

(2015) 06 MAD CK 0536
In the Madras High Court
Case No : C.M.A. Nos. 537 to 540 of 2015

P.K. Shefi

APPELLANT

Vs

The Customs, Excise and Service Tax Appellate Tribunal and
Others

RESPONDENT

Date of Decision : 12-06-2015

Acts Referred:

Finance Act, 1994 — Section 2(zc)(vii), 65(105)(zzt), 65(105)9zzt, 65(24), 65(76a)

Citation : (2016) 53 GST 99 : (2015) 40 STR 89 : (2016) 87 VST 82

Hon'ble Judges : R. Sudhakar, J;K.B.K. Vasuki, J

Bench : Division Bench

Advocate : N. Sriprakash, for the Appellant

Judgement

R. Sudhakar, J—Aggrieved by the common order of the Tribunal ordering pre-deposit in the applications filed by the appellant/assessee, the appellant/assessee is before this Court by filing the present appeals raising the following questions of law :-

"i) Whether the CESTAT has committed an error of law in disregarding the principles laid down by the Hon'ble Supreme Court in its judgments reported in Northern India Caterers (India) Ltd. Vs. Lt. Governor of Delhi, AIR 1980 SC 674 : (1980) 2 SCC 167 : (1980) 2 SCR 650 : (1980) 45 STC 212 : (1980) 12 UJ 494 and Tamil Nadu Kalyana Mandapam am Assn. Vs. Union of India (UOI) and Others, AIR 2004 SC 3757 : (2004) 4 CompLJ 108 : (2004) 3 CTC 63 : (2004) 188 CTR 297 : (2004) 93 ECC 353 : (2004) 167 ELT 3 : (2004) 267 ITR 9 : (2004) 4 JT 568 : (2004) 4 SCALE 647 : (2004) 5 SCC 632 : (2004) 2 SCR 169 Supp : (2004) 135 STC 480 : (2006) 3 STR 260 : (2004) AIRSCW 7365 : (2004) AIRSCW 3991 : (2004) AIRSCW 4665 : (2004) 6 Supreme 121 : (2005) 2 Supreme 693 : (2004) 4 Supreme 637 and the judgment of the Hon'ble Delhi High Court reported in 20 STR 437 [M/s.IRCTC Vs Government of NCT of Delhi]?

ii) Whether the CESTAT has committed an error of law in disregarding the factors relevant for disposal of a waiver-cum- stay application?"

2. The brief facts of the case are as follows:

The appellant is a contractor and has been awarded a contract by M/s.IRCTC for supply of food and refreshments to the passengers on board the trains run by the Indian Railways. The catering services rendered by the appellant became liable to service tax levy under Section 66 of the Finance Act, 1994, with effect from 1.3.2006. It is seen that during the period 10.9.2004 to 28.02.2006, the said service when provided on railway trains remained exempted from the levy of service tax vide notification No. 19/2004-ST dated 10.9.2004. However, the said notification was rescinded vide Notification No. 2/2006-ST dated 01.03.2006 to make the outdoor catering service provided on trains liable to pay service tax payment from 1.3.2006 onwards.

3. It is seen that Writ Petitions have been filed before this Court challenging the vires of Sections 65(24), 65(76a) and 65(105)(zzt) of the Finance Act, 1994. This Court, by order dated 25.7.2001, upheld the vires of the above provisions, which was reported in Tamil Nadu Hotels Association Vs. Union of India (UOI), (2001) 78 ECC 584 : (2001) 133 ELT 265 : (2006) 2 STR 513 .

4. It is stated in the order-in-original that the appellant was paying service tax for the services provided to passengers on board the Rajdhani/Shatabdi Express Trains. Alleging that the appellant did not pay service tax for the services rendered by them on board other Mail/Express Trains, four show cause notices were issued for the periods March, 2006 to September, 2009, October, 2009 to September, 2010, October, 2010 to September, 2011 and October, 2011 to December, 2012 proposing to demand service tax along with interest and penalty.

5. After due process of law, the Adjudicating Authority passed an order holding as follows:

"12. I find that out door catering service provided on trains became liable to service tax levy with effect from 1.3.2006 and M/s.P.K. Shefi even though have rendered the catering service in trains, and have paid service tax on catering services (except cost of water, for which separate demand notices have been issued) provided to passengers on board the Rajdhani/Shatabdi Express but have not paid service tax on catering services in respect of the Mail/Express (i.e. other than Rajdhani/Shatabdi Express trains). This fact by itself makes clear that even when the activities are similar, M/s.P.K. Shefi have paid service tax in some cases and have not done so in other cases.

