(2014) 04 AHC CK 0032

In the Allahabad High Court

Case No : Central Excise Appeal No. 67 of 2014

Daurala Organics APPELLANT

Vs

Commissioner of Central Excise RESPONDENT

Date of Decision : 01-04-2014

Acts Referred:

Finance Act, 1994 — Section 65(105)(zzr), 65(55b), 68, 71, 73

Citation : (2015) 273 CTR 192 : (2014) 46 GST 303 : (2014) 35 STR 214 : (2014) 72 VST 309

Hon'ble Judges : Dhananjaya Yashwant Chandrachud, C.J;Dilip Gupta, J

Bench : Division Bench

Advocate : Vivek Chaudhary, Adarsh Bhushan and Pankaj Bhatia, Advocate for the Appellant; Ashok Singh, Sr. S.C, Advocate for the Respondent

Judgement

1. This appeal by the assessee arises from a judgment of the Customs, Excise & Service Tax Appellate Tribunal, dated 24 January, 2014. By the judgment which is impugned, the Tribunal has dismissed the appeal filed by the assessee against an order of the Commissioner, Central Excise, Meerut-I passed in exercise of the revisional powers conferred by Section 84 of the Finance Act, 1994 imposing penalties on the assessee under Sections 76, 71 and 78 of the Finance Act, 1994. The assessee set up a plant for the manufacture of Parahydroxy-phenylglycine (PHPG) and entered into a licensed agreement with Gerard Kessels Sociedad Anonima (KSA), a company incorporated under the laws of Spain on 17 May, 2000. Under the agreement, KSA agreed to transfer technology to the assessee for use in connection with the production of PHPG at Daurala, District Meerut.

2. On 8 November, 2004 followed by corrigendum dated 22 February, 2006, a notice to show cause was issued to the assessee to explain why on the basis of the agreement between the assessee and KSA service tax should not be levied and recovered, treating the transfer of know-how and technology as "scientific and technical consultancy service". On 28 December, 2006 an order was passed

by the Additional Commissioner (Adjudication), Central Excise, Meerut-I by which the proceedings were dropped. The adjudicating authority held that the transaction between the assessee and KSA was in the nature of sale or transfer of intangible property and did not constitute a ''scientific and technical consultancy service''.

3. On 7 January, 2008, a notice to show cause was issued to the assessee following an audit covering the period between 2004-05 and 2005-06 which found that the assessee had not got itself registered under the category of Intellectual Property Services and had failed to file returns and had suppressed information regarding payment of royalty to KSA. ''Intellectual Property Right Services'' is governed by the provisions of Section 65(105)(zzr) of the Finance Act, 1994 with effect from 10 September, 2004. The definition of ''Intellectual Property Service'' u/s 65(55b) was introduced with effect from 16 June, 2005. Another show cause notice was issued to the assessee on 11 March, 2008. The show cause notice dated 7 January, 2008 pertained to the period from 1 October, 2004 to 31 March, 2007, while the show cause notice dated 11 March, 2008 pertained to the period from 1 April, 2007 to 31 December, 2007.

4. The appellant furnished replies to the show cause notices, which had invoked the extended period of limitation within the meaning of the proviso to Section 73(1) of the Finance Act, 1994. On 5 December, 2008, the appellant paid the entire amount of service tax together with interest as demanded in the notices to show cause. According to the appellant, it did so, since it was entitled to CENVAT credit in respect of all the taxes paid. On 24 February, 2009, the Additional Commissioner passed an order of adjudication holding that the assessee was liable to pay service tax and that the extended period could be invoked. Moreover, it was held that the transaction between the assessee and KSA constituted ''Intellectual Property Service'' and was liable to service tax with effect from 10 September, 2004. However, the adjudicating authority proceeded not to impose any penalty, giving to the assessee the benefit of Section 80 of the Finance Act, 2004. The adjudicating officer was of the view that the issue involved interpretation of legal provisions which had resulted in non-payment of service tax in time. The assessee had obtained registration for service tax under the category of ''Intellectual Property Right Services'' on 30 September, 2006 in respect of the agreement with KSA and was paying service tax since October, 2007. Moreover, it was noted that the assessee had paid the entire service tax dues together with interest covering the period from 10 September, 2004 to 30 September, 2007 on 10 December, 2008. Bearing in mind the voluntary tax compliance behaviour of the assessee, it was held that a bona fide cause was duly established by the assessee though in the initial stages, there was some confusion and the assessee had disputed the levy.

