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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066
CUSTOMS APPEAL BRANCH

Appeal No. ST/477-78 /2010 - CU[DB] Date **18/08/2011**

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

To :
M/S BALVINDER SINGH NEEL,

314, VIVEKANAND COLONY UJJAIN (M.P.)

M/S BALVINDER SINGH NEEL, Appellant

Vs

C.C.E. INDORE Respondent

I am directed to transmit herewith a certified copy of **Final order No.ST/359-60 2011 CU|DB|** dated 12.08.2011 passed by the Tribunal under **Section 129, (B) of the Customs Act,1962 & Financial Act 1994 relating to Service Tax.**

Assistant Registrar
(Customs Appeal Branch)

Copy to :

1. Respondent
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BOX NO. 10, INDORE 452001 (M.P.)

2. Adv. / Consult Mr. Jatin Mahajan, Adv
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Lajpat Nagar – II
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3. C.D.R
4. Bar association, CESTAT, New Delhi
5. Director Publications, Customs, Excise. I.P. Estate, New Delhi
6. M/s Centax Publictions Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi -
7. Company Law Institute of India Pvt Ltd.,No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
8. Taxmann Allied Service Pvt Ltd., 59/32, New Rohtak Road, New Delhi - 110005
9. Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road, Ahmedabad-15
10. LAWCRUX Advisors Pvt Ltd, LAW House,1-8,Sector - 10, Faridabad 121003 (Haryana)
11. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor,Vasant Arcade,Nelson Mandela Road, Vasant Kunj, New Delhi - 110070
12. Office Copy
13. Guard file

Assistant Registrar
(Customs Appeal Branch)

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI
Court No.III

ST/Appeal Nos. 477-478/2010

(Arising out of order in appeal No.IND/1/300/298 dated 10.12.09 passed by the Commissioner of Customs & Central Excise(Appeals), Indore)

Date of Hearing : 7.7.2011
Date of Pronouncement: 12-08-11

For Approval and signature:

Hon'ble Mr S.S. Kang, Vice President
Hon'ble Mr.Mathew John, 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?
2. Whether it would 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 Department Authorities?

Balvinder Singh Neel — Appellant

Vs

CCE, Indore — Respondent

Appeared for the Appellant : Shri Jatin Mahajan, Advocate
Appeared for the Respondent: Shri Fateh Singh, DR

Coram: **Hon'ble Shri S.S. Kang, Vice President**
Hon'ble Shri Mathew John, Member (Technical)

Final ORDER No. ST/359-360/11

Per Mathew John:

These Appeals deals with two appeals from the same appellant which are interlinked. The Appellant is a cable operator liable to pay service tax under the provisions of Finance Act 1994. In Sept 2006 and Nov 2006 the Appellant was issued with two SCNs demanding service tax as per details below:

(i) SCN dated 27-09-06

This SCN was issued on the ground that during the financial year 2004-05 he had rendered service for a value of Rs. 4000590/- as per his ST3 return and hence he was not eligible for the exemption under Notification 6/2005-ST for small units for the year 2005-06. The service tax demanded in this SCN was Rs. 38556/-

(ii)SCN dated 13-11-06

This SCN was issued on the ground that the value of service tax declared by him in his ST-3 return was lower than the income stated by him in his Income tax return. The SCN was issued in relation to service rendered during the years 2002 -03, 2003-04, 2004-05, 2005-06 and April 2006. This demand for the difference of Rs 73534 (the tax based on income tax return) and Rs. 38863 (the amount already paid by him as per ST-3 Return)

2. It appellant argues that there is overlapping of the demand in the two SCNs to the extent of Rs. 38556. The Revenue after studying the objection has given a report that the overlapping is only to the extent of Rs.3213/- only. This issue will be dealt with after examination of the merit of the Appeals.

3. Adjudication order 78/2008-09 dated 16-03-09 dealing with SCN dated 27-09-2006 confirmed duty demand of Rs. 38556 along with

interest and imposed penalties under section 76, 77 and 78 of the Finance Act 1994. In appeal against this order the Commissioner (Appeal) confirmed duty demand and penalties under section 77 and 78 but set aside penalty under section 76.

4. The adjudication order 79/2008-09 dated 16-03-2009 dealing with SCN dated 13-11-06, confirmed duty demand of Rs. 73,534/- with interest and appropriated an amount of Rs. 38863/- already paid Further penalties were imposed under section 76 and 78 of the Finance Act, 1994. In appeal against this order the Commissioner (Appeal) confirmed the demand and penalty under section 78 but set aside penalty under section 76.

5. The Counsel for the Appellant has not raised any serious contention regarding the proceedings arising from issue in SCN dated 27-09-06.

