(2010) 08 KAR CK 0013

In the Karnataka High Court

Case No : C.E.A. No. 13 of 2007

Commissioner of Service Tax — APPELLANT

Vs

Bharat Electronics Ltd. — RESPONDENT

Date of Decision : 12-08-2010

Acts Referred:
Finance Act, 1994 — Section 66 A, 68

Citation : (2010) 20 STR 307 : (2010) 28 STT 456 : (2011) 42 VST 185

Hon'ble Judges : N. Kumar, J;H.S. Kempanna, J

Bench : Division Bench

Advocate : Shivaprabhu S. Hiremath, for the Appellant; K.S. Ravishankar, for the Respondent

Final Decision : Dismissed

Judgement

1. This appeal is by the revenue challenging the order passed by the Tribunal which held that service tax is not leviable on transfer of technology, relying on various judgments cited.

2. The assessee entered into a collaboration agreement with five foreign parties for transfer of technology and technical assistance for manufacture of products in India including technical expertise, training of personnel designs, software, test specifications and quality manuals. The assessee was issued with a show-cause notice for having contravened the provisions of Finance Act, 1994 calling upon them to show cause as to why a sum of Rs. 31,96,691 should not be demanded as per Section 68 of the Finance Act, 1994 read with Rule 6(1) of Service Tax Rules, 1994 and secondly, why penalty should not be imposed. The assessee submitted his explanation. However, the Deputy Commissioner, Central Excise, Sales Tax Division, confirmed the proposals by its order dated 31-3-2003. Aggrieved by the said order, the assessee preferred an appeal to the Commissioner (Appeals), who dismissed the appeal and affirmed the order of the Deputy Commissioner. Aggrieved by the same, the assessee preferred an appeal to the Tribunal. The Tribunal relying on various decided cases held that the

assessee was not liable to pay any service tax received by him from entities which, are outside the country. Therefore, it set aside the order of the authorities and held that the assessee is not liable to pay service tax.

3. In fact, the Tribunal clubbed other two appeals and passed a common order. The other two assessees namely M/s. SKF India Limited and M/s. Araco Corporation were respondents in two appeals preferred by the revenue, against the very same order, in which, this Court up held order of the Tribunal and dismissed the appeals.

4. The learned Counsel for the appellant-revenue assailing the impugned order contends that the facts in other two cases are quite different from the facts of this case and therefore, the said judgment has no application. He further contended that in the agreement entered into between foreign collaborators and the assessee, there is a specific provision providing for payment of tax duty even by such foreign collaborators. That apart, second proviso to Rule 6(1) casts liability on the receiver of the service to pay tax on the duty authorised by the provider. Therefore, he submits that the liability to pay service tax is squarely on the assessee and as he failed to pay the tax as demanded by the authority, the Tribunal is not justified in interfering with the said demand as well as the confirmation order.

5. Per contra, the learned Counsel for the assessee submitted that Section 68 of the Act casts liability on the service provider to pay tax. The Rules framed under the Act, in particular, Rule 6(1) casts liability on the receiver of the service to pay tax. The said rule runs counter to the section and the Supreme Court has up held the judgment of the Bombay High Court which has struck down the said rule. Even otherwise, he contends that if the service provider is liable to pay tax under the Act and if he has authorised the receiver of service to pay tax, the second proviso is attracted. Admittedly, all the service providers are non-residents who have no place of business in Bangalore and they are not amenable to the law of this Country. Therefore, there is no liability on their part to pay tax. When there is no liability, the question of receiver of service paying the tax would not arise. The Parliament after noticing this lacuna has now amended the Act by introducing Section 66A casting an obligation on the service receiver to pay tax.

6. In those circumstances, the order passed by the Tribunal is strictly in conformity with the law and that is the view expressed all over the Country as affirmed by the Apex Court. Therefore, he submits that no case for interference is made out.

7. From the aforesaid facts and rival contentions, it is clear that the assessee has received technical know-how and technical assistance from five foreign collaborators. Service Act has no application to them. Section 68 categorically provides that the liability to pay service tax is on the service provider. When the Rule framed under the Act casts an obligation on the service receiver for which, there is no provision under the Act, the said rule has to make way for the

express statutory provisions in Section 68. That is precisely what the Bombay High Court is stated which is upheld by the Apex Court.

8. Insofar as second proviso to Rule 6(1) is concerned, it provides that if the service provider authorises the service receiver, then the receiver of service can pay tax on behalf of the service provider, i.e., if the service provider is liable to pay tax under the Act and he authorises the receiver of service, then it is the receiver of service who shall pay the tax on behalf of the service provider. As this Act is not applicable to non-residents, there is no liability on their part to pay service tax. Therefore, the said proviso is not attracted. In fact, this is the view taken by this Court in the other two cases when the revenue challenged the very same order pertaining to M/s. Araco Corporation and M/s. SKF India Ltd.

9. In that view of the matter, we are satisfied that the order passed by the Tribunal is in accordance with law and do not call for interference. Accordingly, the appeal is dismissed.