(2010) 11 MAD CK 0368

In the Madras High Court

Case No : Writ Petition (MD) No''s. 265, 6323, 6411, 7068, 8653-8654, 9227-9228, 9437, 10178-10179 of 2007 and 2556-2557 of 2008

Polyspin Exports Ltd. APPELLANT

Vs

Union of India (UOI) RESPONDENT

Date of Decision : 03-11-2010

Acts Referred:
Finance Act, 1994 — Section 64, 64(1), 65, 65(105), 66
Finance Act, 2006 — Section 55A, 65, 66A
Service Tax Rules, 1994 — Rule 2(1)

Citation : (2011) 22 STR 9

Hon'ble Judges : R.S. Ramanathan, J

Bench : Single Bench

Advocate : M. Venkatraman for R. Karthikeyan, for the Appellant; B. Vijay Karthikeyan, for the Respondent

Final Decision : Allowed

Judgement

R.S. Ramanathan, J.—In all these writ petitions, the Petitioners prayed for declaration, declaring that Explanation to Section 65(105) of the Finance Act, 1994, read with amended Rule 2(1)(d)(iv) of the Service Tax Rules, 1994, coming into effect from 16-6-2005 is ultra vires Sections 64, 65, 66, 67 and 68 of the Finance Act, 1994 and as a result Service Tax cannot be extended to such services rendered by service providers from and outside India even though the service recipients are located in India.

2. In some of the writ petitions the Petitioners also challenged the show cause notice issued under explanation to Section 65(105) of the Finance Act, 1994, read with amended Rule 2(1)(d)(iv) of the Service Tax Rules, 1994.

3. As the issue is relating to the vires of the explanation to Section 65(105) of the Finance Act, 1994, read with amended Rule 2(1)(d)(iv) of the Service Tax Rules, 1994, there is no need to go into the facts of the case.

4. It is submitted by the learned Senior Counsel Mr. N. Venkatraman that recovery of tax cannot be made without first creating a charges on the service receiver and such charge was created by the introduction of Section 66(A) of the Finance Act for the first time and therefore earlier to introduction of Section 66(A), the Service Tax cannot be levied, in respect of service provided by a person who is having office out side India and therefore, service tax levied prior to 18-4-2006 are illegal and without creating a charges service tax cannot be levied and therefore explanation (2) Section 64(1) of the Finance Act is to be declared as ultra vires.

5. The learned Counsel Mr. Vijay Karthikeyan appearing for the Respondent elaborately argued the case and also submitted written notes of arguments and contended that explanation to Section 65(105) of Finance Act was validly enacted and cannot be declared as ultra vires and also relied upon the judgments referred in the notes of arguments.

6. On the other hand the learned Senior Counsel Mr. Venkatraman appearing for the Petitioner argued that having regard to the resent judgment of the Hon''ble Supreme Court upholding the judgment of the Bombay High Court rendered in Indian National Shipowners Association Vs. Union of India (UOI), the writ petitions are liable to be allowed. Nevertheless, for the purpose of narration the following facts are necessary. The explanation to Section 65(105) of the Finance Act, 1994, was introduced on 16-6-2005 and corresponding amendment was also made. The explanation to Section 65(105) of the Finance Act 1994 is as follows:

where any service provided or to be provided by a person, who has established a business or has a fixed establishment from which the service is provided or to be provided, or has his permanent address or usual place of residence, in a country other than India and such service is received or to be received by a person who has his place of business, fixed establishment, permanent address or, as the case may be, usual place of residence, in India, such service shall be deemed to be taxable service for the purposes of this clause.

7. A Corresponding amendment was made to Rule 2(1)(d)(iv) which reads as follows:

In relation to any taxable service provided or to be provided by a person, who has established a business or has a fixed establishment from which the service is provided or to be provided, or has his permanent address or usual place of residence, in a country other than India, and such service provider does not have any office in India, the person who receives such service and has his place of business, fixed establishment, permanent address or, as the case may be, usual place of residence, in India.

Thereafter the explanation to 65(105) was omitted and 66A of the Finance Act was introduced with effect from 18-4-2006 which reads as follows:

Where any service specified in Clause (105) of Section 65 is

a. Provided or to be provided by a person who has established a business or has a fixed establishment from which the service is provided or to be provided or has his permanent address or usual place of resident, in a country other then India and

b. Received by a person who has his place of business, fixed establishment, permanent address or usual place of residence, in India.

