(2009) 02 P&H CK 0100

In the Punjab And Haryana At Chandigarh

Commissioner of Central Excise Commissionerate APPELLANT

Vs

Darmania Telecom RESPONDENT

Date of Decision : 12-02-2009

Acts Referred:

Central Excises and Salt Act, 1944 — Section 35G
Finance Act, 1994 — Section 76, 78, 80, 83, 84

Citation : (2009) 14 STR 145 : (2009) 20 STT 98

Hon'ble Judges : M.M. Kumar, J;Augustine George Masih, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

M.M. Kumar, J.—The revenue has challenged order dated 31.3.2008, passed by the Customs, Excise and Service Tax Appellate Tribunal, New Delhi (for brevity, ''the Tribunal'') by invoking Section 35G of the Central Excise Act, 1944 read with Section 83 of the Finance Act, 1994 (for brevity, ''the Act''). It has been claimed that the following question of law would emerge from the order of the Tribunal for adjudication of this Court:

Whether the learned CESTAT is justified in setting-aside the penalty u/s 78 of the Finance Act, 1994 enhanced by the Commissioner in exercise of powers u/s 84 of the Act particularly when suppression of the facts with intent to evade service tax stands proved against the Respondents?

2. The order-in-original was passed by the Assistant Commissioner on 15.6.2005 (A-1) and penalty of Rs. 1,000/- under Sections 76 and 78 of the Act was imposed by exercising power vested in him u/s 80 of the Act. The aforesaid discretion exercised by the Assistant Commissioner was interfered with by the Commissioner while exercising revisional power u/s 84 of the Act by raising it to Rs. 31,652/-. The Commissioner also recorded the finding that the assessee had suppressed the value of taxable service. However, the Tribunal set aside the order of the Commissioner passed in exercise of revisional power and restored the order-in-original by observing that leniency shown by the original authority in

terms of Section 80 of the Act did not suffer from any illegality and could not have been interfered with by the revisional authority.

3. Having heard learned Counsel for the revenue we are of the view that the provisions of Section 80 of the Act in un-mistakable terms provide that despite the provisions of Section 78, no penalty should be imposed on the assessee for any failure referred in that section if the assessee has shown that there was reasonable cause for the said failure. The provision u/s 78 of the Act is required to be acted upon in the absence of finding of fraud, collusion, wilful mis-statement, suppression of facts etc., as envisaged by Section 78 of the Act. The order-in-original dated 15.6.2005 (A-1) does not record any finding of fraud, mis-statement etc., which could have been the basis for acquiring jurisdiction to impose the penalty. Accordingly, the Assessing Authority exercised the power u/s 80 of the Act and decided not to impose any penalty under

4. Section 78. There was no basis for the Revisional Authority-cum-Commissioner to acquire the jurisdiction to impose penalty. There is no evidence produced before the revisional authority or any other authority to prove fraud, collusion, misrepresentation etc. so as to attract the application of Section 78 of the Act. In our view, the Tribunal has rightly restored the order of the Assessing Authority. Therefore, no question of law much less any substantial question of law would arise for determination of this Court. As a consequence, the appeal fails and the same is dismissed.