IN THE HIGH COURT OF JUDICATURE AT BOMBAY NAGPUR BENCH, NAGPUR.

CENTRAL EXCISE APPEAL NO. 2 OF 2016

The Commissioner, Central Excise, Commissionerate Nagpur-II

-vs-

M/s. Roshan R. Jaiswal, Gondia

Office notes, Office Memoranda of Coram, appearances, Court's orders or directions and Registrar's orders.	Court's or Judge's Orders.

Mr.Sharad Bhattad and Mr. Kunal Nalamwar, counsel for the appellant.
Mr.Amit Agrawal, counsel for the respondent.

CORAM : SMT. VASANTI A. NAIK & MRS. SWAPNA JOSHI, JJ.

DATE : 12.07.2016.

By this Central Excise Appeal, the appellant-Department challenges the order of the Customs, Excise and Service Tax Appellate Tribunal, dated 14/07/2015, so far as it discharges the respondent-Assessee of its liability to pay the penalty.

The respondent-Assessee was dealing in the sale of recharge coupons/vouchers of the Bharat Sanchar Nigam Limited and received certain amount from the Bharat Sanchar Nigam Limited towards commission. In respect of the transactions of the relevant years 2003 to 2008, a show cause notice was issued to the respondent-Assessee, asking it as to why the service tax should not be recovered from the respondent-Assessee along with the interest and penalty. The respondent-Assessee challenged the action of the appellant-Department in an appeal. The Appellate Authority held that the sale of recharge vouchers was not liable to service tax. Since the appeal of the respondent-Assessee was allowed, the appellant-Department filed the appeal before the Customs, Excise and Service Tax Appellate Tribunal. By the order, dated 14/07/2015, the Tribunal partly allowed the appeal of the appellant-Department and set aside the order of the Appellate Tribunal that the respondent-Assessee was not liable to service tax. The Tribunal, however, held by invoking the provisions of

Section 80 of the Finance Act, 1994 that though the respondent was liable to pay the service tax, the respondent-Assessee would not be required to pay the penalty. The order of the Tribunal so far as it rejects the appeal of the appellant-Department against the imposition of the penalty, is challenged in the present appeal.

On hearing the learned counsel for the appellant-Department and on a perusal of the orders, we find that there is no scope for interference with the order of the Tribunal in this appeal. The respondent-Assessee had discharged the entire services tax liability of about rupees nineteen lakhs, after the show cause notice was served on it and the same is appropriated by the Adjudicating Authority. The Tribunal found that the discharge of service tax liability on the sale of recharge coupons/vouchers from the telephone service provider was a highly contested issue and was pending before the Higher Judicial Forum, during the relevant period. The Tribunal, therefore, recorded a finding of fact that it was possible for the respondent-Assessee to entertain a *bona fide* belief that it is not liable to service tax. The submission made on behalf of the appellant-Department that, as the respondent-Assessee had secured the service tax registration in the year 2004 and had not paid the service tax despite demands, the Department had rightly held that the respondent-Assessee was well aware that it was liable to pay the service tax, is not liable to be accepted, as even according to the Tribunal, the issue of the liability to pay the service tax on the sale of recharge vouchers/coupons was pending before the Higher Judicial Forum, during the relevant period. The counsel for the appellant-Department has heavily relied on the judgments of the Hon'ble Supreme Court, reported in ***AIR 2006 SC 1383 (Bharat Sanchar Nigam Ltd. v. Union of India)*** and ***(2011) 12 SCC 608 (Idea Mobile Communication Ltd. v. CCE & Customs)*** to substantiate the submission that service tax is payable even on transactions by which mobile phone connections are enjoyed. We, however, find that the actual issue involved in this case was not involved in the decision rendered by the Hon'ble Supreme Court in the year 2006 and the other decision relied on by the counsel for the

Department is rendered by the Hon'ble Supreme Court in 2011. Admittedly, the relevant period, during which the respondent-Assessee did not pay the service tax, is 2003 to 2008. A Clear finding of fact has been recorded by the Tribunal that the sale of recharge coupons/vouchers purchased from the telephone service provider was a seriously contested issue before the Higher Judicial Forum at the relevant time and hence, there was reason to believe that the respondent-Assessee *bona fide* believed that the same was not payable. Also, we do not find from the material on record that the registration of the respondent-Assessee to service tax in the year 2004 is referrable only to the sale of recharge vouchers/coupons and not to anything else. We do not, therefore, find that the Tribunal committed any illegality in invoking the provisions of Section 80 of the Finance Act, 1994 for discharging the respondent-Assessee of the liability to pay the penalty.

Since no substantial question of law arises for determination in this Central Excise Appeal, we dismiss the same with no order as to costs.

JUDGE **JUDGE**

KHUNTE