

(2014) 07 MAD CK 0130

In the Madras High Court

Case No : Civil Miscellaneous Appeal No. 386 of 2014

Digital Magic Visual India Ltd.

APPELLANT

Vs

Customs, Excise and Service Tax Appellate Tribunal

RESPONDENT

Date of Decision : 18-07-2014

Acts Referred:

Central Excises and Salt Act, 1944 — Section 35F
Finance Act, 1994 — Section 66, 70, 73(1), 75, 76

Citation : (2014) 47 GST 489 : (2015) 37 STR 46 : (2014) 75 VST 465

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

Bench : Division Bench

Judgement

R. Sudhakar, J.—This appeal is filed seeking to set aside the order dated 14-5-2013 passed in Misc. Order No. 41232 of 2013, in ST/S/209/2011 in ST/300/2011 by the Customs, Excise and Service Tax Appellate Tribunal, Chennai, and to direct the Tribunal to dispose of the appeal ST/300/2011 of the appellant on merits without insisting on any pre-deposit of the amounts demanded. The substantial question of law that arises for consideration in this appeal is whether the Tribunal was justified in calling upon the appellant to make a pre-deposit of Rs. 35,00,000/- for entertaining an appeal in terms of Section 35-F of the Central Excise Act, 1944.

2.1 The brief facts of the case are as under: The appellant is engaged in post production services for film industry, media, advertising, etc. They started an education and academic wing during April, 2006 to provide a two year diploma course in "Digital and Animation Effects". The curriculum of the course includes drawing, clay modeling, Matte Printing, Animation and Visual Effects, Motion Photography and Acting.

2.2 The Department, on scrutiny of the records, issued a show-cause notice demanding payment of service tax, interest, penalty, etc. In response to the same, the appellant by placing reliance on No. 24/2004-ST,, claimed exemption from payment of service tax. However, the Department was of the view that the

courses offered by the appellant/assessee are in the nature of computer training and in view of the subsequent amendment dated 16-6-2005 to the notification, referred to above, the appellant, being a computer training institute, is not entitled to the benefit of above said notification dated 10-9-2004. The operative portion of the order dated 21-2-2011 passed by the Commissioner of Central Excise, Chennai-IV, reads as under:

"(i) I confirm the demand of service tax of Rs. 47,91,191/- (Rs. Forty seven lakhs ninety one thousand one hundred and ninety one only) being the service tax payable for the period April 2004 to March 2009 under proviso to Section 73(1) of Finance Act, 1994 for the service provided under Video Tape Production and Commercial Training and Coaching Services.

(ii) I demand appropriate rate of interest on the amount at

(i) above under Section 75 of the Finance Act, 1994.

(iii) I disallow the Cenvat Credit of Rs. 2,34,384/- (Rs. Two lakhs thirty four thousand three hundred and eighty four only) being the ineligible credit taken during the period from September 2004 to March 2008 and order recovery of the same along with interest under Rule 14 of Cenvat Credit Rules, 2004 read with proviso to Section 73(1) of Finance Act, 1994.

(iv) I demand interest of Rs. 1,19,091/- (Rs. One lakh nineteen thousand and ninety one only) being the interest for the delayed payment of service tax made during the period from April 2004 to March 2008 under Section 75 of the Finance Act, 1994.

(v) I appropriate an amount of Rs. 2,34,384/- paid in GAR 7 Challan vide cheque No. 6182899, Dt. 23-6-09. I also appropriate an amount of Rs. 1,28,241/- paid as interest on the above amount against sl. No.(iii) above.

(vi) I appropriate an amount of Rs. 87,905/- paid in GAR 7 Challan vide cheque No. 612898 dated 23-6-09 against sl. No.(i) above. I also appropriate an amount of Rs. 1,19,091/- towards interest on the belated payment of service tax and short payment of service tax (Annexure C) for the period April 2004 to March 2008 against (iv) above.

(vii) I appropriate an amount of Rs. 3,04,332/- paid in GAR 7 Challan vide cheque No. 619121 dated 2-7-09 against sl. No. (i) above. I also appropriate an amount of Rs. 1,68,991/- paid by the assessee through Cenvat Credit against sl. No.(i) above. The total amount of appropriation in this Order is equal to Rs. 7,95,612/- towards service tax and Rs. 2,47,332/- towards interest as per Show-Cause Notice. I direct the jurisdictional Deputy Commissioner of Service Tax to verify the genuineness of the payment made and appropriated and to ensure that the amounts have been remitted to government account.

(viii) I impose a penalty of Rs. 50,25,575/- on M/s. Digital Magic Visuals (I) Ltd. under Section 78 of the Finance Act, 1994 for the contraventions discussed supra.

