

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/532 /2007-SM[BR]

Date 23/05/2008

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

To :
M/S INDUSTRIAL SECURITY AGENCY
PARHA, KARIA ROAD, GORAKHPUR, U.P.
M/S INDUSTRIAL SECURITY AGENCY

C.C.E ALLAHABAD

Appellant
Vs
Respondent

I am directed to transmit herewith a certified copy of **Final order No. 807 /2008 –SM[BR]** dated 12.5.2008
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 ALLAHABAD

38,M.G.MARG, CIVIL LINES, ALLAHABAD

2. Adv. / Consult

MR.S.D.GAUR

SB-108, SHASTRI NAGAR, GHAZIABAD.

3. S.D.R.

~~4. J.C.D.R.~~

5. Bar association, CESTAT, New Delhi

6. M/s. Deeparchi Publications, M-93, Marg. 46, Saket, New Delhi 110017

7. M/s Centax Publications (P) Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi -

8. Excise & Customs cases, B-37, Sector -1, NOIDA - 201301 Gautam Budh Nagar, (U.P.)

9. Raghuraman's 44-B, Regal Flat, Shipra Suncity, Indirapuram - 201010, Ghaziabad, DT, U.P.

10. Nidheshak publications, I.P.Estate, new Delhi

11. Taxmann Allied Service Pvt Ltd., 21/35, West Punjabi Bagh, New Delhi - 110026

12. Commercial Laws of India Pvt Ltd Post Bag No. 1033, No.70(Old No. 88), Thyagaraya Road, T. Nagar, Chennai 60017

13. Taxindiaonline.com Pvt.Ltd, B-XI/8183, Vasant Kunj, New Delhi - 110070

14. Office Copy

15. Guard file


Assistant Registrar
(SM Appeal Branch)

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH - COURT NO. 1

Service Tax Appeal No. 532 of 2007

(Arising out of Order-in-Appeal No. 25/ST/ALLD/2006 dated 06.12.2006
passed by the Commissioner of Central Excise (Appeals), Allahabad).

DATE OF HEARING : 12.05.2008
DATE OF DECISION : 12.05.2008

FOR APPROVAL AND SIGNATURE :

HON'BLE MR. JUSTICE S.N. JHA, PRESIDENT

1.	Whether Press Reporters may be allowed to see the order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982 ?.	
2.	Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not ?	
3.	Whether their Lordships wish to see the fair copy of the Order ?	
4.	Whether Order is to be circulated to the Departmental Authorities?	

M/s Industrial Security Agency

Appellants

(Rep. by Sh. S.D. Gaur, Adv.)

VERSUS

CCE, Allahabad

....

Respondent

(Rep by Sh. B.S. Suhag, DR)

CORAM : HON'BLE MR. JUSTICE S.N. JHA, PRESIDENT

Final ORDER NO. 807/08 sm(BR) Dtd. 12.5.08

PER JUSTICE S.N. JHA :

This appeal by the assessee is directed against the order of the Commissioner (Appeals) dated 06.12.2006 by which, modifying the order-in-original of the Assistant Commissioner of Central Excise dated 17.02.1006, he imposed penalty of Rs. 6,54,489/- (Rs. 2,31,300 + 4,23,189) under Section 76 and Rs. 4,23,189/- under Section 78 of the Finance Act, 1994. However, penalty of Rs. 1,000/- under Section 77 was upheld. The Commissioner also directed that interest at the applicable rate may be recovered under Section 75 of the Act, after deducting the interest already paid.

2. The appellant is engaged in the business of providing 'Security Agency' service – a taxable service within the meaning of Section 65(105)(w) of the Finance Act, 1994. In course of scrutiny of records of M/s B.S.N.L., Gorakhpur, it transpired that the appellant was providing the Security Agency Service to them from April 2000 to December 2003, and received a sum of Rs. 1,30,75,260/- for the period April 2000 to April 2003, and Rs. 36,00,455/- for the period May 2003 to December 2003 as the value of the service, but failed to pay Service Tax amounting to Rs. 9,41,799/-. The appellant, it was found, had suppressed the fact that it was providing Security Agency Service to M/s B.S.N.L. at the time of submitting application for registration and

they did not file ST-3 return for the relevant period making them liable for penalties under Sections 76, 77 & 78 of the Act, apart from interest under Section 75 on the amount of tax. Show cause notice was issued to the appellant on 23.12.2005. At the conclusion of the adjudication proceedings, the appellant was held liable to pay Service Tax of Rs. 9,41,799/- along with interest on the said amount; the appellant was also held liable to penalties of Rs. 9,41,799/- under Sections 76 and 78 each, besides penalty of Rs. 1,000/- under Section 77. The Commissioner (Appeals) took notice of the fact that the entire amount of tax stood paid and there was no tax liability; he however, confirmed the penalties to the extent indicated above.

