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In the Karnataka High Court

Case No : C.E.A. No. 71 of 2007

Commissioner of Central Excise APPELLANT

Vs

Tiger Service Bureau RESPONDENT

Date of Decision : 27-08-2010

Acts Referred:

Finance Act, 1994 — Section 68, 70, 76, 78

Citation : (2011) 21 STR 364 : (2010) 28 STT 451 : (2011) 45 VST 75

Hon'ble Judges : N. Kumar, J;H.S. Kempanna, J

Bench : Division Bench

Advocate : C. Shashikantha, for the Appellant;

Judgement

1. This appeal is by the revenue, challenging the order passed by the Tribunal as well as the first Appellate Authority, contending that, they have no jurisdiction to reduce the penalty imposed by the Assessing Authority under Sections 76 and 78 of the Finance Act, 1994.

2. The assessee, a Security Agency, had registered with the Service Tax Registration No. SA/MNG/04/2001-TSB, dated 18-5-2001. In the course of the audit of records of M/s. Bharath Sanchar Nigam Limited, Mangalore, (hereinafter referred to as "BSNL" for short), it was observed that the assessee had provided Security Agency Service to them for the period from 1-5-2001 to 31-3-2002 against payment of Rs. 18,84,141. However, the assessee had not paid the service tax on the said taxable value nor filed the ST3 return as required. Therefore, a show-cause notice was issued to the assessee, alleging that they have contravened Sections 68 and 70 of the Finance Act, 1994 (for short, hereinafter referred to as the "Act") and that they have concealed/suppressed the value of the taxable service with intent to evade payment of service tax and thereby rendered themselves liable for penal action u/s 78 of the Act. In the reply dated 31-7-2003, the assessee asserted that there was no deliberate intention to delay the payment of service tax. Though in the work order, the nature of job is indicated as "round the clock watch and ward", the services of

the guards were utilized for office maintenance and house keeping job and that they were under the impression that they were exempted from payment of service tax. They have requested the BSNL to amend the work order and requested to make payment of service tax as demanded in the show-cause notice and that they are not in a position to pay service tax on their own unless it is recovered from BSNL. They also requested the authorities not to impose any penalty and they offered to pay the said service tax. Accordingly, they paid the service tax on 24-10-2003 and on 2-12-2003 in two instalments. The Assessing Authority did not accept the said explanation. Overruling the said objection he held, the assessee has contravened Section 68 of the Act. Similarly, there was a deliberate omission and suppression of this information and therefore, he proceeded to pass an order-in-original, confirming the service tax already paid by the assessee at Rs. 94,207 and demanded interest from 1-5-2001 till the actual date of payment and imposed penalty of Rs. 86,000 u/s 76 of the Act and also imposed penalty of Rs. 500 u/s 77 of the Act and imposed further penalty of Rs. 94,207 u/s 78 of the Act. Aggrieved by the said order, the assessee preferred an appeal to the Commissioner of Central Excise. Though the Appellate Authority did not find fault with the approach of the Assessing Officer, in imposing penalty, it observed that non-payment of service tax and non-filing of returns in this case establishes suppression of value of taxable service. However, taking into account the fact that the assessee paid the tax and interest before issue of show-cause notice, the case calls for lenient treatment with regard to penalty. Therefore, the Appellate Authority reduced the penalty to Rs. 20,000 under both Sections 76 and 78 of the Act and in all other respects, confirmed the order of Assessing Authority.

3. Aggrieved by the said order, the revenue preferred an appeal to the Tribunal. The Tribunal after referring to various judgments, held, penalty would not be imposable if tax is paid even before the issue of show-cause notice and therefore, it held the appeal by the revenue for enhancement of penalty is not justified and therefore, dismissed the appeal. Aggrieved by the said order of the Tribunal, the revenue is in appeal before us. This appeal came to be admitted to consider the following substantial question of law:

Whether the CESTAT or the Commissioner (Appeals) has got power to reduce the penalties which are mandatory under Sections 76 and 78 of the Finance Act, 1994?

4. Learned Counsel for the revenue, assailing the impugned orders contended, the service tax was paid only after the issue of show-cause notice and not before the issue of show-cause notice. However, both the appellate authorities proceeded on the assumption, as the service tax was paid even before the issue of show-cause notice, a lenient view is to be taken, which is factually incorrect. Consequently, he contended, having regard to the language of Sections 76 and 78 of the Act, once the contravention is established, once suppression of the information regarding the liability to pay service tax is established, no discretion

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is left to the authorities including the appellate authorities insofar as imposing the penalty is concerned. It has to be the minimum that is prescribed under the aforesaid provisions. In that view of the matter, when the minimum has been imposed as penalty, the Appellate Authority had no jurisdiction to interfere with the said imposition of penalty and reduce it to Rs. 20,000 without any basis. The Tribunal committed a serious error in not interfering with such an order, which is one without jurisdiction and therefore, he submits a case for interference is made out.

5. The material on record discloses, the assessee had registered himself under the Act as a service provider. In respect of consideration received for the service rendered in respect of other clients, he had promptly paid the service tax due under the Act. It is only in respect of BSNL, a Government of India undertaking, he had not paid the service tax and in the returns, the receipt of the consideration from BSNL was also not disclosed. The explanation offered makes it clear that he entertained a genuine doubt, whether any service tax is payable at all to the service rendered to BSNL ? After the issue of show-cause notice, he demanded payment of service tax from BSNL. But, in the meanwhile, probably being of the opinion that he is liable to pay service tax, paid the same in two instalments. The said payment of service tax is after the issue of show-cause notice and not before the issue of show-cause notice, as incorrectly understood by the authorities. However, the question is, when once the Assessing Authority has imposed penalty under Sections 76 and 78 of the Act to the minimum, whether the appellate authorities could reduce the same further? Though Sections 76 and 78 deal with imposition of penalty, the said sections are subject to Section 80 of the Act, which reads as under:

Notwithstanding anything contained in the provisions of Section 76, Section 77, Section 78, or Section 79, no penalty shall be imposable on the assessee for any failure referred to in the said provisions, if the assessee proves that there was reasonable cause for the said failure.

Therefore, it is clear that the imposition of penalty under Sections 76 and 78 of the Act is not automatic. A discretion is conferred on the authorities not to impose the penalty which includes imposition of penalty less than what is prescribed under law, depending upon the reasonable cause to be shown for the failure to pay the penalty. Therefore, the contention that the first Appellate Authority had no jurisdiction to reduce the penalty imposed by the Assessing Authority is incorrect.

6. On the merits of the case, it is clear that the assessee has been prompt in paying the service tax in respect of other customers other than BSNL, which is a Government of India undertaking. From the explanation offered and his subsequent conduct, it is obvious probably entertaining a genuine doubt, whether the service tax is payable in respect of a service rendered to BSNL, a Government of India undertaking? and as they did not pay any service tax, in turn, he did not pay the service tax and after issue of show-cause notice,

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demanded BSNL to pay service tax which they did not pay, but in order to avoid penal consequence, he has paid the tax at the earliest in two instalments.

7. Under the circumstances, the Appellate Authority intended to take a lenient view and wanted to give the benefit and reduced the penalty to Rs. 20,000 under both heads. It cannot be said to be a wrong exercise of discretion by the Appellate Authority, though the Tribunal referred to decisions which are no more good law, in substance, they declined to exercise their discretion with the discretionary order passed by the Appellate Authority. In the facts of the case, we are satisfied no case for interference is made out. Accordingly, we dismiss the appeal, answering the substantial question of law in favour of the assessee and against the revenue. Parties to bear their own costs.

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