13. The impugned notices have made out a case that the transaction between the passengers and M/s.P.K. Shefi is amounting to outdoor catering service which attracts levy of service and as the said service provider had billed and collected the charges for his activity which are inclusive of the charges for supply of food, service tax was payable on 50% of the gross value of the charges received, in terms of Sections 66 & 68 of the Finance Act, 1994 read with Notification No. 1/2006-ST dated 1.3.2006."

6. The Adjudicating Authority relying upon the decision of the Apex Court in the case of Tamil Nadu Kalyana Mandapam am Assn. Vs. Union of India (UOI) and Others, AIR 2004 SC 3757 : (2004) 4 CompLJ 108 : (2004) 3 CTC 63 : (2004) 188 CTR 297 : (2004) 93 ECC 353 : (2004) 167 ELT 3 : (2004) 267 ITR 9 : (2004) 4 JT 568 : (2004) 4 SCALE 647 : (2004) 5 SCC 632 : (2004) 2 SCR 169 Supp : (2004) 135 STC 480 : (2006) 3 STR 260 : (2004) AIRSCW 7365 : (2004) AIRSCW 3991 : (2004) AIRSCW 4665 : (2004) 6 Supreme 121 : (2005) 2 Supreme 693 : (2004) 4 Supreme 637 came to hold that there was no difference in the service provided by the present appellant from the one provided by the outdoor caterer provided in factory canteens. For better clarity, we extract below the findings of the Adjudicating Authority:

"15.2. In the present case, I do not find any difference between the services rendered on board the trains and the out- door catering service provided in factory canteens where the outdoor caterer are engaged to provide the catering services at a place other than his own and he apart from supplying food, snacks and beverages to the staff and workers at the prices fixed by the factory management which are to be borne by the factory either fully or partially, also supplies food articles to the factory staff and workers and charges them directly.

15.3. Importantly, in the period from 10.09.2004 to 28.02.2006, out-door catering service provided on railway trains was exempted from the levy of service tax vide Notification No. 19/2004-ST, dated 10.09.2004 and after withdrawal of this exemption vide Notification No. 2/2006-ST dated 01.03.2006, Out Door Catering Service provided on trains became liable to service tax payment from 1.3.2006 onwards. Thus, it cannot be disputed that service tax is leviable on activities that are meeting out the definition of outdoor catering service as defined under Section 65(105)9zzt) of Finance Act, 1994 and from thereon they are required to pay service tax on this service in the manner provided under Section 68 of the Finance Act, 1994. "

7. The Adjudicating Authority also relied upon the circular CBEC (TRU) Letter F.No. 332/38/2006-TRU dated 1st August, 2006, wherein it was clarified that the private contractor was required to pay service tax on the entire amount billed under outdoor catering service.

8. On the question whether the transaction is pure sale or the one involving both sale and service equally, the Adjudicating Authority relying upon the two decisions of the Karnataka High Court in the case of Commissioner of Service Tax, Service Tax Commissionerate, Bangalore Vs. LSG Sky Chef India Pvt. Ltd., (2011) 46 VST 57 and Commissioner of Service Tax Vs. The Grand Ashok, (2013) 31 STR 528 : (2011) 32 STT 223 , came to hold that the appellant was paying service tax by treating the same activity as out-door catering service provided to passengers on board the Rajdhani/Shatabdi Express trains and in contrast thereto, they claimed similar activity as an outright sale when comes to other trains. The Adjudicating Authority, therefore, came to hold that the reliance placed by the assessee on the decision of the High Court of Delhi in the case of

IRCTC v. Govt. of NCT of Delhi & Ors. reported in 2010 [20] STR 437 (Delhi) was a case of levy of Sales Tax/VAT and not on a direct service tax dispute. He further relied on the decision of the Kerala High Court in the case of M/s. Saj Flight Services Pvt. Ltd. Vs. Supdt. of Central Excise, (2006) 200 CTR 591 : (2005) 3 KLJ 533 : (2006) 1 KLT 128 : (2006) 4 STR 429 and held that it is a clear case of levy of service tax. The Adjudicating Authority, therefore, gave a reasoned order holding that the supply of services along with food etc. rendered by the appellant in trains other than Rajdhani/Shatabdi express trains in the period from March 2006 to December 2012 amounted to outdoor catering service as defined under the Finance Act, 1994 and determined the service payable by them to the tune of Rs. 5,90,89,389 with interest. He also imposed penalty under Sections 78 and 76 of the Finance Act, 1994.

