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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066

SINGLE MEMBER APPEAL BRANCH

Appeal No. ST/61 /2010 – SM[BR] & ST / STAY / 81 / 2010 –SM[BR] Date 15/03/2010

Assistant Registrar
C.E.S.T.A.T, New Delhi

To :
M/S ORBIT PROTECTION FORCE
1/2 LIG COLONY, A.B.ROAD INDORE (M.P.)

M/S ORBIT PROTECTION FORCE — Appellant

Vs

C.C.E. INDORE — Respondent

I am directed to transmit herewith a certified copy of **Final order No**. 307 / 2010-SM[BR] & S/ 104 /2010 dated 10.3.2010 passed by the Tribunal under Section 129, (B) of the Customs Act,1962 & Financial Act 1994 relating to Service Tax

Assistant Registrar
(SM Appeal Branch)

Copy to :

1. Respondent
   C.C.E. INDORE
   MANIK BAGH PALACE, POST BOX NO. 10, INDORE 452001 (M.P.)
2. Adv. / Consult
   MR.A.K.BATRA & ASSOCIATES
   A-36, FIRST FLOOR, RAJOURI GARDEN, RING ROAD, N DELHI.
3. S.D.R
4. ~~J.C.D.R.~~
5. Bar association. CESTAT. New Delhi
6. Director Publications. Customs. Excise. I.P. Estate. New Delhi
7. M/s Centax Publictions Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi - 3
8. Commercial Laws of India Pvt Ltd. Post Bag No. 1033, No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
9. Raghuraman's 44-B. Regal Flat.Shipra Suncity. Indirapuram - 201010.Ghaziabad. DT. U.P.
10. M/s Manupatra Information Solutions Pvt Ltd. Excise & Customs Cases B-37, Sector - 1, Noida - 201301, Gautam Budh Nagar, (UP)
11. M/s. Deeparchie Publications. M-93. Marg. 46. Saket. New Delhi 110017
12. Taxindiaonline.com Pvt.Ltd. B-XI/8183.Vasant Kunj. New Delhi - 110070
13. Taxmann Allied Service Pvt Ltd.. 21/35. West Punjabi Bagh. New Delhi - 110026
14. Easy Service Tax Online Dot Com Pvt.Ltd.407A.Iscon Mall.Above Star India Bazar.Satellite Road.Ahmedabad-15
15. LAWCRUX Advisors Pvt Ltd. LAW House.1-8.Sector - 10. Faridabad 121003 (Haryana)
16. Office Copy
17. Guard file

Assistant Registrar
(SM Appeal Branch)

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI
COURT NO.II

ST/S/81/2010, ST/Appeal No. 61/2010-SM(Br)

(Arising out of order in original No. 18/Commr/ST/Ind/2009 dated 22.9.2009 passed by the Commissioner of Central Excise Indore)

M/s Orbit Protection Force Appellant

Vs

CCE, Indore Respondent

Appeared for Appellant : Shri A.K. Batra, C.A
Appeared for Respondent : Shri S.N. Srivastava, SDR

Date of Hearing: 19.2.2010

Coram: **Hon'ble Mr.D.N. Panda, Judicial Member**

Final Order No. 307 /2010 SM (Br) + Stay Order No - 104/2010 SM(Br)

Per D.N. Panda:

The appellant has come against the revision order passed by the learned Commissioner under Section 84 of the Finance Act, 1994 imposing penalty under Section 76 and 78 of the Finance Act, 1994. The penalty has been imposed under Section 76 as that shall be calculated at the rate of Rs.200/- per day for the default period or at the rate of 2% per of the tax liability per month. Penalty of Rs. 75,199/- has been imposed under Section 78 of the Finance Act, 1994. The Revisionary Authority was of the view that equal amount of penalty ought to have been imposed. The order which was sought to be revised by him confirmed the service tax of Rs. 75,199/- which is not disputed by the assessee and that has been discharged in two strokes followed by penalty of Rs.10,000/- each under Sections 76 and 78 of the Finance Act, 1994.

2. Shri Batra Chartered Accountant moving the stay application states that when the service tax demand has already been discharged, realization of the balance demand may be stayed during pendency of the appeal.

3. Learned DR submits that the order passed by the learned Commissioner in exercise of the Revisionary jurisdiction was proper which has taken into account the law laid down by the Apex Court in the case of Dharmendra Process Textiles Vs UOI reported in 2008 (231) ELT 3 SC. He submits that the service tax was not discharged before issuance of show cause notice. The independent nature of liability incurred by Sections 76 and 78 of the Finance Act, 1994 cannot be ignored. Learned Adjudicating Authority has committed error of law. The Revisionary Authority therefore passed appropriate order.

4. Heard both the sides and perused the record.

5. It is a fit case for not to add to the pendency of the registry for which dispensing the pre-deposit, the appeal itself is disposed observing very categorically that none of the authorities have dealt with the matter of penalty following the law laid down in the case of Rajasthan Spinning Mills reported in 2009(238) ELT 3. Added to this, when First Proviso to Section 78 of the Finance Act, 1994 has made provision for concessional penalty, that proviso cannot be ignored following the law laid down by the Hon'ble High Court of Delhi in K.P. Pouch case reported in 2008 (228) ELT 31. The

Hon'ble High Court has categorically laid down the law that in order to remove the difficulties, the option exercisable for the concessional penalty cannot be denied. In the fitness of circumstances, the authorities should grant appropriate concession to the assessee if the case warranted for imposition of penalty at all. It is needless to say that the assessee has right to be heard on the concessional penalty itself once imposition of penalty becomes decision of the Authority. Record does not reveal whether the case of assessee warranted imposition of penalty. Therefore, it is necessity of law to send the matter back to the learned Adjudicating Authority to re-examine the issue whether at all penalty shall be imposable and if so, the assessee is entitled to concessional penalty under Section 70 of the Finance Act, 1994 read with law laid down by the High Court in the case of K.P. Pouch (supra).

6. In the result, confirming the service tax demand, Revisionary order is set aside remanding the matter to the learned Adjudicating Authority to grant fair opportunity of hearing and pass order as he considers proper on the issue of penalty.

(Order dictated and pronounced in the open Court).

(D.N. Panda)
Judicial Member

MPS*