(2011) 01 KAR CK 0006

In the Karnataka High Court

Case No : C.E.A. No. 33 of 2010

Commissioner of C. EX. and S.T., Bangalore — APPELLANT

Vs

Micro Labs Ltd. — RESPONDENT

Date of Decision : 27-01-2011

Acts Referred:
Finance Act, 1994 — Section 65 (19), 66 A, 68 (2)

Citation : (2011) 22 STR 615 : (2011) 32 STT 390 : (2011) 43 VST 261

Hon'ble Judges : Ravi Malimath, J;N. Kumar, J

Bench : Division Bench

Advocate : Jeevan J. Neeralgi, for the Appellant; K.S. Ravi Shankar, for the Respondent

Final Decision : Dismissed

Judgement

N. Kumar, J.—This appeal is by the revenue challenging the order passed by the Tribunal holding that the service tax liability on the recipient of the services arises only from 18-4-2006 and therefore service tax liability imposed on the Assessee from 9-7-2004 to 31-3-2006 was set aside.

2. The Assessee is engaged in the activity of receiving taxable services under the category of Business Auxiliary Service as defined u/s 65(19) of Finance Act 1994 (hereinafter referred to as ''the Act''). In the course of business the Assessee had entered into an agreement with commission agents outside India who marketed/ distributed the pharmaceutical products belonging to the Assessee during the period from 9-7-2004 to 31-3-2006. For receiving such services the Assessee was paying remuneration in the form of commission to the agents outside India. The commission agents/service providers were non-residents or outside India or did not have offices in India. Therefore a show cause notice was issued calling upon the Assessee to discharge the service tax liability. An amount of Rs. 1,19,71,705/- was claimed as total value of the taxable service. In addition education cess and interest was also claimed and they were also called upon to show cause as to why penalty should not be imposed. The Assessee contended

that the service providers are providing service abroad. Hence the service providers did not attract levy of service tax and they have no intention to evade service tax in as much as they were under the bona fide belief that they were not liable to pay service tax for the aforesaid reasons. They denied the liability to pay tax, interest and penalty.

3. The assessing authority on a consideration of the aforesaid representation held that it is not in dispute that the Assessee is a receiver of taxable service from abroad. The Assessee had agreements with overseas commission agents who provided the service of distribution of pharmaceuticals belonging to the Assessee. For the aforesaid service provided by the overseas agent, commission was paid by the Assessee. The Assessee was a recipient of service provided from abroad. That the service providers had provided the service abroad is not legally tenable. The service was received by the Assessee in India and consumed in India. The service providers in the present case are admittedly non-resident/ from outside India and do not have any office in India. In such a case service tax liability is fastened on the recipient of service as prescribed under Rule 2(1)(d)(iv) of Service Tax Rules, 1994. Therefore, they fastened the liability to pay the service tax on the Assessee for the period earlier to 31-3-2006. They also imposed interest and penalty. Aggrieved by the said order the Assessee preferred an appeal to the Tribunal. The Tribunal relying on the judgment of the High Court of Bombay in the case of Indian National Shipowners Association Vs. Union of India (UOI), and (2008) 15 STJ 405 , held that the service tax liability on the recipient of the service would arise only from 18-4-2006 and therefore he set aside the order passed by the assessing authority. Aggrieved by the same, revenue is in appeal.

4. The learned Counsel appearing for the revenue submitted that the primary liability of payment of service of tax is on the service providers and the service providers are admittedly situated outside India and are not resident in India. He is not liable to pay service tax. But by Notification No. 36/2004-S.T., dated 31st December, 2004, by virtue of the power conferred by Sub-section (2) of Section 68 of the Act the Central Government has notified the tax services for the purposes of cess and also who has pay the said tax. It is specifically stated that any taxable service provided by a person who is not a resident or is from outside India, does not have any office in India, then the recipient of the service in India is liable to pay tax with effect from January, 2005. Therefore the revenue contends that the judgment of the Bombay High Court has no application when substantial power is conferred on the Central Government to issue Notification not only specifying the services which are taxable but also the person who is liable to pay the tax.