9. Aggrieved by the said order of adjudication, the appellant/assessee preferred appeals before the Tribunal along with an application for waiver of pre-deposit. The Tribunal considering the ratio laid down in the case of Imagic Creative Pvt. Ltd. Vs. The Commissioner of Commercial Taxes and Others, (2008) 2 CLT 735 : (2008) 1 CTC 843 : (2008) 1 JT 496 : (2008) 1 SCALE 356 : (2008) 2 SCC 614 : (2008) 9 STR 337 : (2008) 12 STT 392 : (2008) 12 VST 371 : (2009) AIRSCW 1746 : (2008) AIRSCW 844 : (2008) AIRSCW 4326 : (2008) 4 Supreme 524 : (2008) 8 Supreme 678 , ordered pre-deposit. For better clarity, the order of the Tribunal reads as follows:

"1. Ld. Counsel vehemently opposes adjudication on the ground that services provided by appellant in railway trains along with food shall not bring the transaction to tax net under Finance Act, 1944. He relies on the decision of the Hon"ble Delhi High Court in the case of Indian Railways C & T Corpn. Ltd., Vs Government of India and others - 2010 (20) STR 437 (Del.) Ld. Commissioner examined the ratio of that judgment and found that the judgment rendered in the context of Delhi Sales Tax has decided the leviability of the sales tax. But leviability of the service tax on the service aspect was not the subject matter of dispute in that case before the Hon"ble High Court. Considering the ratio laid down by the apex Court in Imagic Creative Pvt. Ltd. Vs. The Commissioner of Commercial Taxes and Others, (2008) 2 CLT 735 : (2008) 1 CTC 843 : (2008) 1 JT 496 : (2008) 1 SCALE 356 : (2008) 2 SCC 614 : (2008) 9 STR 337 : (2008) 12 STT 392 : (2008) 12 VST 371 : (2009) AIRSCW 1746 : (2008) AIRSCW 844 : (2008) AIRSCW 4326 : (2008) 4 Supreme 524 : (2008) 8 Supreme 678 , appellant is directed to pre deposit the following amounts in the stay applications noted against each within 8 weeks from today and make compliance on 07.04.2015.

Upon compliance, there shall be waiver of pre- deposit of balance demand in question and stay of recovery thereof during pendency of the appeals.

10. Aggrieved by the order of the Tribunal, the appellant/assessee is before this Court raising the above-mentioned substantial questions of law.

11. Heard learned counsel appearing for the appellant/assessee and the learned standing counsel appearing for the respondent and perused the materials placed before this Court.

12. We find that the order of the Tribunal merely reiterates the findings of the Adjudicating Authority that the decision of the Delhi High Court in the case of *IRCTC v. Govt. of NCT of Delhi & Ors.* reported in 2010 [20] STR 437 (Delhi) is in relation to sales tax and not directly relatable to service tax. Though several pleas have been taken by the appellant, the Tribunal relied upon the decision of the Apex Court in the case of *Imagic Creative Pvt. Ltd. Vs. The Commissioner of Commercial Taxes and Others*, (2008) 2 CLT 735 : (2008) 1 CTC 843 : (2008) 1 JT 496 : (2008) 1 SCALE 356 : (2008) 2 SCC 614 : (2008) 9 STR 337 : (2008) 12 STT 392 : (2008) 12 VST 371 : (2009) AIRSCW 1746 : (2008) AIRSCW 844 : (2008) AIRSCW 4326 : (2008) 4 Supreme 524 : (2008) 8 Supreme 678 and passed a brief order ordering pre-deposit. The primary plea appears to be that there is no element of suppression insofar as the period March 2006 to September, 2009 stating that he has filed a Writ Petition and the Department was aware of the same.

13. We are unable to accept such a plea. as the present proceedings have been initiated by the jurisdictional Commissioner and they were not a party to the said Writ Petition. Even otherwise, the other plea of the appellant is that when there are two views one in favour of the assessee in view of the decision of the Delhi High Court and the contra view by the Kerala High Court on the issue, as to whether such transaction would be outdoor catering, liable for service tax, suppression cannot be alleged per se.

14. This contention is opposed by the learned standing counsel appearing for the respondent. The issue as to whether the liability to service tax in respect of the services rendered by the appellant would fall outside the purview of the service tax has to be considered by the Tribunal on the basis of the factual position relating to the contract, the nature of services provided as alleged by the Department and taking into consideration the plea of the appellant that they are only effecting primary sales. We are not inclined to go into the merits of the issue at this point of time, as it will have a bearing on the issue before the Tribunal.

15. Yet another plea raised by the counsel for the appellant is that if the sale of goods covered by maximum retail price concept should be considered, there is a substantial reduction in demand. This plea, however, has been taken before the Tribunal, but not before the Adjudicating Authority. Therefore, we leave the issue open to the assessee to contest the same on its own merits before the Tribunal.

