

(2014) 11 MAD CK 0065

In the Madras High Court

Case No : Civil Miscellaneous Appeal Nos. 2904-2906 and 516-518 of 2014

STC Technologies Pvt. Ltd.

APPELLANT

Vs

CESTAT, Chennai

RESPONDENT

Date of Decision : 14-11-2014

Acts Referred:

Finance Act, 1994 — Section 73(1), 73(2), 75, 76, 77

Citation : (2015) 39 STR 15

Hon'ble Judges : R. Sudhakar, J;R. Karuppiiah, J.

Bench : Division Bench

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

Judgement

R. Sudhakar, J.?The above Civil Miscellaneous Appeals are filed against the order dated 21-3-2014 made in Final Order Nos. 40197, 40198 and 40199 of 2014 and the order dated 28-8-2013 in Miscellaneous Modify Order Nos. 42176, 42179 and 42182 of 2013 on the file of the Customs, Excise and Service Tax Appellate Tribunal, Chennai raising the following substantial questions of law:

"C.M.A. Nos. 2904 to 2906 of 2014:

1. Whether the Tribunal was right in dismissing the appeal of the appellant by its order dated 21-3-2014 on the sole ground of noncompliance of the modified stay order dated 28-8-2013 without considering that an appeal against the said order is pending consideration before this Hon"ble Court in CMA Nos. 516 to 518 of 2014?

2. Whether the Tribunal was right in passing the impugned order dismissing the appeal of the appellant without considering the merits of the appeal, particularly when the Tribunal itself had admitted vide its stay order dated 27-5-2013 to examine the eligibility of the appellant towards 50% of the course fee collected which is actually towards the cost of course material sold to the trainees at the time of final hearing of the appeal?

3. Whether the Tribunal was right in passing the impugned order dismissing the appeal of the appellant without considering the merits of the appeal, particularly when the Tribunal itself had admitted vide its Mis. Modify order dated 28-8-2013 that the application for raising additional grounds will be considered for further detailed argument at the time of disposal of appeal?

4. Whether the Tribunal was right in not considering the decisions of the co-ordinate Benches of the Tribunal in identical matters holding the issue in favour of the appellant herein inspite of the said decision having been specifically brought to its notice?"

C.M.A. Nos. 514 to 516 of 2014:

1. Whether the Tribunal was correct in observing that it will not be proper for it to make any modification of the stay order in view of the existence of the order of the Hon''ble Bombay High Court in the case of Baron International Ltd. Vs. Union of India (UOI), overlooking the subsequent judgment of the very same court in the case of Maina Khemka Vs. Union of India (UOI), holding that the said judgment though held that tribunal cannot exercise review jurisdiction, had jurisdiction to modify its orders within the permissible limits and parameters laid down under law?

2. Whether the Tribunal was correct in not following the decision of the coordinate Bench in the case of Rayudu Vision Media Ltd. v. CEX, Hyderabad, 2013 (31) STR. 501 (Tri-Bang) involving identical issue, by not following the ratio of the Hon''ble Supreme Court in the case of Gammon India Ltd. Vs. Commissioner of Customs, Mumbai, .

3. Whether the Tribunal is correct in holding that the testing of software is primarily connected with computer development software and therefore would stand excluded from the relevant clause of impugned Notification No. 24/2004-S.T., dated 10-9-2004 as amended by Notification No. 19/2005-S.T., dated 7-6-2005, even while not disputing that the training in testing of software enables the trainee to seek employment and therefore would be more appropriately covered within the meaning of vocational training institute as appended to the said notification?"

The brief facts are as follows:

The appellant is engaged in conducting courses on Software Testing for various students and other clients and is registered with the Service Tax Commissionerate, Chennai as "Commercial Training and Coaching Service". During audit of the accounts carried out by the Officers of the Internal Audit Wing, it was found that the assessee had not discharged service tax on the gross amount received. On a detailed enquiry and verification, the assessee informed that they were paying service tax only on the 50% of the gross amount representing the training fees and the remaining 50% amount represents the sale value of the course material. The Department was of the view that the

course materials were never been sold to any students but given to the trainees only after their enrolment for a particular course. The Department was also of the view that course materials were neither priced at any fixed rate nor available in open market. Therefore, the Department held that the course materials provided by the assessee for commercial training would form part of the taxable value and chargeable to service tax. Accordingly, the Department demanded service tax of Rs. 1,12,26,207/- on the balance 50% of the gross amount received from the students for the period April, 2005 to November, 2008. Apart from this, there was service tax due since April 2007. Hence, in all, the Department demanded service tax at Rs. 1,21,98,372/-. A show cause notice was issued to the assessee vide SCN No. 132/2009 dated 9-4-2009 stating that as to why service tax along with interest and penalty should not be levied. It appears that some amount has been paid pending enquiry.