(ix) I impose a penalty of Rs. 5,000/- on M/s. Digital Magic Visuals (I) Ltd. under Section 77 of the Finance Act, 1994 for non-registration under CTC services.

(x) I order payment of late fee of Rs. 4,000/- under Section 70 of Finance Act, 1994 for non-furnishing of ST-3 return for the period ending 30-9-2008 and 31-3-2009.

(xi) I refrain myself from imposing penalty under Section 76 of the Finance Act, as penalty imposed under Section 78 would suffice."

2.3 Aggrieved by the said order, the appellant preferred an appeal before the Tribunal. The appellant also submitted written submissions, wherein it is specifically pleaded that the appellant has produced documentary evidence, including course content, to show that it is only a vocational training institute in the field of digital animation. According to the appellant, the Diploma course offered by them would fall under the category of "vocational coaching and training" eligible for exemption from service tax and they are not imparting coaching or training relating to computer hardware or computer software.

2.4 The Tribunal, after considering the plea of the appellant, was of the view that the training provided in writing codes using languages like UNIX or Oracle or Java are on the same footing as training in creating animation using a software in computer and there is some difference in the level of knowledge of the internal structure of software that is imparted. The Tribunal observed that the training provided by the appellant is more relating to the usage of the software and not about the contents of the software. On this premise, the Tribunal was of the view that the matter needs detailed examination in final hearing. However, the Tribunal, by order dated 14-5-2013, directed the appellant to pre-deposit a sum of Rs. 35,00,000/- (Rupees Thirty Five Lakhs only) within a period of six weeks and report compliance on 10-7-2013. Assailing the said order passed by the Tribunal, the present appeal is filed.

3. We have heard the learned counsel on either side and perused the documents filed in support of these appeals.

4. Before advertng to the merits of the case, it is relevant to refer to No. 24/2004-ST,, which reads as under:

No. 24/2004-ST,

Government, being satisfied that it is necessary in the public interest so to do, hereby exempts the taxable services provided in relation to commercial training or coaching, by,-

(a) a vocational training institute; or

(b) a recreational trained institute,

to any person, from the whole of service tax leviable thereon under section 66 of the said Act.

Explanation.- For the purposes of this notification,-

(i) "vocational training institute" means a commercial training or coaching centre which provides vocational training or coaching that impart skills to enable the trainee to seek employment or undertake self-employment, directly after such training or coaching;

(ii) "recreational training institute" means a commercial training or coaching centre which provides training or coaching relating to recreational activities such as dance, singing, martial arts or hobbies."

5. The above said notification was subsequently amended by another notification dated 16-6-2005 and the relevant portion reads as under:

6. In the case on hand, the course offered by the appellant, prima facie, is to impart skills to enable the trainees to seek employment or undertake self-employment, directly after such training or coaching. Therefore, the reasoning given by the Tribunal that the training imparted by the appellant is more relating to the usage of the software and not about the contents of the software, and the same requires detailed examination enures to the benefit of the appellant.

7. That apart, the appellant has pleaded undue financial hardship. It was urged before this Court that since the appellant has already paid a sum of Rs. 7,95,612/- as against the demand of Rs. 47,91,191/- towards service tax, the condition of pre-deposit imposed by the Tribunal may be waived considering the fact that the appellant is only a training institute helping students to get trained for getting employment.

8. The above said plea of the appellant establishes prima facie case for considering the request for waiver of pre-deposit.

9. In this regard, 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 35-F of the Act reads as follows:

"35-F. 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 duty 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 35-F. 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."

10. We find much force in the plea of the appellant regarding undue hardship and financial difficulty in pursuing the appeal on payment of the pre-deposit as ordered by the Tribunal. The same, therefore, requires to be modified considering the prima facie case of the appellant. The payment already made by the appellant towards tax and the further payment that we are ordering will safeguard the interest of the Revenue as well. For the foregoing reasons and taking note of the fact that the appellant had already paid a sum of Rs. 7,95,612/- towards tax, we 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 14-5-2013;

(ii) Consequently, the order of the Tribunal dated 14-5-2013 is modified to the effect that the appellant shall make a pre-deposit of Rs. 15,00,000/- (Rupees Fifteen Lakhs only) towards the claim of service tax within eight weeks from the date of receipt of a copy of this order and subject to such compliance, as stated in the order of the Tribunal dated 14-5-2013, 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 order of the Tribunal dated 14-5-2013 dismissing the appeal for noncompliance 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. No costs. Consequently, M.P. No. 1 of 2014 is closed.