www.taxguru.in

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

TAX APPEAL No.1367 of 2009

For Approval and Signature:
HONOURABLE MR.JUSTICE D.A.MEHTA Sd/-

HONOURABLE MS.JUSTICE H.N.DEVANI Sd/-

==========

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	**YES**
2	To be referred to the Reporter or not ?	**YES**
3	Whether their Lordships wish to see the fair copy of the judgment ?	**NO**
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?	**NO**
5	Whether it is to be circulated to the civil judge ?	**NO**

==========

COMMISSIONER, CENTRAL EXCISE & CUSTOMS-Appellant(s)
Versus
PORT OFFICER - Opponent(s)

==========

Appearance :
MR DARSHAN M PARIKH for Appellant(s) : 1,
MR SN SOPARKAR with MRS SWATI SOPARKAR for the Opponent

==========

CORAM : HONOURABLE MR.JUSTICE D.A.MEHTA
and
HONOURABLE MS.JUSTICE H.N.DEVANI

Date : 08/07/2010

ORAL JUDGMENT

(**Per : HONOURABLE MR.JUSTICE D.A.MEHTA**)

(1) This appeal has been preferred by appellant-revenue challenging order dated 26.12.2008

www.taxguru.in

made by Customs, Excise and Service Tax Appellate Tribunal, West Zonal Bench, Ahmedabad (the Tribunal) proposing following question of law:

"Whether the penalty under Section 76 of the Finance Act, 1994 can be reduced below the limit prescribed by the section?"

(2) On 06.05.2010, when the appeal came up for hearing, following order came to be made by the Court:

"1. Heard the learned Standing Counsel for appellant revenue.

2. Learned counsel has invited attention to section 76 as it stood at the relevant time as well as section 80 of the Finance Act, 1994 to assail the impugned order of the Tribunal.

3. Notice for final disposal returnable on 24th June, 2010."

(3) Pursuant to the said order in response to notice issued by the Court, the respondent-assessee has put in appearance through learned Senior Advocate, who has been heard. **ADMIT**.

www.taxguru.in

The aforesaid question is treated as the substantial question of law.

(4) Learned counsel appearing for the respondent-assessee submitted that under Section 76 of the Finance Act, 1994 (the Act) the authority is empowered to levy penalty but has discretion in so far as the quantum of penalty is concerned. When read with Section 80 of the Act the said discretion empowers the authority to reduce the penalty to an amount below the limit stipulated in Section 76 of the said Act because once there is a discretion to delete the entire penalty such discretion can also extend to reducing the penalty partially, if the facts so warrant. In support of the submissions following ten judgments have been relied upon to submit that High Courts of Rajasthan, Bombay, Punjab & Haryana and Karnataka have taken a view similar to the view adopted by the Tribunal in the facts of the present case and, therefore, no interference was warranted:

WEB COPY

www.taxguru.in

(i) Union of India Vs. Dial and Travels, [2007] 7 STT 372 (Raj.);

(ii) Commissioner of Central Excise & Customs, Nasik Vs. D.R. Gade, [2008] 16 STT 249 (Bom.);

(iii) Commissioner of C.Ex. & Customs, Nashik Vs. Vinay Bele & Associates, 2008 (9) S.T.R. 350 (Bom.)

(iv) Commissioner of Service Tax, Mumbai Vs. S.R. Enterprises, [2008] 15 STT 430 (Bom.);

(v) Commissioner of Central Excise & Service Tax, Jalandhar Vs. R.K. Associates, [2009] 18 STT 536 (Punj. & Har.);

(vi) Commissioner of Central Excise Commissionerate, Jalandha Vs. Darmania Telecom, [2009] 20 STT 98 (Punj. & Har.);

सत्यमेव जयते
THE HIGH COURT OF GUJARAT
WEB COPY

(vii) Commissioner of Central Excise, Mangalore Vs. Vishwanatha Karkera, [2009] 21 STT 213 (Kar.);

(viii) Commissioner of Central Excise Vs. Madhuri Travels, [2009] 23 STT 45 (Bom.);

(ix) Commissioner of Central Excise,

www.taxguru.in

Jalandhar Vs. Batala CITI Cable (P.) Ltd., [2010] 24 STT 354 (Punj. & Har.);

(x) Commissioner of Central Excise, Jalandhar Vs. Steel Craft (India), [2010] 25 STT 421 (Punj. & Har.).

It was further submitted that the Finance Act, 1994, which imposes service tax, is an All India Statute and this High Court should normally not deviate from the view expressed by the other High Courts in the country. Lastly, it was submitted that if the Court was of the opinion that the impugned order of Tribunal was a non-speaking order, the matter could be restored to file of the Tribunal, leaving it open to the assessee to plead applicability of Section 80 of the Act.