2. The assessee filed a written submission to the show cause notice. The Commissioner of Service Tax considered the same and held that the perusal of the receipts issued by the assessee to the students showed that the whole amount received by them represents course fee and not for sale of goods. The Commissioner, therefore, held that the course materials are not priced, but only for the purpose of payment of service tax, the assessee deliberately adopted 50% of the course fee as charges for course material. Therefore, he held against the assessee upholding the demand of service tax. The relevant portion of the order of the Commissioner reads as follows:

"i. In terms of the provisions of Finance Act, 1994, I order confirming the demand of service tax of Rs. 1,21,98,372/- (Rupees one crore twenty one lakh ninety eight thousand three hundred and seventy two only) payable by M/s. STC Technologies Pvt. Ltd. during the period from April, 2005 to November, 2008 under proviso to Section 73(1) of the Finance Act, 1994 read with Section 73(2) of the Act.

ii. In terms of the provisions of the Finance Act, 1994, I order confirming the demand of service tax of Rs. 15,41,102/- (Rupees fifteen lakh forty one thousand one hundred and two only) payable by M/s. STC Technologies Pvt. Ltd. during the period from December, 2008 to March, 2010 under Section 73(1) of Finance Act, 1994 read with Section 73(2) of the Act.

iii. I order that M/s. STC Technologies Pvt. Ltd shall pay interest on the amounts demanded under SI. Nos.(i) and (ii) above in terms of Section 75 of the Finance Act, 1994 from the due date for payment of service tax till the date of actual payment.

iv. I impose penalty of Rs. 1,21,98,372/- (Rupees one crore twenty one lakh ninety eight thousand three hundred and seventy two only) under Section 78 of the Finance Act, 1994 on M/s. STC Technologies Pvt. Ltd. in respect of SCN No. 132/2009 dated 9-4-2009. This penalty shall however be reduced to 25% of the service tax determined, if only the service tax and interest determined is paid

along with reduced penalty within 30 days from the date of receipt of this order in terms of proviso to Section 78 of the Finance Act, 1994. I do not impose penalty under Section 76 as the penalty imposed under Section 78 would meet the ends of justice.

v. I impose a penalty of Rs. 200/- (Rupees two hundred only) for every day at the rate of 2% of tax determined per month, whichever is higher up-to 7-4-2011 and Rs. 100/- (Rupees one hundred only) for every day or at 1% of the tax determined per month, whichever is higher with effect from 8-4-2011, starting with the first day after the due date till the date of actual payment under Section 76 of the Finance Act, 1994 in respect of the demands made under SCN Nos. 208/2010 dated 16-4-2010 and SCN No. 15/2011 dated 20-4-2011. However, the total amount penalty payable under Section 76 shall not exceed the service tax payable.

vi. I impose a penalty of Rs. 5000/- (Rupees five thousand only) under Section 77 of the Finance Act, 1994."

3. Appeals were preferred by the assessee for the different periods as against the order of the Commissioner of Service Tax before the Tribunal along with applications for an order of stay. By order dated 27-5-2013, in Miscellaneous Order Nos. 41372 and 41374 of 2013, the Tribunal came to the conclusion that there was no prima facie case for grant of waiver of pre-deposit. However, considering the plea of the appellant, directed the appellant to deposit a sum of Rs. 40.00 lakhs within a period of six weeks. For better clarity, the relevant portion of the order of the Tribunal reads as follows:

"7. Opposing the prayer, the Ld. AR. for Revenue submits that the value of the study materials has been arbitrarily fixed just to avoid payment of appropriate service tax. He points out that the material in question is not sold independently of the training service and is of no value independent of the service. He submits the cases where the Tribunal allowed exemption there was evidence that the books were sold independently also and the cost of the books was not artificially inflated to reduce the cost of the taxable service. Further, he invites our attention to para 6.4 of the order incorporating images of sample receipt and invoice which shows that the full amount is received from trainees as "course fee" but the amount is artificially split. He relies on the decision of the Tribunal in the case of *Soni Classes v. CCER*, 2013 (30) STR (92) (Tri.-Del.)