6. Regarding proceeding arising from SCN dated 13-11-2006, the contention of the Appellant is that the difference between figures in ST-3 return and Income tax return is because income tax return shows amount received inclusive of entertainment tax and also bad debts not received. He contends that ST-3 Return is based on values actually received from the customers. He submits the balance sheet prepared by a chartered accountant to support this argument. We are not impressed with this argument at all. The Income tax returns for the relevant years is availed in Form 2D known also as Saral Form. In this form only Income from Business or Profession only is shown. There is no evidence of any balance sheet prepared and submitted. There is no chance of a person reporting receipt of Entertainment Tax or Service Tax from his customers as his income. There is no chance of reporting monies not received from customers as his income by a person submitting return in Saral form. Further we note that the balance sheet prepared and submitted is not a dated document. It is too obvious that this is a document is prepared to escape the service tax

demand made in the two SCNs. So we reject the contentions of the Counsel on merits of the issue.

7. Now the issue to be examined is the contention regarding overlapping of demand in the two SCNs. On 01-02-11 when the case was heard the Counsel for Appellant had given detailed worksheets showing how excess duty is being demanded from him. This was given to the revenue asking for a report from the jurisdictional Commissioner to reconcile figures. When this matter was taken up on on 07-07-11, Revenue produced a report from Commissioner dated --/03/2011. According to the report there is no overlapping of demand though the Commissioner conceded that there is an excess demand of Rs. 3213/- on account of tax paid by the Appellant for April 2005, which was not taken into account in the SCN. However the Counsel for the Appellant was very emphatic about excess duty being demanded though the matter was not explained properly by him.

8. On scrutiny of the papers it is seen that the first demand is for 2005-06 and April 2006 for the reason that the Appellant was not eligible for exemption for small units. This is based on figures reported in ST3-3 return. The second demand is for a larger period covering also the period covered under the first SCN. But the demand is only for tax on differential value (figures in Income tax return minus figures in ST-3 Return) and not for tax on the entire value of service tax rendered during the period. So overlapping of demand does not arise. The error that Revenue is admitting is that in their calculation as per Annexure-I, the value on which tax is already paid is taken as zero which should have been 31500, thus resulting in excess demand of Rs. 3213. This is a clerical mistake and not an issue of overlapping demand.

9. However since the Appellant was persistent in the matter of overlapping demand we have done a more detailed scrutiny using data of payments furnished by the Counsel during hearing on 01-02-2011.

Then what we found is that in the adjudication order dated 16-03-2009 adjudicating the first SCN in para 2.1 mentions about deposit of Rs. 38556/- in relation to the demand. However the order does not take notice of this amount paid and does not appropriate the amount already paid. This may be reason why the Appellant is strongly arguing about overlapping of demand. The confusion was getting further confounded because of improper presentation of argument by the counsel.

10. There is a para 2.2 in the order dated 16-03-2009 relating to payment for demand in the second SCN another payment of Rs. 35293/-. The adjudication order does not deal with this amount either. However the second adjudication order adjusts an amount of Rs. 38863/-. All these facts are adding to the confusion and there is no attempt in the report dated --/03/2011 to sort out this confusion.

11. After scrutiny of the records it appears that the position on this matter is reflected in the following tables:

11.1 Tax Dues

S. No	SCN date	Amount confirmed	Amount payable
1	27-09-06	38556	38556
2	13-11-06	73534	70321

11.2 Payments made by assesse, as reported by the Counsel, are as follows:

S. No	When paid	Dates of Challan	Tax	Interest
1	27-09-2006- (after SCN)	31/01/07, 19-02-07, 17/04/07 and 04/06/07	34481	10000
2	13-11-2006 (Before SCN)	26/06/06, 26/06/06, 26/07/06, 10/07/06, 24/07/06, 01/08/06, 21/08/06, 21/08/06 and 29/08/06	35293	10961
	13-11-2006 (Before SCN)	18/09/06	3570	625
	TOTAL		73344	10961

12. This matter requires verification and relook by the adjudicating authority in view of what is stated in para 2.1 and 2.2 of the adjudication order 78/2008-09 dt 16-03-2009 and the fact that there is no adjustment of duty paid in the order portion of the said order. The adjudicating authority shall do this in a fresh proceeding after giving a hearing to the Appellant.

13. Further we notice that as per the submission of the Appellant, he had paid substantial portion of the duty demanded and interest before issue of order-in-original but the Appellant which was not given the option to pay balance of the demands and 25% of duty involved as penalty within 30 days of the order in the order-in-original as per provisions of section 78. So following the decision of the Delhi High

Court in the case of K.P. Pouches Pvt. Ltd. v. Union of India-2008 (228) E.L.T. 31 (Del.), the adjudicating authority shall give the option to pay 25% of the duty amount demanded within 30 days of receipt of the order.

14. The Appeals are allowed by setting aside the impugned orders and remanding the matter to adjudicating authority for determination of limited issues as per directions above.

(Pronounced in Open Court on 12/08/11)

(S. S. Kang)
Vice President

(Mathew John)
Member(Technical)

MPS*