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**(2013) 09 KAR CK 0055**  
**In the Karnataka High Court**  
**Case No : C.E.A. No. 73 of 2006**

|                                                         |            |
|---------------------------------------------------------|------------|
| Commissioner of Service Tax Service Tax Commissionarate | APPELLANT  |
| Vs                                                      |            |
| M/s. First Flight Couriers Limited                      | RESPONDENT |

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**Date of Decision :** 12-09-2013

**Acts Referred:**

Finance Act, 1994 — Section 76, 77  
Income Tax Act, 1961 — Section 80(2)  
Industrial Disputes Act, 1947 — Section 10(3)

**Citation :** (2014) 35 STR 311

**Hon'ble Judges :** Dilip B. Bhosale, J;B. Manohar, J

**Bench :** Division Bench

**Advocate :** V.K. Narayanaswamy, for the Appellant;

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## Judgement

Dilip B. Bhosale, J.—This Central Excise Appeal is directed against the order dated 20th December 2005 passed by the Customs, Excise and Service Tax Appellate Tribunal, (for short "the Tribunal") in Appeal No. ST/13/2004 whereby learned Member of the Tribunal has reduced the penalty of Rs. 5,20,000/- to Rs. 1,00,000/-. The penalty so imposed was under Sections 76 and 77 of the Finance Act, 1994. Section 76 provides penalty for failure to collect or pay service tax while Section 77 provides penalty for failure to furnish prescribed returns. The Tribunal set aside the order passed by the First Appellate Authority namely the Commissioner of Central Excise (Appeals) dated 25-11-2003 where by the order dated 11-10-2002 passed by the Deputy Commissioner of Central Excise, Service Tax (Sales), Bangalore in Original Order No. 18/2002 was upheld.

2. We have heard the learned counsel for the appellant. None appears for the respondent though served.

3. We have perused the order passed by the Tribunal whereby the Tribunal reduced the penalty from Rs. 5,20,000/- to Rs. 1,00,000/-. The relevant observations in paragraph 3 of the order read thus:

There was an all India Strike of the employees and they had prevented the management from functioning and thus resulted in delayed payment of Service tax. The Tribunal had noted the Apex Court judgments and also the Tribunal rulings to reduce the penalty in the appellant's own case. Therefore, the reason has already been accepted. During the relevant period also, there was a strike of the employees in their branches in the country which resulted in delay. Therefore, the total penalty of Rs. 5.20 lakh is reduced to Rs. 1,00,000/- (Rupees One lakh only).

4. It is not in dispute that the tribunal reduced the penalty on the basis of the order passed in respect of the very same respondent i.e. M/s. First Flight Couriers Ltd., dated 19-11-2004 in Final Order No. 1859/2004.

5. Learned counsel appearing for the appellant invited our attention to the order dated 25.07.2007 passed by this Court in CEA No. 19/2005 arising from the order passed by the Tribunal dated 19-11-2004 in Final Order No. 1859/2004 and submitted that this Court has set aside the order of the Tribunal and affirmed the order passed by the authorities below. Learned counsel for the respondent does not dispute the submission made on behalf of the appellant. The order dated 25.07.2007 was not available/passed on the date of impugned order dated 20.12.2005.

6. We have perused the order passed by this Court dated 25-07-2007. It is clear that the Tribunal in the impugned order placed reliance upon the order dated 19-11-2004 passed in Final Order No. 1859/2004 for reducing the penalty from Rs. 3,03,300/- to Rs. 50,000/-. The relevant observations made by this Court in the order dated 25-07-2007 whereby the order dated 19-11-2004 in Final Order No. 1859/2004 was set aside read thus:

