

(2008) 04 RAJ CK 0029
In the Rajasthan High Court

Union of India (UOI) and Another

APPELLANT

Vs

Aakar Advertising and Aakar Communication

RESPONDENT

Date of Decision : 23-04-2008

Acts Referred:

Central Excises and Salt Act, 1944 — Section 35F
Finance Act, 1994 — Section 68, 75, 76, 77, 78

Citation : (2008) 217 CTR 467 : (2008) 3 RLW 2509 : (2008) 11 STR 5 : (2008) 15 VST 542

Hon'ble Judges : N.P. Gupta, J;Kishan Swaroop Chaudhari, J

Bench : Division Bench

Final Decision : Allowed

Judgement

1. These two appeals arise out of the common order of the learned Tribunal dt. 14.8.2003, whereby the learned Tribunal has partly allowed the appeal, and modifying the order of the learned Commissioner, has reduced the penalty, inasmuch as the penalty imposed u/s 76 has been reduced to 10% of the duty demanded in both the Appeals No. 68 and 69, while the penalty u/s 77, in Appeal No. 69 has been reduced to Rs. 2000/-.

2. Appeal No. 25 arises out of the judgment of the Tribunal in Appeal No. 68, which in turn arises out of the order of the Commissioner in Appeal No. 544 dated 27.9.2002, whereby the learned Commissioner has reduced the penalty imposed u/s 77 to the maximum permissible limit, while the penalty imposed u/s 76 to the extent of amount of tax being Rs. 39,250 was upheld. The Tribunal in Appeal No. 68 reduced this penalty to 10% of the duty demanded.

3. Appeal No. 4 arises out of the judgment of the Tribunal passed in Appeal No. 69, which in turn arises out of the order of the learned Commissioner dated 19.6.2002, whereby the learned Commissioner has dismissed the appeal for default in complying with the requirement of pre-deposit.

4. In this case, the order in original imposed a penalty u/s to the tune of amount

of tax being Rs. 89,929/- and a penalty of Rs. 11,800/- was imposed u/s 77. The learned Tribunal despite noticing the fact that the appeal was dismissed by the Commissioner for non-deposit of the requirement of pre-deposit, allowed the appeal, and reduced the penalty u/s 77 to the maximum permissible extent, and the penalty u/s 76 was reduced to 10%.

5. The appeal No. 4 was admitted on 13.4.2005, while appeal No. 25 was admitted on 5.12.2005, by framing identical questions of law, notwithstanding the fact, that in appeal No. 25, which arose out of the appeal No. 68 before the Tribunal, the question No. 2 did not at all arise. Be that as it may. The questions framed in both the appeals read as under:

(1) Whether the Tribunal could reduce the penalty imposable u/s 76 of the Finance Act, 1994 as amended by the Finance Act, 1998 read with Rule 6 of the Service Tax Rules below the minimum limit prescribed under that section?

(2) Whether the Tribunal could entertain an appeal on merits when the appeal before the Commissioner was rejected because of default by the Assessee in payment of pre-deposit required u/s 35F of the Central Excise Act, 1944?

6. So far as the question No. 2 as involved in appeal No. 4 is concerned, admittedly the requirement of pre-deposit has not been complied with. Even the learned Tribunal has not recorded any otherwise finding in this regard, and on the face of language of Section 35F, there is no escape from the conclusion, that the appeal was rightly dismissed by the learned Commissioner, and the learned Tribunal could not entertain the appeal on merits. Accordingly, this question is answered against the assessee, and in favour of the Revenue.

7. At this stage, learned Counsel for the assessee submits, that since the learned Tribunal has already allowed the appeal, and since this Court is not inclined to uphold that order, the assessee may be granted reasonable time, even now, to comply with the requirement of pre-deposit, and the order dismissing the appeal, passed by the Commissioner be set aside, and the Commissioner be directed to decide the appeal on merits.