5. Per contra, the learned Counsel appearing for the Assessee relying on the aforesaid judgment of the Bombay High Court contended that the liability to pay service tax on the recipient of the service was imposed for the first time by amending the Act and introducing Section 66-A. Till such time there was no

liability on the recipient of tax as held by the Bombay High Court which has been confirmed by the Apex Court. Section 68(2) did not empower the Central Government by specifying the person who is liable to pay tax and even they have specified in the Notification that it is one without jurisdiction as held by the Bombay High Court. He therefore submits that the order passed by the Tribunal based on the aforesaid judgment cannot be found fault with.

6. Therefore the answer to this question revolves round the interpretation to be placed on Section 66-A as well as Section 68(2) of the Act. Section 68 of the Act reads as under:

68. Collection and recovery of service tax. - (1) Every stock-broker, the telegraph authority or the insurer who is providing taxable services to any person shall collect the service tax at the rate specified in Section 66.

(2) The service tax collected during any calendar month in accordance with the provisions of Sub-section (1) shall be paid to the credit of the Central Government by the 15th of the month immediately following the said calendar month.

(3) Any person, responsible for collecting the service tax, who fails to collect the tax in accordance with the provisions in Sub-section (1), shall notwithstanding such failure, be liable to pay the tax to the credit of the Central Government in accordance with the provisions of Sub-section (2).

From a perusal of the aforesaid Section it is clear from Sub-section (1) of Section 68 that every person providing taxable service is liable to pay service tax. However, Sub-section (2) makes it very clear that notwithstanding anything contained in Sub-section (1) in respect of any taxable service provided by the Central Government in the Official Gazette the service tax thereon shall be paid by "such person in such manner" and the same may be prescribed at the rate specified in Section 66 and all provisions of this Chapter shall apply to such person as if he is the person liable for paying the service tax in relation to such service. Therefore, the aforesaid provision authorises the Central Government to issue a Notification and prescribe a person who is liable to pay tax as well as the manner in which the tax is to be paid. As the opening words of Sub-section (2) starts with non-obstante clause even though u/s 68(1) the service tax is payable by the person who provides the service it is open to the Central Government by issuing a Notification under Sub-section (2) to specify that a person other than the service provider is also liable to pay tax. It is in this context the Notification 36/2004 S.T., dated 31st December 2004 has been issued not only stipulating the services which are liable for service tax and it also makes it clear that any taxable service provided by a person who is not a resident or is from outside India who is not having any office in India. The said Circular is set out hereunder:

(Notification No. 36/2004-S.T., dated 31-12-2004)''

Service tax payment in relation to specified services:

In exercise of the powers conferred by Sub-section (2) of Section 68 of the Finance Act, 1994 (32 of 1994), the Central Government hereby notifies the following taxable services for the purposes of the said Sub-section, namely:

(A) the services, -

(i) in relation to a telephone connection or pager or a communication through telegraph or telex or a facsimile communication or a leased circuit;

(ii) in relation to general insurance business;

(iii) in relation to insurance auxiliary service by an insurance agent; and

(iv) in relation to transport of goods by road in a goods carriage, where the consignor or consignee or goods is, -

(a) any factory registered under or governed by the Factories Act, 1948 (63 of 1948);

(b) any company established by or under the Companies Act, 1956 (1 of 1956);

(c) any corporation established by or under any law ;

(d) any society registered under the Societies Registration Act, 1860(21 of 1860) or under any law corresponding to that Act in force in any part of India;

(e) any co-operative society established by or under any law;

(f) any dealer of excisable goods, who is registered under the Central Excise Act, 1944 (1 of 1944) or the rules made the thereunder; or

(g) any body corporate established, or a partnership firm registered, by or under any law;

(B) any taxable service provided by a person who is a non-resident or is from outside India, does not have any office in India.

