CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHANDIGARH

REGIONAL BENCH - COURT NO. I

Service Tax Appeal No. 727 of 2010

[Arising out of Order-in-Appeal No. 83/MA/GGN/2010 dated 18.02.2010 passed by the Commissioner (Appeals), Central Excise, Delhi-III]

M/s Faridabad Communication Pvt Ltd **......Appellant**
M/s Sanjay Bhatia Director, B-399 bcd, Nehru Ground,
Faridabad, Haryana 121002

VERSUS

Commissioner of Central Excise & Service Tax, Faridabad **......Respondent**
M.G. Road, I.P. Estate, New Delhi

APPEARANCE:

Shri Tarun Sharma, Advocate for the Appellant

Shri Varun Sharma, Authorized Representative for the Respondent

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

FINAL ORDER NO. 60492/2026

DATE OF HEARING:26.05.2026
DATE OF DECISION:06.08.2026

S.S. GARG:

The present appeal is directed against the impugned Order-in-Appeal dated 18.02.2010 passed by the Commissioner (Appeals), Central Excise, Delhi-III, Gurgaon; whereby the learned Commissioner(A) has rejected the appeal of the appellant and confirmed the demand along with interest and penalties under

Section 75, 76, 77 and 78. The service tax and the interest already paid by the appellant in July, 2006 was appropriated in the Order-in-Original upheld in the Order-in-Appeal.

2. Briefly the facts of the present case are that according to Revenue as per intelligence gathered by the officers of Anti Evasion branch it came to notice that appellant was a distributor of M/s Win Cable & Data Com Pvt Ltd/M/s Hathway Cable & Data Com Pvt Ltd a Multi System Operator (M. S. O) and was providing or rendering taxable service to them. In order to further investigate the matter, M/s Halthway Cable & Data Com Pvt Ltd were issued summons to appear in the office on 23.06.06. Sh Ashish Malik DSM (Accounts) of M/s Hathway Cable appeared on 23.6.06 to tender his statement and submitted that their company was engaged in the business of Cable TV services. In Delhi this service was being managed by M/s Win Cable & Data Com Pvt Ltd a subsidiary Co. of M/s Hathway. They had appointed various distributors to look after their work for which they were given incentives/commission.

2.1 The Department collected the information from M/s Win Cable and also recorded the statements of Sh. Sanjay Bhatia director of the firm and found that M/s Hathways paid commission to the appellant but the appellant did not pay the service tax due under Business Auxiliary Service. On these allegations, a show cause notice was issued after recording the statement of Sh. Sanjay Bhatia on 21.08.2007 alleging that the service tax is leviable fall under Business Auxiliary Services (BAS) as defined under Section 65(19) of the Finance Act, 1994 but the appellant neither registered nor discharged service tax liability on the service so provided. The show cause notice also proposed penalty under suppression of facts with intent to evade tax. After following the due process, the Original authority confirmed the demand along with penalties and appropriated the payment already made and imposed penalties under Section 75(A), 76, 77 and 78 of the Act. Aggrieved by the said order, the appellant filed the appeal before the Commissioner (Appeals) who rejected the same vide the impugned order. Hence, the present appeal.

3. Heard both the parties and perused the material on record.

4. Learned Counsel for the appellant submits that the impugned order is not sustainable in law and is liable to be set aside as the same has been passed without properly appreciating the facts and the law; and binding judicial precedents. He further submits that the Department's entire case of classification of service under BAS apparently hinges on Clause 15 of Para 4 of the agreement; he further submits that clause 15 is a standard generic good faith covenant and the Department has mis-construed the context and the contents of clause 15 of the agreement and erroneously alleged that the appellant was exclusively engaged in providing BAS under the guise of promotion and marketing. He further submits that the Department has not taken holistic view of the various clauses of the contract mentioned in the show cause notice. He further submits that the analysis of various clauses of the agreement clearly shows

that the essential character and pre-dominate object of the agreement was to provide "Distribution Management" "Logistical Support", and Customer Relationship Management" to MSO. He further submits that it is a settled principle of contract interpretation that a commercial contract must be read as a whole. He further submits that since the service tax and interest has been paid long back under bonafide admission which now the appellant is not disputing such payment but contesting and seeking relief for setting aside the penalties imposed under sections 75A, 76, 77 and 78 of the Act. He further submits that no penalty under Section 78 of the Act is imposable in the absence of any positive act of suppression.

