
(2011) 08 AP CK 0108

In the Andhra Pradesh High Court

Case No : Writ Petition No. 18315 of 2011

VPR Mining Infra Pvt. Ltd.

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 27-08-2011

Acts Referred:

Central Excises and Salt Act, 1944 — Section 35
Finance Act, 1994 — Section 66, 67, 75, 76, 77

Citation : (2011) 6 ALT 442

Hon'ble Judges : Raja Elango, J;A.Gopal Reddy, J

Bench : Division Bench

Advocate : D. Prakash Reddy and C. Hanumanth Rao, for the Appellant; A. Rajasekhara Reddy, for the Respondent

Final Decision : Dismissed

Judgement

A. Gopal Reddy, J.—Petitioner-Contractor a registered dealer in Service Tax Department is engaged in providing service under the category of "site formation, clearance and excavation". On assessment for the period from 16-06-2005 to 31-03-2008, penalties were imposed under Sections 76 and 77 of Finance Act, 1994 (for short "the Act") by the Commissioner of Customs, Central Excise & Service Tax (Adjudicating Authority)-third Respondent herein by order dated 21-12-2009. Aggrieved by the same Petitioner preferred appeal before the Customs, Excise and Service Tax Appellate Tribunal-2nd Respondent in ST/731 & 1798/10 with an application for waiver of pre-deposit. The Appellate Tribunal by impugned order dated 06-04-2011 held that the Petitioner has not made a strong case for complete waiver of dues and on condition of paying an amount of Rs. 10,00,00,000/-within a period of six weeks from the date of order, the pre-deposit will be waived and granted stay for the balance dues as per the impugned order. Questioning the same the present writ petition is filed contending that the Petitioner has been paying service tax as per the works contract awarded to them on the amount charged to the service receiver. The service receiver supplied diesel/HSD Oil, explosives and other accessories at the

site. The value of the goods supplied by the service receiver were not known to the Petitioner and in the bona fide belief that their values was not required to be included in the taxable value, the Petitioner did not pay service tax on such value. While so, show cause notice O.R. No. 44/2009 Adjn. ST, dated 22-04-2009 was issued requiring the Petitioner to show cause as to why an amount of service tax of Rs. 13,12,26,103/-for the period from 16-06-2005 to 31-03-2008 should not be paid by the Petitioner on the value of HSD oil and explosives supplied by the service receiver enclosing bonus amount paid to the Petitioner. Another show cause notice in O.R. No. 140/2009 Adjn.ST, dated 20-10-2009 was issued for the period from April, 2008 to June, 2009 on the same grounds proposing to demand service tax of Rs. 22,71,78,522/-; interest u/s 75 and penalties under Sections 76 and 77 of the Act. In spite replies given to the show cause notices the Adjudicating Authority-3rd Respondent confirmed the demand in toto without quantification of penalty at the rate of 2% per month on the service tax amount and penalty of Rs. 5,000/-. The Petitioner preferred appeals before the Appellate Tribunal in ST 731/2010 and 1798/2010 along with separate applications for waiver of pre-deposit. In similar matters, the Tribunal granted total waiver of pre-deposit in M/S. Gulf Oil Corporation Ltd. v. Commissioner of Central Excise, Hyderabad (2010 (20) STR 830 (Tri-Bang)) and in case of M/s. PLR Projects Limited in Stay Order No. 538/2010, dated 05-07-2010. In both the cases the Tribunal held that supply of materials by the client does not amount to consideration but discriminated the Petitioner for waiving the interest which is contrary to the statutory provisions, as the free supplies by the service receiver are not part of the consideration charged u/s 67 of the Finance Act r/w Service Tax (Determination of Value) Rules, 2006.