2. This notification shall come into force on the first day of January, 2005.

The said Circular was amended further by Notification No. 9/2006 dated 19th April, 2006 which reads as under:

Services provided from country other than India-Tax liability-Amendment to Notification No. 36/2004-S.T.

In exercise of the powers conferred by Sub-section (2) of Section of 63 of the Finance Act, 1994 (32 of 1994), the Central Government hereby makes the following further amendment in the notification of the Government of India in the Ministry of Finance (Department of Revenue) No. 36/2004-Service Tax, dated the 31st December, 2004, G.S.R. 849 (E), dated the 31st December, 2004, namely:

In the said notification, for paragraph (B), the following paragraph shall be substituted, namely:

(B) any taxable service provided or to be provided from a country other than India and received in India, u/s 66A of the Finance Act, 1994.

Further Notification No. 24/2005-S.T., dated 7th June-2005, was issued which reads as under:

Service tax liability when on person other than Service providers-Amendment to Notification No. 36/2004-S.T.

In exercise of the powers conferred by Sub-section (2) of Section 68 of the Finance Act, 1994 (32 of 1994), the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby makes the following further amendments in notification of the Government of India in the Ministry of Finance (Department of Revenue) No. 36/2004-Service Tax, dated the 31st December, 2004 which was published in the Gazette of India, Extraordinary, vide number G.S.R. 849(E), dated the 31st December, 2004, namely:

In the said notification:

(a) in paragraph (A), in sub-paragraph (iv), in item (b), for the words "established by or under", the words "formed or registered under" shall be substituted;

(b) for paragraph (B), the following paragraph shall be substituted namely:

any taxable service provided or to be provided by a person, who has established a business or has a fixed establishment from which the service is provided or to be provided, or has his permanent address or usual place of residence, in a country other than India, and such service provider does not have any office in India.

In none of these Notifications the Central Government had specified the person who is liable to pay service tax in the case of a service provider who is residing outside India who has no fixed establishment in India or who has no permanent address in India. However, the Parliament has amended the Act by introducing Section 66-A by the Finance Act 2006 which came into effect on 18-4-2006 which reads as under:

66-A. Charge of service tax on services received from outside India. -

(1) Where any service specified in Clause (105) of Section 65 is,-

(a) provided or to be provided by a person who has established a business or has a fixed establishment from which the service is provided or to be provided or has his permanent address or usual place or residence, in a country other than India, and

(b) received by a person (hereinafter referred to as the recipient) who has his place of business, fixed establishment, permanent address or usual place of residence, in India, such service shall, for the purposes of this section, be the taxable service, and such taxable service shall be treated as if the recipient had himself provided the service in India, and accordingly all the provisions of this Chapter shall apply:

Provided that where the recipient of the service is an individual and such service received by him is otherwise than for the purpose of use in any business or commerce, the provisions of this Sub-section shall not apply:

Provided further that where the provider of the service has his business establishment both in that country and elsewhere, the country, where the establishment of the provider of service directly concerned with the provision of service is located, shall be treated as the country from which the service is provided or to be provided.

(2) Where a person is carrying on a business through a permanent establishment in India and through another permanent establishment in a country other than India, such permanent establishments shall be treated as separate persons for the purposes of this section.

Therefore it is clear that from 18-4-2006 the service provided by a person who is outside the country and who has no fixed establishment or permanent address in the country, such a taxable service shall be treated as if the recipient of service had himself provided the service in India and accordingly all the provisions of this Chapter shall apply. Therefore prior to 18-4-2006 the service tax was not payable by the recipient, in the event the service provider was outside the country and he had no permanent address or place of business within the country. Under these circumstances, the order passed by the appellate authority relying on the aforesaid Judgments of the Bombay High Court and Delhi High Court cannot be found fault with. Accordingly we do not see any merit in this appeal. Hence, it is dismissed.