
(2013) 04 MAD CK 0168

In the Madras High Court

Case No : C.M.A. No. 907 of 2013 and M.P. No. 1 of 2013

M/s. Foxteq Services India Ltd.

APPELLANT

Vs

The Commissioner of Service Tax

RESPONDENT

Date of Decision : 03-04-2013

Acts Referred:

Central Excises and Salt Act, 1944 — Section 35F

Finance Act, 1994 — Section 65

Sales of Goods Act, 1930 — Section 9

Citation : (2013) 198 ECR 150 : (2014) 67 VST 333

Hon'ble Judges : R. Banumathi, J;K. Ravichandrabaabu, J

Bench : Division Bench

Advocate : Md. Shaffiq, for the Appellant; V. Sundareswaran, SCGSC, for the Respondent

Judgement

K. Ravichandrabaabu, J.—The above appeal is filed by the assessee against the Miscellaneous Order passed by the CESTAT whereby the appellant was directed to make pre-deposit of 50% of the tax amount. The short facts, as projected by the appellant, are as follows:-

The appellant is a company engaged in the trading of computer parts and peripherals. They have entered into a contract with a multi national company viz., Hewlett Packard (HP) for sale of computer parts and accessories. The said MNC (HP) had also entered into a contract with another company viz., Redington India for rendition of warranty/after sales service. As far as the contract entered into with the MNC (HP) is concerned, there is an obligation on the part of the appellant to sell the spares, components and accessories to the said MNC (HP) and hand over the same to the other company viz., Redington India on the instructions of HP. It is the obligation of Redington India to undertake the warranty/after sales service by utilising the components sold by the appellant to HP. For rendering the services provided by the appellant to HP, they were paid an agreed amount for every sale of computer, which covered their service charges.

2. It is the case of the Revenue that the operations performed by the appellant on behalf of their buyer viz., HP are liable to be classified under sub-clause (iv) of Clause (19) of Section 65 of the Finance Act 1994 under the category of procurement of goods or service on behalf of the client under Business Auxiliary Service and the charges so collected are liable to service tax.

3. Accordingly, the Revenue issued two show cause notices dated 23.4.2008 and 20.3.2009 to the appellant demanding an amount of Rs. 2,03,97,252/- and 50,47,451/- respectively towards the service tax, Education Cess etc., for two different periods. The appellant filed a detailed reply and denied their liability. Consequently, the respondents herein passed the Order-in-original No. 59/2009 dated 22.10.2009 and No. 04/2010 dated 25.3.2010, whereby the proposals made in the show cause notices were confirmed.

4. Challenging the same, the appellant filed appeals before the CESTAT and also miscellaneous petitions seeking for waiver of pre-deposit of the tax demanded.

5. The CESTAT by its order dated 24.1.2013 directed the appellant to make pre-deposit of 50% of the tax amount as confirmed in the order in original. Aggrieved against the same, the present appeal is preferred by the appellant by raising the following substantial questions of law:-

1. Whether the order of the Tribunal fails to see that levy of sales tax and service tax are mutually exclusive and thus a strong prima facie case is made out by the appellants inasmuch as the receipt/consideration on which service tax is levied has been subjected to levy of sales tax by the State and thus levy of service tax falls outside the legislative competence of the Union to treat the same as service liable to service tax, much less an authority of the Union to levy service tax thereon warranting dispensing with the condition of pre-deposit ?

2. Whether the order of the Tribunal inasmuch as it proceeds on the premise that the value of the goods has been excluded while levying service tax suffers from non-application of mind inasmuch as the Adjudicating authority has proceeded to levy tax on the entire consideration/receipt from the customer and no deduction is given in respect of the value of the goods sold if the value of the goods sold were deducted then there can be no levy of service tax inasmuch as the entire consideration/receipt from the customer has been treated as value of goods sold and subject to sales tax/VAT?

3. Whether the Tribunal ought to have seen that the adjudicating authority has erred in denying the appellants the benefit of Notification No. 12 of 2003 which excludes the value of goods sold from levy of service tax on the erroneous premise that the appellants charge their customers a fixed sum and does not fix the value of the goods sold completely overlooking the fact that the fixed sum constitutes the value of goods sold and Section 9 of "Sale of Goods Act" leaves the manner of fixing the price to the discretion of the contracting parties ?