Such service shall, for the purposes of this section, be the taxable service, and such taxable service shall be treated as if the recipient had himself provided the service in India, and accordingly all the provisions of this Chapter shall apply:

Provided that where, the recipient of the service is an individual and such service received by him is otherwise than for the purpose of use in any business or commerce, the provisions of this Sub-section shall not apply;

Provided further that where the provider of the service has his business establishment both in that country and elsewhere, the country, where the establishment of the provider of service directly concerned with the provisions of service is located, shall be treated as the country from which the service is provided or to be provided.

Where a person is carrying on a business through a permanent establishment in India and through another permanent establishment in a country other than India, such permanent establishments shall be treated as separate persons for the purposes of this section.

Explanation 1-A person carrying on a business through a branch or agency in any country shall be treated as having a .business establishment in that country.

Explanation 2-Usual place of resident, in relation to a body corporate, means the place where it is incorporated or otherwise legally constituted

Consequent to introduction of Section 66(A) a corresponding amendment was made to Rule 2(1)(d)(iv) which reads as follows:

in relation to any taxable service provided or to be provided by any person from a country other than India and received by any person in India u/s 55A of the Act, the recipient of such service.

8. In the judgment rendered in Indian National Shipowners Association Vs. Union of India (UOI), , the Petitioners challenged the constitutional validity of Section 66A of the Finance Act explanation to Section 65(105) which was in force between 16-6-2005 to 17-4-2006 and Rule 2(1)(d)(iv) of Service Tax Rule 1994, in certain with effect from 16-8-2002.

9. The Bombay High Court after carefully analysing the provisions of the Income Tax and Service tax and after following the judgment of the Hon''ble Supreme Court rendered in Laghu Udyog Bharati v. Union of India reported in Laghu Udyog Bharati and Another Vs. Union of India and Others, held as follows:

It appears that it is first time when the Act was amended and Section 66A was inserted by Finance Act, 2006 w.e.f. 18-4-2006, the Respondents got legal authority to levy service tax on the recipients of the taxable service. Now, because of the enactment of Section 66A, a person who is resident in India or business in India becomes liable to be levied service tax when he receives service outside India from a person who is non-resident or is from, outside India. Before enactment of Section 66A it is apparent that there was no authority vested by law in the Respondents to levy service tax on a person who is resident in India, but who receives services outside India. In that case till Section 66A was enacted a person liable was the one who rendered the services. In other words, it is only after enactment of Section 66A that taxable services received from abroad by a person belonging to India are taxed in the hands of the Indian residents. In such case, the Indian recipient of the taxable services is deemed to be a service provider. Before enactment of Section 66A, there was no such provision in the Act and therefore, the Respondents had no authority to levy service tax on the members of the Petitioners-association.

In the result, therefore, the petition succeeds and is allowed. Respondents are restrained from levying service tax from the members of the Petitioners-association for the period from 1-3-2002 till 17-4-2006, in relation to the services received by the vessels and ships of the members of the Petitioners association outside India, from persons who are non-residents of India and are from outside India.

10. Therefore, as per the judgment of Bombay High Court service tax cannot be levied prior to 17-4-2006 and the charge was created only after the introduction to Section 66A of the Finance Act. The judgment of the Bombay High Court referred to above was upheld by the Hon''ble Supreme Court in SLP Civil No. 1893 of 2009 on 14-12-2009 and the same is reported in 2010 (17) S.T.R. J57. Therefore, having regard to the judgment of the Bombay High Court which was later approved by the Hon''ble Supreme Court, the authorities have no power to levy the service tax prior to 17-4-2006 and therefore the impugned show cause notices demanding service tax prior to the period are liable to be quashed. As a matter of fact it has been made clear in the Bombay High Court judgment that only after the introduction of Section 66A the Respondent got legal authority to levy service tax on the recipients of the taxable services. It is also admitted that after the introduction of Section 66A the explanation to Section 65(105) was also deleted. Hence, the show cause notice issued, on the basis of explanation Section 65(105) of the Finance Act, 1994, read with amended Rule 2(1)(d)(iv) of the Service Tax Rules, 1994 are not valid in law and liable to be quashed.

Accordingly, the writ petitions are allowed. Consequently, connected miscellaneous petitions are closed.