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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

CENTRAL EXCISE APPEAL NO.42 OF 2015

Riya Travel & Tours (I) Pvt. Ltd. ..Appellant
-Versus-
The Commissioner of Service Tax-I ..Respondent

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Mr. S. V. Sridharan, Senior Counsel, a/w Prakash Shah i/b. M/s. PDS Legal for the Appellant.
Mr. Pradeep S. Jetly i/b. Ms. Suchitra Kamble for the Respondent.

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CORAM: S.C. DHARMADHIKARI
AND
S. P. DESHMUKH, JJ.

DATE :- 16th FEBRUARY, 2015.

P.C.:

This Appeal by the Assessee challenges the order passed by the Customs, Excise and Service Tax Appellate Tribunal, West Zonal Bench at Mumbai, dated 21st July, 2014 on an application for stay and dispensation of pre-deposit.

2] The Order-in-Original was passed on 7th August, 2013 by the Commissioner of Service Tax-I, Mumbai. The Adjudicating Authority has confirmed the service tax demand of Rs.8,71,86,127/- for the period 1st April, 2004 to 31st March, 2012 along with interest thereon against the

Assessee. That is by classifying the services rendered by the Assessee to Computerized Reservation System (CRS) companies under the taxable service category of 'Business Auxiliary Service'. He has also imposed penalties under section 76 to 78 of the Finance Act, 1994. Aggrieved by said order, the Assessee preferred an Appeal to the CESTAT and applied for dispensation of pre-deposit and stay.

3] The argument was that it is the CRS Companies which promote the business of the airlines and by receiving some incentive from the airlines. That is because if these CRS companies access these airlines and seek their tickets and in turn the traveling agencies like the Assessee's seek the services of the CRS companies, then, it is a part of that incentive which the CRS companies received and which is in turn passed on to the Appellant-Assessee. That does not promote or market the services provided by the client. In such circumstances and when the argument was in relation to one agreement with M/s. Galileo India Private Ltd. that it was argued that the said agreement and clauses thereof will not denote any such service and provided by the Assessee. The argument which has been noted by the Tribunal is that in such agreement, the parties do not join hands in promoting and marketing the business of M/s. Galileo in India in exchange of a support fee. Therefore, one clause or one sentence from the clause cannot be picked up by the Tribunal to hold otherwise.

4] That argument has not found favour completely inasmuch as from paras 5 to 5.5 the Tribunal considered the rival contentions. It holds that, prima facie, the services rendered by the Assessee would merit classification under Business Auxiliary Services as defined in law. It has, therefore, proceeded to direct deposit of Rs.5.8 crores and which demand according to the Tribunal is within the period of limitation provided by law.

5] The argument before us of Mr. Sridharan, learned Senior Counsel, appearing for the Assessee in support of this Appeal is that at one stage the Tribunal's finds a prima facie or an arguable case in favour of the Assessee. However, after it discusses the contentions it comes to a conclusion that there is an absence of a prima facie case and financial hardship, hence, balance of convenience lies in ordering pre-deposit. Mr. Sridharan has taken us through the relevant provisions of the Finance Act and the paragraphs of the Tribunal's order. He has also emphasizes the dealing or relationship arising out of the sharing of some amount received as an incentive by the CRS companies, with the Appellant-Assessee. It is submitted that so long as it is not found that the Assesee is promoting or marketing the business of the service provider, then, the pre-deposit should not have been ordered.

6] On the other hand, Mr. Jetly on behalf of the Respondent would submit that this is an interim order. The Tribunal has not concluded anything. It has only rendered a prima facie and tentative view. The discretion has not been exercised arbitrary or capriciously. If it has been exercised judiciously, then, merely because another view is possible this Court should not interfere. The Appeal thus, raises no substantial questions of law. It must be dismissed.

7] With the assistance of the counsel appearing for both sides we have perused the paper book including the impugned order. We are of the view that the Appeal raises substantial question of law. It is, therefore, admitted on the following substantial of law:-

> "Whether in the facts and circumstances of the case, the Appellate Tribunal was correct and justified in directing pre-deposit amounting to Rs.5.8 crores?"