5. On 19 November, 2010 the Commissioner of Central Excise, suo motu invoked his powers u/s 84 of the Finance Act, 1994, as if then stood, and issued a notice to show cause proposing to revise the order of adjudication in so far as it

dropped the penalty proceedings. The assessee filed its reply on 30 December, 2010. On 17 February, 2011, the Commissioner of Central Excise, in exercise of powers conferred by Section 84, came to the conclusion that the assessee was liable to pay the following penalties for violation of Sections 76, 77 and 78 of the Finance Act, 1994 :-

"(a) Rs. 12,87,153/- (Rs. twelve lac eighty-seven thousand one hundred fifty three only) upon M/s. Daurala Organic Ltd., Daurala, Meerut u/s 76 of the Finance Act, 1994;

(b) Rs. 1,000/- (Rs. one thousand only) upon M/s. Daurala Organic Ltd., Daurala, Meerut u/s 77 of the Finance Act, 1994;

(c) Rs. 14,98,776/- (Rs. fourteen lacs ninety-eight thousand seven hundred seventy-six only) upon M/s. Daurala Organic Ltd., Daurala, Meerut u/s 78 of the Finance Act, 1994."

6. The assessee filed an appeal which has been dismissed by the Tribunal by the impugned judgment and order. The Tribunal has held that once the extended period of limitation under the proviso to Section 73(1) was attracted and the finding of the Additional Commissioner was not challenged by the assessee, there was no scope for the assessee to contend that it did not discharge the service tax liability with a bona fide intention. Consequently, according to the Tribunal, confirmation of the service tax demand by invoking the proviso to Section 73(1) and a waiver of penalty u/s 80 could not co-exist. Hence, the appeal was dismissed.

7. Though several questions of law have been framed, the following three questions of law would suffice for disposal of the appeal :-

1. Whether the benefit of Section 80 of the Finance Act, 1994 is not available in the case where proviso to Section 73(1) of the Act is invoked?

2. Whether the interpretation of Section 80 as given by the Tribunal renders the entire Section 80 otiose in the case of mandatory penalty u/s 78 of the Act?

3. Whether the Commissioner in exercise of his revisional power u/s 84 of the Act can reverse the discretion exercised by the adjudicating authority u/s 80 of the Act?"

8. Prior to 18 April, 2006, Section 76 provided as follows :-

Any person, liable to pay service tax in accordance with the provisions of section 68 or the Rules made under this Chapter, who fails to pay such tax, shall pay, in addition to such tax and the interest on that tax amount in accordance with the provisions of section 75, a penalty which shall not be less than one hundred rupees for every day during which such failure continues but which may extend to two hundred rupees for every day during which such failure continues, so, however, that the penalty under this clause shall not exceed the amount of service tax that he failed to pay.

9. The provisions of Section 76 for the period with effect from 18 April, 2006 are as follows :-

"Any person, liable to pay service tax in accordance with the provisions of section 68 or the Rules made under this Chapter, who fails to pay such tax, shall pay, in addition to such tax and the interest on that tax amount in accordance with the provisions of section 75, a penalty which shall not be less than two hundred rupees for every day during which such failure continues but which may extend to two hundred rupees for every day during which such failure continues or at the rate of two per cent of such tax, per month, whichever is higher starting with the first day alter due date till the date of actual payment of the outstanding amount of service tax :

Provided that the total amount of the penalty payable in terms of this section shall not exceed the service tax payable."

10. Section 77 is to the following effect :-

Whoever contravenes any of the provisions of this Chapter or any rules made thereunder for which no penalty is separately provided in this Chapter, shall be liable to a penalty which may extend to an amount not exceeding one thousand rupees.

11. Section 78 provides as follows :-

"78. Penalty for suppressing value of taxable service.-Where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, by reason of-

(a) fraud; or

(b) collusion; or

(c) wilful mis-statement; or

(d) suppression of facts; or

(e) contravention of any of the provisions of this Chapter or of the rules made thereunder with intent to evade payment of service tax, the person, liable to pay such service tax or erroneous refund, as determined under sub-section (2) of section 73, shall also be liable to pay ''a penalty, in addition to such service tax and interest thereon, if any, payable by him, which shall not be less than, but which shall not exceed twice, the amount of service tax so not levied or paid or short-levied or short-paid or erroneously refunded"

12. Section 80 provides as follows :-

80. Penalty not to be imposed in certain cases.--Notwithstanding anything contained in the provisions of section 76, section 77 or section 78, 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.

13. Section 76 provides for a penalty where a person, who is liable to pay service tax, fails to pay such tax. The penalty is evidently mandatory because the provision stipulates that a person who fails to pay service tax shall pay, in addition to the tax and interest on the tax, a penalty. The quantum of the penalty, however, is subject to a minimum and a maximum with a ceiling that the total penalty would not exceed the amount of service tax. Section 77 similarly contains a mandate under which a penalty is imposed where a person has contravened the provisions of the Chapter or any rule made thereunder where no separate provision for penalty is provided elsewhere in the Chapter. Section 78 similarly provides for a mandate of a penalty but deals with a situation where service tax has not been levied or paid or has been short-levied or short paid or erroneously refunded, by reason of (i) fraud; or (ii) collusion; or (iii) wilful misstatement; or (iv) suppression of fact; or (v) contravention of any of the provisions of the Chapter or the rules with intent to evade the payment of service tax. u/s 78 the minimum penalty is the amount of service tax which is not levied or paid or short-levied or short-paid or erroneously refunded while the maximum penalty is twice that amount. Section 76 deals with a situation where a person, who is liable to pay service tax, fails to pay such tax. Section 76 does not deal with an aggravated situation which is specifically dealt with in Section 78. Section 78 deals with situations where the failure to levy or pay tax or a short levy or short payment or erroneous refund is occasioned by conduct of the assessee falling within the description of one of the clauses of that section. Fraud, collusion, wilful misstatement, suppression of fact or contravention of the Chapter or the rules with intent to evade the payment of service tax, all postulate that the assessee is guilty of such conduct or behaviour accompanied by an element of intent, designed to defeat the payment of service tax dues. Consequently, Section 78 imposes a higher quantum of penalty since the penalty u/s 78 can extend up to twice the amount of service tax which has not been levied or paid or short-levied or short-paid or erroneously refunded.

