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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/802 /2008 – SM[BR] Date 09/10/2009

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

To :
C.C.E. KANPUR

117/7, SARVODAYA NAGAR, KANPUR 208005.

C.C.E. KANPUR Appellant

Vs

M/S MALAY I NET COMMUNICATION, Respondent

I am directed to transmit herewith a certified copy of **Final order No**. 1212 / 2009 –SM[BR] dated 16.9.2009

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

M/S MALAY I NET COMMUNICATION,

33, CHAMAN LAL MARKET, GUMTI NO.5, KANPUR.

2. Adv. / Consult

NONE;------------

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,

West Block No.2, R.K.Puram, New Delhi

COURT-IV

Date of hearing/decision: 16.9.2009

Service Tax Appal No.802 of 2008-SM

Arising out of the order in appeal No.349-ST/APPL/KNP/2008 dated 30.9.2008 passed by the Commissioner (Appeals), Customs & Central Excise, Kanpur.

For Approval and Signature:

Hon'ble Shri M. Veeraiyan, Member (Technical)

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

C.C.& C.Ex., ... Appellant
Kanpur

Vs.

M/s Malay I Net Communication .... Respondents

Appearance:

Shri S. Gautam, Authorized Departmental Representative (SDR) for the Revenue and none for the respondents

Coram: Hon'ble Shri M. Veeraiyan, Member (Technical)

Oral Order No. 1212/2009 SM (BR)

Per M. Veeraiyan:

This is an appeal by the Department against the order of the Commissioner (Appeals) No. 349-ST/APPL/KNP/2008 dated 30.9.2008 in so far as the same relates to setting aside the penalty imposed by the original authority.

2. None appears for the respondents in spite of notice. On earlier occasion also, none has appeared on behalf of the respondents.

3. Heard the learned SDR.

4. The relevant facts , in brief, are that the respondents are internet service providers. They have received such services from BSNL and Data On Line and distributed to various customers. The Department held that the service provided by the respondents is subject to service tax and accordingly, the original authority confirmed the demand of service tax amounting to Rs.76,659/- along with interest; imposed penalty of Rs.500/- under Section 75A; imposed penalty of Rs.200- per day during which failure to pay service tax continues under Section 76; imposed penalty of Rs.1000/- under Section 77; also imposed penalty of Rs.76,659/- under Section 78. On appeal by the party, the Commissioner (Appeals) upheld the demand of service tax and interest. However, he set aside the penalty. Hence the department is in appeal.

5. Learned SDR reiterates the findings and reasoning of the original authority and the grounds of appeal.

6.1 I have carefully gone through the submissions and perused the records. The Commissioner (Appeals) has held that the respondent has made out a reasonable cause for invoking the provisions of Section 80 of Finance Act, 1994. His findings, in this regard, are as follows:

> " ***Finally, I take up the issue of waiver of penalty. In this regard, I observe that benefit of waiver of penalty can be granted in terms of Section 80 of the Act, if the assessee proves that there was a reasonable cause for said failure. The relevant provision of Section 80 of the Finance Act, 1994 reads as under:***
>
> > ***'Section 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.'***
>
> ***Here the appellants have sought waiver of penalties on the ground that they have not deliberately acted to evade the payment of service tax.The appellants submitted that they were under the impression that once the tax liability has been discharged at the time of purchasing the services from BSNL, and data online the further redistribution shall not attract service tax. The appellants have pleaded that due to this belief, they did not collect the service tax form their customers and did not pay any service tax. After considering the facts I find that the appellants have not gained any benefit from non-***

payment as they had not to pay the same from their own pocket rather the tax was to be collected from their customers and paid into the Government account. I do not find any mala fide intention on the part of the appellants to evade payment of service tax.

I agree with the submissions of the appellants and find that the ingredients of mens - rea were not present in the case as much as the appellants did not avoid the tax liability intentionally. In these circumstances, I find that the appellants had succeeded in proving that that the failure on their part was due to confusion and bona fide belief. I am of the opinion that this is a fit case for allowing the benefit of Section 80 of the Finance Act, 1994. I therefore, hold that no penalty is imposable on the appellants under Section 76, 77 & 78 of the Finance Act, 1994."

6.2 In other words after taking note of the facts that the respondent was redistributors of online services and that the original suppliers have paid service tax and that the respondents have not collected any service tax form their customers came to the conclusion that there was no mala fide intention on the part of respondents, therefore, extended benefit of Section 80 of the Finance Act. The appeal has been filed mainly on the ground that even after mistake was pointed out to them, the respondents did not pay service tax payable and the interest on it and that the bona fide of the respondents are in doubt. This ground is not sufficient to interfere with the well-reasoned order of the Commissioner (Appeals) holding that the benefit of Section 80 is warranted in the said case.

7. In view of the above, the appeal by the Department is rejected.

(M. Veeraiyan)
Member (Technical)

scd/