

Commissioner of Central Excise Vs Ess Ess Engineers

Court: High Court Of Punjab And Haryana At Chandigarh

Date of Decision: May 13, 2011

Acts Referred: Central Excises and Salt Act, 1944 " Section 35G
Finance Act, 1994 " Section 76, 78

Citation: (2011) 23 STR 3 : (2011) 31 STT 548 : (2011) 44 VST 378

Hon'ble Judges: A.K. Goel, Acting C.J.; Ajay Kumar Mittal, J

Bench: Division Bench

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

Adarsh Kumar Goel, Actg. C.J.

This appeal has been preferred by the revenue u/s 35G of the Central Excise Act, 1944 (for short, "the

Act") against order dated 12-8-2010, Annexure A-4, passed by the Customs, Excise and Service Tax Appellate Tribunal, New Delhi claiming

following questions of law:

(i) Whether the judgment and order passed by the Id. CESTAT, New Delhi is proper and legal?

(ii) Whether the CESTAT has rightly allowed the party's appeal regarding waiving penalty u/s 78 of the Finance Act, 1994? Whether the grounds

that for imposition of penalty u/s 78 some positive evidence of deliberate mis-declaration of value of taxable service with intent to evade the service

tax, other than mere failure to declare the full value of taxable service in ST-3 returns must be procured are legally correct?

2. The Assessee is, inter alia, engaged in providing of taxable service of "Erection, Commissioning and Installation". It failed to pay the service tax

for the services rendered during 1-7-2003 to 30-9-2006. Show-cause notice was issued proposing to recover the service tax and levy penalty.

The adjudicating authority confirmed the demand with interest and also levied penalty under Sections 76 and 78 of the Finance Act, 1994. The

Appellate Authority partly allowed the appeal but upheld the demand of levy of penalty. On further appeal, the Tribunal set aside the levy of

penalty holding that failure of the Assessee to pay the service tax due was not with intention to evade the payment of duty but on account of bona

fide belief that the same was not payable. Following finding has been recorded in the impugned order:

3. I have carefully considered the submissions from both the sides and perused the records. I find that short payment was detected in course of

audit of records of the Appellant Company when they submitted their financial records to the audit for inspection. It is not in dispute that the

Appellant were registered with the Department and they were filing their returns regularly. The allegation against them is that they were not

disclosing full value of the taxable service provided to their clients with the intention to evade the service tax. However, the Appellant's contention

is that in addition to erection, commissioning and installation, they were also undertaking the work relating to fabrication and dismantling, on which

they were not paying any service tax as according to them, service tax was not payable on the charges for fabrication and dismantling. On going

through the records, I find the substance in this contention of the Appellant. In view of this, I am of the view that short payment was mainly due to

the Appellant's understanding that they are not liable to pay service tax on the fabrication and dismantling charges. In view of this so far as penalty

u/s 76 is concerned, I am of the view that there is a case for invoking Section 80.

4. As regards penalty u/s 78 is concerned, the same is imposable in a case where service tax has not been levied or paid or has been short levied

or short paid or erroneously refunded, by reason of fraud; or collusion; or wilful misstatement; or suppression of facts; or contravention of any of

the provisions of this Chapter or of the rules made there under with intent to evade payment of service tax. The question arises as to whether in the

circumstances of this case, the penal provisions of Section 78 are invocable.

3. We have heard learned Counsel for the Appellant.

4. Only contention raised on behalf of the Appellant is that penalty u/s 78 of the Act should not have been interfered with as the Assessee was

guilty of mis-declaration of value of taxable service with intent to evade the service tax.

5. We are unable to accept the submission. The Tribunal has recorded a finding of fact that the Assessee did not have the requisite mens rea to

evade payment of service tax. The Assessee had duly paid the service tax with interest and also made full and true disclosure in the return. The

finding so recorded is not shown to be in any manner perverse.

6. No substantial question of law arises.

The appeal is dismissed.