8. Though this request is opposed by the learned Counsel for the Revenue, but in the circumstances, we are inclined to grant indulgence, and direct, that if the appellant complies with the requirement of pre-deposit, now, within a period of four weeks from today, the dismissal of the appeal by the Commissioner, on account of non fulfillment of requirement of pre-deposit, shall stand set aside, the Commissioner shall decide the appeals on merits.

9. Then, comes question No. 1. For appreciating the question No. 1 we may gainfully quote the provisions of Section 76, which read as under:

76. Penalty for failure to pay service tax. Any person, liable to pay service tax in accordance with the provisions of Section 68 or the rules made thereunder, who fails to pay such tax shall pay in addition to paying such tax, and interest on that tax 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.

10. A look at the provisions of the section does show, that it does prescribe a minimum amount of penalty, by using the expression "not less than". Of course, the upper limit has also been prescribed therein. The question precisely is, as to whether the Tribunal, or the authority below, have any authority to impose a penalty, which is even less than the amount permissible to be imposed by Section 76. Learned Counsel for the assessee referred to the provisions of Section 80, and one judgment of Hon"ble the Supreme Court, in Dilip N. Shroff Karta of N.D. Shroff Vs. Joint Commissioner of Income Tax, Special Range Mumbai and Another, , and one judgment of Division Bench of this Court, in Union of India through Commissioner of Central Excise v. Dial and Travel reported in (2007) 208 CTR170, and contended, that when Section 80 provides that penalty shall not be imposable for any failures referred in Sections 76, 77 and 78, if the assessee proves, that there was reasonable cause for the said failure, which reasonably implies, that the authority can impose a penalty, less than the minimum prescribed in the two sections.

11. We have gone through the judgment, and find, that those judgments nowhere lay down, that despite the provision providing for penalty, by using the expression "not less than", still the authorities can impose any amount of penalty, lesser than "not less than". Therefore, the two judgments are of no assistance.

12. May be, that the penalty imposable may be set aside, if the assessee proves that there was reasonable cause for the said failure, then the existence of sufficient cause is a question of fact, which is required to be decided by the authorities below, and if it is found, that there is sufficient cause the penalty can not be imposed, but the question is, that if reasonable cause is not shown, and penalty is required to be levied, then, the minimum penalty prescribed cannot be further reduced, under the garb of any existing discretion, assumed to be vesting, with the authority, including the Tribunal. Where the two limits have been prescribed, being the minimum and upper limit, then obviously the free play is available between the two limits only, and the discretion can be exercised, within those limits, but then, that does not mean, that the authorities have any power to impose penalty less than the minimum prescribed by the Section. Accordingly question No. 1 is answered in favour of the Revenue, and against the assessee.

13. However, a look at the orders, being the order in original, and that of the learned Commissioner shows, that u/s 76 a penalty in both the cases has been imposed equal to the amount of tax, while according to language of Section 76, the minimum and maximum penalties are prescribed, with the upper ceiling of being equal to the amount of tax. From perusal of the orders, it further

transpires, that the authorities below the Tribunal, have not at all applied their mind, on the question, as to whether the minimum penalty was required to be imposed, or maximum penalty was required to be imposed. When the statute provides discretion, to be available within the two upper and lower limits, the discretion was required to be exercised. It is not always necessary, that maximum penalty should be imposed. To illustrate, in one case, being appeal No. 4, as appears from the order in original, that there is total delay of 59 weeks i.e. something around 413 days, and the minimum penalty would be Rs. 41,300/-. Likewise in other appeal the delay is of 12 weeks i.e. 84 days, and thus, the minimum penalty could be Rs. 8400/-, while the penalty imposed in both the cases is Rs. 89,929/- and Rs. 39,250/-respectively.

14. In that view of the matter, we think it appropriate, while deciding the legal question as above in favour of the revenue, and setting aside the order of the learned Tribunal, by allowing the appeal, to remit the matter back to the learned Commissioner, to decide afresh, the amount of penalty to be imposed u/s 76, objectively and dispassionately, and after hearing the parties, keeping in view the observations made above.

15. Accordingly, the appeals are allowed as above.