2. Sri D. Prakash Reddy, learned senior counsel appearing for the Petitioner contends that assessing authority brought the value from the service receiver in fixing the liability. If the Petitioner purchases the items, which are consumed for providing service, they are liable to be excluded as admitted by the assessing authority in para-18 of its order stating that the department clarified that this exemption would be available only in cases where the sale of such goods is evidenced and the sale value is quantified and shown separately in the invoice, but has not excluded on the ground that Supreme Court dismissed the Civil Appeal filed by the Revenue challenging the decision of the Tribunal in Commissioner v. Shilpa Colour Lab 2009 (14) STR J 163 (SC) did not constitute the binding precedent. The Supreme Court after granting leave dismissed the appeal. Therefore, the finding that the decision of the Supreme Court will not constitute a binding 1 2009 (14) STR J 163 (SC) precedent is factually incorrect. Relying on another Tribunal's order the present impugned order is passed, which is contrary to the judgment of the Supreme Court; therefore the same is liable to be set aside.

3. Sri Rajasekhar Reddy, learned senior standing Counsel for Central Excise contends that Section 35(b) of Central Excise Act, 1944 provides an appeal to the Appellate Tribunal. u/s 35(F), the Appellate Authority is granted deposit,

pending appeal of duty demanded or penalty levied. When a right of appeal is creature of statute, the lower appellate Court exercised the discretion and stayed the execution of the order impugned under appeal subject to deposit of amounts waiving of pre-deposit. Deposit of certain amount cannot be given rise to any question of law. By referring to the judgments of this Court in *The Commissioner of Central Excise Vs. Sri Chaitanya Educational Committee*, he contends that interest of the Revenue has to be safeguarded, wherein this Court set aside the order of the Tribunal maintaining said dispensation of pre-deposit by imposing conditions.

4. Petitioner admitted in para-5 of the affidavit that the value of the goods supplied by the service receiver were not known to the Petitioner and is in the bona fide belief their value was not required to be included in the taxable value, the *The Commissioner of Central Excise Vs. Sri Chaitanya Educational Committee*, Petitioner did not pay service tax on such value but wanted dispensation of the pre-deposit on the ground that Tribunal has granted total waiver of pre-deposit under the identical circumstances viz., in the case of *M/s. Gulf Oil Corporation Ltd. v. Commissioner of Central Excise, Hyderabad (2010 (20) STR 830 (Tri-Bang)* and the stay order passed in *PLR PROJECTS LIMITED* dated 15-07-2010.

5. Learned senior counsel by placing reliance on the Notification No. 12/2003 S.T., dated 20-06-2003 contends that goods and materials provided by service provider to recipient of service are exempted for the purpose of service tax, which reads as under:

In exercise of the powers conferred by Section 93 of the Finance Act, 1994 the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts so much of the value of all the taxable services, as is equal to the value of the goods and materials sold by the service provider to the receipt of service, from the service tax leviable thereon u/s 66 of the said Act, subject to condition that there is documentary proof specially indicating the value of the said goods and materials.

It is not the case that goods and materials sold by service provider to recipient of the service but, in fact, recipient supplied the said goods for rendering services by the writ Petitioner.

6. In *Shilpa Colour Lab v. Commissioner of Central Excise, Calicut 2007 (5) STR 423 (Tri.Bang)* the issue which fell for consideration before the Tribunal was the correct valuation of the services rendered by Shilpa Colour Lab for the purpose of discharge of service tax. According to the Appellant, the value of the materials, consumables etc. used for providing the photography services should be deducted from the gross receipt in order to arrive at the correct value of services for the purpose of calculating service tax. Whereas it is the case of the Revenue that such a deduction is not available as there are no sales of the materials, consumables etc. by the service provider. After referring to the judgments of the

Supreme Court, the Tribunal held the services relating to photography, if certain goods and materials are consumed, then the value of those goods and materials cannot be included in the value of the services for levy of service tax. On appeal, the Supreme Court after condoning the delay dismissed the appeal holding that the Appellate Tribunal in the impugned order held that as per notification, departmental clarification and Tribunal decisions, in the services relating to photography, if certain goods and materials are consumed, then the value of those goods and materials cannot be included in the value of the services for levy of Service Tax. (2009 (14) S.T.R. 163.

