(2007) 02 RAJ CK 0001

In the Rajasthan High Court

Union of India (UOI) APPELLANT

Vs

Dial and Travel RESPONDENT

Date of Decision : 05-02-2007

Acts Referred:

Central Excises and Salt Act, 1944 — Section 35H
Finance Act, 1994 — Section 67, 68, 70, 75, 76

Citation : (2007) 208 CTR 170 : (2007) 7 STT 372

Hon'ble Judges : Rajesh Balia, J;Chatra Ram Jat, J

Bench : Division Bench

Judgement

1. Heard learned Counsel for the parties.

2. This application u/s 35H of the Central Excise Act as it existed on 1st April, 2002 r/w Section 83 of the Finance Act, 1994 containing the provisions relating to levy and collection of service-tax is directed against the order of Customs, Excise and Gold Control Tribunal, New Delhi, to state the case and refer the following question of law for the decision of this Court:

Is the Tribunal empowered to reduce the penalty under Sections 67 and 68 of the Finance Act, 1994?

3. As we shall presently notice that in the circumstances and on the facts found the aforesaid question is of academic importance for the present purposes.

4. The respondent is a provider of services as travelling agent and is filing its regular returns and paying service-tax since September, 1999. A show-cause notice was issued to the respondent by the adjudicating authority of the Central Excise Act as to why a penalty should not be imposed upon them under the provisions of Section 70 of the Finance Act, 1994, and why the amount of service-tax recoverable from them along with interest @ 1.5 per cent per month payable in accordance with provisions of Section 75 of the Act of 1994 should not be recovered from them in terms of Section 76 and why a penalty should not be imposed upon them u/s 76.

The assessee has submitted its reply vide letter dt. 6th Oct., 2000 stating that:

They were very regular in remitting the service-tax and submitting the returns since registration. During October, 1998, they came to know that henceforth the same at source. Subsequently, they have written to their principal who would deduct - Indian Airlines. But in spite of several reminders reply is still awaited. The assessee further submitted that on persuasion from the Department, Shri Ashok Jain, proprietor of the firm, met with the officers of the Department who cleared the situation and convinced that service-tax is leviable on the services rendered by them. As soon as they were ready to deposit the service-tax they came to know that their official staff have cheated them in the way that they have misappropriated an amount around one lakh twenty-five thousand rupees. The photocopy of the letter submitted to the DIG Police, Jodhpur, enclosed with the letter and further submitted that meanwhile, in order to pay the principal, Indian Airlines, the money was arranged from the friends and relatives. However, having remitted the service-tax and interest payable the return for half-year ending March, 1999 and submitted on 20th Sept., 2000. The assessee has further submitted that they did not have any intention to escape from or breach the Service-tax Rules and requested to decide the case with a sympathetic view in the matter.

These facts were not in contention and were accepted by the adjudicating authority and considering these facts he was of the opinion that it is a fit case for taking a lenient view of the matter and considering the provisions of Section 77, he imposed the minimum imposable penalty under the aforesaid provisions which amounted to Rs. 12,900 and u/s 76 and Rs. 9,863 u/s 76.

5. The order of the adjudicating authority dt. 28th Nov., 2000, was affirmed on appeal by the CIT(A) vide his order dt. 21st July, 2001.

6. On further appeal, the Tribunal bringing into consideration made by the respondent before the adjudicating authority reduced the penalty to Rs. 5,000.

7. Aggrieved with the aforesaid order, this application was moved.

It was pointed out by the learned Counsel for the respondent that Section 80 of the Finance Act, 1994 envisages that where assessee furnished an explanation for delayed or non-payment of service-tax in time, making out a reasonable cause for default, no penalty under Sections 76 and 77 is to be levied. Unfortunately, this provision was neither noticed by the adjudicating authority or other authorities, nor was brought to the notice of the Revenue by the assessee. The acceptance of assessee''s submission noticed above which has gone into consideration provides a reasonable cause for delayed or non-payment and submission of tax in time.

8. Having perused Section 80 of the Finance Act of 1994 which reads as under:

Penalty not to be imposed in certain cases:

Notwithstanding anything contained in the provisions of Section 76, Section 77, Section 78, no penalty shall be imposable on the assessee for any failure referred to in said provisions, if the assessee proves that there was reasonable cause for the said failure.

the contention of the learned Counsel for the respondent appears to be justified.

9. If the explanation stated by the respondent assessee is taken to be correct, irresistibly it amounts to a reasonable cause for assessee''s default. The fact that without noticing provisions of Section 80, which obliterates liability to the levy of penalty, the adjudicating authority has used the expression ''lenient'', that those grounds are enough to take a lenient view and breach of these grounds were not disputed by the Revenue at any time. The bona fide belief held by the assessee that the service-tax on travelling service was provided by the Indian Airlines, who is the principal, and the assessee was only acting as its agent, the liability to pay service-tax was of the principal, the assessee has not filed the return and paid service-tax thereon.

It was only when the matter was taken up with the Indian Airlines on receipt of notice that it became clear to the assessee that while selling tickets of the Indian Airlines and making remittance of such receipts to the Indian Airlines, assessee was required to deduct service at source, the amount of service-tax in respect of service rendered under such tickets. The assessee filed its return and deposited the tax along with interest payable thereon. The subsequent unblemished conduct of the assessee was also taken note of by the adjudicating authority for the purpose of sustaining the assessee''s explanation.

10. In view of the aforesaid circumstances, the assessee''s case clearly fell within the province of Section 80 of the Finance Act, 1994 and truly speaking no penalty was leviable. However, since the assessee and Revenue both failed to notice Section 80 and acted only with a view to levy less or the minimum penalty. The facts and circumstances sterling on the face of the record cannot be ignored. It is also clear from the fact that the assessee has not taken any recourse to challenge the order before Tribunal and had he done so he was likely to succeed and relieved of the whole penalty.

11. On the facts found by the adjudicating authority and in the facts and circumstances of the present case, there is no room for sustaining penalty, even if the answer to the question raised by the Revenue is in the affirmative in their favour. We, therefore, decline to direct Tribunal to refer the aforesaid question for the decision of this case in peculiar facts of the present case. No orders as to costs.