THE HIGH COURT OF GUJARAT
WEB COPY

(5) The facts which emerge from the orders placed on record indicate that originally the adjudicating authority confirmed demand to the tune of Rs.93,621/- towards short paid service tax and imposed penalty of Rs.20,000/- under Section 76 of the Act with penalty of

www.taxguru.in

Rs.95,000/- under Section 78 of the Act. When the matter was carried in appeal before Commissioner (Appeals) in the first round vide order dated 01.05.2007 Commissioner (Appeals) deleted the entire penalty under Section 76 of the Act on the footing that penalty had been levied also under Section 78 of the Act and thereafter reduced the penalty under Section 78 of the Act from Rs.95,000/- to Rs.94,000/-. The same was carried in appeal by respondent-assessee. Tribunal vide order dated 03.09.2007 allowed the appeal and remanded the matter back to the adjudicating authority.

(6) In the fresh round of proceedings the adjudicating authority once again confirmed the demand of service tax at Rs.93,180/- and imposed penalty of Rs.93,180/- under Section 78 of the Act, and penalty of Rs.93,180/- under Section 76 of the Act. When the assessee went in appeal before Commissioner (Appeals) following order was made by Commissioner (Appeals) on 05.05.2008:

www.taxguru.in

"8. As regards the equal penalty imposed under Section 76, I find that, the Lower Authority under his Original Order No.1344/Service Tax/2006 dated 31.08.2006 has imposed penalty of Rs.20,000/- for the delay payment of service tax. The penalty has been increased by the Lower Authority in his donovo order from Rs.20,000 to Rs.93,180/- for the same violation without any additional ground. I find that, the appellant has already paid the interest of Rs.21,926/- vide T.R.6 challan dated 20.12.2007 for the delay payment of differential service tax and delay in payment of service tax is on account of change in the rate w.e.f. 10.09.2004. This is not a case where the assessee failed to pay their service tax on monthly/quarterly basis. I find that, there is justification in appellant's arguments. Therefore I take lenient view and reduce the penalty imposed under Section 76 of the Finance Act, 1994 from Rs.93,180/- to Rs.10,000/-.

9. In view of the above discussion, I uphold the order of the Lower Authority to the extent of confirming & appreciating the demand of service tax and interest paid thereon and set-aside the penalty imposed under Section 78 of the Finance Act, 1994 & reduce the penalty imposed under Section 76 as stated in Para 8 of this Order."

WEB COPY

www.taxguru.in

(7) Revenue carried the matter in appeal before Tribunal and the Tribunal has passed the following order:

> "2. In view of the several decisions cited by the ld. Chartered Accountant on behalf of the respondents, which clearly cover the issue under consideration u/s 76 of Finance Act, 1994 i.e. penalty can be reduced in exercise of the power u/s 80 of Finance Act, 1994, I respectfully follow the decisions cited and reject the appeal filed by the Revenue against the impugned order. I also find that benefit of Section 80 of Finance Act, 1994 has been appropriately extended to the respondents."

सत्यमेव जयते
THE HIGH COURT OF GUJARAT
WEB COPY

(8) As can be seen from the impugned order of Tribunal in first numbered Paragraph No.2 (there being two paragraphs bearing No.2), the Tribunal has recorded submissions of both the sides and accepted the contentions raised on behalf of the assessee that authority has discretion to impose lesser penalty under Section 80 of the Act. Thereafter the decisions have been enumerated by the Tribunal

www.taxguru.in

on which reliance has been placed on behalf of the assessee. In the entire order one does not find as to how and in what manner either Section 76 or Section 80 of the Act vests a discretion in the authority to levy penalty below the minimum prescribed. The last sentence, which appears in the order, indicates that the same is virtually an afterthought. After holding that the Tribunal rejects the appeal filed by the revenue it is observed "I also find that benefit of Section 80 of Finance Act, 1994 has been appropriately extended to the respondents." The impugned order is thus not a reasoned order.

सत्यमेव जयते
THE HIGH COURT OF GUJARAT
WEB COPY

(9) Sections 76 and 80 of the Act as are relevant for the present (and as applicable at the relevant point of time), read as under:

> "**76.Penalty for failure to collect or pay service tax**. -- Any person, liable to pay service tax in accordance with the provisions of Sec. 68 or the rule made thereunder, who fails to pay such tax, shall

www.taxguru.in

pay, in addition to paying such tax, and interest on that tax in accordance with the provisions of Sec. 75, a penalty which shall not be less than one hundred rupees but which may extend to two hundered rupees for everyday 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."

"**80. Penalty not to be imposed in certain cases**. -- Notwithstanding anything contained in the provisions of section 76, section 77, section 78 or section 79, 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."