7. In the case on hand, Petitioner, who was providing service, received diesel and explosives necessary for carrying out the service from M/s. Singareni Collieries Company Ltd. (SCCL) and did not include their cost in the value for the purpose of payment of service tax. The Petitioner/assessee contended that as per the notification No. 12/2003 -ST, dated 20-06-2003, as referred above, they are exempted from service Tax and it is the case of the Petitioner though there was no sale of goods and materials provided by the service provider i.e. Petitioner, the value of such materials used in providing the taxable service could not be included in the taxable value. The cost of the goods and materials was borne by the service recipient. The case of the Petitioner before the Appellate Tribunal was as per the notification 12/2003-ST, dated 20-06-2003 consumables supplied at free of cost by the recipient of the service is not consideration received by it includible in the taxable value and free supply of these materials did not entail any benefit to the Assessee and therefore, the same do not constitute consideration includible in the taxable value.

8. In M/s. Burn Standard Company Ltd. and another Vs. Union of India and others, the Assessee was called upon to show cause as to why the excise duty be not computed and charged on the value of the completed wagon including that of the "free supply items". On challenging the show cause notice, the learned single Judge of the Calcutta High Court allowed the writ petition and quashed the demand raised by the central excise authorities. On appeal, the Division Bench set aside the order of the single Judge and dismissed the writ petition. On further appeal by the Assessee, the Supreme Court held what comes down from the assembly-line of the Appellant's factory is a complete wagon and as such the Appellant being manufacturer of wagons is liable to pay duty of excise on the value of a complete wagon. The "free supply items" like wheel-sets etc. in the process of manufacturing become part of the complete wagon and lose their identity. It hardly matters how and in what manner the components of the wagon are procured by the manufacturer, so long as the Appellant is manufacturing and producing the goods called "wagons" it is liable to pay duty of excise on the normal value of the wagon. By referring to its earlier judgments in Empire Industries Limited and Others Vs. Union of India and Others, and M/S. Ujagar Prints v. Union of India (1989) 3 SCC 488 upheld the orders of the Division Bench of the Calcutta High Court holding that the valuation cost of the free supply items should be included in the manufacturing cost of wagons.

9. Under the Scope of Work 1(b)(i) the SCCL undertook to supply SMS system explosives, NONELS per BCM and detonators as per details, giving option to the contractor to select explosive supplier from vendor base of SCCL.

10. The contractor shall make agreement with explosive supplier and accordingly SCCL releases the order on that firm for supply of explosives to the project. Whereas the service provider-SCCL limited the prices of explosives and accessories, on landed cost basis, to the prevailing SCCL order prices for OBR by SCCL at RG.OC III Project, from time to time and applicable rates of excise duty, educational cess & VAT etc. or as per invoice price, whichever is less. Any other charges like handling and transportation charges etc. shall be to the account of service provider. The SCCL undertook to pay for the quantify jointly certified by the contractor and SCCL authorities and the value arrived based on the quantity of OB excavated during the month at the rate of bench-wise agreed quantity of explosives and accessories per BCM of OB removed will be to SCCL account. Whereas if the period of execution beyond schedule time i.e. contract period penalty equivalent to the value of excess consumed explosives and accessories would be levied to the contractor and the same would be recovered from the work done bills of contractor.

11. It is nowhere stated by the contractor that the prices of supplies will be recoverable from the bills payable. Once the recipient of service-SCCL agreed to supply material, cost of the same has to be included in the taxable value or not has to be decided by the Appellate Tribunal on interpretation of agreed clause etc.

12. Therefore, the Petitioner has not made out prima facie case for waiver of pre-deposit on the value of diesel/HSD Oil supplied by the service receiver.

13. The writ petition is accordingly dismissed. However, time granted for pre-deposit is extended by four weeks from today. On such deposit the Tribunal can proceed with the appeal and decide the same as expeditiously as possible preferably within four months from the date of receipt of copy of this order. No order as to costs.