(2014) 08 MAD CK 0049

In the Madras High Court

Case No : C.M.A. No. 1293 of 2014

Arafaath Travels Pvt. Ltd. APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 22-08-2014

Acts Referred:

Finance Act, 1994 — Section 65, 65(105)(zzb), 65(19), 67(1)(i), 73(1)

Citation : (2015) 38 STR 934 : (2015) 85 VST 174

Hon'ble Judges : R. Sudhakar, J;G.M. Akbar Ali, J.

Bench : Division Bench

Advocate : Arvind P. Datar, SC for S. Raghunathan, for the Appellant; K. Sundareswaran, for the Respondent

Judgement

R. Sudhakar, J.?The present appeal has been preferred against, the Common Order Nos. 454 & 455/2010, dated 20-9-2010, passed by the 2nd respondent in Stay Application Nos. ST/S/206, 211/2010 in Appeal Nos. ST/354, 359/2010 [2011 (21) S.T.R. 61 (Tribunal)]. The assessee has filed this appeal against the order of the Tribunal directing pre-deposit, contending that the conditions imposed by the Tribunal for the purpose of hearing of the appeal will defeat, the very purpose of pursuing the appeal as the condition imposed is onerous and the Tribunal has not considered the prima facie case and financial hardship pleaded by the appellant.

2. The assessee has raised the following questions of law for consideration of this Court:-

"(i) Whether the 2nd respondent Tribunal is justified in directing pre-deposit of the amounts, when the services rendered by the appellant both under the Passenger Sales Agreement and the Cargo Sales Agreement would come within the purview of export of services and, hence, not taxable.

(ii) Whether the 2nd respondent is justified in its order which has been passed overlooking the fact that directing the appellant to pay Service Tax on the commission and incentives earned by IATA agents would amount to double taxation since the IATA agents have already effected Service Tax on the same under the category Business Auxiliary Services, and raised debit memos on SAA (the service receiver abroad) for reimbursement, of the amounts paid by them towards Service Tax.

(iii) Whether the 2nd respondent would be correct, in directing pre-deposit of the amounts despite observing that the issue as to whether incentives paid to the cargo agents are to be included in the appellant''s taxable value is debatable.

(iv) Whether the 2nd respondent''s order would be sustainable since the show cause notice bearing No. 530 of 2009 for the period April, 2008 to March, 2009 has been issued on 19-10-2009 which is beyond the stipulated period of one year from the date when the Service Tax is allegedly to have been paid and hence the demand is barred by limitation in terms of Sections 73(1) and 73(6)(i)(c) of the Finance Act.

(v) Whether the 2nd respondent is justified in directing the pre-deposit without taking into consideration the provisions contained in the Export of Services Rules, 2005 and the relevant statutory provisions and circulars as per which, Service Tax would not be payable in respect of a taxable service under clause (105) of Section 65 of the Finance Act, 1994, when there is (a) export of services provided from India and used outside Indian and (b) the payment for services which is provided outside India, is received by the Service Provider/Assessee in convertible foreign exchange would be exempted from payment of Service Tax and which criteria is met with by the appellant.

(vi) Whether the 2nd respondent would be correct in directing pre-deposit of the amounts since SAA, who is the servicer receiver, is located outside India, the benefits accrue to SAA outside India, the agreement has been executed at Jeddah, Saudi Arabia, the appellant is required to obtain instructions only from SAA, Jeddah and consequently the hiring/order for the appellant''s services has been made by SAA from Jeddah and hence the service has been provided from India and used outside India which would be export of services and hence not taxable.

(vii) Whether the 2nd respondent would be correct in directing pre-deposit of amounts since the overriding commission for the services provided by the appellant both towards passenger sales and cargo sales, is by way of deductions made by the appellant, while remitting the sale proceeds to the overseas service recipient, viz., SAA and which deductions in the appellant''s hands would be deemed to be in foreign currency and hence the service is to be treated as export of service under Rule 3(3) of the Export of Services Rules and hence exempted from Service Tax.

