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(2010) 01 MAD CK 0124

In the Madras High Court

Case No : Writ Petition No. 19089 of 2009 and M.P. No. 1 of 2009

Abaqus Engineering (I) Ltd. APPELLANT

Vs

Additional Commissioner RESPONDENT

Date of Decision : 18-01-2010

Acts Referred:

Finance Act, 1994 — Section 65, 73(1), 75, 76, 78
Finance Act, 2006 — Section 66A
Taxation of Services (Provided from Outside India and Received in India) Rules, 2006 — Rule 3

Citation : (2010) 29 VST 244

Hon'ble Judges : P. Jyothimani, J

Bench : Single Bench

Advocate : R.L. Ramani for B. Raveendran, for the Appellant; S. Yashwanth, for the Respondent

Judgement

P. Jyothimani, J.—Admit. By consent of the learned Counsel on either side, the writ petition itself is taken up for final disposal.

2. The writ petition is directed against the show-cause notice issued by the respondent dated August 14, 2009, by which the respondent has directed the petitioner to show cause as to why an amount of Rs. 38,05,867 should not be demanded from them under proviso to Section 73(1) of the Finance Act, 1994 towards service tax apart from the interest chargeable u/s 75 of the Finance Act, 1994 and penalty under Sections 76 and 78 of the Finance Act, 1994.

3. The petitioner is a dealer in computer software and an authorised dealer of M/s. Abaqus Inc., USA and the sole distributer of the ABAQUS software in India, which is developed only in the United States.

4. Under the Taxation of Services (Provided from Outside India and Received in India) Rules, 2006, the second proviso has come into effect by the notification No. 6/2008-ST dated March 1, 2008. Rule 3 provides for taxable service provided from outside India and received in India and states as follows:

Provided further that where the taxable services referred to in Sub-clauses (zzg), (zzh) and (zzi) of Clause (105) of Section 65 of the Act, are provided in relation to any goods or material or any immovable property, as the case may be, situated in India at the time of provision of service, through internet or an electronic network including a computer network or any other means, then such taxable service, whether or not performed in India, shall be treated as the taxable service performed in India.

5. According to the petitioner, the service has to be treated as taxable service in India and the petitioner is not liable for service tax as it is shown in the impugned show-cause notice issued by the respondent.

6. The learned senior counsel for the petitioner also brings to the notice that under similar circumstances, a Division Bench of the Bombay High Court in Indian National Shipowners Association Vs. Union of India (UOI), has held that the respondents have no authority to levy the service tax and the relevant portion of the order is as follows (at page 73 of VST):

26. It appears that a similar provision in the rules was made applicable by the Government in relation to the clearing agents by making customers of the clearing agent liable for levy of service tax. That question has been decided by the Supreme Court by its judgment in the case of Laghu Udyog Bharati and Another Vs. Union of India and Others, and the Supreme Court has clearly laid down that the imposition of the service tax is on the persons rendering the services and by making a provision in the Rules, levy of tax cannot be shifted to the recipients of the services and the rule framed, which brought about this situation, has been declared by the Supreme Court to be invalid. The law laid down by the Supreme Court in its judgment in Laghu Udyog Bharati and Another Vs. Union of India and Others, is squarely applicable to Rule 2(1)(d)(iv), which is relied on in this case. It appears that it is first time when the Act was amended and Section 66A was inserted by the Finance Act, 2006 with effect from April 18, 2006, the respondents got legal authority to levy service tax on the recipients of the taxable service. Now, because of the enactment of Section 66A, a person who is resident in India or a business in India becomes liable to be levied service tax when he/it receives service outside India from a person who is non-resident or is from outside India. Before enactment of Section 66A it is apparent that there was no authority vested by law in the respondents to levy service tax on a person who is resident in India, but who receives services outside India. In that case till Section 66A was enacted a person liable was the one who rendered the services. In other words, it is only after enactment of Section 66A that taxable services received from abroad by a person belonging to India are taxed in the hands of the Indian residents. In such cases, the Indian recipient of the taxable services is deemed to be a service provider. Before enactment of Section 66A, there was no such provision in the Act and therefore, the respondents had no authority to levy service tax on the members of the petitioners-association.

7. The same was of the view taken by the Delhi High Court in United Ltd. v.

Commissioner of Service Tax, Delhi reported in [2009] 15 STR 385 (Delhi). It is also not in dispute that as against the judgment of the Division Bench of the Bombay High Court, a SLP was filed before the Supreme Court and the same stood dismissed by the judgment of the Division Bench in Union of India v. Indian National Ship Owners reported in 2009 TIOL 129 SC ST.

8. In such circumstances, according to the learned Counsel for the petitioner, the impugned show-cause notice deserves to be set aside.

9. Be that as it may, now as it is stated by the learned Counsel for the petitioner, the legal position is clear as per the Rules. Accordingly, the writ petition is disposed of with a direction to the petitioner to give objections to the impugned show-cause notice of the respondent dated August 14, 2009 in the light of the legal position as stated above and if the petitioner submits such objections within a period of one week from the date of receipt of a copy of this order, the respondent shall pass final orders taking note of the above legal position within a period or four weeks thereafter. No costs Consequently connected M.P. No. 1 of 2009 is closed.