4. Whether the order of the Tribunal inasmuch as it has not even considered nor

rendered any finding on the existence or otherwise of "undue hardship" while exercising its power to dispense with predeposit u/s 35F of the Central excise Act suffers from non-consideration of relevant aspect/statutory condition stands vitiated and the Tribunal ought to have seen that any condition directing pre-deposit would cause "Undue hardship" inasmuch the petitioner has not collected any service tax on the bonafide belief that the levy of service tax is impermissible ?

5. Whether the order of the Tribunal directing a pre-deposit of 50% of the disputed taxes stands vitiated inasmuch as it fails to see that the condition imposed is such which for all intent and purport takes away the appellants vested right of appeal and works as a deterrent or disables and impedes access to a forum viz., CESTAT which is meant for redressal of the grievance of an assessee suffering an adverse order, and results in rendering the statutory remedy of appeal illusory ?

6. As the appeal itself is against the miscellaneous order passed by the CESTAT directing 50% payment of pre-deposit, the main appeal itself is taken up for final disposal with the consent of both the parties.

7. The learned counsel appearing for the appellant submitted that the Tribunal proceeded to direct the appellant to make the pre-deposit based on the premise that the value of the goods sold has been deducted while arriving at the value of taxable service. The above presumption is contrary to the facts on record as the adjudicating authority has not deducted the value of the goods sold. Therefore, the learned counsel submitted that the discretion exercised by the Tribunal u/s 35F of the Central Excise Act was based on non-existent facts. He also submitted that the Tribunal failed to see that the entire consideration received by the appellant had suffered VAT/Sales Tax and once the transaction had suffered such levy, the service tax ought to be levied after excluding the value in view of notification No. 12/2003. He also submitted that the payment of sales tax by itself makes a strong prima facie case, which is a relevant factor while exercising discretion u/s 35F of the Central Excise Act. He further submitted that the Tribunal had not rendered any finding on "undue hardship" as the appellant had not collected any service tax on the bonafide belief that the transactions are transactions of sale and thus not liable to service tax. He further submitted that the appellant had incurred a loss of Rs. 6.53 lakhs for the year ended March 31st, 2012 and under such circumstances the impugned order of the Tribunal directing the appellant to make a pre-deposit of 50% of the tax demanded would result in the appeal becoming illusory.

8. In support of his submissions, the learned counsel appearing for the appellant relied on the decisions in Indian Railway Construction Co. Ltd. Vs. Ajay Kumar, Omar Salay Mohamed Sait Vs. Commissioner of Income Tax, Madras, Bharat Sanchar Nigam Ltd. and Another Vs. Union of India (UOI) and Others, 1) Imagic Creative Pvt. Ltd. Vs. The Commissioner of Commercial Taxes and Others, .

9. Per contra, the learned Senior Central Government Standing Counsel appearing for the Revenue submitted that u/s 35F of the Central Excise Act 1944, the payment of deposit is mandatory and the order of the Tribunal directing the appellant to make pre-deposit of 50% of the tax demanded is perfectly in accordance with Section 35F and the provision made therein. He also submitted that the Tribunal only after specifically finding that the appellant failed to make out a prima facie case for waiver of pre-deposit of the entire amount of tax, interest and penalty had directed payment of 50% of the tax, which shows that the Tribunal had considered "undue hardship" pleaded by the appellant as well. Therefore, the learned counsel submitted that the said order passed by the Tribunal does not warrant any interference, as the said order has taken care of the interest of the Revenue as well as the undue hardship pleaded by the appellant. In support of his submissions, the learned Counsel appearing for the Revenue relied on the decision of the Apex Court in Benara Valves Ltd. and Others Vs. Commissioner of Central Excise and Another, and two unreported decisions passed by the Division Bench of this Court in C.M.A. No. 1613 of 2011 dated 24.6.2011 (M/s. Indusind Bank Ltd., Vs. The Commissioner of Service Tax) and W.A. No. 419 of 2012 dated 17.7.2012 (Commissioner of Customs and Central Excise Vs. M/s. Visaka Industries Ltd.,) and the order of the Hon'ble Supreme Court made in SLA (Civil) No. 24321 of 2012 on 27.8.2012.

10. Heard the learned counsel appearing for either side.

11. The present appeal filed before this Court is against an interim order passed by the Tribunal in the miscellaneous application filed for waiver of pre-deposit u/s 35F of the said Act.

