

Court No. - 3

Case :- CENTRAL EXCISE APPEAL No. - 106 of 2016

Appellant :- M/S Amit Pandey Physics Classes

Respondent :- Commissioner, Central Excise, Kanpur

Counsel for Appellant :- Ashok Shankar Bhatnagar, Parv Agrawal

Counsel for Respondent :- S.S.C., Krishna Agarwal

Hon'ble Pankaj Mithal, J.

Hon'ble Umesh Chandra Tripathi, J.

Heard Shri Bhatnagar, learned counsel for appellant-assessee, Shri Krishna Agarwal, learned counsel for the respondent and perused the record.

The appellant-assessee has preferred this appeal under Section 35G of the Central Excise Act, 1944 [hereinafter referred to as 'Act'] against the order dated 18.09.2015 of the Central Excise and Service Tax Appellate Tribunal [hereinafter referred to as 'CESTAT'].

The dispute in the appeal is regarding the penalty imposed upon the appellant-assessee under Section 78 of the Finance Act 1994 with regard to service tax.

The appellant-assessee is running a "Commercial Coaching & Training Institute" as a sole proprietor. It is required to submit quarterly returns in respect to service tax. It failed to file return S.T.-3 for the Assessment Year 2006-07. An order of assessment in original was passed on 07.01.2010 by the Assistant Commissioner, Central Excise and Service Tax, Division-III, Kanpur in respect of the above period confirming the demand of Rs. 4,26,667/- under Section 73(2) of the Act, determining interest of Rs. 25,212/- under section 75 of the Act and imposing penalty of Rs. 4,26,667/- under Section 78 of the Act equal to the amount of the service tax determined. In addition to the above, a penalty of Rs. 5000/- was imposed under Section 77 of the Act.

This order was challenged by the appellant-assessee in appeal before Commissioner Appeals [Central Excise] but was dismissed on 10.09.2010, whereupon the appellant-assessee preferred a second appeal before the CESTAT which has been dismissed by the impugned order.

The main question which arises in this appeal is as under:-

"Whether in view of the language of Section 78 of the Act, the tribunal is justified in confirming penalty equivalent to the amount of the service tax determined or it ought to have been on the amount of shortage of the service tax deposited?"

The Adjudicating Officer has determined the service tax for the relevant period under Section 73 of the Act to be Rs.4,26,667/- and had imposed equal amount of penalty under Section 78 of the Act.

There is no dispute that out of the service tax of Rs. 4,26,667/- so determined by the Adjudicating Officer a sum of Rs. 3,27,787/- was already deposited by the appellant-assessee and therefore the shortfall was of Rs. 98,880/-.

The appellant-assessee deposited the aforesaid short fall of Rs. 98,880/- of the service tax, along with interest @ 25% on the aforesaid shortfall by way of penalty within 30 days of the passing of the adjudicating order in original.

Section 78 of the Act inter alia provides that where service tax has been short paid for the reasons mentioned therein, the person liable to pay such service tax under Section 73(2) shall also be liable to pay penalty in addition to such service tax and interest equivalent to the amount of service tax so not levied or paid or short levied or short paid or an erroneously refunded.

A plain and simple reading of the aforesaid provision demonstrate that the penalty in addition to the service tax is payable on the amount of service tax not paid or short paid therefore in the present case as the amount of service tax was short paid by Rs. 98,880/-, the penalty could have been imposed only equal to the said amount. The Adjudicating Authority as such manifestly erred in law in imposing the penalty equal to the amount of the service tax determined completely ignoring the short fall in the deposit of the service tax.

The proviso (2) & (3) of Section 78 lays down that "where service tax and interest payable thereon is paid within 30 days from the date of communication of the order of the Central Excise Officer determining service tax, the amount of penalty liable to be paid by the person shall be

25% of the service tax and the benefit of reduced penalty would be available, if the penalty determined is paid within 30 days as refereed above.

In the instant case as the shortage of service tax and the penalty of 25% of the service tax was deposited by the appellant-assessee within 30 days of the communication of the order, the appellant-assessee became entitled for the reduced amount of penalty of 25% in place of the amount equal to the shortage of service tax.

In view of aforesaid facts and circumstances, we answer the question of law as formulated above in favour of the assessee-appellant and hold that the CESTAT could not have imposed penalty equal to the amount of the service tax determined rather equal to the amount of shortage in the service tax deposited and that the assessee-appellant is entitle to reduced amount of penalty.

Accordingly, impugned order of the CESTAT is hereby set aside.

Order Date :- 14.7.2017

Sharad/-