

(2014) 07 MAD CK 0236

In the Madras High Court

Case No : Civil Miscellaneous Appeal Nos. 1868 to 1870 of 2014 and M.P. No. 1 of 2014

Perfect Vending India Pvt. Ltd.

APPELLANT

Vs

The Customs, Excise and Service Tax Appellate Tribunal

RESPONDENT

Date of Decision : 10-07-2014

Acts Referred:

Finance Act, 1994 — Section 65(24), 65(76a)

Citation : (2015) 37 STR 437 : (2014) 76 VST 443

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

Bench : Division Bench

Judgement

R. Sudhakar, J.—The present appeals have been filed by the assessee against the order of the Customs, Excise and Service Tax Appellate Tribunal, Chennai, wherein direction was given to the appellant to pre-deposit Rs.30,00,000/= (Rupees Thirty Lakhs only) for the purpose of hearing the appeal. In these appeals, the following substantial questions of law are raised:

1. Whether the tribunal was correct in recording the finding that the service of supply of coffee at a fixed price dispensed through the vending machines to the employees of company at their premises undertaken by the appellant has a predominant element to hold that the appellant failed to make out a prima facie case, by omitting to take proper note of the rulings of the Supreme Court in the case of Tamil Nadu Kalyana Mandapam am Assn. Vs. Union of India (UOI) and Others, and later clarified by Board Circular dated 24.9.1997 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 customer, where the element of service should be more weighty, visible and predominant?

2. Whether the tribunal was correct in not considering the fact specifically brought to its notice that the state authorities having levied VAT on the sale of coffee dispensed through the vending machines before recording the observation that the transaction claimed by the appellant to be a mere sale of coffee prima

facie cannot be accepted?

3. Whether the tribunal was correct in not following the judgment of the Supreme Court in the case of Imagic Creative Pvt. Ltd. Vs. The Commissioner of Commercial Taxes and Others, holding that payment of sale tax and service tax are mutually exclusive?

4. Whether the tribunal was correct in failing to consider the clear ratio laid down at para 39 of the judgment of the Delhi High Court in the case of Indian Railways C&T Corp. Ltd. v. Government of NCT of Delhi, reported in 2010 (20) STR 437 (Del)?

5. Whether the tribunal was correct in not considering para 6.1.2 of the decision of the Delhi Bench of the tribunal in the case of Sayaji Hotels Ltd. v. CEX, Indore, reported in 2011 (24) STR 177 (Tri-Del) and recording the finding that there is force in the submissions of the Authorized Representative for the Revenue, that the decision of the Sayaji Hotel case is in favour of the revenue and had considered the judgment of Delhi High Court by overlooking the crucial fact that the said case involved the dispute relating to the taxable service of mandap keeper and not merely the outdoor catering service?

2. The appellant is engaged in the business of manufacture and sale of coffee and tea through vending machines. An agreement dated 30.10.2008 was entered into between SGS India Ltd., and the present appellant, for running catering service for supply of coffee and tea to the employees of the company at a fixed rate. According to the department/revenue, the transaction in question falls within the definition of "outdoor caterer" in terms of Section 65(76a) of the Finance Act, 1994 and the appellant is a "caterer" in terms of Section 65(24) of the Finance Act, 1994.

3. A show cause notice was issued by the department demanding service tax, which was resisted by the appellant/assessee stating that they are not liable to pay service tax, primarily on the ground that it is not an outdoor caterer or caterer within the definition as above and that the transaction in question suffered Value Added Tax (VAT) and, therefore, the benefit of notification No. 12/2003 -ST : dated 20.6.03 is available to them. Therefore, service tax, as demanded by the department is, prima facie, not maintainable.

4. The adjudicating authority came to the conclusion that this notification will not apply to the facts of the present case as supply of coffee, tea and beverages to the company and its employees was on contract basis and it is only a service rendered and not a sale and the demand for service tax was upheld.

5. On appeal, in application filed for waiver of pre-deposit, the Tribunal, prima facie, was of the view that the applicant was rendering service to supply coffee to the employees of the company and particularly they appointed a pantry boy for such service. Further, the reference made to the Board's circular dated 24.9.1997 clarified that outdoor caterer has an element of personalized service

provided to the customer in which the service element is more weighty, visible and predominant aspect in the case of outdoor catering and, therefore, in the case on hand, the Tribunal held that the service of supply of coffee to the employees of the company at their premises is predominant element. Therefore, the Tribunal came to the conclusion that the pre-dominant element in the whole transaction is that there was a service rendered by the appellant in respect of supply of coffee, tea and other beverages to the employees and, evidently, did not show an element of sale. However, the Tribunal held that the appellant did not make out a prima facie case for waiver of the entire amount of pre-deposit, but was inclined to allow the application on deposit of Rs.30,00,000/= (Rupees Thirty Lakhs only) within a period of eight weeks from the date of the order. Aggrieved against the order passed by the Tribunal, the present appeal has been filed by the assessee.

6. Heard the learned counsel appearing for the appellant and the learned standing counsel appearing for the 2nd respondent.

7. We find that the issue as to whether the claim of the appellant that the transactions have suffered Value Added Tax (VAT) and as a consequence thereof, service tax stands excluded, is an issue, which has to be gone into in the appeal. Further, there was no material placed before the authorities to come to the conclusion that service tax is not payable in view of Notification No. 12/2003-ST . At this stage, we find that the Tribunal, did not order the entire amount, but has exercised its discretion and ordered pre-deposit of Rs.30,00,000/= (Rupees Thirty Lakhs only), considering the undue hardship of the appellant.

8. We have considered the plea of the appellant and heard the learned Standing Counsel for the respondent, who states that the order of the Tribunal need not be interfered with. The substantial plea made by the appellant is that they have already discharged the VAT component on the sale of coffee, tea and beverages and the same is an issue that has to be considered by the Tribunal in the appeal. However, that is a prima facie case that enures to the benefit of the appellant. Since the VAT component has been paid, the interest of the Revenue is safeguarded as against the disputed claim. In this regard, the plea of the appellant relying on the decision of the Supreme Court in *Imagic Creative Pvt. Ltd. Vs. The Commissioner of Commercial Taxes and Others*, , more particularly paragraph (28) is relevant and the same reads as under:

28. Payments of service tax as also VAT are mutually exclusive. Therefore, they should be held to be applicable having regard to the respective parameters of service tax and the sales tax as envisaged in a composite contract as contradistinguished from an indivisible contract. It may consist of different elements providing for attracting different nature of levy. It is, therefore, difficult to hold that in a case of this nature, sales tax would be payable on the value of the entire contract, irrespective of the element of service provided. The approach of the assessing authority, to us, thus, appears to be correct.

9. At this juncture, 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 35F 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 appeals 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.

11. For the foregoing reasons, we pass the following order:

(i) On the questions 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 16.1.2014; and

(ii) Consequently, the order of the Tribunal dated 16.1.2014 is modified to the effect that the appellant shall make a pre-deposit of Rs.15,00,000/= (Rupees Fifteen Lakhs only) on or before 8th August, 2014 as a condition precedent for hearing the appeal and subject to such compliance, as stated in the order of the Tribunal dated 16.1.2014, 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.

12. In the result, these appeals are ordered in above terms. Consequently,

connected miscellaneous petitions are closed. However, there shall be no order as to costs.