

**Pioneer Agencies Vs. Cce**

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**SooperKanoon Citation :** [sooperkanoon.com/46926](http://sooperkanoon.com/46926)

**Court :** Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

**Decided On :** Jan-31-2008

**Judge :** P Das

**Appellant :** Pioneer Agencies

**Respondent :** Cce

**Judgement :**

1. The appellants filed this appeal against the revised order passed by the Commissioner of Central Excise whereby the adjudication order was revised and the penalty under Sections 76 and 78 of the Finance Act, 1994 was enhanced.
2. The relevant facts in brief are that the appellants are engaged in the business of selling of recharge coupons of mobile phones. They obtained registration on 31.10.04 under the nature of service of 'Business Auxiliary Service'. They paid tax on 20<sup>th</sup> July, 2005 and interest on 23<sup>rd</sup> August, 2005 for the period 1<sup>st</sup> July, 2003 to 31<sup>st</sup> March, 2004. The adjudicating authority took a lenient view under Section 80 of the Finance Act, 1994 and imposed penalty of Rs. 100/- each under Sections 76 and 77 of the Finance Act. The Commissioner by the impugned order, revised the penalty of Rs. 98,900/- under Section 76 and Rs. 1,94,920/- under Section 78 of the said Act.
3. The learned Advocate submits that the appellant is engaged in the small business of buying and selling of recharge coupons of mobile phones. There is a dispute of levy of tax on such activities.

Therefore, there is a delay in payment of tax. He relied upon the following decisions: *South East Corporation v. CCE 4*. The learned DR reiterates the finding of the Commissioner. He relies upon the decision of Hon'ble Supreme Court in the case of *Bharat Sanchar Nigam Ltd v. Union of India* reported in 2006 (2) STR 161. He submits that the appellants did not explain the reasons for delay in payment of tax.

5. After hearing both sides and on perusal of the record, I find that the Tribunal in the case of *South East Corporation (supra)* held that purchase and sale of sim cards are not amounting to business auxiliary service. Further, the Tribunal on identical issue in the case of *Renee Telepoint (supra)* set aside the penalty under Section 78 of the Act and penalty under Section 75-A of the Act to only Rs. 500/- was imposed.

The Division Bench of the Tribunal in the case of *Steel India (supra)* held that buying and selling are separate from being a commission agent and prima facie, the demand is not sustainable and stay application was allowed.

6. Thus, it is apparent that the levy of tax on the buying and selling of sim cards is in dispute. The Hon'ble Karnataka High Court in the case of *Sunitha Shetty (supra)* held that Commissioner was not justified in revising the order passed by the Deputy Commissioner as he has exercised his discretion conferred on him under Section 80 of the said Act. The learned DR relied upon the decision of the Hon'ble Supreme Court in the case of *BSNL Ltd (supra)* which is related to imposition of sales tax on telephone communication service.

7. I find that in the present case, the appellant had not disputed the liability of tax and therefore, the decision cited by the learned DR is not relevant herein. The issue involved in this case is to decide as to whether in this situation, penalty is leviable. I find that the levy of tax is still in dispute as revealed from the various decisions of the Tribunal. In any event, the appellants have already deposited the tax.

Therefore, the Adjudicating Authority has rightly exercised his power under Section 80 of the said Act. Accordingly, the impugned order of the Commissioner

is set aside and the order of the Assistant Commissioner is restored. The appeal is allowed with consequential relief.

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