12. The appellant filed appeal before the Tribunal aggrieved against the order passed by the original authority demanding service tax by treating the appellant's transaction as the one under Business Auxiliary Services. It is the case of the appellant that the commercial transaction entered into with the HP by the appellant does not attach service obligation and on the other hand it is only in the nature of selling goods. It is their contention that a pure and simple sale/purchase transaction cannot be mis-construed as a service contract u/s 65(19) (iv) of the Finance Act, 1974. Consequently, it is pleaded that the order passed by the Tribunal directing pre-deposit of 50% of the tax demand is without considering the above said facts.

13. Whether the appellant's transaction with HP is to be classified under clause (4) of Section 65(19) of the Finance Act 1974 so as to make them liable to pay the service tax is the core issue to be gone into and adjudicated upon by the Tribunal, taking into consideration of all the facts and circumstances of the case with which we are not called upon at this stage to express any view on merits. What is now urged before us is against the pre-deposit order passed by the Tribunal.

14. Before considering the correctness or otherwise of the order passed by the

Tribunal, let us consider the scope of Section 35F of the Central Excise Act. Section 35F of the Central Excise Act contemplates deposit of the duty demanded or the penalty levied pending the appeal filed before the Commissioner (Appeals) or the Appellate Tribunal. The word "shall" appearing u/s 35F makes it clear that such pre-deposit is mandatory. However, the first proviso to Section 35F grants a discretionary power to the appellate authorities to dispense with such deposit subject to such conditions so as to safeguard the interest of the Revenue, if in its opinion, the deposit of duty demanded or penalty levied would cause undue hardship to the appellant.

15. It is pertinent to note at this juncture that only a discretion is vested on the appellate authorities as it is apparent from the word "may" appearing in the first proviso. Thus, a overall reading of Section 35F with first proviso would make it clear that making pre-deposit is mandatory and dispensing with the same is discretionary. Keeping this in mind, let us consider the matter further.

16. The Tribunal pointed out at paragraph 4 of its order that from the perusal of the agreement, prima facie it found force in the submission of the learned counsel appearing for the Revenue and that the appellant failed to make out a prima facie case for waiver of predeposit of the entire amount of tax, interest and penalty. Consequently, the Tribunal directed 50% of the pre-deposit.

17. It is relevant to note at this juncture the decision of the Hon"ble Supreme Court reported in Monotosh Saha Vs. Special Director, Enforcement Directorate and Another, as follows:-

11. Two significant expressions used in the provisions are "undue hardship to such person" and "safeguard the realisation of penalty". Therefore, while dealing with the application twin requirements of considerations i.e. Consideration of undue hardship aspect and imposition of conditions to safeguard the realisation of penalty have to be kept in view.

18. Even though the said decision was made while dealing with the order of pre-deposit contemplated under Foreign Exchange Management Act, 1999, still the analogy made therein can be applied to Section 35F of the Central Excise Act also. Thus, from the reading of the above decision of the Apex Court, the twin test viz., the undue hardship and safeguarding the interest of the Revenue are to be applied to each and every case where waiver of pre-deposit is sought for. In the very same decision, it is also observed by the Apex Court that undue hardship is a matter within the special knowledge of the applicant for waiver and has to be established by him. Equally, it is also observed that the Tribunal has to bring into focus about the other aspect relating to imposition of condition to safeguard the realisation of penalty and the relevant paragraphs 12 to 16 are extracted hereunder:-

12. As noted above there are two important expressions in Section 19(1). 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 have 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 realisation of penalty. 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 realisation of penalty. 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 realisation of penalty.

16. The above position was highlighted in *Benara Valves Ltd. and Others Vs. Commissioner of Central Excise and Another*, The decision was rendered in relation to Section 35F of the Central Excise Act, 1944 where also identical stipulations exist.

19. The very same view was expressed by the Apex Court in another decision relied on by the Revenue reported in *Benara Valves Ltd. and Others Vs. Commissioner of Central Excise and Another*, .

20. By following the above decision of the Apex Court, a Division Bench of our High Court in the decision reported in *Fayshaw Apparels Vs. The Appellate Tribunal for Foreign Exchange and The Special Director* wherein one of us (R. Banumathi, J.) was a party, held that interim order of dispensation of deposit should not be passed, merely by establishing a prima facie case and only where it appears that the penalty imposed has no legs to stand or it would be undesirable to ask the appellant to pay the full or part of the penalty, the Appellate Tribunal can dispense with the condition of pre-deposit of penalty. It is also observed therein that the courts will have to keep in view the interest of the revenue of the State/Government Exchequer, while considering the applications for dispensation with pre-deposit.

