(2010) 01 KAR CK 0079

In the Karnataka High Court

Case No : Central Excise Appeal No. 137 of 2009

Commr. of S.T. APPELLANT

Vs

Atria Convergence Tech. P. Ltd. RESPONDENT

Date of Decision : 29-01-2010

Acts Referred:
Central Excise Act, 1944 — Section 35 B, 35 G

Citation : (2010) 18 STR 265 : (2010) 27 STT 343 : (2010) 30 VST 671

Hon'ble Judges : N. Ananda, J;D.V. Shylendra Kumar, J

Bench : Division Bench

Advocate : Jeevan J. Neeralgi, CGSC, for the Appellant; None, for the Respondent

Final Decision : Dismissed

Judgement

D.V. Shylendra Kumar, J.—The appeal by the Revenue u/s 35G of the Central Excise Act, 1944 [for short ''the Act''] is directed against the order of the Central Excise Service Tax Appellate Tribunal, South Zonal Bench, Bangalore, [for short ''CESTAT''] dated 11-5-2009 where under the Tribunal rejected the appeal of the Commissioner of Central Excise [Appeals-I], Bangalore, preferred u/s 35B of the Act in turn directed against the order of the Commissioner of Central Excise [Appeals] dated 31-3-2006 where under the Commissioner had set aside certain penalties that had been levied on the assessee by the adjudicating authority u/s 78 of the Finance Act, 1994, on the premise that there was suppression and non-payment of duty on the part of the assessee in not paying commensurate Service tax for the period from 1-4-2002 to 31-3-2004.

2. The genesis of the above orders are that a show cause notice dated 31-12-2004 [copy at Annexure-B] had been issued to the assessee a cable operator providing internet services proposing a total levy of Rs. 25,79,591/- by way of Service tax for the period in question in view of the different nature of services provided by the assessee, namely, as a cable operator with effect from 16-8-2002 and as internet and advertisement provider from the year 2003-04 to

31-3-2004 etc., as indicated below:

Nature Service Taxable Service S. Tax S. Tax Difference rendered & Value Tax Pay- paid as credit S.Tax to period able per TR6 utilized be payable Challan Cable Operator : 2002-03 3,91,23,684/- 19,56,184/- 9,72,907/- - 9,83,277/- [w.e.f. 16-8-02] 2003-04 & 2004-05 [Upto 7,50,17,299/- 57,43,297/- 19,75,115/- 25,27,953/- 12,45,229/- 4/04] Internet & Advertisement - 1,39,203/- 1,39,203/- - - 2001-02 2002-03 - 4,29,956/- 4,29,956/- - - 2003-04 & 2004-05 [upto 78,98,422/- 6,05,833/- 2,54,748/- - 3,51,085 4/04] Total Service tax 25,79,591/- payable 3. The assessee responded denying the liability etc., However, in terms of the order dated 28-7-2005, the adjudicating authority has levied Service tax of Rs. 3,51,085/- with further demand in respect of related services and while duty to this extent was demanded, the adjudicating authority thought it proper to levy penalty u/s 78 of the Finance Act, 1994 and was of the view that penalty u/s 76 of the Finance Act, 1994 deserves to be waived in exercise of the powers u/s 80 of the Finance Act, 1994. As against the order levying penalty alone, the assessee appealed to the Commissioner of Central Excise [Appeals-I].

4. The Commissioner of Central Excise [Appeals-I] in terms of his order dated 31-3-2006 (copy at Annexure-D] while thought it proper to set aside the penalty levied u/s 73 of the Finance Act, 1994, was of the view that there was neither any suppression or deliberate misrepresentation on the part of the assessee warranting levy of penalty u/s 78 of the Finance Act, 1994.

5. It is aggrieved by this order of the Appellate Commissioner setting aside the order of penalty, the Revenue had chosen to file the appeal before the CESTAT.

6. The CESTAT having dismissed the appeal in terms of its order dated 18-6-2009 [copy at Annexure-A] agreeing with the view taken by the Commissioner of Central Excise [Appeals], the present appeal u/s 35G of the Act.

7. We have heard Sri Jeevan Neeralgi, learned Central Government standing counsel for the appellant.

8. Submission of Sri Jeevan Neeralgi, learned Central Government standing counsel for the appellant is that when the assessee had not specifically pleaded as to under what circumstances Service tax had not been paid within permitted time and particularly as tax liability was required to be determined by invoking the extended period of limitation, it was inevitable for the adjudicating authority to levy penalty u/s 78 of the Finance Act, 1994 and there was no occasion for the Appellate Commissioner or the Tribunal to have opined that no levy of penalty was warranted u/s 78 of the Finance Act, 1994; that with the invoking of extended period, levy of penalty will be automatic.

9. We are not impressed with the submissions made by the learned standing counsel appearing for the Revenue. The finding of fact by the adjudicating authority and as affirmed by the appellate authority is that there was no

suppression in meeting any Service tax liability. In the wake of such clear and categorical finding of fact, this appeal does not merit examination u/s 35G of the Act, as there is absolutely no scope for interference, in this appeal with the order of the Tribunal.

10. We do not find any error or illegality in the orders passed by the Tribunal as well as the Commissioner.

11. Accordingly, this appeal is dismissed.