4.1 He also submits that show cause notice alleged suppression and invoked the extended period under Section 73(1) without any cogent evidence. He also submits that to sustain a charge of suppression under the proviso to Section 73(1) and impose a penalty under Section 78, the Department was duty bound to prove a positive act of deliberate concealment with the explicit intent to evade tax, wherein, in the present case, neither the show cause notice nor the subsequent orders established any positive act of suppression except that the tax was paid after initiation of enquiry. He further submits that it is the settled legal position that mere failure to pay tax when there is scope for doubt does not equate to deliberate suppression to evade tax; something positive other than mere inaction on the part of the assessee is required to allege suppression. For this, he relied upon the following decisions:

- ***CCE v. Chemphar Drugs & Liniments, 1989 (40) E.L.T. 276 (S.C.).***
- ***Uniworth Textiles Ltd. v. CCE, Raipur - 2013 (288) E.L.T. 161 (S.C.).***
- ***Anand Nishikawa Co Ltd vs. CCE, Meerut - 2005 (188) E.L.T. 149 (S.C.)***
- ***Padmini Products Limited vs. CCE-1989 (43) ELT 195 (SC).***

4.2 He further submits that in the present case involves interpretation of multi-clause commercial agreement and therefore extended period cannot be invoked to impose penalty under Section 78 of the Act. As regards penalty under Section 76 is concerned and learned counsel submits that it is settled principle of law that penalty under Section 76 & 78 cannot be imposed together because both the penalties are mutually exclusive. He further submits that penalty under Section 75A is wholly without jurisdiction because the Section 75A of the Act was unconditionally omitted by the Finance Act, 2004 with effect from 10.09.2004 and there is no semi-clause to permit issuance of show cause notice under Section 75A after 10.09.2004, therefore, according to the learned counsel, the issuance of the show cause notice and Order-in-Original under Section 75A was completely non-existent on the statute book. The learned counsel also submits that the confirmation of penalty under Section 77 is bad in law and void ab initio because as per show cause notice dated 21.08.2007, the Revenue specifically proposed to impose a penalty under Section 77 of the Act for the offense of failure to file service tax returns. Whereas, the adjudicating authority in the Order-in-Original completely shifted the goalposts and confirmed the penalty under Section 77 for failure to take service tax registration. He further submits that where the show cause notice proposes a penalty for one specific offense, the confirmation of a penalty for a completely different infraction under the same section is invalid. Learned counsel further submits that the appellant is entitled to the benefit of Section 80 of the Act which is a benevolent provision stating that the penalty u/s 76, 77 and 78 are not imposable if there was a reasonable cause for failure referred in the said provisions. He also submits that the appellant was under a strong, bona fide understanding that its service to MSO did not attract service tax during the disputed period and the moment taxability of the service came into the appellant’s knowledge; the appellant immediately obtained registration paid tax and whereby showed to its willingness to comply with law. In support of his submissions, he relied upon the decision in the case of M/s Sunrise Communication- Order in appeal No. 235/S. Tax/II/2010 dated 15.06.2010 passed by the Commissioner (Appeals), New Delhi, wherein, the learned Commissioner after considering all the facts has given relief to the assessee under Section 80 of the act and set aside the penalty under Section 77 & 78 of the Act.

5. On the other hand, learned Authorized Representative for the revenue filed written submissions and reiterated the findings of the

impugned order. The learned AR further submits that perusal of the various clauses of the agreement will clearly shows that the service falls under the services in relation to "promotion or marketing of service provided by the client". He further submits that the appellant has also admitted his liability and has also paid the service tax along with interest and therefore he cannot now contest the demand and interest in the present appeal.

