

**2012 (25) S.T.R. 440 (Tri. - Del.)**

IN THE CESTAT, PRINCIPAL BENCH, NEW DELHI

[COURT NO. II]

**Shri D.N. Panda, Member (J)**

**BESTILO PACKAGING PVT. LTD.**

*Versus*

**COMMISSIONER OF C. EX., CHANDIGARH-II**

*Final Order No. 713/2011-SM(BR)(PB) and Stay Order No. 624/2011-SM(BR)(PB), dated 30-9-2011 in Application No. ST/Stay/1630/2011-SM(BR) in Appeal No. ST/787/2011-SM(BR)*

REPRESENTED BY : Shri Vikrant Kakaria, Advocate, for the Appellant.

Shri Fatesh Singh, DR, for the Respondent.

**[Order].** - Learned Counsel submits that the riders provided by Notification No. 34/2004-S.T., dated 3-12-2004 in the matter of levy of service tax relating to GTA service were in confusion. While one rider is that if the gross amount charged against consignments transported in a goods carrier does not exceed Rs. 1500/- there is liability under Finance Act, 1994, the other rider is, if gross amount charged on an individual consignment transported in a goods carrier does not exceed Rs. 750/- there shall be liability. The appellant was under a *bona fide* belief that individual consignment was basis for liability of the appellant. Therefore, there was confusion in the understanding of notification for which the Audit viewed that there was short payment of service tax. To buy peace, the appellant discharged service tax amount to be payable as was raised by the Audit. There was no suppression of facts and there was only a *bona fide* construction of the riders of Notification. Had there the appellant made suppression it would not have recorded the receipts made from different consignments for detection by audit. When the facts and figures are available on record there was absence of suppression. The facts and circumstances does not warrant levy of penalty under Section 76 and 78 of the Finance Act, 1994. Therefore, not only requirement of pre-deposit may be waived but appeal may also be decided.

2. Learned D.R. on the other hand says that penalty is imposable under Section 78 of Finance Act.

3. Heard both sides and perused the record.

4. Learned Appellate Authority while disposing the appeal has no independent finding about the behavior of the appellant. The Audit observation was only basis to issue show cause notice. This is apparent from Para 6.1 of the appellate order. When the authority fails to examine the issue independently, the appellate order suffers from legal infirmity. So also when the Notification No. 34/2004 relied upon by Revenue is read, it can be construed that a common man may find it difficult to understand riders described by that notification. Although the riders are independent in nature, but very difficult to understand by a common man. So also noticing no contumacious conduct of the appellant discovered by the department, the appellant cannot be asked to suffer penalty. All these observations require the appeal to be allowed. Therefore, dispensing with pre-deposit, appeal is also allowed. Accordingly, both stay application and appeal are allowed.

(Dictated & pronounced in the Open Court)

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