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**(2011) 05 P&H CK 0289**

**In the Punjab And Haryana At Chandigarh**

**Case No : S.T. Appeal No. 2 of 2011 (O and M)**

Commissioner of Central Excise

APPELLANT

Vs

Ess Ess Engineers

RESPONDENT

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**Date of Decision : 13-05-2011**

**Acts Referred:**

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

**Citation :** (2011) 23 STR 3 : (2011) 31 STT 548 : (2011) 44 VST 378

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

**Bench :** Division Bench

**Final Decision :** Allowed

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## **Judgement**

Adarsh Kumar Goel, Actg. C.J.—This appeal has been preferred by the revenue u/s 35G of the Central Excise Act, 1944 (for short, "the Act") against order dated 12-8-2010, Annexure A-4, passed by the Customs, Excise and Service Tax Appellate Tribunal, New Delhi claiming following questions of law:

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

(ii) Whether the CESTAT has rightly allowed the party's appeal regarding waiving penalty u/s 78 of the Finance Act, 1994? Whether the grounds that for imposition of penalty u/s 78 some positive evidence of deliberate mis-declaration of value of taxable service with intent to evade the service tax, other than mere failure to declare the full value of taxable service in ST-3 returns must be procured are legally correct?

2. The Assessee is, inter alia, engaged in providing of taxable service of "Erection, Commissioning and Installation". It failed to pay the service tax for the services rendered during 1-7-2003 to 30-9-2006. Show-cause notice was issued proposing to recover the service tax and levy penalty. The adjudicating authority confirmed the demand with interest and also levied penalty under Sections 76

and 78 of the Finance Act, 1994. The Appellate Authority partly allowed the appeal but upheld the demand of levy of penalty. On further appeal, the Tribunal set aside the levy of penalty holding that failure of the Assessee to pay the service tax due was not with intention to evade the payment of duty but on account of bona fide belief that the same was not payable. Following finding has been recorded in the impugned order:

3. I have carefully considered the submissions from both the sides and perused the records. I find that short payment was detected in course of audit of records of the Appellant Company when they submitted their financial records to the audit for inspection. It is not in dispute that the Appellant were registered with the Department and they were filing their returns regularly. The allegation against them is that they were not disclosing full value of the taxable service provided to their clients with the intention to evade the service tax. However, the Appellant's contention is that in addition to erection, commissioning and installation, they were also undertaking the work relating to fabrication and dismantling, on which they were not paying any service tax as according to them, service tax was not payable on the charges for fabrication and dismantling. On going through the records, I find the substance in this contention of the Appellant. In view of this, I am of the view that short payment was mainly due to the Appellant's understanding that they are not liable to pay service tax on the fabrication and dismantling charges. In view of this so far as penalty u/s 76 is concerned, I am of the view that there is a case for invoking Section 80.

4. As regards penalty u/s 78 is concerned, the same is imposable in a case where service tax has not been levied or paid or has been short levied or short paid or erroneously refunded, by reason of fraud; or collusion; or wilful misstatement; or suppression of facts; or contravention of any of the provisions of this Chapter or of the rules made there under with intent to evade payment of service tax. The question arises as to whether in the circumstances of this case, the penal provisions of Section 78 are invokable.

3. We have heard learned Counsel for the Appellant.

4. Only contention raised on behalf of the Appellant is that penalty u/s 78 of the Act should not have been interfered with as the Assessee was guilty of mis-declaration of value of taxable service with intent to evade the service tax.

5. We are unable to accept the submission. The Tribunal has recorded a finding of fact that the Assessee did not have the requisite mens rea to evade payment of service tax. The Assessee had duly paid the service tax with interest and also made full and true disclosure in the return. The finding so recorded is not shown to be in any manner perverse.

6. No substantial question of law arises.

The appeal is dismissed.