CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
CHANDIGARH

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REGIONAL BENCH – COURT NO. 1

Service Tax Appeal No. 1226 Of 2011

[Arising out of Order-in-Appeal No. 163/CE/CHD-I/2011 dated 03.05.2011 passed by the Commissioner (Appeals) Customs & Central Excise, Chandigarh-II]

M/s Network **: Appellant (s)**
SCO-383 Top Floor
Sector-37, Chandigarh

Vs

The Commissioner of Central Excise,
Chandigarh-I **: Respondent (s)**
Central Revenue Building
Sector-17C, Chandigarh-160017

APPEARANCE:
Shri Surjeet Bhadu, Advocate for the Appellant
Shri Ravinder Jangu, Authorised Representative for the Respondent

CORAM : HON'BLE Mr. S. S. GARG, MEMBER (JUDICIAL)
HON'BLE Mr. P. ANJANI KUMAR, MEMBER (TECHNICAL)

FINAL ORDER No.60123/2023

Date of Hearing: 08.05.2023
Date of Decision:11.05.2023

Per : P.ANJANI KUMAR

The appellants were providing internet/cable connections to the general public as agents of M/s SIFY. On the basis of certain information received, Department came to the conclusion that these cable TV operators like the appellant were required to pay Service Tax under 'Business Auxiliary Service' and were not paying the same. SCN dated 22.11.2007 was issued to the appellant seeking to confirm the Service Tax of Rs.55,641/- along with penalties under Section 76,77 and 78 of the Finance Act, 1994. The Original Authority vide Order
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dated 30.11.2009 confirmed Service Tax of Rs.34,572/- and imposed penalty under Section 76; penalty of Rs.34,572/- under Section 78 and penalty of Rs.1000/- under Section 77. The Appellate Authority vide Order dated 03.05.2011 has upheld the order but reduce the penalty to the extent of the penalty deposited by the appellants.

2. Shri Surjeet Bhadu, learned Counsel for the appellants submits that M/s SIFY has already discharged Service Tax liability on the gross amount charged to the customer; small scale exemption is applicable to them; in terms of Section 80, penalty cannot be imposed on them; moreover, the appellants have deposited the tax payable along with interest and 25% of the penalty and as such the proceedings should be discontinued and no further penalty should be imposed or payable by them. He submits that Tribunal in many cases held that even before 10.05.2008, separate penalty under Section 76 and 78 cannot be imposed. He submits that Hon'ble Punjab & Haryana High Court in the case of *Pannu Property Dealers, Ludhiana* (ST/13/2020) held that there has been an amendment to Section 78 by Finance Act, 2008 adding a proviso to the fact that if penalty is payable under Section 78 of the Act, proviso of Section 76 will not apply; the said amendment shows the intention of the legislature to avoid penalty.

3. Shri Ravinder Jangu, learned Authorized Representative appearing for the Revenue reiterates the findings of the OIA and OIO and submits that this very Bench in the case of *City Cable Opera VS*

CCE, Chandigarh-2020 (41) GSTL 506 (Tri. Chan.) has upheld the Department's contentions in similar set of facts.

4. Heard both sides and perused the records of the case. The brief issue that remains in the instant case is whether the appellants are liable to pay the balance of penalty when they have discharged the duty liability along with interest and also have paid 25% of the penalty on receipt of the communication of the Original Authority. The appellants, though, argued on merits the appeal made by the Counsel during the course of argument was to the fact that balance of penalty be waived. As the appellants did not insist on the merits of the case, we are not going into the same. Moreover, looking into the decision of this Bench in the case of M/s City Cable Opera (Supra), there is no issue left on the merits of the case. Coming to the issue of penalty, the Original Authority as well as the Appellate Authority have confirmed all the penalties particularly under Sections 76 and 78 for the reason that the amendment made by Finance Act, 2008 making Sections 76 & 78 mutually exclusive is not retrospective.

5. We find that the jurisdictional High Court in the case of *Pannu Property Dealers, Ludhiana* (Supra) held that:

> "*We are of the view that even if technically, scope of Sections 76 and 78 of the Act may be different, as submitted on behalf of the revenue, the fact that penalty has been levied under Section 78 could be taken into account for levying or not levying penalty under Section 76 of the Act. In such situation even if reasoning given by the appellate authority that if penalty under Section 78 of the Act was imposed, penalty under Section 76 of the Act could never be imposed may not be correct, the appellate authority*

was within its jurisdiction not to levy penalty under Section 76 of the Act having regard to the fact that penalty equal to service tax had already been imposed under Section 78 of the Act. This thinking was also in consonance with "the amendment now incorporated though the said amendment may not have been applicable at the relevant time. Moreover, the amount involved is Rs.51026/- only."

6. Though, the Hon'ble High Court did not categorically hold that the imposition of penalty under Section 76 and Section 78 separately is not mutually exclusive prior to 10.05.2008, Hon'ble High Court has certainly held that the Appellate Authority was within its right to hold that the penalty is mutually exclusive and in the spirit of the amendment. While the amount involved in the above case was Rs.51,026/-, the amount involved in the instant case is about half that amount. Therefore, in deference to the jurisdictional High Court's order, we find that penalty under Section 76 and 78 can be seen to be mutually exclusive even before the amendment.

7. Moreover, it was the plea of the appellants that the benefit of Section 80 of the Finance Act, 1994 was not given to them. Section 80 of the Finance Act, 1994 reads as under:

80. Penalty not to be imposed in certain cases

Notwithstanding anything contained in the provisions of Section 76 [section 77 or section 78], 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.

We find that in the facts and circumstances of the case and looking into the fast changes that were coming in the Service Tax law during the relevant period, it can be concluded that the appellant being a small operator had no wherewithal to keep track of the law and thus, the applicability of the Service Tax to him, more so looking into the fact that the main cable operator M/s SIFY had discharged Service Tax on the entire amount collected from the customers, there are reasons to believe that there were sufficient reasons for the appellant in not discharging the applicable Service Tax. Looking into the conduct of the appellants in depositing the tax with interest and 25% penalty the provisions of Section 80 are invited and the benefits of Section 80 can be extended to the appellants. Thus, we find that the penalties imposed are not sustainable.

8. In view of the above, the appeal is partly allowed by setting aside the penalties imposed. We, however, confirm the Service Tax paid along with interest.

(Pronounced on 11.05.2023)

(S. S. GARG)
MEMBER (JUDICIAL)

(P. ANJANI KUMAR)
MEMBER (TECHNICAL)

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