**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA**
**EASTERN ZONAL BENCH: KOLKATA**

**Appeal No. ST/327/2010, CO-110/2010**

Arising out of Order-in-Original No. 03/Commr./ST/Kol/2010-11 dated 07.06.2010 passed by the Commissioner of Service Tax, Kolkata.

Commissioner of Service Tax, Kolkata.
…Appellant (s)

**Vs.**

M/s Wire & Wireless India Ltd.
…Respondent (s)

Appearance:
Shri S. Mukhopadhyay, Suptd. (AR) for the Appellant (s)
Shri S. K. Goyal, C.A. for the Respondent(s)

**CORAM:**
**HON'BLE SHRI P. K. CHOUDHARY, MEMBER (JUDICIAL**
**HON'BLE SHRI C. L. MAHAR, MEMBER (TECHNICAL)**

Date of Hearing/Decision: - 28.06.2018

ORDER No…FO/A/77119/2018

**Per Bench:**

The respondent assessee M/s Wire & Wireless India ltd is engaged in providing ñcable operator serviceò and is registered with the service tax Department. Show Cause Notice dated 22.10.2009 was issued for recovery of short payment of service tax along with interest and imposition of penalty. The adjudicating authority vides the impugned order, confirmed service tax demand along with interest and dropped the penalty proceedings. Revenue has filed appeal before the Tribunal for non-imposition of penalty under Section 78 of the Finance Act, 1994. Respondents have filed cross-objection. The Ld. D.R.

reiterates the grounds of appeal and submits that the penalty under Section 78 is has very much impossible on the respondent. The Learned Counsel appearing on behalf of the respondents reiterates the grounds of cross-objection and submits that the entire demand of service tax along with interest has been paid by the respondent assessee much before the issuance of the Show Cause Notice and accordingly provision of Section 73A are applicable in their case.

2. Heard both sides and perused the appeal records.

3. We find that the demand of service tax has been paid by the respondent on different dates through challan and utilization of CENVAT Credit towards payment of service tax liability alongwith interest, much before the issuance of the Show Cause Notice and the same has been appropriated in the Show Cause Notice as well as in the adjudication order. Regarding the non-imposition of penalty under Section 78, the learned Commissioner has observed as under;

> ñIn the instant case, Section 78 has been invoked on the grounds of violation of Section 73A and for the matter that the noticee did not disclose the actual realization of service tax from their clients.
>
> The provisions of under Section 73A needs to be examined for arriving at a conclusion. It is envisaged in the provision that a person who is liable to pay service tax, and has collected any amount in excess of the service tax assessed or determined from the recipient of service tax in any manner as representing service

tax , shall forthwith deposit the same to the credit of Central Government, and where any person has collected any amount, which is not required to be collected, from any person, in any manner as representing service tax, such person shall forthwith pay the amount so collected to the credit of the Central Government.

From the bare perusal of the statute it is clear that the provisions of Section 73A is not applicable to the instant case as the assessee had not collected any amount in excess of the service tax assessed. It is not a case that the assessee had collected the amount of service tax which was not required to be collected, as the assessee is required to collect and pay service tax for the service provided and the same is not disputed either by the assessee or the department. Thus, there can never be a violation of Section 73A, which is not at all applicable to the facts, and circumstances of the case.

Now comes the allegation of suppression and non-disclosure of the actual realization of service tax from the clients. The allegation is totally unfounded in the absence of any evidence on record produced to this effect. The allegation is very fragile and do not have legs to stand as the fact remains that there is no dispute regarding value of service and more so the figure in the SCN had been admittedly derived from the calculation sheet provided by the noticee and which again is in total agreement with the figures furnished in the ST-3 returns submitted for the period.

There is no ingredient of fraud, suppression with intent to evade payment of tax. Admittedly there was short payment/non-payment of service tax but the intention to evade was not there, since the notice never suppressed material facts from the department. Further suppression is neither proved nor substantiated in the Show Cause Notice. It is also a fact that short payment during each half -year was duly reflected in respective ST-3 returns for the period. Such circumstances do not warrant imposition of penalty under Section 78 of the Act. As and upshot of discussion no penalty under Section 78 is imposed.ò

4. In view of the above discussions, we do not find any reason to interfere with the impugned order and we do so. Accordingly the appeal is dismissed. Cross objection is disposed of.

(Operative portion of the order have already pronounced in the open court)

**(C. L. Mahar)**
**Member (Technical)**

**(P. K. Choudhary)**
**Member (Technical)**

Tushar Kr.