6. We have considered the submissions of both parties and perused material on record. We find that though the appellant is contesting the demand of service tax under Business Auxiliary Service by submitting that the Department has classified the service under BAS by showing the clause 15 of para 4 of the agreement which is general in nature and based on good faith covenant. He further submits that various clauses of the agreement clearly shows that the essential character of the agreement was to provide distribution management and other related services which does not fall under the category of BAS. We also note that since the appellant has admitted the liability of service tax and has also paid the same along with interest in July, 2006 itself; therefore, we confirm the demand along with interest which stands deposited and has been appropriated in the Order-in-Original. Now, coming to the imposition of penalties, we find that the penalty has been imposed under Section 78 by invoking the extended period of limitation under Section 73(1) but the Department has not been able to sustain the charge of suppression under the proviso to Section 73(1). We also note that the Department is duty bound to prove a positive act and

deliberate concealment with intent to evade tax, whereas, in the present case neither in the show cause notice nor the subsequent order established any positive act of suppression except that the tax was paid after initiation of enquiry. We also find that this issue of invoking the extended period has been considered in various cases by the Hon'ble Supreme Court and different courts. Here, we may refer to the case of ***M/s Chemphar Drugs & Liniments***, cited (Supra), wherein the Hon'ble Supreme Court has observed as under:

> *"8.... In order to make the demand for duty sustainable beyond a period of six months and up to a period of 5 years in view of the proviso to sub-section 11A of the Act, it has to be established that the duty of excise has not been levied or paid or short-levied or short-paid, or erroneously refunded by reasons of either fraud or collusion or wilful misstatement or suppression of facts or contravention of any provision of the Act or Rules made thereunder, with intent to evade payment of duty. Something positive other than mere inaction or failure on the part of the manufacturer or producer or conscious or deliberate withholding of information when the manufacturer knew otherwise, is required before it is saddled with any liability, before the period of six months. Whether in a particular set of facts and circumstances there was any fraud or collusion or wilful misstatement or suppression or contravention of any provision of any Act, is a*

question of fact depending upon the facts and circumstances of a particular case.

7. Therefore, considering the fact that the issue was relating to interpretation of commercial agreement and therefore, alleging suppression with intent to evade tax cannot invoked, therefore, we set aside the penalty under Section 78 of the Act. As regards the penalty under Section 76, we hold that once the penalty under Section 78 is imposed and penalty under Section 76 cannot imposed because both the penalties are mutually exclusive, therefore, we set aside the penalty under section 76 also. As regards penalty under Section 75(A) is concerned, we hold that the said penalty is without jurisdiction because the said section stands omitted with effect from 10.09.2004 and the said penalty has not been saved under the new Finance Act. We also find that penalty under Section 77 is also bad in law because in the show cause notice, the penalties proposed to be imposed under section 77 for offence to failure to service tax returns, whereas adjudicating authority in the Order-in-Original has confirmed the penalty for failure to take service tax registration which cannot be done legally; therefore, we also set aside the penalty under Section 77.

8. Further, we also find that otherwise also the appellant is entitled to the benefit of Section 80 of the Act which is a benevolent provision if the appellant proves that he has a strong bonafide belief that its services to MSO did not attract tax. We find that moment taxability came to the notice to the appellant they immediately obtained registration and paid tax and complied with the liability

which further shows that there was no deliberate intent to evade tax and therefore reasonable cause for failure to pay the same, therefore we extend the benefit under Section 80 of the Act.

9. In view of our discussion above, we allow the appeal partially by holding that the demand of service tax along with interest is upheld as the same stands paid. As regards the imposition of penalty under various sections we are of the view that the same is not sustainable in law, therefore, we set aside the imposition of penalty under various sections as discussed (cited Supra).

10. In the result, the appeal is partially allowed on the above terms.

(Order pronounced in the open court on 06.08.2026)

(S. S. GARG)
MEMBER (JUDICIAL)

(P. ANJANI KUMAR)
MEMBER (TECHNICAL)

Kailash