

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
CHANDIGARH

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REGIONAL BENCH – COURT NO. 1

**Service Tax Appeal No. 814 of 2011**

[Arising out of Order-in-Appeal No.18/CE/A/CHD/2011 dated 21.02.2011 passed by the Commissioner (Appeals), Customs & Central Excise, Chandigarh]

**M/s Prime Cyber**

2238/86A, Thakurdwara,  
Opposite CAT-III, Manimajra,  
Chandigarh

**: Appellant (s)**

Vs

**The Commissioner of Central  
Excise- Chandigarh-I**

Central Revenue Building  
Sector-17C, Chandigarh-160017

**: Respondent (s)**

APPEARANCE:

None for the Appellant

Shri Ravinder Jangu, Authorised Representative for the Respondent

**CORAM :**

**HON'BLE Mr. S. S. GARG, MEMBER (JUDICIAL)**

**HON'BLE Mr. P. ANJANI KUMAR, MEMBER (TECHNICAL)**

**FINAL ORDER No.60212/2023**

Date of Hearing:27.06.2023

Date of Decision:21.07.2023

**Per : P.ANJANI KUMAR**

The officers of Preventive Branch of Central Excise, Chandigarh investigated certain Cable TV Operators (CTOs) who were appointed by M/s SIFY to provide internet service to customers through cable; it was revealed that the CTOs have installed necessary infrastructure for the providing of service; M/s SIFY were paying commission to the CTOs on the basis of a fixed percentage of amount received from the ultimate users of broadband; the appellant was one of the CTOs investigated. It appeared to the Department that the CTOs are

providing "Business Auxiliary Services" to M/s SIFY and as such, they are liable to pay service tax. Two show-cause notices dated 04.12.2007 were issued to the appellants, demanding a service tax of Rs. 7,694/- and Rs.95,376/-, invoking extended period; the same was confirmed by the OIO dated 31.08.2009. On an appeal filed by the appellants, Commissioner (Appeals) has reduced the demand confirmed to Rs.57,407/- along with penalty under Sections 76 & 78 of Finance Act, 1994. Hence, this appeal.

2. None for the appellant. Learned Authorized Representative for the Department reiterates the findings of OIO and relies on the case of *Citi Cable Opera- 2020 (41) GSTL 506 (Tri. Chennai)* and this Bench vide *Final Order No.60123/20203 dated 11.05.2023*.

3. Heard the learned Authorized Representative and perused the records of the case. We find that the appellants have accepted the duty liability of Rs.57,407/- and contested the imposition of penalties; they have, in fact, deposited total duty of Rs.99,769/- vide Challan dated 1<sup>st</sup> October, 2009. We find that the issue is no longer *res integra* having been decided by the Tribunal in the case of *City Cable (supra)*. We find that though the issue has been decided in favour of the Revenue, the appellant's contention on penalty need to be examined.

4. Hon'ble Punjab & Haryana High Court in the case of *Pannu Property Dealers-2011(24) STR 173 (P&H)* (Appeal No. ST/13/2010) has held as follows:

*"We are of the view that even if technically, scope of Sections 76 and 78 of the Act may be different, as*

*submitted on behalf of the revenue, the fact that penalty has been levied under Section 78 could be taken into account for levying or not levying penalty under Section 76 of the Act. In such situation even if reasoning given by the appellate authority that if penalty under Section 78 of the Act was imposed, penalty under Section 76 of the Act could never be imposed may not be correct, the appellate authority was within its jurisdiction not to levy penalty under Section 76 of the Act having regard to the fact that penalty equal to service tax had already been imposed under Section 78 of the Act. This thinking was also in consonance with "the amendment now incorporated though the said amendment may not have been applicable at the relevant time. Moreover, the amount involved is Rs.51026/- only."*

5. Though, the Hon'ble High Court did not categorically hold that the imposition of penalty under Section 76 and Section 78 separately is not mutually exclusive prior to 10.05.2008, Hon'ble High Court has certainly held that the Appellate Authority was within its right to hold that the penalty is mutually exclusive and in the spirit of the amendment. While the amount involved in the above case was Rs.51,026/-, the amount involved in the instant case is about half that amount. Therefore, in deference to the jurisdictional High Court's order, we find that penalty under Section 76 and 78 can be seen to be mutually exclusive even before the amendment.

6. Moreover, it was the plea of the appellants that the benefit of Section 80 of the Finance Act, 1994 was not given to them. Section 80 of the Finance Act, 1994 reads as under:

*80. Penalty not to be imposed in certain cases  
Notwithstanding anything contained in the provisions of Section 76 [section 77 or section 78], no penalty shall be imposable on the assessee for any failure referred to in the said provisions if the assessee*

*proves that there was reasonable cause for the said failure.*

7. We find that in the facts and circumstances of the case and looking into the fast changes that were coming in the Service Tax law during the relevant period, it can be concluded that the appellant being a small operator had no wherewithal to keep track of the law and thus, the applicability of the Service Tax to him, more so looking into the fact that the main cable operator M/s SIFY had discharged Service Tax on the entire amount collected from the customers, there are reasons to believe that there were sufficient reasons for the appellant in not discharging the applicable Service Tax. Looking into the conduct of the appellants in depositing the tax with interest and 25% penalty the provisions of Section 80 are invited and the benefits of Section 80 can be extended to the appellants. Thus, we find that the penalties imposed are not sustainable.

8. In view of the above, we set aside the penalties imposed and the appeal is partially allowed to that extent.

*(Pronounced in the open Court on 21/07/2023)*

**(S. S. GARG)**  
MEMBER (JUDICIAL)

**(P. ANJANI KUMAR)**  
MEMBER (TECHNICAL)