(viii) Whether the 2nd respondent is justified in directing pre-deposit without considering the provisions contained in Section 67(1)(i) of the Finance Act as per which Service Tax chargeable on any taxable service with reference to its value shall, in a case where the provision of service is for a consideration in money, be the gross amount charged by the service provider for such service provided or to be provided by him which would therefore not include the incentive and commission paid to the IATA agents as a part of the appellant''s taxable value."

3. The appellant-assesses in this case is a general sales agent, in respect of cargo sales and passenger sales under an agreement with Saudi Arabian Airlines Corporation (for short ''SAA'') based on General Sales Agency Agreement dated 1-5-1984 and 1-10-2004. Based on the said agreement, the appellant engaged in direct sales of air tickets and from the year 1997 they have been remitting Service Tax on the commission earned by them on such direct sales. The appellant-assessee has registered itself with the Service Tax department in this regard.

4. The issue, which now arises for consideration is with regard to the commission received by the appellant, which is termed as ''overriding commission'' in respect of passenger sales and cargo sales and commission paid to IATA agents and incentive paid to IATA agents. It is the case of the appellant that major part of the passenger tickets are sold through IATA agents and the sales effected by the IATA agents are effected through bank settlement plan, whereby the IATA agents render sales account of their sales to SAA after deducting the incentive amount and remit the balance proceeds to the bank and the bank, in turn, remits the same to SAA. Insofar as the cargo sales is concerned, IATA cargo agents deduct their commission and incentive payable to them on the cargo sales and remit the balance amount to the appellant from out of which the appellant deducts 2.5% towards overriding commission and pay over the balance to SAA.

5. In regard to these two different transactions, the department was of the view that those amounts are liable for Service Tax under the category of ''Business Auxiliary Services'' falling under Section 65(19) r/w Section 65(105)(zzb) of the Finance Act, 1994. Therefore, show cause notices were issued for the earlier period of time, and adjudicated. Against those orders the assessee has preferred appeals, which are pending. Insofar as the present appeal is concerned, it relates to the period 1-4-2007 to 31-3-2009.

6. The stand of the appellant is primarily based on the ground that there was no case of suppression stating that the show cause notice No. 336/2008, dated 22-2-2008 was issued and adjudicated and, the question of suppression will not arise in view of the earlier show cause notice No. 91/2006, dated 17-10-2006 and 215/2007 dated 23-10-2007, which were also adjudicated upon. Reliance was placed on the decision of the Supreme Court in Nizam Sugar Factory Vs. Collector of Central Excise, A.P., , wherein it has been held that subsequent notice on suppression of same or similar facts cannot be issued if there is knowledge in the earlier proceedings.

7. On merits, it is the stand of the appellant that it is performing export service and, therefore, no Service Tax is payable under clause (105) of Section 65 of the

Finance Act, 1994, for any such export services provided outside India, for which reliance is placed on the provisions of Rule 3 of Export of Services Rules, 2005 and Circular No. 111/05/2009-S.T., dated 24-2-2009 .

8. That apart, it is the appellant''s stand that even assuming that the overriding commission of 3% in respect of passenger sales for the two periods, viz., 1-4-2007 to 31-3-2008 and 1-4-2008 to 31-3-2009 and overriding commission of 2.5% in respect of cargo sales from 1-4-2007 to 31-3-2008 and 1-4-2008 to 31-3-2009, would not fall under export of taxable service, the effect of Service Tax liability insofar as overheads, viz., 5% commission paid by SAA to IATA agents for the relevant periods and the incentive paid to IATA agents for the very same period should be excluded for the purpose of Service Tax, on the ground that those amounts have already suffered Service Tax liability at the hands of the IATA agents, who are also, according to the appellant, registered payers of Service Tax. In such view of the matter, the Tribunal, on a brief order, without discussing the prima facie case, has directed the appellant to pre-deposit a sum of Rs. 35 lakhs from and out of the total amount of Rs. 1,31,45,172/-, demanded as Service Tax together with interest and penalty. This order of the Tribunal directing pre-deposit of a sum of Rs. 35 lakhs would cause undue hardship to the appellant, as it has already discharged the Service Tax liability insofar as direct sales is concerned and this issue has to be decided by the Tribunal on merits.