16. The other plea taken by the counsel for the appellant is financial hardship. Learned counsel for the appellant submitted that the appellant is required more than Rs. one crore to provide the services and therefore, the demand in this case would cripple the 30 year contract, which itself is sufficient to safeguard the interest of the Revenue.

17. The facts in the case of *IRCTC v. Govt. of NCT of Delhi & Ors.* reported in 2010 [20] STR 437 (Delhi), were the Government company providing services including catering on board the trains run by Indian Railways on a contract between the petitioner company and the Indian Railways. The Government company sub-leased the contract in respect of some trains to various contractors. The consideration of such services is included in the fare charged by the Indian Railways from the passengers and the Government company was paid by Indian Railways from what it termed as services including catering provided by it to the passengers. The Adjudication order dated 23.3.2006 passed by the Commissioner of Value Added Tax held that VAT was payable on the services provided on board the trains, since it amounted to sale within the meaning of Section 2(zc)(vii) of the Act. This finding of the Adjudicating Authority came to be upheld by the Delhi High Court holding as follows:

"46. Since there is transfer of goods, by the petitioner company to Indian Railways, for consideration and the property in the goods also passes to Indian Railways, the transaction between them is no doubt a case purely of sale of goods under the provisions of Sale of Goods Act as well as Delhi Value Added Tax Act and the element of service by way of heating the food, heating/freezing the beverages and then serving them to the passengers is purely incidental and minimal required for sale of food and beverage in a transaction of this nature. There is no privity of contract between the petitioner-company and the passengers travelling in trains. No package of services is being provided to Indian Railways, by the petitioner-company. It is neither a contract for providing service nor a composite contract for sale/supply of goods and providing of service by the petitioner-company to Indian Railways. The contesting respondents are, therefore, entitled to levy and demand VAT, on the entire amount of consideration paid by Indian Railways to the petitioner-company for food and beverages.

47. In the case of *Northern Caterers (supra)* one of the reasons for holding that the transaction was not a sale, was that the customer had no right to take away the unconsumed food. There is no such prohibition on the passengers travelling in trains. Since the transaction in a restaurant has, in subsequent decisions, been held to be a sale, despite the Court taking the view that the customer had no right to take away the unconsumed food, there is no good reason to take a different view in a transaction involving a train passenger, to whom even such a disability is not attached."

18. As a corollary, it also held that it is for the petitioner to claim refund of the service tax already paid in respect of such transaction. The Delhi High Court further came to the conclusion as follows:

"54. For the reasons given in the preceding paragraphs, we hold that the transaction between the petitioner-company and Indian Railways for providing food and beverages to the passengers, on board the trains, is a transaction of sale of goods by the petitioner-company to Indian Railways. It is neither a contract for providing services nor a composite contract for supply of goods and

providing of services. We also hold that sale in respect of goods loaded on board the trains in Delhi, takes place, when the goods are loaded in the trains. Accordingly, we find no merit in the writ petitions and the same are hereby dismissed. It will, however, be open to the petitioner to claim refund of service tax already paid by it in respect of such transactions. If the refund is declined, the petitioner will be at liberty to initiate such proceedings, as may be open to it in law in this regard. If service tax is sought to be levied, upon the petitioner, in future, in respect of such transactions, it will be open to it, to challenge the same in appropriate proceedings."

19. The Kerala High Court in the case of M/s. Saj Flight Services Pvt. Ltd. Vs. Supdt. of Central Excise, (2006) 200 CTR 591 : (2005) 3 KLJ 533 : (2006) 1 KLT 128 : (2006) 4 STR 429 , however, took a contra view in that matter.

20. In view of the different views taken by two Courts and going by the nature of the services provided by the appellant as alleged by the Department in the adjudication order, we find that this issue still remains debatable on facts and on law. We, therefore, not inclined to go into the merits of the case. However, taking note of the financial hardship pleaded and in view of the uncertainty on the levy of service tax, which we find is still a debatable issue, we are inclined to modify the brief and non-speaking order of the Tribunal in the following manner:

(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 13.02.2015;

(ii) Consequently, the order of the Tribunal dated 13.02.2015 is modified to the following effect:

(iii) It is made clear that the appellant shall make a predeposit of 50% of Rs. 2.50 crores modified by this Court within a period of four weeks from the date of receipt of a copy of this order and the balance 50% shall be made within a period of four weeks thereafter and subject to such compliance, the pre-deposit of balance amount demanded shall remain waived and its collection shall stand stayed during the pendency of the appeals before the Tribunal.

In the result, these appeals are ordered in the above terms. No costs. Consequently, connected Miscellaneous Petitions are closed.