(2011) 01 P&H CK 0405

In the Punjab And Haryana At Chandigarh

Case No : S.T.A. No. 48 of 2010

Commissioner of C. Ex. APPELLANT

Vs

First Flight Courier Ltd. RESPONDENT

Date of Decision : 28-01-2011

Acts Referred:

Central Excises and Salt Act, 1944 — Section 35G
Finance Act, 1994 — Section 76, 78, 83

Citation : (2011) 22 STR 622 : (2011) 39 VST 502

Hon'ble Judges : Ajay Kumar Mittal, J;A.K. Goel, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Adarsh Kumar Goel, J.—This appeal has been preferred by the revenue u/s 35G of the Central Excise Act, 1944 read with Section 83 of the Finance Act, 1994 (in short "the Act") against order dated 25-5-2010 passed by the Customs Excise and Service Tax Appellate Tribunal, claiming following substantial questions of law:

(i) Whether the judgment and order passed by the ld. CESTAT, New Delhi is proper and legal?

(ii) Whether the ld. CESTAT was right in not imposing penalty u/s 76 of the Finance Act, 1994 for the period prior to 10-5-2008 by holding that penalty u/s 76 & 78 of the Act is not imposable simultaneously, particularly when these sections became mutually exclusive from 10-5-2008 after amendment of Section 78 of the Finance Act, 1994?

2. The Assessee is a service provider liable to pay service tax under the provisions of the Act. According to the department, there was short payment of service tax to the extent of Rs. 44,858/- for the period from 1-4-2002 to 31-3-2005 and on that account after issuing show cause notice, demand for tax was confirmed and penalty under Sections 76 and 78 of the Act was imposed. On

appeal, while the demand of service tax was upheld, penalty u/s 78 was reduced to 25% on the ground that the amount was deposited within one month on receipt of order. Penalty u/s 76 was set aside on the ground that penalty u/s 76 as well as 78 could not have been imposed simultaneously. The appeal of the department against the order of the Commissioner (Appeals) has been dismissed by the Tribunal.

3. We have heard learned Counsel for the revenue.

4. Only point which has been urged by learned Counsel for the Appellant is that after 10-5-2008, there is an amendment providing that penalty u/s 76 could not be levied if penalty u/s 78 has been levied but for the period prior thereto, penalty could be levied under both Sections. The Commissioner (Appeals) as well as the Tribunal erred in deleting the penalty u/s 76 by assuming that simultaneously penalty under both the provisions could not be levied for the period in dispute.

5. We are unable to accept the submission. Section 76 provides for penalty for failure to pay the amount while Section 78 provides for penalty for suppressing the taxable value. Section 78 is, thus, more comprehensive and provides for higher amount. Even if technically, the scope of Sections 76 and 78 is different, penalty u/s 76 may not be justified if penalty had already been imposed u/s 78. The matter was considered by this Court in STA No. 13 of 2010 (Commissioner of Central Excise v. Pannu Property Dealers, Ludhiana) decided on 12-7-2010, wherein it was observed:

We are of the view that even if technically, scope of Sections 76 and 78 of the Act may be different, as submitted on behalf of the revenue, the fact that penalty has been levied u/s 78 could be taken into account for levying or not levying penalty u/s 76 of the Act. In such situation, even if reasoning given by the appellate authority that if penalty u/s 78 of the Act was imposed, penalty u/s 76 of the Act could never be imposed may not be correct, the appellate authority was within its jurisdiction not to levy penalty u/s 76 of the Act having regard to the fact that penalty equal to service tax had already been imposed u/s 78 of the Act. This thinking was also in consonance with the amendment now incorporated though the said amendment may not have been applicable at the relevant time.

6. In view of the above, no substantial question of law arises. The appeal is dismissed.