9. Heard Mr. Arvind P. Datar, learned Senior Counsel appearing for the appellant and Mr. K. Sundareswaran, learned Standing Counsel appearing for the respondents.

10. Before deciding on the submissions as advanced by the appellant, it would be useful to advert, to the relevant rules governing the aspect of export of services outside India and also the relevant circulars issued by the Government of India from time to time. Rule 3 of the Export of Services Rules, 2005, which is, pertinent to the case on hand, clearly lists out the export services for the purpose of tax. For better clarity and easy reference, the said rule is extracted hereunder:-

3. Export of taxable service. - (1) Export of taxable services shall, in relation to taxable services.

(i) specified in 9[sub-clauses (d), (m)] (p), (q), (v), (zzq), (zzza), (zzzb), (zzzc), (zzzh), (zzzr), (zzzy), (zzzz), (zzzza), [(zzzza), [(zzzzm), (zzzzu), (zzzzv) and (zzzzw)]] of clause (105) of Section 65 of the Act, be provision of such services as are provided in relation to an immovable property situated outside India?

(ii) specified in sub-clauses (a), (f), (h), (i), (j), (l), (n), (o), (w), (z), (zb), (zc), (zi), (zj), (zn), (zo), (zq), (zr), (zt), (zu), (zv), (zw), (zz), (zza), (zzc), (zzd), (zzf), (zzg), (zzi), (zzl), (zzm), (zzo), (zzt), (zzv), (zzw), (zzx), (zzy), (zzzd), (zzze), (zzzf), (zzzzg), (zzzzh), (zzzzi), (zzzzk), (zzzzl) and (zzzzo) of clause (105) of Section 65 of the Act, be provision of such services as are performed outside India:

Provided that where such taxable service is partly performed outside India, it shall be treated as performed outside India:

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 outside 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 outside India, shall be treated as the taxable service performed outside India:]

(iii) specified in clause (105) of Section 65 of the Act, but excluding-

(a) sub-clauses (zzzo) and (zzzv);

(b) those specified in clause (i) of this rule except, when the provision of taxable services specified in sub-clauses 8(d), (zzzc), (zzzr) and (zzzzm)] does not relate to immovable property; and

(c) those specified in clause (ii) of this rule, when provided in relation to business or commerce, be provision of such services to a recipient located outside India and when provided otherwise, be provision of such services to a recipient located outside India at the time of provision of such service:

Provided that where such recipient has commercial establishment or any office relating thereto, in India, such taxable services provided shall be treated as export of service only when order for provision of such service is made from any of his commercial establishment or office located outside India.

Provided further that where the taxable service referred to in sub-clause (zzzzj) of clause (105) of Section 65 of the Act is provided to a recipient located outside India, then such taxable service shall be treated as export of taxable service subject to the condition that the tangible goods supplied for use are located outside India during the period of use of such tangible goods by such recipient.

(2) The provision of any taxable service specified in sub-rule (1) shall be treated as export of service when the following conditions are satisfied, namely:-

(a) such service is provided from India and used outside India; and

(b) payment for such service provided outside India is received by the service provider inconvertible foreign exchange."

11. Similarly, Circular No. 111/05/2009-S.T., dated 24-2-2009 of the Government of India, Ministry of Finance, on which much stress has been placed by the learned Senior Counsel for the appellant, wherein clarity is given by the Government of India in respect to tax on services performed outside India. For proper appreciation, the said circular is extracted hereunder for better clarity:-