8] After hearing both sides at some length, we find that no useful purpose will be served if this appeal is kept pending in this Court. If it questions an order on application for dispensation of pre-deposit and stay, then, it deserves to be disposed of finally. Accordingly, with the consent of both sides, we have disposed of this Appeal finally.

9] We have perused the definition of the term Business Auxiliary Services. It means any service in relation to promotion or marketing or sale of goods produced or provided by or belonging to the client or promotion or marketing of service provided by the client, or any customer care service provided on behalf of the client etc.

10] Any service incidental or auxiliary to any activity specified in sub-clause (i) and (vi) have been brought in under sub-clause (vii) in clause (19)of section 65, the section was substituted by Finance Act 23 of 2004 with effect from 10th September, 2004. In the instant case, the agreement or arrangement between parties will have to be probed at length. The Tribunal must eventually consider as to whether any amounts which have been received from the CRS companies by the Appellant-Assesee is for promoting or marketing their service. It may be that the CRS companies receive huge amounts from the airlines so that they access their ticketing systems and to the maximum. Thereafter the system of CRS companies are accessed by these travel agents like the Assessee. The Tribunal will have to ultimately hold that such of the airlines which give incentive to the CRS companies allowing them to get the benefit of payment made to the CRS companies by them. Meaning thereby if travel agents access the system of CRS companies and in most cases to book tickets of the airlines the financial incentives to the CRS companies by the Airlines reveals the marketing and promotional agreement. Thus, depending upon other stipulations and reading the agreement as a whole, the Tribunal may conclude that such a service is falling within the purview of this definition. We clarify that it is for the Tribunal to go into these questions and issues at length. The issues and questions have been raised squarely and on account of the arguments of the Assessee's counsel before the Tribunal and before us. They also arise in the light of the definition of the term and which opens with the words "means any service in relation to". In such circumstances, the Tribunal should not have directed that the entire amount which according to it is a demand within the period of limitation needs to be secured. If the Tribunal has to devote at least 5 to 6 paragraphs to find out what is the nature of the service allegedly provided and to whom and whether that falls within the definition, then, this was a imminently arguable case. It could not be termed as absence of a prima facie case in any event. In the circumstances, we think that the Tribunal should not have rendered any conclusion and particularly that the service rendered by the Assessee merits classification as business auxiliary service as defined in law. If it was required to refer to several judgments and to distinguish some of them to hold thus and it is the substance of the agreement which must be seen, then, this was definitely an arguable case.

A prima facie case, is thus, made out by the Appellant. In the light of the fact that the issues would arise squarely in the light of the definition and it would require interpretation depending upon the facts and circumstances of a given case, then, the entire amount should not have been directed to be deposited. The demand within limitation is stated to be Rs.5.8 crores approximately. Merely because there was no pleading of an financial hardship does not mean that in this case the equities cannot be balanced. They could have been balanced properly.

11] As a result of the above discussion and finding that the discretion has not been exercised by the Assessee judiciously, we substitute its direction with the following order;-

a) On the Appellant-Assessee depositing a sum of Rs.1.5 crores with the Revenue on or before 15th March, 2015, the balance sum and which is stated to be the demand within limitation as also that which the Tribunal prima facie does not find to be within limitation, should not be, then, enforced.

b) On complying with this condition, therefore, the balance sum need not be deposited and for which there need not be any proceedings for recovery pending the Appeal.

c) If this condition is complied all consequences in law shall follow.

d) If the Tribunal has dismissed the Appeal of the Assessee for non-compliance already, then, if the Assessee complies with these conditions and produces the proof thereof, the Tribunal to restore the Appeal of the Assessee and hear it on merits and in accordance with law.

e) We clarify that we have not expressed any opinion on the rival contentions. Equally, the Tribunal's view and anything in our order should be taken as tentative and prima facie. It has been rendered only for disposal of these applications and made at interlocutory stage. The prima facie case, therefore, should not bind the Tribunal at the hearing of the Appeal.

f) All contentions of both sides in relation to the demands are kept open.

g) The Appeal is disposed of. No orders as to costs.

(S. P. DESHMUKH, J.) **(S.C. DHARMADHIKARI, J.)**

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