
(2012) 01 DEL CK 0272
In the Delhi High Court
Case No : CEAC 24 of 2011

Commissioner of Service Tax

APPELLANT

Vs

M/s Bas Engineering Pvt Ltd

RESPONDENT

Date of Decision : 04-01-2012

Acts Referred:

Citation : (2012) 189 ECR 1 : (2012) 278 ELT 603 : (2012) 26 STR 306 : (2012) 34 STT 475 : (2012) 51 VST 317

Hon'ble Judges : Sanjiv Khanna, J; R.V. Easwar, J

Bench : Division Bench

Advocate : R.C.S. Bhadoria, for the Appellant; Ruchir Bhatia, for the Respondent

Judgement

Sanjiv Khanna, J.—The present appeal filed by the Revenue u/s 35G of the Central Excise Act, 1944 read with Section 83 of the Finance Act, 1994 (for short "Act") impugns the order No.ST/71/2011-CU(DB) dated 08.03.2011 passed by the Customs, Excise and Service Tax Appellate Tribunal (for short, "Tribunal") in appeal No.ST/656/2007 in the case of Bas Engineering Pvt. Ltd.

2. Having heard the counsel for the parties, the following two substantial questions of law are framed:-

(i) Whether the Tribunal was right in deleting/quashing penalty u/s 78 of the Finance Act 1994 on the ground that the show cause notice did not grant any opportunity of rebuttal to the respondent-assessee to defend the penalty under the said Section?

(ii) Whether the Tribunal was in right in deleting the penalty imposed u/s 76 and 78 of the Finance Act 1994?

3. The respondent -assessee was/is an authorized dealer of passenger cars. The cars were sold to customer from their show room. Some of the cars were sold under finance schemes offered by various banks/financial institutions. The respondent-assessee received payments/commission from banks/financial

institutions. Initially question was raised whether the respondent-assessee was liable to pay service tax on the payout/commission received from the said banks/ financial institutions for providing the service under the Business Auxiliary Service. It is now an admitted position that the said tax is payable. The same was paid with interest but belatedly.

4. By order-in-original No.20/VKG/2007 dated 31.07.2007, the Commissioner, Service Tax Commissionerate, New Delhi imposed penalty of Rs.79,67,977/- u/s 78 of the Act. Further, penalty of Rs.1,000/- was imposed u/s 77 of the Act for each periodical return and penalty of Rs.100/- per day was imposed for failure to pay the tax amount of Rs.79,67,977/- u/s 76 of the Act.

5. The respondent-assessee preferred an appeal before the Tribunal.

6. The Tribunal deleted the penalty imposed u/s 76 of the Act relying upon the decision of Allahabad High Court in CCE v. Auto World, 2010 (18) STR 5 (All). With regard to the penalty u/s 78, the Tribunal recorded as under:-

8. We are not in disagreement with the learned AR in so far as the levy of penalty u/s 78 of the Finance Act, 1994 is concerned. We do appreciate that the show cause notice gives rise to civil and penal consequences. There was no opportunity of rebuttal granted to the appellant to defend the penalty imposed which is apparent from the show cause notice available at page 18 of the appeal folder. We are satisfied that there was no proposition in the show cause notice for penalty u/s 78. Therefore, the appellant succeeds on the count of levy of penalty u/s 78 of the Finance Act, 1994 and such penalty is hereby set aside.

7. The contention of the learned counsel for the appellant is that the two corrigendums dated 12.12.2006 and 16.05.2007 were issued calling upon and asking the respondent-assessee to give its explanation as to why the penalty u/s 78 of the Finance Act should not be imposed. This factual aspect has been overlooked and ignored by the Tribunal.

8. Learned counsel for the assessee submits that the corrigendums were not received and he relies upon a judgment of the High Court of Punjab and Haryana in Commissioner of Central Excise Vs. Ashwani Nut Bolts Industries, .

9. The two corrigendums mentioned above were filed and are on record of the Tribunal. In the order dated 29.01.2008 passed by the Tribunal, while disposing of the application of the respondent-assessee for waiver of the service tax liability, these two corrigendums were referred to. We have examined the said order wherein it has been specifically stated that the corrigendums were issued invoking Section 78 of the Act.

10. In these circumstances we feel that there is an error and mistake in the impugned order and the reasons given for deleting penalty u/s 78 of the Act cannot be sustained.

11. The decision of the High Court of Punjab and Haryana in case of

Commissioner of Central Excise Vs. Ashwani Nut Bolts Industries (supra) is distinguishable because in the said case there was a dispute whether or not corrigendum was issued or was served. In the present case, this is not an issue or the ground on which the Tribunal has deleted the penalty u/s 78 of the Act. Of course, it will be open to the respondent- assessee to dispute that the corrigendum was issued or was issued after the limitation period or was not served. If any such contention is raised, the same will be considered and decided by the Tribunal in accordance with law. First question of law mentioned above is, accordingly answered in favour of the Revenue and against the assessee and on the said aspect the matter is remitted to the Tribunal for a fresh decision.

12. With regard to the second question, we are inclined to restore the matter back to the Tribunal. It is apparent that the respondent-assessee has invoked Section 80 of the Act and submitted that there was a reasonable cause and, therefore, penalty should not have been imposed. The factual aspects, explanation offered etc. have not been dealt with and adverted to. Reference has been made to the decision in Auto World (supra) but the factual matrix, the period of default, conduct etc. have not been examined. The Tribunal while deleting the penalty has not discussed and stated the stand of the respondent-assessee and recorded any finding on the said respect. It merely relied on the judgment in Auto World (supra). Accordingly, we answer the second question in favour of the Revenue and against the respondent-assessee and an order of remit is passed. However, it is clarified that whether or not there was any reasonable cause will be examined by the Tribunal. No opinion has been expressed by us.

The appeal is disposed of.

The parties will appear before the Joint Registrar of the Tribunal on 24th February, 2012, when a date of hearing will be fixed.