THE HIGH COURT OF GUJARAT
WEB COPY

(10) A plain reading of Section 76 of the Act indicates that a person who is liable to pay service tax and who has failed to pay such tax is under an obligation to pay, in addition to the tax so payable and interest on such tax, a penalty for such failure. The quantum of penalty has been specified in the provision by

www.taxguru.in

laying down the minimum and the maximum limits with a further cap in so far as the maximum limit is concerned. The provision stipulates that the person, who has failed to pay service tax, **shall pay**, in addition to the tax and interest, a penalty which shall not be less than one hundred rupees per day but which may extend to two hundred rupees for everyday during which the failure continues, subject to the maximum penalty not exceeding the amount of service tax which was not paid. So far as Section 76 of the Act is concerned, it is not possible to read any further discretion, further than the discretion provided by the legislature when legislature has prescribed the minimum and the maximum limits. The discretion vested in the authority is to levy minimum penalty commencing from one hundred rupees per day on default, which is extendable to two hundred rupees per day, subject to a cap of not exceeding the amount of service tax payable. From this discretion it is

www.taxguru.in

not possible to read a further discretion being vested in the authority so as to entitle the authority to levy a penalty below the stipulated limit of one hundred rupees per day. The moment one reads such further discretion in the provision it would amount to re-writing the provision which, as per settled canon of interpretation, is not permissible. It is not as if the provision is couched in a manner so as to lead to absurdity if it is read in a plain manner. Nor is it possible to state that the provision does not further the object of the Statute or violates the legislative intent when read as it stands. Hence, Section 76 of the Act as it stands does not give any discretion to the authority to reduce the penalty below the minimum prescribed.

(11) In so far as Section 80 of the Act is concerned, it overrides provisions of Sections 76, 77, 78 and 79 of the Act and provides that

www.taxguru.in

no penalty shall be imposable even if any one of the said provisions are attracted if the assessee proves that there was reasonable cause for failure stipulated by any of the said provisions. Whether a reasonable cause exists or not is primarily a question of fact. The provision indicates that the onus to establish reasonable cause is on the assessee. Once reasonable cause is established the authority has the discretion to hold that no penalty is imposable. The provision does not say that even upon establishment of reasonable cause a reduced quantum of penalty is imposable. The provision only says no penalty is imposable. If one reads the power in the provision as contended by the respondent it would mean that the provision is re-drafted by incorporating words which are not there. At the cost of repetition, it is required to be stated that the language of the provision as it stands is unambiguous and it is not necessary to add any words to make the

www.taxguru.in

provision intelligible.

(12) Therefore, even on a conjoint reading of Sections 76 and 80 of the Act it is not possible to envisage a discretion as being vested in the authority to levy a penalty below the minimum prescribed limit. If the authority imposing the penalty is not entitled to levy below the minimum prescribed the appellate authority and the Tribunal cannot read the provision so as being vested with such powers, namely, to reduce the penalty below the minimum prescribed.

(13) When one goes through the impugned order of Tribunal it becomes clear that the Tribunal has failed to even consider the provisions of Sections 76 and 80 of the Act before passing the impugned order. The statement by the Tribunal that benefit of Section 80 of the Act has been appropriately extended to the assessee indicates total non-application of mind on the part of the Tribunal. How and in

सत्यमेव जयते
THE HIGH COURT OF GUJARAT
WEB COPY

www.taxguru.in

what manner reasonable cause is shown to exist by the assessee in the facts of the case has not even been recorded. It is unfortunate that despite catena of judgments of the Apex Court and this High Court the Tribunal continues to pass orders which can at best be termed to be non-speaking and cursory. It is necessary that the Tribunal realises that passing of such orders results in multiplicity of proceedings without benefiting any one, resulting in repeated litigation.

(14) In so far as judgments of various High Courts cited on behalf of the assessee are concerned, suffice it to state that this Court is in respectful disagreement with the said judgments in light of the fact that in none of the judgments have the provisions of either Section 76 or Section 80 of the Act been analyzed and dealt with.

(15) In the circumstances, the impugned order of Tribunal dated 26.12.2008 is hereby quashed

www.taxguru.in

and set aside and Appeal No.ST/126/2008 stands restored to file of the Tribunal for deciding the same afresh in accordance with law. Existence or otherwise of reasonable cause having not been pleaded before any authority at any stage, the contentions based on the same raised by learned counsel for the assessee have not been gone into, leaving it open to the assessee to raise the same before the Tribunal. The question is accordingly answered in the negative. The appeal stands disposed of accordingly.

Sd/-
[D. A. MEHTA, J]

Sd/-
[H.N.DEVANI, J]

*Bhavesh**

सत्यमेव जयते
THE HIGH COURT OF GUJARAT
WEB COPY