(2016) 01 MAD CK 0033

In the Madras High Court

Case No : Civil Miscellaneous Appeal Nos. 87-88 of 2016 and C.M.P. Nos. 886-887 of 2016

Perfect Vending India Pvt. Ltd. APPELLANT

Vs

Cestat, Chennai RESPONDENT

Date of Decision : 22-01-2016

Acts Referred:

Citation : (2017) 345 ELT 167

Hon'ble Judges : M. Jaichandren and S. Vimala, JJ.

Bench : Division Bench

Advocate : Shri N. Viswanathan, Counsel, for the Appellant; Shri V. Sundareswaran, SC, for the Respondent

Final Decision : Disposed Off

Judgement

S. Vimala, J.—Civil Miscellaneous Appeal No. 87 of 2016 has been filed by the Assessee against the Misc. Order No. 41418/2015, dated 20-11-2015 in ST/Misc/40668/2015 in ST/41805/2015-DB.

1.1 Civil Miscellaneous Appeal No. 88 of 2016 has been filed by the Assessee against the Misc. Order No. 41420/2015, dated 20-11-2015 in ST/Misc/40670/2015 in ST/41806/2015-DB, passed by the CESTAT/first respondent herein.

Brief facts :-

2. The appellant is engaged in the business of sales/supplies of coffee and tea, through the vending machines installed at their customer''s premises. The charging was on the basis of the rate per cup of supply. Sometimes, the machines are also leased or sold and to those customers, they sell the consumables such as pre-mix on payment of appropriate Value Added Tax (VAT).

2.1 The Original Authority passed orders holding that the activities undertaken by the appellant would fall within the ambit of Taxable "Outdoor Catering

Service", in terms of Section 65 (75A of the Finance Act, 1994), notwithstanding the fact that the appellant had paid their VAT.

2.2 According to the learned counsel for the appellant, the activities undertaken by the appellant will not come under the category of "Outdoor Catering Service".

2.3 For the period from April, 2011 to June, 2012, the appellant was issued with two statements of demand for sums of Rs. 25,64,853/- and Rs. 92,87,442/-, respectively. The appellant sent a reply contending that the transactions purely involved sale of coffee/tea and therefore, it cannot be subjected to the levy of service tax in terms of the Finance Act, 1994, and that the appellant is entitled to the benefit extended of the Notification No. 12/2003-S.T.

2.4 The Commissioner of Service Tax did not appreciate the contentions of the appellant and held that the benefit of the notification will not apply to the appellant, holding that the supply of Tea and Coffee to the employees of the company was on a contract basis and therefore it is only a service and not a sale.

2.5 Aggrieved over the order, the appellant preferred two appeals before the CESTAT/the first respondent herein. The first respondent directed the appellant to make pre-deposit of Rs. 15,00,000/-, by the common order, dated 20-11-2015, within a period of eight weeks from the date of the order, for admission of the appeal.

2.6 This order is under challenge in these Civil Miscellaneous Appeals.

3. As the common questions of law and fact are involved, common judgement is pronounced.

4. The first contention of the learned counsel for the appellant is that, the order of the Tribunal, ordering pre-deposit suffers from infirmity as the Tribunal omitted to take note of the fact that the appellant has the arguable, i.e., meritorious case before the appellate forum. It is specifically pointed out that, as per the dictum laid down by the Hon''ble Apex Court in the case of Tamil Nadu Kalyana Mandapam Assn. v. Union of India reported in 2006 (3) S.T.R. 260 : 2004 (167) E.L.T. 3 (S.C.), it has been held that in order to attract the levy of service tax, under the taxable Outdoor Catering Service, there should be a personalized service provided to the customers and so far as this case is concerned, the activities undertaken by the appellant do not have the predominant element of personalized service and therefore, there is no liability for the appellant to pay any service tax. The relevant observation of the case, cited supra, reads as under :-

"?.. Outdoor catering has an element of personalized service provided to the customer. Clearly the service element is more weighty, visible and predominant in the case of outdoor catering. It cannot be considered as a case of sale of food and drink as in restaurant??"

4.1 The next contention of the learned counsel for the appellant is that, when the appellant was able to establish that it has a strong prima facie case, the Tribunal should not have insisted upon the pre-deposit to be made, especially when the appellant has pleaded financial hardship, invoking the provisions of Section 35-F of the Central Excise Act, 1944. The dictum laid down in the case of Benara Valves Ltd. v. CEX, reported in 2008 (12) S.T.R. 104 (S.C.) : 2006 (204) E.L.T. 513 (S.C.) is relied upon, in which the relevant observation reads as under :-

".... But if on a cursory glance it appears that the demand raised has no leg to stand, it would be undesirable to require the assessee to pay full or substantive part of the demand.

....

Two significant expressions used in the provisions are "undue hardship to such person" and "safeguard the interests of 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 interest of Revenue have to be kept in view."

5. From the decisions relied upon, cited supra, it appears that the appellant may have a prima facie case/an arguable case before the Appellate Authority.

6. Under such circumstances, the undue financial difficulties pleaded by the appellant ought to have been considered, while considering the interest of the Revenue.

7. Considering the cumulative circumstances, the common order, dated 20-11-2015, passed by the first respondent, directing the appellant to pre-deposit a sum of Rs. 15,00,000/-, as a condition to admit the appeal, is modified to Rs. 5,00,000/- and the remaining amount of Rs. 10,00,000/- is waived. On such deposit of Rs. 5,00,000/-, being made, within a period of two weeks from the date of receipt of a copy of this judgment, the first respondent shall admit the appeal and hear the matter on merits and pass appropriate orders in accordance with law.

8. With the above directions, these Civil Miscellaneous Appeals are disposed of. No costs. Consequently, the connected CMPs are closed.