8. Considered submissions on both sides. The applicant has not been able to demonstrate that 50% of the course fees collected is actually cost of course of the material sold. Further, the material appears to be a type which has no separate value when dissociated with the service provided which matter can be examined during the hearing of the appeal. At this stage, we do not consider this a fit case for full waiver of pre-deposit for admission of appeal. So, we order the applicant to make a further deposit of Rs. 40,00,000/- (Rupees Forty Lakhs only) within 6 weeks from the date of this order. Subject to such pre-deposit, pre-

deposit of balance dues arising from the impugned order is waived and its collection stayed during the pendency of the appeal".

4. Thereafter, the appellant filed nine miscellaneous petitions against the order dated 27-5-2013 in Miscellaneous Order Nos. 41372 to 41374 of 2013 seeking leave to raise additional grounds; extension of time and to modify the order dated 27-5-2013.

5. In the additional grounds raised before the Tribunal, it was pointed out that the appellant is eligible for exemption under Notification No. 24/2000-S.T., dated 10-9-2004, which provides exemption for vocational training imparted by vocational training institutes. Before the Tribunal, the appellant relied on the decision of the Bangalore Bench of the Tribunal in the case of Rayudu Vision Media Ltd. v. Commissioner of Central Excise, Hyderabad reported in 2013 (31) STR 501 (Tri. Bang.) .

6. The Authorised representative of the Revenue objected to the raising of the fresh grounds and reconsideration of the stay order. The Revenue relied on the decision of the Bombay High Court in the case of Baron International Ltd. Vs. Union of India (UOI), . However, the said decision has been modified by the another Bench of the Bombay High Court in the case of Maina Khemka Vs. Union of India (UOI), , holding that the Tribunal had powers to modify its order, but the power of review alone is not there.

7. It is then pleaded by the appellant that in view of the decision of the Supreme Court in the case of Gammon India Ltd. Vs. Commissioner of Customs, Mumbai, , the decision of the Bangalore Tribunal should have been given credence by the Tribunal in the present case by allowing modification and ought not to take a different view. The decision of the Supreme Court in the case of CCE Vs. Sunwin Technosolution P. Ltd., is distinguishable on facts, and that, the appellant's business is in the nature of vocational training and therefore, should get exemption.

8. The Tribunal considered all the above said pleas and came to the conclusion that the activity of the appellant relates to testing of software and is primarily connected with computer software development and is covered by exclusion clause under Notification No. 24/2000-S.T. as amended by Notification 19/2005-S.T. All the nine petitions were taken up by the Tribunal and by order 28-8-2013, the Tribunal after hearing the appellant declined to modify the earlier order dated 27-5-2013, however, extended the time-limit for complying with the stay order till 17th October, 2013, holding as follows:

"6. We have considered submissions of both sides. Stay order of the Bangalore Bench is with reference to training in 2D and 3D animation, which training was imparted using computer software and computer hardware. The Bangalore Bench of the Tribunal was of the prima facie view that it was not computer training but only a vocational training conducted with the aid of computers. In the case before us, the activity relates to testing of software and is primarily connected

with computer software development and hence is prima facie covered by the exclusion clause under Notification No. 24/2004-S.T. as amended by Notf. 19/2005-S.T. Therefore, prima facie, we do not find any merit in the new legal argument raised by the learned counsel. We also note that it will not be proper to make any modification of the stay order, in view of the observation of the Bombay High Court in the case of Baron International Ltd., (Supra). Considering both the aspects in view, we reject the modification application. However the time-limit for complying with the stay order is extended by another six weeks from today. Compliance to be reported on 17th October, 2013.

7. The applications for additional grounds will be considered for further detailed argument at the time of disposal of appeal. We make it clear that what we have expressed is only a prima facie view for the purpose of deciding the stay petition. The nine miscellaneous applications are disposed of accordingly."

