(2013) 12 DEL CK 0098

In the Delhi High Court

Case No : CEAC No. 24 of 2013

Times Internet Ltd. APPELLANT

Vs

Commissioner of Central Excise RESPONDENT

Date of Decision : 18-12-2013

Acts Referred:

Citation : (2013) 12 DEL CK 0098

Hon'ble Judges : Sanjiv Khanna, J;Sanjeev Sachdeva, J

Bench : Division Bench

Advocate : Prem Lata Bansal and Mr. Ruchir Bhatia, for the Appellant; Pradeep Desodya for Ms. Anjana Gosain, for the Respondent

Judgement

Sanjiv Khanna, J.—Having heard learned counsel for the parties, we are inclined to frame the following substantial question of law:-

Whether the Customs, Excise and Service Tax Appellate Tribunal was justified and correct in directing the appellant to deposit Rs. 1.5 crores in five monthly equal instalments starting March, 2013 as a pre-condition of hearing of the appeal on merits?

With the consent of the parties, as limited and a short issue arises for consideration, the appeal is taken for hearing today itself.

2. The appellant is a company engaged in the business of internet/internet services and providing mobile digital data.

3. By order-in-original dated 6th August, 2012, the appellant was directed to pay following amounts towards service tax, penalty etc.:

(i) I confirm and demand ST amounting to Rs. 2,95,63,317/- (Rs. Two Crores Ninety-Five Lakh Sixty-Three Thousand Three Hundred Seventeen only) including Education Cess & Higher Secondary Education Cess short paid on the total taxable value of the "Business Auxiliary Service" from M/s. TIME under proviso to sub-section (1) of Section 73, read with Section 66 and 68 of the of the (sic) Act.

(ii) I confirm and demand ST amounting to Rs. 2,75,95,438/- (Rs. Two Crores Seventy-Five Lakh Ninety-Five Thousand Four Hundred Thirty-Eight only) including Education Cess & Higher Secondary Education Cess short paid on the total taxable value of the "MMR services" from M/s. TIME under proviso to sub-section (1) of Section 73, read with Section 66 and 68 of the of the (sic) Act.

(iii) I also order recovery of Interest on the amount of ST short paid till the date of actual payment of ST by M/s. TIME, at the appropriate rate u/s 75 of the Act.

(iv) I impose a Penalty of Rs. 5,71,58,755/- (Rupees Five Crores Seventy-One Lakh Fifty-Eight Thousand Seven Hundred Fifty-Five only) on M/s. TIME u/s 78 of the said Act. In view of penalty imposed u/s 78, I refrain from imposing penalty u/s 76 of the Act. I further impose a penalty of Rs. 5000/- on M/s. TIME u/s 77 of the said Act, for contravening various provisions of the said Act and the rules made there under.

4. The appellant has preferred an appeal and by the impugned order dated 27th February, 2013, as is recorded above, has been directed to pay Rs. 1.5 crores in five equal monthly instalments of Rs. 30 lacs each by 25th of each month starting from March, 2013.

5. At the outset, we notice that financial hardship was not pleaded by the appellant before the tribunal. Before us, learned counsel for the appellant has filed today a copy of the revised balance sheet as on 31st March, 2013, which indicates that the appellant had suffered losses for the year ending 31st March, 2012 but had positive income for the year ending 31st March, 2013. Bank balances as on 31st March, 2013 show positive figures of more than Rs. 5 crores. It is submitted that to overcome the losses and to keep the balance sheet in positive figures the appellant company had to sell its investments. However, these contentions do not disclose financial stringency of a nature, that deserves or requires complete waiver. In any case, we should examine facts, prima facie case, etc.

6. As is evident from the operative portion of the adjudication order, the service tax demand is on two accounts; "Business Auxiliary Service" and "Management, Maintenance and Repair Services" (MMR Services, for short).

7. On the first account, it is pointed out that the appellant had entered into contracts with cellular mobile service providers and it was a joint business venture. The mobile service users or subscribers had used the data provided by the appellant and while making payment to the cellular mobile service providers had also paid the service tax. The adjudication order holds that the cellular service providers should have again charged or deducted service tax on the payments made to the appellant, notwithstanding the position that the mobile service subscribers have already paid service tax. The contention of the appellant is that they had developed certain data which was utilised with the telecom companies on revenue sharing basis, i.e., as a joint venture and it was incorrect to hold that the appellant had rendered service to the telecom companies. It is

submitted that the ultimate consumer, i.e., the mobile phone users had availed the services and had paid service tax and second or double taxation for the same service should not be permitted and was unacceptable. Having considered the contention raised by the appellant, we feel that the plea does require consideration and detailed examination by the tribunal. The appellant has certainly been able to make out a prima facie and a good case on this aspect, to pray for waiver of pre-deposit.

8. With regard to the second issue, it is an accepted position that the appellant is engaged and had provided services in form of development and maintenance of websites. The contention of the appellant is that software or development and maintenance of websites service were exempt from service tax in terms of Circular No. 70 dated 17th December, 2003 till 1st June, 2007. It is pointed out that the demand in question relates to the period 2004-05 to 31st March, 2006. On the said aspect, learned counsel for the respondent has relied upon Circular No. 81/2/2005-ST dated 7th October, 2005. The said Circular relies upon judgment of the Supreme Court in Tata Consultancy Services Vs. State of Andhra Pradesh, which held that software were goods. We also notice that the appellant themselves had started paying service tax on the aforesaid service, with effect from 1st April, 2006 under the head "online information".

9. Keeping in view the aforesaid facts, we feel that the appellant should pay and deposit Rs. 1 crore as a pre-condition for hearing of the appeal. While fixing the amount, we have taken into consideration the Circular No. 81/2/2005-ST issued on 7th October, 2005 and also examined the definition of MMR Services as defined in Section 65(4) of the Finance Act, 1994. The aforesaid payment of Rs. 1 crore will be made in two equal instalments and the first instalment will be paid on or before 31st January, 2014 and the second will be paid before 15th March, 2014. The question of law is accordingly answered. The appeal is disposed of. In the facts of the case, there will be no order as to costs. We clarify that opinion expressed in the order will not be binding on the tribunal and the contentions will be examined on merits, without being influenced by the aforesaid observations.

Copy of this order be given dasti to the learned counsel for the parties under signature of the Court Master.