

(2011) 10 KAR CK 0025
In the Karnataka High Court
Case No : CEA No. 12 of 2011

United Communications, Udupi

APPELLANT

Vs

Commissioner of Central Excise, Central Excise
Commissionerate

RESPONDENT

Date of Decision : 15-10-2011

Acts Referred:

Finance Act, 1994 — Section 73, 73 (3), 76, 78

Citation : (2012) 281 ELT 168 : (2012) 34 STT 285 : (2012) 48 VST 118

Hon'ble Judges : Ravi Malimath, J;N. Kumar, J

Bench : Division Bench

Advocate : Cherias Runnoose, for the Appellant; Jeevan J. Neeralgi, for the Respondent

Final Decision : Allowed

Judgement

N. Kumar, J.—This appeal is by the assessee challenging the order passed by the Tribunal holding that the assessee is liable to pay penalty even though he has paid duty and interest prior to the issue of show cause notice under Sections 76 and 78 of the Finance Act, 1994.

2. The facts are not in dispute. The assessee is a cable operator. He got himself registered as a service provider under the Finance Act. Thereafter he was remitting the service tax payable for the amounts he received from his customers. In pursuance of an enquiry by the department, he gave information regarding the number of subscribers, the amount charged, amount collected and the period for which it is collected and also stated that he would pay the differential tax after quantification by the department as he has not maintained any accounts. It is thereafter a communication was sent as per Annexure "B" pointing out that he is liable to pay Rs. 4,81,370 of service tax, Rs. 6,497 on Education Cess and Rs. 51,963 interest, in all a sum of Rs. 5,39,830. On receipt of the said communication he promptly paid the said amount on 23-11-2005. It is thereafter proceedings were initiated u/s 73 of the Finance Act asking him to

show cause why penalty under sections 76 and 78 should not be imposed for suppression of facts and for wilful misstatement. He gave a reply contending that he had not maintained accounts and he had not received the subscription from the consumers. He paid service tax in respect of payment received and he had not paid service tax in respect of the amount he had not received. However, on computation he has paid the tax even before issue of show cause notice. However, the assessing authority did not accept the aforesaid explanation and proceeded to levy penalty both under Sections 76 and 78 of the Act. Aggrieved by the said order of levying penalty, the assessee preferred an appeal to the Commissioner of Central Excise Appeals, who accepting the cause shown by the assessee set aside the order of the assessing authority imposing penalty. In pursuance to the said order the penalty paid was also refunded. The revenue challenged the said order of the Appellate Commissioner before the Tribunal. The Tribunal set aside the order of the Appellate Commissioner on the ground that once suppression of facts is established which do not constitute sufficient cause for non-payment of duty and interest the penalty is liable to be imposed under Sections 76 and 78 of the Act even though the duty and interest is paid even before the issue of show-cause notice. Aggrieved by the said order the assessee is before us.

3. Learned counsel for the assessee submitted that when once the duty and interest is paid even before issue of show cause notice by virtue of sub-section (3) of Section 73 of the Act, authorities could not have initiated proceedings much less levied penalty and therefore, he submits, the order passed by the Tribunal required to be set aside.

4. Per contra learned counsel for the revenue submitted that sub-section (3) of Section 73 of the Finance Act has no application to a case of suppression of facts, wilful misstatement and therefore, the assessing authority as well as the Tribunal were justified in not granting the benefit to the assessee under sub-section (3) of Section 73 and levying penalty.

5. From the material on record, it is clear that the assessee registered himself as a service provider under the Act as far back as 2002 thereafter he has filed returns regularly. Therefore, he is aware of the liability to pay tax. On the ground that some of the subscribers did not pay the money due to him he has not remitted any service tax in respect of money which he has not received. When the authorities wrote to him seeking clarification, promptly he replied by giving number of subscribers, amount payable by each one of them and amount paid by them and also requested the authorities to compute the differential duty so that he would pay the duty with interest. To that extent he has shown his bona fides. When the authorities computed the lax payable with interest and intimated him, promptly he has paid the said amount. However, in order to demonstrate that the reason for non-payment of tax was non-receipt of the subscription from the subscribers, he has not produced any material. It is because he has not maintained any records. Not maintaining records cannot constitute a sufficient

cause u/s 80 to avoid the liability to pay penalty. Therefore, once he has registered himself, filed returns, aware of the liability under the Act, the returns which he filed did not truly represent the facts which constituted a wilful mistake. Sub-section (4) of Section 73 expressly provides the benefit of sub-section (3) of Section 73 is not attracted to a case falling under sub-section (4). Therefore, the contention of the assessee that he is not liable to pay penalty as he has paid the differential duty with interest before issue of show-cause notice is unsustainable. At the same time it is now well-settled that the liability cannot be imposed both under sections 76 and 78. Therefore, in this case the liability to pay penalty is only u/s 78. In fact the proviso to section 78 makes it very clear that if penalty is payable under this Section, the proviso to Section 76 shall not apply. Thereby no penalty could be imposed both under Sections 76 as well as 78. Therefore, in this case the penalty is to be construed u/s 78. To that extent the appeal succeeds. Once Section 78 is attracted, proviso to Section 78 makes it clear, a person who is liable to pay penalty in addition to payment of tax and interest, if he pays the said tax and interest within 30 days from the date of determination of the liability by way of an order the penalty payable is only 25%. This statutory provision has been ignored both by the Assessing Authority as well as by the Tribunal.

6. Admittedly, in the instant case of differential duty and the interest payable thereon has been paid even before the institution of the proceedings, i.e., prior to show cause notice itself. Therefore, as the payment is made even anterior to the date of the order the liability payable is to be restricted to only 25%.

Hence, we pass the following order:

ORDER

(i) Appeal is partly allowed.

(ii) The order of the Tribunal and the Assessing Authority is modified to the extent by holding that the penalty payable is only 25% of what is levied by the Assessing Authority.