3. The case of the appellant is that it was not aware of the obligation to pay Service Tax on the service provided by it and, therefore, failure to pay the tax deserves to be condoned under Section 80 of the Act. It was submitted that for failure of M/s B.S.N.L. to pay the dues for the services rendered to it, the appellant filed a Writ Petition in the Allahabad High Court and pursuant to order of the High Court, a sum of Rs. 4,23,189/- was paid by M/s B.S.N.L. directly to the Assistant Commissioner. It was also submitted that after getting registration from the Department, the appellant paid the Service Tax along with interest on the delayed payment and, therefore, there was no justification for imposing penalties.

4. As mentioned above, penalties have been imposed separately under Sections 76, 77 and 78 of the Finance Act. Section 76 provides for penalty where a person liable to pay Service Tax fails to pay the tax. Section 77 provides for penalty for violation of any of the provisions of Chapter V of the Finance Act, 1994 or any Rule made thereunder for which no penalty is separately provided in the Chapter. Section 78 provides for penalty in cases of non-levy/non-payment or short levy/short payment or erroneous refund by reason of fraud or collusion or wilful mis-statement or suppression of facts or contravention of any of the provisions of the Chapter or the Rules with intent to evade payment of Service Tax. Section 80 lays down that notwithstanding anything contained in Section 76, 77 or 78, penalty shall not be imposable for any failure referred to in the said provisions if the assessee proves that there was reasonable cause for such failure. In view of non-obstante clause of Section 80, notwithstanding the default(s) committed by the person liable to pay Service Tax, penalty may not be imposed for such default. However, the person is required to prove that there was reasonable cause for the failure/default. The submission of the learned consultant for the appellant in this regard was that M/s B.S.N.L. had failed to make the payment and as the amount was very high, it was not possible for the appellant to discharge the Service Tax liability. The submission, in my opinion, would not

justify complete waiver of penalty in view of the provisions of Section 67(I) of the Finance Act which lays down the value of taxable service (in case service is for monetary consideration) as "gross amount charged by the service provider". There is no dispute that in terms of under Section 68(I), the appellant being service provider was liable to pay Service Tax. In this view of the matter, the fact that M/s B.S.N.L. did not pay the amount and the appellant had to file Writ Petition in the Allahabad High Court and pursuant to the order of the High Court payment was made by M/s B.S.N.L. direct to the Assistant Commissioner, is not enough to justify waiver of penalty.

5. At this stage it may be mentioned that sum of Rs. 6,54,489/- payable under Section 76 in terms of the impugned order comprises of the sums of Rs. 2,31,300/- payable on delayed payment of the Service Tax amounting to Rs. 5,18,610/- for the period April 2000 to June 2002 and Rs. 4,23,189/- being equivalent to the amount of tax payable for the period June 2002 to December, 2003. The payment made by M/s B.S.N.L. pursuant to the direction of the Allahabad High Court pertains to the later period i.e June 2002 to December, 2003.

6. The sum of Rs. 2,31,300/- (supra) has been arrived at @ Rs. 100/- per day for the delay of 2,313 days in payment of Service Tax amounting to Rs. 5,18,610/-. It may be mentioned that under Section 77, as it stood prior to the amendment by the

Finance Act, 2006 (effective from 18.04.2006) penalty was imposable @ Rs. 100/- for every day of failure. In terms of the proviso, total amount of penalty, however, was not to exceed the Service Tax payable. That is how penalty of Rs. 4,23,189/- (supra) came to be quantified for the subsequent period i.e June 2002 to December 2003. Though the Act prescribes the rate/amount at which penalty is to be imposed and quantified, it is well settled that the authorities have a discretion to impose lesser penalty. As a matter of fact, by virtue of the provisions of Section 80, in an appropriate case where the assessee proves there was sufficient cause for the failure, penalty may not be imposed at all. The point for consideration, therefore, is whether any case for waiver of penalty in terms of Section 80 of the Act is made out. However, before advertng to this aspect, I may mention that in terms of Section 76, penalty is imposable "in addition to such tax and the interest on that tax" and, therefore, the submission of the learned consultant that having paid the interest on the amount of tax, in cases of delayed payment, penalty cannot be imposed, must be rejected out of hand.