14. Section 80 of the Finance Act, 1994 contains a non obstante provision which begins with the words notwithstanding anything contained in the provisions of Section 76, Section 77 or Section 78. u/s 80, the burden is cast upon the assessee of proving that there was reasonable cause for the failure referred to in Section 76, 77 or 78, in which event no penalty would be imposable for the failure. The important point to note is that while enacting Section 80, Parliament introduced an overriding non obstante provision which operates even in relation to the provisions of Section 78. Consequently, the provision envisages that notwithstanding what is contained in Section 78, it is open to an assessee to prove that there was a reasonable cause for the failure attributed in Section 78.

15. The view which has found acceptance by the Tribunal in the present case is that once the extended period of limitation u/s 73(1) has been applied, there can be no reasonable cause within the meaning of Section 80. Now, the

circumstances which have been set out in the proviso to Section 73(1) are indeed similar to those which are set out in Section 78 for the imposition of a penalty. Notwithstanding this, the Parliament did allow to the assessee an opportunity to establish that there was a reasonable cause for the failure and this provision in Section 80, as noted above, overrides Section 78 as well by virtue of the non obstante clause. The non obstante provision of Section 80 must obviously be given a meaning. If the view of the revenue, which was accepted by the Tribunal, were to be affirmed, that would render the non obstante provision of Section 80 otiose. For, it would then have to be held that once a penalty has become imposable u/s 78, it would be inconsistent to allow the assessee to establish that there was a reasonable cause for the failure. The words which have been used in the Statute in the present case in Section 80 cannot be regarded as being redundant or otiose.

16. Consequently, in our view the Tribunal was in error in coming to the conclusion that there would be no occasion to establish a reasonable cause within the meaning of Section 78, once, the extended period of limitation had been validly invoked under the proviso to Section 73(1). If the analogy which has been used by the Tribunal is extended, it would have to be held that Section 80 would have no application whatsoever to a case which falls within the purview of Section 78 since as we have noted, the language of Section 78 is similar to the language which is used in the proviso to Section 73(1). Accepting such an interpretation would involve re-writing the provisions of Section 80 by excluding the provisions of Section 78 from the non obstante clause which is contained in Section 80. This would be, in our view, impermissible. In interpreting a fiscal enactment, the duty of the Court is to adopt a plain and a literal construction of the words which have been used by the Legislature.

17. Significantly, Section 80 was amended by the Finance Act, 2011 (Act No. 8 of 2011). As a result of the amendment, the reference to Section 78 in Section 80(1) has been amended to read as a reference to the first proviso to subsection (1) of Section 78. Consequently, after the amendment by the Finance Act, 2011, the opportunity which is granted to the assessee to establish a reasonable cause applies to a situation which is governed by the first proviso to Section 78(1). This case, however, deals with a period prior thereto but we have adverted to the subsequent amendment only by way of illustration.

18. In the present case, the adjudicating authority while deciding not to impose a penalty, had due regard to the fact that the assessee had obtained registration for the purposes of service tax in respect of ''Intellectual Property Right Services'' on 30 September, 2006; that the entire dues on account of service tax together with interest for the period from 10 September, 2004 to 30 September, 2007 had been paid on 10 December, 2008 and there was compliance by the assessee thereafter.

19. In this background the adjudicating authority held that there was some confusion in regard to the applicability of the service tax. This circumstance must

be also coupled with the admitted circumstances in the present case which were that a notice which was issued to the assessee on 8 November, 2004 (together with a corrigendum dated 22 January, 2006) seeking to levy service tax on scientific technical consultancy service had resulted in an order of adjudication by which the demand had been dropped on 28 December, 2006.

20. In this view of the matter, the Commissioner could not have been unmindful of the fact that he was exercising a revisional jurisdiction u/s 84 as it then stood. A possible view was taken by the adjudicating officer while deleting the penalty and the interference of the Commissioner in the exercise of his revisional jurisdiction was clearly not warranted.

21. For the reasons aforesaid, we answer the questions of law as framed by the assessee by holding that the adjudicating authority had correctly granted to the assessee the benefit of the provisions of Section 80 of the Finance Act, 1994 as it then stood by deleting the penalty and that the exercise of revisional jurisdiction u/s 84 by the Commissioner was not in accordance with law. The appeal is disposed of, accordingly. The questions of law are accordingly answered. There shall be no order as to costs.