21. Likewise, another Division Bench of this Court in an unreported decision made in C.M.A. No. 1613 of 2011 dated 24.6.2011 (*M/s. Indusind Bank Ltd., Vs. The Commissioner of Service Tax*) has observed that the Appellate Tribunal need not consider each and every ground raised and answer the same for the purpose

of disposing of the interim application for waiver of the pre-deposit and in fact Section 35F requires the appellate Tribunal to find out as to whether the complaint of the appellant to deposit the duty demanded or the penalty levied would cause undue hardship and for that purpose only the prima facie case is to be considered.

22. In another unreported decision made in W.A. No. 419 of 2012 dated 17.7.2012 (Commissioner of Customs and Central Excise Vs. M/s. Visaka Industries Ltd.), the Division Bench of this Court found that when the assessee had not established a prima facie case of undue hardship necessarily they should be directed to make pre-deposit. There is no via media in such cases.

23. It is also seen that the order passed in W.A. No. 419 of 2012 dated 17.7.2012 has been confirmed by the Apex Court by dismissing SLA (Civil) No. 24321 of 2012 on 27.8.2012.

24. Going by all these decisions, what emerges is that the appellant is not only required to plead undue hardship but also to establish the same before the Tribunal. We have already pointed out that the liability of the appellant to pay the Service tax has to be decided only in the main appeal before the Tribunal.

25. No doubt the appellant had raised several grounds on merits in the appeal before the Tribunal. Certainly, the Tribunal would consider all those grounds at the time of hearing the main appeal. Therefore, the only question that has to be seen here is as to whether the appellant had established the plea of undue hardship before the Tribunal. When we see the application filed before the Tribunal seeking for waiver of pre-deposit, it is stated by the appellant in the affidavit filed before the Tribunal that the petitioners would be put to irreparable loss and undue hardship, if the original order is not stayed. It is also stated that the petitioners would be exposed to a too serious financial difficulty as the amount involved is huge on the one hand and the resource crunch gripping the appellant on the other. In our considered view, these averments made in the affidavit are too general in nature without there being any specific averments of the facts and figures to establish the undue hardship. However, now before this court, the learned counsel appearing for the appellant placed the balance sheet as on March 31, 2012 and the statement of Profit and Loss for the year ended March 31, 2012 to show the loss suffered by the appellant. Admittedly, these documents were not placed before the Tribunal, which is a fact finding authority. It is also not specifically pleaded in the affidavit filed before the Tribunal about these facts. Therefore, we cannot find fault with the Tribunal in passing the impugned order. On the other hand, though the Tribunal has not specifically stated in so many words about "undue hardship", yet by passing the very order directing the appellant to deposit only 50% of the tax amount, it could be seen that the Tribunal had considered the undue hardship also.

26. Learned counsel for the appellant relied on the decisions as stated supra only to show that non-consideration or non-application of mind on relevant factors will

be regarded as manifest error. As we found that the Tribunal had given a prima facie finding and also granted 50% waiver, the decisions reported in Indian Railway Construction Co. Ltd. Vs. Ajay Kumar, ; Omar Salay Mohamed Sait Vs. Commissioner of Income Tax, Madras, are factually distinguishable.

27. Likewise in so far as the other decisions viz., Bharat Sanchar Nigam Ltd. and Another Vs. Union of India (UOI) and Others, Imagic Creative Pvt. Ltd. Vs. The Commissioner of Commercial Taxes and Others, are concerned, they are in respect of merits of the appeal which is pending before the Tribunal. As we have already pointed out that it is for the Tribunal to decide on merits about the liability of the appellant, the above said two decisions cannot be pressed into service at this stage by the appellant.

28. Learned counsel for the appellant at the conclusion of the submissions had pleaded that any further reduction in the percentage of the pre-deposit may be considered by this court, by taking note of the inability of the appellant due to the loss in business.

29. It is seen from the materials placed before this court that the appellant had suffered loss during the financial year 2011-2012. Even though the said material was not placed before the Tribunal, instead of remitting the matter for that purpose and in order to render substantial justice, we deem it fit that the appellant can be directed to deposit 25% of the total tax demanded instead of 50% so that the appeal shall be taken up for hearing on merits without loss of further time. Accordingly, the order of the Tribunal is modified by directing the appellant to deposit 25% of the tax demanded as pre-deposit within a period of eight weeks from the date of receipt of copy of this order. The Civil Miscellaneous Appeal is disposed of accordingly. Consequently, the connected M.P. is closed. No costs.