"3. It is an accepted legal principle that the law has to be read harmoniously so as to avoid contradictions within a legislation. Keeping this principle in view, the meaning of the term ''used outside India'' has to be understood in the context of the characteristics of a particular category of service as mentioned in sub-rule (1) of Rule 3. For example, under Architect Service (a Category I service [Rule 3(1)(i)]), even if an Indian architect prepares a design sitting India for a property located in U.K. and hands it over to the owner of such property having his business and residence in India, it would have to be presumed that service has been used outside India. Similarly, if an Indian event, manager (a Category II service [Rule 3(1)(ii)] arranges a seminar for an Indian company in U.K., the service has to be treated to have been used outside India because the place of performance is U.K., even though the benefit of such a seminar may flow back to the employees serving the company in India. For the services that fall under Category III [Rule 3(1)(iii)], the relevant factor is the location of the servicer receiver and not the place of performance. In this context, the phrase ''used outside India'' is to be interpreted to mean that the benefit of the service should accrue outside India. Thus, for Category III services [Rule 3(1)(iii)], it is possible that export of service may take place even when all the relevant activities take place in India so long as the benefits of these services accrue outside India. In all the illustrations mentioned in the opening paragraph, what is accruing outside India is the benefit in terms of promotion of business of a foreign company. Similar would be the treatment for other Category III [Rule 3(1)(iii)] services as well."

12. Keeping in mind the above rule and the circular issued by the Government of India, this Court has analysed the case on hand threadbare. Even if we accept the plea of Service Tax liability in respect of overriding commission relatable to passenger sales and cargo sales is concerned, at best it could be only Rs. 60 lakhs approximately as could be seen from the tabulation, which is extracted hereinbelow:-

13. In the above circumstances, we find much force in the plea of the appellant that Circular No. 111, dated 24-2-2009 issued by the Government of India, Ministry of Finance, provides that if the benefits of the service accrues outside India, it will be export of taxable service. Furthermore, the issue of 5% commission paid to IATA agents and incentive paid to IATA agents, who have already discharged Service Tax liability, for the purpose of Service Tax, would have to be considered on merits so as to exclude those substantial amounts from out of the purview of tax liability mulcted on the appellant. The Tribunal has not considered the calculation as probable amount as shown above. This Court, prima facie feels that the Tribunal should have taken the above factors into consideration while ordering pre-deposit. The plea that the pre-deposit order is onerous, and would cause undue hardship on a running business organization is, therefore, tenable. Further, the appellant has also pleaded that such pre-deposit will erode the working capital of the company and if the amount is directed to be paid, it will seriously jeopardize the running business of the appellant, which is a travel agent, and, its business would almost come to a standstill.

14. At this juncture, it is apposite to refer to a decision of the Supreme Court in Benara Valves Ltd. and Others Vs. Commissioner of Central Excise and Another, , wherein it has been held as under:

"8. It is true that on merely establishing a prima facie case, interim order of protection should not be passed. But if on a cursory glance it appears that the demand raised has no legs to stand on, it would be undesirable to require the assessee to pay full or substantive part of the demand. Petitions for stay should not be disposed of in a routine manner unmindful of the consequences flowing from the order requiring the assessee to deposit full or part of the demand. There can be no rule of universal application in such matters and the order has to be passed keeping in view the factual scenario involved. Merely because this Court has indicated the principles that does not give a licence to the forum/ authority to pass an order which cannot be sustained on the touchstone of fairness, legality and public interest. Where denial of interim relief may lead to public mischief, grave irreparable private injury or shake a citizen''s faith in the impartiality of public administration, interim relief can be given.

9. It has become an unfortunate trend to casually dispose of stay applications by referring to decisions in Siliguri Municipality and Others Vs. Amalendu Das and Others, and Assistant Collector of Central Excise, Chandan Nagar, West Bengal Vs. Dunlop India Ltd. and Others, cases without analysing factual scenario involved in a particular case.