9. Aggrieved by the order of the Tribunal, the appellant filed C.M.A. Nos. 516 to 519 of 2014. In the meantime, since the stay order has not been complied with, the Tribunal, by final order Nos. 40197 to 40199 of 2014 dated 21-3-2014, dismissed the main appeals.

10. Aggrieved by the order of the Tribunal, C.M.A. Nos. 2094 to 2096 of 2014 have been filed.

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

12. The same issue raised before the Tribunal is pleaded before us. We find that even as per the statement originally made, the appellant is registered as commercial training and coaching service. 50% of the service tax has been discharged and for the balance, it was claimed that it relates to sale of course material, eligible for exemption. This plea was primarily declined in paragraph 5 of the order of the Tribunal dated 27-5-2013 stating that only standard text books will be considered for exemption and the plea of the appellant was not accepted in paragraph 7 of the order dated 27-5-2013. On the contrary, on verifying the sample receipts and invoices, the Tribunal came to the conclusion that the amount received from the trainees as course fee was artificially split to avoid payment of service tax. We, therefore, find no error in the order of the Tribunal.

13. The next plea that Notification No. 24/2004-S.T., dated 10-9-2004 provides exemption for vocational training imparted by vocational training institutes. The said Notification was amended by Notification No. 19/2005-S.T., which inserted a proviso and explanation, and makes it clear that Notification No. 24/2004 will not apply to taxable services provided in relation to commercial training or coaching by a computer training institute. According to the Department, the appellant is a computer training institute. The Tribunal was justified in distinguishing the interlocutory order passed by the Bangalore Tribunal in the case of Rayudu Vision

Media Ltd. v. Commissioner of Central Excise, Hyderabad reported in 2013 (31) STR 501 (Tri.-Bang.) , as it found that it related to a case of training in 2D and 3D animations and it was not a case of computer training, but only a vocational training conducted with the aid of computers. Nevertheless, we find no reason why the Tribunal in the present case should be bound by the interlocutory order passed by the Bangalore Tribunal in the case of Rayudu Vision Media Ltd. v. Commissioner of Central Excise, Hyderabad reported in 2013 (31) STR 501 (Tri.-Bang.). The order passed in the stay petition cannot have binding force. The issue raised by the appellant on the basis of the decision in the case of Gammon India Ltd. Vs. Commissioner of Customs, Mumbai, which relates to judicial discipline of the Tribunal in deciding the appeals, where it was held that two Tribunals should not take differently divergent views, which will create judicial uncertainty in declaring the law involved in identical issues.

14. Here, we are dealing with the case of pre-deposit and therefore, the said decision would not apply. There is no dispute that the Tribunal may reconsider the discretion already exercised in Miscellaneous order based on the additional grounds raised. However, prima facie the Tribunal came to the conclusion that the proviso to Notification No. 24/2004-S.T., dated 10-9-2004 clearly excludes the case of the appellant. At this stage, we do not find any reason to differ with the finding of the Tribunal, more so, in view of the decision of the Apex Court in the case of CCE Vs. Sunwin Technosolution P. Ltd., . Even on merits, we find that the appellant has not made out any prima facie case to interfere with the order of the Tribunal. We find that the Tribunal has granted much relief to the appellant by ordering pre-deposit of Rs. 40.00 lakhs only doubting the payments alleged to have been paid by the appellant in paragraph 3 of the order dated 27-5-2013 as against a sum of Rs. 1,37,39,474/-. Hence the order of the Tribunal is just and reasonable.

For better clarity, we extract Paragraph 3 of the order of the Tribunal dated 27-5-2013 as below:

"3. After adjudication, a total tax amount of Rs. 1,37,39,474/- is confirmed against the applicant along with interest and penalties. Out of this, the applicant states that they have already paid an amount of Rs. 32,59,467/- towards tax and Rs. 7,25,190/- towards interest which claim could not be clearly verified from the papers filed. However, it is seen that payment of Rs. 10,37,881/- is recorded in the Show Cause notice 132/2009 dated 9-4-2009."

15. For the above said reasons, we find no reason to interfere with the order of the Tribunal on pre-deposit. Accordingly, we find no question of law much less any substantial question of law arises for consideration in these appeals. In the result, all the above Civil Miscellaneous Appeals are dismissed. No costs. Consequently, connected Miscellaneous Petitions are also dismissed.