Section 80 sub-section (2) of the Income Tax Act mandates the respondent herein to pay Service Tax. It is an undisputed fact that Service Tax could not be paid within the stipulated time so also returns were not submitted by the respondent. The reasons assigned for not having paid the Service Tax was that there was unrest" in the factory, which started from October 1998 to May 1999. in this regard, the notification issued by the State Government u/s 10(3) of the Industrial Disputes Act is produced. The same has been disbelieved by the Assessing Authority, as it is not a reasonable explanation for the reasons recorded by him namely that the Service Tax payable for the period from April 1998 to March 1999 during the period prior to October 1998 namely prior to 1.10.1998 the law which was prevalent at that point of time was that the assessee was required to remit the Service Tax on monthly basis and file the ST (3) returns on quarterly basis. The returns for the period April 1998 to June 1998 and July 1998 to September 1998 were required to be filed on or before 15.7.1998 and 15.9.1998, respectively. Further, it is recorded that the company was not prompt in its statutorily complying in remitting the Service Tax and filing the returns. The period, for which the Service Tax and returns are to be filed, undisputedly there was no unrest of workmen in the factory. Therefore, the

Assessing Authority rightly recorded a finding of fact stating that reason assigned by the respondent for non-payment of Service Tax and non-submission of quarterly returns to the Assessing Authority, is not tenable in law. Therefore, the Assessing Authority for the period from April 1998 to September 1998, the penalty was imposed by him in exercise of his discretion of power at the rate of Rs. 100/- per day and for the remaining period from October 1998 to March 1999, the explanation offered by the respondent regarding the labour unrest is accepted by the Assessing Authority as the same was evidenced by the Government order of prohibiting the strike. For that period the penalty is not levied by the Assessing Authority. The said finding of fact is affirmed by the first Appellate Authority in its order. No doubt, he has not assigned reasons. Nonetheless, the order of penalty imposed is accepted by him. The same is in conformity with the reasons assigned by the Assessing Authority. The second Appellate Tribunal was not right in setting aside the same by following the decision of the Supreme Court and its own decision of the Delhi Bench and the same is in contravention of the material on record on the basis of which the finding is recorded by the original authority and further there is no tenable explanation by the assessee for not to impose penalty upon it for the period April 1998 to September 1998. Therefore, the original authority has rightly imposed penalty in exercise of his discretionary power at Rs. 100/- per day instead of imposing Rs. 200/-. The same neither can be termed as unreasonable or arbitrary. The second Appellate Authority has not applied its mind with reference to the findings and reason recorded in imposing the penalty in exercise of the power u/s 76 of the Finance Act. Therefore, the Appellate Tribunal committed an error in law in interfering with the said portion of the order by reducing the penalty from Rs. 3,03,300/- to Rs. 50,000/-. Therefore, without assigning any reason for setting aside the findings recorded by the fact finding authority, the second Appellate Tribunal simply placed reliance upon the decision of the Supreme Court and the decision of the Delhi Bench, which decisions have no application to the fact situation of this case, particularly having regard to the finding recorded by the original authority. Therefore, we have to answer the substantial question of law in favour of the appellant revenue and allow the appeal.

7. In that case, the following question was formulated by the Division Bench of this Court:

Whether Section 76 of the Finance Act, 1994 relating to Service Tax to be read as "the penalty which shall not be less than Rs. 100/- per day but for every day during which such failure continues." or "the penalty which shall not be less than Rs. 100/- in absolute terms?"

8. The questions framed in the memorandum of present appeal read thus:

(i) Whether the impugned order of the CESTAT, SZ, Bangalore, is legally justified and correct in reducing the penalty imposed u/s 76 and 77 of the Act from Rs. 5.20 Lakh to Rs. 1.00 Lakh, particularly when it upheld the confirmation in

respect of demand of Service Tax and interest leviable thereon against the respondent-assessee?

(ii) Whether the Hon''ble CESTAT was right in not following the decision rendered by the Hon''ble Supreme Court in the case of Gujarat Travancore Agency, Cochin Vs. Commissioner of Income Tax, Kerala, Ernakulam, and also in the case of Zunjarrao Bhikaji Nagarkar Vs. U.O.I. and Others, wherein it has been held that imposition of penalty u/s 173Q of the Act, is mandatory, though its quantum is discretionary?

9. Having considered the order passed by this Court in CEA No. 19/2005 dated 25-07-2007, in our opinion, the questions of law framed in the present appeal stand answered in terms of the said order. In the circumstances, we allow this appeal and answer both the questions in favour of the appellant and against the respondent.