10. Section 35F of the Act reads as follows:

"35F. Deposit, pending appeal, of duty demanded or penalty levied. - Where in any appeal under this Chapter, the decision or order appealed against relates to any duty demanded in respect of goods which are not under the control of Central Excise Authorities or any penalty levied under this Act, the person desirous of appealing against such decision or order shall, pending the appeal, deposit, with the adjudicating authority the duty demanded or the penalty levied:

Provided that where in any particular case, the Commissioner (Appeals) or the Appellate Tribunal is of opinion that the deposit of duty demanded or penalty levied would cause undue hardship to such person, the Commissioner (Appeals) or, as the case may be, the Appellate Tribunal, may dispense with such deposit subject to such conditions as he or it may deem fit to impose so as to safeguard the interests of the Revenue:

Provided further that, where an application is filed before the Commissioner (Appeals) for dispensing with the deposit of duly demanded or penalty levied under the first proviso, the Commissioner (Appeals) shall, where it is possible to do so, decide such application within thirty days from the date of its filing."

11. Two significant expressions used in the provisions are "undue hardship to such person" and "safeguard the interests of the Revenue". Therefore, while dealing with the application twin requirements of considerations, i.e.,

consideration of undue hardship aspect and imposition of conditions to safeguard the interests of the Revenue have to be kept in view.

12. As noted above there are two important expressions in Section 35F . One is undue hardship. This is a matter within the special knowledge of the applicant for waiver and has to be established by him. A mere assertion about undue hardship would not be sufficient. It was noted by this Court in S. Vasudeva Vs. State of Karnataka and others, that under Indian conditions expression "undue hardship" is normally related to economic hardship. "Undue" which means something which is not merited by the conduct of the claimant, or is very much disproportionate to it. Undue hardship is caused when the hardship is not warranted by the circumstances.

13. For a hardship to be "undue" it must be shown that the particular burden to observe or perform the requirement is out of proportion to the nature of the requirement itself, and the benefit which the applicant would derive from compliance with it.

14. The word "undue" adds something more than just hardship. It means an excessive hardship or a hardship greater than the circumstances warrant.

15. The other aspect relates to imposition of condition to safeguard the interests of the Revenue. This is an aspect which the Tribunal has to bring into focus. It is for the Tribunal to impose such conditions as are deemed proper to safeguard the interests of the Revenue. Therefore, the Tribunal while dealing with the application has to consider materials to be placed by the assessee relating to undue hardship and also to stipulate conditions as required to safeguard the interests of the Revenue."

15. In the above circumstances, taking note of the prima facie case, financial hardship and balance of convenience, this Court feels that the pre-deposit of Rs. 35 lakhs as ordered by the Tribunal is liable to be modified. Accordingly, the order of Rs. 35 lakhs as pre-deposit ordered by the Tribunal is modified and the appellant is directed to deposit a sum of Rs. 15 lakhs. Though, the Court was of the view that eight weeks time could be granted to the appellant to deposit the sum of Rs. 15 lakhs, learned Standing Counsel appearing for the department vehemently urged that the Court may not grant more than four weeks for deposit of the amount, as the matter relates to the year 2010. The appellant, has not deposited any amount and, therefore, the time for deposit should be restricted to four weeks. On such submission made by the learned Standing Counsel for the respondent, learned Senior Counsel appearing for the appellant submitted that the appellant, will abide by any time frame as may be fixed by this Court and will deposit the amount as ordered by this Court within the said period.

16. Accordingly, for the foregoing reasons, this Court pass the following order:

(i) On the question of law raised, we are of the view that the Tribunal was not justified in ordering the pre-deposit in the manner stated in its order dated 20-9-2010;

(ii) Consequently, the order of the Tribunal dated 20-9-2010 is modified to the effect that the appellant shall make a pre-deposit of Rs. 15,00,000/- (Rupees fifteen lakhs only) towards pre-deposit on or before 21-11-2014 and subject to such compliance, as stated in the order of the Tribunal dated 20-9-2010, the pre-deposit of balance amount demanded shall remain waived and its collection shall stand stayed during the pendency of the appeal before the Tribunal; and

(iii) The notice of the Tribunal dated 8-10-2010 calling upon the appellant to report compliance of the stay order is set aside and the appeal is restored to the file of the Tribunal.

In the result, this appeal is ordered in the above terms. However, there shall be no order as to costs.

