is allowed. Impugned order of the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Bangalore dated 19-11-2004 is set aside. The order passed by the original authority dated 17-10-2000 is restored.