(2015) 09 CESTAT CK 0011

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Appeal No. 835 Of 2009

M/s. B.S.L. Ltd. APPELLANT

Vs

C.C.E., Jaipur-II RESPONDENT

Date of Decision : 11-09-2015

Acts Referred:
Finance Act, 1994 — Section 76, 77, 78

Citation : (2015) 09 CESTAT CK 0011

Hon'ble Judges : G. Raghuram, J;R. K. Singh, Technical Member

Bench : Division Bench

Advocate : Rajni Gupta, Suchitra Sharma

Final Decision : Disposed Of

Judgement

1. Appeal has been filed against Order-in-Appeal dated 26.08.2009, which upheld Order-in-Original dated 12.06.2008 which:-

(i) In respect of Show Cause Notice dated 06.06.2007, confirmed service tax demand of Rs.17,77,604/- along with interest and penalties under

Sections 76, 77 & 78 of the Finance Act, 1994.

(ii) In respect of Show Cause Notice dated 04.10.2007, confirmed service tax demand of Rs.7,45,157/- along with interest and penalties under

Sections 76, 77 & 78 of the Finance Act, 1994.

(iii) In respect of Show Cause Notice dated 12.02.2008, confirmed service tax demand of Rs.9,91,888/- along with interest and penalties under

Sections 76, 77 & 78 of the Finance Act, 1994.

The said demands were confirmed on the ground that the appellant engaged various overseas agents to procure export orders and paid them

commission, but did not pay service tax under Business Auxiliary Service (BAS) under reverse charge mechanism during the period 01.10.2006 to

30.01.2007.

2. The appellant is not contesting the impugned demand and interest, but is pleading that (i) the impugned Order-in-Appeal was received by it on

06.01.200, (ii) it had deposited the entire impugned service tax demand amounting to Rs.35,14,649/- with interest and also deposited 25% of the said

amount as penalty within 30 days of the receipt of the impugned order and that the penalty under Section 76 ibid should not be imposed as penalty

under Section 78 ibid has been imposed.

3. We have considered the contentions of the appellant. There is no doubt that the commission paid to overseas agents by the appellant was liable to

service tax under BAS and the appellant is not contesting the same. However, regarding the contention of the appellant that it should not have been

imposed penalty under Section 76 ibid, we find that in the case of Jubiliant Enpro (P) Ltd. Vs. CCE, Naida [2015-TIOL-2535-CESTAT-DEL],

CESTAT has held as under:-

12. The appellants have argued that once penalty under Section 78 has been imposed, penalty under Section-76 of Finance Act, 1994

should not be imposed. We find that Punjab & Haryana High Court in several cases (viz CCE Vs. First Flight Couriers Ltd. - 2011- TJOL-

67-HC-P7H-ST, CCE-Chandigar-1 Vs. M/s. Cool Tech Corporation - 2011-TIOL-23-HC-P&H-ST, CCE Vs. Pannu Property Dealers

Ludhiana 201O-TIOL-874- HC-P&H-ST) has held that even if at the relevant time the penalties under Section 76 & 78 were not mutually

exclusive, once penalty under Section 78 has been imposed, penalty under Section 76 ibid may not be justified. We a/so have no difficulty in

agreeing with the appellants that maximum penalty under Section 77 was only Rs. 1000/-.

In the light of the said judicial pronouncement, we are inclined to accept the contention of the appellant with regard to the penalty under Section 76

ibid. We also find that none of the lower authorities expressely gave the appellant option to pay reduced mandatory penalty under Section 78 ibid. In

terms of the decision of Gujarat High Court in the case of Ratnamani Metals & Tubes [2013-TIOL-1124-HC-AHM-CX], such an option can be given

even at the level of CESTAT.

4. In the light of the foregoing, we pass the following order:-

(i) We uphold the impugned demand and interest.

(ii) We set aside the penalty under Section 76 ibid.

(iii) Penalty under Sections 77 and 78 ibid are upheld.

However, penalty under Section 78 ibid shall be 25% of the amount of demand confirmed (i.e., 25% of Rs.35,14,649/-), if the same along with

impugned demand and interest is deposited within 30 days of the receipt of this order, if the same has already not been done. Needless to say, (any)

amounts already deposited towards the impugned demand, interest and penalty will be taken into account for this purpose.

5. The appeal is disposed of in the above terms.