7. Now coming to the question as to whether the benefit of Section 80 can be extended to the appellant, it may be mentioned that the 'Security Agency' service is a notified taxable service since 16.10.1998 itself and it is idle for the appellant to contend that it was not aware of its Service Tax obligations.

Though the appellant was liable to pay tax on the service provided by it since 16.10.1998 itself, it escaped the liability for a substantial period as no action was taken within time, as even by applying the extended period of limitation, the appellant could not be fastened with the tax liability for the period prior to 2000.

8. Imposition of penalty under Sections 77 and 78 is different from the one under Section 76. In the instant case, penalty under Section 77 has been imposed on the appellant for its failure to obtain registration. It is a common ground that no penalty is separately provided for failure to obtain registration and in the absence of any dispute that the appellant was rendering taxable service, there is no difficulty in holding that the penalty under Section 77 requires no modification.

9. However, as regards penalty under Section 78, I am of the opinion that penalty can be imposed as it appears from the plain wording of the Section where non-levy/non-payment etc. was on account of fraud, collusion or wilful mis-statement or suppression of facts or contravention of any relevant statutory provision with intent to evade payment of Service Tax. No case of fraud, collusion or wilful mis-statement or even contravention of the statutory provisions with intent to evade payment of Tax is made out. Learned DR tried to bring the case under the clause 'suppression of facts'. It was submitted that non-submission of returns amounted to suppression of facts attracting the

provisions of Section 78. In my opinion, non-submission of the return was the result and concomitant of non-registration for which penalty has already been imposed under Section 77 of the Act. The clause "suppression of facts" can be applied where return is filed or some statement or declaration (which the person is required to submit) concealing material facts having bearing on the tax liability of the person. In that situation, it can be said that he has suppressed facts resulting in the non-levy/non-payment or short levy/short payment or erroneous refund. I am inclined to think that merely because the appellant did not submit return, he cannot be penalized under Section 78. It may be kept in mind that Section 78 refers to "penalty for suppressing value of taxable service". Though the heading of the Section cannot be read as substantive provision, it can be used as a guide to cull out the real meaning of the provision. The language of the heading, prima facie, suggests that penalty can be imposed where the person has suppressed any fact pertaining to the value of taxable service. Non-submission of the return per se, in my opinion, may not attract penalty under Section 78 and accordingly I am inclined to hold that the provisions of Section 78 are not attracted in the instant case and, therefore, no penalty thereunder could be imposed against the appellant.

10. Now coming to penalty under Section 76, as seen above, penalty has been imposed on the appellant @ Rs. 100/-

per day for the period from April 2000 to June 2002 and at the rate equivalent to the amount of tax for period from June 2002 to December 2003. Penalty, no doubt, can be quantified and imposed in that manner in terms of Section 76 of the Act, but it does not mean that penalty must necessarily be worked out at the rate and in the manner provided in Section 76. Quantification of penalty depends on discretion of the authorities. It does not mean that lower penalty should be imposed arbitrarily, but in an appropriate case, a lesser penalty can be imposed. Though the circumstances in which a lesser penalty can be awarded cannot be exhaustively laid down. Broadly stated, the amount would depend on the facts and circumstances of the case including the defence of the persons. It should be kept in mind that under Section 80, where the person/assessee succeeds in proving reasonable cause for failure to pay tax, penalty may be waived altogether.

11. In the facts and circumstances, the belief of the appellant that it was liable to pay Service Tax only on receipt of the amount from the recipient which is M/s B.S.N.L., could be a bonafide belief. It may be recalled that the appellant had filed Writ Petition seeking direction from the Allahabad High Court to pay the dues and pursuant to the orders of the High Court, the dues were paid by B.S.N.L. directly to the Assistant Commissioner of Central Excise.

12. In the facts and circumstances, I am of the view that penalty of Rs. 50,000/- each for the periods in question totalling Rs. 1 lac in all would be sufficient to discharge the penal obligations under Section 76 of the Act.

13. In the result, the order of the Assistant Commissioner as modified by the Commissioner (Appeals), is further modified in the following manner :

- (i) appellant is held liable to pay penalty of Rs. 1 lac under Section 76 of the Finance Act, 1994;
- (ii) appellant is further held liable to pay penalty of Rs. 1,000/- under Section 77 of the Act; and
- (iii) appellant is held not liable to pay any penalty under Section 78 of the Act.

14. The appeal stands allowed partly in the manner mentioned above.

(Dictated and pronounced in the open Court on the 12TH day of May, 2008)

(JUSTICE S.N. JHA)
PRESIDENT