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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/84 /2009 – SM[BR] Date 19/11/2009

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

To :
C.C.E. LUDHIANA

CENTRAL EXCISE HOUSE, 'F' BLOCK, RISHI NAGAR,
LUDHIANA 141001 (PUNJAB)

C.C.E. LUDHIANA Appellant

Vs

M/S AKASH CABLE Respondent

I am directed to transmit herewith a certified copy of **Final order No.** 1456 / 2009 –SM[BR] dated 13.11.2009 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 AKASH CABLE

   141, URBAN ESTATE, PHASE II, DUGRI, LUDHIANA.
2. Adv. / Consult SHRI RUPENDER SINGH ADV.
   DSK LEGAL, 46 ARADHNA, CHANAKYAPURI
   NEW DELHI

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-III

Date of hearing/decision:13.11.2009

Service Tax Appeal No. 84 of 2009-SM

[Arising out of order-in-Appeal No.347/CE/Ldh/2008 dated 22.10.08 passed by the Commissioner, Central Excise, Ludhiana]

For approval and signature:

Hon'ble Shri M. Veeraiyan, Technical Member

1.	Whether Press Reporters 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 the 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

CCE, Ludhiana — Appellant

Vs.

M/s Akash Cable — Respondent

Appearance:
Appeared for the Appellant – Shri Mahesh Rastogi, SDR

Appeared for the Respondent- Shri Rupender Singh, Advocate

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

Final Order No. 1456/2009 SM(BR)

Per: M. Veeraiyan:

This is an Appeal by the Department against the order of the Commissioner (Appeals) No.347/CE/Ldh/2008 dated 22.10.08.

2. Heard both sides.

3. The Respondent was engaged in providing service of cable operator. The original Authority held that during the period from 1.4.2003 to 31.12.2005, the Respondent suppressed taxable value of Rs.23,36,795/- and evaded Service Tax amounting to Rs.2,06,848/-. The amount of Service Tax was paid prior to issue of show-cause notice. The interest was paid on 21.2.2006 and 18.3.2008 in two instalments. The original Authority confirmed the Service tax demand and interest. He imposed a penalty of Rs.2,06,848/- under Section 76 of the Act; he imposed penalty of Rs.1000/- under Section 77 of the Act and a penalty of Rs.2,06,848/- under Section 78 of the Act. Commissioner (Appeals) by impugned order taking note of the fact that the entire amount of Service tax and interest has been paid, set aside the penalty under Section 76 holding that penalty under Section 76 and penalty under Section 78 are mutually exclusive. He also reduced the penalty under Section 78 to 25% of the Service Tax evaded.

4. Ld. SDR submits that it is a clear case of non-payment of Service Tax knowingly by the assessee citing the ground that their association was contesting the tax liability and was taking up the matter with the higher Authorities. Under these circumstances, imposition of penalty under Section 76 for the delay in payment of Service Tax and imposition of penalty under Section 78 for wilful, suppression of facts are justified especially because the period is

prior to amendment to Section 78 on 10.5.08 by which, it was clarified that if the penalty is payable under Section 78 the provisions of Section 76 was not to be applied. He also relies on the decision of Hon'ble High Court of Kerala in the case of **Assistant Commissioner of Central Excise Vs. Krishna Poduval** reported in 2006 (1) STR 185, wherein it has been held that the provisions of both the Sections 76 and 78 shall apply even if offences are committed in course of same transactions or arise out of the same act and penalty imposable for ingredients of both offences.

5. Ld. Advocate for the Respondent submits that there was dispute about taxability of service on the cable operators and their association has taken up with the higher Authorities. Once it was clarified they had to pay tax, they promptly paid the same even without waiting for issue of show-cause notice. There was no deliberate intention on their part to evade the tax. They also raised the plea for benefit of granting benefit in terms of Section 80 of the Finance Act before the Commissioner (Appeals). After taking all the submissions into account, the Commissioner has set aside the penalty under Section 76. He also relied on the decision of the Tribunal in the case of **The Financers Vs. CCE, Jaipur** reported in 2007 (8) STR 7, wherein it has been held that once penalty under Section 78 is imposed, no penalty should be imposed under Section 76 of the Act. He also relied on the decision of Division Bench of the Tribunal in the case of **Sri Venkateswara Cable Network Vs. CCE** reported in 2008 (11) STR 512, wherein a similar

circumstances, in exercise of powers under Section 80 of the Finance Act, the penalty imposed on the cable operator has been set aside by the Tribunal.

6. I have carefully considered the submissions from both sides. The tax liability is not in dispute and the same has been paid along with interest. Commissioner (Appeals) relying on the decision of the Tribunal in the case of **The Financers** (supra) held that once penalty imposed under Section 78 of the Act, no penalty was imposable under Section 76 of the Act. It has not been shown any Appeal has been filed against the said order of the Tribunal and stay granted. The decision of the Hon'ble High Court of Kerala in the case of **Krishna Poduval** dealt the issue whether Section 76 and 78 can be invoked to the same transactions. In the said decision, the Hon'ble High Court has also taken note of the fact that powers under Section 80 of the Finance Act, could have been invoked by the Appellate Authority. The Appellants have also raised the plea for benefit of Section 80 before the Commissioner (Appeals). The ld. Advocate also brought to my notice that in substantially similar situation, the Tribunal has exercised the powers under Section 80 of the Act and therefore setting aside the penalty under Section 76 by the Commissioner (Appeals) cannot be held to be unreasonable. Further, the Respondent has admittedly paid 25% of the penalty within one month from the date of the order of the original Authority. Therefore, the waiver of penalty in excess of 25% of the

Service Tax evaded under Section 78 is also justified and, therefore, order of the Commissioner (Appeals) calls for no interference.

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

(Dictated & pronounced in open Court)

(M. VEERAIYAN)
TECHNICAL MEMBER

RM