

(2013) 02 BOM CK 0066

In the Bombay High Court

Case No : Central Excise Appeal (L) No. 35 of 2013

Central Railway

APPELLANT

Vs

Commissioner of C. Ex. and Cus.

RESPONDENT

Date of Decision : 08-02-2013

Acts Referred:

Finance Act, 1994 — Section 65(105)(zzg), 93(1)

Citation : (2013) 199 ECR 183 : (2014) 25 GSTR 441 : (2013) 31 STR 134 :
(2014) 70 VST 68

Hon'ble Judges : D.Y. Chandrachud, J;A.A. Sayed, J

Bench : Division Bench

Advocate : R.V. Desai and Surekh Kumar, for the Appellant; Pradeep S. Jetly and Jitendra B. Mishra, for the Respondent

Judgement

1. This Appeal is admitted on the following substantial question of law:

Whether in the facts and circumstances of the case and in law the Tribunal is justified in directing the Appellant to make a pre-deposit of 50% of the service tax adjudged within a period of eight weeks and report compliance by 11-2-2013?

By consent, the Appeal is taken up for hearing and final disposal.

2. This Appeal by the Central Railway arises from an order of the CESTAT on an application for stay of recovery of a demand.

3. The Central Railway has carried out maintenance and repairs of railway sidings owned by private parties. According to the Revenue, this constitutes a taxable service of the management and maintenance of repairs and services as defined in Section 65(105)(zzg) of the Finance Act, 1994 as amended, with effect from 16 June 2005. The demands in question were governed by two show cause notices. The first show cause notice was for 2005-06, 2006-07 and 2007-08, dated 13 October 2010. The second show cause notice was for 2010-11 and was dated 3 May 2011. Both the show cause notices were adjudicated upon. The dues on account of service tax are Rs. 2.51 crores under the first show cause

notice and Rs. 74.22 lakhs under the second show cause notice. The demand has been confirmed on adjudication. On an application for stay, the CESTAT has directed the Appellant to make a pre-deposit of 50% of the service tax and to report compliance.

4. Counsel appearing on behalf of the Appellant submits that by a Notification dated 21 December 2010, an exemption was provided in respect of management, maintenance or repair of railways. Hence, it has been urged that a waiver was necessary. Moreover, it has been urged that the dues of the Union Government are secure since, after all, it is the Union Ministry of Railways which has to pay the demand if it is found to be due and payable.

5. On the other hand, Counsel appearing on behalf of the Revenue supported the order of the Tribunal.

6. On 27 July 2009¹, the Central Government in the Ministry of Finance issued a Notification u/s 93(1) of the Finance Act, 1994 exempting the taxable service referred to in Section 65(105)(zzg) provided to any person by any other person in relation to management, maintenance or repair of roads, from the whole of the service tax leviable thereon. The earlier Notification was amended on 21 January 2010 to expand the scope of the exemption to cover, inter alia, the management, maintenance or repair of roads, bridges, tunnels, dams, airports, railways and transport terminals. In view of the exemption, prima facie, it appears that from 21 December 2010 the service provided for the management, maintenance or repair of railways stands exempted. The contention of the Appellant is that the work of management and repair of railway sidings owned by private parties is an incident of the maintenance and repair of the railway tracks. This, in our view, would raise prima facie a substantial question for consideration. Hence, insofar as the demand covered by the second show cause notice dated 3 May 2011 for 2010-11 is concerned (Rs. 74.22 lakhs), a complete waiver of deposit was warranted. That leaves the balance of the demand of Rs. 2.51 crores which relates to the period 2005-06 to 2007-08. This period is prior to the exemption notification. Having regard to the fact that the demand has been levied against the Union Ministry of Railways, we are of the view that the ends of justice would require that the extent of the deposit should be scaled down. At the same time, having evaluated the merits, prima facie, we are of the view that an absolute waiver for the earlier period is not warranted. No case of financial hardship has been urged at the hearing.

7. In the circumstances, we direct in this appeal that (i) there shall be a complete waiver of pre-deposit in respect of the demand for Rs. 74.22 lakhs governed by the show cause notice dated 3 May 2011 for the period 2010-11 as adjudicated; and (ii) as regards the balance of the demand for Rs. 2.51 crores for the period 2005-06 to 2007-08 governed by the show cause notice dated 13 October 2010 as adjudicated, the Appellant shall deposit an amount equivalent to 20% of the demand within a period of eight weeks from today.

8. The order of the Tribunal shall stand modified accordingly in these terms. The question of law accordingly stands answered. We clarify that our observations in this order are only confined to a prima facie evaluation for the purpose of the stay application and shall not come in the way of the final disposal of the appeal before the Tribunal on merits. The Appeal is disposed of. There shall be no order as to costs.

_____ 1. Notification No. 24/2009-Service Tax.