IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,
EAST REGIONAL BENCH : KOLKATA

Appeal Nos.ST/98/2009 & ST/130/2009

(Arising out of Order-in-Original No.02/Commr/ST/ADJ/DIB/09 dated 09.02.2009 passed by the Commissioner of Central Excise, Dibrugarh)

1. M/s BSNL …APPELLANT(S)
2. Commissioner of Central Excise, Dibrugarh

VERSUS

1. Commissioner of Central Excise, Dibrugarh
2. M/s BSNL

…RESPONDENT (S)

APPEARANCE

None for the Appellant
Shri A.K.Biswas, Suptd. (AR) for the respondent.

CORAM:
HON'BLE SHRI P. K. CHOUDHARY, JUDICIAL MEMBER
Hon'ble SHRI V.Padmanabhan, Member (Technical)

Date of Hearing : 26.10.2018

Date of Pronouncement: 31.10.2018

ORDER NO.FO/76832/2018

Per Shri V.Padmanabhan :

These two appeals are cross appeals against the Order-in-Original No.02/Commr/ST/ADJ/DIB/09 dated 09.02.2009. BSNL is registered for provision of Telephone Services. The department audited the accounts of BSNL for the period November, 2004 to December, 2007, during which it was noticed that BSNL did not fully discharge the due service tax in the following cases:

i) BSNL collects security deposit from its customers and adjusts the security deposit against the pending bills of their customers. At the time of surrender of the telephone connection, only the remaining amount is refunded to the customers. The department was of the view that the amount of unpaid bill adjusted from the security deposit is liable to payment of service tax.

ii) BSNL had allowed several Public Call Offices (PCO) to be operated. At the time of settlement of bills in respect of these PCOs, certain commission amounts were allowed to be deducted from the total bill. Department was of the view that the service tax on such amount of commission is required to be paid. During the period under dispute it was noticed that service tax on such commission amounts were paid only for part of the period.

iii) It was further noticed that in many months, BSNL failed to pay service tax on due dates and accordingly were liable for payment of interest under Section 75 of Finance Act, 1994.

iv) A few instances of short payment of service tax as well as *suo moto* adjustment of excess paid service tax of in subsequent months were noticed. These adjustments were made for amounts beyond the limit of Rs.50,000/- specified in the Service Tax Rules, 1994 which was considered improper.

2. Show cause notice dated 01.10.2008 was issued proposing recovery of service tax on the above lines. After consideration of the reply filed by BSNL and grant of personal hearing, the impugned order was passed, in which the Adjudicating Authority upheld a part of the demand raised in the show cause notice. He also ordered payment of interest as well as penalties under Section 70 and 78 of the Finance Act, 1994, but did not impose penalty under Section 76 *ibid*.

3. In the appeal filed by the Revenue against the impugned order, they have challenged the dropping of a part of the service tax demand by the

adjudicating authority. Further, it has been submitted that the adjudicating authority should have imposed penalty under Section 76 also in addition to penalties under Section 70 and 78.

4. In the appeal filed by BSNL, the demand for service tax confirmed has been challenged on the following grounds:

i) It cannot be alleged that BSNL has suppressed the facts, since the entire proceedings were based on statutorily maintained records which remained open for scrutiny of the proper officer at all material times. Further, the revenue has not brought on record any positive act of suppression of material fact. Consequently the demand raised is to be considered as hit by time-bar.

ii) In respect of demand which survives, if any, after the benefit of time bar is extended, the cum tax value benefit is to be extended to them.

iii) In respect of interest on delayed payment, he submitted that the department has not provided the details of the service tax paid with delay; as such, such demand for interest is not sustainable.

iv) Regarding the *suo moto* adjustment of excess paid service tax, he submitted that the demand under dispute has been dropped by the adjudicating authority which needs no interference.

5. None appeared for appellant inspite of notice. Revenue represented by Shri A.K.Biswas, Suptd.(AR).

6. After hearing the ld.DR, it is seen that the main thrust of the argument advanced by the BSNL against the service tax demand confirmed against them is that the show cause notice is hit by time bar for a significant part of demand. In this regard we note that the demand raised in the show cause

notice is a consequence of audit undertaken by the department of the books of accounts of BSNL. From the show cause notice we find that a bland allegation of willful suppression has been raised against BSNL. The department has not brought on record any single positive act on the part of BSNL for suppressing any material fact. The show cause notice has been issued on the basis of the scrutiny of relevant documents maintained by BSNL. BSNL being a public sector company, the statutorily maintained records were open for scrutiny to the proper officer at all material times and that hence there can be no allegation of suppression of material fact by the appellant. Consequently, we are of the view that the show cause notice, which has been issued invoking the extended period of limits available under Section 73 of the Finance Act, 1994 is to be considered as hit by the time bar. Consequently we set aside the demand beyond the normal period of limitation.

7. A significant part of the demand raised in the show cause notice has been dropped by the adjudicating authority. This pertains to adjustments made suo moto by BSNL between the excess paid service tax in certain months with the service tax payable in subsequent months. The demand on this ground has been dropped by the adjudicating authority, by taking the view that such adjustments were reflected in their returns and no evasion of service tax can be alleged. The adjudicating authority has further held that there have been no violation of then Rule 6(4)B of the Service Tax Rules, 1994. This issue stands challenged by the revenue in the present appeal.

8. After carefully considering the appeal filed by the revenue as well as the facts of the case, we find no infirmity in the dropping of such demand in as much as the alleged violations of Rule 6(4)B are merely procedural infractions. Hence, this ground raised by the revenue is rejected.

9. In respect of other demands confirmed by the adjudicating authority, BSNL has submitted that they will be entitled to cum tax benefit. We have already held above that the demand is to be restricted to the normal time limit. We direct the adjudicating authority to requantify the demand falling within the normal time limit and at the same time extend cum tax benefit.

10. In the facts and circumstances of the case we find no justification to impose any penalty which is set aside by taking recourse to Section 80 of the Finance Act, 1994.

11. In the result, the following order is passed:

i) The appeal filed by the revenue is rejected.

ii) Appeal filed by the BSNL is partly allowed in following terms;

a) Demand is restricted to a normal time limit. The adjudicating authority to requantify the same.

b) Any surviving demand will be redetermined with the cum tax benefit.

c) Any delayed payment will be liable to payment of interest under Section 75.

d) All penalties are vacated under Section 80.

(Pronounced in the open court on 31.10.2018)

S/d.	S/d.
(P. K. CHOWDHARY)	**(V.Padmanabhan)**
MEMBER (JUDICIAL)	**MEMBER (TECHNICAL)**

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